IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID F. POLLOCK, et al., Plaintiffs,	)	
vs.	)	Civil Action No. 10-1553
ENERGY CORPORATION OF AMERICA, Defendants.	)	

REPORT AND RECOMMENDATION

REPORT

I. INTRODUCTION

Pending before the Court is Plaintiffs' Motion for Class Certification. [ECF No. 106]. For the reasons that follow, it is respectfully recommended that Plaintiffs' Motion for Class Certification be denied.

II. BACKGROUND[1]

The named Plaintiffs[2] are Pennsylvania landowners who entered into oil and gas leases with Defendant, Energy Corporation of America ("ECA"). Plaintiffs allege the following facts:

> In the natural gas industry, gas is produced at the wellhead and transported through a system of small gauge "gathering" lines to the interstate pipeline system, a network on interconnecting pipeline systems owned by various interstate pipeline companies engaged in the business of transporting gas on behalf of the owner of the gas. The owner of the gas, designated as the "shipper" on contracts with the interstate pipeline companies, delivers the gas into the interstate pipeline system at any one of thousands of

[1] Because the facts are known by the parties, the Court will only discuss those necessary for the disposition of the pending motion.

[2] The terms "Plaintiffs," "Landowners" and "putative" or "purported class representatives" are used interchangeably throughout the opinion and refers to the remaining Plaintiffs.

> "receipt points" and out of the interstate pipeline system at any one of thousands of "delivery points."
>
> Gas producers can either sell the gas at the receipt point into the interstate pipeline or can enter into transportation agreements with one or more interstate pipeline companies to transport the gas through the interstate pipeline companies for sale to a more distant buyer. When gas is sold at the receipt price into the interstate pipeline system, it is sold at the published "pool" price for that receipt point. The pool is a virtual pool, not an actual pool, and is simply an accounting mechanism used in the industry for setting the price of sales at the entrance to the interstate pipeline system. The entity buying the gas from the producer at the pool price then enters into transportation agreements with the interstate pipeline company (or companies) to transport the gas through the interstate pipeline to the next buyer of the gas.
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> Producers often do not sell their gas at the receipt point into the interstate pipeline system. Instead, they frequently transport the gas through the interstate pipeline system on its own behalf to a more distant buyer. When this occurs, the producer enters into its own transportation agreements with the interstate pipeline companies. Dispositive as to who owns the gas transported through the interstate pipeline system is the entity designated as the "shipper" on the transportation agreements. [Under] federal law the owner and the shipper must be the same. *See* 18 C.F.R. 284.8[.] The transportation agreements, filed with and approved by the Federal Energy Regulatory Commission ("FERC"), must include a warranty by the shipper that the shipper holds title to the gas. A shipper that submits a false warranty as to the ownership of the gas is subject to strict FERC enforcement[.] . . .
>
> The sale price at the delivery points on the interstate pipeline system is invariably higher than the pool price paid at the entrance to the interstate system, even when the cost of the interstate transportation is subtracted.

Pls.' Resp. to Interrogatories [ECF No. 121-11] at 3-4. Plaintiffs allege that prior to March 26, 2012, Eastern Marketing Corporation ("EMCO"), a marketing affiliate of ECA and ECA entered into a Gas Purchase/Sales Contract.[3] The agreement identifies EMCO as the buyer of the gas and ECA as the seller, and contains a "WHEREAS" clause that describes EMCO's role as an

[3] As of March 26, 2012, EMCO was dissolved and ECA now sells its gas directly to purchasers, thus March 26, 2012 is the operative date to determine the remaining claims.

"Agent to purchase gas for industrial end users, local distribution companies, or other markets." Pls.' Amended Concise Statement of Material Facts [ECF No. 83]; Gas Purchase/Sales Contract [ECF No. 83-21]. The agreement further provides that "[t]he title to the gas sold and delivered pursuant to this Contract shall pass from SELLER [ECA] to BUYER's [EMCO's] Purchaser(s) at the Deliver/Receipt point(s) identified." *Id.*

EMCO pays ECA a monthly weighted average sales price per pipeline less any of the deductions, marketing fees, transportation, and gathering fees for the gas. Def.'s Concise Statement of Material Facts [ECF No. 68] at ¶ 11; Farkosh Dep. [ECF No. 68-2] at 51-53. Under industry practice, the third party purchaser of the gas provides the data regarding the gas volumes sold and the price paid for those volumes. Def.'s Concise Statement of Material Facts [ECF No. 68] at ¶ 17; O'Malley Dep. [ECF No. 68-1] at 34. The title to gas passes to the third party purchasers at five delivery/receipt points into the interstate pipeline system and the volume of gas sold is measured at sales meters located at these points. Pl.'s Am. Concise Statement of Material Facts [ECF No. 82] at ¶ 58; Gas Purchase/Sales Contract [ECF No. 83-21].

Generally, Plaintiffs allege that ECA deducted amounts from the royalty payments that were not permitted under their leases. Consistent with the Guaranteed Minimum Royalty Act, the leases provide that the landowners are entitled to a one-eighth royalty of the net proceeds received from the sale of gas. The putative class representatives executed differing lease agreements at different time periods spanning from 2002 to 2009. The Dibiase lease executed on September 5, 2002, the Whipkey lease executed on March 3, 2005, the Frayte lease executed on June 10, 2005, and the Christopher lease executed on August 26, 2005 provide in pertinent part:

> Lessee agrees to pay . . . as a royalty for all gas produced and marketed, including all substances contained in such gas, one-eighth ($1/8^{th}$) of the net proceeds received by Lessee from the sale of all gas produced, saved and sold from said premises.

See Dibiase Oil and Gas Lease [ECF No. 106-2] at 3; Frayte Oil and Gas Lease [ECF No. 106-2] at 7; Christopher Oil and Gas Lease [ECF No. 106-2] at 11; Whipkey Oil and Gas Lease [ECF No. 12-1] at 14.

The Vecchio lease executed on March 13, 2006 contains a gas royalty provision that provides in pertinent part:

> Lessee covenants and agrees . . . [t]o pay Lessor as royalty for all gas and the constituents thereof, (except stored gas and gas produced from any storage horizon), including all liquid, solid or gaseous substances produced and saved from any said sand or sands and/or formations on the lease premises, an amount equal to one-eighth ($1/8^{th}$) of the price received by the Lessee from the sale of such gas and the constituents at the well head.

See Vecchio Oil and Gas Lease [ECF No. 106-2] at 15.

The Virgili lease executed on April 20, 2007 and the Shaffer lease executed on March 12, 2009 provide in pertinent part:

> In calculating the net proceeds received by Lessee from the sale of such . . . gas . . . at the wellhead, Lessee shall be entitled to deduct from the price received . . . Lessor's proportionate part of all post production cost incurred by Lessee (including internal post production costs of Lessee, an affiliate of Lessee and non-affiliated third parties) together with all transportation, gathering, compression, processing, treating, dehydration and marketing expenses charged by Lessee, an affiliate of Lessee or an non-affiliated third party associated with the sale of such . . . gas . . . and any other costs incurred by Lessee necessary to render the gas merchantable and to deliver the same to market.

Virgili Oil and Gas Lease [ECF No. 106-2] at 19; Shaffer Oil and Gas Lease [ECF No. 106-2] at 22.

The leases also provide differing language with respect to the free use provision. The Christopher, Dibiase, Frayte and Whipkey leases provide:

> Lessee shall have the right to use, free of royalty or any other

> charge, gas, oil and water from the premises **for drilling operations on the premises**.

See Christopher Oil and Gas Lease [ECF No. 106-2] at 11; Dibiase Oil and Gas Lease [ECF No. 106-2] at 3; Frayte Oil and Gas Lease [ECF No. 106-2] at 7; Whipkey Oil and Gas Lease [ECF No. 12-1] at 14. (emphasis added).

The free use clause in the Shaffer, Vecchio and Virgili leases provide:

> Lessee shall have the right to use, free of royalty or any other charge, gas, oil and water from the leased premises **for drilling and production operation of the leased premises**. Said rights shall include, but are not limited to injection, compression, dehydration, distillation, pumping and heat.

See Shaffer Oil and Gas Lease [ECF No. 106-2] at 22; Vecchio Oil and Gas Lease [ECF No. 106-2] at 15; Virgili Oil and Gas Lease [ECF No. 106-2] at 19 (emphasis added). Plaintiffs allege that these two provisions are functionally equivalent and mandate that the gas extracted can be used free from royalty payments only if it is consumed on the leased premises. *See* Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 7.

Three claims remain against ECA. Plaintiffs allege that ECA breached their leases by (1) deducting charges for interstate pipeline services prior to March 26, 2012; (2) deducting marketing fees prior to March 26, 2012; (3) and paying no royalty on gas used as plant fuel off the leased premises. Plaintiffs seek to certify the following class under Fed. R. Civ. P. 23:

> All lessors on an oil and gas lease with Energy Corporation of America or Eastern American Energy Corporation that conveys oil and gas rights to real property in Pennsylvania and (1) the lessee deducted charges for interstate pipeline services prior to March 26, 2012 (sub-class 1); and/or (2) the lessee deducted marketing fees from the royalties prior to March 26, 2012 (subclass 2); and/or (3) the lessee failed to pay a royalty on gas used as plant fuel off the leased premises (subclass 3).

Id. at 4. A class certification hearing was held on June 11, 2013. *See* Minute Entry of 6/11/2013

[ECF No. 124].

a. Deduction of Charges for Interstate Pipeline Services Prior to March 26, 2012[4]

Plaintiffs claim that ECA breached their leases by improperly deducting interstate transportation costs from their royalties because the interstate transportation charges were not incurred by ECA before the point of sale. *Id*. at 6. In support of its claim it contends that "[p]rior to March 26, 2012, ECA sold all of its Pennsylvania gas production to a single buyer, Eastern Marketing Company ("EMCO"), at the delivery points into the interstate pipeline system[,]" and therefore, ECA never incurred interstate transportation charges because it sold the gas to EMCO who then transferred it to the interstate pipeline system. *Id*. at 6 (emphasis added).

Defendant argues that some of the named Plaintiffs, and therefore some of the putative class members' leases "expressly authorize the deduction of transportation costs whether the costs are incurred by ECA, an affiliate or a third-party purchaser." Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 5. Further, Defendant argues that it does not "utilize interstate transportation for the gas from all wells in Pennsylvania" therefore the transportation charges are limited to the gas that entered the A.C. Nielsen gathering line in Greene County, Pennsylvania. *Id*. (citing O'Malley Dec. [ECF No. 121-1] at ¶ 4).

b. Deduction of Charges for Marketing Costs Prior to March 26, 2012[5]

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[4] The Court granted summary judgment in Plaintiff's favor on this claim. *See* Rep. and Rec. [ECF No. 92] at 30; Memo. Order [ECF No. 103] at 11 (adopting Report and Recommendation as Opinion of the court). It stated: "*Kilmer* defined post-production costs as those 'expenditures from when the gas exits the ground until it is sold.' 990 A.2d 1149, n.2. Thus, the proper inquiry is the point at which the gas is sold, and not, as ECA suggest, whether ECA actually incurred the interstate pipeline transportation costs. On this point, it is undisputed EMCO buys the gas from ECA. It is also undisputed that, under the terms of the Gas Purchase/Sales Contract, ECA retains title to the gas until it passes to third party purchasers at the five points where the gas is received into the interstate system. Thus, the gas is 'sold' at these points and ECA cannot recover costs incurred thereafter. Therefore, it is recommended that summary judgment be granted in Plaintiffs' favor on this claim." Rep. and Rec. [ECF No. 92] at 30.

[5] The Court denied cross summary judgment motions on the claim for the deduction of marketing costs from the royalties. *See* Rep. and Rec. [ECF No. 92] at 23; Memo Order [ECF No. 103] at 10-11 (adopting Report and Recommendation as Opinion of the Court). The court stated in pertinent part: Whether the marketing fee is

Plaintiffs allege that prior to March 26, 2012, ECA incurred no marketing costs because it sold all of its gas to EMCO under the Gas Purchase/Sales Contract. In support it cites ECA's Vice President of Accounting's declaration which states:

> ECA sells the gas produced from the wells under plaintiffs' leases to Eastern Marketing Corporation ("EMCO"), a subsidiary of ECA, which in turn sells the gas to third parties under gas purchase agreements. Although for credit assurance purposes some of the gas sales contracts with third parties are in the name of ECA, or are jointly in the name of ECA and EMCO, the contracts are considered EMCO contracts and EMCO performs all obligations and assumes all risk of performance as the seller of the gas under the contracts.

O'Malley Dec. [ECF No. 106-3] at ¶ 4. Therefore, Plaintiffs contend that the deduction of a marketing fee was a breach of the lease because ECA incurred no bona fide marketing charges to properly deduct from the Plaintiffs' royalty payments. Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 7. Defendant argues that because some of the Plaintiffs' and therefore putative class members' leases expressly allow ECA to make marketing deductions, regardless of who incurs them, the class cannot be certified.

c. Fuel Used for Compression[6]

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chargeable to the Plaintiffs depends upon which entity actually incurs the marketing costs and requires an analysis of the legal relationship between ECA and EMCO. . . . Plaintiffs maintain that because the marketing costs are incurred after ECA sells the gas, those costs are chargeable to EMCO's third party purchaser clients and not to them. . . . ECA responds that, since it is undisputed that it incurs the marketing fees, these costs are included in the category of post-production costs encompassed by the definition of royalty and can be subtracted from the proceeds payable to the Plaintiffs from the sale of gas. . . . [T]he nature of the transactions governed by the contract is itself ambiguous. While the Gas Purchase/Sales Contract describes EMCO as the buyer of the gas, it also provides that EMCO never holds title to the gas. . . . [Also,] there is a dispute regarding whether the post-formation behavior of the parties constituted an oral modification of the contract. The Court cannot conclude that either party is clearly entitled to a judgment as a matter of law and recommends that both ECA's and Plaintiffs' Motions for Summary Judgment be denied on the marketing costs issue." Rep. and Rec. [ECF No. 92] at 20-23.

[6] The Court denied summary judgment as to ECA's allocation method that results in the deduction of gas used by ECA off of the leased premises. *See* Rep. and Rec. [ECF No. 92] at 28; Memo. Order [ECF No. 103] at 10-11 (adopting Report and Recommendation as Opinion of the Court). The Court found, in pertinent part: "*Kilmer* forecloses Plaintiffs' recovery for gas that is unaccounted for or lost between extraction and the point of sale . . . despite both parties' representations to the contrary, it has not specifically addressed the issue of whether ECA's use of gas off the leased premises constitutes a breach of the leases. . . . Gas used to fuel compressors and dehydrators is neither lost nor unaccounted. It remains to be decided if ECA's allocation methodology regarding gas usage off the

Plaintiffs' third claim is that ECA breached the lease by not paying royalties for gas used off of the leased premises. They allege that "[g]as used for operations off the leased premises . . . is subject to royalty, absent lease language to the contrary." *Id*. at 7. In support, they allege the following:

> First, ECA Midstream LLC, a gathering company, transports the gas from the leased premises to the interstate pipeline system. The gathering agreement provides that the gathering company will provide 'gathering, compression and dehydration' services . . . [and shall] 'receive quantities of Gas from ECA at Point(s) of Receipt on the Gathering Systems and shall deliver thermally equivalent quantities, less Retainage, to or for ECA at the interconnection(s) of the Gathering Systems with the downstream Transporter(s)[.]"

Id. (quoting Gas Gathering Agreement [ECF No. 106-5] (internal citations to the record omitted)). The gathering agreement defines "Retainage" as "the sum of compressor fuel, line loss, dehydration, fuel, or lost unaccounted-for gas, generally expressed as a percentage of Gas delivered at the Point(s) of Receipt." *Id*. at 7-8. Plaintiffs claim that ECA does not pay a royalty on Retainage because "each well is credited its pro rata share of the gas sold at the interconnect points with the interstate pipelines based on each well's share of the aggregate production measured at the wells." *Id*. Plaintiffs point to each well's Allocation Statement that shows, by well and by month, the variance between the volumes measured at the wellhead and the volumes that ECA allocates to the well, and claims that in some cases the volumes allocated to the well are 75% of the volumes actually produced at the wellhead. *Id*. at 8 n. 6.

Defendant argues again that because the leases differ in language, with some providing for free use of gas for operations "of" the premises and "on" the premises, it creates different

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premised breaches the leases. . . . The Court agrees with Plaintiffs that the leases do not provide that ECA has free use of gas from the wells off the premises. ECA does not respond to this argument, citing its interpretation of the Court's prior recommendation on lost and unaccounted for gas. Given the misunderstanding . . . the Court cannot fairly adjudicate it at this juncture and recommends that summary judgment be denied." Rep. and Rec. [ECF No. 92] at 28-29.

legal obligations. Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 6. Further, Defendant argues that not all of the gas in Pennsylvania is compressed, and consequentially there is no gas taken into account when calculating the royalties. *Id.*

III. STANDARD OF REVIEW

Parties seeking to represent the class "must affirmatively demonstrate [their] compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. --, -- 131 S.Ct. 2541, 2551 (June 20, 2011). *See also Comcast v. Behrend*, -- U.S. --, -- 133 S.Ct. 1426, 1432 (March 27, 2013). Federal Rule of Civil Procedure 23 "does not set forth a mere pleading standard." *Comcast*, 133 S.Ct. at 1432 (quoting *Wal-Mart*, 131 S.Ct. at 2551). The putative representatives "must not only 'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation[.]" *Ibid.* "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Agmen Inc. v. Connecticut Retirement Plans and Trust Funds*, - - U.S. - -, - - 133 S.Ct. 1184, 1194-95 (Feb. 27, 2013).

In making its decision, "the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). The putative representatives must make more than a "threshold showing" that requirements of Rule 23 are satisfied. *Id.* Where the merits of the claim and a requirement for class certification coincide, the court may resolve factual disputes to determine whether the proposed class should be certified. *Id.* at 316. "Factual determinations supporting Rule 23 findings must be made by a

preponderance of the evidence" by the party seeking class certification. *Id*. at 307. In making factual determinations, "[i]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Comcast*, 133 S.Ct. at 1432. "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d at 318 (citations omitted). "[W]here the court finds, on the basis of substantial evidence . . . that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 191 (3d Cir. 2001) (quoting *Windham v. Am. Brands, Inc*., 565 F.2d 59, 70 (4th Cir. 1977)). "Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d at 318. The district court must make a "rigorous analysis" that the prerequisites of Rule 23 are satisfied, and "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Hayes v. Wal-Mart Stores, Inc*., -- F.3d --, --, 2013 WL 3957757, at *2 (3d Cir. Aug. 2, 2013).

IV. ANALYSIS

a. Ascertainability

As a prerequisite to a Rule 23 analysis, "the Court first must consider whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class." *Gates v. Rohm and Haas, Co*., 265 F.R.D. 208, 214 (E.D.Pa. 2010) (citing *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). This is generally referred to as the "ascertainability" factor. *See Hayes v. Wal-Mart Stores, Inc*., -- F.3d --, --, 2013 WL 3957757

(3d Cir. 2013); *Marcus v. BMW of North America*, 687 F.3d 583, 596 (3d Cir. 2012). In making this determination, the court considers whether "a particular group . . . was harmed during a particular time frame, in a particular location, in a particular way, and uses objective criteria." *Hayes*, 2013 WL 3957757, at *3. The plaintiffs "need not prove that class members have been injured for purposes of defining the class." *Id.* "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials', then a class action is inappropriate." *Marcus*, 687 F.3d at 592. By determining whether the class is sufficiently ascertainable before delving into a Rule 23 analysis, "it eliminates 'serious administrative burdens that are incongruous with the efficiencies expected in a class action' by insisting on the easy identification of class members." *Id.* at 593 (quoting *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D.Pa. 2000)). It also "protect[s] absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action." *Marcus*, 687 F.3d at 593. [Additionally,] it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Id.* "To summarize, plaintiff must show by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class." *Hayes*, 2013 WL 3957757, at *5.

Although neither party has addressed the ascertainability factor, the proposed class, as defined, is sufficiently ascertainable. It is limited to those who hold leases with ECA in the state of Pennsylvania for the applicable time period. This can be proven objectively through company records. Therefore, the class is clearly identifiable and administratively feasible. The ascertainability factor is met.

b. <u>Numerosity</u>

Plaintiffs allege that numerosity is satisfied and present an inventory assembled by the

Pennsylvania Department of Environmental Protection ("DEP") that states that ECA actively operates 1,623 gas wells in Pennsylvania, and because "[t]here are usually two lessors on an oil and gas lease[,]" ECA has over 3,000 lessors in Pennsylvania. Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 9.

Defendant argues that numerosity has not been met because merely pointing to the DEP inventory of the wells operating in Pennsylvania is not conducive to showing that any of the lessors have one or more remaining claims against ECA. Defendant argues that "not all of ECA's Pennsylvania wells produce gas that is compressed or utilizes interstate transportation." Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 9 (citing O'Malley Dec. [ECF No. 121-1] at ¶ 8). Further, some of the leases, including leases of the named Plaintiffs, include a provision that expressly permits ECA to calculate royalties by deducting marketing and transportation costs whether charged by ECA, its affiliate or a non-affiliated third-party. Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 9.

In Plaintiffs' reply brief, they supplement their original argument and assert that a preponderance of the evidence suggests that ECA deducted interstate transportation charges, deducting marketing charges and failed to pay a royalty on gas used off of the leased premises for at least forty lessors. *See* Pls.' Reply [ECF No. 123] at 11 – 13.

As to the transportation charges, Plaintiffs argue that one of the ten transportation agreements between ECA and Columbia Gas Transmission in Greene County

> is used to transport 50,000 dekatherms of natural gas through the interstate pipeline system every day. If the other ten transportation agreements transport a comparable amount of gas, ECA transports 500,000 dekatherms of gas produced in Greene County alone every day. The DEP Report shows that only 208 (or 8%) of ECA's 1,623 active gas wells in Pennsylvania are in Greene County. If a comparable amount of gas is transported through the interstate pipeline system from the 92% percent [sic] of ECA's Pennsylvania

> wells that are not in Greene County, ECA transports over 5,000,000 dekatherms of gas produced in Pennsylvania daily through the interstate pipeline system[,]

and by operation, numerosity is satisfied. *Id*. at 11.

As to the deduction of marketing fees, Plaintiffs offer a similar argument. Plaintiffs argue that EMCO issued separate monthly Gas Control Statements for each point into the interstate pipeline system where it received the gas from ECA for re-sale to EMCO's third party purchasers. Plaintiffs argue that the two Gas Control Statements produced (the points that apply to the representative Plaintiffs) show that EMCO billed ECA $216,156.00 in marketing fees for the gas that entered the Columbia system at the meter point, and $241,935.20 in marketing fees for the gas that entered the Texas Eastern system at that meter point and that satisfies numerosity. *Id*. at 12.

As to the failure to pay the royalty on the gas used off premises, Plaintiffs allege that numerosity is satisfied because Steven Sly, the President of Gas Analytical Services, (the company that ECA hires to measure the gas produced by each well, the aggregate of all wells feeding into the interstate pipeline, and allocate the pro rata share) testified that the amount allocated back to each well is less than the amount of gas produced at the wellhead. *Id*. at 13. Further, Plaintiffs argue that because ECA produced the Gas Wells Allocation Statements for May 2011 and redacted all but the eight named Plaintiffs, the "extensive amount of redactions shows that the line item information of over 200 wells was redacted[,]" and comes to this conclusion by stating "[t]he line item for each well is 1/16 inch. The amount of the redactions shows that approximately 200 wells were redacted on each of the two monthly statements." *Id*. at 14 n. 4.

To satisfy numerosity, no "magic number" exists. *Stewert v. Abraham*, 275 F.3d 220,

226-27 (3d Cir. 2001). Generally, classes of forty (40) or more suffice. *Id*. Additionally, to establish numerosity, the named class must be "sufficiently identifiable without being overly broad" to determine whether a putative class member has been subject to the alleged harm. *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 233 (W.D.Pa. 2001). "The proposed class may not be amorphous, vague, or indeterminate." *Id*. at 233 (citations and internal quotations omitted). A plaintiff need not present "direct evidence of the exact number and identities of class members. But in the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a court to make a factual finding." *Marcus*, 687 F.3d at 596. If direct evidence is absent, the court may "forgo precise calculations and exact numbers" and rely on its "common sense" that numerosity is met. *Id*. at 597 (citing *Lloyd v. City of Phila*., 121 F.R.D. 246, 249 (E.D.Pa. 1988) (numerosity not satisfied where a preponderance of the evidence suggested only four plaintiffs met the defined class where plaintiff speculated class exceeded 10,000). Additionally, "where a putative class is some subset of a larger pool, the trial court may not infer numerosity from the number in the larger pool alone." *Hayes*, 2013 WL 3957757, at *6.

Here, Plaintiffs offer speculation and conjecture that the class exceeds forty members. They have not proven by a preponderance of the evidence that for each sub-class that numerosity is satisfied. Presenting the total amount of active Pennsylvania leases that ECA holds without proof that any of the leases (besides the named Plaintiffs) contain the operative provisions that Plaintiffs seek to hold ECA liable for a breach of contract does not satisfy numerosity. The Court cannot determine from the evidence whether any of the putative class members have suffered the alleged harm that Plaintiffs assert. The class is also overly broad because it includes lessors who have not been harmed by ECA because their leases expressly authorize the conduct

that Plaintiffs complain of. The evidence that Plaintiffs present calls the Court to speculate that the class "would be equal-to-or-less than" 1,623, and "equal-to-or-greater-than zero. Within that range, [the Court] can only speculate as to the number of class members." *Hayes*, 2013 WL 3957757, at *6. Therefore, numerosity has not been satisfied.

c. Commonality

In support of commonality, Plaintiffs allege that "[t]here are multiple questions of fact and law in this case, including (1) whether ECA breached the leases by deducting interstate pipeline charges incurred after it no longer owned the gas; (2) whether ECA breached the leases by deducting marketing costs when, by contract, it sold all [of] its gas to a single buyer; (3) whether ECA breached the leases by paying no royalty on gas used as plant fuel off [of] the premises; (4) whether a reasonably diligent royalty owner could have determined from the royalty check stubs that ECA was breaching the leases in these three ways." Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 10. Plaintiffs claim that it is of no consequence whether the class members' lease forms are identical because "none of the forms allows ECA to (1) deduct interstate pipeline charges after it no longer owns the gas, (2) deduct marketing costs when, by contract, it sells all of its gas to a single buyer, and (3) pay no royalty on gas used as plant fuel off the premises." *Id.* at 10 n. 8. Moreover, Plaintiffs seek to invoke the discovery rule to "extend the damage period back to the first . . . royalty underpayment under each lease." *Id.*

ECA argues that Plaintiffs merely present common questions, and not common answers capable of classwide resolution. Specifically, ECA argues that "the royalty provisions of the purported class members' leases differ in ways that are critical to the marketing and transportation claims" because they allow for the deduction of marketing and transportation costs associated with the sale of gas, regardless of who incurred them. ECA argues that the class

members with this provision cannot claim a breach of contract against it. Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 10. As for the interstate transportation costs, ECA argues that a majority of the costs at issue "were not incurred until ECA contracted with [Columbia Gas] in 2011 for firm transportation from delivery points on the A.C. Nielsen gathering line in Greene County, Pennsylvania. [Therefore, t]he majority of interstate transportation costs . . . were shared only with those Greene County lessors whose wells connect to the A.C. Nielsen system." *Id.* at 10-11. ECA also argues that not all of the putative class members have a claim for gas used off of the premises as compression fuel because some of the gas from the wells is not subject to compression and do not share in that cost. *Id.* at 11. Moreover, because the lease language differs in some leases allowing free use "of the lease premises" and "on the leased premises" this creates differing legal obligations. *Id.*

To prove commonality under Rule 23, "the plaintiff . . . [must] demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S.Ct. at 2551. The injury alleged "must be of such a nature that it is capable of classwide 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." *Id.* "What matters to class certification . . . is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citations and internal quotation marks omitted) (emphasis in original). A plaintiff does not meet the commonality requirement by merely alleging "systemic violations of the law." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). Rather, the plaintiff must prove "a discrete legal or factual question common to the class . . . exist[s]." *Id.*

In a case similar to the one at bar, after applying the *Wal-Mart* analysis, the court found that common answers did not exist, and denied class certification finding that commonality was not present. *Foster v. Apache Corp*., 285 F.R.D. 632 (W.D.Okla. 2012). In *Foster*, a royalty owner for a gas well alleged that she was underpaid for her royalty interest and filed a putative class action against the oil and gas production company for, *inter alia*, breach of contract.[7] *Id*. at 636. The court found that a "lessee's obligations to the mineral owner are determined largely by the terms of the oil and gas lease. . . . [Thus,] in determining the nature and extent of the obligation to pay the royalty, the terms of the particular lease must be examined. *Id*. at 641. Further, because the defendant had over ten thousand leases applicable to the interests of the proposed class, with differing royalty clauses, "the leases create what are, in at least some instances, varying or arguably varying royalty obligations. As a result, [defendant's] common practice of paying all royalties in a common fashion may violate some leases but not others." *Id*. at 642. *See also Morrison v. Anadarko Petroleum Corp*., 280 F.R.D. 621, 625 (W.D.Okla. 2012) ("The dissimilarities amongst the putative class members' oil and gas leases impedes the generation of common answers. In other words, the central issue of whether [defendant] underpaid royalties cannot be resolved 'in one stroke' because the varying terms regarding royalty valuations amongst plaintiff's and putative class members' leases will generate different answers based upon the particular lease.").

The same reasoning applies here. Plaintiffs admit that two of the nine remaining defendants do not have viable claims under the first two sub classes because their leases expressly allow the deduction of marketing fees and interstate transportation costs. Proof that

[7] Plaintiff specifically alleged that the gas production company had been systematically underpaying royalty on gas production because under Oklahoma law, the gas was not marketable as a matter of law until the residue gas is fungible and can be transmitted through an interstate pipeline, and the gas production company should bear all costs necessary to place gas in that condition without deduction from the royalty share unless a royalty-interest owner's lease specifically stated which deductions are to be shared by the royalty interest. *Foster*, 285 F.R.D. at 639.

ECA breached the lease provisions would not prove that it breached each contract of the entire class or subclass because each lease has different provisions that impose differing or arguably differing obligations. Therefore, it is possible that a disposition of one of the breach of contract claims would not adjudicate all of the members of the class, because the lease provisions impose differing obligations. Additionally, the differing royalty clauses would require an individualized inquiry into each contract to determine what duties and obligations the lease creates. Because ECA claims that not all of the gas produced from the wells in Pennsylvania enters the interstate system, some putative class members have not been assessed interstate transportation charges. The Court would have to conduct an individualized analysis as to each well outside of the A.C. Nielson gathering line to determine whether the gas was transported to an interstate pipeline. Plaintiffs have not provided any evidence as to how this could be shown by common proof. As for the fuel used off of the premises, defendant alleges that some putative class members have wells whose gas is not compressed. The Court would have to make an individual inquiry into each of the putative class members to determine whether the gas was compressed, and if so, whether it was accounted for in the distribution of royalties. Plaintiffs have not made a threshold showing based on a preponderance of the evidence that the commonality factor has been satisfied. Plaintiffs also seek to invoke the discovery rule to include damages for underpayment of royalties for more than four years prior to the filing of the lawsuit. Because the Court finds that there are no issues common to the class, the issue of whether the discovery rule is proper for class treatment will not be discussed.

d. Typicality

In support of Plaintiffs' claim that typicality is satisfied, Plaintiffs summarily argue that "[t]he claims of the named plaintiff and the class are the same both in terms of the facts and law,

the named plaintiffs are not subject to unique defenses, and the interests and incentives of the named plaintiffs are sufficiently aligned with those of the class." Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 11. Plaintiffs offer no evidence to support its assertion.

ECA argues that because there are different lease provisions among the putative class, they do not share identity of claims among the class. It argues:

> Because the named Plaintiffs and the potential class members have different lease provisions that govern their breach of contract claims, they cannot all assert the same claims or allege entitlement to the same items of damages. Some of the named Plaintiffs and class members have leases that expressly permit ECA to deduct the marketing expenses and transportation costs that are the subject of two of the remaining claims.

Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 16. Although ECA argues that unique defenses exist, it fails to point out what those defenses are.

To determine whether typicality is satisfied, the Court must assess "whether 'the named plaintiff[s'] individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" *Johnston*, 265 F.3d at 184 (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985)). Typicality certifies that the putative class members' and class representatives' interests "are aligned 'so that the latter will work to benefit the entire class through the pursuit of [her] own goals.'" *Newton*, 259 F.3d at 183 (quoting *Barnes v. American Tobacco Co*., 161 F.3d 127, 141 (3d Cir. 1998)). Typicality is satisfied "when the named plaintiffs and the proposed class members 'challenge [ ] the same unlawful conduct . . . . Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Thomas v. SmithKline Beecham Corp*., 201 F.R.D. 386, 394 (E.D.Pa. 2001) (quoting *Baby Neal*

for and by Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)). Total "factual similarity is not required; just enough factual similarity so that maintaining the class action is reasonably economical and the interests of other class members will be fairly and adequately protected in their absence." *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 598 (3d Cir. 2009). A court uses the following analysis to determine whether the named plaintiffs are markedly different from the class as a whole:

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

Marcus, 687 F.3d at 598 (internal quotations and citations omitted).

The named Plaintiffs are not typical of the class because their litigation does not advance the interests of the class as a whole. As for the interstate transportation costs and marketing fees, the leases of two of the Plaintiffs differ from the rest of the class because it allows for these deductions. Therefore, they do not have the same claim as the rest of the class. Moreover, ECA has a defense against these putative class members that no breach occurred. As for the fuel used for compression, some of the putative class members' gas is not compressed, and would not have a claim for a royalty. These putative members are not typical of the class, and ECA would have a unique defense to these plaintiffs. Plaintiffs offer no evidence in support of their claim therefore they have not made a threshold showing that typicality is satisfied.

e. <u>Adequacy</u>

Plaintiffs contend that "the named plaintiffs' interests are aligned with the interests of the class because the claims of the named plaintiffs and the class members are the same. In proving

their own claims, the named plaintiffs necessarily will prove the claims of the class. Further there are no intra-class conflicts." Pls.' Br. in Supp. of Mot. for Class Cert. [ECF No. 107] at 12.

ECA challenges adequacy for the sole reason that Plaintiffs "fail to show that the class representatives possess the 'minimal degree of knowledge' necessary for adequate class representation." Def.'s Br. in Op. to Mot. for Class Cert. [ECF No. 121] at 17.

The adequacy factor ensures that the class representatives "fairly and adequately protect[s] the interests of the class." Fed. R. Civ. P. 23(a)(4). It "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Beck v. Maximus Inc*., 457 F.3d 291, 296 (3d Cir. 2006) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). This inquiry serves two purposes: (1) to test "the qualifications of the counsel to represent the class[;]" and (2) "to uncover conflicts of interest between named parties and the class they seek to represent." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 532 (3d Cir. 2004).

Here, the ability of Plaintiffs' counsel to adequately represent the class has not been challenged, therefore the Court will focus on the issue of whether the Plaintiffs are sufficiently competent to adequately protect the interests of the class.

"[T]he substantive competence of the named plaintiff is not part of the [adequacy] inquiry." *Smith v. Life Investors Ins. Co. of America*, 2009 WL 3756913, at *10 (W.D.Pa. Nov. 6, 2009).

> A class representative need only possess a minimal degree of knowledge to meet the adequacy standard. A proposed representative's lack of particularized knowledge concerning the dispute at issue does not render her inadequate given the fact that she has retained adequate counsel to represent her. . . . The standard for adequacy of the class representative is a low one, requiring only a minimal degree of knowledge. Furthermore, a class representative need not be intimately familiar with the legal

> theory behind his claims since he is represented by adequate counsel.

Id.

The Court finds that the putative class members are otherwise adequate representatives of the class. A class representative need not be intimately familiar with the legal theory behind his claims. Plaintiffs have been participating in the proceedings of the case, including answering interrogatories, being deposed, and attending and testifying at the class certification hearing. Although they might not know the complex legal intricacies of their case, Plaintiffs have demonstrated the minimal degree of knowledge necessary to meet the adequacy requirement.

f. Common Issues Predominate

Because there are no common answers apt to drive the resolution of this litigation, the predominance and superiority factors of Rule 23(b)(3) need not be discussed. "It logically follows that if Plaintiffs have failed to satisfy the criteria for showing commonality, they cannot satisfy the more strenuous demands of the predominance analysis." *Lewis v. Ford Motor Co*., 263 F.R.D. 252, 268 (W.D.Pa. 2009). "[I]f proof of the essential elements of the cause of action required individual treatment, then there cannot be a predominance of 'questions of law and fact common to the members of the class.'" *In re Linderboard Antitrust Litig*., 305 F.3d 145, 156 (3d Cir. 2002) *cert. denied sub nom Gaylord Container Corp. v. Garrett Paper, Inc*., 538 U.S. 977 (2003). *See also Hayes*, 2013 WL 3957757, at *8 (not applying Rule 23(b) where Rule 23(a) was not met). Therefore, the Court finds that Rule 23(b)(3)'s requirements has not been met because the less arduous demands of commonalty has not been satisfied.

V. CONCLUSION

As discussed at length above, Plaintiffs have failed to prove that the class is numerous, that the claims against ECA are common to the class, and that the Plaintiffs are typical of the

class. It is therefore respectfully recommended that Plaintiffs' Motion for Class Certification be denied.

RECOMMENDATION

For the aforementioned reasons, it is respectfully recommended that Plaintiffs' Motion for Class Certification [ECF No. 106] be denied.

Parties who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date. Failure to do so will waive the right to appeal. Any party opposing written objections shall have fourteen (14) days from the date of service of objections to respond thereto.

Dated: August 5, 2013

Respectfully submitted,

/s Robert C. Mitchell
Robert C. Mitchell
United States Magistrate Judge