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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 STATEMENT OF MATERIAL FACTS AS TO WHICH GENUINE ISSUES EXIST AND STATEMENT OF CORRECTIONS TO PLAINTIFF'S RULE 56.1 STATEMENT OF FACTS

Defendant, formerly known as Lance Oil & Gas Company, Inc. (Lance), submits this Statement of Material Facts pursuant to Wyo. R. Civ. P. 56.1. In addition to certain material facts as to which genuine issues exist, Plaintiff's Rule 56.1 Statement of Facts (Pl.'s SOF)

contains several inaccurate and immaterial "facts." Lance incorporates below the assertions made in Plaintiff's 56.1 Statement and when appropriate, describes the inaccuracy and/or immateriality of Plaintiff's "facts" to assist the Court.

1. Kenneth B. Geer ("Geer") brought this action on behalf of himself and all similarly situated royalty interest owners and overriding royalty interests owners (collectively "Royalty Owners") to whom Lance is obligated to pay royalties on gas produced in Campbell County, Wyoming.

Correction: Because Lance is obligated to pay royalty interest owners and overriding royalty interest owners based on their contracts with different and varying royalty provisions, all royalty interest owners are not "similarly situated" to Plaintiff because of these widely varying royalty obligations Lance owes them. ***Kris Terry Expert Report (Terry Report), cited as Ex. 5 to Def.'s Mot. to Decertify the Damages Class (Decertify Mot.); James Steven Wilson Deposition (Wilson Dep.), 43: 11-25, 44: 1-15, 45: 1-11 (Def.'s Mot. to Strike Rule 26(a)(2) Designation of James Steven Wilson (Def.'s Mot. to Strike) Ex. 1); 48: 18-25; 49: 1-4 (excerpts attached here as Ex. A).***

2. This Court certified the class by Order dated January 29, 2013.

Comment: Defendant filed a Motion to Decertify the Damages Class on August 1, 2013 that is pending before the Court.

<u>Issue #1 – Ad Valorem rates</u>

3. Because ad valorem taxes are paid in Wyoming the year following the production year, the exact ad valorem tax rate is unknown at the time that Lance makes Royalty payments. *Exhibit 3, Deposition of Anadarko Petroleum Corporation, formerly Lance Oil & Gas Company,*

Inc. Accounting Manager Janis Wallner, 101:18-24. Lance therefore estimates the ad valorem tax rate when it calculates the amount to be deducted from Royalty payments.

4. In most years from 2002 through 2011, the ad valorem tax rate imposed by Lance for its royalty deduction calculations exceeded the ad valorem tax rates actually imposed by Campbell County and paid by Lance. *Exhibit 1, Wilson Affidavit, ¶13, Exhibit B thereto.*

Correction: Plaintiff's statement is wrong for two reasons. First, multiple taxing districts within Campbell County levy individual ad valorem tax rates upon Lance's production, some of which were higher than Lance's estimated ad valorem tax rate for the time period covered by Plaintiff's Complaint. *Wilson Dep. Ex. 20 (attached as Ex. B), Wilson Dep. 61: 7-25, 62: 1-22 (Def.'s Mot. to Strike Ex. 1).* Second, Lance's estimated ad valorem rate for the State of Wyoming was lower than the lowest taxing district in Campbell County during some periods from 2002 to 2011. *Wilson Dep. Ex. 19 (attached as Ex. C), Wilson Dep. 60: 3-9 (Def.'s Mot. to Strike Ex. 1).*

5. For example, for May, 2001 production, Lance used an ad valorem tax rate of 6.7434%. The actual effective rate for that period was 5.9723%. As a result, for the Hannum 21-19-4773 well, Lance overwitheld from one royalty owner for that month $0.13. *Exhibit 1, Wilson Affidavit, ¶¶ 11-12, Exhibit A thereto.*

Correction: Plaintiff's statement is wrong and immaterial. May 2001 production is outside the scope of this case. Plaintiff filed his lawsuit in 2012, and at most, his claims are subject to a ten year statute of limitations period for breach of contract. Wyo. Stat. § 1-3-105(a)(i). Further, Plaintiff's allegation that Lance "overwithheld" $.13 from one

unidentified owner is disputed due to the multiple errors admitted by Mr. Wilson in his "damages" calculations. ***See Def.'s Mot. to Strike.***

6. Lance concedes that it has incorrectly estimated and deducted the ad valorem tax rate that will be imposed, and never reimbursed the royalty owners for the over withholding. *Exhibit 3, Wallner Deposition, 101:25-102; 103:22-25.*

Correction: Plaintiff's statement is wrong. Janis Wallner, Lance's 30(b)(6) representative, did not testify that Lance incorrectly estimated the ad valorem tax rates. Rather, Ms. Wallner testified that Lance relied upon an estimated tax rate because "the information is not available at the time that we need to withhold the taxes to have actual rates from the state." ***Wallner Dep. 103: 14-18 (Pl.'s SOF Ex. 3).*** **In addition, the overwithholding estimates from Mr. Wilson are flawed.** ***See Def.'s Mot. to Strike; Wilson Dep. Ex. 20 (Ex. B), Wilson Dep. Ex. 19 (Ex. C); Wilson Dep. 60: 3-9, 61: 7-25, 62: 1-22 (Def.'s Mot. to Strike Ex. 1).***

Issue #2 – Taxable Value

7. Lance calculates all ad valorem, severance and conservation tax ("Production Tax") amounts that it deducts from royalty payments based on Royalty Value rather than Taxable Value.

Correction: This statement is misleading and immaterial because it uses the term "Royalty Value" not defined in the Wyoming Royalty Payment Act (WRPA) and not used by Lance to calculate a royalty owner's share of taxes. ***Wallner Dep. 48: 6-17 (Pl.'s SOF Ex. 3).*** **Lance calculates a royalty owner's tax deduction as follows: (Owner Gross Value**

minus owner transportation deductions) times the tax rate. ***Lance Resp. to Pl.'s First Interrog., No. 2 (Pl.'s SOF Ex. 2).***

8. "Royalty Value" is the value Lance uses to calculate an individual Royalty Owner's royalty. Wyoming law prohibits the operator from deducting "costs of production" from the Royalty payment (including, for example, costs of production such as gathering and separating). W.S. § 30-5-304(a); *Cabot Oil & Gas Corp v. Followill*, 2004 WY 80, ¶11, 93 P.3d 238, 242 (Wyo. 2004).

Correction: This statement is misleading and immaterial because it uses the term "Royalty Value" not defined in the Wyoming Royalty Payment Act (WRPA) and not used by Lance to calculate a royalty owner's share of taxes. ***Wallner Dep. 48: 6-17 (Pl.'s SOF Ex. 3).*** **Lance calculates a royalty owner's tax deduction as follows: (Owner Gross Value minus owner transportation deductions) times the tax rate.** ***Lance Resp. to Pl.'s First Interrog., No. 2 (Pl.'s SOF Ex. 2).*** **Plaintiff's statement about the WRPA is also wrong and grossly misleading in this case. The WRPA only prohibits the operator from deducting "costs of production" from the royalty payment, "unless otherwise expressly provided for by specific language in an executed written agreement." Wyo. Stat. § 30-5-305(a). Gathering costs and separating costs are deductible pursuant to the WRPA if the royalty owner's controlling lease allows for such deductions.** ***Id.*** **It is undisputed that over 80% of the Class Members' leases reviewed by Lance's expert "otherwise expressly provide" for "costs of production" deductions not allowed under the WRPA.** ***Terry Report ¶¶ 27, 45 (Decertify Mot. Ex. 5).***

9. For the entire period at issue, Lance has calculated royalty owner taxes using the following calculation: (Owner Gross Value – owner transportation) x tax rate. *Exhibit 2, Lance Responses to Plaintiff's First Interrogatories, No. 2.* Owner gross value minus owner transportation is the Royalty Value historically used by Lance.

Correction: The second sentence is misleading and immaterial because it uses the term "Royalty Value" not defined in the Wyoming Royalty Payment Act (WRPA) and not used by Lance to calculate a royalty owner's share of taxes. ***Wallner Dep. 48: 6-17 (Pl.'s SOF Ex. 3).*** **Further, royalties "historically used" by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.**

10. "Owner gross value" is defined by Lance as "the property gross value reported on the owner's check stub multiplied by the royalty owner's decimal interest. *Exhibit 2, Lance Responses to Plaintiff's First Interrogatories, No. 3.*

11. "Taxable Value" is the value reported by Lance to the Wyoming Department of Revenue from which Production Taxes are calculated, assessed, and paid. Under Wyoming law, the operator may exclude from Taxable Value certain costs, such as for gathering and separating. W.S. 39-14-203(b)(iv); *Williams Production RMT Co. v. Wyoming Dept. of Revenue*, 2005 WY 28, ¶¶9-12, 107 P.3d 179, 183-84.

Correction: Plaintiff's second sentence is wrong and immaterial. Unlike the WRPA that allows for variable royalty obligations depending on specific contract language, the Wyoming tax statutes identify the specific and unchanging point where gas is valued for tax purposes: "The fair market value for . . . natural gas shall be determined after the

production process is completed." Wyo. Stat. § 39-14-203(b)(ii). "The production process for natural gas is completed after extracting from the well, gathering, separating, injecting and any other activity which occurs before the outlet of the initial dehydrator." Wyo. Stat. § 39-14-203(b)(iv). Contrary to what Plaintiff alleges, a producer is explicitly excluded by statute from deducting gathering and separating costs for tax valuation purposes. *See Williams Production RMT Co. v. Wyoming Department of Revenue*, 2005 WY 28, ¶¶ 10-11, 107 P.3d 179, 183-84 (Wyo. 2005); Wyo. Stat. § 39-14-203(b)(iv). Plaintiff's confusion is no doubt created by Plaintiff's expert's inability to describe which costs are deductible for taxable value:

> 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.

Wilson Dep. 71: 13-25, 72: 1-17 (Def.'s Mot. to Strike Ex. 1).

12. Lance annually certifies Taxable Value to the State of Wyoming, and the ad valorem, severance and conservation taxes it pays are calculated based on that certified value. *Exhibit 3, Wallner Deposition, 39:15-18; 42:12-22.*

13. Lance calculates the amount it deducts for taxes from royalty payments by applying the tax rate to Royalty Value, not Taxable value.

Correction: This statement is misleading and immaterial because it uses the term "Royalty Value" not defined in the Wyoming Royalty Payment Act and not used by Lance to calculate a royalty owner's share of taxes. ***Wallner Dep. 48: 6-17 (Pl.'s SOF Ex. 3).*** **Lance calculates a royalty owner's tax deduction as follows: (Owner Gross Value minus owner transportation deductions) times the tax rate.** ***Lance Resp. to Pl.'s First Interrog., No. 2 (Pl.'s SOF Ex. 2).***

14. Because there are fewer allowable deductions from Royalty Value than from Taxable Value, Royalty Value exceeds Taxable Value.

> Q: Would you agree with me that the royalty value calculated by Lance as you've described from 2002 through 2013, the present, is larger than the taxable value calculated and reported by Lance to the State of Wyoming for severance and ad valorem purposes?
> A: Can you define royalty value? Are you talking property level or an owner's level?
> Q: We're talking property level. Property level royalty value. Property value level on which you calculate royalties. Okay?
> A: Yes.
> Q: Is larger than the taxable value you report to the State of Wyoming for severance and ad valorem purposes.
> A: That is correct.
> Q: And that is always the case, correct?
> A: I believe so.

Exhibit 3, Wallner Deposition, 48:6-23.

Correction: Plaintiff's statement is wrong and without competent authority. Plaintiff's royalty expert concedes that "royalty value" to a royalty owner depends on the lease, that it varies, and that it could be less than Taxable Value. ***Wilson Dep. 54: 10-17, 109: 5-10 (Def.'s Mot. to Strike Ex. 1).*** **The WRPA allows for a producer to deduct more deductions than those allowed by the Wyoming tax statutes for tax valuation purposes, depending on the royalty contract language. Wyo. Stat. § 30-5-305(a) (any deduction from royalty payment allowed if executed in written agreement). It is undisputed that over 80% of the Class Members' leases reviewed by Lance's expert "otherwise expressly provide" for "costs of production" deductions not allowed under the WRPA.** ***Terry Report ¶¶ 27, 45 (Decertify Mot. Ex. 5).***

Further, Ms. Wallner's personal "belief" about royalty value exceeding taxable value was given during her non-Rule 30(b)(6) deposition, and it is clear that Ms. Wallner as a revenue accountant does not interpret contract language to determine deductions to be taken from royalty. ***Wallner Dep. 48:6-23 (Pl.'s SOF Ex. 3); Wallner 30(b)(6) Dep. 34: 6-25 (excerpts of Wallner 30(b)(6) Dep. attached as Ex. D); Wallner 30(b)(6) Dep. 35: 1-2 (Pl.'s SOF Ex. 4); Wallner Dep. Ex. 5, ¶ 13 (Def.'s Opp. to Mot. for Class Cert. Ex. 1).***

15. Lance's use of the Royalty Value number for purposes of Production Tax deductions from Royalty payments results in deductions for taxes from class members' royalty payments that exceed the royalty owners' proportionate share of the taxes actually paid by Lance.

Correction: This statement is misleading, immaterial and uses the term "Royalty Value" not defined in the Wyoming Royalty Payment Act and not used by Lance to

calculate a royalty owner's share of taxes. ***Wallner Dep. 48: 6-17 (Pl.'s SOF Ex. 3).*** **Lance calculates a royalty owner's tax deduction as follows: (Owner Gross Value minus owner transportation deductions) times the tax rate. Lance** ***Resp. to Pl.'s First Interrog., No. 2 (Pl.'s SOF Ex. 2).*** **Further, as evidenced by Plaintiff's lack of citation or support, there is no evidence that Lance's deductions from royalty for taxes exceed the royalty owners proportionate share of taxes actually paid by Lance – Plaintiff assumes that in phrasing his argument.** ***See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 14.***

16. For purposes of illustration, assuming a gross value of $10,000 and royalty ownership interest of 5%, the following would illustrate the effect of Lance's use of different values for purposes of calculating tax deductions from royalty payments:

Gross value	$10,000
Trans. expenses	3,000
Royalty value	7,000
Gross value	10,000
Trans	3,000
Processing	1,000
Taxable value	6,000

Production taxes 12.04%
7,000 x 12.04 = 842.80
6,000 x 12.04 = 722.4

In this example, Lance actually pays $722.40 in taxes; but Lance calculated the taxes to deduct from royalty payments based on $842.80. At 5% ownership percentage in the lease, that would result in a deduction of $42.14 from the royalty payment; while Lance actually paid $36.12 for the royalty owner's proportionate share of taxes paid on this production. *Exhibit 5, Deposition of Debra Liller, 19:20-24:2.*

Correction: Plaintiff's hypothetical example (1) misstates the cited testimony of Lance's expert, Ms. Liller; (2) draws incorrect conclusions; and (3) fails to acknowledge Plaintiff's expert's admission that this hypothetical results in different effective tax rates for Lance and the royalty owner.

First, Ms. Liller did not agree that Lance withheld $42.14 for taxes from royalty but only paid $36.12 for the royalty owner's proportionate share of taxes:

> **Q And it's your opinion that that would be -- the $350 as set forth in this hypothetical on Page 4 would be the correct deduction from the royalty payment?**
> **A I believe $42.14 taxes deducted from the royalty owners is the correct amount of tax.**
> **Q Okay. Even though what Lance is actually paying for taxes on the proportionate share on those taxes is actually $36.12?**
> **A Lance is remitting to the various governmental taxing authorities $722.40.**
> **Q Correct. And what's the proportionate share of the royalty owners -- or what is the royalty owner's proportionate share of that $722?**
> **A $42.14.**

Deposition of Debbie Liller (Liller Dep.), 21: 4-18 (Pl.'s SOF Ex. 5).

Second, there is no evidence that Lance only paid $36.12 for the royalty owner's proportionate share of taxes in this hypothetical. Plaintiff disingenuously cites to Ms. Liller agreeing to a mathematical calculation for this "fact":

> **Q And Lance is paying, in our hypothetical, $842 -- I'm sorry, Lance is actually paying $722.40 in taxes. What I want to know is, what is the royalty owner's proportionate share of the taxes actually paid? It's just a calculation that I've asked you to do.**
> **A I believe you're asking me what 5 percent of $722.40 is.**
> **Q That is.**
> **A That number is $36.12.**

Liller Dep. 23: 18-25, 24:1-2 (Id.).

Third, Plaintiff's expert Wilson was asked about this same hypothetical. He admitted that the royalty owner tax of $42.14 means that Lance and the royalty owner pay

the same production tax rate of 12.04% but that if Lance only deducted $36.12 for taxes the effective tax rates for the royalty owner and Lance would be different:

> **Q Okay. Taking $36.12 means that the royalty owner is paying an effective tax rate of 10.32 percent, right?**
> **A Right.**
> **Q And taking $42.14 means that the royalty owner is paying a 12.04 percent tax rate, right?**
> **A Right.**
> **Q Okay. So all I'm asking is, The way Lance is doing it -- and using the numbers in this example -- means that Lance and the royalty owner pay the same tax rate of 12.04 percent, right?**
> **A Right.**
> **Q Okay. So under your theory of taxable value versus royalty value, you're really asking Lance to pay a higher tax rate than the 12.04 percent tax rate, right?**
> **A That's what this example shows.**
> **Q Do you have any reason to question the math or the methodology here?**
> **A No, the math is correct.**

Wilson Dep. 104: 17-25, 105: 1-11, and Ex. 22 at 3 (Def.'s Statement of Facts (SOF) Exs. 6 and 12, respectively). **Mr. Wilson further admitted that certain contracts that have a lower "royalty value" compared to taxable value would require a royalty owner in Plaintiff's hypothetical to pay an 18.06% tax instead of the 12.04% tax, because "it's what the [tax] statute says."** ***Wilson Dep. 110: 3-12 and Ex. 23 (Def.'s SOF Exs. 6 and 13, respectively).*** **Mr. Wilson's reconciliation of that extra burden on royalty owners is that such owners do not belong in the Class.** ***Id. 110: 20-25, 111: 1-6.*** **That means over 80% of the royalty owners do not belong in the Class.** ***Terry Report ¶¶ 27, 45 (Decertify Mot. Ex. 5). See Decertify Mot.***

17. Another illustration of Lance's methodology is set forth in *Exhibit 1, Wilson Affidavit, ¶, 16, and Exhibit A thereto.*

Correction: Plaintiff's statement is wrong and immaterial. May 2001 production is outside the scope of this case. Plaintiff filed his lawsuit in 2012, and at most, his claims are subject to a ten-year statute of limitations period for breach of contract. Wyo. Stat. § 1-3-105(a)(i). Further, Plaintiff's allegation that Lance "overwithheld" $.13 from one unidentified owner is disputed due to the multiple errors admitted by Mr. Wilson in his "damages" calculations. ***See Def.'s Mot. to Strike.***

Further, Mr. Wilson's Affidavit characterizes an alleged tax overdeduction as an "underpayment of royalty," although he admits that he has no opinion on whether royalties are underpaid pursuant to any contract requirements for royalty:

> **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 underpayment -- you're not saying royalty owners are underpaid under their leases, are you?**
> **A No.**

Wilson Dep. 55: 3-25, 56: 1-3 (Decertify Mot. Ex. 7).

18. Lance designated Debra Liller as its expert to support its theory that it is legitimate to deduct more than the interest owners' proportionate share of taxes actually paid. Her explanation is:

A: The royalty interest owners are not entitled to a 5 percent share of the $1,000 processing fee deduction because they did not pay for the processing fee deduction, nor did Lance deduct the processing fee from their royalty payment.

Q: So because the royalty owners did not contribute to these costs essentially, they shouldn't get the benefit of the tax deduction. Is that what you're saying?

A: Well, they -- the royalty owners are going to benefit by not paying the processing fee. So it's going to be whatever the processing fee would have been times one minus the tax rate. That's the benefit to the royalty owners.

Q: I understand what you're saying the benefit is. My question is: Because they're getting this benefit, that's the basis for your position that they then should not be entitled to the tax deductions that Lance is getting because of paying those costs?

A: That's correct.

Exhibit 5, Debra Liller Deposition, 25:7-26:3.

Correction: Plaintiff's introductory statement is wrong and misstates Ms. Liller's expert opinions. Ms. Liller was designated in part, to establish that basic tax theory does not allow taxpayers (royalty owners) to enjoy tax benefits for costs they do not pay. ***Liller Report, at 1, 5-6; Liller Dep. 24: 3-16 (Def.'s SOF Exs. 7 and 9, respectively).*** **More importantly, Lance's expert does not opine that Lance deducts more than royalty owners' proportionate share of taxes – instead she opines that Lance is deducting royalty owners' proportionate share of taxes:**

Q But what Lance is doing is deducting the royalty owner's proportionate share of the $842.80, correct?

A I don't see that.

Q Okay. What is your understanding of what Lance's practice is in taking deductions from royalty payments for taxes based on this hypothetical? What number are they using?

A I believe that Lance is calculating 12.04 percent tax on the royalty owner's proportionate share of revenue less deductions paid of $350, which is 5 percent of gross value and 5 percent of transportation.

Q So you think that what Lance's practice is is actually to deduct from royalty payments the royalty owner's proportionate share of the $722.40?

A That's correct. The royalty owners should be paying the statutory tax rate of 12.04 percent on their share of the revenues, net revenues received, which is $350.

Liller Dep. 20: 9-25, 21: 1-3 (Pl.'s SOF Ex. 5).

19. When asked repeatedly for the basis for her opinion, Ms. Liller could only point to "years and years and years" of experience, "basic taxation theory," *Exhibit 5, Liller Depo, 8:10-17; 9:13-19*, and W.S. § 39-14-203(c)(iii), *Liller Depo, 13:21-14:8.* Ms. Liller could cite to no authority for her views of "basic taxation theory." *Liller Depo, 9:20-10:2.*

Correction: Plaintiff's statement is wrong. Ms. Liller relied in part on the same authority Plaintiff relies on: the Wyoming tax statutes at Wyo. Stat. § 39-14-203(c)(i), (ii) and (iii). *Liller Dep. 13: 12-25, 14: 1-5 (Pl.'s SOF Ex. 5); Liller Dep. 28: 15-22 (Def.'s SOF Ex. 9).* Plaintiff has never provided any authority to support his position. *See S. Wilson Dep. 69:19-25, 70: 1-12 (Def.'s Mot. to Strike Ex. 1).* Further, Plaintiff has not challenged the reliability or relevance of Ms. Liller's expert opinions as Plaintiff has as to other Lance experts. *See Pl.'s Mot. to Strike the Testimony of Def. Expert Witness Enick, Terry, Wilson, and Zeeb.* Ms. Liller is an undisputed expert who relies on her unchallenged experience as a CPA and tax accountant.

20. These practices, which are built into Lance's computerized accounting methodology, are applied by Lance for all its royalty payment calculations for Campbell County production. *Exhibit 3, Wallner Deposition, 49-53.*

21. The combined effect of these two incorrect methodologies is an over-withholding by Lance for the class in excess of $600,000.00, plus interest at the rate of 18% in excess of $875,000.00 for a total in excess of $1,475,000 for Issue #1 (Tax Rate); and over-withholding by Lance for the class in excess of $1,600,000.00, plus interest at the rate of 18% in excess of

2,200,000.00, for a total in excess of $3,800,000.00 for Issue #2 (Tax Value). *Exhibit 1, Wilson Affidavit, ¶¶ 14, 17.*

Correction: Plaintiff's statement is wrong and relies on unreliable opinions. *See Def.'s Mot. to Strike.* Plaintiff's expert, Mr. Wilson, testified that his report should not be relied upon. *Wilson Dep. 122: 7-13 (Def.'s Mot. to Strike Ex. 1).* Further, Mr. Wilson testified that he had no opinion on whether royalty owners were underpaid because he was instructed not to read the contracts despite his normal accounting practices. *Id. at 56: 1-11.* It is undisputed that Mr. Wilson's testimony is unreliable, including any supplement even if the Court so allows. *See Zeeb Aff. (Def.'s Mot. to Strike Ex. 6).*

Lance's Setoff Claim

22. Lance contends that, even if it has overdeducted taxes from royalty payments, it has not underpaid some royalty owners because it is entitled to the benefit of certain deductions which it has historically not taken, although it may have been entitled by specific language in some leases to have taken such deductions.

Correction: Plaintiff's statements are wrong and immaterial. Lance contends that its tax methodology is correct. *See Def.'s Mot. for Summ. J.* Lance does contend that even if its tax methodology is incorrect, Lance has still overpaid most of its royalty owners based on the terms of the contracts between Lance and these owners. *Zeeb Report, 2-4 (Decertify Mot. Ex. 4).* It is undisputed that Plaintiff has not identified a single royalty owner who has been underpaid based on the royalty payment obligation of the governing contract. *Wilson Dep. 67: 2-9 (Def.'s Mot. to Strike Ex. 1).*

Further, deductions "historically not taken" by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.

23. Lance has historically deducted from royalty payments only transportation costs,

> and not to deduct the costs related to any treating or processing of the gas – fuel to move the gas from top to bottom – from the wellhead through the final sale nor any costs attributable to gathering charged through the gathering system.

Exhibit 4, Wallner 30(b)(6) Deposition, 18:12-20, 19:16-23.

24. As a business practice, Lance has never taken these deductions during the Class period (2002-present). *Exhibit 4, Wallner 30(b)(6) Deposition, 17:19-18:3.*

Correction: Plaintiff's statement is immaterial. Lance's business practice not to take certain deductions allowed by leases and the WRPA, such as processing, have nothing to do with Plaintiff's breach of contract claim and whether Lance overpaid or underpaid the required royalty under various royalty owner contracts. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3176, 2013 WL 3389469 (10th Cir. July 9, 2013) (Decertify Mot. Ex. 2); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 12-7047, 2013 WL 3388629 (10th Cir. July 9, 2013) (Decertify Mot. Ex. 3); *Cowden v. Parker & Assoc., Inc.*, No. 5:09-323-KKC, 2013 WL 2285163 (E.D. Ky. May 22, 2013) (Decertify Mot. Ex. 10). Deductions not taken by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.

25. There has been no discussion by Lance of any plans to change its longstanding business practice of deducting only transportation costs from royalty payments. *Exhibit 4, Wallner 30(b)(6) Deposition, 20:2-10; 22:8-14.*

Correction: Plaintiff's statement is immaterial. Lance's business practice not to take certain deductions allowed by leases and the WRPA, such as processing, have nothing to do with Plaintiff's breach of contract claim and whether Lance overpaid or underpaid the required royalty under various royalty owner contracts. (Decertify Mot. Exs. 2, 3, and 10). Deductions not taken by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.

26. Lance voluntarily decided not to take these deductions because it chose to take a "conservative approach." Lance's "conservative approach" was not based on "anything to do with the manageability of paying what amounts to thousands of royalty owners." *Exhibit 4, Wallner 30(b)(6) Deposition, 35:16-36:6.*

Correction: Plaintiff's statement is immaterial. Lance's business practice not to take certain deductions allowed by leases and the WRPA, such as processing, have nothing to do with Plaintiff's breach of contract claim and whether Lance overpaid or underpaid the required royalty under various royalty owner contracts. (Decertify Mot. Exs. 2, 3, and 10). Deductions not taken by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.

27. If Lance did change its business practice and decide to take these deductions, it would be prospective only. *Exhibit 4, Wallner 30(b)(6) Deposition, 22:12-24.*

Correction: Plaintiff's statement is immaterial. Lance's business practice not to take certain deductions allowed by leases and the WRPA, such as processing, have nothing

to do with Plaintiff's breach of contract claim and whether Lance overpaid or underpaid the required royalty under various royalty owner contracts. (Decertify Mot. Exs. 2, 3, and 10). Deductions not taken by Lance have nothing to do with underlying and varying contract obligations for royalties, which are the heart of this breach of contract controversy.

28. Although Lance has never raised this argument as a counterclaim in this action, it did assert a counterclaim for deductions not taken in *Sandra K. Lange Trust et al v. Lance Oil & Gas Company, Inc.*, Case No. 32513, Sixth Judicial District Court (*"Lange Trust"*) in which Lance asserted a counterclaim for recoupment. *Answer and Counterclaims of Defendant Lance Oil & Gas Company to Plaintiff's First Amended Complaint,* Case No. 32513, pp. 10-16. *Exhibit 6.*[1]

Correction: Plaintiff's statement is immaterial. Lance did raise a counterclaim in Case No. 32513 involving a specific fee to reserve capacity on transportation pipelines, which Lance refers to as a stranded gas fee. In the present case, Plaintiff's Complaint did not raise the issue of Stranded Gas Fees and such fees are not related to Plaintiff's breach of contract claims. *See Compl. ¶ 6.* Lance's counterclaim in an unrelated case has no relevance to Plaintiff's breach of contract claim and Lance's defense to that claim in this case. Plaintiff cites this immaterial fact presumably in support of Plaintiff's attempt to mischaracterize Lance's contract defense as a counterclaim for setoff or recoupment. *See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 11.*

[1] "[A] court may "take judicial notice of its own records in the case before it or in a case closely related to it." *Hultgren v. State,* 261 P.3d 753, 754 n.1, 2011 WY 139, ¶6 n.1, quoting *State in Interest of C.,* 638 P.2d 165, 172, n. 10 (Wyo.1981); *Wayt v. State,* 912 P.2d 1106, 1109 (Wyo.1996).

29. The propriety of arguably permissible deductions (specifically for "stranded gas") was at issue in Lange Trust. See Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Class Certification, ¶¶20, 22, Exhibit 7.

Correction: Plaintiff's statement is immaterial. Stranded Gas Fees were indeed a specific component of the Lange Trust case, which was not a breach of contract case. Here, Plaintiff's Complaint alleges breach of contract. ***Compl.*** **¶** ***6.*** **Lance has never alleged that it can or should have deducted Stranded Gas Fees from royalty owners in the present case. Plaintiff cites this immaterial fact presumably in support of Plaintiff's attempt to mischaracterize Lance's contract defense as a counterclaim for setoff or recoupment.** ***See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 11.***

30. *Lange Trust* has now been conditionally settled by the parties and approved by the Court. The Settlement Agreement provides:

> 1.40 **"Reserved Claims"** shall mean:
>
> 1.40.1 Claims relating to price, volume or decimal interest arising out of clerical errors, as well as any counterclaims or defenses Lance may have related to such claims, if asserted. It is understood and agreed that such reserved claims or counterclaims apply only to individual claims unique to certain Royalty Payees and not to Settlement Class Members as a whole since any such common claims or counterclaims are included in Settled Claims.
>
> 1.40.4 Claims made in that certain litigation entitled *Kenneth B. Geer v. Lance Oil & Gas Company, Inc.* filed in the Sixth Judicial District as Civil Action No. 32940 as of the Effective Date.
>
> 1.45 "**Settled Claims**" shall mean and include the following:
>
> 1.45.1 For claims against Lance and/or the Lance Additional Released Parties. . . .
>
> 1.45.2 For claims asserted or which could have been asserted by Lance, "Settled Claims" shall mean and include any and all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, including

> interest, attorney fees, and penalties, whether known or unknown, asserted or unasserted, and whether in contract, or tort, or based on statute, or any other legal or equitable ground or theory including but not limited to the *Act,* or duties arising under implied covenants, if any, or any other duties arising under the law, that are held by Lance **that constitute or in any way relate to or arise from or arise out of Over Payment Claims that Lance has or could assert, including those for recoupment or as counterclaims,** against Class Representatives and/or Settlement Class Members, excepting only Reserved Claims.

Exhibit 8, Agreement for Settlement and Release of Claims Against and by Anardarko E&P Onshore LLC as Successor in Interest to Lance Oil & Gas Company, Inc. (emphasis added).

Correction: Plaintiff's statement is immaterial. Plaintiff cites this immaterial fact presumably in support of Plaintiff's attempt to mischaracterize Lance's contract defense as a counterclaim for setoff or recoupment. *See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 11.*

31. Lance has never asserted a counterclaim ("setoff" or "recoupment") for overdeductions in this case. Lance could have asserted all of its setoff and recoupment counterclaims in *Lange Trust.* Lance's alleged setoff or recoupment is a Settled Claim, and is not a Reserved Claim under the *Lange Trust* Settlement Agreement. Settled Claims are released. *Settlement Agreement*, ¶2.12; *Wallner 30(b)(6) Deposition, 29:16-31:12* ("Q. And so any of those for gathering, fuel, processing, that Lance is -- is asserting that could be taken are resolved in the Lange settlement methodology? A. Yes.")

Correction: Plaintiff's statement is wrong and immaterial. The *Lange* Settlement only resolved the specific deductions that Lance could take from royalty owners in that case on a prospective basis as a future "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 Settlement Agreement* ¶¶ *2.4.1 and 2.5.1 (Pl.'s SOF Ex. 8).* **In other words, Lance's contract defense in this case that most Class Members suffered no breach of contract was not resolved or affected by the *Lange* settlement. Plaintiff cites this immaterial fact in support of Plaintiff's attempt to mischaracterize Lance's contract defense as a counterclaim for setoff or recoupment.** *See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 9-11.*

32. This Court has ruled against Lance's setoff argument in this case twice before.

Correction: Plaintiff's statement is wrong. 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 *Roderick*, 2013 WL 3389469 and *Chieftain*, 2013 WL 3388629 (Decertify Mot. Exs. 2, 3). *See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 12-14.*

33. In *Defendant Lance Oil & Gas Company's Memorandum in Opposition to Plaintiff's Motion for Class Certification*, dated October 5, 2012, Lance argued that no class could be certified because the different lease language that it might raise as a setoff would defeat the element of typicality. (Lance Memorandum, pp. 22-24)

Correction: Plaintiff's statement is wrong and immaterial. Lance did not make a setoff argument in its opposition to Plaintiff's Mot. for Class Certification. Rather, Lance

argued that Plaintiff's individual leases, as well as the class member leases, allow for different deductions, and therefore, destroy typicality. ***Def.'s Opp. to Mot. for Class Cert. 22-24.*** **Plaintiff cites this immaterial fact presumably in support of Plaintiff's attempt to mischaracterize Lance's contract defense as a counterclaim for setoff or recoupment.** ***See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 9-10.***

34. In its Findings of Facts, Conclusions of Law and Order Granting Plaintiff's Motion for Class Certification, the Court rejected Lance's argument:

> ¶ 52. . . .The issue in this case is the legality of Lance's deductions for Production Taxes from royalty payments. This case is not about whether, under various lease terms, Lance might be able to take deductions for gathering, processing and fuel.
>
> ¶58. In this case, Defendant's course of conduct in implementing its internal business policy of treating its owners the same for deducting taxes from Royalty payments, regardless of lease language, demonstrates the "typicality" requirement is satisfied.

Correction: Plaintiff's statement is wrong. 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*, 133 S.Ct. 1426, 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 *Roderick*, 2013 WL 3389469 and *Chieftain*, 2013 WL 3388629 (Decertify Mot. Exs. 2, 3). ***See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 12-14.***

35. Lance again attempted to raise the deductions-not-taken argument when it opposed the Plaintiff's proposed Class Notice, arguing that the Notice should include language of its setoff. *Defendant Lance Oil & Gas Company's Proposed Class Notice and Objection to Plaintiff's Proposed Class Notice*, dated March 15, 2013.

Correction: Plaintiff's statement is wrong. Lance did not request that the Notice include language of setoff that Plaintiff proposed, but rather requested language in the notice that described Lance's breach of contract defense that Plaintiff mistakenly insists should be a counterclaim. Plaintiff's proposed class notice filed with the Court contained the following language: "Defendant has asserted defenses to the claims that include but are not limited to accord and satisfaction, setoff and recoupment." *Pl.'s Proposed Class Notice, Feb. 27, 2013.* Lance objected to the incompleteness of this proposed class notice, requesting this sentence before the above-quoted sentence proposed by Plaintiff:

> **Defendant Lance denies Plaintiff's allegations and contends that its tax accounting methodology did not result in actual underpayment of the royalty due under the terms of a Royalty Owner's lease or other contract with Lance. Lance contends that it does not deduct certain costs that could be taken from Royalty Owners under the terms of certain leases and under the WRPA, and that this practice causes an overpayment to Royalty Owners that would eliminate any alleged underpayment caused by tax accounting methodology that Lance denies is improper.**

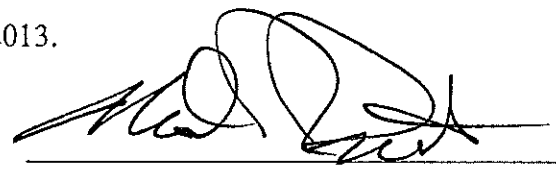
Def.'s Proposed Class Notice and Objection to Pl.'s Proposed Class Notice, Mar. 18, 2013.

36. In its May 10, 2013 Decision Letter on the Class Notice, the Court stated:

> The possible additional deductions that defendant *might* have been able to take under a certain lease are a complication that is unnecessary to bring within this case. If there are any such deductions and if this is not a compulsory counterclaim, the defendant could assert those outside of this class action proceeding in a court of competent jurisdiction as to the amount of the claim and deal with the claim on an individualized basis.

Comment: Plaintiff quotes what the Court previously said. Lance believes 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*, 133 S.Ct. 1426, 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 *Roderick*, 2013 WL 3389469 and *Chieftain*, 2013 WL 3388629 (Decertify Mot. Exs. 2, 3). *See Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. 12-14.*

DATED this 22nd day of August, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, I served the foregoing **DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH GENUINE ISSUES EXIST AND STATEMENT OF CORRECTIONS TO PLAINTIFF'S RULE 56.1 STATEMENT OF FACTS** 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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