IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-00495-DDD-NRN

JOLLEY POTTER RANCHES ENERGY CO, LLC
on behalf of itself and all others similarly situated,

Plaintiff,

v.

TEP ROCKY MOUNTAIN LLC,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION IN PART AND GRANTING MOTION TO CERTIFY CLASS

In this oil-and-gas case, Plaintiff Jolley Potter Ranches Energy Co., LLC seeks damages from Defendant TEP Rocky Mountain LLC on behalf of a putative class of lessors in Garfield County, Colorado, who allegedly received underpayments of royalties from TEP. Doc. 9 at ¶ 3. Jolley Potter has filed for class certification, Doc. 92, which then-Magistrate Judge Gordon P. Gallagher recommended granting in part and denying in part. Doc. 119. Both parties object to portions of Judge Gallagher's report and recommendation. For the reasons described below, I overrule the parties' objections and adopt the report and recommendation, with the exception that, given information supplied by the plaintiff in its objection, Doc. 120, all of the residue gas claims may proceed, but the certified class must exclude certain leaseholders as to the transportation claim.

.

BACKGROUND

Jolley Potter (and its predecessors) and TEP (and its predecessors) appear to have a lengthy history, potentially including several previous legal battles.[1] Their protracted and often contentious relationship has resulted in a twisting and convoluted fact pattern.

This certification motion involves a putative class of mineral estate owners in the Piceance Basin ("the Basin"), and TEP, the lessee of the oil and gas rights owned by the putative class. Jolley Potter alleges breaches of implied oil-and-gas covenants arising from various Royalty Instruments (leases and related legal instruments) that Jolley Potter, or its predecessors, entered into with TEP or its predecessors. *See* Doc. 9 at ¶¶ 9, 20. Jolley Potter alleges that these breaches started in August 2011 (*Id.* at ¶ 20) and ran until December 2020. Doc. 92 at 4.

Judge Gallagher's recommendation provides a helpful guide to the background of the dispute. Neither party objects to his characterization and I will summarize it here. Jolley Potter's claims for which it seeks class certification can be grouped into two categories: (1) residue gas claims and (2) affiliate claims.

The residue gas claims are based on the interaction between the transportation of gas and TEP's decisions regarding where to sell gas. TEP's transportation costs are deducted from revenue when calculating royalties, so royalty holders bear the cost of transportation. TEP can sell gas within the Basin, at locations such as the White River Hub, or it can sell gas downstream. To facilitate downstream sales, TEP entered into firm transportation agreements with pipeline companies wherein TEP agreed to pay a "demand charge" in exchange for "reserving" space on a

[1] For the sake of clarity, I will not use the names of the predecessors.

given pipeline and a "variable charge" on gas it shipped downstream on the pipeline. Doc. 119 at 7. The variable charge only applied when TEP transported gas on a given pipeline, while the demand charge was paid whether or not TEP actually used the pipeline space it reserved. *Id*. But not all demand charges are created equal—in a previous settlement, the *Lindauer* settlement, TEP agreed that royalty holders would only bear the demand charge when TEP used its reserved space on the pipeline.[2]

The transportation charge arrangement created an advantage to TEP to sell gas downstream, where it could share the transportation costs with royalty holders, and a contrary advantage to royalty holders to sell gas in-Basin, where they would not have to shoulder the demand charge. This is the basis of Jolley Potter's first and second residue gas class claims. First, Jolley Potter alleges that TEP did not pay residue gas royalties on the best reasonably available price. This is the "price claim." *Id*. at 10; *see also* Doc. 91 at 3-4. Under these allegations TEP unreasonably sold gas downstream because it allowed the defendant to pass along a portion of the demand charge to the royalty holders, even when the available in-Basin price for gas was higher than the downstream price. *See* Docs. 119 at 10, 121 at 7. The second claim is closely related: Jolley Potter alleges that TEP failed to market residue gas with reasonable diligence, meaning that it sold gas downstream when those sales prices, after transportation costs, were more economically unfavorable to the royalty holders than an in-Basin sale would have been. *See* Docs. 119 at 10, 121 at 7, 120 at 3. This is the "transportation claim."

[2] Royalty holders also bore a portion of the variable charge. As explained below, the putative class contains both royalty owners inside and outside of the *Lindauer* settlement. Both parties agree that the subject leases contain variations as to how transportation costs are borne.

Jolley Potter's third residue gas class claim, the "Concord claim," goes a step beyond the facts alleged above. From July 2016, TEP began to sell "virtually all" its residue gas to Concord Energy, an in-Basin buyer. Doc. 92-1 at 6. TEP assigned Concord some of its firm transportation agreements as part of the marketing arrangement. *Id*. Concord then took over the variable and demand charges from TEP. But Jolley Potter alleges that Concord deducted the demand charges, even when no gas was transported, from the contract price. *Id*. Judge Gallagher notes Exhibit 14 where Concord deducted over $1.17 million in demand charges from a $44 million purchase of gas from TEP, resulting in a net payment to TEP of just under $43 million. Doc. 119 at 10. TEP used the $43 million figure, rather than $44 million, to calculate royalties, meaning the royalty holders unknowingly paid the transportation costs for TEP's in-basin sale.

The affiliate class action claim, as Judge Gallagher notes, is more nebulous. In 2010 TEP's parent company transferred assets used for gathering and processing gas from TEP's predecessor to another affiliate. Docs. 119 at 11, 92 at 4. TEP entered into an agreement with the affiliate to pay the affiliate for the gathering and processing services, a cost which was passed down to royalty holders via deduction from gross revenue. *Id*. Jolley Potter argues, in essence, that the agreement was not arm's length and TEP harmed royalty holders when it paid allegedly unreasonably high fees to the affiliate, which were passed down to royalty holders. *Id*.

LEGAL STANDARDS

When a magistrate judge issues a recommendation on a dispositive matter, a district judge must "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th

Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate."). Both parties filed timely and specific objections to the Recommendation. *See* Docs. 120, 121.

A motion for class certification is considered dispositive, and therefore subject to de novo review. *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1462 (10th Cir. 1988) (holding that the motions listed in 28 U.S.C. § 636(b)(1)(A) are considered dispositive for the purposes of Rule 72); *see also* 28 U.S.C. § 636(b)(1)(A) ("[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion . . . to dismiss or to permit maintenance of a class action.").

A class action is a procedural mechanism that enables a federal court to adjudicate the claims of multiple parties at once. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). Certification of the class is required for the class action to proceed. Federal Rule of Civil Procedure 23 contains a two-part inquiry that governs the requirements for class certification. Rule 23(a) requires that a plaintiff demonstrate the following: numerosity, commonality, typicality, and adequacy. If plaintiffs satisfy Rule 23(a), they must go on to show through "evidentiary proof" that they satisfy one of three conditions defined in 23(b). *Tabor v. Hilti, Inc.,* 703 F.3d 1206, 1228 (10th Cir. 2013). The only condition at issue in the present class certification is 23(b)(3): class certification is appropriate where "questions of law or fact common to class members predominate over any questions affecting only individual members, and [] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits,

but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quotations omitted). But the burden rests on the plaintiff to prove that each of the Rule 23 requirements have been met. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006).

DISCUSSION

I. Unobjected-to Portions

Judge Gallagher found that the opinions of Jolley Potter's expert, Ms. Bourque, are admissible in their entirety, "subject only to the persuasiveness of TEP's cross-examination and competing evidence on questions that relate to issues of commonality and typicality." Doc. 119 at 14. This is not disputed; I do not find error in it; and I therefore adopt his approach.

Neither party disputes Judge Gallagher's finding that the numerosity requirement is met. The plaintiff alleges that the proposed class involves more than 1,200 leases and about 1,500 class members. Doc. 119 at 15. Joinder of this number of landowners is impractical. I find no clear error in Judge Gallagher's recommendation on numerosity, and will adopt it.

The parties do not dispute Judge Gallagher's findings that the claims or defenses of Jolley Potter are typical of the claims or defenses of the class, and that Jolley Potter will fairly and adequately protect the interests of the class. *Id.* at 19, 27. Judge Gallagher did not explicitly state that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy, per 23(b)(3), but this was implied in his recommendation for certification. *Id.* at 28. I also believe that a class action is superior given the high number of class members, some of whom have small royalty interests, and the inability to distinguish gas between wells given the consistent commingling through

gathering, processing, and marketing. *See* Doc. 92 at 22. I find that Judge Gallagher did not err in his findings. I adopt his recommendation as to typicality and adequacy and find that Jolley Potter has also met the superiority requirement.

II. Commonality and Predominance

I will address the issues of commonality and predominance jointly, as satisfaction of the latter necessarily constitutes satisfaction of the former. The class's "common contention must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). The predominance prong asks, within that, "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) (citing 2 William B. Rubenstein et al., *Newberg on Class Actions* § 4:49, at 195–96 (5th ed. 2012)). A plaintiff "need not show that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *Id.* (citing *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)). I will address each party's objections in turn. I reject the defendant's objections and sustain the plaintiff's objections to a limited extent.

The defendant's objections primarily rest on the contention that there is so much variation between classes of leaseholders that there is no common contention capable of classwide resolution. Two primary objections spring from this argument: (1) the *Lindauer* Settlement argument; and (2) the lease language argument.

TEP first argues that Jolley Potter and over 900 other royalty owners' claims are precluded, as they are bound by the *Lindauer* Settlement, which sharply divides the putative class into *Lindauer* and non-*Lindauer*. Doc. 121 at 9-11. I agree that this may become an issue later in litigation which could require a post-certification creation of subclasses under Fed. R. Civ. P. 23(c)(5). But I also believe that interpretation of the *Lindauer* Settlement is fundamentally a merits inquiry that is not appropriately addressed at the class certification stage, as it is not necessary to determine the propriety of certification.

Judge Gallagher succinctly described the issue of merits and expert testimony and report at the class certification stage. Doc. 119 at 13-14. His analysis of the merits was not a holding, but sums up the convoluted analysis of merits that occurs at class certification. I approach class certification the same way—it is impossible and unnecessary to turn a blind eye to the merits of the plaintiff's claims, but it is appropriate to certify a class that seems likely to lose on the merits if the questions common to the class are also amendable to common proof. *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 459 (2013); *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 915 (10th Cir. 2018).

Jolley Potter's claims are based in the implied covenant to diligently market gas or duty to obtain the best reasonably available price ("IDM"). Doc. 92 at 2. TEP argues that the *Lindauer* Settlement "expressly addresses the price on which TEP will value royalties," which precludes parties subject to the *Lindauer* Settlement from invoking IDM. Doc. 121 at 11. I will not delve into a granular analysis of the meaning or effect of the *Lindauer* Settlement because the overarching question is one of merits that is properly resolved at the summary judgment stage. The *Lindauer* Settlement "expressly provides" that TEP is to use the Weighted Average Sales Price ('WASP') to calculate royalties, and "there

will be a separate WASP for residue gas" and the WASP "will include all proceeds [TEP] and any affiliate receives for the applicable production month from third parties in arms-length transactions." *Id.* at 10. But from the limited briefing available, it does not appear that the Lindauer Settlement expressly waived TEP's IDM duties.

Jolley Potter does not argue that they should not be bound by the settlement, but that TEP's behavior is unreasonable and falls outside of the settlement. Jolley Potter's contention that TEP secretly passed along demand charges to royalty owners would seem to be in violation of the *Lindauer* Settlement, making the question of whether they were doing so even more important to the *Lindauer* portion of the putative class. Whether, under Colorado law, the language of the *Lindauer* Settlement can impliedly abrogate TEP's IDM duties is a question that goes to the merits of Jolley Potter's claims. TEP's arguments may be compelling but they are fundamentally merits arguments that only support Jolley Potter's argument at this stage that there is a common question of law in need of resolution. As discussed below, the resolution of the applicability of IDM in agreements with royalty holders is similarly important to the non-*Lindauer* leaseholders. This weighs heavily in favor of commonality and predominance. Further, were the Court to find at a later stage that the settlement does bar certain or all claims, the Court at that time could appropriately divide the class into *Lindauer* and non-*Lindauer*.

TEP also points out that non-*Lindauer* leaseholders have leases with varying provisions. TEP's argument is twofold: first, that many of these provisions waive TEP's IDM obligations, and thus there is no commonality; and second, that the variations among lease language are so great as to defeat commonality among the leaseholders. Once again, the issue of whether IDM can be waived by provisions that may imply abrogation but do not expressly disclaim IDM is a common question of law that goes

to the merits of Jolley Potter's claims. As to variation between leases, I find the defendant's argument unpersuasive. The categorical nature of the plaintiffs' claims override lease language variation—was TEP unreasonably selling gas downstream for a lower price than what was available in-Basin? Did TEP unreasonably deduct the Concord transportation costs? For the proposed sub-class who were subject to gathering and processing costs, was TEP's agreement with its affiliate unreasonable and not at arm's length? All of these questions relate directly back to the question of the implied duty of marketability.

I am similarly unsympathetic to TEP's lease variation argument. The Tenth Circuit has held that the preparation of a lease chart is adequate to establish commonality. *Naylor Farms, Inc. v. Chaparral Energy* LLC, 923 F.3d 779, 795-796 (10th Cir. 2019) (holding that a categorized chart organizing leases by royalty clause language is what a plaintiff ought to do to establish commonality). The parties have prepared a stipulated, categorized lease spreadsheet that divides the 1,245 leases into 13 categories. *See, e.g.*, Doc. 129 at 3. Jolley Potter also contends that none of the lease language variations waives the IDM. *Id.* (citing *Davis v. Cramer,* 808 P.2d 358, 361 (Colo. 1991)). Further, as Judge Gallagher noted, lease language variation has no impact on the Concord claim, as all royalty owners bore the brunt of transportation charges the TEP did not actually incur. Doc. 119 at 22. At present the amount of lease variation is manageable, and the categorized list sufficiently establishes commonality. Again, at a later point in litigation, a decision on the merits may result in a group of leases being carved out from the class. But that cannot happen until a merits decision is made.

TEP argues that Jolley Potter inappropriately based a monthly comparison of TEP's WASP to an index price for Jolley Potter's second class residue gas claim. Doc. 121 at 7. I agree with TEP and Judge Gallagher

that this argument is likely to fail on the merits. But this again goes to a question of the extent of the IDM. It also creates a potential new extension of *Lindauer v. Williams* ("*Lindauer II*") on price impact and reasonable transportation costs that should be decided at the merits stage. 381 P.3d 378 (Colo. App. 2016).

Finally, TEP has made multiple affirmative defenses and damages arguments that they contend bar class certification. Doc. 121 at 13. Such arguments go deeply into the merits of the case and are not appropriate at the class certification stage. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442,453-454 (2016) (holding that when commonality exists and predominated, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (internal quotation marks and citations omitted).

Jolley Potter only raises one true objection regarding Judge Gallagher's recommendation that the transportation claim not be certified. Jolley Potter argues that Judge Gallagher erroneously found intraclass conflict between leaseholders for whom transportation costs were not deducted vs. those for whom transportation costs were deducted. Doc. 120 at 4-5. Judge Gallagher explained that the transportation claim produced intraclass conflict because the claim is predicated on the theory that it was unreasonable for TEP to sell gas downstream even when the downstream market offered higher prices than the in-Basin market, because the transportation deductions made the sale less profitable to *some* royalty holders, that is to say, royalty holders whose lease terms allowed TEP to deduct transportation costs.

Jolley Potter argues, in effect, that because the transportation claims exist for a closed period, the leaseholders for whom transportation costs were not deducted will not be harmed by a decision that benefits the

other classes of leaseholders. *Id.* at 6. Lack of harm to some putative class members does not commonality create. Plaintiffs have not met their burden to establish commonality between the transportation deducted group vs. transportation not-deducted group. But in their objections, Jolley Potter explains that there are only five leases that contained language prohibiting TEP from deducting transportation costs. *Id.* at 5. Jolley Potter offers to exclude these five leases, known as Category 12 leases, from the certified class. Because I find commonality among the other 1,200-odd leases, I overrule Jolley Potter's objection but agree to certify the transportation claim excluding the Category 12 leases.

In sum I find commonality and predominance on the basis that Jolley Potter's claims revolve around categorical questions of law and fact that must be resolved at the merits stage. It may well be that the class that comes out of this litigation is not the same class that is certified. But questions of the extent of IDM and the reasonableness of TEP's actions bridge the putative class in a way that is central to the validity of each of the claims.

III. Class Representative and Counsel

Judge Gallagher's recommendation does not explicitly make a recommendation regarding the appointment of class counsel. Under Rule 23(g), the court must appoint class counsel in view of (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims at issue here; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

As set forth in Plaintiff's motion, Doc. 92 at 12-13, Plaintiff's counsel are appropriate appointees to represent the class. Counsel have devoted considerable time and effort already to this case and have shown a willingness to expend considerable resources toward litigating these claims, including the retention of multiple experts. Plaintiff's counsel has significant experience not only with this case but with other oil-and-gas class action litigation. Given this, and absent any objections from Defendant or anyone else, Plaintiff's counsel will be appointed class counsel.

CONCLUSION

Judge Gallagher's Report and Recommendation (Doc. 119) is ACCEPTED and ADOPTED except as to his recommendation on the transportation claim.

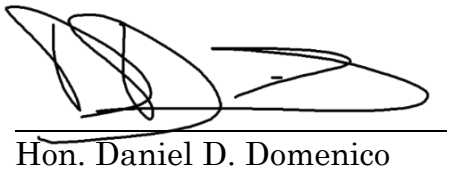
Plaintiff's Motion to Certify Class, Doc. 92, is GRANTED IN PART. I FIND that the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) are satisfied and that certification of the proposed class is appropriate under Rule 23(b)(3) for all Class Claims (Doc. 9, Claims 2, 3, 6, and 7) except as follows. The Class Definition (Doc. 92 at 1) proposed by Plaintiff is ADOPTED AS MODIFIED to exclude the Category 12 leases from the transportation claim.

Plaintiff is appointed as class representative, and counsel for Plaintiff is appointed as class counsel pursuant to Rule 23(g).

The parties must file, on or before **October 27, 2023**, a proposed notice to be given to all class members and proposed method(s) of providing notice, all consistent with Rule 23(c)(2)(B).

DATED: September 21, 2023

BY THE COURT:



Hon. Daniel D. Domenico