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OIL & GAS COMPANY

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

KENNETH B. GEER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 32940
	)	
LANCE OIL & GAS COMPANY, INC., A DELAWARE CORPORATION,	)	
	)	
	)	
Defendant.	)	

DEFENDANT LANCE OIL & GAS COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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Defendant Lance Oil & Gas Company, Inc. (Lance) respectfully submits this memorandum in opposition to Plaintiff's Motion for Class Certification. For the reasons set forth below, the Motion should be denied.

I. Introduction and Summary of Argument

This is not a tax case and Plaintiff has no cause of action under the Wyoming tax code. This is a breach of contract case to recover alleged underpayment of royalties. Lance is obligated to pay royalties to Plaintiff and the putative class members under several thousands of leases with individual royalty owners. The terms of those leases, not the Wyoming Royalty Payment Act, Wyo. Stat. Ann. § 30-5-301 et seq. (WRPA), or the Wyoming tax code, govern the outcome of this case.

Plaintiff asserts four claims: (1) Lance breached its leases with Mr. Geer and violated the WRPA by deducting ad valorem taxes from royalty payments based upon an estimated ad valorem rate, thereby underpaying royalties owed to Mr. Geer; (2) Lance breached its leases with Mr. Geer and violated the WRPA by failing to pass along to royalty owners tax benefits for costs that royalty owners did not bear, thereby underpaying royalties owed to Mr. Geer; (3) Lance violated the WRPA by failing to accurately report to Mr. Geer taxes it deducted from royalty payments; and (4) Plaintiff and the putative class members are entitled to declaratory judgment of the parties' rights under the several thousands of leases, along with injunctive relief. In short, Plaintiff alleges two discrete breach of contract claims and a corresponding request for punitive interest on underpayments under the WRPA, a reporting claim under the WRPA, and a claim for

declaratory judgment, none of which satisfies the requirements of Wyo. R. Civ. P. 23 ("Rule 23").[1]

Plaintiff's claims are premised on his broad allegation that Lance's tax deductions—by themselves—violate the WRPA and trigger the penalty provisions of the Act. Pl. Mot. at 2. Plaintiff argues that Lance improperly calculated royalty owners' tax liability and, therefore, "over-withheld" taxes from royalty payments that Lance made to royalty owners. Plaintiff concludes that this "over-withholding" constitutes a breach of his leases and violates the WRPA.

Even if Lance's tax calculation methods were inaccurate, a breach of any particular royalty agreement does not automatically follow where, as here, Lance does not take other permissible deductions such that the net result is overpayment to the royalty owner. A simple example illustrates the point. If Lance is entitled by the language of a lease to deduct from royalty $1.00 of total costs, but is actually only deducting $.50 of those costs, then Lance is overpaying the royalty owner by $.50. A $.05 error in the tax calculation then yields a $.45 overpayment, rather than a $.50 overpayment, but not breach of the lease. Under these circumstances, there is no breach of contract and no cause of action regardless of the merits of Plaintiff's tax theory because the royalty owed by the lease terms is still being fully paid.

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[1] The Court is obligated to evaluate class certification on a claim-by-claim basis and certify the class with respect to only those claims, if any, for which certification is appropriate. *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 295 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) ("Certification on a claim-by-claim, rather than holistic, basis is necessary to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members."). Each claim must independently satisfy the requirements of Rule 23 in order to be properly certified. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003).

Lance would only be liable for underpayment under the leases if the **overall** royalty payment made to any given royalty owner is less than the amount required by the governing lease. "The [WRPA] takes effect when the lessee discovers a **royalty payment deficiency**." *Ultra Resources, Inc., v. Hartman*, 2010 WY 36, ¶ 71, 226 P.3d 889, 916 (Wyo. 2010) (emphasis added); Pl. Mot. at 6. Assuming, *arguendo*, that Plaintiff's tax analysis is correct[2], neither the WRPA nor Plaintiff's leases provide any relief for inaccurate tax deductions unless and until that results in a breach of the lease.[3] Similarly, the Wyoming tax statutes do not provide an independent cause of action for improper tax calculations.

Lance has overpaid most of its royalty owners by not taking all the deductions allowed by each owner's lease. Royalty owners' leases vary, as do the deductions allowable under the

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[2] Plaintiff's theory is that royalty owners should share in the benefit of tax deductions, such as processing expenses deducted by Lance to arrive at taxable value, even though royalty owners do not contribute to these expenses. Lance's tax accounting methodology which does not share the benefit of tax deductions with royalty owners who do not contribute to Lance's expenses for these deductions is a well recognized tax principle. "Generally, deductions attributable to expenditures are allowable to the taxpayer who bears the economic burden of the expenditure and who receives the benefits of the expenditures." MAULE, 503-3rd Tax Management Portfolio, *Deductions: Overview and Conceptual Aspects* VII(A), (Bloomberg BNA) (*citing, e.g., Case v. Comr.*, 50 T.C.M. 1291, 1295 (1985); *Bordo Prods. Co. v. U.S.*, 476 F.2d 1312, 1327 (Ct. Cl. 1973). Contrary to Plaintiff's claim that Lance employs an "illegal methodology" (Pl. Mot. at 13), this very Court approved the *Addison/Barlow* class settlements which state that royalty owners are not entitled to tax benefits to which producers are entitled based on costs that the royalty owners do not bear. *See, e.g.,* Pennaco Settlement Agreement at ¶ 1.10.1 ("The Settlement Class Members will bear their proportionate share of taxes, however, they will not receive any tax benefits or credit associated with the costs or expenses they do not bear.") Exhibit 11.

[3] The obligation to pay royalties correctly originates from the lease. The WRPA does not impose additional contractual responsibilities; rather, the WRPA imposes penalties upon producers for failure to comply with lease terms. *See ANR Prod. Co. v. Kerr-McGee Corp.*, 893 P.2d 698, 705 (Wyo. 1995).

leases.[4] Accordingly, analysis of Plaintiff's claims requires a lease-by-lease evaluation to determine whether Lance's royalty payments to thousands of different royalty owners comply with the specific royalty clauses of their individual leases. Such an undertaking defeats the commonality requirement of Rule 23, and compels this Court to deny class certification.[5]

Besides glossing over the commonality requirement, Plaintiff likewise glosses over the typicality and adequacy requirements under Rule 23(a). Plaintiff's claims are not typical of the putative class because his leases differ from leases of other putative class members. Further, Plaintiff's own leases contain differing terms as to what costs Lance can deduct from its royalty payments. The determination of what deductions are allowed under the leases is crucial. Lance did not deduct certain permissible deductions; therefore, most royalty owners were not underpaid royalties even assuming improper tax withholding. Accordingly, most royalty owners did not suffer an injury in breach of the lease or violation of the WRPA. Plaintiff's reporting claims, which are nothing more than restated underpayment claims, are also not typical of the putative class. Plaintiff's tax deductions were reported accurately pursuant to a 2009 royalty reporting class action settlement in which Plaintiff participated.

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[4] For example, many leases allow deductions for gathering, fuel and processing costs that Lance could but has not taken. In addition, Lance could take processing costs under the WRPA for leases otherwise silent on allowable deductions. Such available deductions more than overcompensate for any alleged tax accounting errors, resulting in no underpayment of royalty under these types of leases.

[5] Commonality is lacking on all of Plaintiff's claims, including his claim for declaratory judgment. The Declaratory Judgment Act empowers courts to declare rights under a written contract, which necessarily requires a lease-by-lease evaluation given the variance in lease language discussed herein. *See* Pl.'s Mot. at 12-13. Accordingly, a class cannot be certified on the basis of Plaintiff's claim for declaratory judgment.

Additional requirements under Rule 23(b)(2) and (3) for certification are also lacking. Lance's accounting methodology for taxes, even if it results in over-deduction from royalty, does not result in an underpayment of royalty for all class members. As Plaintiff notes, the absence of a certain cohesiveness among class members with respect to their injuries should preclude class certification under Rule 23(b)(2). Pl. Mot. at 12 (citing *Shook v. Bd. of County Comm'rs*, 543 F.3d 597, 604 (10th Cir. 2008)). Moreover, the need to analyze thousands of individual leases to determine if any damages exist defeats predominance. The "core issue" for resolution is whether Lance's tax calculation methodology resulted in underpayment of royalties, thereby breaching individual royalty owner leases. Even assuming that common tax calculations resulted in excess tax deductions, the tax deductions did not result in underpayment of royalties for those many leases allowing for deductions of costs that were not taken by Lance.

Finally, the class action mechanism is not superior here. First, the number of individualized issues based on different lease terms and the impacts on the royalties owed by Lance renders a class action unmanageable. Second, the WRPA provides costs and attorney's fees for prosecuting a single plaintiff's claims. Each royalty owner has ample means and incentive to prosecute a claim that Lance violated the leases, thus triggering provisions of the WRPA. The class action mechanism is not necessary.

In short, even assuming but not admitting that Plaintiff's claims are true, improper tax accounting methodology does not automatically result in an underpayment of royalties and therefore does not automatically trigger the penalty provisions of the WRPA. The determination of whether royalties owed to individual royalty owners were properly paid is dictated by the individual leases. The WRPA penalizes royalty underpayment **under a lease**, not accounting

methodology practices that do not result in an underpayment. For many putative class members' leases and most of Plaintiff's leases, underpayment did not occur, thereby rendering claims of royalty underpayment subject to dismissal for failure to state a claim on which relief can be granted. In any event, Plaintiff does not have and cannot invent a cause of action that results in resolution of this case in a single stroke, making the case inappropriate for class certification.

II. Statement of the Facts

Lance is party to thousands of leases with individual royalty owners in Campbell County, Wyoming. The terms of those leases define the royalty payment owed, and prescribe what costs can be deducted from royalty payments. The WRPA may also prescribe what costs can be deducted under some leases.

In relevant part, the 1989 Amendments to the WRPA provided a number of gap-filler definitions that control absent specific lease language. But the language of individual leases still controls where applicable because the parties can agree otherwise. Wyo. Stat. Ann. § 30-5-305(a) ("*Unless otherwise expressly provided for by specific language* in an executed written agreement, "royalty", "overriding royalty" . . . shall be interpreted as defined in W.S. 30-5-304.") (emphasis added). "Royalty" is defined as "the mineral owner's share of production, free of the costs of production[.]" Wyo. Stat. Ann. § 30-5-304(a)(vii). "Overriding royalty" is defined as "a share of production, free of the costs of production, carved out of the lessee's interest under an oil and gas lease[.]" Wyo. Stat. Ann. § 30-5-304(a)(v). "Costs of production," in turn, is defined as follows:

> . . . all costs incurred for exploration, development, primary or enhanced recovery and abandonment operations including, but not limited to lease acquisition, drilling and completion, pumping or

> lifting, recycling, gathering, compressing, pressurizing, heater treating, dehydrating, separating, storing or transporting . . . the gas into the market pipeline. **"Costs of production" does not include the reasonable and actual direct costs associated with transporting . . . the gas from the point of entry into the market pipeline or the processing of gas in a processing plant;**

Wyo. Stat. Ann. § 30-5-304(a)(vi) (emphasis added). Accordingly, the WRPA limits permissible deductions to transportation and processing costs, **unless the underlying leases or agreements provide otherwise.** This makes it mandatory to consult the terms of all lease and royalty contracts when breach claims are at issue, because many leases "provide otherwise" and thus must be consulted.

For all times material to Plaintiff's claims, Lance has only deducted from royalty payments the owners' proportionate share of transportation costs, if leases allowed for such deductions. Affidavit of Janis Wallner, ¶ 3, attached as Exhibit 1. Lance has not deducted other costs such as gathering, compression, dehydration, fuel or processing, even where the leases expressly allow Lance to deduct such costs. *Id.* at ¶ 4.

Because there is no independent cause of action for violating the Wyoming tax code or improperly deducting taxes, to determine whether Lance breached any lease, the Court must analyze whether Lance's tax deduction resulted in a royalty payment less than the royalty due under each lease.

A. Thousands of Leases will Generate Different Results

Lance's expert, Kris Terry, reviewed hundreds of leases from Campbell County and identified various forms of leases that contain disparate royalty payment clauses. In short, some leases allow for the deduction of most or all costs Lance incurs from the wellhead, some leases

prohibit deduction of some of these costs, and some leases are silent. Ms. Terry concluded that it is impossible to determine whether Lance underpaid a royalty owner, assuming Plaintiff's tax analysis is correct, without first looking to the underlying lease to identify what a royalty owner was actually due. Expert Report of Kris Terry, attached as Exhibit 2.

B. Lance's Tax and Royalty Payment Processes

1. Lance's Tax Liability to the State and Calculation of Taxable Value

Lance remits taxes to the State of Wyoming based on a taxable value, which it reports to the State on a monthly and annual basis. The taxable value is calculated by deducting certain costs from a well's gross wellhead value. For production taxes, a producer, like Lance, is allowed to deduct all costs incurred after the point of valuation, which for tax purposes, is located at the outlet of the initial dehydrator. *See* Wyo. Stat. Ann. § 39-14-203(b)(iv).[6] Accordingly, Lance calculates its taxable value, a value reported to and audited by the State of Wyoming, by deducting from the gross wellhead value the costs incurred (a) downstream of the inlet to MIGC, Fort Union Gas Gathering system (FUGG), and other similar pipelines, (b) carbon dioxide (CO2) removal services, and (c) fuel incurred at three CO2 removal plants known as Little Thunder, Medicine Bow, and Bison. Ex. 1, Wallner Aff., at ¶ 7. All of these services occur downstream of the outlet of the initial dehydrator. Affidavit of Chris Wilson, ¶ 13, attached as Exhibit 3.

To illustrate Lance's taxable value calculation, Janis Wallner, an Accounting Manager in charge of Lance's CBM production, queried all the well level costs associated with a well named

[6] Identical bases for imposing an ad valorem tax on CBM production are referenced at Wyo. Stat. Ann. § 39-13-103(b)(iv).

Geer Trust 14-26-5474 for production month October 2011, which is copied in the table below. Ex. 1, Wallner Aff., at ¶¶ 8 - 9.

Geer Trust 14-26-4574	
Gross Value	**$909.77**
Downstream Transportation charges	$172.53
Processing (CO2 Removal) Costs	$24.42
Exempt Royalty (There are no state or federal royalty owners)	$0.00
Gathering costs	$103.67
Fuel (consumed between well and inlet to pipelines such as MIGC, FUGG and other similar pipelines)	$42.95

The taxable value for the Geer Trust 14-26-4574 totaled **$712.82**, which was calculated by deducting from gross wellhead value downstream transportation costs and CO2 removal costs allocated to the well. ($909.77 - $172.53 - $24.42 = $712.82 taxable value). Ex. 1, Wallner Aff., at ¶ 10. This value is confirmed by Exhibit C to Plaintiff's Expert Report, titled Monthly Calculation of Severance and Ad Valorem Tax Values and Deductions." *See* Pl. Mot. for Class Certification, Ex. 1, at Pl. Ex. C, pg 32 of 32.

2. Lance's Royalty Tax Deduction Calculation and Handling of Other Deductible Costs

Lance calculates and pays ad valorem, severance, and conservation taxes (collectively, production taxes) on the wells it operates. On a monthly basis, Lance deducts a royalty owner's share of taxes associated with each well in which the owner has an interest. Ex. 1, Wallner Aff., at ¶ 5. To calculate a royalty owner's production tax owed on a well, Lance calculates the owner's proportionate share in gross wellhead value less the owner's proportionate share of

downstream transportation charges (assuming the underlying lease allows for such deductions). This value is then multiplied by the applicable tax rate to determine the owner's proportionate share of taxes for that well. *Id.* at ¶ 6.

Even if Plaintiff's allegations that he was overtaxed are correct, Plaintiff's lease and corresponding royalty payment demonstrate that Plaintiff has not been underpaid. Plaintiff's lease associated with Geer Trust 14-26-4574 contains a royalty clause and other provisions, which state in relevant part, as follows:

> 3. Lessee covenants and agrees to pay royalty to Lessor as follows:
>
> * * *
>
> (b) On gas of whatsoever nature or kind, including coalbed gas and other gases, . . . Lessee shall pay, as royalty, 16% of the **prevailing wellhead market price** paid for Gas of similar quality in the same field or producing area . . . **The prevailing wellhead market price shall reflect all costs associated with compression, dehydration, processing, treating and transportation of the gas down stream of the central delivery point.**
>
> * * *
>
> 6. **Lessee shall have the right to use, free of cost, Gas,** oil and water **produced on the Premises for Lessee's operations thereon. . . .**

Geer Shallow Oil and Gas Lease, dated August 21, 1997, attached as Exhibit 4, at p. GEER000007 (emphasis added).[7]

[7] Plaintiff has two additional leases with Lance dated August 26, 1997, that contain the identical royalty clause provision. See Ex. 4 at pp. GEER000010 and GEER000015 (both leases dated August 26, 1997). For convenience, Plaintiff's leases with the same royalty clause provisions will be referenced and produced as one lease.

Using the same illustration regarding well costs for the Geer Trust 14-26-4574, Plaintiff paid taxes on a value that reflected the owner's gross value less the owner's proportionate share of transportation deductions, the only costs borne by Plaintiff in this well.

Geer Trust 14-26-4574		
Cost	**Well Cost**	**Owner's Share (4.00%)**
Downstream Transportation (deducted)	$172.53	$6.90
Processing (CO2 Removal) **(not deducted but expressly allowed by the lease)**	$24.42	$.98
Gathering **(not deducted but expressly allowed by the lease)**	$103.67	$4.15
Fuel **(not deducted but expressly allowed by the lease)**	$42.95	$1.72

Plaintiff's royalty payment for October 2011 production reflected Plaintiff's proportionate share of downstream transportation charges that totaled $6.90. Had Lance deducted all the costs allowed by Plaintiff's lease, Lance was allowed to deduct an additional **$6.85** for Plaintiff's proportionate share of processing, gathering, and fuel.

Lance deducted $3.69 in taxes, but Plaintiff's expert report contends that Plaintiff's tax deduction should have been roughly $3.42 in taxes on October 2011 production for Geer Trust 14-26-4574.[8] If Plaintiff is correct, then Lance over-withheld for taxes $.27 more than allowed.

[8] These figures include conservation tax rates as well. Plaintiff's expert report did not contain an opinion on conservation taxes, but the figures cited above relied on Plaintiff's expert's calculations.

However, this example demonstrates that under the terms of the lease, Plaintiff was overpaid by **$6.58** ($6.85 less $.27), since Lance did not deduct all costs it was entitled to deduct under the terms of the lease. In other words, Plaintiff did not receive any tax benefits for costs that he did not bear.

Based on the language in Plaintiff's lease, even if Lance over-withheld $.27 in taxes, Plaintiff was still paid royalties in excess of the amount owed under the terms of the lease. Although Plaintiff might challenge the deductibility of these costs, the processing costs for CO2 removal are deductible under the plain language of Plaintiff's leases as well as the plain language of the WRPA: "'Costs of production' does not include . . . the **processing of gas in a processing plant**." Wyo. Stat. Ann. § 30-5-304(a)(vi) (emphasis added).[9] If Lance confined its analysis to the processing deduction, Plaintiff was still overpaid on this well by roughly $.71 ($.98 - $.27 = $.71).

Clearly, Plaintiff has been overpaid on Geer Trust 14-26-4574 and has no claim of breach to make. Plaintiff may be able to find examples of royalty owners who have been underpaid based on Plaintiff's tenuous tax theory, but locating these royalty owners will require a lease-by-lease review, which by definition, precludes class certification.

C. Lance's Royalty Reporting

Plaintiff alleges that "Lance is liable to Geer and the class of Campbell County Royalty Owners for failure to accurately reports [sic] its deductions for taxes, as required by W.S. 30-5-305(b)(v)." Pl. Mot. at 6. Section 30-5-305(b)(v) states as follows: "Whenever payment is made

[9] In *Exxon Mobil v. Dep't of Revenue*, the Wyoming Supreme Court ruled that facilities with the intended and specialized purpose of removing CO2 are considered "processing" facilities. *Exxon Mobil v. Dep't of Revenue*, 2009 WY 139, ¶ 29, 219 P.3d 128, 137-38 (Wyo. 2009).

for oil or gas production to an interest owner, all of the following information shall be included and labeled on the check stub or on an attachment to the form of payment, unless the information is otherwise provided on a regular monthly basis: . . . [t]he total amount of state severance, ad valorem and other production taxes[.]" Wyo. Stat. Ann. § 30-5-305(b)(v). Section 305(b)(v) makes no mention of deductions; rather, it presumably requires Lance to report the taxes associated with a specific well. No Wyoming court has ever addressed this specific section.

In 2009, Lance entered into a class action settlement agreement that was approved by this Court. Order Certifying Settlement Class and Approving Class-Wide Settlement Agreement, Sandra K. Lange Trust dated June 28, 1994, by and through its Trustee Sandra K. Lange, et al v. Lance Oil & Gas Company, Inc., Civil Action No. 29635, State of Wyoming County of Campbell, Sixth Judicial District (*Lange*), attached as Exhibit 5. As provided in the class notice, the settlement agreement specifically addressed how taxes would be reported on a check stub: ". . . Lance may report total taxes deducted as [sic] single line item on its check stub." *Lange* Notice of Pendency of Class Action Proposed Settlement With Defendant Lance Oil & Gas Company, Inc., ¶ 4(a), at p. LOG000136KBG, attached as Exhibit 6. Plaintiff was a member of the settlement class. Ex. 5, at p. LOG000194KBG. The Court records from this previous reporting case show that Plaintiff received over $700.00 as a member of the putative class. *Id.* at p. LOG000246KBG.

Plaintiff has already had one bite at this apple, and Plaintiff's current attempt to revise a settlement agreement this Court approved over two years ago should be rejected.

ARGUMENT

III. Plaintiff is Suing for Breach of Contract to Recover WRPA Penalties

Plaintiff argues that he is suing for breach of his and the putative class members' lease agreements, the determination of which requires the consideration of each separate lease agreement. Pl.'s Compl. ¶¶ 2-4, 6, 11, 22-24, 29 ("The Defendant has breached the leases or other agreements with the Plaintiff and has violated the [WRPA]." ¶ 24); Pl. Mot. at 13 ("Plaintiff seeks to have the court construe his rights as a Royalty Owner under his leases with Lance, affected by the WRPA."); *ANR Prod. Co.*, 893 P.2d at 705 ("[T]he Legislature's intent . . . was to limit the application of the Act to cases where a preexisting legal obligation for payment of the proceeds of the sale of hydrocarbons exists."). Claims for breach of royalty payment obligations arising from different lease contracts with different rights and obligations are inappropriate for class certification. A leading treatise on oil and gas law explains the problem: "Because the royalty provisions vary as to type, **a class action is not appropriate to recover deficiencies in payment of royalty under separate leases** and units in separate fields." 3 E. KUNTZ, OIL AND GAS LAW § 40.4(a) (2012) (emphasis added).

By alleging underpayment of royalties owed, Plaintiff is necessarily suing for breach of the royalty clauses contained in thousands of separate lease contracts, many of which have their own unique royalty payment provisions that must be examined to determine whether, in any individual case, Lance failed to pay royalties properly. Plaintiff's claims require a lease-by-lease analysis, making them inappropriate for class certification.

A. The WRPA Penalizes Royalty Underpayment Based on Individualized Lease Terms, But Not the Accuracy of Associated Tax Calculations

The WRPA requires that "[t]he proceeds derived from the sale of production . . . be paid to all persons legally entitled thereto." Wyo. Stat. Ann. § 30-5-301(a). If a party legally responsible for payment violates section 301(a), the royalty owner is entitled to the unpaid amount plus penalty interest. Wyo. Stat. Ann. § 30-5-303(a). The WRPA penalizes royalty non- or underpayment. It does not, contrary to Plaintiff's contention, penalize accounting practices. As Plaintiff accurately points out, "[t]he act takes effect when the lessee discovers a **royalty payment deficiency**." *Ultra Resources, Inc.*, ¶ 71 (emphasis added); Pl. Mot. at 6. Thus, the WRPA's penalties are not triggered unless and until a royalty owner is paid less than provided for in the underlying lease. The pertinent determination is whether Lance underpaid royalties under any given lease, and that determination can only be made by assessing what royalty amount Lance is **obligated** to pay under the terms of each lease.

It is settled law that the royalty clauses themselves provide the "proper method of determining the [party's] royalty share." *Cities Serv. Oil & Gas Corp. v. State*, 838 P.2d 146, 151 (Wyo. 1992). The ultimate conclusion regarding each mineral contract may vary on a case-by-case basis based upon the intent of the parties as expressed by the language they used. *Caballo Coal Co. v. Fidelity Exploration & Prod. Co.*, 2004 WY 6, ¶ 22, 84 P.3d 311, 320 (Wyo. 2004).

B. Plaintiff Has No Cause of Action for Incorrect Tax Calculations

Plaintiff does not claim and does not have a private right of action under the Wyoming tax statutes applicable to oil and gas production, Wyo. Stat. Ann. §§ 39-14-201 through 39-14-

212. Private rights of action arising from statute may only be pursued "where the statute creates such a private right or the claimant can establish his status as a third-party beneficiary of a contract made to fulfill a governmental obligation." *Tidwell v. HOM, Inc.*, 896 P.2d 1322, 1326 (Wyo. 1995) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979)). Since there is no contract between Lance and the State in which Plaintiff is a third-party beneficiary, a private right of action must be expressly created by statute or implied by legislative intent, which it is not. *Id.*; *Herrig v. Herrig*, 844 P.2d 487, 493-94 (Wyo. 1992).

Plaintiff's allegations that Lance's "practices" violate the WRPA are actionable only if Lance's tax calculation practices result in a royalty payment deficiency. *Ultra Resources, Inc.*, ¶ 71. Thus, Plaintiff's characterization of their "common claims" for "over-deduction" is wrong. There is no cause of action for technically incorrect calculations unless the "over-deduction" results in overall royalty underpayment. As discussed above, determining whether there was an underpayment requires the Court to analyze each individual lease.

IV. Plaintiff Cannot Satisfy the Requirements of Rule 23(a)

Plaintiff attempts to define a putative class of royalty interest and overriding royalty interest owners in Campbell County: "The class so represented by Plaintiff in this action, and of which Plaintiff is himself a member, consists of all owners of royalties and overriding royalties in oil and gas leases covering lands throughout the State of Wyoming for which the Defendant pays, has paid or will pay royalties." Pl. Comp. ¶ 11.[10] Plaintiff's Complaint characterizes himself as a royalty owner and an overriding royalty interest owner: "The Plaintiff is the lessor

[10] Plaintiff's claims are limited to Campbell County, Wyoming. Pl. Mot. at 2, fn 1.

under oil and gas leases **and** the owner of related overriding royalty interests (derived or carved out of such leases) creating non-working interest royalties and overriding royalties (collectively "Royalties") with respect to oil and gas . . . " Pl. Comp.¶ 2 (emphasis added). Though Plaintiff alleges an ownership of an overriding royalty interest, Plaintiff's definition of "overriding royalty interest" is inconsistent with the WRPA. The WRPA defines overriding royalty as an interest carved out of the working interest, not the mineral interest as Plaintiff describes his overriding royalty. Wyo. Stat. Ann. § 30-5-304(v). Further, Plaintiff has not produced in discovery, and Lance is not otherwise aware, of any instrument that would entitle Plaintiff to an overriding royalty interest. Based on Plaintiff's definition of overriding royalty, which contradicts the WRPA, Plaintiff's putative class definition must therefore be limited to royalty interest owners in Campbell County. Ex. 2, Terry Report, at ¶ 14.

A. The Applicable Standard and Plaintiff's Burden to Certify a Class

The burden on Plaintiff for class certification is strict. Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation omitted). A plaintiff must demonstrate "under a strict burden of proof" that the case "clearly" satisfies each class action prerequisite. *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) (citation omitted).

Before certifying a class, the Court must therefore conduct a "rigorous analysis" to ensure Rule 23's requirements have been satisfied. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Facts in a plaintiff's motion for class certification are not deemed true. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010) (the court "need not blindly rely on conclusory allegations of the complaint which parrot Rule 23 and may consider the legal and factual issues

presented by plaintiff's complaints" (internal quotations omitted)). The court must make whatever factual inquiries are necessary to determine whether a plaintiff "in fact" satisfies the Rule 23 prerequisites. *Wal-Mart*, 131 S. Ct. at 2551. Frequently, the court's "rigorous analysis" entails "some overlap with the merits of the plaintiff's underlying claim." *Id.* at 2551-52 ("[C]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.").

B. Plaintiff Cannot Satisfy Commonality under the Supreme Court's Heightened *Wal-Mart* Standard

Plaintiff cannot satisfy the commonality requirement for a very simple and straightforward reason: improper tax deductions do not necessarily result in underpayments. Although Plaintiff goes to great lengths in his Complaint and his Motion to Certify to depict a complicated tax scheme designed to retain portions of royalty payments properly owed to Plaintiff and other royalty owners, he glosses over the crucial point that neither the lease nor the WRPA necessarily requires correct tax calculations. Contrary to Plaintiff's allegations, the WRPA does not penalize accounting practices by themselves without a corresponding underpayment of royalties. Pl. Mot. at 2-3 (". . . Lance's challenged accounting methodology violates the WRPA . . ."). Rather, the WRPA penalizes "**royalty payment deficiency.**" *Ultra Resources, Inc.*, ¶ 71 (emphasis added); Pl. Mot. at 6. Thus, only if Lance's tax deductions result in an overall royalty underpayment to any individual class member is the lease breached and the WRPA penalties triggered.

Lance's accounting practices do not form the proper basis for satisfying commonality because Lance's tax deductions will not result in an underpayment in every single case, if any.

This is the result of wide variation in royalty language among Plaintiff's leases and the putative class members that requires this Court to examine each and every lease to determine whether Lance underpaid royalties and thereby breached the lease and violated the WRPA. Any similarity in the application of Lance's tax calculation methodology is defeated by the disparity with which the practice affects Plaintiff and the putative class members.

1. Plaintiff's Claims Cannot Be Resolved in One Stroke

In *Wal-Mart*, the Supreme Court clarified the "commonality" prong of the class certification analysis,[11] noting that the "commonality" language of Rule 23(a)(2) is "easy to misread" since "[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 131 S. Ct. at 2551 (citations omitted). Rather than focus on whether class members have things in common, however, the "commonality" requirement of Rule 23 instead requires that all class members suffer the same alleged injury, and the common injury must be "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity **of each one of the claims in one stroke.**" *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added). Each class member must therefore have the same claim, and resolution of the class representative's claim must simultaneously resolve the same claim for each class member.

Thus, under *Wal-Mart*, merely raising a common question is insufficient; instead, the question must be central to each claim **and have a common answer that will resolve each**

[11] Rule 23(a)(2) is identical to that portion of the federal rule, so federal cases interpreting it are highly persuasive. *See, e.g., Lamar Outdoor Adver. v. Farmers Co-op Oil Co. of Sheridan*, 2009 WY 112, ¶ 12, 215 P.3d 296, 301 (Wyo. 2009) ("[F]ederal court interpretations of their rules are highly persuasive in our interpretation of the corresponding Wyoming rules.").

claim in a single stroke. *Id.* *Wal-Mart* thus established a heightened commonality standard. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012) (though the district court's analysis reasonably applied pre-*Wal-Mart* precedent, *Wal-Mart* "heightened the standards for establishing commonality" and rendered the district court's analysis insufficient).

None of Plaintiff's claims has a common answer that will resolve each claim in a single stroke. Rather, it is questionable whether the class has any claim at all. Because the existence of an underpayment claim depends on lease language that varies throughout the class, even a common answer will not resolve all claims, if any.

For example, some of the leases in which Lance owns an interest expressly and unambiguously allow Lance to deduct transportation and gathering charges downstream of the wellhead. Others allow only deduction of transportation costs downstream of the inlet to the market pipeline. But Lance only takes deductions from each royalty owner's proportionate share of downstream transportation costs. Under leases that permit deductions over and above downstream transportation costs, Lance's tax withholding would have to exceed the amount Lance **is allowed to** deduct for there to be an underpayment claim.

2. Varying Lease Terms Defeat Required Commonality

Plaintiff misrepresents the state of the case law addressing class action certification of claims based on varying lease language. In his Motion for Class Certification, Plaintiff states that "operators' arguments that variations in lease language are fatal to class certification have been consistently rejected by the courts." Pl. Mot. at 9-10. In support, Plaintiff cites **one** case: *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 483 (D. Kan. 2012). Plaintiff's claim that courts consistently reject the importance of lease language is

inaccurate. *See, e.g.*, *Foster v. Apache Corp.*, No. CIV-10-0573-HE, --- F.R.D. ---, 2012 WL 3568244, at *6-7 (W.D. Okla. August 20, 2012) (*Apache Corp.)*; *Morrison v. Anadarko Petroleum Corp.*, 280 F.R.D. 621, 624-25 (W.D. Okla. 2012); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646, 654 (W.D. Okla. 2011); *Foster v. Merit Energy Co.*, 282 F.R.D. 541, (W.D. Okla. 2012) (*Merit Energy Co.*).

Several cases decided post-*Wal-Mart* have refused to certify a class of royalty owners because their claims under numerous leases would have to be analyzed on a lease-by-lease basis. Most recently, in a decision issued on August 20, 2012, the U.S. District Court for the Western District of Oklahoma applied *Wal-Mart*'s heightened commonality standard and denied class certification finding that the plaintiffs could not establish commonality. *Apache Corp.*, 2012 WL 3568244, at *6-7. Specifically, the court noted that "[w]hether defendant's payment practices violate its obligations to any class member is necessarily dependent on what those obligations were—and those may differ from class member to class member . . . [based on] the terms of the oil and gas lease." *Id.* at *6. Because the evidence established that the defendant had over ten thousand leases, and the royalty clauses in those leases varied, the plaintiffs could not establish commonalty. *Id.* at *7.

Similarly, in *Tucker*, 278 F.R.D. at 654, the court found no commonality due in part to the "varying terms of the hundreds of leases":

> The Court finds that the varying terms of the hundreds of leases, relating to matters such as the method for calculating royalty, allowance for post-production charges or fuel use and affiliate sales **demonstrate the inability to adjudicate the claims of the named plaintiff and expect the same result to apply to all members of the proposed class.**

Id. (emphasis added). These post-*Wal-Mart* cases demonstrate that class claims that are dependent upon an examination of lease language are not suitable for class treatment. Lance's obligation to pay a certain amount of royalty will vary between Plaintiff and each class member based on the lease language, and these types of claims not uniformly resulting in royalty underpayment simply do not generate common answers to be resolved "in one stroke."

Under *Wal-Mart*'s heightened commonality standard, the "central issue of whether [Lance] underpaid royalties cannot be resolved 'in one stroke' because the varying terms regarding royalty valuations among [P]laintiff's and the putative class members' leases will generate different answers based upon the particular lease." *Morrison*, 280 F.R.D. at 625. As Plaintiff concedes, "the amounts Lance over-withheld from each royalty owner will vary. . . ." Pl. Mot. at 4. Because the allowable deductions under each lease will likewise vary, the Court faces a fact-intensive, individualized analysis to determine whether any given lease was breached by an over-deduction of taxes. Plaintiff cannot satisfy the commonality prerequisite.

C. Plaintiff Cannot Satisfy the Typicality Requirement

Plaintiff's unique lease language and participation in a previous royalty reporting settlement agreement destroy the typicality of his individual claims.

1. Plaintiff's Claims Are Not Typical of the Entire Putative Class

To satisfy the prerequisite of typicality, Plaintiff must show that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Wyo. R. Civ. P. 23(a)(3). This means that Plaintiff must have the same claims against Lance that the entire class would have, such that resolution of his claims would, in a single stroke, resolve the claims of everyone else. This "limits the class claims to those fairly encompassed by the named plaintiffs'

claims." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (internal brackets omitted). The named plaintiff must, by virtue of pursuing his own claims, also advance the interests of the class members. *Id.* "[A]s goes the claim of the named plaintiff, so go the claims of the class." *Id.* Typicality is not present here with regard to Plaintiff.

Plaintiff alone has multiple leases with Lance that contain four different royalty clause provisions. As stated previously, Plaintiff's August 21, 1997, lease allows Lance to deduct from Plaintiff's royalty all costs downstream of the central delivery point. (Ex. 4.) Plaintiff's remaining leases contain the following royalty clause provisions:

> (1) "Second. To pay lessor one eighth (1/8) **of the proceeds** received for gas sold from each well where gas only is found, or the market value at the well of such gas used off the premises . . ." (Geer, Oil and Gas Lease, 1969, attached as Exhibit 7 Geer Oil and Gas Lease, 1978, attached as Exhibit 8).
>
> (2) "2nd. To pay lessor one-eighth (1/8) of the gross proceeds each year, payable quarterly, for the gas from each well where gas only is found, while the same is being used off the premises . . ." (Geer, Oil and Gas Leases, June 16, 1997, attached as Exhibit 9)
>
> (3) 2. . . ."Lessee covenants, agrees and shall pay to Lessor as royalty, free of all costs of production (as defined under the Wyoming Royalty Payment Act, Wyo. Stat. 30-5-301. et seq.), . . .[18.75%] of the total gross weighted average price actually received at the points of the bona fide arms-length sales of the natural gas and related products . . . produced from the leased premises (wellhead volumes) minus all applicable transportation and fuel charges and usage of any pipeline providing service downstream of the pipeline interconnect with the WIC pipeline located in southern Converse County, Wyoming or the interconnect with a similar interstate gas pipeline though which the gas is transported." (Geer, Oil and Gas Lease, December 15, 2005 (the 2005 lease), attached as Exhibit 10).

Except for perhaps Plaintiff's 2005 lease, none of Plaintiff's leases explicitly prohibit processing deductions, which are expressly allowed by the WRPA, absent lease provisions to the contrary. Indeed, many of his leases expressly allow such deductions (*See* August 1997 leases, Ex. 4). Plaintiff's claims are not typical of those class members whose leases prohibit Lance from deducting processing costs, among others. Moreover, contrary to Plaintiff's assertion that "[t]he only difference between [sic] the class members will be in the amount of damages," (Pl. Mot. at 10) the variation in lease language and allowable deductions not taken will result in **no damage whatsoever** for some, including Plaintiff under his 1997 leases. Plaintiff is a prime example of an individual who has not been damaged under his lease even if his tax arguments were correct, and therefore is in no position to prosecute the claims of those who may have been damaged by tax accounting under an individual lease.

2. Plaintiff is Subject to Unique Defenses

Moreover, the presence of "unique defenses" against a class representative can disqualify the representative because it threatens to distract the named plaintiff from pursuing the issues applicable to the larger class. *Rolex Emps. Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 663-64 (D. Or. 1991); *see also In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 642 (D. Kan. 2008); Jerold S. Solovy, Ronald L. Marmer, Timothy J. Chorvat & David M. Feinberg, MOORE'S FEDERAL PRACTICE § 23.25[b][iv] (2012). "The certification of a class is questionable where it is predictable that a major focus of the litigation will be on an arguable defense unique to the plaintiff or to a subclass." *Rolex Emps. Ret. Trust*, 136 F.R.D. at 664; *see also In re Urethane Antitrust Litig.*, 251 F.R.D. at 642.

As a condition precedent to filing suit, Plaintiff's 2005 lease required him to give Lance 30 days' notice of intent of alleged breach of the lease. The purpose of the notice was to provide the parties an opportunity to meet and cure any breach. Ex. 10, at ¶ 10 (the 2005 lease). Plaintiff did not comply with this provision and filed suit without any notice. To the extent Plaintiff attempts to rely on the 2005 lease to support a breach of lease claim, Plaintiff is subject to unique defenses that would bar such a claim.

Further, Plaintiff is estopped from re-litigating reporting claims settled in his 2009 Settlement Agreement with Lance.

D. Plaintiff Cannot Satisfy the Adequate Representation Requirement

Because a class action binds the entire class, the named plaintiff must demonstrate that he "will fairly and adequately protect the interests of the class." Wyo. R. Civ. P. 23(a)(4). Plaintiff bears the burden of establishing adequate representation. *Kelley v. Mid-Am. Racing Stables, Inc.*, 139 F.R.D. 405, 410 (W.D. Okla. 1990). Plaintiff must therefore establish that he has adequate knowledge of and involvement in the suit to protect the interests of the absent class members, and the ability to assist counsel meaningfully as to the manner in which the litigation will be conducted. He must also demonstrate that he does not have interests antagonistic to those of the class. *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 514 (D. N.M. 2004), *Versteeg*, 271 F.R.D. at 672.

Courts have refused class certification where plaintiffs did not understand their cases well enough to represent other people. *See, e.g., Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 501-02 (N.D. Ga. 2006) (finding class representative inadequate based on deposition testimony revealing ignorance of basic facts and allegations); *Kelley*, 139 F.R.D. at 410

(concluding plaintiffs had "abdicated" their role to counsel); *Koenig v. Benson*, 117 F.R.D. 330, 337 (E.D.N.Y. 1987) (refusing to approve class representative who displayed a lack of knowledge of the facts); *Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255, 256-57 (S.D.N.Y. 1985) (denying motion to certify class in part because class representative "demonstrated serious lack of familiarity with the suit," including little personal knowledge of the facts alleged).

Class representatives must possess sufficient knowledge to "check the otherwise unfettered discretion of counsel in prosecuting the suit." *Azoiani v. Love's Travel Stops & Country Stores, Inc.*, 2007 WL 4811627, at *2 (C.D. Cal. Dec. 18, 2007) (overturned on other grounds) (citation omitted). The purported class representative cannot fairly and adequately represent the interests of the class when bringing claims that he does not understand. Nor may he check the unfettered discretion of class counsel, who in this case has developed all claims, pleadings and even affidavits. As one appeals court observed, "[c]lass action lawsuits are intended to serve as a vehicle for capable, committed advocates to pursue the goals of the class members through counsel, not for capable, committed counsel to pursue their own goals through those class members." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001).

1. Plaintiff Filed Breach of Contract Claims Without Reading or Complying with his Leases

Plaintiff's deposition testimony revealed that he is not a proper class representative. Most notably, Plaintiff read his leases for the first time on September 28, 2012, during his deposition. Deposition of Kenneth Geer Dep. Tr., attached as Exhibit 12, at 32:6-15; 37:17-38:1; 46:22-25; 49:18-21; 54:1-55:5. When Plaintiff filed his complaint in February 2012, raising numerous breach of contract arguments, Plaintiff had never read any of his leases with any

particularity, *id.* 56:1-7, and relied entirely on his attorneys and experts to define his cause of action. *Id.* 55:6-56:19; 57:8-20. As of September 28, 2012, Plaintiff did not know what deductions were allowed by the terms of his multiple leases. *Id.* 73:18-23.

Plaintiff testified a number of times that he relies entirely on legal counsel to understand legal documents and that he has no independent knowledge of facts alleged in the Complaint or any of the materials produced in discovery. *Id.* 55:6-57:20; 62:16-19; 77:23-78:9. Additionally, Plaintiff testified that he has never read the WRPA and is not familiar with the reporting requirement, the reporting penalty, or the statutory interest provision. *Id.* 21:7-18; 75:23-76:16; 81:15-82:10.

In short, Plaintiff sent off his check stubs to his attorney, who then forwarded them to an accountant, who then found a cause of action to bring. *Id.* 26:20-27:15. Absent from this entire process was Plaintiff—presumably the real party in interest and the party now attempting to establish adequate representation of a class.

2. Plaintiff is an Inadequate Class Representative Because His Claims are Not Typical

Issues of typicality (discussed above) are also relevant to determining whether the named plaintiff will adequately represent the class. *United Food & Commercial Workers Union v. Chesapeake Energy Corp.*, 281 F.R.D. 641, 652 (W.D. Okla. 2012) ("The adequacy test includes, but is broader than, the typicality test."). For example, "[a] proposed class representative is not adequate or typical if [he] is subject to a unique defense that threatens to play a major role in the litigation." *In re Urethane Antitrust Litig.*, 251 F.R.D. at 642 (quoting *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999)); *see also Doll v. Chicago Title*

Ins. Co., 246 F.R.D. 683, 687 (D. Kan. 2007) (unique defense can interfere with representative's ability to adequately represent the class); *Robinson v. Gillespie*, 219 F.R.D. 179, 187 (D. Kan. 2003) (same). As explained above, Plaintiff's claims are not typical of the class and Plaintiff is subject to unique defenses. The fact that Plaintiff's and the putative class members' different leases will produce different results, with some members having no underpayment claim whatsoever, destroys typicality and makes Plaintiff an inadequate class representative. Lance's unique defenses against Plaintiff, namely that one of his leases requires notice of intent to sue and that his reporting claim is barred by a prior class action settlement, likewise establish that Plaintiff is not an adequate class representative.

V. Plaintiff Has Further Failed to Satisfy the Requirements of Rule 23(b)[12]

Even if Plaintiff could satisfy the requirements of Rule 23(a), he must still meet the requirements of at least one subsection under Rule 23(b). Plaintiff cannot meet that burden.[13]

A. Plaintiff Cannot Sustain Certification of any of his Claims under Rule 23(b)(2)

Rule 23(b)(2) requires the party opposing class certification to have "acted or refused to act on grounds generally applicable to the class" such that the injunctive or declaratory relief requested applies class wide. Wyo. R. Civ. P. 23(b)(2). According to the United States Supreme

[12] Plaintiff alleges in his Complaint that this class is properly maintained as a class action under Rule 23(b)(1)(A). However, Plaintiff abandons this allegation by failing to assert it in his Motion for Class Certification.

[13] Plaintiff asserts in a two-sentence paragraph that adjudication of Mr. Geer's claim would, as a practical matter, be dispositive of the interests of other royalty owners, and therefore this class is fit for certification under Rule 23(b)(1)(B). Pl. Mot. at 12. Because Lance's tax calculations do not necessarily result in royalty payment deficiencies, resolution of Mr. Geer's claims would not be dispositive of claims, if any, of other royalty owners.

Court, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 131 S. Ct. at 2557 (citations omitted).

1. Lance's Tax Deductions Affect Royalty Owners Differently

Rule 23(b)(2) is not met here for the same reason commonality is not present: some owners are treated differently under their lease terms and thus Lance has not acted or refused to act on grounds applicable to the entire class. Even if its tax deduction methods are uniform across the class, the amount of its individual royalty payments must be assessed against an individual lease to determine whether a royalty owner has been underpaid. The differing lease language controls and results will vary throughout the class. Those results will define the existence or non-existence of injuries, rather than simply the amount of damages as Plaintiff assumes and mistakenly asserts. Pl. Mot. at 13. Also, under *Wal-Mart*, the Court may not certify Plaintiff's claims under which he seeks money damages, as those damages, rather than injunctive relief, are the driving force behind this litigation and not, as Plaintiff may argue, incidental.

2. Plaintiff Cannot Establish a Cohesive Class

Contrary to Plaintiff's blanket assertion, he does not propose a cohesive class. Plaintiff correctly states that the absence of a "certain cohesiveness among class members . . . can preclude certification." Pl. Mot. at 12 (citing *Shook*, 543 F.3d at 604 (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007))). That is the situation here. Plaintiff could not credibly assert that the putative class members – with varying leases and varying

deductions, most if not all of which result in no claim for underpayment under the WRPA – form a cohesive class. The variance among class members will not be that of just damages – rather, the variance is the existence or absence of claims, and conflicting factual bases upon which their disparate interests will be served.

B. Plaintiff Cannot Demonstrate Rule 23(b)(3) Predominance and Superiority

For any damages claim, Plaintiff must satisfy the additional requirements of Rule 23(b)(3): predominance and superiority.

1. No Issue Predominates the Dissimilar Leases

Even if commonality were established under Rule 23(a), class certification would still be inappropriate because the common questions posed would not predominate over the individualized questions that would still remain. Even if this Court found that Lance's tax calculations require adjustment, the issue of underpayment of royalty obligation depends on widely varying leases and overwhelms the supposed common questions.

The predominance requirement of Rule 23(b)(3) is "far more demanding" than the mere commonality requirement of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Even in the face of *Wal-Mart*'s heightened commonality standard, the rule regarding predominance has not changed. *Wal-Mart*, 131 S. Ct. at 2556-57. The test for predominance is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.* at 623; 5 MOORE'S FEDERAL PRACTICE § 23.45[1]. The test focuses on "the relationship between the common and individual issues." *E.g.*, *Rosales v. El Rancho Farms*, No. 1:09-CV-00707-AWI-JLT, 2012 WL 3763955, at *7-8 (E.D. Cal. Aug. 29, 2012).

Where individual transactions must be evaluated to adjudicate the class claim, courts have found that the individual claims predominate over any otherwise common claim. *E.g.*, *Northside Chiropractic, Inc. v. Yellowbook, Inc.*, No. 09-CV-04468, 2012 WL 3777010, at *7 (N.D.Ill. Aug. 29, 2012) (holding the details of individual customer agreements with varying terms predominated resolution of the dispute over otherwise common questions), *Merit Energy Co.*, 282 F.R.D. at 561-62 (holding the same for oil and gas leases). In its "more demanding" inquiry into predominance, a court is not looking for similarities in the class but is instead looking for "fatal dissimilarities" among class members which impede the common resolution of the class members' claims. *Id.* at 562 n. 21. Where some common issues exist, if the court would also have to resolve a variety of individual issues to right the wrongs affecting the class, then the common issues do not predominate and class certification must be denied.

The fatal dissimilarity in this case is the varying lease clauses. As the *Apache Corp.* court noted, the predominance requirement is not met when there are varying leases. *Apache Corp.*, 2012 WL 3568244, at *11, n.27. "Substantial litigation of individual issues would be required" to resolve the otherwise common issue in that case. *Id.* at *11. Even where royalty payment practices are uniform across a proposed class, shared treatment is not enough to satisfy the predominance requirement where the existence of different lease language affords the defendant different defenses on an individualized basis across the purported class. *Merit Energy Co.*, 282 F.R.D. at 562.

2. Class Adjudication is Not Superior

Superiority exists when the benefits of a class-wide adjudication of common issues outweigh any difficulties that may arise in the management of the class. *E.g.*, *Tana Oil & Gas*

Corp. v. Bate, 978 S.W.2d 735, 743-44 (Tex. App. 1998). A class action must be better than, not equal to, other methods of adjudication. When evaluating superiority, this Court is obligated to consider the difficulties likely to be encountered in the management of the proposed class action. Wyo. R. Civ. P. 23(b)(3)(D). The dissimilarities among lessors in the putative class create management difficulties in the ultimate adjudication of this case. The burden to determine which members of the class, if any, have breach of contract claims due to Lance's tax calculations will not advance the efficiency that class actions are designed to promote. *See Merit Energy Co.*, 282 F.R.D. at 562-63. The management burden alone in this case, where the lease terms are so disparate, is sufficient to weigh against class certification as a superior means of adjudication. *Id.*

Further, a class action is also not superior where a statutory scheme provides penalties and attorney's fees as incentives to prosecute violations. *See, e.g., Jones v. CBE Group, Inc.*, 215 F.R.D. 558, 570 (D. Minn. 2003) (finding that class action was not the superior means of resolving the dispute because the applicable statute provided for actual damages, statutory damages, plus costs and attorney's fees; therefore, there was no lack of incentive for either plaintiffs or counsel to pursue individual actions); *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D. 106, 117 (D. N.J. 2009) (same); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 163 (D. Kan. 1996) (superiority not satisfied because statutory provision for recovery of attorney's fees is strong incentive for individual suits). Here, the WRPA provides costs and attorney's fees for prosecuting a single plaintiff's claims. The class action mechanism is simply not necessary.

VI. Conclusion

Plaintiff lacks a cause of action applicable to the entire putative class. His underpayment theories based on alleged tax accounting errors cannot rely on the Wyoming tax code or the Wyoming Royalty Payment Act for a cause of action. His only cause of action is for breach of contract, and that cause of action necessarily requires an analysis of each lease to determine whether tax accounting caused an overall royalty underpayment. The results will vary widely, with allowable deductions not taken by Lance under many leases negating any tax over-deduction, such that many putative class members have suffered no injury at all. This core fact defeats class certification under Rule 23 that Plaintiff has the burden to demonstrate. Lance respectfully requests the Court deny Plaintiff's class certification motion.

DATED October 5, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, I served the foregoing DEFENDANT LANCE OIL & GAS COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION 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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