IN THE DISTRICT COURT OF CUSTER COUNTY
STATE OF OKLAHOMA

FILED
DISTRICT COURT
Custer County, Okla.
JUL 31 2008
CONNIE BURDEN
COURT CLERK

MEL JEAN WEBER, as Personal Representative of the ESTATE OF TOM RUBLE; DONALD CLAUSSEN; AND ZELMA BEERS, Individually and as Class Representatives,

Plaintiffs,

And

COLEEN MANNERING; CHARLES KENNETH DODSON, Trustee of The Charles Kenneth Dodson Revocable Trust Agreement dated the 17th day of April, 1998, and DON GARNER, Individually and as Class Representatives,

Intervenor Plaintiffs,

v.

MOBIL OIL CORPORATION, a corporation; EXXONMOBIL OIL CORPORATION, a corporation; MOBIL EXPLORATION AND PRODUCING NORTH AMERICA INC., a corporation; MOBIL EXPLORATION AND PRODUCING U.S., INC., a corporation; and MOBIL NATURAL GAS, INC., a corporation;

Defendants.

Case No. CJ-2001-53

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs' Mel Jean Weber, as Personal Representative of the Estate of Tom Ruble; Donald Claussen and Zelma Beers, individually and as class representatives and Intervenor Plaintiffs, Colleen Mannering, Charles Kenneth Dobson[1], Trustee of the Charles Kenneth Dobson Revocable Trust Agreement, dated the 17th day of April, 1998, and Don Garner,

individually and as class representatives, hereinafter referred to as Plaintiffs, moved for certification of the instant action against Mobil Oil Corporation, a corporation; Exxon Mobil Oil Corporation, a corporation; Mobil Exploration and Producing North American Inc., a corporation; Mobil Exploration and Producing US, Inc., a corporation and Mobil Natural Gas, Inc., a corporation, hereinafter referred to as Defendants, as a class action pursuant to 12 Okla. Stat. § 2023. The Court conducted a four day evidentiary hearing on Plaintiff's Motion for Class Certification, beginning on April 30, 2008, and ending on May 5, 2008, and with closing arguments presented on May 15, 2008, and thereafter took the matter under advisement. The evidence presented by the parties was extensive and took the form of briefs, with exhibits attached, deposition testimony, live witnesses, numerous exhibits and argument of counsel. Based upon the matters presented at the hearing, and having reviewed and considered the evidence and having been fully advised on the matter, the Court makes the following Finds of Facts, Conclusions of Law and Order. **The following findings are not as to the merits o the claims and defenses; rather, the findings represent the Court's determination that requisites for proceeding as a class action pursuant to applicable Oklahoma law have been satisfied at this stage of the proceeding.**

BACKROUND FACTS

A. The Unit

1. The first oil well was drilled in the Putnam Oswego Trend in 1959 by Sinclair Oil and Gas ("Sinclair"), with most wells producing casinghead[2] gas. Plaintiffs' Exhibit No. 96.

2. In or about mid-1962, Mobil began exploring the economic feasibility of a gas processing plant to prevent the flaring of approximately 1.5 million cubic feet of casinghead gas a day. Plaintiffs' Exhibit No. 2.

3. Mobil and several other operators in the area built the Putnam Oswego Gas Plant in Thomas, Oklahoma ("Thomas Plant"). It began operating in early 1964. 1 Tr. 51, Plaintiffs' Exhibit No. 96.

4. By early 1965, Mobil and the other operators in the Putnam Oswego Field became concerned about the ultimate recovery of the oil, gas and natural gas liquids from the formation because the Putnam Oswego oil reservoir contained a large amount of gas in solution with the oil. Plaintiffs' Exhibit No. 6.

5. As oil production continued, the ratio of gas produced with the oil increased. As the production of gas increased, the reservoir pressure decreased. Plaintiffs' Exhibit No. 6.

6. The operators' group determined that pressure maintenance operations would be needed to reverse or control this accelerated loss of bottom hole pressure, ultimately opting to utilize gas cycling as the method to maintain pressure. 1 Tr. 45 - 52, Plaintiffs' Exhibit No. 6.

7. In early 1968, Mobil filed its Oklahoma Corporation Commission ("OCC") application to form the Plan of Utilization ("POU"). 1 Tr. 52, Plaintiffs' Exhibit Nos. 7 and 37.

8. The evidence shows that Mobil represented to the OCC that the Thomas Plant was nothing more than a "sophisticated lease separator" and that utilization of the Thomas Plant as a unit facility would recognize the Royalty Owners' interest in the profits resulting from the unitized operations. 1 Tr. 63, Plaintiffs' Exhibit No. 9.

9. In selling the concept of unitization to the royalty owners, Mobil represented to <u>each</u> royalty owner in the Unit Area that the entire cost of unitization and pressure maintenance operations will be paid for by the Working Interest Owners, and that their interest will be free and clear of any operating or investment costs. 1 Tr. 68 – 71, Plaintiffs' Exhibit No. 11.

10. The OCC agreed with Mobil. On October 3, 1968, the OCC entered its Order on Mobil's Application to Create the Putnam Oswego Unit. It found "the evidence of applicant also shows that the Thomas Gas Processing Plant is essential to Unit operations and that the same is a lease facility and that in order to accomplish equity for the working interest owners and the royalty owners, the Plant must be included as a Unit Facility." 1 Tr. 52, Plaintiffs' Exhibit No. 10.

11. The OCC ordered that the "Putnam Oswego Unit is hereby created for the common source of supply of oil and gas described above, in accordance with the terms, provisions and conditions of the Plan of Unitization attached to the application in this cause." Plaintiffs' Exhibits No. 10 and 37.

12. The Thomas Plant which was contributed to the POU, became known as the Putnam Oswego Unit Plant and was operated by Mobil from 1968 until Mobil divested its interests in the Unit in 1998 as testified to by both Plaintiffs' Expert Pete Huddleston and Defendant's Expert Kris Terry. Plaintiffs' Exhibit No. 96.

13. The evidence and relevant testimony shows that the operating committee which represented the working interest owners agreed in 1968 at the time of formation of the Unit, that royalties would be calculated according to the "Fiske Formula." 1 Tr. 73 – 83, 3 Tr. 119 - 121, Plaintiffs' Exhibit 121.

14. In 1991 blowdown of the POU commenced with gas recycling operations stopping at the Thomas Plant. However, Mobil continued to use the "Fiske Formula." Plaintiffs' Exhibit No. 96.

15. Defendant Mobil was the Unit Operator for the entire POU for the period 1968 to 1998, as designated by the OCC in its Order establishing the Unit.

I. CLASS DEFINITION

16. The Court finds that the proposed class definition does not require an adjudication of the central liability issue.

17. The "class":

"The Plaintiffs bring this action for themselves and as representatives of a class pursuant to Okla. Stat. Title 12, Section 2023, for all similarly situated royalty owners in the Unit who meet both of the following qualifications:

> A. All person or entities who own or have owned a royalty interest (as that term is defined in the Plan of Unitization) in the unit from the effective date of the Plan of Unitization (November 1, 1968) to the present together with their heirs, legatees, beneficiaries, executors, representatives, successors, and assigns; and
>
> B. Such persons or entities who own or have owned a royalty interest in a tract included within the unit area from which Exxon[1] took and received in kind or separately disposed of all or a portion of the unitized substances allocated to said tract together with their heirs, legatees, beneficiaries, executors, representatives, successors, and assigns; provided that the following persons were entities who meet both qualification set forth above shall be excluded.
>
> a. The United States of America and its agencies are excluded.
>
> b. The officers and directors of defendants are excluded.
>
> c. All entities in which any defendant has a controlling interest including any entity which is a parent subsidy or affiliate of or is controlled by a defendant are excluded.
>
> d. The legal representatives, heirs, successors, or assigns of any excluded person or entity are excluded.
>
> e. Overriding royalty interest owners are excluded to the extent of their overriding royalty interest.
>
> f. Owners of production payments are excluded to the extent of their production payment interest.

[1] Defined as All Defendants in this litigation in Plaintiffs' Second Amended Petition.

18. It was admitted by Defendants that Mobil or its agents separately disposed of all or a portion of the Unitized Substances from all tracts for at least a portion of the time Mobil operated the Unit. 3 Tr. 73 – 76. Therefore, under Part A and Part B all royalty owners will be included in the class.

19. CB Graft, Steve Lunsford, Gavin Manes, and Benjamin Hackett all testified that the royalty owners could be ascertained by a combination of title searches and data from Mobil and other Tract Operator's records. 4 Tr. 116 – 118; 4 Tr. 225 – 226, 4 Tr. 232.

20. The Court further finds that the class is identifiable by objective criteria — their ownership of a royalty interest in the POU.

21. The Court further finds that there is no fail-safe class.

22. The class definition includes and is limited to all past and present royalty owners in the POU, together with their heirs, legatees, beneficiaries, executors, representatives, successors and assigns.

23. The class definition does not include those owners of personal property who are not past or present royalty owners or their heirs, legatees, beneficiaries, executors, representatives, successors and assigns.

24. Working interest owners and overriding interests owners are excluded from the class to the extent their royalty exceed the basic $1/8^{th}$ royalty.

25. The class is identifiable by objective criteria — their ownership of a $1/8^{th}$ royalty interest in the POU.

II. FACTS RELATING TO THE ELEMENTS OF CLASS CERTIFICATION

A. Ascertainability

26. Experts presented by both sides, including C.B. Graft, Steve Lunsford, Gavin Manes, and Benjamin Hackett, all testified that the royalty owners could be ascertained by a combination of title searches and data from Mobil and other Tract Operator's records. 4 Tr. 116 – 118, 4 Tr. 225 – 226, 4 Tr. 232

27. The evidence is undisputed that there is less fractionalization of mineral interests in this part of Oklahoma than the rest of the state, as testified to by Defendants' Expert Benjamin Hackett and Plaintiffs' Expert Steve Lunsford and Plaintiffs witness C.B. Graft. 1 Tr. 155 – 156, 4 Tr. 106 – 110; 4 Tr. 231 – 232.

28. According to the testimony of Plaintiffs' Expert Steve Lunsford, title searches have already been performed on approximately 25% of the Unit Tracts, with the cost of performing a title search on the remaining unit taking less than 2 months and costing approximately $70,000.00. 1 Tr. 155 - 156.

29. Plaintiffs' Expert Gavin Manes testified that a paydeck can be created from Mobil's computer files. 4 Tr. 225 – 226.

30. The Court finds that the ownership issues for the purposed class are common and ascertainable.

B. Numerosity

31. It is undisputed that there approximately 1600 members of the putative class.

C. Commonality

a. Commonality of Facts

(i) The Unit Plan Presents Common Facts to the Class

32. Testimony from Plaintiffs' Expert Pete Huddleston and the evidence presented show that operations in the Unit were conducted as if there was a single lease executed by all royalty interest mineral owners in the Unit. 1. Tr. 58 – 59, Plaintiffs' Exhibit No. 37.

33. The record reflects that the Plan of Unitization requires the "sharing of Unitized Substances" among the Tracts and their owners. Plaintiffs' Exhibit No. 37.

34. The record reflects that production from anywhere in the Unit was considered production from each Tract and Unit Production was allocated to each Tract based on a Tract Participation Percentage contained in the Plan. Plaintiffs' Exhibit No. 37.

35. The plain language of the Unit Plan allocated one-eighth (1/8) part of the Unit Product or the proceeds thereof as royalty to be distributed among and paid to the Owners of Royalty Interest, free and clear of all Unit Expense and free of any liens. Plaintiffs' Exhibit No. 37.

36. Unit Expense is broadly defined in the Plan to mean "all cost, expense, or indebtedness incurred by the Unit or Unit Operator pursuant to this Plan of Unitization." 1 Tr. 57, Plaintiffs' Exhibit No. 37.

37. The Court finds that Defendants acted uniformly with respect to the Unit and the proposed class of Royalty Owners and that the class members are claiming that Mobil improperly remitted royalty on their one-eighth (1/8) protected royalty pursuant to the Unit Plan.

(ii) Common Facts as to Accounting and Damages

38. Mobil, as Unit Operator, accounted for Unit Substances uniformly for all Tracts in the Unit. 2 Tr. 65 – 70, 3 Tr. 63 - 67, Plaintiffs' Exhibit 113.

39. Testimony shows that Mobil applied the Fiske Formula, reducing the average weighted price for unit substances by 14.83% for the entire period 1968-1998 irrespective of

operational changes and/or division orders. 3 Tr. 65 – 70, 3 Tr. 102, 3 Tr. 175 - 176, Plaintiffs Exhibit 113.

40. Mobil, as Unit Operator, uniformly computed the average weighted price for the entire stream of gas and liquids sold at the tailgate of the plant. 3 Tr. 65 – 66.

41. The evidence presented and testimony shows working interest owners adopted Mobil's method of payment pursuant to the 1968 Agreement of the Unit Operating Committee, so that the issue of whether the deduction was appropriate is an issue common to the Class. 2 Tr. 99, 3 Tr. 119 – 121, Plaintiffs' Exhibit 121.

42. The evidence presented shows that for the entire class period, schedules exist that either contain monthly Gross Plant Income or Gross Value for Royalty, for 336 months out of the 360 month claim period. 2 Tr. 56, 3 Tr. 66 - 69, Plaintiffs' Exhibit No. 113.

43. The value of damages can be calculated from Mobil's monthly schedules and applied to the tracts in the unit as Mobil applied the formula throughout the entire class period irrespective of operational changes. 1 Tr. 145, 2 Tr. 66 – 68.

44. The Court finds that common questions regarding accounting and damages exist for the class.

(iii) Common Representations and Omissions

45. The evidence and testimony presented shows that Mobil made common representations to the putative class members. 2 Tr. 99, Plaintiffs' Exhibit 98.

46. The evidence and testimony shows that Mobil and Tract Operators failed to disclose the Fiske formula 14.83% deduction in communications with the Class, except for one isolated disclosure. 2 Tr. 98 – 99, 3 Tr. 103 - 110.

47. The record and testimony presented shows that for the purpose of class certification, Mobil failed to disclose the deductions to the Class uniformly throughout the period 1968-1998. 3 Tr. 116.

48. The Court finds that for the purpose of class certification, Plaintiffs have met their burden in showing commonality exists and predominates the issues of representations and omissions.

b. Commonality of Law

(i) The Plan Presents Common Questions of Law

49. The evidence is that the Plan and its implementation are common issues for the Class.

50. The evidence overwhelmingly shows that the Plan was created and governed by Oklahoma law.

51. The OCC created the Unit and approved the Plan.

52. Oklahoma's interest in the conduct of the Unit Operator appointed by one of the State's regulatory agencies is highly significant in this case.

(ii) Common Questions of Law exist in Oklahoma's Significant Contacts

53. The mineral interests in this case are all within of the State of Oklahoma.

54. The Unit Substances were all produced and sold within the State of Oklahoma.

55. The OCC's approved Plan governs the costs properly deductible against the proceeds from those sales.

56. The content of check stubs sent to Class Members regarding Unit production is regulated by Oklahoma Statutes and the duties owed to class members arise out of the extraction of Oklahoma petroleum resources owned by the Class.

57. Mobil operated the Unit as Unit Operator under Oklahoma law for 30 years and was subject to the jurisdiction of Oklahoma law and the Oklahoma Corporation Commission during that entire time period.

58. Production of the products upon which royalty was paid took place in Oklahoma.

59. Class Members own property (royalty interests) in Oklahoma and their claims arise from those interests.

60. Oklahoma has a strong state interest related to the production of oil and gas within its boundaries.

61. Mobil presented evidence that some members of the Class currently live in forty (40) different states. However, the evidence clearly shows that no other single state can be said to have interests that approach the level of significant contacts that Oklahoma has with the parties and this litigation.

62. Common questions of Oklahoma law predominate the class.

D. Typicality

63. Each class representative is a royalty interest owner in the POU.

64. Each class representative has shown that they are basing their only claims on their one-eighth royalty interest.

65. The legal basis for their claims is the same as for the Class, and is based upon use of the Fiske Formula.

66. The alleged injury suffered by a class representative is the same as the injuries suffered by the Class, which is the alleged underpayment of royalty.

(i) Class Representatives

67. Coleen Mannering, Don Garner, Ken Dodson, Zelma Beers, Donald Claussen and Mel Jean Weber as personal representative of the estate of Tom Ruble all have a lawful interest in the POU.

68. Each class representative is claiming that Mobil improperly calculated royalties payable to all class members such that a one-eight (1/8) was protected from Unit costs and expenses, and is only making claim for that one-eight (1/8) protected royalty.

69. Each class representative has knowledge of the basic operation and formation of the POU.

70. Coleen Mannering, Don Garner, Ken Dodson, Zelma Beers, Donald Claussen and Mel Jean Weber as personal representative of the estate of Tom Ruble all have actively participated in this lawsuit including attending depositions, providing discovery documents and attending the certification hearing.

71. Coleen Mannering, Don Garner, Zelma Beers, Donald Claussen and Mel Jean Weber as personal representative of the estate of Tom Ruble have each agreed to be a class representative of this class and their claims are typical of the class.

E. Adequacy of Representation

72. Pursuant to the testimony of the proposed class representatives, they will fairly and adequately protect the interests of the class.

73. Each class representative has shown a basic knowledge of and involvement in the lawsuit to assist counsel.

74. Named Plaintiffs and counsel have shown vigorous prosecution of the action and have shown no conflicts.

75. Defendants have not challenged the adequacy of counsel.

III. PREDOMINANCE

76. Class members' common questions of fact and legal issues predominate over any facts or issues affecting only individual class members.

77. Common issues for all class members, including but not limited to the following, predominate over individual issues that might exist, including but not limited to the following:

(a) Did Mobil improperly cause the Class Members to bear Unit Expenses by use of the Fiske formula ("the Formula")?

(b) Did Mobil consistently apply the Formula for calculation of royalty during the period it was Unit Operator?

(c) Did the Formula result in Class Members' damages?

(d) Did Mobil owe, as Unit Operator, a fiduciary duty to the Class Members?

(e) Did Mobil, as Unit Operator, violate its fiduciary duty to the Class Members?

(f) Did Mobil and the other Tract Operators agree to use the Formula for all Class Members?

(g) Did Mobil's representations to the Corporation Commission and to the Class Members that Class Members would not bear any expenses of the unit create a legal obligation to not use the Formula?

(h) Did Mobil's actions require affirmative disclosure of the Formula to all Class Members?

(i) Did Mobil improperly account for Unit Production at an artificially low affiliate transfer price?

(j) During the time that Mobil used the affiliate transfer pricing, were all Class Members affected?

(k) After the Thomas Plant was closed, did Mobil continue to apply the Formula?

(l) After the closure of the Thomas Plant, did the Class Members bear an additional expense for gas processing?

(m) Did application of the Formula result in conversion of Class Members' property?

(n) Did Mobil's actions constitute "blanket fraud" on Class Members?

78. Common legal issues exist in the implementation of the Unit Plan pursuant to Oklahoma law.

IV. SUPERIORITY

A. Individual Prosecution

79. The evidence reflects that each mineral owner, separately, has a small claim.

80. Individual litigation of each claim would significantly increase litigation costs, as well as significantly increase the time, effort, cost and burden placed upon the courts of this state.

81. Individual litigation of each claim in different courts might lead to inconsistent rulings and conflicting verdicts.

B. Desirability of Forum

82. The evidence shows that all royalty interests are located in either Custer or Dewey Counties.

83. The Court finds that concentrating this action in this forum is highly desirable as the evidence shows that all royalty interests are located within either this Second Judicial District or its neighboring Fourth Judicial District.

84. Plaintiffs' Witness C.B. Graft and Defendants' Expert Benjamin Hackett testified that most class members still have a connection with the area. 4 Tr. 230 – 231.

85. The evidence is undisputed that there is less fractionalization of mineral interest in this part of Oklahoma than the rest of the state and most of the royalty interests in the Putnam Oswego Unit have been kept in the families. 1 Tr 155 – 156, 4 Tr. 109.

C. Manageability of this Class Action

86. The record reflects that most class members can be ascertained and notified.

87. There are no insurmountable issues in the management or trial of this matter.

88. The Plan of Unitization is the primary issue.

89. The actual damages are liquidated and easily ascertainable.

90. Oklahoma Law can be applied at trial without violating due process.

CONCLUSIONS OF LAW

I. STANDARD FOR CERTIFICATION

A. Burden of Proof

91. Plaintiffs have the burden of establishing that each of the relevant prerequisites to class action certification is satisfied. First Life Assur. Co. v. Mountain, 848 P.2d 1177, 1178-79 (Okla. App. 1993).

92. To maintain a case as a class action under 12 O.S. § 2023(B)(3), Plaintiffs must satisfy the following requirements: (1) numerosity, (2) commonality, (3) typicality, (4) adequate representation, (5) predominance and (6) superiority.

93. Through the facts and testimony presented to the Court, Plaintiffs have met the burden of establishing (1) numerosity, (2) commonality, (3) typicality, (4) adequate representation, (5) predominance and superiority as required under 12 O.S. § 2023(B)(3).

94. The decision to grant certification of a class action rests within the discretion of the district court. Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337, 342 (Okla. 1998).

95. If there is any doubt as to whether a matter is to be certified as a class action, such doubt should be resolved in favor of certification. Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337, 342 (Okla. 1998).

96. The Court has broad discretion in determining whether a class should be certified. Anderson v. City of Albuquerque 690 F.2d 796, 799 (10th Cir. 1982). The Court may modify its ruling granting certification later if justice mandates, and therefore, Courts are liberal in certifying a class. Because class certification is subject to later modification, the Court should err in favor of, and not against, the maintenance of a class. LOBO Exploration Co. v. Amoco Production Co. 1999

OKCIV APP 112, 991 P.2d 1048; Esplin v. Hirschi, 402 F.2d 94 (10th Civ. 1968) cert. denied, 394 US 928, 89 S. Ct. 1194, 222 Ed 459 (1969).

B. Class Definition

97. A class must be defined by objective criteria, but it "need not be so clearly defined that every class member can be identified at the commencement of the action. Duhe v. Texaco, Inc., 779 So.2d 1070, 1080 (La. App. 2001).

98. The Court finds that for the purpose of class certification, the evidence and testimony show the class is defined by objective criteria and as such is appropriate for certification.

C. Plaintiffs are members of the Class

99. The court finds that Plaintiffs have satisfied the implied requirement under 12 O.S. § 2023 that they are members of the class and their ownership of royalty interest in the POU is recognized by the Court.

II. CLAIMS OF THE CLASS

100. After careful analysis of the elements of the substantive claims and defenses of the parties as required by law, this Court finds that plaintiffs have met their burden of proof in establishing, for certification purposes, evidence to support those substantive claims. Joseph v. General Motors Corp., 109 F.R.D. 635, 637-38 (D. Colo. 1986).

A. Breach of Fiduciary Duty

101. The Court finds that the Plaintiff has presented evidence that the Class and Mobil, as Unit Operator, had a relationship of trust and confidence and that Class members were entitled to rely upon Mobil as Unit Operator to act in the best interests of the Class. For the purposes of class certification, Plaintiffs' have met their burden of presenting evidence that Mobil breached that trust and confidence.

102. Court's findings on evidence of breach of fiduciary duty are based upon sound Oklahoma law. *See* In re Estate of Beal, 769 P.2d 150, 154 (Okla. 1989); Roberts Ranch Co. v. Exxon Corp., 43 F.Supp.2d 1252 (W.D. Okla. 1997); Mid-Am. Fed. Sav. & Loan v. Shearson/Am. Express, 886 F.2d 1249, 1259 (10th Cir. 1989); Lowrance v. Patton, 710 P.2d 108, 111-112 (Okla.1985); West Edmond Hunton Lime Unit v. Young, 325 P.2d 1047, 1052 (Okla. 1958); Young v. West Edmond Hunton Lime Unit, 275 P.2d 304 (Okla. 1954), *app dissm'd*, 349 U.S. 909 (1955).

B. Conversion

103. "Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." Steenbergen v. First Fed. Sav. & Loan of Chickasha, 753 P.2d 1330, 1332 (Okla. 1987).

104. The Court finds that for certification purposes, the Plaintiffs have met their burden of proof in establishing that Defendants may have committed conversion on their property.

A. Fraud

105. The Court finds that pursuant to Oklahoma law, Plaintiffs have met their burden of proof for purposes of certification that Defendants may have committed actual or constructive fraud upon them. *See* Whitson v. Okla. Farmers Union Mut. Ins. Co., 889 P.2d 285, 287 (Okla. 1995); 15 O.S. § 58(3); Varn v. Maloney, 516 P.2d 1328, 1332 (Okla. 1973); 15 O.S. § 59; Faulkenberry v. Kansas City Southern Railway Co., 602 P.2d 203, 206 (Okla. 1979); Silver v. Slusher, 770 P.2d 878, 882, n.11 (Okla. 1988); Buford White Lumber Co. Profit Sharing and Savings Plan & Trust v. Octagon Properties Limited, 740 F. Supp. 1553 (W.D. Okla. 1989).

A. Breach of Contract

106. The elements of breach of contract claim are that: (1) a contract was formed between the plaintiff and the defendant, (2) the defendant breached the contract, and (3) the plaintiff suffered damages as a direct result of the breach. OUJI 2d No. 23.1, *citing* Thompson v. Phillips Pipe Line Co., 200 Kan. 669, 438 P.2d 146, 149 (1968); Gilomen v. Southwest Mo. Truck Ctr., 737 S.W.2d 499, 500-01 (Mo. App. 1987); Cleland v. Stadt, 670 F. Supp. 814, 816 (N.D. Ill. 1987); Stration Group, Ltd. v. Sprayregen, 458 F. Supp. 1216, 1217 (S.D.N.Y. 1978).

107. The Court finds that for purposes of class certification, Plaintiffs have met their burden of establishing that Defendants may have breached their contract with Plaintiffs per the Unit Plan.

A. Breach of Duty of Good Faith and Fair Dealing

108. Gathered from various case law, the elements of a cause of action for breach of the duty of good faith and fair dealing include: (1) a contract was formed between the plaintiff and the defendant, (2) the defendant breached the implied duty of good faith and fair dealing, and (3) the plaintiff suffered damages as a direct result of the breach. Hall v. Farmers Insurance Exchange, 713 P.2d 1027, 1030 (Okla. 1985); Wright v. Fidelity and Deposit Co. of Maryland, 54 P.2d 1084, 1087 (Okla. 1936). If the defendant acted with gross or wanton negligence, then the action rises to the level of a tort; otherwise, the breach merely results in a breach of contract. First Nat'l Bank & Trust Co. v. Kissee, 859 P.2d 502, 509 (Okla. 1993); Rogers v. Tecumseh Bank, 756 P.2d 1223, 1227 (Okla. 1988) (requiring the same level of proof for tortious breach of contract). *See also* Roberson v. Painewebber, Inc., 998 P.2d 193, 201 (Okla. App. 1999); Beshara v. Southern Nat'l Bank, 928 P.2d 280, 291 (Okla. 1996).

109. The Court finds that for the purposes of class certification, Plaintiffs have met their burden of proof in establishing that a claim for breach of duty of good faith and fair dealing may exist.

A. Violation of Production Revenue Standards Act

110. Title 52 O.S. § 570.10 imposes obligations on those who are responsible to remit royalty payments to royalty owners in oil and gas wells in Oklahoma.

111. Upon proof of those elements found in 52 O.S. § 570.10, Plaintiff would be entitled to recover actual damages and specific performance, as well as interest, costs of suit including attorneys fees and expert witness fees. 52 O.S. § 570.14.

112. The Court finds that for the purposed of class certification, Plaintiffs have met their burden of proof in establishing that a claim for violation of Production Revenue Standards Act may exist.

A. Unjust Enrichment

113. To recover for unjust enrichment, a party must establish "enrichment to another coupled with resulting injustice." Teel v. Public Serv. Co. of Okla., 767 P.2d 391, 398 (Okla. 1985). Proof of unjust enrichment can be established by showing either an expenditure adding to the property of another or one that saves the other from expense or loss. County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1518 (10th Cir. 1991).

114. The Court finds that for the purposed of class certification, Plaintiffs have met their burden of proof in establishing that a claim for unjust enrichment may exist.

A. Accounting

115. "A cause of action for an accounting is stated where: [1] a confidential relationship involving the control of property and the records thereof, as well as [2] the delivery

of substantial property, and [3] a failure to return or account for the same have been alleged." Arthur v. Arthur, 354 P.2d 199 syl. 3 (Okla. 1959).

116. The Court finds that for the purposed of class certification, Plaintiffs have met their burden of proof in establishing that a claim for equitable accounting may exist.

A. Constructive Trust

117. Under Oklahoma law, a "constructive trust" is raised by equity in regard to property that has been acquired by fraud, or even if not acquired by fraud, it is against equity that it should be retained by the defendant. Guarantee Reserve Life Ins. Co. v. Hardin, 404 F.Supp. 961 (W.D. Okla. 1974).

118. The Court finds that for the purposes of class certification, Plaintiffs have met their burden of proof in establishing that a claim for constructive trust may exist.

A. Breach of Plan of Unitization

119. The Court finds that for the purposed of class certification, Plaintiffs have met their burden of proof in establishing that a claim for Breach of the Plan of Unitization may exist.

A. Deceit

120. The Court finds that for the purposed of class certification, Plaintiffs have met their burden of proof in establishing that a claim for deceit may exist.

A. Constructive Fraud

121. The elements are the same for constructive fraud and actual fraud, except that constructive fraud (1) does not require proof of fraudulent intent, (2) only requires negligence on the part of the defendant (e.g. even if statement is made innocently or without any moral guilt), and (3) requires the existence of an underlying legal or equitable duty (e.g. fiduciary duty or confidential relationship) to be correctly informed of the facts, even if merely to protect a recognized public interest. 15 O.S. § 59; Faulkenberry v. Kansas City Southern Railway Co.,

602 P.2d 203, 206 (Okla. 1979); Silver v. Slusher, 770 P.2d 878, 882, n.11 (Okla. 1988); Buford White Lumber Co. Profit Sharing and Savings Plan & Trust v. Octagon Properties Limited, 740 F. Supp. 1553 (W.D. Okla. 1989).

122. The Court finds that for the purposes of class certification, Plaintiffs have met their burden of proof in establishing that a claim for constructive fraud may exist.

III. ELEMENTS OF 12 O.S. § 2023(B)(3)

A. Numerosity

123. Pursuant to 12 O.S. § 2023, the class must be so numerous that joinder of all members is impracticable... a party seeking class certification is not required to precisely enumerate the members of the class to obtain class certification. 12 O.S. § 2023(A)(1).

124. Statutory and relevant case law show that the numerosity test is satisfied by numbers alone when the size of the class is in the hundreds and can be satisfied with as few as eleven class members. See Black Hawk Oil Co. v. Exxon Corp., 969 P.2d at 343 and Hall Jones Oil Corp. v. Claro, 459 P.2d 858, 862 (Okla. 1969).

125. Accordingly, as the record clearly reflects, the evidence of over 1000 putative class members satisfies the numerosity required by 12 O.S. § 2023(A)(1).

A. Commonality

126. Commonality in an Oklahoma Class Action requires only that a single issue be common to the class. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999).

127. Commonality does not demand a complete unity of all claims raised in the class action. Realmonte v. Reeves, 169 F.3d 1281, 1285 (10th Cir. 1999).

128. 12 O.S. § 2023(A)(2) states the source of the commonality may be in either a question of law *or* a question of fact.

129. The Court finds that common questions of law and fact exist and predominate this class.

A. Typicality

130. For typicality to be met, class representatives must show their interests are aligned with the class, not identical. J.B. by Hart v. Valdez, 186 F.3d at 1299.

131. The claims of the Plaintiffs must fairly encompass the claims of the Class. Gen. Tel. Co. of N.W. v. EEOC, 446 U.S. 318, 330 (1980)

132. The injury suffered by Plaintiffs align with the Class — underpayment of royalty.

133. Each class representative has shown that they are basing their claims on what they allege is a one-eighth protected royalty. The Court finds that this claim is typical of the entire class

134. Plaintiffs satisfy the typicality requirement of 12 O.S. § 2023(A)(3) .

A. Adequacy of Representation

135. To be adequate representatives, the law provides that "the representative parties will fairly and adequately protect the interests of the class." 12 O.S. § 2023(A)(4).

136. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187-88 (10th Cir. 2002).

137. The Court finds that Plaintiffs and their counsel have shown that they will vigorously prosecute this matter, that all class representatives understand their responsibilities, no conflicts of interests exist and Plaintiffs are asserting a common right.

IV. PREDOMINANCE AND SUPERIORITY

138. Title 12 O.S. § 2023(B)(3) does not require that all questions of law or fact be common; it only requires that the common questions predominate over individual questions.

139. When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than individual basis. Harrington v. City of Albuquerque, 222 F.R.D. 505, 516-18 (D. N.M. 2004); In re Asbestos School Litig., 104 F.R.D. 422, 431 (E.D. Penn. 1984), *aff'd in part, rev'd in part*, 789 F.2d 996 (3d Cir. 1986).

140. The Court finds that predominance arises in this case from common questions of fact and law.

A. Common Questions of Fact Predominate

141. The Plan presents a valid basis for certification here, just as it did in Young v. West Edmond Hunton Lime Unit, 275 P.2d 304, 310 (Okla. 1954) which held that class certification was appropriate in a case against a unit operator by royalty owners in a compulsory unit ordered by the Oklahoma Corporation Commission who alleged a breach of fiduciary duty to obtain the best price available for unit production

142. The Court finds that common questions of fact predominate regarding the Unit Plan, accounting by Defendants, common ownership issues and common alleged misrepresentations and reliance.

(i) Common Facts Regarding the Unit Plan

143. The Court finds that the finding of facts enumerated above show Defendants' obligations under that Unit Plan remained common and those common questions of fact predominate for the purposes of certification.

(ii) Common Accounting and Damages

144. Defendants have alleged that damages cannot be ascertained due to operation changes at the plant. Courts have consistently rejected arguments that operational changes defeat predominance.

145. In Glassell v. Ellis, 956 S.W.2d at 686, the court affirmed certification of a class of royalty owners in a case for breach of an implied covenant to prevent drainage in their oil and gas leases. The defendants argued that whether the implied covenant had been breached "will vary depending on the status of development or the existence of drainage at certain points in time." Id. Rejecting that contention, the Glassell Court found that common issues predominated over these changes in operations and field activities over time. *Id.*

146. The Court finds that the way Defendant Mobil, as Unit Operator, accounted for Substances under the plan remained constant and these common questions of accounting in regard to whether Mobil improperly deducted royalties remained the same throughout the class period.

(iii) Common Ownership Issues Persist

147. Defendants allege that Ownership issues do not permit certification.

148. The Court finds that transfers of royalty interest do not defeat predominance in class certification cases.

149. In Freeman v. Great Lakes Energy Partners, LLC, 12 A.D.3d 1170 (4th Dep't (N.Y.) 2004), the court certified a class of 1,500 former and present royalty owners who sued various energy company lessees for their "common course of conduct with respect to plaintiffs, including whether certain deductions taken by defendants in calculating the royalties were improper and whether defendants artificially manipulated the royalty calculations as a result of self-dealing transactions." Proof of title was not required at class certification.

150. In Bice v. Petro-Hunt, LLC, 681 N.W.2d 74, the court did not require any proof of title of class members' claims for unpaid royalties due to various costs and expenses being charged by the defendant operator of gas plant that processed casinghead gas in affirming class certification.

151. The Court finds through the relevant testimony, evidence and facts that ownership issues can easily be resolved and Defendants have failed to show the Court that those alleged individual ownership issues predominate.

(iv) Common Misrepresentations and Reliance.

152. Defendants assert that misrepresentations and reliance give rise to separate claims and discovery issues.

153. Defendants' Expert Berghammer asserts that contrary Oklahoma law in Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998) is incorrect regarding misrepresentation and reliance and, thus, certification should be denied.

154. Oklahoma law holds that when common or uniform written misrepresentations or omissions have been made to the class members, class certification cannot be rejected based on any perceived need to demonstrate individual reliance by the class members at the time of certification. Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998)

155. The Court finds that Defendants have failed to present evidence for the purpose of class certification to defeat Plaintiffs' allegations that common misrepresentations and reliance occurred as it relates to Defendants' operation of the Unit and royalty accounting. The Court further finds that it is bound to Oklahoma precedent and not a Defendants' Experts opinion that the Oklahoma Supreme Court erred in its holding in Black Hawk.

156. Therefore, the Court finds that pursuant to Black Hawk, the evidence and testimony presented show that common or uniform written misrepresentations or omissions may have been made to the class members by Defendants and thus common misrepresentations and reliance persist.

A. Common Questions of Law Predominate.

157. Oklahoma granted authority for creating the POU Unit, as well as appointing Mobil as the Unit Operator, arose solely under Oklahoma Statutes. 52 O.S. §§ 287.1 *et seq.*

158. A single state's law will apply in class actions involving class members from more than one state "when that state has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985).

159. The Oklahoma Supreme Court recognizes Shutts as providing the controlling choice of law analysis for class action cases involving class members from more than one state. Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 626 (Okla. 2003).

160. Shutts does not require courts to apply the law of every state where class members reside and does not prohibit the application of a single state's law to all class members' claims, regardless of their residence. In re Lilco Securities Litig., 111 F.R.D. 663, 670 (E.D. N.Y. 1986).

161. Oklahoma is not precluded from applying its own law in a class action so long as it has a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class such that the application of the forum law is not arbitrary or unfair." Lobo Exploration Company v. Amoco Production Company, 1999 OK CIV APP 112, *citing* Shutts v. Phillips Petroleum Co., 732 P.2d 1286 (Kan. 1987).

162. The Court finds that common issues of law arise out of the formation of the Unit pursuant to Oklahoma law and the duties owed to class members arise out of contracts governed by Oklahoma law.

163. As a matter of law, it is the defendants' burden to demonstrate the existence of a true conflict of law. Defendants have not met that burden at this stage. Moreover, choice of law issues may be revisited during the merits phase upon a more complete record. Lobo Exploration Company v. Amoco Production Company, 1999 OK CIV APP 112, ¶ 6.

A. Superiority

164. 12 O.S. § 2023(B)(3) requires the Court to consider the relative superiority of the class action device as compared to other judicial procedures that could address the issues in the case.

165. The United States Supreme Court has opined in the royalty context that class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually" and that "most of the plaintiffs would have no realistic day in court if a class action were not available." Phillips Petroleum Co. v. Shutts, 472 U.S. at 809.

166. Courts have consistently found the superiority requirement met in royalty class actions. *See, e.g.*, SEECO, Inc. v. Hales, 954 S.W.2d 234, 241 (Ark. 1997); In re Lease Oil Antitrust Litig., 186 F.R.D. 403, 429 (S.D. Tex. 1999).

167. Here, the claims in this suit are not, individually, particularly sizeable. Bringing individual actions to protect the interests of the Class Members would be economically prohibitive.

(i) Individual Prosecution

168. The Court finds that Plaintiffs have met their burden of proof for certification purposes that absent class certification, individual prosecution against Defendants would not

occur and that the Class Action device is the best device available to prosecute these common claims.

(ii) Desirability of Forum

169. Pursuant to the significant contacts this forum has with the issues of this case, the Court finds that it has proper jurisdiction over the claims in this case.

(iii) Manageability of the Class

170. In making a manageability determination and considering the class trial of this case, the Court should consider the host of management tools available to address whatever individualized determinations may be needed in the action. In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001).

171. The Court further finds that pursuant to applicable law, there are no insurmountable issues in the management of discovery, the trial, or the distribution of damages in this case and that differences among class members will not be difficult during the merits phase of this litigation.

V. DEFENDANTS ASSERTION THAT MIDDLESTEADT CONTROLS IS INCORRRECT

172. Contrary to Defendants assertions, the Court finds that Plaintiffs are not alleging a claim that would provide for individual analysis pursuant to Mittlesteadt v. Santa Fe Minerals, Inc., 954 P.2d 1203 (Okla. 1998).

VI. SEPARATION OF CLAIMS FROM ROYALTY OWNERSHIP

173. Defendants contend that some rights to recover for past Royalty underpayments are personal property that has been separated from the Royalty ownership and that litigation of these issues would create a conflict among the class as well a require

the application of laws from several different states. If this were the case, it would be impossible for any class involving past royalty under payments to ever be certified as a class. The court finds this issue does not prevent certification because: it has not been shown to be widespread; if it involves past or present royalty owners or their heirs, etc. they are member of the class, and such isolated issues can be manageably resolved during the claims phase; and to the extent it involves anyone who is not a past or present royalty owner or their heirs, legatees, beneficiaries, executors, representatives, successors, and assigns, they are not part of the class in this lawsuit.

VII. THIS CASE IS CERTIFIABLE UNDER 12 O.S. § 2023

174. The Court finds that this case is certifiable pursuant to Oklahoma law.

IT IS SO ORDERED this 31st day of July, 2008.

Gale F. Smith, Associate District Judge