IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Clarksburg

THE KAY COMPANY, LLC;
H. DOTSON CATHER, Trustee
of Diana Goff Cather Trusts; and
JAMES E. HAMRIC III, and all other
persons and entities similarly situated,

Plaintiffs,

v.

Civil Action No. 1:13-CV-151
Judge Bailey

EQT PRODUCTION COMPANY, a
Pennsylvania Corporation; and **EQT CORPORATION**, a Pennsylvania Corporation,

Defendants.

ORDER RESOLVING MOTIONS

Pending before this Court are the following motions:

1. Plaintiffs' Motion to Certify Class Action [Doc. 299];

2. Defendants' Joint Motion for Summary Judgment [Doc. 327];

3. Plaintiffs' Motion for Summary Judgment (Re: Alter Ego) [Doc. 329]; and

4. Plaintiffs' Motion for Summary Judgment on Gas Sales to Affiliates and/or Alter Egos and Related Issues [Doc. 331].

All the above motions have been fully briefed and are ripe for decision.

Plaintiffs are the owners and lessors of natural gas interests subject to leases held by EQT, as lessee.[1] Plaintiffs bring this action, on behalf of themselves and others similarly

[1]Plaintiffs contend that all defendants are responsible for the conduct complained of herein, as explained below. All defendants: EQT Production Company, EQT

situated against defendants in this case, to recover royalties defendants owe them for natural gas extracted and produced from their property or leasehold.

This action is brought for damages, including punitive damages, which occurred after December 7, 2008[2], pursuant to plaintiffs' causes of action in this case based upon breach of contract, constructive and actual fraud, including fraudulent concealment, and intentional breach of contract. Plaintiffs also claim that EQT Corporation is the alter ego of the other defendants, which are wholly owned subsidiaries of EQT Corporation, except for Midstream. EQT Corporation is not the sole owner of Midstream, but it is controlled by EQT. Plaintiffs contend that the defendants were acting in concert and in combination with one another with respect to shorting plaintiffs' royalties. Plaintiffs seek to impose liability on each of the defendants based upon their own acts, conduct and omissions and the conduct of each of the other defendants as a result of (a) agency, (b) alter ego, (c) joint venture and (d) contract among themselves.

Plaintiffs seek the Court's approval to prosecute the claims for monetary relief on behalf of the following class:

> All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was

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Corporation, EQT Energy, LLC, EQT Investments Holdings, LLC, EQT Gathering, LLC and EQT Midstream Partners, LP are referred to collectively as EQT defendants. EQT Production claims to be the sub-lessee of said leases.

[2]A previous class action preceded this civil action which resolved by a class action settlement, effective on December 8, 2008. All participants of the previous settlement entered into releases, resolving said claims which relieved EQT from any further liability prior to December 8, 2008, but retained plaintiffs' claims for any liability and damages from December 8, 2008, forward.

produced within the boundaries of the State of West Virginia from their natural gas or mineral estates during the period beginning December 8, 2008, and extending to the present (during any time within their leasehold period.) (See exception below.)

Plaintiffs seek to prosecute the classes for relief on behalf of two subclasses:

(A) All EQT natural gas lessors with flat rate leases converted by operation of W. Va. Code, § 22-6-8 and that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning December 8, 2008, and extending to the present (during any time within their leasehold period.).

(B) All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning December 8, 2008, and extending to the present (during any time within their leasehold period,) except for those lessors holding flat rate leases converted according to W. Va. Code, § 22-6-8.

There would be excepted from the class the following:

(1) Flat rate leases which have not been converted unless by operation of W. Va. Code § 22-6-8, the West Virginia Supreme Court finds that they are to be converted or grants relief in the appeal now pending before the West Virginia Supreme Court.

(2) Excluded from the classes are officers and agents of any defendant or subsidiary of any defendant named in this lawsuit or any lawsuit involving the same or similar claims as those alleged in this lawsuit; any attorney for any such defendant; any attorney for any plaintiff in this lawsuit or in any lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant; and any judicial officer who presides over this lawsuit or over any other lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant.

The Plaintiffs

a. The Kay Company, L.L.C. is a small West Virginia land holding company which leases its coal, oil and gas rights to producers, including EQT defendants. The relevant lease language of Kay's lease is:

> Lessee agrees to pay Lessor for each gas well from the time and while the gas is marketed, at the rate of one-eighth (1/8) of the current wholesale market value at the well of the gas, gasoline and other products thereof, based on the usual price paid therefor in the general locality of said leased premises, payable each three months, all pursuant to subsection (a) of this article, and determined at the point or points provided in subsection (b) of this article. In no event shall the current wholesale market value of such gas at the well for the purposes hereof be less than 18¢ per mcf.

b. William Cather, Trustee of Diana Goff Cather Trusts, is a trust which holds family natural gas interests, a part of which is presently leased to EQT defendants. The relevant leases and lease language is as follows:

(i) …Second—to pay as royalty for all gas produced and marketed from each well when and as the gas is marketed, one-eighth (1/8) of the wholesale market value thereof at the well based on the usual price paid therefor in the general locality of the leased premises, payable on or before the 25th day of the month following that in which the gas was delivered into the marketing pipeline. Said payments shall constitute the entire consideration to Lessors for such gas including the gasoline and other content thereof except as hereinafter provided.

(ii) ...and 2d-To pay SEVENTY-FIVE and 00/100 ($75.00) Dollars each three months in advance for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises as a gas well, said payment to be made on each well from date utilized, and to be paid each three months thereafter while the gas from said well is so marketed and used.

(iii) To pay quarterly one-eighth (1/8) of the proceeds received for the gas from each and every gas well drilled on said premises, the production from which is marketed and used off the premises, while the gas from said well is so marketed and used.

c. James E. Hamric, III, owns certain natural gas rights and leases same to EQT defendants. The relevant lease language is as follows:

(i) The Lessee shall pay Lessor as royalty one-eighth (1/8) of the proceeds from the sale of gas as such at the mouth of the well where gas, condensate, distillate or other gaseous substance is found.

The plaintiffs' leases include flat rate leases and leases without mention of deductions, yet plaintiffs allege that the defendants take deductions, including taxes and do not pay plaintiffs for liquids.

The Defendants

a. EQT Corporation is a publicly traded corporation which, among other endeavors, directly or indirectly enters into contractual arrangements to receive monetary benefits from West Virginia lessors through the taking of deductions through, and by the use of subsidiaries, joint venturers and partners, it leases and acquires leases by assignment or otherwise of certain natural gas rights within the boundaries of the State of West Virginia and elsewhere, and it produces, gathers, transports and represents that it sells the same at "points of sale" on interstate natural gas pipelines at published index prices.

All other EQT defendants are wholly owned subsidiaries of EQT Corporation. As set out below, EQT Corporation operates its natural gas business through various subsidiaries, including the other EQT defendants.

All defendants and other subsidiaries also work together by the use of "groups" which are made up of personnel sometimes including EQT Corporation employees and various of the subsidiaries. EQT Corporation and each of the defendants, except perhaps EQT Investment Holdings, LLC, have charges and expenses which are included in the bucket of service charges which are deducted from plaintiffs' royalties. Therefore, the parent and all defendant subsidiaries profit from the deductions taken from plaintiffs and the class by getting together and deciding how much goes into the basket and how much each gets from it.

b. EQT Production is the designated lessee of plaintiffs and the putative class. It owns the leases, drills the wells and claims to sell the gas to EQT Energy, another subsidiary. EQT Energy purchases all of Production's natural gas and sells it at "first liquid trading point" which is defined as at the interstate pipeline, such as the TCO at "index price" or other index prices, which is the published trading price for that day.

c. EQT Energy, however, does not pay Production the price it receives at the actual point of sale. Instead, Energy deducts the price that a different wholly-owned subsidiary, EQT Gathering, charges for taking the gas from the wellhead to the point of sale. Energy then claims that it buys the gas at the wellhead and Production claims it sells the gas at the wellhead. Energy, however, does not pay plaintiffs for the volume at the wellhead.

d. EQT Midstream Partners is part of the gathering group. It is a publicly traded, limited partnership which, along with EQT Gathering, gathers the gas from West Virginia wells and delivers it to the "point of sale" and charges plaintiffs part of gathering charges. EQT Corporation is the principal owner and controls the board of directors of Midstream. [Doc. 299-2, Deposition of Jimmi Sue Smith, pp. 19-22].

e. EQT Investment Holdings, LLC, among other duties, handles loans among and between EQT Corporation and subsidiaries and assists in managing and financing the subsidiaries for and on behalf of EQT Corporation. While it may have no direct involvement with deductions, it does provide bases for the joint venture and alter ego of the subsidiaries, to the extent it uses Corporation's money to run subsidiaries.

<u>Case Law</u>

In West Virginia, unlike some other states, the evaluation and analysis of the duties and responsibilities of lessees with respect to paying royalties to their lessors necessarily requires reference to at least three cases decided by the West Virginia Supreme Court of

Appeals. In ***Estate of Tawney v. Columbia Natural Resources, L.L.C.***, 219 W. Va. 274, 633 S.E.2d 22 (2006), the Supreme Court, relying, in part, on the case of ***Wellman v. Energy Resources, Inc.***, 210 W. Va. 200, 557 S.E.2d 254 (2001) answered the certified question as follows:

> In light of the fact that West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise, is lease language that provides that the lessor's 1/8 royalty is to be calculated "at the well," "at the wellhead" or similar language, or that the royalty is "an amount equal to 1/8 of the price, net all costs beyond the "wellhead," or "less all taxes, assessments, and adjustments" sufficient to indicate that the lessee may deduct post-production expenses from the lessor's 1/8 royalty, presuming that such expenses are reasonable and actually incurred?
>
> Answer: No
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> Syllabus Point 1 of ***Tawney*** provides that:
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> "If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale." Syllabus Point 4, ***Wellman v. Energy Resources, Inc.***, 210 W. Va. 200, 557 S.E.2d 254 (2001).
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> Syllabus Point 2 of ***Tawney*** provides that:
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> "If an oil and gas lease provides that the lessor shall bear some part of the

costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable." Syllabus Point 5, ***Wellman v. Energy Resources, Inc.***, 210 W. Va. 200, 557 S.E.2d 254 (2001).

Syllabus Point 10 of ***Tawney*** provides that:

Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.

Syllabus Point 11 of ***Tawney*** provides that:

Language in an oil and gas lease that provides that the lessor's 1/8 royalty (as in this case) is to be calculated "at the well," "at the wellhead," or similar language, or that the royalty is "an amount equal to 1/8 of the price, net all costs beyond the wellhead," or "less all taxes, assessments, and adjustments" is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.

Finally, in ***Leggett v. EQT Production Co.***, 239 W. Va. 264, 800 S.E.2d 850 (2017), the West Virginia Supreme Court, reviewing the treatment of flat-rate leases which are converted to 1/8 royalty leases by W.Va. Code § 22-6-8, held that "royalty payments pursuant to an oil or gas lease governed by West Virginia Code § 22-6-8(e) (1994) may be subject to pro-rata deduction or allocation of all reasonable post-production expenses actually incurred by the lessee. Therefore, an oil or gas lessee may utilize the net-back or work-back method to calculate royalties owed to a lessor pursuant to a lease governed by West Virginia Code § 22-6-8(e). The reasonableness of the post-production expenses is a question for the fact-finder." Syllabus Point 8, ***Leggett***.

Another case which has addressed the holdings in ***Tawney*** and ***Wellman*** is ***W.W. McDonald Land Co. v. EQT Production Co.***, 983 F.Supp.2d 790 (2014). In ***McDonald***, Judge Goodwin held:

> The defendants cannot calculate royalties based on a sale between subsidiaries at the wellhead when the defendants later sell the gas in an open market at a higher price. Otherwise, gas producers could always reduce royalties by spinning off portions of their business and making nominal sales at the wellhead. I predict with confidence that, if confronted with this issue, the Supreme Court of Appeals would hold the same. *See* ***Howell v. Texaco, Inc.***, 112 P.3d 1154 (Okla. 2004) ("an intra-company contract is not an arm's length transaction, [and] it is not a legal basis on

> which [a producer] can calculate royalty payments"); ***Beer v. XTO Energy, Inc.***, 2010 WL 476715 (W.D. Okla. Feb. 5, 2010) (gas sale at wellhead between two controlled, affiliated companies not appropriate for royalty calculation).

983 F.Supp.2d at 804.

Judge Goodwin added:

> To determine the wellhead price, the defendants use a "work-back method" which "involves subtracting post-production costs that enhance the value of the gas from the interstate connection price." . . .. Absent lease language to the contrary, ***Tawney*** requires lessees to pay royalties free of these costs. The defendants cannot avoid ***Tawney*** by simply reorganizing their businesses and making intra-company wellhead sales. Accordingly, I FIND that ***Tawney's*** specificity requirements apply to royalty payments made under the defendants' work-back method after 2005.

Id.

<u>Class Certification</u>:

According to plaintiffs, this case is ideally suited for class certification because it will allow resolution of distilled factual and legal issues through this superior mechanism. Presenting the legal issues on behalf of a class will allow the Court to determine, in one fell swoop on a class wide basis whether the method by which the defendants calculate the sales price of gas and the deductions which it takes from the sales price complies with West Virginia law. Plaintiffs' class certification proposal thus allows for the "consolidation of recurring common issues" which "make up the heart of Plaintiffs' case," ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d 417, 426 (4th Cir. 2003) (quoting ***Central Wesleyan v. W.R. Grace & Co.***, 6 F.3d 177, 185 (4th Cir. 1993)), and are therefore ideal for resolution through the class action mechanism.

"A district court 'has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 146 (4th Cir. 2001), quoting ***In re American Med. Sys., Inc.***, 75 F.3d 1069, 1079 (6th Cir. 1996). "[P]laintiffs bear the burden . . . of demonstrating satisfaction of the Rule 23 requirements and the district court is required to make findings on whether the plaintiffs carried their burden . . .." ***Thorn v. Jefferson-Pilot Ins. Co.***, 445 F.3d 311, 317 (4th Cir. 2006), quoting ***Gariety v. Grant Thornton, LLP***, 368 F.3d 356, 370 (4th Cir. 2004).

In an action such as this, class certification may be granted only if the plaintiffs satisfy the requirements of numerosity, commonality, typicality, representativeness, predominance, and superiority of Rule 23(a)[3] and (b)(3)[4] are met. ***Lienhart***, 255 F.3d at

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[3] Rule 23(a) provides:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

[4] Rule 23(b)(3) provides:

146.

"[N]umerosity requires that a class be so large that 'joinder of all members is impracticable.' Fed.R.Civ.P. 23(a)(1). Commonality requires that 'there are questions of law or fact common to the class.' Fed.R.Civ.P. 23(a)(2). The common questions must be dispositive and over-shadow other issues." ***Id***., citing ***Stott v. Haworth****,* 916 F.2d 134, 145 (4th Cir. 1990). "In a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Id.***, at n.4, quoting ***Amchem Prods., Inc. v. Windsor****,* 521 U.S. 591, 609 (1997).

"Typicality requires that the claims of the named class representatives be typical of those of the class; 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' ***General Tel. Co. of Southwest v. Falcon****,* 457 U.S. 147, 156 (1982) (internal quotation marks omitted).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Representativeness requires that the class representatives 'will fairly and adequately protect the interests of the class.' Fed.R.Civ.P. 23(a)(4). . . . [T]he final three requirements of Rule 23(a) 'tend to merge, with commonality and typicality "serv[ing] as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."' ***Broussard v. Meineke Discount Muffler Shops, Inc.***, 155 F.3d 331, 337 (4th Cir. 1998) (quoting ***Falcon***, 457 U.S. at 157 n. 13)." ***Id.*** at 146-47.

"In contrast to actions under Rule 23(b)(1) and (b)(2), Rule 23(b)(3) actions are '[f]ramed for situations in which class-action treatment is not clearly called for,' but 'may nevertheless be convenient and desirable.' ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 615 (1997) (internal quotation marks omitted). In addition to the four Rule 23(a) requirements, Rule 23(b)(3) actions such as this one must meet two requirements: predominance and superiority. Predominance requires that '[common] questions of law or fact ... predominate over any questions affecting only individual members.' Fed.R.Civ.P. 23(b)(3). The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' ***Amchem***, 521 U.S. at 623. Superiority requires that a class action be 'superior to other methods for the fair and efficient adjudication of the controversy.' Fed.R.Civ.P. 23(b)(3)." ***Id***. at 147.

Plaintiffs are asking this Court to determine whether the method by which the defendants calculate the "sales price" of the gas collected under their leases complies with West Virginia law and whether the method by which the defendants calculate the deuctions taken for post-production costs comply with West Virginia law.

These questions present common legal issues which are susceptible to class action treatment. Trial courts have great discretion to conduct and manage litigation in an efficient and equitable manner. Manual for Comp. Litig., at Introduction,10.13 (4th ed. 2005). Particularly in the context of a class action, Rule 23 "allows district courts to devise imaginative solutions to problems created by… [determining] individual damages issues." ***Carnegie v. Household Int'l, Inc.***, 376 F.3d 656, 661 (7th Cir. 2004); *see also* ***In re Scientific Atlantic Inc., Sec. Litig.***, 571 F.Supp.2d 1315, 1343 (N.D. Ga. 2007) (quoting ***Carnegie*** for this proposition and certifying class upon finding, "even if the Court ultimately concludes that aggregate damages models are not sufficiently reliable for use in this case, the Court is convinced that other viable alternatives exist to address any individual damages issues that may arise."). Accepted methods of assessing the individual issues relating to class members include:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. (citing ***In re Visa Check/MasterMoney Antitrust Litig.***, 280 F.3d 124, 141 (2d Cir. 2001)).

This Court used a similar process to resolve a similar class action in ***Dijkstra v.***

Carenbauer**,* No. 5:11-cv-152 (N.D. W.Va.). Specifically, in ***Dijkstra, the Court made liability findings on the class claims and awarded statutory and disgorgement damages on a class-wide basis, and then allowed for individual class members to come forward with any claims of actual damages beyond those compensable on a class-wide basis. [***Dijkstra*** Orders at Docs. 210 & 242]. The defendant in ***Dijkstra*** filed two separate petitions for appeal, challenging this Court's certification decisions. Both were rejected. (*See* U.S.C.A. Case No. 13-107, petition denied Feb. 6, 2013 [***Dijkstra*** Doc. 129]; U.S.C.A. Case No. 14-386, petition denied July 31, 2014 [***Dijkstra*** Doc. 256]).

I. Numerosity:

"Rule 23(a)(1) requires that the class be of sufficient size that joinder of all members is 'impracticable.' In determining whether joinder is impracticable, a court should analyze the factual circumstances of the case rather than relying on numbers alone. ***Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n**,* 375 F.2d 648 (4th Cir. 1967). Factors to be considered are 'the estimated size of the class, the geographic diversity of class members, the difficulty of identifying class members, and the negative impact of judicial economy if individual suits were required.' ***Christman v. American Cyanamid Co.**,* 92 F.R.D. 441, 451 (N.D. W.Va. 1981); ***McGlothlin v. Connors**,* 142 F.R.D. 626, 632 (W.D. Va. 1992)." ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. 221, 237 (S.D. W.Va. 2005) (Goodwin, J.).

"Impracticable does not mean impossible." ***Hewlett v. Premier Salons, Int'l, Inc.***, 185 F.R.D. 211, 215 (D. Md. 1997) (Chasanow, J.)(quoting ***Robidoux v. Celani***, 987 F.2d 931, 935 (2d Cir. 1993)). "When a class is extremely large, the numbers alone may allow the court to presume impracticability of joinder. ***Buford v. H & R Block, Inc.,*** 168 F.R.D. 340, 348 (S.D. Ga. 1996) (citing ***Finnan v. L.F. Rothschild & Co., Inc.****,* 726 F.Supp. 460, 465 (S.D. N.Y. 1989); ***Riordan v. Smith Barney****,* 113 F.R.D. 60, 62 (N.D. Ill. 1986)). There is no bright line test for determining numerosity; the determination rests on the court's practical judgment in light of the particular facts of the case. ***Id****.* (citing ***Deutschman v. Beneficial Corp.****,* 132 F.R.D. 359, 371 (D. Del. 1990))." ***Id.***

There is no set minimum number of potential class members that fulfills the numerosity requirement. *See* ***Holsey v. Armour & Co.****,* 743 F.2d 199, 217 (4th Cir. 1984) (citing ***Kelley v. Norfolk & Western Ry. Co.****,* 584 F.2d 34 (4th Cir. 1978)). However, where the class numbers twenty-five or more, joinder is usually impracticable. ***Cypress v. Newport News General & Nonsectarian Hosp. Ass'n****,* 375 F.2d 648, 653 (4th Cir. 1967) (eighteen class members sufficient).

The defendants claim to hold approximately 25,000 lease documents, satisfying the first portion of the numerosity test. Defendants also asmit that the class is sufficiently numerous, but contest whether the leaseholders are sufficiently identifiable.

The defendants argue that EQT Production and the named Plaintiffs were parties to earlier royalty litigation in the Southern District of West Virginia in ***The Kay Company v. Equitable Production***, Civil Action No. 2:06-0612. They state that in administering the 2008 Kay Company litigation class settlement, it was difficult to determine who was entitled to payment because many of the original lessors' heirs were unknown, and that generally speaking, it is challenging to locate individuals who are entitled to royalty payments under an oil and gas lease, as is illustrated by the fact that there are approximately 3,500 West

Virginia lessors whose interests are being held in suspense. This Court does not view this situation as an insurmountable obstacle. If the determinations in the action result in additional royalties being owed, those payments may be added to whatever escrow accounts the defendants maintain for the present leases. This Court deems the numerosity requirement to be satisfied.

II. Commonality:

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Rule 23(b)(3) requires that questions of law or fact common to the class predominate over any questions affecting only individual members. The Fourth Circuit has held that "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 147 n. 4 (4th Cir. 2001)(quoting ***Amchem***, 521 U.S. at 609). Because this is a class action brought under Rule 23(b)(3), this Court will analyze the two factors together in the predominance section of this opinion. *See* ***In re LifeUSA Holding Inc.***, 242 F.3d 136, 144 (3d Cir. 2001) (analyzing the two factors together).

III. Typicality:

"To satisfy the typicality requirement under Rule 23(a)(3), the 'claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.' *Fed.R.Civ.P.* 23(a)(3). 'A sufficient nexus is established [to show typicality] if the claims or defenses of the class and class representatives arise from the same event or pattern or practice and are based on the same legal theory.' ***In re Terazosin Hydrochloride Antitrust Litig.***, 220 F.R.D. 672, 686 (S.D. Fla. 2004) (quoting ***Kornberg v. Carnival Cruise Lines, Inc.***, 741 F.2d 1332, 1337 (11th Cir. 1984)); *see also* ***In re Diet Drugs***, 2000 WL 1222042 at *43 (E.D. Pa. Aug. 28, 2000). The class representatives and class members need not have suffered identical injuries or damages. ***United Broth. of Carpenters v. Phoenix Assoc., Inc.***, 152 F.R.D. 518, 522 (S.D. W.Va. 1994); *see also* ***Mick v. Ravenswood Aluminum Corp.***, 178 F.R.D. 90, 92 (S.D. W.Va. 1998)." ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. 221, 238 (S.D. W.Va. 2005) (Goodwin, J.).

"The typicality requirement has been observed to be a redundant criterion, and some courts have expressed doubt as to its utility. ***Buford***, 168 F.R.D. at 350 (citing ***Sanders v. Robinson Humphrey/American Express, Inc.***, 634 F.Supp. 1048, 1056 (N.D. Ga. 1986), *aff'd in part, rev'd in part on other grounds sub nom.*, ***Kirkpatrick v. J.C. Bradford & Co.***, 827 F.2d 718 (11th Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)). Some courts treat typicality as overlapping with commonality, *see* ***Zapata [v. IBP, Inc.***], 167 F.R.D. at 160; *cf.* ***Falcon***, 457 U.S. at 157 n. 13 (noting that typicality and commonality 'tend to merge'); other courts equate typicality with adequacy of representation. ***Buford***, 168 F.R.D. at 350 (citing ***Alfus v. Pyramid Technology Corp.***, 764 F.Supp. 598, 606 (N.D. Cal. 1991)). Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. ***Zapata***, 167 F.R.D. at 160 (citing 1 *Newberg on Class Actions* § 3.13). A plaintiff's claim may differ factually and still be typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.' ***Id.*** (quoting 1 *Newberg on Class Actions* § 3.13). So long as the plaintiffs and the class have an interest in prevailing in similar legal claims, then the typicality requirement is satisfied. ***Buford,*** 168 F.R.D. at 351 (citing ***Meyer v. Citizens and Southern Nat'l Bank,*** 106 F.R.D. 356, 361 (M.D. Ga. 1985)). The existence of certain defenses available against plaintiffs that may not be available against other class members has been held not to preclude a finding of typicality. *See* ***id.*** (citing ***International Molders' and Allied Workers' Local Union No. 164 v. Nelson,*** 102 F.R.D. 457, 463 (N.D. Cal. 1983)). The burden of showing typicality is not meant to be an onerous one, but it does require more than general conclusions and allegations that unnamed individuals have suffered discrimination. ***Kernan,*** 1990 WL 289505, at *3 (citing ***Paxton v. Union Nat'l Bank,*** 688 F.2d 552, 556 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983))." ***Hewlett v. Premier Salons, Int'l, Inc.***, 185 F.R.D. 211, 216 (D. Md. 1997) (Chasanow, J.).

In this case, the claims of each of the putative class members arise from the same pattern or practices on the part of the defendants - the defendants use the same process to determine the sales price upon which the royalty payment is based and the company appears to use the same methodology for calculating the basic charge for post-production costs. This Court finds that the requested classes as certified satisfy the typicality requirement.

IV. Adequacy of Representation:

"The final requirement of Rule 23(a) is set forth in subsection (4), which requires that 'the representative parties will fairly and adequately protect the interests of the class.'

Fed.R.Civ.P. 23(a)(4). This determination requires a two-pronged inquiry: (1) the named plaintiffs must not have interests antagonistic to those of the class; and (2) the plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation**.** ***Hewlett v. Premier Salons Int'l, Inc.***, 185 F.R.D. 211, 218 (D. Md. 1997)." ***Serzone***, 231 F.R.D. at 238.

The defendants do not contest plaintiffs' counsel's ability to conduct the litigation, nor does this Court. The defendants have not pointed out any interests that the named plaintiffs have that are antagonistic to the interests of the proposed class.

Accordingly, this Court finds that the named plaintiffs and their counsel are able to fairly and adequately protect the interests of the class.

V. Predominance

The first factor under Rule 23(b)(3) requires that the questions of law or fact common to all class members predominate over questions pertaining to individual members. ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. at 239. Common questions predominate if class-wide adjudication of the common issues will significantly advance the adjudication of the merits of all class members' claims.

"The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" ***Lienhart***, 255 F.3d at 147 (quoting ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 623 (1997)); ***Gariety v. Grant Thornton, LLP***, 368 F.3d 356, 362 (4th Cir. 2004). Where significant common questions can be resolved for class members in one action, it is efficient to deal with class claims on a representative rather than an individual basis. *See* Charles Alan Wright & Arthur R. Miller, 7A ***Federal Practice and Procedure*** § 1778 (3d ed. 2009). "The predominance inquiry focuses on whether liability issues are subject to class-wide proof or require individualized and fact-intensive determinations. Deciding whether common questions predominate over individual ones involves a qualitative, rather than quantitative, inquiry." ***Singleton v. Domino's Pizza, LLC***, 976 F.Supp.2d 665, 677 (D. Md. 2013) (Chasanow, J.)(citations omitted).

As noted by Judge Copenhaver in ***Good v. American Water Works Co., Inc.***, 310 F.R.D. 274 (S.D. W.Va. 2015):

> A principle often forgotten is that the balancing test of common and individual issues is qualitative, not quantitative. ***Gunnells v. Healthplan Services, Inc.***, 348 F.3d 427, 429 (4th Cir. 2003). Common liability issues may still predominate even when individualized inquiry is required in other areas. ***Id***. At bottom, the inquiry requires a district court to balance common questions among class members with any dissimilarities between class members. *See* ***Gunnells***, 348 F.3d at 427–30.
>
> While courts have denied certification when individual damage issues are especially complex or burdensome, *see, e.g.,* ***Pastor v. State Farm Mut. Auto. Ins. Co.***, 487 F.3d 1042, 1047 (7th Cir. 2007), where the qualitatively overarching issue by far is the liability issue of the defendant's [actions], and the purported class members were exposed to the same risk of harm every time, such as where a defendant violates a statute in the identical manner on every occasion, individual damages issues are insufficient to defeat class

> certification under Rule 23(b)(3). *See* ***Murray v. GMAC Mortg. Corp.***, 434 F.3d 948, 953 (7th Cir. 2006); ***Smilow v. Southwestern Bell Mobile Systems, Inc.***, 323 F.3d 32, 40 (1st Cir. 2003). The same principle would apply here to the alleged liability [issues].

310 F.R.D. at 296-97.

Common issues will predominate if "individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria — thus rendering unnecessary an evidentiary hearing on each claim." Newberg on Class Actions § 4:50 (5th ed.). In addition, common issues predominate when adding more plaintiffs to the class would minimally or not at all affect the amount of evidence to be introduced. *Id*. Courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as "well nigh universal." Newberg on Class Actions § 4:54 (5th ed.), citing ***Comcast v. Behrend***, 569 U.S. 27, 133 S.Ct. 1426, 1437 (2013). *See also,* ***Gunnells***, 348 F.3d 417 at 428.

The facts demonstrate that defendants' methodology for determining what costs are to be deducted from plaintiffs' royalty payment is uniform. Costs are gathered from defendants' subsidiaries and from corporate by one group headed by Mr. Piccirilli, who aggregates all of it and then "estimates" what it should be next year, never accounting for the actual cost and including matters which are not reasonable to charge its lessors under any circumstances. If defendants' method of calculating its deductions did not comply with ***Wellman*** and ***Tawney***, then none of its deductions should have been taken from the plaintiffs or the class and they are entitled to recover all of said deductions.

Secondly, regardless of whether the leases provided for specific deductions, defendants took deductions from them. ***Tawney*** made clear that leases must specifically state what deductions, if any, are to be taken in order for a lessee to deduct same. For the subclass of those leases which do not provide for specific deductions, resolution of plaintiffs' claims will resolve the liability of all such leases.

In this case, the issues common to all class members predominate over any individual questions. The discussions to date show that the defendants use the same method to determine sales price as to all leases and that the same methodology is used to determine the deduction for post-production charges. The liability phase of this case presents the following issues, which are common to all potential class members:

(1) Is EQT the alter ego of the other subsidiaries and, therefore, liable as a result, is it liable as a result of its own misconduct or by virtue of a fraudulent scheme or joint venture?

(2) Did defendants breach their contractual duties, implied or otherwise, to plaintiffs and the classes?

(3) Are the deductions proper and reasonable under West Virginia law?

(4) Did the defendants provide a "method for calculating" the costs to be deducted?"

(5) Are defendants entitled to any of the deductions based upon ***Tawney***?

(6) Are plaintiffs and the class entitled to payment from the volume at the wellhead?

(7) Did the defendants fraudulently charge plaintiffs for the deductions?

(8) Did the defendants intentionally and maliciously over-charge plaintiffs for deductions?

(9) Are plaintiffs entitled to punitive damages?

The common questions discussed above predominate. The resolution of these issues will largely dispose of this litigation. Surely these determinations are similar to other certified classes of which the Fourth Circuit has approved. *See, e.g.,* ***Brown v. Nucor Corp.***, 785 F.3d 895 (4th Cir. 2015) (vacating district court's decertification of Title VII class of black steelworkers and remanding with instructions to certify the class in light of the "inherent cohesiveness of the class"); ***Gray v. Hearst Communs., Inc.***, 444 Fed. Appx. 698, 702 (4th Cir. 2011) (affirming certification of advertisers' class claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices against directory distributors upon finding that "the common question regarding [defendant's] distribution obligation predominates over any individual issues because the putative class members all assert injury from the same action (*i.e.* failure by [defendant] to follow its standard distribution practice), and determination of whether [defendant] breached its standard distribution obligation will resolve in one stroke an issue that is central to the validity of the class members' breach of contract claims"); ***Central Wesleyan v. W.R. Grace & Co.***, 6 F.3d 177, 188 (4th Cir. 1993) (affirming conditional certification of a nationwide class of colleges and universities with asbestos in their buildings despite the "daunting number of individual issues", including the ability of each college to prove liability, differing statutes of limitation, differing asbestos products and exposures, present in the case).

Numerous courts in other jurisdictions have certified class actions involving claims arising from natural gas leases, the royalties paid under such leases, and/or the deductions taken from such royalty payments, among other related issues. *See, e.g.*, ***Seeco, Inc. v. Hales***, 330 Ark. 402, 954 S.W.2d 234 (1997) (involving claims of fraud and constructive fraud, breach of oil and gas leases, breach of duty to market gas reasonably, breach of duty of good faith and fair dealing, violation of statutes governing penalties for fraudulently withholding oil and gas lease payments, unjust enrichment, tortious interference with contractual relations, civil conspiracy, and violation of statute governing calculation of royalties); ***Bice v. Petro-Hunt, L.L.C.***, 681 N.W.2d 74 (N.D. 2004) (claims for underpayment of royalties under leases, breach of implied covenant to market hydrocarbons, conversion, unjust enrichment, an accounting, breach of implied covenant of good faith and fair dealing, and declaratory relief); ***Freebird, Inc. v. Merit Energy Co.***, 2011 WL 13638 (D. Kan. Jan. 4, 2011) (Vratil, J.) (claims for breach of leases concerning underpayment of royalties, unjust enrichment, and an accounting); ***Schell v. Oxy USA, Inc.***, 2009 WL 2355792 (D. Kan. July 29, 2009) (Marten, J.) (claims arising from alleged breach of free gas clause in oil and gas leases and the implied duty to make gas useable for house gas use); ***Anderson v. Merit Energy Co.***, 2008 WL 2484187 (D. Colo. June 19, 2008) (Babcock, J.) (claims of breach of leases, the underpayment of royalties, and the implied duty of marketability); ***Davis v. Devon Energy Corp.***, 147 N.M. 157, 218 P.3d 75 (2009) (court affirming class certification for declaratory and injunctive relief and reversing denial of class certification for monetary damages in case where royalty owners alleged gas producers had improperly deducted from royalty payments the costs of making coalbed methane gas marketable); ***Arkansas Louisiana Gas Co. v. Morris***, 294 Ark. 496, 744 S.W.2d 709 (Ark. 1988) (claims to be paid royalties on new wells drilled based upon the "proceeds" from the sale of gas from the new wells, under 8 to 10 theories of recovery, including estoppel, waiver, and reformation).

The defendants contend that class certification is inappropriate inasmuch as there are many variations in lease language. While there are some variations in lease language, defendants have maintained lease files for all of its lessors and a list of leases categorized within its Enertia electronic database. None of the leases however, provide a methodology for calculating deductions. Therefore, resolution of this issue will resolve the "questions class-wide" as to whether the lessee could take the deductions it took. Furthermore, the subclasses will separate the leases into those where there exists specific deductions and those which do not; among the relevant leases are groups of leases with the same or very similar characteristics which, if necessary, can be evaluated as a group or subclass, including flat rate leases and amended leases.

Defendants have not made the Court's task easier in this regard, however. Defendants have lists of leases and their characteristics documented in lists and within their databases, but as stated above, refuse to produce same or provide how they determine whether and how they are entitled to deductions from each lease. Plaintiffs state that they have obtained the defendants' lease files which reveal, that while there are a number of variations in lease language, they can easily be broken out into subclasses and/or groups since most producers use similar forms for different periods. The combination of specificity by the West Virginia Supreme Court in ***Tawney*** sets a standard for lessees to meet in order for lessees to deduct any amount from plaintiffs' royalty.

Either a lease satisfies the ***Tawney*** standard or it does not. The issue of whether the lease satisfies ***Tawney*** is strictly an issue of law. In that regard, a hearing will be held beginning October 10, 2017, at 9:00 a.m., in the Wheeling North Courtroom to determine which leases meet the ***Tawney*** standards.

The issues common to the class predominate over any individual issues here. These common questions are broad and apply to all potential class members. Accordingly, the predominance requirement is met.

VI. Superiority

"The superiority test of Rule 23(b)(3) requires the court to find that the class action instrument would be better than, not just equal to, other methods of adjudication. The four factors listed in this subsection (interest in controlling individual prosecutions, existence of other related litigation, desirability of forum, and manageability) are simply a guideline to help the court determine the benefit of the proposed class action. Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett v. Premier Salons, Intern., Inc.***, 185 F.R.D. 211, 220 (D. Md. 1997) (Chasanow, J.).

Rule 23(b)(3) requires the proposed class action to be superior to other methods of adjudication so that the class action will "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 615 (1997) (quotations omitted). A primary purpose of class actions lawsuits, particularly money damages claims aggregated under 23(b)(3), is to enable the litigation of small claims like most of these claims, that could not be pursued individually. *Newberg on Class Actions* § 4:65 (5th ed.). *Accord* ***Amchem***, 521 U.S. 591, 617 (such cases are the "core" of the class action mechanism.).

The efficiencies that a class action may achieve are greater when the class is large. ***Id***. The need to avoid duplicative litigation can be significant even when the class is relatively small in number, but it is when there are many potential claimants that class actions bring the greatest efficiencies. ***Id***. A class action may enhance judicial efficiency and legitimacy by preventing inconsistent results. ***Id***.

A. Interest in controlling individual prosecutions

"The first factor identified in the rule is 'the interest of members of the class in individually controlling the prosecution or defense of separate actions.' Fed.R.Civ.P. 23(b)(3)(A). 'This factor has received minimal discussion in Rule 23(b)(3) actions.' ***Buford,*** 168 F.R.D. at 361 (quoting 1 *Newberg on Class Actions* § 4.29). According to the drafters of the rule:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic[al] rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett***, at 220-21.

This case falls into the latter category, considering the likely relatively small potential individual recoveries, and fact that no other cases appear to have been filed.

B. Existence of other related litigation

"Under Rule 23(b)(3)(B), the court should consider the 'extent and nature of any litigation concerning the controversy already commenced by or against members of the class.' This factor is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits. 7A *Federal Practice and Procedure* § 1780, at pp. 568-69. 'If the court finds that several actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be enjoined, which is not always feasible, a Rule 23 proceeding only might create one more action. . .. Moreover, the existence of litigation indicates that some of the interested parties have decided that individual actions are an acceptable way to proceed, and even may consider them preferable to a class action. Rather than allowing the class action to go forward, the court may encourage the class members who have instituted the Rule 23(b)(3) action to intervene in the other proceedings.' ***Id.*** at 569-70." ***Hewlett***, at 221.

This factor is, in this case, a non-factor, since this Court has been made aware of no other lawsuits against the defendants concerning this issue.

C. Desirability of forum

Rule 23(b)(3)(C) requires the court to evaluate the desirability of concentrating the litigation in a particular forum. Because all of the potential class members are residents of the State of West Virginia, because the class representative and class counsel live here, and because defendant has counsel here, this forum is as good as any.

D. Manageability

"The last factor that courts must consider in relation to superiority is the difficulty that may be 'encountered in the management of the class action.' Fed.R.Civ.P. 23(b)(3)(D). 'Of all the superiority factors listed in Rule 23, *manageability* has been the most hotly contested and the most frequent ground for holding that a class action is not superior.' ***Buford**,* 168 F.R.D. at 363 (quoting 1 *Newberg on Class Actions* § 4.32). Some courts have said, however, '[t]here exists a strong presumption against denying class certification for management reasons.' ***Id**.* (citing ***In re Workers' Compensation**,* 130 F.R.D. 99, 110 (D. Minn. 1990); ***In re South Central States Bakery Prod. Antitrust Litig.**,* 86 F.R.D. 407, 423 (M.D. La. 1980))." ***Hewlett***, at 221.

"The manageability inquiry includes consideration of the potential difficulties in identifying and notifying class members of the suit, calculation of individual damages, and distribution of damages. ***Six Mexican Workers v. Arizona Citrus Growers**,* 904 F.2d 1301, 1304 (9th Cir. 1990); ***Maguire v. Sandy Mac, Inc.**,* 145 F.R.D. 50, 53 (D. N.J. 1992); ***Kernan*** [***v. Holiday Universal, Inc.***]*,* 1990 WL 289505 at *7 [D. Md. Aug. 14, 1990]; ***In re Folding Carton Antitrust Litig.**,* 88 F.R.D. 211, 216 (N.D. Ill. 1980)." ***Hewlett**,* at 221-22.

The question that courts consider when they analyze manageability is not whether a class action is manageable in the abstract but how the problems that might occur in managing a class suit compare to the problems that would occur in managing litigation without a class suit. ***Amchem***, 521 U.S. at 617. Manageability should rarely, if ever, be in itself sufficient to prevent certification of a class. ***Id***.

While a judge on the Second Circuit, Justice Sonia Sotomayor wrote, in an oft-cited passage, that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'" ***In re Visa Check/MasterMoney Antitrust Litigation***, 280 F.3d 124, 141 (2d Cir. 2001). Before denying class certification (here for reasons concerning individualized damages), a court may consider whether any of a number of "management tools" might enable the case to proceed; the listed options included the following:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. *See also*, *Newberg on Class Actions* § 4:80 (5th ed.); ***Pitt v. City of Portsmouth, Va.***, 221 F.R.D. 438, 447 (E.D. Va. 2004).

Indeed, while certifying a class action can certainly create difficult management concerns, Judge Copenhaver points out that courts must also be:

> cognizant of the inefficient, costly and time consuming alternative. Absent the proposed liability issues certification, the issue of fault, for one, would have to be tried seriatim in every case for which a jury is empanelled. That consideration alone tips the balance heavily toward the limited issue certification sought by plaintiffs. *See* ***Gunnells***, 348 F.3d at 426 ("Proving these issues in individual trials would require enormous redundancy of effort,

including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and relitigation of many similar, and even identical, legal issues.”).

Additionally, absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented. That is another factor influencing the outcome sought by plaintiffs. *See* ***Gunnells***, 348 F.3d at 426 (noting in that case that “class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, ‘[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.’” (quoting ***Amchem***, 521 U.S. at 617)).

Surely, the plaintiffs thus receive a benefit from the proposed issues certification. But so, too, do the defendants. As our court of appeals has noted, the focus of Rule 23(b)(3) in the mass tort context is to “ensure that class certification in such cases ‘achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’” ***Gunnells***, 348 F.3d at 424 (quoting ***Amchem Products, Inc. v. Windsor***, 521 U.S. 591, 615 (1997)). As in ***Gunnells***, defendants benefit from procedural fairness by certification:

> "Furthermore, class certification 'provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects the defendant from inconsistent adjudications.' This protection from inconsistent adjudications derives from the fact that the class action is binding on all class members. By contrast, proceeding with individual claims makes the defendant vulnerable to the asymmetry of collateral estoppel: If [the Defendant] lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent [the Defendant] from litigating the issue. A victory by [the Defendant] in an action by an individual plaintiff, however, would have no binding effect on future plaintiffs because the plaintiffs would not have been party to the original suit. Class certification thus promotes consistency of results, giving defendants the benefit of finality and repose."

Gunnells, 348 F.3d at 427.

Good v. American Water Works Company, Inc., 310 F.R.D. 274, 297-98 (S.D. W.Va. 2015).

In ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d 417 (4th Cir. 2003), the Fourth Circuit stated:

> First, it appears likely that in the absence of class certification, very few claims would be brought against TPCM, making "the adjudication of [the]

> matter through a class action ... superior to no adjudication of the matter at all." *See* 5 *Moore's Federal Practice* § 23.48[1] (1997). Thus, class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." ***Amchem,*** 521 U.S. at 617 (citation omitted).

348 F.3d at 426.

In this case, the plaintiffs' claims are easily susceptible to resolution on a classwide basis. In the event that the class would become unmanageable, this Court can decertify the class. ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d at 426 (4th Cir. 2003); ***Central Wesleyan College v. W.R. Grace & Co.***, 6 F.3d 177, 184 (4th Cir. 1993).

Likewise, in the event that damages issues would require individual inquiry, the damage issues may be bifurcated. "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations. *See* Fed.R.Civ.P. 23 advisory committee's note (1966 Amendment, subdivision (c)(4)) (noting that Rule 23(c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with 'the members of the class ... thereafter ... required to come in individually and prove the amounts of their respective claims.'); *see also* 5 *Moore's*

Federal Practice § 23.23[2] (1997) ('[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality.'). Indeed, '[i]n actions for money damages under Rule 23(b)(3), courts *usually* require individual proof of the amount of damages each member incurred.' *Id.* at § 23.46[2][a] (1997) (emphasis added). When such individualized inquiries are necessary, if 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied.' ***Id.***" ***Gunnells***, at 427-28.

"Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will *not* defeat class certification. *See* ***Central Wesleyan***, 6 F.3d at 189; ***Hill v. W. Elec. Co., Inc.***, 672 F.2d 381, 387 (4th Cir. 1982) ('Bifurcation of ... class action proceedings for hearings on ... damages is now commonplace.'); ***Chisolm v. TranSouth Fin. Corp.***, 184 F.R.D. 556, 566 (E.D. Va. 1999) (collecting cases)." ***Gunnells***, at 429 (emphasis in original).

Rule 23(g) requires that a court certifying a class also appoint class counsel. The Rule directs a court to consider several factors, including "[t]he work counsel has done in identifying or investigating potential claims in the action; [c]ounsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; [c]ounsel's knowledge of the applicable law; and [t]he resources counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(C)(i).

Proposed class counsel are qualified and able to represent the class. This Court appoints Marvin W. Masters and Michael Carey, both of whom were class counsel in ***Tawney*** to serve as class counsel.

For the reasons stated above, Plaintiffs' Motion for Class Certification [Doc. 299] will be granted. This Court will conditionally certify the following class and sub-classes:

> All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their natural gas or mineral estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.) (See exception below.)
>
> > Subclass A - All EQT natural gas lessors with flat rate leases converted by operation of W. Va. Code, § 22-6-8 and that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.).
> >
> > Subclass B - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period,) and whose leases do not permit the deduction of post-

> production expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, § 22-6-8.
>
> Subclass C - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period,) and whose leases do permit the deduction of post-production expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, § 22-6-8.

There would be excepted from the class the officers and agents of any defendant or subsidiary of any defendant named in this lawsuit or any lawsuit involving the same or similar claims as those alleged in this lawsuit; any attorney for any such defendant; any attorney for any plaintiff in this lawsuit or in any lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant; and any judicial officer who presides over this lawsuit or over any other lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant.

Defendants' Motion for Summary Judgment

In Defendants' Joint Motion for Summary Judgment [Doc. 327], the defendants seek summary judgment on several grounds:

(1) the defendants are not alter egos of one another;

(2) EQT Production's wellhead sale of gas to EQT Energy cannot be disregarded; and

(3) that "actual and reasonable costs" means those costs incurred by a lessee.

For the reasons hereinafter stated, the Motion will be denied.

With respect to the issue of whether the defendants are alter egos of one another, this issue will be discussed below in the consideration of the plaintiffs' motion for summary judgment directed specifically to that issue.

With respect to the claim that EQT Production's wellhead sale of gas to EQT Energy "cannot be disregarded," the defendants essentially ask the Court to reject ***W.W. McDonald Land Co. v. EQT Production Co.***, 983 F.Supp.2d 790 (2014), which held that EQT "cannot calculate royalties based on a sale between subsidiaries at the wellhead when the defendants later sell the gas in an open market at a higher price. Otherwise, gas producers could always reduce royalties by spinning off portions of their business and making nominal sales at the wellhead. I predict with confidence that, if confronted with this issue, the Supreme Court of Appeals would hold the same. *See* ***Howell v. Texaco, Inc.***, 112 P.3d 1154 (Okla. 2004) ("an intra-company contract is not an arm's length transaction, [and] it is not a legal basis on which [a producer] can calculate royalty payments"); ***Beer v. XTO Energy, Inc.***, 2010 WL 476715 (W.D. Okla. Feb. 5, 2010) (gas sale at wellhead between two controlled, affiliated companies not appropriate for royalty calculation).

Judge Goodwin added that "in order to determine a wellhead price at which EQT

Production sells gas to EQT Energy, defendants essentially admit they continue to deduct post-production expenses. To determine the wellhead price, the defendants use a "work-back method" which "involves subtracting post-production costs that enhance the value of the gas from the interstate connection price." (Mem. in Supp. of Defs.' Joint Mot. for Summ. J. [Docket 170], at 25). Absent lease language to the contrary, ***Tawney*** requires lessees to pay royalties free of these costs. The defendants cannot avoid ***Tawney*** by simply reorganizing their businesses and making intra-company wellhead sales. This Court find no basis upon which to disregard Judge Goodwin's ruling. Obviously, the defendants can attempt to demonstrate that the price at which the gas was sold was the fair price by indicia other than the sales price to an affiliate.

Finally, with respect to the issue of whether "actual and reasonable costs" means those costs incurred by a lessee, what the defendants are seeking is a determination that since EQT Production pays EQT Gathering (or EQT Energy, who then pays EQT Gathering) for the post production costs, these costs are the actual costs and the Court cannot go behind EQT Gathering's costs to see if they are reasonable. That dog won't hunt. Such a ruling would permit one affiliate to charge another affiliate a unreasonable price, which would be whitewashed by the payment by the other company.

For those leases which do permit the deduction of post-production expenses, such costs must be reasonable and actually incurred. Charges submitted from an affiliate or an alter ego, which is not part of a true arms-length transaction, cannot properly be included because they would not constitute true, actually incurred costs. Should any such deductions be permitted by the lease, they must be for only that sum of costs actually incurred by the company in getting the gas to market. As Judge Goodwin held, indirect costs, including meals and entertainment, uniforms, meter operations and repair, personal property taxes, personnel costs, production management costs, depreciation, and return on investment are not directly related to the cost of getting gas to market. Moreover, lessors have no control over the construction and maintenance of the gathering system.

The defendants' Motion will be denied.

Plaintiffs' Motion for Summary Judgment (Re: Alter Ego):

In their Motion, the plaintiffs seek a finding that EQT Corporation is the alter ego of the defendant subsidiaries and of EQT Midstream Partners and further that EQT Production Company, EQT Corporation, EQT Energy, LLC, EQT Investments Holdings, LLC, EQT Gathering, LLC, and EQT Midstream Partners, LP, are alter egos of one another.

In opposing the Motion, the defendants, *inter alia*, argue that there is no need to address the issue of alter ego because EQT Corporation has more than sufficient assets to satisfy any judgments. While this is true, there is clearly another purpose in seeking the alter ego ruling. It would appear that EQT Production holds the leases and harvests the gas and then turns the gas over to EQT Gathering which collects the gas and delivers the gas to EQT Energy, which pays EQT Production for the gas. EQT Production then pays the royalties to the lessors. The fly in the ointment is that EQT Energy pays EQT Production a price that credits EQT Gathering for the costs of transmission, costs that with respect to some leases are not chargeable. In that regard, the defendants utilize the fallacy that these transactions are arms-length transactions among independent entities.

A claim of an alter ego relationship is not itself an independent cause of action but a means of imposing liability on one corporation/business for the alleged wrongful acts of another related corporation/business:

> The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather, it is an assertion of facts and circumstances that will persuade the court to impose the corporate obligation on its owners.[] It is a means of assessing liability for the acts of a corporation against an equity holder in the corporation.[] It is not itself an action but is merely a procedural means of allowing liability on a substantive claim.[]

18 Am. Jur. 2d Corporations § 48 (citations omitted).

West Virginia law has long recognized that, "[a]s a general rule, corporations are considered wholly separate entities from each other and from those who own them." ***Tucker v. Thomas***, 853 F.Supp.2d 576, 590 (N.D. W.Va. 2012), citing, ***Laya v. Erin Homes, Inc.***, syl. pt. 1 & 2, 177 W. Va. 343, 352 S.E.2d 93 (1986). This separation is a legal fiction and the "alter-ego doctrines, alternatively 'instrumentality', 'identity', 'agency', 'piercing the corporate veil', or 'disregarding the corporate fiction '"permit courts," in certain circumstances, to disregard the corporate form and 'look beyond the bare legal relationship of the parties to prevent the corporate form from being used to perpetrate injustice, defeat public convenience or justify wrong.'" ***Tucker***, 853 F.Supp.2d at 590, quoting, ***Southern***

States Cooperative, Inc. v. Dailey, 167 W. Va. 920, 928, 280 S.E.2d 821, 828 (1981). As further explained by the Supreme Court of Appeals in ***Laya***, *supra*:

> While, legally speaking, a corporation constitutes an entity separate and apart from the persons who own it, such is a fiction of the law introduced for purpose of convenience and to subserve the ends of justice; and it is now well settled, as a general principle, that the fiction should be disregarded when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences.

Syl. Pt. 2, ***Laya***, 177 W. Va. 343, 352 S.E.2d 9, quoting, Syl. Pt. 10, ***Sanders v. Roselawn Memorial Gardens, Inc.***, 152 W. Va. 91, 159 S.E.2d 784 (1968) (emphasis added).

It is also well-settled that "the corporate form will never be disregarded lightly." ***Southern States Cooperative, Inc.***, 167 W. Va. at 827, 280 S.E.2d at 930. *Accord*, ***Southern Elec. Supply Co. v. Raleigh County Nat. Bank***, 320 S.E.2d 515, 522, 173 W. Va. 780, 787 (1984); ***Tucker***, 852 F.Supp.2d at 590-591. Rather, to "pierce the corporate veil, a court must find that there has been an abuse of the protections provided by the corporate form, and the heavy burden of making such a showing is on the party seeking to invoke the doctrine." ***Tucker***, 852 F.Supp.2d at 590, citing, ***Southern Electrical Supply Co. v. Raleigh Cnty. Nat'l Bank***, 173 W. Va. 780, 786, 320 S.E.2d 515 (1984).

In support of its claim for a determination of alter ego, the plaintiffs submit the following:

1. The fact that many of the officers and directors of EQT Corporation are also

officers and directors of one or more of other defendants (See Doc. 329-1);

2. For example, EQT Gathering's president was Randy Crawford. Randy Crawford, above, was also senior vice president of EQT Corporation. (Id., at 94-95.). Mr. Crawford was also president of EQT Energy and he reported directly to Dave Porges, who was president and CEO of EQT Corporation. [Id. at 66]. He was also president of Midstream and Commercial organizations and the Distribution organizations, essentially all subsidiaries except Midstream Partners. [Id. at 92]. Ms. Smith, as another example, was vice president and controller of Midstream, Commercial and Distribution. Basically, she was vice president and controller of all subsidiaries except for EQT Midstream Partners. [Id. at 69]. Dan Greenblatt was the treasurer of essentially all of the subsidiaries. [Id. at 92]. Nicole King was secretary of essentially all of the subsidiaries. [Doc. 299-23, p. 6]. Even the publicly traded EQT Midstream Partners was controlled by EQT Corporation. Its employees ran the partnership and four of the seven directors were EQT Corporation employees or officers. [Id. at 155-156].

3. The Court notes that in filings on August 8 and 18, 2017, the defendants represented that: (a) Steven T. Schlotterbeck was the Chief Executive Officer of all defendants, (b) that each subsidiary has a president who reports to Mr. Schlotterbeck; (c) and that none of the subsidiaries employs a lawyer - EQT Corporation provides legal counsel as a "shared service." [Docs. 386 & 392];

4. All of EQT Corporation's and subsidiary's financial statements are consolidated as are the tax returns. [Doc. 299-2, pp. 13-14];

5. The offices for all of Corporate and subsidiaries are located in one office complex in Pittsburgh, except for EQT Investments and a few other small subsidiaries. [Id.

at 14];

6. John Bergonzi testified that he was the chief corporate accounting officer for all subsidiaries "so I was responsible for setting accounting policy across the organization, making sure internal controls were in place and were followed." [Doc. 299-3, at 12-13]. Mr. Bergonzi reported to the Chief Financial Officer for EQT Corporation and he was paid by EQT Corporation [Id. at 10-11]. Mr. Bergonzi admitted that he was an officer for "most" of the subsidiaries except EQT Midstream Partners. Mr. Bergonzi put together the financial information from all subsidiaries and lines of business that went to the Board. [Id. at 119-120]. He held the office of Assistant Treasurer or Secretary and, in that role, he made sure that their accounting policies were consistent across the organization. [Id. at 11-12].

7. Mr. Bergonzi explained that the subsidiaries would meet together with various "groups" of officers and employees of the subsidiaries and EQT Corporation to arrive at a consolidated business plan for each year. [Id. at 59-61]. This was an ongoing year long process that entailed the subsidiaries and groups working together, both in operations and in a budgeting and revenue accounting and planning for all of the subsidiaries, with the express purpose of doing what was right for EQT. [Id. at 65]. The business units involved in these business plan meetings would include 20 to 30 legal entities. [Id. at 64-65]. The Board of Directors of EQT Corporation has the right to approve or not approve the business plan that ultimately is submitted to the Board. [Id. at 67]. The Board depends, to some degree, on the various business units who are responsible for determining the cost of service. [Id. at 68].

8. Plaintiffs offered Dan Selby as a financial and business expert. Mr. Selby concluded that:

(A) EQT Energy entered into contracts with EQT Gathering and EQT Production for the purpose of purchasing gas from EQT Production at a lower price than the market price at the interstate pipeline for plaintiffs' gas by virtue of EQT Energy's purchase "at the wellhead."

(B) EQT Energy, Production, Gathering and Midstream Partners, along with EQT Corporation, planned and agreed to a cost of service in their business plan process in order to accumulate costs from Corporate and subsidiaries to charge and deduct from plaintiffs' royalty.

(C) EQT Gathering supposedly billed for the gathering costs, but Energy agreed that the gathering rate was simply a pass through and they received no billing from Gathering.

9. Mr. Selby also concluded EQT Corporation has effective and functional control over its subsidiaries and its affiliated limited partnership, so that the entities operate in an integrated and intertwined fashion so much so that they are one company in fact and substance:

• The formulation of financial statements indicates that the parent company exercises material control over the operations of its subsidiaries. Per reference to Intermediate Accounting, fourth edition, Welsch, Zlatkovich and White, 1976, "Consolidation, while using the equity method, carries a presumption that the investor owns a sufficient number of shares of the other companies to exercise significant influence over the operating and the financial policies of the other company."

• EQT and its subsidiaries have interlocking management, per reference to page 29 of EQT's SEC Form 10K for the years ending December 31, 2015.

• EQT maintains access to capital for subsidiary capital needs, per page 53 of the Company's SEC Form 10K for the years ending December 31, 2015.

• Per reference to page 38 of the Company's SEC Form 10K for the year ending December 31, 2015, "The company reported the components of each segment's operating income from continuing operations and various operational measures in the sections below, and where appropriate, has provided information describing how a measure was derived. EQT's management believes that presentation of this information provides useful information to management and investors regarding the financial condition, operations and trends of EQT's business segments without being obscured by the financial condition, operations and trends for other segments or by the effects of corporate allocations of interest, income taxes and other income. In addition, management uses these measures for budget planning purposes. The Company's management reviews and reports the EQT Production segment results with third-party transportation and processing costs reflected as a deduction from operating revenues as management believes this presentation provides a more useful view of average net sales price and is consistent with industry practices. Third-party costs incurred to gather, process and transport gas produced by EQT Production to market sales points are recorded as a portion of transportation and processing costs in the Statements of Consolidated Income. Purchased gas costs at EQT Midstream include natural gas purchases, including natural gas purchase from affiliates, purchased gas costs adjustments and other gas supply expenses. These purchased gas costs are primarily with affiliates and are eliminated in consolidation. Consistent with consolidated results, energy trading contracts recorded within storage, marketing and other are reported net within operating revenues, regardless of whether the contracts are physically or financially settled. The Company has reconciled each segment's operating income to the Company's consolidated operating income and net income in Note 4 to the Consolidated Financial Statements" This disclosure denotes control on a collective fashion.

• These statements are intended to present financial information about a parent and its subsidiary(ies) as a single economic entity to show the economic resources controlled by the group.

• Per reference to the series of organizational charts collectively marked EQT Gathering - 001575 through 001586, EQT Corporation possesses and exercises direct and indirect control of all material operating aspects of EQT Energy, LLC, EQT Investments Holdings, LLC, EQT Gathering, LLC, and EQT Mainstream Partners, LP. [Doc. 299-22].

• In addition, organizational charts numbered EQT Energy 8870, 8874, 8878, 8871, 8875, 8879, 8872, 8876, 8880, 8873, 8877 show an integrated picture of operations and interrelated and collective commingling of operating capacities for the purpose of joint expectation of profit.

• All fixed and variable costs of operations are planned and coordinated on an integrated fashion; Per EQT Business Plan and Capital Budget EQT

Midstream 2014 and EQT SG&A Expense Business Plan.

• Pricing of units relative to inter-company and external sales are determined through integrated means (Depositions Piccirilli and Bergonzi).

• All material aspects of operations are consolidated for reporting purposes and reflective of one entity's results of operations and a consolidated entity's utilization and marshaling of assets and capacities in the pursuit of profits for the benefit of shareholders of EQT Corp. (SEC Form 10K, 2015).

• The above noted subsidiaries do not operate on a "stand-alone" basis. They operate from common capacities to access capital, to share risk, to share managerial attributes, and to share internal and market economies. (Per SEC Form 10K 2015)

• Per reference EQT Financial Risk and Credit Policy text, EQT Corporation controls and monitors the risk of operations as partially evidenced by the following: "the Financial Risk and Credit Policy that describes the risk management and credit philosophy of EQT Corporation and its subsidiaries, including EQT Midstream Partners, LP, referred to herein collectively as the "Company". (Bates Stamp EQT-Gathering 1071429). In Section II, Rules and Responsibilities, Bates Stamp EQT-Gathering 1071431, indicates EQT Board monitors all operations oversight through the appointment of an Audit Committee. "Oversight of EQT's activities is provided by its Board. The Board appoints the Audit Committee and the Audit Committee monitors the CRC. The following have the responsibility for financial and credit risk management of EQT: The Corporate Risk Committee (CRC), the three business segments (EQT Production, EQT Midstream and Distribution) the Hedge Committee Corporate Risk Control, Corporate Credit and Corporate Treasury.

• Subsidiaries must get approval for significant expenditures from the CRC. (Per Financial Risk and Credit Policy).

[Doc. 299-20].

This Court finds that EQT Corporation does own, operate and control its business segments. Its business segments have corporation or LLC behind their names but are not real companies, but follow their parent's orders and directions. Subsidiary officers and employees cannot act independently and must coordinate their activities for EQT Corporation as captive corporations who are required to perform for the parent.

The undisputed facts in this case justify a finding that the EQT defendants are alter egos of one another. Generally speaking, when relevant factors are proven, the doctrine of alter ego or single entity or enterprise liability recognizes that a parent corporation can be liable for the acts of its subsidiaries or that sister corporations can be liable for the acts of one another. *See, e.g.*, ***Southern Elec. Supply Co. v. Raleigh County Nat. Bank***, 173 W. Va. 780, 320 S.E.2d 515 (1984) (shareholder and corporation); ***Laya v. Erin Homes, Inc.***, 177 W. Va. 343, 352 S.E.2d 93 (1986) (shareholder and corporation); ***Norfolk Southern Ry. Co. v. Maynard***, 190 W. Va. 113, 437 S.E.2d 277 (1993) (parent and subsidiary); ***Matter of Bowen Transports, Inc.***, 551 F.2d 171, 179 (7th Cir. 1977) ("We do not believe that the equitable doctrine of piercing the corporate veil is limited to the parent-subsidiary relationship. The separate corporateness of affiliated corporations owned by the same parent may be equally disregarded under the proper circumstances."); ***Nichols v. Pabtex, Inc.***, 151 F.Supp.2d 772, 780 (E.D. Tex. 2001) ("What makes this case somewhat unique is that Nichols seeks to hold a company liable for the acts of a sister company, not a parent for the acts of its subsidiary. Few cases address this situation, but those that have indicate that the distinction between parent-subsidiary and sister-sister is not relevant."); ***Dickson Marine Inc. v. Panalpina, Inc.***, 179 F.3d 331, 338-39 (5th Cir. 1999) (evaluating sister companies under alter ego doctrine but finding insufficient evidence of parental control); ***Allstate Financial Corp. v. United States***, 109 F.3d 1331, 1332 (8th Cir. 1997) (sister corporations operating under the parent umbrella of the "Detroit companies" were determined by the IRS to be alter egos of one another, as well as alter egos of the Detroit companies); ***Las Palmas Associates v. Las Palmas Center Associates***, 235 Cal.App.3d 1220, 1 Cal.Rptr.2d 301, 318 (1992) ("[U]nder the single-enterprise rule, liability can be found between sister companies.").

The "alter ego" doctrine, which permits a court to pierce the corporate veil, is "designed to prevent injustice when the corporate form is interposed to perpetuate an intentional wrong, fraud or illegality." ***Southern Elec. Supply Co. v. Raleigh County Nat. Bank***, 173 W. Va. at 786, 320 S.E.2d at 521-522. As similarly stated,

> In this era of associated corporations with vast networks of holding and subsidiary companies, there are often times when the corporate form must be disregarded in the interest of justice. Courts will not allow the corporate form to be used to permit the perpetration of an injustice or the subversion of public policy. . ..

> Justice may require that courts look beyond the bare legal relationship of the parties to prevent the corporate form from being used to perpetrate injustice, defeat public convenience or justify wrong. . ..

Southern States Co-Operative, Inc. v. Dailey, 167 W. Va. 920, 929-30, 280 S.E.2d 821, 827 (1981).

Under West Virginia law, "[a] corporate shield may, of course, be 'pierced' to . . . make a corporation liable for the behavior of another corporation within its total control." ***Southern Elec. Supply Co.***, 173 W. Va. at 787, 320 S.E.2d at 522. The West Virginia Supreme Court of Appeals has expressed the principle of "piercing the corporate veil" as follows:

> While, legally speaking, a corporation constitutes an entity separate and apart from the persons who own it, such is a fiction of the law introduced for purpose of convenience and to subserve the ends of justice; and it is now well settled, as a general principle, that the fiction should be disregarded when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences.

Syl. Pt. 1, ***Laya v. Erin Homes, Inc.***, *supra* (citing Syl. Pt. 10, ***Sanders v. Roselawn Memorial Gardens, Inc.***, 152 W. Va. 91, 159 S.E.2d 784 (1968)). Stated another way, a corporation is a legal fiction for the purpose of doing business, and this legal fiction may be disregarded when the purpose for which it was intended if abused. 18 C.J.S. Corporations § 6 (footnotes omitted).

In a case involving an alleged breach of contract, there is a two-prong test to determine whether to pierce the corporate veil. First, there must be such unity and interest and ownership that the separate personalities of the corporations no longer exist (a disregard of formalities requirement). Second, an inequitable result must occur if the acts are treated as those of the corporation alone. See Syl. Pt. 3, ***Laya***, *supra*. The present matter involves claims for breach of contract **and** tort. Importantly, "courts will more readily disregard a corporate form in cases of tort liability than in contract cases because contracts are voluntarily entered into with the corporate structure." *See* ***Laya***, 177 W. Va. at 349 n. 5, 352 S.E.2d at 99 n. 5 (citing ***Southern Electrical Supply Co.***, 173 W. Va. at 787 & n. 13, 320 S.E.2d at 522-23 & n. 13).

The first prong of the test is determined by looking at the totality of the circumstances. The West Virginia Supreme Court of Appeals has announced numerous factors to assist in the determination of whether to pierce the corporate veil. *See* **Laya**, 177 W. Va. at 347-48, 352 S.E.2d at 98-99. *See also* ***Norfolk Southern Ry. Co. v. Maynard***, 190 W. Va. at 118, 437 S.E.2d at 282 (discussing relevant factors between parent and subsidiary corporations); ***Southern Electrical Supply Co.***, 173 W. Va. at 788, 320 S.E.2d at 523 (setting forth relevant factors to consider); ***Southern States Cooperative, Inc. v. Dailey***, 167 W. Va. at 930-31, 280 S.E.2d at 827 (discussing relevant factors).

The list of factors most relevant to the relationship between parent and subsidiary corporations is set forth in ***Norfolk Southern Ry. Co. v. Maynard***, *supra*. The ***Maynard*** Court listed the following as factors to consider:

(1) Whether the parent corporation owns all or most of the capital stock of the

subsidiary;

The stock of the subsidiaries EQT Energy, Production and Investment are wholly owned by EQT Corporation. [Doc. 299-3, at 121]. Further, EQT Midstream Partners, L.P. was created by EQT and EQT is the general manager by and through another wholly owned subsidiary of EQT. [Excerpt of 2012 10-K].

(2) Whether the parent and subsidiary corporations have common directors and officers;

As set forth in the attached list and chart, the subsidiaries are predominantly staffed with officers and directors of EQT Corporation and by various subsidiaries within each subsidiary.

(3) Whether the parent corporation finances the subsidiary;

EQT Investment provides the loans to the subsidiaries as required by EQT Corporation. Mr. Bergonzi and Ms. Smith testified that EQT Corporation would finance the subsidiaries. If they needed operating cash, Ms. Smith said EQT Investment would provide the money which would be eliminated at the consolidation level. Therefore, EQT Corporation certainly finances the subsidiaries as well as controls the resources and income they may receive.

(4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;

EQT Corporation clearly owns all the stock of the subsidiaries and it created EQT Midstream and is its general partner and controls it.

(5) Whether the subsidiary has grossly inadequate capital;

The subsidiaries of EQT Corporation have only the capital which EQT Corporation allows it to have as the contracts and arrangements above make clear. They are mere departments and part of business segments which do not even have separate addresses. They are all housed in one building, primarily in one office complex in Pittsburgh, Pennsylvania. While they have capital, the resources are subject to EQT Corporation's control.

(6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary;

Certainly, if there is a loss, EQT Corporation loans them money and it is at the parent's discretion then whether to allow the subsidiary income to increase the resources, for example, by allowing EQT Production to sell its gas at the interstate pipeline for more money or to decrease or increase its cost of service pursuant to its procedure to loan the money. Jimmie Sue Smith confirmed that EQT Corporation's practice was to prepare loans for subsidiaries if it was needed. As noted in the Selby Affidavit, all fixed and variable costs of operations are planned and coordinated on an integrated fashion. Further, corporate costs from EQT are allocated to subsidiaries as noted by Mr. Selby as "allocated costs". The depositions of John Bergonzi and Joe Piccirilli discuss that corporate costs are allocated to the subsidiaries given expense allocators.

(7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;

The subsidiaries EQT Production, Gathering and Investment have essentially no business except with the parent. EQT Energy does business with some third parties, but its business is primarily with its parent and Production is required to utilize EQT Energy. EQT Midstream Partners does some business with third parties, but it also depends on EQT Corporation for most of its revenue. While some of the sales are to third parties, the majority of sales are to the parent or controlled entities, and the product base is wholly dependent upon the corporate structure of the consolidated entity.

(8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;

EQT Corporation refers to its business as its own and refers to the part of business the subsidiaries perform, such as the gathering function, as a business segment it calls the “Midstream Business Segment.” The same is true for EQT Production’s part. It is referred to as a segment. In addition, there are numerous groups which transcend even the subsidiaries that have no formal entity attached, for example, Joseph Piccirilli’s group is the Revenue Accounting Group which serves essentially all subsidiaries. EQT refers to its subsidiaries as its business segments. They are clearly not “stand-alone” businesses.

(9) Whether the parent corporation uses the property of the subsidiary as its own;

EQT Corporation treats the profits of the subsidiaries as its own.

(10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest;

There is no question as to the control over the boards of directors and officers of the subsidiaries. They are essentially treated as employees reporting to their supervisors who are officers and directors of EQT Corporation's Board and EQT Corporation's Board has the say over each subsidiaries' budgets, revenue, business, responsibilities and employees. Again, as pointed out by the Selby affidavit, per reference to EQT text, EQT Corporation controls and monitors the risk of operations as partially evidenced by the following: "the Financial Risk and Credit Policy that describes the risk management and credit philosophy of EQT Corporation and its subsidiaries, including EQT Midstream Partners, LP, referred to herein collectively as the "Company". (Bates Stamp EQT-Gathering 1071429). In Section II, Rules and Responsibilities, Bates Stamp EQT-Gathering 1071431, indicates EQT Board monitors all operations oversight through the appointment of an Audit Committee. Subsidiaries must get approval for significant expenditures, including capital property expenditures, from the CRC.

These factors are not exclusive and no one factor is determinative. Many of the factors are satisfied in this case as set forth above. ***Norfolk Southern Ry. Co. v. Maynard***, 190 W.Va. at 118, 437 S.E.2d at 282.

Based upon the foregoing, this Court finds that EQT Corporation is the alter ego of the subsidiary defendants and of EQT Midstream Partners and that the defendants are alter egos of each other with respect to this civil action.

Plaintiffs' Motion for Summary Judgment on Gas Sales to Affiliates and/or Alter Egos and Related Issues

This Motion was filed in response to certain questions asked of the parties by the Court. Essentially, the Motion addresses four related questions, being:

A. Should the Court follow the holding by Judge Goodwin in ***McDonald Land*** that sale of gas by an affiliate did not count as an arm length transaction?

B. Why should not the price for gas be determined by the first sale to a non-affiliated party?

C. When dealing with an affiliated company does actual and reasonable costs mean the cost charged by the company or the direct costs incurred by the company?

D. When dealing with an alter ego company does actual and reasonable costs mean the cost charged by the company or the direct costs incurred by the company?

These questions must be viewed in conjunction with the law in this State concerning charges against royalties. Under West Virginia law, oil and gas lessees are prohibited from deducting post-production expenses from royalties unless expressly provided for in the lease in terms that meet specific requirements. From the earliest West Virginia cases involving oil and gas royalties to the present, the West Virginia Supreme Court of Appeals has consistently adhered to the principle that landowners' royalties are to be paid on gross proceeds or gross market value free and clear of production, marketing and other costs. Two recent landmark decisions extend these basic principles and hold that post-production costs cannot be deducted from royalties, unless the relevant leases expressly provide otherwise.

In 1939, the West Virginia Supreme Court addressed the question of whether an oil and gas lessee could allocate to the landowner a portion of the privilege tax due for entities engaged in the production of oil and gas and thereby reduce royalties. ***Kanawha Valley Bank v. United Fuel Gas Co.***, 121 W.Va. 96, 1 S.E.2d 875 (1939). According to the Court, by this royalty clause, "the lessee bound itself to pay the lessor a full one-eighth of the market price of the gas at the well - not such price less one-eighth of the production tax." ***Id***. To the extent the lessee made a deduction, the Court added: "The lessee's deduction would be a material, unilateral modification of the contract, a modification courts cannot sanction." ***Id***. The Court established clear precedent that royalties must be paid on the full value of the mineral extracted free of deductions.

Interestingly, within eleven days of the date of the ***Kanawha Valley Bank*** decision the legislature amended the privilege tax statute in question, then W.Va. Code § 11-13-2, to provide that oil and gas producers shall pay the privilege tax based on the "entire production, with no deduction by reason of payments...to the owners of the royalty interest...." The amendment then provided: "[e]very person who is hereby required to pay said tax measured by the entire production of the property operated, is hereby authorized and empowered to deduct from any payment...to the owners of any royalty interest...that proportion of the tax paid which the said royalty...bears to the entire production." *See* ***Cole v. Pond Fork Oil & Gas Co.***, 127 W. Va. 762, 767, 35 S.E.2d 25, 28 (1945). This amendment was declared unconstitutional in ***Cole*** on the basis that the statute violated the constitutional prohibition against impairing contracts. The premise for this conclusion was that the royalty clause in the contract, the oil and gas lease, required that the lessee pay the lessor "one-eighth part of the proceeds from the marketing or sale of natural gas." ***Cole***, 127 W. Va. at 764, 35 S.E.2d at 26. As in ***Kanawha Valley Bank***, the Court found that this clause required payment on the gross proceeds with no deduction for a tax. Accordingly, to the extent the legislature was attempting to authorize a deduction not permitted by the contract, the Court held that the legislation abrogated the contract and was a "plain violation" of the Constitution. ***Cole***, 127 W. Va. at 772, 35 S.E.2d at 30.

In ***Kohlsaat v. Main Island Creek Coal Co.***, 90 W. Va. 656, 112 S.E. 213 (1922), the Court was presented similar issues under a 1913 coal lease requiring the lessee to pay as royalty "ten (10) per cent. of the selling price of said coal above ninety (90) cents per ton." ***Kohlsaat***, 112 S.E. at 214. During World War I, the President of the United States issued an executive order permitting an increase of 45 cents in the price of coal per ton, provided there was a corresponding increase in the wages of miners. The coal company availed itself of the opportunity and increased its sale price by 45 cents, and in addition, employed a sales agent to assist with sales. ***Id***. In calculating royalty, the coal company deducted from the sale price before calculating royalty the 45 cent increase on the grounds that it received no benefit of the increased price, along with the commissions paid the sales agent. ***Id***. at 216. Upon challenge by the lessor, the Court ruled that the lease, in requiring royalty of 10% of the sale price, was clear and unambiguous and required that the calculation be made on the gross sale price, including the 45 cent increase, with no deductions. ***Id***. at 217. The Court reasoned that the relative profit or loss of the lessor and the business risks faced were matters over which the lessor had "no voice or control" and were of "no moment to them, except the laudable concern of a landlord for the success of the tenant." ***Id***. at 216. With respect to commissions, which were deducted as post-production costs, the Court held they were "a necessary part of its business ...so far as the payment of royalties is concerned" and were not deductible from royalty. ***Id***. at 217.

In two more recent cases, the obligations of a lessee to pay royalties as required by the terms of leases were addressed, and the backdrop in each case was the post-production cost of transporting gas to the sales point. The first case, ***Cotiga Development Co. v. United Fuel Gas Co.***, 147 W. Va. 484, 128 S.E.2d 626 (1963), involved a 1929 lease covering 34,519 acres entered between Cotiga and Woods Oil and Gas Company. The day after the lease was executed, Woods Oil and Gas assigned the lease to United Fuel. United Fuel ultimately drilled 16 wells and a sublessee drilled an additional 8 wells. The gas royalty clause in the lease required payment of 1/8th "of the gas produced...at the rate received by Lessee for such gas." ***Cotiga***, 147 W.Va. at 488, 128 S.E.2d at 630. Instead, United Fuel calculated royalty on the basis of the "wellhead or field price." A key issue on appeal was whether United Fuel was required to adhere to the literal terms of the lease and pay royalty on the price received, wherever the gas was sold, regardless of the fact that it was a public utility at the time, with the large overhead expense of delivering gas to utility customers after extensive transportation and handling. ***Id***. The Court rejected United Fuel's contention that royalty should be paid on the field price, as if a company such as the original lessee had developed the property, and held that the terms of the lease were clear and unambiguous and required that royalty be paid on the gross proceeds received by United Fuel whenever and wherever the gas was sold. ***Id***. 147 W.Va. at 492-93, 128 S.E.2d at 633-34. While not directly addressing the issue of post-production costs, the heart of this case and the over-arching issue was the fact that the sale price or "rate received" by United Fuel was significantly higher at the sale end than in the field, and this difference was ultimately attributable to transportation, commingling and handling, yet United Fuel was denied consideration of these cost factors.

In a similar vein, the Fourth Circuit in ***Imperial Colliery Co. v. OXY USA INC.***, 912 F.2d 696 (4th Cir. 1990), considered the lessee's obligations under a 1944 lease requiring that the 1/8th royalty be based on "the current wholesale market value at the well." ***Id***. at 699. In that case, OXY had thirteen wells in production on the property and all gas was committed to a long term sales contract entered in 1948, under which OXY transported the gas through a 12-mile pipeline, compressed the gas at a compressor facility and metered it before moving it into the transmission line of the buyer. ***Id***. The underlying record in that case established that the sale price under the contract was 32.74 cents per mcf, that OXY deducted over 20 cents per mcf for transportation, compression and handling and paid royalty on a net sale price of 12 cents. The record further established that the market values of gas rose from 50 cents per mmbtu in 1975 so that average market values over the relevant period were $3.50 per mmbtu. The dramatic difference between the sale price, netted to 12 cents, and market value led the lessor to institute suit for the underpayment of royalty, asserting that the lessor was entitled to be paid in accordance with the literal language in the lease. Specifically, the plaintiff asserted that royalty be based on market value as opposed to the sale price. So calculated, the 1/8th royalty on $3.50 gas was 44 cents, and this was more than the sale price of 32.74 cents, and far more than the net price of 12 cents. The over-arching issue in Imperial Colliery was the fact that production expenses exceeded income for many years and the overall operations were conducted with significant losses. Nevertheless, both the District Court and the Fourth Circuit held that the lessor was entitled to the full value of 1/8th of the market value of its gas, and no consideration was given to the cost of transportation, compression and handling.

In ***Cotiga***, the Court recognized that the decision had a harsh result, and certainly the same could be said for ***Imperial Colliery***. Both decisions, however, were based on the same simple proposition that oil and gas leases providing for 1/8th of either the proceeds received or the market value of gas are clear and unambiguous contract terms, they must be given effect and they require that royalty be based on the gross price or value. While neither case directly addressed post-production costs, these costs were a major underlying factor in both cases, and neither court considered adjustment for them.

To the extent post-production costs were background issues in ***Cotiga*** and ***Imperial Colliery***, they came to the forefront in the two recent royalty cases in West Virginia: ***Wellman v. Energy Resources, Inc.***, 210 W. Va. 200, 557 S.E.2d 254 (2001), and ***Estate of Tawney v. Columbia Natural Resources***, 219 W. Va. 274, 633 S.E.2d 22 (2006). In these cases, the West Virginia Supreme Court of Appeals adhered to the prohibition against deducting post-production costs from royalty, and further, greatly restricted any exceptions to this rule, first, to leases which not only express an intent to allocate post-production costs, but meet three expressed conditions, and, second, to cases meeting three additional factual predicates.

Wellman involved an oil and gas lease with a "proceeds" type royalty clause requiring that the lessee pay 1/8th of "the proceeds from the sale of gas...at the mouth of the well." 210 W. Va. at 204, 557 S.E.2d at 258. The lessee in that case sold the gas for $2.22, deducted post-production costs to arrive at a net sale price of $.87 and then paid royalty on the net of $.87. ***Id***. The ability to deduct such costs was squarely presented. In considering this issue, the court looked first to ***Davis v. Hardman***, 148 W. Va. 82, 133 S.E.2d 77 (1963), and Donley, the Law of Coal, Oil and Gas in West Virginia and Virginia (1951), for the general proposition that royalties are "not chargeable with any of the costs of discovery and production." ***Wellman***, at 210, 264. (It also could have looked to ***Kanawha Valley Bank***, ***Cole*** and ***Kohlsaat***.). The Court recognized that, despite this generally recognized concept, some producers charged lessors with a pro rata share of certain expenses recognized as "post- production" expenses and that a split among the states has developed on the ability to deduct these costs. ***Id***. In siding with the states that have held that post-production costs are not deductible from royalty, the Court found that the rationale for the result rests upon the implied covenant to market which "embraces the responsibility to get the oil or gas in a marketable condition and actually transport it to the market." ***Id***. at 264. Recognizing that "West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced," the Court concluded that a lessee must "bear the cost of complying with his covenants under the lease." Upon this reasoning, the Court concluded:

> If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all

> costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.

Syl. Pt. 4, ***Wellman***.

This straightforward Syllabus Point establishes a clear and controlling general principle for oil and gas royalties that post production costs cannot be deducted. In so holding, however, the Court recognized that parties by a contract which "provides otherwise" may agree that a lessor shall bear some of the costs, and in such a case, the Court further held by syllabus point:

> If an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs, and that they were reasonable.

Syl. Pt. 5, ***Wellman***.

The Court then determined that Energy Resources failed to introduce any evidence that the post-productions costs "were actually incurred or that they were reasonable." ***Id***. at 211, 265. For failure to meet this condition, the court held that costs were not deductible and that royalty must be paid on the gross sale price. ***Id***.

Thus, ***Wellman*** establishes the general rule in West Virginia that post-production costs may not be deducted from royalty unless a lease affirmatively "provides otherwise" that they can. In those cases where the lease "provides otherwise" costs may be deducted only if: (i) they are actually incurred, (ii) they are reasonable, and (iii) they can be proven in an accounting.

In ***Tawney***, *supra*, the Court not only affirmed the general principle that post-production costs may not be deducted from royalty, but provided clear guidance on the requirements to "provide otherwise" that costs may be deducted. ***Tawney*** was a class action involving approximately 8,000 plaintiffs with 2,258 leases of varying forms and types, including both "proceeds" and "market value" clauses. At least 1,382 of the leases at issue in ***Tawney*** had language indicating that the royalty payment is to be calculated "at the well" and "at the wellhead," language similar to the lease in ***Wellman***, but also included leases which more clearly suggested that deductions might be taken with provisions such as: "net of all costs beyond the wellhead," or "less all taxes, assessments, and adjustments." 219 W. Va. at 269, 633 S.E.2d at 25. The lessee in ***Tawney*** asserted that the above provisions permitted the lessee to deduct post-production expenses from the lessors' royalties. The Court rejected these arguments and held that the language in question was ambiguous and therefore ineffective to permit the lessee to deduct postproduction expenses from the lessors' royalties. The holding of the Court is stated in Syllabus Point 11, as follows:

> Language in an oil and gas lease that provides that the lessor's 1/8 royalty is to be calculated "at the well," "at the wellhead," or similar language, or that the royalty is "an amount equal to 1/8 of the price, net all costs beyond the wellhead," or "less all taxes, assessments, and adjustments" is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the

> lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.

Syl. Pt. 11, ***Tawney***.

The Court then considered the requirements for "providing otherwise" that costs can be deducted. The holding of the Court on this issue is found in Syllabus Point 10 of ***Tawney*** which states:

> Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.

Syl. Pt. 10, ***Tawney***.

The above conditions pre-suppose the ***Wellman*** requirements that post-production costs be "actually incurred", "reasonable" and that they can be proven in an accounting. Indeed, these requirements were stated to be "presumed" in the certified question answered by the ***Tawney*** Court. ***Tawney***, 219 W. Va. at 269, 633 S.E.2d at 25. When the ***Tawney*** and ***Wellman*** requirements are combined, six conditions must be met before a lessee may deduct post-production costs from royalties. These are:

1. The lease must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and point of sale;

2. The lease must identify with particularity the specific deductions that the lessee may take;

3. The lease must expressly provide for a method of calculating the amount to be deducted from royalty for post-production costs;

4. The costs, which have been identified with particularity, must be actually incurred;

5. The amount of the costs must be reasonable; and

6. The lessee must prove all costs as it would in an action for an accounting.

If all six elements are not established, the lessee is not permitted to deduct post-production expenses. *See also* ***W.W. McDonald Land Co. v. EQT Production Co.***, 983 F.Supp.2d 790, 797-799 (S.D. W.Va. 2013) (surveying relevant West Virginia gas law to the present). Accordingly, in light of the restrictions set forth in ***Wellman*** and ***Tawney***, and the need to carefully scrutinize calculation of post-production activities, whether it be alter-ego self-dealing, or a "sweetheart" deal with an affiliate, if a lease provides for post-production deductions, actual and reasonable costs must mean the actual and direct costs incurred rather than the costs charged by a company.

Subsequent to the West Virginia Supreme Court's decisions in ***Wellman*** and ***Tawney***, Judge Joseph Goodwin had the occasion to apply their holdings in a case involving many, if not all, of the same defendants as in this case. In ***W.W. McDonald Land Co. v. EQT Production Co.***, 983 F.Supp.2d 790 (S.D. W.Va. 2013) opinion clarified (Jan. 21, 2014), Judge Goodwin noted that:

both ***Tawney*** and ***Wellman*** are premised on the implied duty to market gas produced:

> The rationale for holding that a lessee may not charge a lessor for "post-production" expenses appears to be most often predicated on the idea that the lessee not only has a right under an oil and gas lease to produce oil or gas, but he also has a duty, either express, or under an implied covenant, to market the oil or gas produced. The rationale proceeds to hold the duty to market embraces the responsibility to get the oil or gas in marketable condition and actually transport it to market.

Tawney, 633 S.E.2d at 27 (emphasis added) (quoting ***Wellman***, 557 S.E.2d at 264). The court in ***Wellman*** explained that West Virginia law "holds that a lessee impliedly covenants that he will market oil or gas produced." 557 S.E.2d at 265. The court continued that "historically the lessee has had to bear the cost of complying with his covenants under the lease. It, therefore, reasonably should follow that the lessee should bear the costs associated with marketing products produced under a lease." ***Id***. The court explained in both the ***Tawney*** and ***Wellman*** that its decisions were predicated on the "duty, either express, or under an implied covenant, to market the oil or gas produced." ***Tawney***, 633 S.E.2d at 27 (quoting ***Wellman***, 557 S.E.2d at 264). ***Tawney*** and ***Wellman*** both cite Professor Robert T. Donley's seminal treatise, which also discusses an implied duty to market gas produced:

> From the very beginning of the oil and gas industry it has been

> the practice to compensate the landowner by selling the oil and by running it to a common carrier and paying to him one-eighth of the sale price received. This practice has, in recent years, been extended to situations where gas is found. . .. In the absence of an express covenant *to market* either oil or gas, the court implies one in order to effectuate the basic purpose of the lease. . ..

Robert T. Donley, ***Law of Coal, Oil and Gas in West Virginia and Virginia*** § 104 (1951) (emphasis added).

By basing the ***Wellman*** and ***Tawney*** decisions on the implied covenant to market, the Supreme Court of Appeals indicated that it was adopting a version of the "marketable product" rule. *See* 3 Eugene Kuntz, Law of Oil and Gas § 40.5 (Lexis 2013) (The ***Wellman*** decision "rel[ied] on the implied covenant to market [and] adopted a marketable product rule. . .."); Owen L. Anderson, ***Rogers***, ***Wellman***, and the New Implied Marketplace Covenant, 2003-1 Rocky Mtn. Min. L. Inst. 13A (2003) ("***Wellman*** take[s] the view that royalty is owed on the value added by transportation incurred to move gas to a first market unless the lease expressly provides otherwise."); *cf.* ***Appalachian Land Co. v. EQT Production Co.***, 2012 WL 523749 (E.D. Ky. Feb. 16, 2012) (deciding whether Kentucky follows the marketable product rule or the "at-the-well" rule, and citing ***Tawney*** to show that West Virginia does not follow the "at-the-well" rule). Under the marketable product rule, lessees impliedly covenant to bear the costs of getting gas into marketable condition and transporting it to market. See 5 Howard R. Williams and Charles J. Meyers, ***Oil and Gas Law*** § 853, p. 396.3 (2012) ("[T]he implied covenant to market as a prudent operator includes an implied duty to prepare the natural gas for a market and even to transport the gas to a commercial market."); Owen L. Anderson, ***Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?*** (Part 2), 37 Nat. Resources J. 611, 634 (1997) (implying that the marketable product rule requires lessees to bring gas to marketable condition and marketable location). Other cases applying versions of the marketable product rule hold the same. *See, e.g.,* ***Rogers v. Westerman Farm Co.***, 29 P.3d 887, 906 (Colo. 2001) ("Absent express lease provisions addressing allocation of costs, the lessee's duty to market requires that the lessee bear the expenses incurred in obtaining a marketable product. Thus, the expense of getting the product to a marketable condition and location are borne by the lessee."); ***TXO Prod. Corp. v. State ex rel. Comm'rs of Land Office***, 903 P.2d 259, 262-63 (Okla. 1994) (holding that post-production costs of compression, dehydration, and gathering were not deductible from royalties because these costs were necessary to deliver the gas into a pipeline).

983 F.Supp.2d 790, 800-02.

After careful consideration od West Virginia law, Judge Goodwin held:

> 1. That the defendants cannot calculate royalties based on a sale between subsidiaries at the wellhead when the defendants later sell the gas in an open market at a higher price. Otherwise, gas producers could always reduce royalties by spinning off portions of their business and making nominal sales at the wellhead. I predict with confidence that, if confronted with this issue, the Supreme Court of Appeals would hold the same. *See* ***Howell v. Texaco, Inc.****,* 112 P.3d 1154 (Okla. 2004) ("an intra-company contract is not an arm's length transaction, [and] it is not a legal basis on which [a producer] can calculate royalty payments"); ***Beer v. XTO Energy, Inc.****,* 2010 WL 476715 (W.D. Okla. Feb. 5, 2010) (gas sale at wellhead between two controlled, affiliated companies not appropriate for royalty calculation); and
>
> 2. Absent lease language to the contrary, ***Tawney*** requires lessees to pay royalties free of these costs. The defendants cannot avoid ***Tawney*** by simply reorganizing their businesses and making intra-company wellhead sales. Accordingly, I **FIND** that ***Tawney's*** specificity requirements apply to royalty payments made under the defendants' work-back method after 2005.

McDonald Land. 983 F.Supp.2d at 804 (S.D. W.Va. 2013).

Finally, on May 26, 2017, the West Virginia Supreme Court issued its opinion upon rehearing in ***Leggett v. EQT Production Co.***, 239 W.Va. 264, 800 S.E.2d 850 (2017). In ***Leggett***, the Court held that under flat rate leases which are "converted" under W.Va. Code

§ 22-6-8, post-production expenses may be deducted from royalties. Syllabus Point 8 of ***Leggett*** states that "[r]oyalty payments pursuant to an oil or gas lease governed by West Virginia Code § 22-6-8(e) (1994) may be subject to pro-rata deduction or allocation of all reasonable post-production expenses actually incurred by the lessee. Therefore, an oil or gas lessee may utilize the "net-back" or "work-back" method to calculate royalties owed to a lessor pursuant to a lease governed by West Virginia Code § 22-6-8(e). The reasonableness of the post-production expenses is a question for the fact-finder."

Beyond its conclusion that ***Tawney*** and ***Wellman*** were not relevant to its examination of W.Va. Code § 22-6-8 in conjunction with canons of statutory interpretation, as opposed to rules of contractual construction, any criticism of ***Tawney*** and ***Wellman*** contained within ***Leggett*** is mere dicta and does not alter the current controlling nature of those precedents.

In Plaintiffs' Motion for Summary Judgment on Gas Sales to Affiliates and/or Alter Egos and Related Issues [Doc. 331], the plaintiffs seek summary judgment on several issues. Question No. 2[5] is "Should the Court follow the holding by Judge Goodwin in ***McDonald Land*** that sale of gas by an affiliate did not count as an arm length transaction?"

This Court agrees with Judge Goodwin's logic and scholarship and will follow the holding in ***McDonald Land*** on that issue. In addition, this Court has already found the EQT entities to be alter egos of one another.

Question No. 3 is "Why should not the price for gas be determined by the first sale to a non-affiliated party?"

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[5] Question No. 1 is addressed in Plaintiffs' Motion for Summary Judgment (Re: Alter Ego) [Doc. 329].

As provided in ***McDonlad Land***, the sales price for gas will be determined by the first sale to a non-affiliated party.

Question No. 4 is "When dealing with an affiliated company does actual and reasonable costs mean the cost charged by the company or the direct costs incurred by the company?" Question No. 5 is "When dealing with an alter ego company does actual and reasonable costs mean the cost charged by the company or the direct costs incurred by the company?"

The answer to questions 4 and 5 are the same. Whether an affiliated party or an alter ego, in circumstances where deductions are permitted under ***Tawney*** or ***Leggett,*** actual and reasonable costs means the actual and reasonable direct cost of providing the post production services. It does not include indirect costs such as "monetary deductions for personnel costs, indirect costs, production management costs, depreciation and return on capital investment and "meals and entertainment," "uniforms," meter operation and repair, and "personal property taxes." *See* ***McDonald Land***, 983 F.Supp.2d at 816.

Conclusion

For the reasons stated above:

1. Plaintiffs' Motion to Certify Class Action [Doc. 299] is **GRANTED**. This Court will conditionally certify the following class and sub-classes:

All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their natural gas or mineral estates during the period beginning after December

8, 2008, and extending to the present (during any time within their leasehold period.) (See exception below.)

Subclass A - All EQT natural gas lessors with flat rate leases converted by operation of W. Va. Code, § 22-6-8 and that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.).

Subclass B - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period,) and whose leases do not permit the deduction of post-production expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, § 22-6-8.

Subclass C - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period,) and whose leases do permit the deduction of post-production expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, § 22-6-8.

2. Defendants' Joint Motion for Summary Judgment [Doc. 327] is **DENIED**;

3. Plaintiffs' Motion for Summary Judgment (Re: Alter Ego) [Doc. 329] is **GRANTED**; and

4. Plaintiffs' Motion for Summary Judgment on Gas Sales to Affiliates and/or Alter Egos and Related Issues [Doc. 331] is **GRANTED**;

5. A hearing will be held beginning **October 10, 2017, at 9:00 a.m.** and continuing from day to day, in the Wheeling North Courtroom to determine which leases meet the ***Tawney*** standards.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: September 6, 2017.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE