

**IN THE COURT UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION**

DAVID F. POLLOCK, as Executor of the
Estate of Margaret F. Pollack;
JOHN T. DIBIASE, JR., STUART W.
WHIPKEY; JOHN S. FRAYTE; PATRICIA L.
CHRISTOHER; LOUIS A. VECCHIO and
BESSIE P. VECCHIO; BARBARA A.
MORRIS; GENE M. VIRGILI and ERIN R.
VIRGILI; and LLOYD R. SHAFFEER, III;
on Behalf of Themselves and All Others
Similarly Situated,

Plaintiffs,

v.

ENERGY CORPORATION OF AMERICA
501 56th Street South East
Charleston, WV 25304

Defendant.

Case No.: 2:10-cv-01553-JFC-RCM

Judge: Joy Flowers Conti

**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

Electronically Filed

Plaintiffs, David F. Pollack, John T. Dibiase, Jr., John S. Frayte, Stuart W. Whipkey, Patricia L. Christopher, Louis A. Vecchio, Bessie P. Vecchio, Barbara A. Morris, Gene M. Virgili, Erin R. Virgili, and Lloyd R. Shaffer, III, on their own behalf and on behalf of others similarly situated, sue Energy Corporation of America for underpayments of oil and gas royalties, and state for their Complaint as follows:

THE PARTIES

1. Plaintiff David F. Pollock is a resident of the Commonwealth of Pennsylvania with a law practice at 54 South Washington Street, Waynesburg, Pennsylvania 15370. On April 25, 2002, Mr. Pollack's parents, Ewing B. Pollock and Margaret F. Pollock, entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which they leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania. Ewing B. Pollock, now deceased, left his

interest in said lease to his wife, Margaret F. Pollock. Margaret F. Pollock, now deceased, left her interest in said lease to her children, including plaintiff David F. Pollock, who is Executor of his mother's estate.

2. Plaintiff John T. Dibiase, Jr., is a resident of the Commonwealth of Pennsylvania and resides at 1747 East Roy Furman Highway, Carmichaels, Pennsylvania 15320. On September 5, 2002, Mr. Dibiase (and his wife, who is now deceased) entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which they leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

3. Plaintiff Stuart W. Whipkey is a resident of the Commonwealth of Pennsylvania and resides at 688 North 88 Road, Carmichaels, Pennsylvania 15320. On March 3, 2005, Mr. Whipkey entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which he leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

4. Plaintiff John S. Frayte, Jr., is a resident of the Commonwealth of Pennsylvania and resides at P.O. Box 14, Richeyville, Pennsylvania 15358. On June 10, 2005, Mr. Frayte entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which he leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

5. Plaintiff Patricia L. Christopher is a resident of the Commonwealth of Pennsylvania and resides at 382 Tin Can Hollow Road, Rices Landing, Pennsylvania 15357. On August 26, 2005, Ms. Christopher entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which she

leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

6. Plaintiffs Louis A. Vecchio and Bessie P. Vecchio, husband and wife, are residents of the Commonwealth of Pennsylvania and reside at 105 Holbert Stretch, Dilliner, Pennsylvania 15327. On March 13, 2006, Mr. and Mrs. Vecchio entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which they leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

7. Plaintiff Barbara A. Morris is a resident of the Commonwealth of Pennsylvania and resides at 401 Dutch Run Road, Waynesburg, Pennsylvania 15370. On April 19, 2006, Mrs. Morris and her husband, James M. Morris, entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which they leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania. Mr. Morris, now deceased, left his interest in the lease to Mrs. Morris, who sold the property and its mineral rights on June 5, 2007.

8. Plaintiffs Gene M. Virgili and Erin R. Virgili, husband and wife, are residents of the Commonwealth of Pennsylvania and reside at 122 Blakers Ridge Road, Waynesburg, Pennsylvania 15370. On April 20, 2007, Mr. and Mrs. Virgili entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which they leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

9. Plaintiff Lloyd R. Shaffer, III, is a resident of the Commonwealth of Pennsylvania and resides at 1271 South Branch Muddy Creek Road, Carmichaels, Pennsylvania 15320. On

March 12, 2009, Mr. Shaffer entered into an oil and gas lease with Eastern American Energy Corporation (now known as Energy Corporation of America) pursuant to which he leased Eastern American Energy Corporation oil and gas rights to real property in Greene County, Pennsylvania.

10. Defendant Energy Corporation of America (“ECA”) is a corporation organized under the laws of the State of West Virginia, with its principal place of business at 4643 South Ulster Street, Suite 1100, Denver, Colorado 80237. ECA is engaged in the production of oil and gas in multiple states, including Pennsylvania. Until December 17, 2009, ECA’s operations in the Appalachian Basin were conducted by Eastern American Energy Corporation, a wholly owned subsidiary organized under the laws of West Virginia. On December 17, 2009, Eastern American Energy Corporation was merged into ECA, with ECA as the surviving entity.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action under the provisions of 28 U.S.C. § 1332(d)(2).

12. The ten named Plaintiffs are residents of the Commonwealth of Pennsylvania and reside at the addresses set forth in paragraphs 1-9 of this Complaint.

13. At least one member of the Plaintiff Class is a citizen of a different state than the Defendant within the meaning of 28 U.S.C. § 1332(d)(2)(A).

14. The claims asserted by the Plaintiff Class, aggregated as required by 28 U.S.C. § 1332(d), exceed the sum of \$5,000,000 within the meaning of 28 U.S.C. § 1332(d)(2).

15. The Plaintiff Class exceeds 100 in number within the meaning of 28 U.S.C. § 1332(d)(5)(B).

16. Venue is proper because the named Plaintiffs reside in this Judicial District and many of the oil and gas leases subject to this action lease gas rights to real property in this Judicial District.

FACTS COMMON TO ALL COUNTS

17. Natural gas producers produce natural gas from wells and then transport the gas through “gathering” lines to the interstate pipeline system. Producers sell the gas either at the point where the gathering line meets the interstate pipeline system or at any one of thousands of receipt and delivery points on the interstate pipeline system.

18. If a gas producer does not own the land from which it wishes to produce gas, it enters into an oil and gas lease with the owner of the gas rights, and then pays the owner a royalty based on the amount of gas produced from the leased property each month.

19. Natural gas royalties are calculated by multiplying the volumes of gas produced each month (in units of a thousand cubic feet or “mcf”) times either the sale price (in a proceeds lease) or the market price (in a market price lease) and dividing that amount by the royalty interest.

20. Effective September 20, 1979, Pennsylvania enacted the Guaranteed Minimum Royalty Act (“GMRA”), 58 P.S. § 33. The GMRA provides that an oil and gas lease must provide the lessor with “at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.”

21. Until the 2010 Pennsylvania Supreme Court decision in *Kilmer v. Elexco Land Services*, it was unsettled whether the GMRA required a royalty of one-eighth the gross value of the gas or 1/8 of the net.

22. The court in *Kilmer* construed “royalty” to mean one-eighth of the value of the gas “at the wellhead,” and held that a lease providing for a one-eighth royalty may authorize a

gas producer to deduct “post production costs” using the “net-back method,” as those terms were defined by the court, when calculating royalties.

23. The court in *Kilmer* defined “post production costs” as “expenditures from when the gas exits the ground until it is sold” and the “net-back method” as “a method for calculating market value of gas at the lease” whereby the “costs of transportation, processing, or manufacturing are deducted from the proceeds received for the gas....”

24. *Kilmer* does not preclude a lessor and lessee from agreeing to share costs above and beyond expenditures for the costs “transportation, processing, or manufacturing,” and the list of deductible costs varies greatly among the lease forms used by gas producers in Pennsylvania. Where, however, a lease does not specify which costs will be deducted, by default the definitions of “post production costs” and “net-back method” used in *Kilmer* control.

25. Under *Kilmer*, a landowner entering into an oil and gas lease is obligated to share either the costs expressly stated and agreed upon in the lease or, if none are stated, the costs as defined in the Pennsylvania Supreme Court’s definitions of “post-production costs” and “net-back method.” Any other rule would allow a gas producer to arbitrarily deduct whatever costs it wishes to deduct without the knowledge or consent of the lessor or the lessor’s constructive notice based on the Pennsylvania Supreme Court’s definitions.

26. *Kilmer* does not permit a landowner to be assessed costs beyond those in the legal definitions of “post production costs” and “net-back method” unless those costs are itemized in the lease.

27. Some oil and gas leases permit a lessee to deduct (i) additional categories of production costs beyond those in the definitions in *Kilmer* (such as “marketing costs”) and (ii) the volumes of gas that the lessee uses or loses between the wellhead and the point of sale. The

leases subject to this action do not authorize ECA do either. Thus, the only permissible deductions permitted by the leases subject to this action are ECA's "expenditures" for the "costs" of "transportation, processing, or manufacturing."

28. The most expansively written oil and gas lease used in Pennsylvania with respect to deductible costs provides:

The Lessee ... shall pay monthly to Lessor for all gas produced and sold from the leases premises, a royalty equal to one-eighth (1/8) of the Amount Realized (as defined below) by Lessee from the first sale of such gas. The Lessor will be paid a royalty based on the volumes of oil and gas sold by Lessee and shall not be entitled to royalty payments for any volumes not sold, regardless if produced or measured at any point other than the point of sale. The "Amount Realized" is the the amount received by Lessee at the first point of sale from the sale of gas minus any and all reasonable and actual post production costs and expenses incurred by Lessee and/or its affiliates between the wellhead and the point of sale, including but not limited to, costs associated with the following: (1) gathering and/or transporting the gas from the well to the point of sale (including line loss); compressing (including the cost of electricity, gas or other fuel); (3) desulphurization and purification; (4) treating; (5) dehydrating; (6) extracting; (7) processing; (8) storage; (9) marketing; (10) sweetening; and removal of liquid or gaseous substances or impurities from the gas. Such expenses and costs shall include all costs and fees charged to or incurred by Lessee and shall include, but may not be limited to, charges for operation and maintenance (including labor and materials, taxes (severance, ad valorem, and other production related taxes), depreciation of pipe lines or equipment based on accepted accounting practices, interest, insurance (workmen's compensation, unemployment compensation, group and annuity) and overhead charges. Lessee shall have the right to allocate post production costs and expenses in its reasonable discretion.

29. *Kilmer* cannot be read to allow a gas producer to arbitrarily deduct an expansive list of costs from the landowner's 1/8 royalty, such as the list in the preceding paragraph of this complaint, unless (i) the lease so states, (ii) the costs listed are appropriately subject to sharing, (iii) the amounts charged the lessee are actual and reasonable and (iv) the landowner agrees to the list of deductions by executing the lease. Absent an itemized list of deductible costs in a

lease, the definitions of “post production costs” and “net-back method” adopted by the Pennsylvania Supreme Court in *Kilmer* control, and costs such as “overhead,” “labor,” depreciation of pipe lines or equipment,” “workman’s compensation insurance,” or gas lost through leaking pipes are not deductible.

30. Oil and gas was produced under each of the leases subject to this action.

31. The leases subject to this action required ECA to pay a royalty on the oil and gas produced under each lease.

32. ECA breached the leases subject to this action each time it made a royalty payment by failing to pay the correct royalties on the oil and the gas by (i) taking impermissible volumetric deductions in calculating the gas royalty; (ii) using the incorrect price of gas when calculating the gas royalty; (iii) taking excessive and unauthorized expense deductions when calculating the gas royalty; and (iv) paying no oil royalty or underpaying the oil royalty.

Impermissible Volumetric Deductions In Calculating Gas Royalty

33. ECA breached the leases subject to this action each time it made a royalty payment by not paying a royalty on gas that it used or lost between the wellhead and the point of sale.

34. During 2010, ECA added a provision to its new leases that states that it will pay no royalty on gas “that is lost or becomes unaccounted for during the production or transportation of such substance to market.” ECA breached all of the leases subject to this action, except those containing this provision, by failing to pay a royalty on the gas that it lost or which became unaccounted for during the production or transportation of the gas to market.

35. The leases subject to this action provide that “Lessee shall have the right to use, free of cost, oil, gas and water produced on said land for its operations on the premises.” “Free of

cost” does not mean “free of royalty,” it means that ECA does not have to the gas it uses on the premises. Even if “free of cost” meant “free of royalty,” the provision only applies to gas used by ECA “on the premises,” not to gas that ECA uses “off the premises.” ECA breached the leases subject to this action by using leasehold gas both on and off the premises without paying a royalty on such gas.

36. Even if the leases subject to this action were construed to allow ECA to take volumetric deductions for gas used or lost, ECA breached the leases by deducting “allocated” line loss rather than “actual” line loss. Unlike many leases, the leases subject to this complaint do not provide that ECA may “Lessee shall have the right to allocate post production costs and expenses in its reasonable discretion.”

37. A gas well’s “actual” line loss is the loss occurring before the gas is co-mingled with the gas of other wells. After a well’s gas is co-mingled with the gas of other wells, there is no accurate means of allocating a share of the aggregate loss to each well.

38. ECA allocates to each well that well’s estimated share of the aggregate line loss of multiple wells based on each well’s share of the aggregate wellhead production. This allocation method does not yield each well’s actual line loss because (i) ECA’s gathering lines do not leak identical amounts of gas and (ii) the amount of gas consumed for compression and for other operating purposes varies based on the distance the gas travels as well as the pre-processed composition of each well’s gas. ECA breached the leases subject to this action by deducting allocated line loss to each well when calculating the gas royalties.

Incorrect Price of Gas in Calculating Gas Royalty

39. The leases subject to this action provide that the royalty on gas shall be “one-eighth of the net proceeds received by Lessee from the sale” of the gas. Upon information and

belief, ECA breached the leases subject to this action by calculating the royalties using a price that was less than the price paid to ECA.

Deduction of Excessive and Unauthorized Costs in Calculating Gas Royalty

40. Under *Kilmer v. Elexco Land Services*, if a lease does not itemize the costs that can be deducted in calculating the royalty, the only deductions that can be taken are the deductions in the definitions of “post production costs” and “net-back method” in *Kilmer*, that is, “expenditures” for the “costs” of “transportation, processing, or manufacturing.”

41. Upon information and belief, ECA breached the leases subject to this action by taking dollar deductions from the gas royalties that exceeded the actual or reasonable costs of “transportation, processing, or manufacturing.”

42. Some oil and gas leases used by gas producers in Pennsylvania charge a fixed price per mcf for post production services and, under those leases, the fixed price is “presumed to be actually occurred and reasonable.” There is no presumption that the amounts deducted for post production costs under the leases subject to this action are either “actually incurred” or “reasonable.”

43. Some leases used in the oil and gas industry provide that the producer may contract with affiliates for post production services. ECA contracted with affiliates for post production services. Upon information and belief, these contracts were not negotiated at arm’s length and resulted in excessive dollar deductions from the gas royalties.

Underpayment of Oil Royalties

44. Every lease subject to this action requires ECA to pay a royalty on oil as well as natural gas. ECA breached the leases subject to this action each time it made a royalty payment by paying no royalty on oil.

CLASS ACTION ALLEGATIONS

45. The named Plaintiffs restate and incorporate by reference the allegations contained in paragraphs 1-44 of this Complaint.

46. The named Plaintiffs bring this action on behalf of themselves and the following Plaintiff Class:

Every person, other than governmental entities, who is, or was at any time, a royalty owner pursuant to an oil and gas lease with Energy Corporation of America or Eastern American Energy Corporation, or with any predecessor in interest of either of these two entities, that leases oil and gas rights to real property in the Commonwealth of Pennsylvania.

47. The members of the Plaintiff Class exceed 100 in number, making joinder of all class members impracticable. The exact number and identities of the members of the Plaintiff Class are currently unknown to the named Plaintiffs, but are known to ECA as reflected in its business records.

48. The claims set forth in this Complaint are common to each member of the Plaintiff Class because (i) each class member is or was entitled to the payment of natural gas royalties from ECA, and (ii) ECA underpaid the royalties due each class member.

49. The named Plaintiffs are adequate representatives of the Plaintiff Class because they are members of the class and the claims they assert in this Complaint are typical of the claims of the members of the class. The claims of the named Plaintiffs are not subject to any unique defenses, nor does any interest of the named Plaintiffs conflict with the interests of any other class member. The named Plaintiffs will fairly and adequately protect the interests of the class.

50. The claims set forth herein are proper for certification as a class action under the provisions of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.

51. The questions of law and fact common to the class predominate over any issues affecting individual class members because liability is subject to class wide proof. Although each class member's damages will have to be calculated individually, the calculation is one of simple mathematics using ECA's books and records and, under settled law, variances in the damages of individual class members do not preclude class certification.

52. Questions regarding the application of the statute of limitations do not preclude class certification where, as here, there are other common issues. In any event, this Court can hold as a matter of law and on a class wide basis that the claims of all class members are timely back to the first royalty payment under each lease by operation of the discovery rule and the fraudulent concealment doctrine.

53. The named Plaintiffs and their counsel are aware of no other action in any court that asserts the claims asserted in this action.

54. This class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein because there are hundreds of members of the proposed class and repeated individual discovery and litigation of the common issues would be a needless waste of judicial resources. The interest of class members in individually controlling the prosecution of separate actions does not outweigh the benefits of a class action as to those issues. It is desirable to concentrate the litigation of these claims in one forum and the difficulties in management of this case as a class action are outweighed by the benefits a class action has with respect to disposing of common issues of law and fact among such a large number of litigants.

55. The prosecution of this civil action by all class members individually in separate actions would create a risk of inconsistent or varying adjudications with respect to individual

class members that would establish incompatible standards of conduct for ECA, could be dispositive of interests of other class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests. Further, ECA has acted or refused to act on grounds generally applicable to the class.

56. A class action is superior to all other methods for the fair and efficient adjudication of this controversy. The class is readily definable, and prosecution as a class action will eliminate the possibility of repetitious litigation while also providing redress for claims that may be too small to support the expenses of individual, complex litigation. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine the rights of all class members with judicial economy.

COUNT I

BREACH OF CONTRACT

57. The named Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1-56 of this Complaint.

58. Oil and gas was produced by ECA under each of the leases subject to this action.

59. Each named Plaintiff and member of the Plaintiff Class is or was entitled to royalty payments pursuant to one or more oil and gas leases with ECA or its predecessors in interest.

60. ECA made periodic royalty payments to each named Plaintiff and member of the Plaintiff Class pursuant to one or more of the leases subject to this action

61. ECA breached all of the leases subject to this action, except for the leases referenced in paragraph 34 of this Complaint, by taking impermissible volumetric deductions when calculating the natural gas royalties.

62. The only post productions that can be deducted from the leases subject to this action are the post production costs in the Pennsylvania Supreme Court's definition of "post production costs" and "net-back method," that is "expenditures" for the 'costs of transportation, processing, or manufacturing.' Gas that a lessor uses, or causes to be lost or unaccounted for, is not an "expenditure" for a "cost."

63. An oil and gas lessor is obligated to share only in costs that are expressly stated in the lease or, if none are stated, the costs in the Pennsylvania Supreme Court's definitions of "post production costs" and "net-back method." Deductable costs are determined either by express agreement in the lease or by the constructive notice of the Pennsylvania Supreme Court's definitions of "post production costs" and "net-back method."

64. Neither the leases subject to this action (except those referenced in paragraph 34 of the Complaint) nor the Pennsylvania Supreme Court's definitions of "post production costs" and "net-back method" provide that no royalty shall be paid on gas that the lessee uses or causes to be lost due to leaks in the lessee's lines.

65. ECA breached all of the leases subject to this action, except for the leases referenced in paragraph 34 of this Complaint, by taking impermissible volumetric deductions when calculating the natural gas royalties.

66. Upon information and belief, ECA also breached the leases subject to this action by calculating the gas royalties using (i) a price that was less than the price required by the leases and (ii) taking dollar deductions from the gas royalty that exceeded the actual or reasonable charges of the post production costs.

67. ECA breached the leases subject to this action by paying no royalty on oil.

68. The breaches of the leases by ECA proximately caused damages to the named Plaintiffs and the members of the Plaintiff Class because, as a direct and proximate result of the breaches, the ECA paid the named Plaintiffs and the members of the Plaintiff Class oil and gas royalties that were less than the full royalties due them.

69. The named Plaintiffs did not discover the breaches of the leases by ECA until the autumn of 2010 because ECA concealed the breaches by issuing accounting statements on the royalty check stubs that contained misrepresentations of material facts and omitted material facts that would have alerted a reasonably diligent lessor of oil and gas rights that the royalty calculations were incorrect. Among other things, each monthly check stub misrepresented the amount of oil and gas produced by each well

70. The monthly accounting statements provided to each named Plaintiff and member of the Plaintiff Class contained misrepresentations of material facts and omissions of material facts, including misrepresentations and omissions regarding (i) the volumes subject to the royalty calculation; (ii) the price at which the gas was sold; (iii) the dollar deductions for post production services; (iv) the existence of a corporate relationship between ECA and the provider of some or all of the post production services; and (v) the royalty on oil.

71. Due to the misrepresentations and omissions in the royalty check stubs described in the preceding paragraph of this Complaint, the named Plaintiffs could not have discovered the breaches before the autumn of 2010 using the reasonable diligence of a reasonably diligent lessor of oil and gas rights. Due to the misrepresentations and omissions, the unnamed members of the Plaintiff Class likely still have not discovered the breaches, and could not have discovered the breaches using the reasonable diligence of a reasonably diligent lessor of oil and gas rights.

WHEREFORE, the named Plaintiffs and the members of the Plaintiff Class demand judgment in their favor and against ECA for breach of contract, compensatory damages, the costs of this action, pre-judgment interest, post-judgment interest, and any other relief deemed appropriate by this Court.

COUNT II
ACCOUNTING

1. The named Plaintiffs re-allege and incorporate by reference the allegations of paragraphs 1-62 of this Complaint.

2. The named Plaintiffs suspect that the royalty payments on all leases subject to this class action were incorrect from the first royalty payment to the present.

3. Under Pa.R.Civ.P. 1021 (a), a plaintiff may seek an accounting as part of his remedy at law. Although generally a request for a court ordered accounting must be incident to a viable assumpsit claim, the Supreme Court of Pennsylvania stated in 2010 in *Kilmer v. Elexco Land Services* that a royalty owner on an oil and gas lease may request a court ordered accounting if the royalty owner “suspects” that the royalty payments are incorrect. Under *Kilmer*, therefore, no viable assumpsit claim is required for a court ordered accounting because a royalty owner can “suspect” that payments are incorrect without yet having a viable assumpsit claim. In any event, the plaintiffs have plead a proper assumpsit claim for breach of contract.

4. Any pre-suit request for an accounting would be futile in this case. In their original complaint in this action, the plaintiffs requested an accounting. In its preliminary objections to the original complaint, CNX chose to object to the request on the ground that a royalty owner is entitled to an accounting only if the royalty owner files a viable assumpsit claim. Given CNX’s demand for a viable assumpsit claim for there to be an accounting, any pre-suit request for an accounting by the plaintiffs would be futile.

5. The named Plaintiffs request a court ordered accounting of each monthly royalty payment to each named Plaintiff and member of the Plaintiff Class that includes the following information, on a well-by-well basis, together with copies of all source documents or electronic databases from which the information was derived:

a. The amount of the natural gas royalty paid;

b. The volumes of natural gas produced as measured by the production meter on the leased property;

c. The volumes of natural gas deducted from the volumes in item b. for purposes of calculating each month's royalty payment;

d. The price per mcf paid to the lessor for each month's production of natural gas from each well, along with (i) the name of the purchaser; (ii) a copy of the purchase contract; and (iii) disclosure of whether the immediate purchaser or any subsequent purchaser is related to or affiliated with the Defendant or has any overlapping ownership with the Defendant.

e. The amount of any monetary deductions taken from each month's natural gas royalty payment and, as to those deductions, (i) a breakdown showing the amount deducted for each category of post production costs; (ii) the entity paid by the lessor for each category of post production costs; (iii) the date of each payment; (iv) the amount of each payment; (v) a copy of the contract requiring the payment; (vi) a copy of the lessor's check making the payment; and (vii) disclosure whether the entity providing the post service is related to or affiliated with the Defendant or has any overlapping ownership interest with the Defendant.

f. With respect to oil production and oil royalties (i) the amount of oil produced by each well in each month; (ii) the price paid to the Defendant in the sale of such oil; (iii) the name and address of the purchaser; (iv) a copy of the purchase contract; (iv) whether the

immediate purchaser or any subsequent purchaser is related to or affiliated with the Defendant or has any overlapping ownership interest with the Defendant; (v) the amount of any monetary deductions taken from each month's oil royalty for each well; (vi) a breakdown showing the amount deducted for each category of post production costs; (vii) the entity paid by the lessor for each category of post production costs; (viii) the date of each payment; (ix) the amount of each payment; (x) a copy of the contract requiring the payment; (xi) a copy of the lessor's check making the payment; and (xii) disclosure whether the entity providing the post production service is related to or affiliated with the defendant or has any overlapping ownership interest with the Defendant.

WHEREFORE, the named Plaintiffs demand an accounting as set forth herein.

Respectfully submitted,

**CARSELLI BEACHER McTIERNAN
& CONBOY LLC**

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