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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

GILBERT H. COULTER and ELIZABETH S. LEIGHNOR, individually and as representative plaintiffs on behalf of persons or companies similarly situated, Plaintiffs, vs. ANADARKO PETROLEUM CORPORATION, Defendants.	Case No. 98-1413-WEB **PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO REMAND**

Pursuant to 28 U.S.C. § 1447(c) and D. Kan. Rule 7.1, Plaintiffs respectfully submit this memorandum in support of their motion to remand.

I. Nature Of The Action

This is an action brought by two Kansas citizens who own mineral interests in lands subject to oil and gas leases owned by Anadarko Petroleum Company (Anadarko). Plaintiffs contend that Anadarko has breached its obligations under oil and gas leases by failing to properly account for and pay royalties, as a result of its improper deduction of production-related expenses and expenses to make the gas marketable. Plaintiffs seek certification of a class of persons who are royalty owners under Anadarko leases where the production from those leases is collected in a gathering system operated by Anadarko Gathering Company, a subsidiary of Anadarko.

In a counterclaim filed after this matter was removed, Anadarko seeks to establish a "counterclaim defendant class" in order to attempt to recover from Kansas royalty owners an amount exceeding $3.6 million in alleged royalty "overpayments" made between 1983 and 1988. This counterclaim arises from the retroactive decision by the Federal Energy Regulatory Commission, reversing its own decade-old decision, concluding that Kansas ad valorem taxes were not recoverable from gas purchasers beyond the applicable maximum lawful price for gas.

II. History Of The Action

Plaintiffs' petition was filed in Stevens County, Kansas, District Court on October 7, 1998. On November 12, 1998, Anadarko filed its notice of removal, pursuant to 28 U.S.C. §§ 1441, et seq. Anadarko contends that the Court has subject matter jurisdiction based upon diversity of citizenship under 28 U.S.C. § 1332(c)(1). Anadarko further suggests the existence of supplemental jurisdiction under 28 U.S.C. § 1367. Plaintiffs do not contend that there were any procedural defects in Anadarko's removal of the action. This motion to remand is based solely on the Court's lack of subject matter jurisdiction.

III. The Law Of Removal And Remand

The removal of an action from state to federal district court is governed by 28 U.S.C. § 1441, the applicable portion of which states:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1447(c) provides:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order or remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

A defendant may remove an action from state court only if the action originally could have been filed in federal court. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). The removing party has the burden of establishing original federal jurisdiction. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S.Ct.35, 66 L.Ed. 144 (1921); Davis v. John Alden Life Ins. Co., 746 F. Supp. 44, 46 (D. Kan. 1990). The removal statutes are construed strictly against the party seeking removal, and any doubts about the correctness of removal are resolved in favor of remand. Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 814, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); Fajen v. Foundation Reserve Ins. Co., Inc, 683 F.2d 331, 333 (10th Cir. 1982); J.W. Petroleum, Inc. v. Lange, 787 F. Supp. 975, 977 (D. Kan. 1992).

IV. Defendant's Claim Of Subject Matter Jurisdiction

Anadarko contends that this Court has original subject matter jurisdiction over the claims set forth in Plaintiffs' petition based on diversity of citizenship. As provided by 28 U.S.C. § 1332(a)(1), this Court has original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different States.

Plaintiffs concede that they are citizens of Kansas, and that Anadarko is a citizen of another state. Anadarko contends that it should be allowed to "aggregate" all of the various amounts potentially due to the putative class members in order to achieve the $75,000 "amount in controversy" requirement needed for diversity jurisdiction. It is this "amount in controversy" aspect of diversity jurisdiction for which Anadarko can not satisfy its burden of proof. As described below, this is clearly not a case in which aggregation of the claims of class members is appropriate. The royalty owners do not and could not assert claims based upon a single title or right in which they have a common and undivided interest.

V. Arguments And Authorities

The basic standard governing jurisdictional aggregation of claims in a class action was stated by the Supreme Court in Pinel v. Pinel, 240 U.S. 594, 596, 36 S.Ct. 416, 60 L.Ed. 817 (1916):

> The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

As set forth in its Notice Of Removal, Anadarko supports its claim of original subject matter jurisdiction as follows:

1. The state court petition contains factual allegations consistent with the requirements for the certification of a (b)(1), (2) and (3) class under K.S.A. 60-223.

2. In 1974 the Tenth Circuit Court of Appeals found that a citizens' suit for the recovery of money on behalf of the state and federal governments against construction contractors and their sureties was a Rule 23(b)(1) "true class action" in which the plaintiffs had united to enforce a

single right in which they claimed a common and undivided interest. Therefore, the claims of the individual class members should be aggregated to determine if the amount in controversy exceeded $10,000.

3. Anadarko asserts that each named plaintiff has a claim exceeding $75,000 in value, and the Court should assert supplemental jurisdiction over any class member claims which do not exceed this amount, under 28 U.S.C. § 1367.[1]

A. The Allegations In The Petition

Anadarko is correct when it states that paragraph G of the state court petition makes allegations consistent with K.S.A. 60-223(b)(1) - a (b)(1) class. Paragraph H contains allegations consistent with a (b)(2) class, while paragraph I contains allegations consistent with a (b)(3) class. Nowhere in the petition do the Plaintiffs allege that they seek to unite in interest with other class members to enforce a single title or right in which they have a common and undivided interest. There is no existing common fund against which these thousands of royalty owners, pursuant to hundreds of separate leases, are entitled to be paid royalties.

Anadarko advances the simplistic argument that if a class is certifiable under (b)(1), the claims of that class can be properly aggregated for jurisdictional purposes. That argument is ill-founded. The requirements for certification under (b)(1) and for aggregation are different.

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[1] In its answers to an initial set of interrogatories (a copy of which is attached - see page 3, section d), Anadarko has conceded that its supplemental jurisdiction suggestion is inconsistent with the decision in Leonhardt v. Western Sugar Company, 160 F.3d 641 (10th Cir. 1998). This case is discussed later in this memorandum, at page 12.

The determination of whether Anadarko is able to prove that this is a common and undivided interest claim class action requiring aggregation must be decided on the facts, not on the classification of the action under Rule 23:

> The inquiry into whether the interests involved are "joint" or "common" for jurisdictional purposes is frequently quite difficult. It will not turn automatically on the classification of the action under Rule 23(b), although it is true that claims falling under Rule 23(b)(1) are more likely to involve an undivided right or interest because of the very nature of the requirement for that subdivision. The decision whether aggregation is permissible therefore will depend on the facts of each case.

7A Charles A. Wright et al., Federal Practice and Procedure § 1756, at 76-77 (1986) (emphasis added.). The fact that Plaintiffs' state court petition makes allegations consistent with the requirements for a (b)(1) class does not mean that Plaintiffs have acknowledged that aggregation is proper. Instead, Anadarko must show that Plaintiffs' claims are common and undivided. As shown below, Anadarko can not meet its burden.

B. The Gallagher Case

In its removal of this action, Anadarko relied upon the case of Gallagher v. Continental Ins. Co., 502 F.2d 827 (10th Cir. 1974). Gallagher brought a class action in Colorado state court, on behalf of the citizens and taxpayers of Colorado and the United States, to recover $55 million for the treasury of the State of Colorado and the treasury of the United States of America. The claim arose out of a highway tunnel construction project on Interstate Highway 70. Gallagher claimed that the state and federal governments had improperly paid the construction contractors sums beyond the original contract amount.

The defendants removed Gallagher's action to federal district court, based upon diversity jurisdiction. The court refused to remand the case. The court then dismissed the case, in part because the plaintiffs lacked standing to bring the action.

One issue on appeal was whether the claims of the plaintiff class could be aggregated to achieve the $10,000 jurisdictional requirement for diversity jurisdiction. The Tenth Circuit Court of Appeals found that aggregation was appropriate under those circumstances:

> Plaintiffs also contend that neither diversity nor federal question jurisdiction can be sustained because the $10,000 requirement of §§ 1331(a) and 1332(a) can be satisfied only by the impermissible aggregation of claims. Although the total sum sought is 55 million dollars, the interest of each plaintiff and of each member of the class whether considered as state or federal citizens and taxpayers is concededly less than $10,000. Separate and district claims may not be aggregated to satisfy the jurisdictional requirement. Snyder v. Harris, 394 U.S. 332, 335, 89 S.Ct. 1053, 1056, 22 L.Ed.2d 319. The rule is different when 'two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.' Ibid. Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511, is not to the contrary. It deals with Rule 23(b)(3) spurious class action and asserts the continuing validity of Snyder. Idib. at 301, 94 S.Ct. 505. We are concerned with a Rule 23(b)(1) true class action wherein the rights of class members are common and undivided. See Advisory Committee's Note to Rule 23, 39 F.R.D. 73, 100. The complaint before us seeks to enforce a single right in which plaintiffs have a common and undivided interest. Hence, aggregation is proper.

502 F.2d at 831.

Gallagher does not stand for the proposition that every (b)(1) class action involves a group of plaintiffs who have united to enforce a single right in which they have a common and undivided interest so as to allow aggregation of their claims for jurisdictional purposes. It was obvious that Gallagher's taxpayer suit involved a common and undivided interest. Fortunately, the Court here need not dwell on the distinctions between such a taxpayer suit (seeking to collect money for the state and federal treasury in connection with one contract) and this royalty owner

suit (seeking to collect individual royalties in connection with hundreds of separate contracts). This Court has a well-established history of deciding that royalty owner class actions do not involve common and undivided claims and do not allow aggregation of such claims in order to meet jurisdictional requirements.

C. This Court Has Routinely Remanded Similar Cases Involving State Law Questions Concerning Royalty Claims.

In a series of decisions during the 1990s, this Court has clearly established that oil and gas royalty owner class actions do not involve joint and common claims, the type of which will allow aggregation to meet jurisdictional requirements. We begin with a recognition of four decisions rendered by Judge Theis. Sternberger v. TXO Production Corp., 771 F. Supp. 330 (D. Kan. 1991); Lemon v. Anadarko Production Co., 771 F. Supp. 335 (D. Kan. 1991)[2]; Farrar v. Mobil Oil Corp., No. 90-1199-T, 1991 WL 192119 (D. Kan. Sept. 18, 1991) [copy attached]; and Alford v. Mesa Petroleum Co., No. 90-1228-T, 1991 WL 268710 (D. Kan. Sept. 24, 1991) [copy attached].

Each of these decisions involved class actions brought on behalf of Kansas oil and gas royalty owners, who sought payment of additional royalties. In each case, the action was commenced in state court, removed by the defendant production company, and remanded by this Court. In each instance, the Court found that it lacked subject matter jurisdiction, since the

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[2] In the Lemon, Farrar and Alford decisions, the Court found that the plaintiffs had plead a Rule 23(b)(3) class action. However, in each case the Court noted that plaintiffs had also alleged that "multiple lawsuits would bring about the risk of inconsistent results." 771 F. Supp. at 336; 1991 WL 192119, *1; 1991 WL 268710, *1. Although the risk of inconsistent results is a factor in a Rule 23(b)(1) class action, this allegations did not distract the Court from finding that the plaintiffs' claim were not common and undivided so as to allow aggregation for jurisdictional purposes.

royalty owner claims were separate and distinct, and could not be aggregated to satisfy the "amount in controversy" requirement for diversity jurisdiction.

Next came the Court's decision in Smith v. Amoco Production Co., No. 93-1363-PFK, 1994 WL 70196 (D. Kan. Feb. 3, 1994) [copy attached]. There the plaintiff, on behalf of himself and a class of oil and gas royalty owners similarly situated, claimed that Amoco had underpaid royalties as a result of the breach of an implied duty to market gas. Alleging diversity jurisdiction, Amoco removed the case from state court. It claimed that the class members had a joint claim or interest and that their claims could be aggregated to meet the $50,000 diversity jurisdiction requirement.

The Court began by noting that it should look to the state court pleadings to identify the amount in controversy.[3] 1994 WL 70196, *1; Lonquist v. J.C. Penney Co., 421 F.2d 597, 599 (10th Cir. 1970). In Smith, the individual plaintiff specifically acknowledged that his claim did not exceeded the $50,000 jurisdictional threshold.

The Court found that the royalty owner claims in Smith were separate and distinct, in spite of the fact that the producer's action may have injured each class member in the same way. The Court cited with approval the following language from Eagle Star Insurance Company v. Maltes, 313 F.2d 778, 781 (5th Cir. 1963):

> [T]he Supreme Court has evinced a desire to give a strict construction to allegations of jurisdictional amount in controversy, so as to allow aggregation only in those situations where there is not only a common fund from which the plaintiffs seek relief, but where the plaintiffs also have a joint interest in that fund, such that if plaintiffs' rights are not affected by the rights of co-plaintiffs then there can be

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[3] In the state court petition filed in the present action, Plaintiffs have alleged that their individual claims do not exceed $75,000. Petition, ¶ N.

no aggregation . . . . In other words, the obligation to the plaintiffs must be a joint one.

The Court found that the claims in Smith were separate and distinct on several grounds, including the following:

1. Each royalty owner's claim is independent of each other royalty owner's claim.
2. Each class member's claim must be determined separately, based on a number of factors.
3. One class member's recovery will not be increased if other class members do not recover.
4. There is no common fund, the total of which is calculated independently of the putative class members' claims.
5. Recovery will be based on the total of the class members' individual claims.
6. The named plaintiffs could bring suit in state court on their own without affecting other class members' rights to sue the producer.

1994 WL 70196, * 6. All of these factors exist with equal strength in the present action.

Consistent with Judge Theis' earlier decisions, the Court in Smith found that subject matter jurisdiction was lacking, as the claims of the class of royalty owners could not be aggregated to achieve the "amount in controversy" required for diversity jurisdiction. This royalty owner class action was remanded to state court.

Later in 1994 Judge Belot issued a similar decision in Leroy Cattle Co. v. Final Oil & Chemical Co., No. 93-1286-MLB, 1994 WL 151105 (D. Kan. March 2, 1994). The claims in this

action were much like those in the Smith case. The plaintiff, on behalf of itself and a class of similarly situated royalty owners, sought recovery of additional royalty payments from a producer. When plaintiff sought remand of the case, the question was whether the amount in controversy needed for jurisdiction under 28 U.S.C. § 1332 could be achieved by aggregating the claims of the various class members. The defendant producer offered an alternative reason for subject matter jurisdiction. It claimed that one class member's potential recovery exceeded $50,000, thereby creating diversity jurisdiction for such claim. It then argued that the Court could entertain supplemental jurisdiction over all other claims of the putative class, including the named plaintiff.

The Court found that the claims of the royalty owner class members were "separate and distinct." Therefore, they could not be aggregated to meet a jurisdictional requirement. The Court then considered the defendant producer's supplemental jurisdictional argument. In order to address this issue, the Court was required to consider the effect of the 1990 enactment of 28 U.S.C. § 1367, the supplemental jurisdiction statute. Fina argued that the enactment of this legislation effectively overruled Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Zahn provides that, except in those cases where several plaintiffs united to enforce a single right in which they have a common and undivided interest, each plaintiff in a class action must independently meet the 28 U.S.C. § 1332 jurisdictional amount requirement in order for the Court to have subject matter jurisdiction in the case. 94 S.Ct. at 508-512.

Based upon the legislative history accompanying the passage of 28 U.S.C. § 1367, which provides that Congress did not intend "to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions," the Court found that this statute should not be read to

overrule Zahn. 1994 WL 151105, * 14. Therefore, the Leroy Cattle case was remanded to state court.

It remains the law in this jurisdiction that 28 U.S.C. § 1367 and its provisions for supplemental jurisdiction did not overrule Zahn. See Amundson & Assoc. Art Studio v. National Counsel on Compensation Ins., 977 F. Supp. 1116 (D. Kan. 1997).

In November 1998 the Tenth Circuit Court of Appeals considered for the first time the effect of the 1990 Judicial Improvement Act upon Zahn. In Leonhardt v. Western Sugar Company, 160 F.3d 631, 641 (10th Cir. 1998), the Court announced:

> We therefore conclude, from both an analysis of the language of § 1367 itself and from its legislative history, that the enactment of § 1367 did not overrule Zahn's holding that each plaintiff in a diversity-based class action must meet the jurisdictional amount in controversy under § 1332.

There is no legitimate basis for the assertion of supplemental jurisdiction in this matter.

D. Conclusion

This Court has established clear precedent holding that oil and gas royalty owner class actions do not involve the type of common and undivided claims which would allow for aggregation to achieve the "amount in controversy" requirement of our diversity jurisdiction statute. The same logic has been applied in other types of class actions. In Amundson & Assoc. Art Studio v. National Council on Compensation Ins., 977 F. Supp. 1116, 1124 (D. Kan. 1997), the Court remanded a class action case. Applying the aggregation law to the class of employers who purchased workers compensation insurance, the Court said:

> To establish a common and undivided interest, defendants must show that the claims of the putative class members derive from rights which they hold in group status. [Citations omitted.] In other words, a class has a common and

undivided interest "where only the class as a whole is entitled to the relief requested."

These royalty owners have no common and undivided interest being asserted in this action. Their claims do not derive from a group status, and it is not the class as a whole which is entitled to relief.

The removal of this action from state district court was inappropriate. Anadarko can not meet its burden of proving that there was original federal subject matter jurisdiction over the claims asserted by Plaintiffs. Plaintiffs respectfully request that this action be remanded to the state district court, pursuant to 28 U.S.C. § 1447(c), and that Plaintiffs recover from defendant their costs and actual expenses incurred as a result of the removal.

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Certificate Of Service

I certify that on June 17, 1999, a copy of this Memorandum was placed in the United States mail in Wichita, Kansas, first class postage prepaid, addressed to Robert J. O'Connor and David E. Bengston, MORRISON & HECKER, 600 Commerce Bank Center, 150 N. Main Street, Wichita, Kansas 67202-1320 (*Counsel For Defendant*).

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