UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIAN EATON and CYNTHIA EATON,
individually and on behalf of a
class of all others similarly situated,

and

CUNNINGHAM PROPERTY
MANAGEMENT TRUST,
individually and on behalf of a
class of all others similarly situated,

Plaintiffs,

v.

ASCENT RESOURCES - UTICA, LLC
301 N.W. 63rd, Suite 600
Oklahoma City, Oklahoma 73116

Defendant.

Case No. 2:19-cv-3412

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsey M. Vascura

FIRST CONSOLIDATED
CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

FIRST CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs Brian C. Eaton, Cynthia K. Eaton, and Cunningham Property Management Trust (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, allege the following based on personal knowledge, investigation of counsel, and belief:

I. INTRODUCTION

1. This is a class action for compensatory damages, injunctive relief, and other legal and equitable remedies arising from the systematic underpayment of royalties owed to Plaintiffs and the putative Class and Subclass members described herein.

2. This First Consolidated Class Action Complaint seeks class certification pursuant to Federal Rule of Civil Procedure 23(c).

II. JURISDICTION AND VENUE

3. Jurisdiction arises pursuant to 28 U.S.C. § 1332(a) and (d) because (i) Plaintiffs and at least one member of the putative class are citizens of a state different from Defendant, (ii) the amount in controversy exceeds $5 million exclusive of interest and costs, and (iii) none of the exceptions under 28 U.S.C. §§ 1332(d) apply to the instant action.

4. Defendant, Ascent Resources – Utica, LLC, is subject to the jurisdiction of this Court pursuant to Federal Rule of Civil Procedure 4 and 28 U.S.C. § 115(b)(2) because it is registered to do business in, and does business in, this District.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and S.D. Ohio Civ. R. 82.1(b) because Defendant transacts business in this District, a substantial part of the events giving rise to the claims occurred in this District, and Defendant is subject to personal jurisdiction in this District.

III. PARTIES

6. Plaintiffs Brian Eaton and Cynthia Eaton own 54.08 acres of real property in Wheeling Township, Belmont County, Ohio. Brian Eaton and Cynthia Eaton are Ohio citizens who reside at 1901 Pennsylvania Avenue, Belpre, Ohio 45714. They are collectively referred to as "Plaintiff Eatons" or "The Eatons" herein. The Eatons are the lessors on the oil and gas lease attached as Exhibit 1.

7. Plaintiff Cunningham Property Management Trust owns approximately 272 acres of real property in Moorefield Township, Harrison County, Ohio. One of the Trust's two Trustees, Philip L. Cunningham, is an Ohio citizen who resides at 76795 Valley Knoll Road, Flushing, Ohio 43977. The Trust and the Cunninghams are collectively referred to

as "Plaintiff Cunningham" herein. Plaintiff Cunningham is the lessor on the oil and gas leases attached as Exhibit 2 and Exhibit 3.

8. Defendant, Ascent Resources – Utica, LLC, is an Oklahoma limited liability company that was previously known as American Energy – Utica, LLC (formed in September 2013). Ascent Resources – Utica, LLC's headquarters and principal place of business is in Oklahoma City, Oklahoma.

9. Defendant, Ascent Resources – Utica, LLC, will also be referred to as "Defendant," "Ascent," or "lessee."

10. Upon information and belief, Ascent Resources – Utica, LLC is a wholly-owned subsidiary of American Energy Partners, LP, an Oklahoma limited partnership whose equity owners include the Estate of Aubrey McClendon, The Energy & Minerals Group, First Reserve, and other institutional investors.

IV. UNDERLYING FACTUAL ALLEGATIONS

A. <u>The process of recovering natural gas by fracking involves expenditures for various procedures that extract, prepare, and transport the natural gas.</u>

11. The Utica Shale lies under New York, Pennsylvania, Ohio, and West Virginia, as well as extending into parts of Kentucky, Maryland, Tennessee, and Virginia. The Utica Shale even extends as far as Ontario and Quebec in Canada.

12. Historically, drilling consisted of going straight into the earth to extract minerals or gas. Soon, technology allowed wells drilled at an angle without much curve. As technology improved, the distance in which the wellbores could go from vertical to horizontal decreased, allowing one well to access many more acres of natural gas reserves between wells.

13. Natural gas from the Utica Shale is located within a sub-surface geologic shale formation and is extracted using new horizontal drilling and hydraulic fracturing methods known as "fracking."

14. Since approximately January 1, 2010, Ohio has seen remarkable growth in natural gas drilling in the Utica Shale. This growth came about based upon the new technology that provided a means to access, produce, and profit from the natural gas trapped within this formation. *See* Kristen Allen, *The Big Fracking Deal: Marcellus Shale – Pennsylvania's Untapped Resource*, 23 Vill. Envtl. L.J. 51, 54 n.26 (2012).

15. Before new technology came about, there was no practical way of accessing the natural gas trapped within the Utica shale, not to mention other shales in the United States. *Id.* at 54-55.

16. The outcome of this new technology was a swell in gas production out of the Utica Shale. Companies such as Ascent quickly realized the profits that could be made employing horizontal drilling. As a result, there was an aggressive race to obtain mineral rights from as many landowners as possible.

17. In exchange for the privilege to extract natural gas from landowners' property, lessees such as Ascent pay a "royalty." The royalty payment is a payment of a percentage of the revenue generated from the sale of oil or natural gas produced from the lessor's property. The royalty rates historically were paid at 12.5%, but with the advent of the recent "shale boom," royalties have risen to as high as 21%.

18. Traditionally, lessees of gas rights did not shift costs to the lessors; however, even in the absence of language permitting any cost-shifting, lessees have begun charging back costs to the landowners.

19. Because not every landowner has enough acreage on which to drill a well, many leases contain what are called "unitization" clauses. A unitization clause allows the lessee to take all, or a portion, of a landowner's land to create a pool of neighboring lands that in combination create a suitable drilling unit.

20. In the Utica Shale, these developers typically desire units of 640 acres to over 1,000 acres given that they are drilling horizontally. Thus, royalties for each landowner are calculated based on the amount of the lessor's land contained within the drilling unit.

21. Once the natural gas is reached through the fracking process, a wellhead is placed on the well bore. After the wellhead is placed, natural gas is moved from the well through gathering pipes and ultimately transported through an intrastate transmission pipeline. Intrastate transmission pipelines connect to major interstate transmission pipelines which transport natural gas throughout the United States. The transport and processing steps, which follow removal of natural gas from the wellhead but precede entry of the gas into an interstate transmission pipeline, are referred to in the industry as "gathering."

22. Natural gas is often not in suitable form to be placed directly into an interstate transmission line and must undergo "processing" during the gathering process to remove water content and other impurities.

23. Natural gas must flow from a higher pressure to a lower pressure in order to move to the market, and operators typically must compress the natural gas at various points in order to effectuate the flow of the gas into transmission pipelines. This process is referred to in the industry as "compressing."

B. The oil and gas industry is plagued by oil and gas lessees that take advantage of lessors by improperly shifting expenses to lessors and inflating deductions from royalty payments.

24. The practice of oil and gas lessees (operators) improperly shifting expenses to mineral owners is not new. Lessees have routinely engaged in these improper practices. *See* Michael Rubinkam, *In Gas Drilling Country, the Honeymoon is Over on Royalties* (Sept. 25, 2016), https://www.msn.com/en-us/money/markets/in-gas-drilling-country-the-honeymoon-is-over-on-royalties/ar-BBwCqjD?li=BBnb7Kz&ocid=edgsp (Attached as Exhibit 4).

25. For example, in Pennsylvania, home to the bulk of the Marcellus Shale, whose "shale boom" preceded the shale boom in Ohio, there have been numerous class-action lawsuits in which mineral owners have made allegations similar to those in this action.

26. In late 2015, the Pennsylvania Attorney General filed a lawsuit against Chesapeake Energy Corporation (Aubrey McClendon's prior company) and its subsidiaries for unfair trade practices and violations of consumer protections laws. The lawsuit alleges that Chesapeake (a major exploration and production company in Pennsylvania) has improperly shifted "post-production" costs and otherwise "inflated" post-production expenses at the expense of the mineral owners in Pennsylvania. (Case No 2015 IR 69, Bradford County Court of Common Pleas.)

27. Chesapeake was also the defendant in another recent class action lawsuit filed in the Middle District of Pennsylvania: *Demchak Partners, Ltd. v. Chesapeake Appalachia, LLC*, Case No. 3:13-cv-02289, in which the plaintiffs made nearly identical allegations to those made in the instant case. Chesapeake settled this lawsuit in 2014.

28. There is a class action pending in the United States District Court for the Middle District of Pennsylvania that alleges similar allegations to the instant action: *Brown v. Access Midstream Partners, LP*, Case No. 3:14-cv-591.

29. There is a second class action pending in the United States District Court for the Middle District of Pennsylvania that alleges similar allegations to the instant action: *The Suessenbach Family LP v. Access Midstream Partners, LP*, Case No. 3:14-cv-01197.

C. Ascent's mishandling of the royalty payments to Plaintiff Eatons is an example of Ascent's widespread impropriety towards its lessors.

30. The Eaton property is burdened by a July 26, 2011 oil and gas lease between Brian and Cynthia Eaton and Marquette Exploration, LLC. The lease covered Tax Parcel #51-00135.00, consisting of 54.08 acres. (Lease attached as Exhibit 1).

31. Defendant Ascent is the successor to Marquette Exploration, LLC and now holds the "lessee" interest in this lease, at least for the Utica Shale.

32. Regarding Royalty Payments, the lease provided for a 16.00% royalty and further states:

5. **Royalty Payments.** The royalties reserved by Lessor, and which shall be paid by Lessee, are: (a) On oil (including but not limited to distillate and condensate) 16% of that produced and saved from the leased premises, the same to be delivered at the wells or to the credit of Lessor in the pipeline to which the wells may be connected, provided; however, Lessee, at its option, may from time to time purchase such royalty oil, paying therefore not less than the price prevailing in the pricing area for oil of like grade and gravity at the time of delivery; (b) On gas, including coalbed methane gas, gob gas, casinghead gas and all other gaseous or vaporous products, the market value at the wells of 16% of the gas so sold or used, such market value at the wells in no event to exceed the net proceeds received by Lessee calculated or allocated back to the wells from which produced, making allowance and deduction for a fair and reasonable charge for gathering, compressing, and making merchantable such gas, provided, that on gas sold at the wells, the royalty shall be 16% of the net proceeds received by Lessee from such sale, after such allowance and deduction, and provided further that, if any such sale of gas is regulated as to price by any governmental agency having jurisdiction, such market value or net proceeds shall in no event exceed the amount received by Lessee, not subject to refund, calculated, or allocated back to the wells from which produced, making allowance and deduction for a fair and reasonable charge for gathering , compressing, and making merchantable such gas, and which amount may be further adjusted up or down prospectively or retrospectively when the price or rate authorized by such governmental agency is finally determined. Lessor agrees to pay any and all taxes levied or assessed upon its interest in the production of oil and gas from the leased premises and Lessee is hereby authorized to pay such taxes and assessments on behalf of Lessor and to deduct the amount so paid from any monies payable to Lessor hereunder. In the event any extraneous substance (being any substance that is obtained from sources other than the leased premises or lands pooled or unitized therewith) is injected into subsurface strata in connection with secondary, tertiary, or other enhanced recovery operations hereunder, any like substance thereafter produced hereunder, or contained in oil or gas thereafter produced hereunder, from such strata shall be deemed to be part of the extraneous substance so injected until the total volume thereof equals the total volume of the extraneous substance so injected, and no royalty shall be payable hereunder on any such extraneous substance. During any period after expiration of the primary term hereof, where there is a gas well on the leased premises or on a unit that includes all or a part of the leased premises, however designated, capable of producing gas and gas is not being sold or used on or off the leased premises and the well or wells are shut-in and there is no current production of oil or operations on any part of said leased premises sufficient to keep this lease in force, Lessee shall be obligated to pay or tender as shut-in rental the amount of Fifty Dollars ($50.00) per net acre of this lease contained in the drilling unit (which shall be the same and shall be paid regardless of the number of shut-in wells and regardless of whether the shut-in well or wells be located upon said leased premises or upon such other acreage as is embraced in such unit) for each six (6) month period during the shut-in period and it will be considered that gas is produced, for all purposes of this lease, during any period that such well or wells are so shut-in; such amount for the first six (6) month period to be payable within ninety (90) days following shutting-in of the last well, and payment for each subsequent six (6) month period, if required, shall be payable on or before the beginning date of each such subsequent six (6) month period. The amount of each such rental payment or tender may be paid to Lessor by check or draft of Lessee and such payments may be commenced and continued either during or beyond the primary term. No such shut-in rental payments shall be required during the primary term of this lease. Lessee's failure to properly pay such rental payments shall render Lessee liable for the amount due but shall not operate to terminate this lease. Lessee shall use reasonable diligence to market gas capable of being produced from such shut-in well or wells, but shall be under no obligation to market such gas under terms, condition, or circumstances which, in Lessee's judgement exercised in good faith, are unsatisfactory.

33. However, the main body of the lease is subject to an Addendum (part of Exhibit 1), which was also signed on July 26, 2011, and made part of the lease.

34. Regarding the royalty payments, the Addendum controls and states:

ROYALTY

Market Enhancement Clause
It is agreed between the Lessor and Lessee that, notwithstanding any language herein to the contrary, all oil, gas or other proceeds accruing to the Lessor under this lease or by state law shall be without deduction, directly or indirectly, for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marketing the oil, gas and other products produced hereunder to transform the product into marketable form; however, any such costs which result in enhancing the value of the marketable oil, gas or other products to receive a better price may be deducted from Lessor's share of production so long as they are based on Lessee's actual cost of such enhancements. However, in no event shall Lessor receive a price that is less than, or more than, the price received by Lessee.

35. During the last six years, Ascent (under its current and former names) has been active in securing oil and gas leases, sub-leases, or partial lease assignments within eastern Ohio for the purpose of exploring for and producing natural gas, oil, and other liquid and gaseous hydrocarbons from the Utica Shale geologic formation.

36. Upon information and belief, the Eaton property is included within the drilling units for several oil and gas wells that are owned and operated by Ascent by virtue of the leasing rights granted in the aforementioned oil and gas lease.

37. Specifically, the Eaton property is included within the associated drilling units for the following wells in Belmont County: CAPSTONE HOLDINGS 2H-9, CAPSTONE HOLDINGS 3H-9, CHC DUTTON W WHL BL 5H, CHC DUTTON W WHL BL 4H, BLAYNEY N WHL 3H, BLAYNEY E WHL BL 5H-A, and BLAYNEY W WHL BL 1H-A.

38. Plaintiff Eatons, as lessors, are entitled to royalty payments from the hydrocarbon production of these wells, to be paid according to the royalty provisions of the operative leases.

39. Plaintiff Eatons began receiving royalty payments with associated "royalty statements" in late 2014.

40. Plaintiff Eatons noticed very substantial "post-production" cost deductions from the royalty payment for items such as compression, processing, treating, transportation, fuel, marketing, gathering, and other costs.

41. Although listed as "Deduct Codes" on the royalty statement, these deductions were not further explained.

42. Plaintiffs noticed that the deductions varied, often substantially, without any explanation or apparent good cause. (See sample Eaton Royalty Statements attached as Exhibit 5.)

43. The royalty statements reflect deductions ranging from 25% of the gross value of the hydrocarbons produced to as much as 76% of the gross value.

44. These deductions, when taken over the course of the life of these wells, will potentially amount to tens, if not hundreds, of thousands of dollars of lost royalty revenue to Plaintiffs.

45. Insofar as the lessee may be entitled to deduct any "post-production" expenses, the lessee (Ascent) may not deduct for expenses related to any infrastructure or efforts that occur *before* the product (natural gas, oil, or condensate) reaches the point of sale to the market. Stated differently, because the natural gas is not in marketable form *until* it meets the quality and pressure specifications of the interstate pipeline into which it is delivered, the lessee may not deduct for any costs incurred to pressurize, transport, or process the gas *before* it is placed into an interstate pipeline.

46. Indeed, per the subject lease, Ascent may only take deductions, in proportion to the lessor's royalty, if and only if, such expenses are to enhance the value of marketable oil, gas, or other products in order to receive a better price.

47. The high deductions indicate that Ascent is arbitrarily deducting for its own capital expenditures for compression, separation, processing, gathering, and transportation equipment associated with Ascent's production operations in eastern Ohio without support in the contract or any basis for doing so.

48. Based on an implied duty to market and also an implied duty to act as a reasonable prudent operator, duties imposed as a matter of law, Ascent is obligated to market and sell its gas production at the highest price obtainable.

49. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "gathering" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law and per the subject lease.

50. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "compression" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law and per the subject lease.

51. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "processing" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law and per the subject lease.

52. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "transportation" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty for any transportation expenses that occur *before the point of sale to the market*, as a matter of law and per the subject lease.

53. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, (a) the deduction must be reasonable, (b) the expense must have been incurred to enhance an already marketable product, and (c) the deduction must relate to an expense that caused the lessor's royalty to increase in proportion with the assessed costs. This is because the leases do not permit Defendant to deduct impermissible deductions or to inflate the amount of permissible deductions, yet this is what Defendant is doing.

54. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, *it is the lessee's burden* to establish that: (a) the deduction is reasonable, (b) the expense was incurred to alter (enhance) an already marketable product, and (c) that the deduction relates to an expense that caused the lessor's royalty to increase in proportion with the assessed costs.

55. Moreover, based upon the Eatons' royalty statements, Ascent actually charged the Eatons *for losses* regarding Natural Gas Liquids (NGLs). From May 2015 through November 2015, the Eatons' royalty for NGLs was reduced below zero and actually *charged for a portion of Ascent's losses* on NGLs, which is not permissible as a matter of law.

56. A sampling of the Eatons' royalty statements attached to this First Consolidated Class Action Complaint has been reviewed by Robert N. Hart. The Affidavit of Mr. Hart is attached as Exhibit 6.

57. Mr. Hart is a petroleum engineer and oil and gas consultant with offices in Charleston, West Virginia. He holds a bachelor's degree in Petroleum Engineering from West Virginia University. Mr. Hart is also a certified mineral appraiser—IIMA 1999-5. *See* Exhibit 6 ¶¶ 2-4.

58. Mr. Hart is the co-owner and principal consultant of HartPetro Global, LLC, providing consulting services in the areas of reservoir engineering, underground gas storage, fair market value appraising, production operations, lease negotiations, reserves projections, royalty audits, and acquisitions and divestitures. Mr. Hart's experience and expertise in the oil and gas industry includes analyses of royalty payment statements, and calculation of royalties. *See* Exhibit 6 ¶¶ 5-6.

59. Based on Mr. Hart's review of the Eatons' royalty statements, his opinion is that certain natural gas post-production expenses appear to be very high and provide reason to investigate further whether they are proper. *See* Exhibit 6 ¶ 8.

60. The law imposes upon all oil and gas lessees an obligation to act in good faith toward its lessors.

61. The expenses taken from Plaintiff Eatons are either not allowed per the lease, or, alternatively, have been and are being taken in improper amounts.

62. Ascent's intentional actions and practice of deducting so-called "post production" expenses from the royalty payments to the Eatons is nothing more than a ruse, a method of taking money that rightfully belongs to the Eatons.

63. The putative class consists of lessors similarly situated to Plaintiff Eatons.

64. The putative class lessors have oil and gas leases that are similar in all relevant respects to the lease of Plaintiff Eatons: the leases provide for the good-faith payment of royalties by Ascent to the lessors. Taking certain deductions from these royalty payments is prohibited as a matter of law, and some leases even expressly preclude the taking of any deductions from royalty payments. Companies such as Ascent use form leases that contain exactly the same or substantially similar terms from lease to lease. *See* Karen E. Kathle and Denielle M. Stritch, *Grouping the Marcellus Payout: Use of Class Actions in Royalty Litigation Concerning Post-Production Cost Deductions*, 88 N.D. L. Rev. 699, 707-08 (2012).

65. The putative class lessors have experienced and are experiencing royalty payments deductions similar to the deductions from royalty payments to Plaintiff Eatons because Ascent "provisioned" its leases so that identical or similarly-worded leases are treated in the same manner.

66. As of the date of filing of this First Consolidated Class Action Complaint, neither Ascent nor Ascent's counsel has provided a satisfactory accounting and explanation of all deductions and calculations regarding royalty payments to the putative class lessors. The basis for, and most of the facts underlying, the deductions and calculations therefore remain peculiarly within the knowledge and/or control of Ascent.

67. Ascent's intentional actions and practice of deducting so-called "post production" expenses from the royalty payments to Plaintiff Eatons and the members of the putative class is nothing more than a ruse, a method of taking money that rightfully belongs to Plaintiff Eatons and the members of the putative class.

68. Ascent's actions are wanton, willful, and undertaken with malice and conscious disregard for the rights of Plaintiff Eatons and the members of the putative class.

D. Ascent's mishandling of the royalty payments to Plaintiff Cunningham is another example of Ascent's widespread impropriety toward its lessors.

69. The Cunningham property is burdened by two separate oil and gas leases.

70. The first lease was between Emerson Mizer, lessor, and Floyd Kimble, lessee, and dated December 11, 1982, covering 88 acres, more or less. This was recorded at Volume 67, Page 474 of the Harrison County Recorder's office. (Lease attached as Exhibit 2.)

71. The second lease was between Lester and Mary Cunningham, lessors, and Floyd Kimble, lessee, and dated January 12, 1983, covering 183 acres, more or less. This lease was recorded at Volume 67, Page 708 of the Harrison County Recorder's office. (Lease attached as Exhibit 3.)

72. Both leases used a standard pre-printed form and provided an identical royalty to each lessor, as stated in Paragraph 5 of each lease:

> In consideration of the premises the Lessee covenants and agrees:

> (A) to deliver to the credit of the Lessor in tanks or pipe lines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at the Lessee's option to may Lessor the market price for such one-eighth (1/8) royalty at the published rate for oil of like grade and gravity prevailing on the date such oil is run into tanks or pipe lines.
>
> (B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the wellhead price paid to Lessee per thousand cubic feet of such gas so marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 10 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit, without allowance for temperature and barometric variations; payments or royalty for gas marketed during any calendar month to be on or about the 30th day of the following month.
>
> (C) Lessee to deduct from payments in (A) and (B) above Lessors prorate share of any severance (excise) tax imposed by any governmental body.
>
> (D) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of The East Ohio Gas Company field market price at the wellhead for gas of like kind or quality, and on the same basis that East Ohio would pay for such gas, including any escalation in price that East Ohio would pay for such gas as if a contract for the sale of same had been entered into at the time of initial production.

73. Plaintiff Cunningham eventually acquired both the surface and the minerals of each property and currently holds the "Lessor" interest under each lease, which is also known as the "royalty" interest.

74. In the years following 1983, Kimble, the Lessee, assigned its "Lessee" interest (also known as the "working" interest) to various assignees, which upon information and belief, were thereafter re-assigned and partially re-assigned.

75. As of today, upon information and belief, Ascent holds the "Lessee" interest of these leases, at least insofar as these interests apply within the Utica shale formation. (Other entities may retain the "Lessee" interest in other geological formations under these two leases, which are not the subject of this action.)

76. During the last three years, Ascent (under its current and former names) has been active in securing oil and gas leases, sub-leases, or partial lease assignments within

Eastern Ohio for the purpose of exploring for, and producing, natural gas, oil, and other liquid and gaseous hydrocarbons from the Utica Shale geologic formation.

77. Upon information and belief, the Cunningham property is included within the drilling units for several oil and gas wells that are owned and operated by Ascent.

78. The Cunningham property was included by Ascent within these drilling units by virtue of the leasing rights granted in the aforementioned oil and gas leases (Exhibits 2 and 3).

79. Specifically, the Cunningham property is included within the associated drilling units for the following wells in Harrison County: RH PETTAY S NTG HR 2H, RH PETTAY S NTG HR 4H, RH PETTAY S NTG HR 6H, RH PETTAY S NTG HR 8H, RH PETTAY S NTG HR 10H, RH HAMILTON S MRF HR 2H, RH HAMILTON S MRF HR 4H, RH HAMILTON S MRF HR 6H, RH HAMILTON S MRF HR 8H, RH HAMILTON S MRF HR 10H.

80. Plaintiff Cunningham, as lessor, is entitled to royalty payments from the hydrocarbon production of these wells, to be paid according to the royalty provisions of the operative leases.

81. Plaintiff Cunningham began receiving royalty payments, with associated "royalty statements" in early 2016.

82. Plaintiff Cunningham immediately noticed very substantial "post-production" cost deductions from the royalty payment for items such as compression, processing, treating, transportation, fuel, marketing, gathering, and other costs.

83. Although listed as "Deduct Codes" on the royalty statement, these deductions were not further explained.

84. Plaintiff Cunningham noticed that the deductions varied, often substantially, without any explanation or apparent good cause. (Cunningham Royalty Statements attached as Exhibit 7.)

85. By April of 2016 (accounting for the sales occurring in February of 2016), Ascent was deducting over 45% of the total gross value of Plaintiff Cunningham's royalty checks for various "post-production" expenses. Such deductions were still without any explanation or good cause.

86. When excluding oil and liquid condensates and only accounting for natural gas, Ascent was deducting *over 68%* of the gross value of the natural gas sales for various gathering, compression, and transportation "expenses."

87. These deductions, when taken over the course of the life of these wells, will potentially amount to hundreds of thousands of dollars of lost royalty revenue to Plaintiff Cunningham.

88. Plaintiff Cunningham contends that the lessee, Ascent, is not entitled to deduct "post-production" expenses as a matter of law (*e.g.*, gathering, processing, and compression costs). The leases require payment of the one-eighth of the entire gross realized sales revenue of the sale of hydrocarbons excepting only deductions for severance (excise) taxes prorated to the lessor's royalty.

89. Moreover, insofar as the lessee may be entitled to deduct any "post-production" expenses (which Plaintiff Cunningham does not concede), the lessee (Ascent) may not deduct for expenses related to any infrastructure or efforts that occur *before* the product (natural gas, oil, or condensate) reaches the point of sale to the market. Stated differently, because the natural gas is not in marketable form *until* it meets the quality and pressure specifications of the interstate pipeline into which it is delivered, the lessee

may not deduct for any costs incurred to pressurize, transport, or process the gas *before* it is placed into an interstate pipeline.

90. Upon information and belief, Ascent is *not* deducting for expenses paid to unaffiliated third parties for services provided to enhance the value of the product taken from Plaintiff Cunningham's property. The high deductions indicate that Ascent is arbitrarily deducting for its own capital expenditures for compression, separation, processing, gathering, and transportation equipment associated with Ascent's production operations in Eastern Ohio without support in the contract or any basis for doing so.

91. Based on an implied duty to market and also an implied duty to act as a reasonable prudent operator, duties imposed as a matter of law, Ascent is obligated to market and sell its gas production at the highest price obtainable.

92. Ascent pays royalties to its lessors based on the sale of the unmarketable gas instead of the higher fair market value, which improperly imposes the costs of making the gas marketable on Plaintiff Cunningham Property Management Trust.

93. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "gathering" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law.

94. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "compression" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law.

95. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "processing" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty, as a matter of law.

96. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, "transportation" expenses (as that term is defined within the industry) may not be deducted from a lessor's royalty for any transportation expenses that occur *before the point of sale to the market*, as a matter of law.

97. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, (a) the deduction must be reasonable, (b) the expense must have been incurred to alter (enhance) an already marketable product, and (c) the deduction must relate to an expense that caused the lessor's royalty to increase in proportion with the assessed costs. This is because the leases do not permit Defendant to deduct impermissible deductions or to inflate the amount of permissible deductions, but this is what Defendant is doing.

98. Further, insofar as the lessee may be entitled to deduct any "post-production" expenses, *it is the lessee's burden* to establish that: (a) the deduction is reasonable, (b) the expense was incurred to alter (enhance) an already marketable product, and (c) that the deduction relates to an expense that caused the lessor's royalty to increase in proportion with the assessed costs.

99. Plaintiff Cunningham asserts that none of the deductions that have been previously deducted, and none that are currently being deducted, satisfy any of the conditions to allow for such deductions (if *any* deductions are permitted as a matter of law). Consequently, the lessee cannot meet any of the burdens it must show with regard to the expenses it has taken from the royalty payments to Plaintiff Cunningham and the putative class members.

100. A sampling of Plaintiff Cunningham's royalty statements attached to this First Consolidated Class Action Complaint has been reviewed by Dr. Benjamin H. Thomas. The Declaration of Dr. Thomas is attached as Exhibit 8.

101. Dr. Thomas is a petroleum engineer and retired professor of petroleum engineering at Marietta College in Marietta, Ohio. He holds a bachelor's degree, master's degree, and a Ph.D. in Petroleum and Natural Gas Engineering. Dr. Thomas also holds a bachelor's degree and master's degree in business administration and has substantial experience in the oil and gas industry. *See* Exhibit 8 ¶¶ 2-5.

102. Dr. Thomas is the president of Thomas Consulting, LLC, and provides consulting services in the areas of reservoir engineering, drilling and production, operations management, reserve reporting, and acquisitions and divestitures. His experience and expertise in the oil and gas industry includes the calculation of royalties. *See* Exhibit 8 ¶¶ 5-6.

103. Based on his review of Plaintiff Cunningham's royalty statements, Dr. Thomas concluded that "certain natural gas post-production expenses appear to be very high and provide reason to investigate further as to whether they are proper." *See* Exhibit 8 ¶ 8.

104. Based on his review of Plaintiff Cunningham's royalty statements, Dr. Thomas also concluded that "certain deducted amounts appear not to be typical and result in a significantly lower net natural gas price being paid to the mineral interest owners." Exhibit 8 ¶ 9.

105. Dr. Thomas' conclusions indicate that Ascent is taking improper expenses resulting in atypical deduction amounts that significantly lower the royalty paid to Plaintiff Cunningham. The taking of unreasonable, improper, or inflated deductions is in violation of Paragraph 5 of each lease.

106. The law imposes upon all oil and gas lessees an obligation to act in good faith toward its lessors.

107. The expenses taken from Plaintiff Cunningham and the members of the putative class are either not allowed as a matter of law or, alternatively, have been and are being taken in improper amounts.

108. The conduct alleged in this First Consolidated Class Action Complaint constitutes a breach of Ascent's duty to act in good faith toward its lessors.

109. On May 13, 2016, counsel for Plaintiff Cunningham sent a letter to Ascent, via certified mail, notifying Ascent of the deduction problem and seeking an accounting and explanation of all deductions and calculations regarding royalty payments to Plaintiff Cunningham. (Attached as Exhibit 9.)

110. As of the date of filing this First Consolidated Class Action Complaint, Ascent has not provided the requested information.

111. On September 1, 2016, Ascent's counsel sent counsel for Plaintiff Cunningham a letter indicating that Ascent has retained his firm to respond to Plaintiff Cunningham's counsel's May 13, 2016 letter. (Attached as Exhibit 10.)

112. On September 6, 2016, counsel for Plaintiff Cunningham sent a letter to Ascent's counsel seeking an accounting and explanation of all deductions and calculations regarding royalty payments to Plaintiff Cunningham. (Attached as Exhibit 11.)

113. On September 23, 2016, Ascent's counsel sent counsel for Plaintiff Cunningham a letter in which Ascent acknowledged the prior notice letters and requests for an accounting. (Attached as Exhibit 12.) Ascent's letter asserted that lessors' share of any post-production costs is the same as their royalty percentage in the leases. Ascent's letter also indicated that Ascent required additional information before it could respond

to the remainder of Plaintiff Cunningham's requests and concerns. The letter indicated that the additional information sought was "what the alleged breaches are."

114. Plaintiff Cunningham's multiple letters to Ascent provide sufficient notice of breach under the notice and opportunity to cure provisions of the operative leases. Moreover, Ascent has failed to provide the requested information or otherwise substantively responded to Plaintiff Cunningham. Ascent's continued refusal to comply with Plaintiff Cunningham's right to an accounting of information that is peculiarly within the knowledge and/or control of Ascent impermissibly prevents Plaintiff Cunningham from providing detailed notice of breaches. Stated differently, Ascent is requiring Plaintiff Cunningham and other lessors to provide detailed notice of breaches when only Ascent is in possession of the information necessary to detail those breaches. Ascent's refusal to provide information reveals that the notice and opportunity to cure provision of the operative leases is a sham and that Ascent is attempting to insulate itself from a lawsuit by asking for details only Ascent has in its possession. Consequently, requiring a notice of breach beyond what Plaintiff Cunningham has already provided would be requiring a futile act. Ohio law does not require a plaintiff to attempt a futile act to satisfy a condition precedent to filing a lawsuit involving a contractual breach. *See Love v. Beck Energy Corp.*, No. 14 NO 415, 2015 WL 1453338, at *7, 2015-Ohio-1283, ¶ 40 (Ohio 7th Dist. Ct. App. Mar. 31, 2015). Federal courts have applied state law rules regarding futility to excuse satisfaction of a condition precedent. *See Fla. Keys Elec. Coop. Ass'n, Inc. v. Nationwide Life Ins. Co.*, No. 2:14-cv-372, 2014 WL 5308630, at *4 (S.D. Ohio Oct. 16, 2014).

115. Defendant has previously agreed that notice is no longer an issue. *See* Opinion and Order, ECF No. 40, at PageID # 584 in Case No. 2:16-cv-00957 (memorializing status conference agreement).

116. The putative class consists of lessors similarly situated to Plaintiff Cunningham.

117. The putative class lessors have oil and gas leases that are similar in all relevant respects to the lease of Plaintiff Cunningham: the leases provide for the good-faith payment of royalties by Ascent to the lessors. Taking certain deductions from these royalty payments is prohibited as a matter of law, and some leases even expressly preclude the taking of any deductions from royalty payments. Companies such as Ascent often use form leases that contain exactly the same or substantially similar terms from lease to lease. *See* Karen E. Kathle and Denielle M. Stritch, *Grouping the Marcellus Payout: Use of Class Actions in Royalty Litigation Concerning Post-Production Cost Deductions*, 88 N.D. L. Rev. 699, 707-08 (2012).

118. The putative class lessors have experienced and are experiencing royalty payments deductions similar to the deductions from royalty payments to Plaintiff Cunningham because Ascent "provisioned" its leases so that identical or similarly-worded leases are treated in the same manner.

119. As of the date of filing of this First Consolidated Class Action Complaint, neither Ascent nor Ascent's counsel has provided a satisfactory accounting and explanation of all deductions and calculations regarding royalty payments to the putative class lessors. The basis for, and most of the facts underlying, the deductions and calculations therefore remain peculiarly within the knowledge and/or control of Ascent.

120. Ascent's intentional actions and practice of deducting so-called "post production" expenses from the royalty payments to Plaintiff Cunningham and the members of the

putative class is nothing more than a ruse, a method of taking money that rightfully belongs to Plaintiff Cunningham and the members of the putative class.

121. Ascent's actions are wanton, willful, and undertaken with malice and conscious disregard for the rights of Plaintiff Cunningham and the members of the putative class.

V. CLASS ACTION ALLEGATIONS

122. All paragraphs of the First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

123. Plaintiffs bring this action individually and on behalf of all others similarly situated pursuant to Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3).

124. Plaintiffs seek to represent the following Class:

> All persons or entities (including their predecessors and successors-in-interest) who have received, or who are entitled to receive, royalty payments (whether as a landowner or mineral owner) from natural gas or oil wells located within the State of Ohio and that have been owned or operated by Ascent (or any Ascent's affiliates, predecessors, successors, or subsidiaries), or whose royalties are paid by Ascent regardless of whether Ascent is the actual lessee since October 1, 2014, or for which Ascent (or any Ascent's affiliates, predecessors, successors, or subsidiaries) was the "lessee" or owner of the "working interest" pursuant to any oil and gas lease, or for which Ascent was associated with such wells or associated drilling units, since October 1, 2014.

125. Plaintiffs Eatons and Cunningham also seek to represent Subclasses (a), (b), and (c), which are respectively defined as follows:

> a. All persons or entities within the Class who have had deductions for "gathering" and "compression" expenses taken from royalty payments by Ascent.
>
> b. All persons or entities within the Class who have had deductions for "processing" expenses taken from royalty payments by Ascent.
>
> c. All persons or entities within the Class who have had deductions for "transportation" expenses taken from royalty payments by Ascent.

126. Plaintiff Eatons also seek to represent Subclasses (d) and (e), which are respectively defined as follows:

> d. All persons or entities within the Class for which Ascent has classified the lessor as having a "market enhancement clause" lease who have had deductions for "processing" expenses taken from royalty payments by Ascent.
>
> e. All persons or entities within the Class for which Ascent has classified the lessor as having a "market enhancement clause" lease who have had deductions for "transportation" expenses taken from royalty payments by Ascent.

127. Excluded from the Class and each Subclass are Defendant, any of its affiliates, parents, subsidiaries, officers, directors, employees, legal representatives, successors, and assigns, and any entity in which Defendant has a controlling interest, as well as that entity's officers, directors, employees, legal representatives, successors, and assigns, in addition to the judicial officers and their immediate family members and court staff assigned to this lawsuit. Also excluded are those persons or entities whose royalties are paid per an overriding royalty interest. Plaintiffs reserve the right to modify or amend the Class and Subclass definitions as appropriate throughout this litigation.

128. This lawsuit has been brought and may be properly maintained on behalf of the putative Class and Subclasses proposed herein under the criteria set forth in Federal Rule of Civil Procedure 23.

129. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the putative Class and Subclasses are so numerous that joinder of all members is impracticable. Upon information and belief, there are several hundred if not thousands of class members with Utica Shale leases with Ascent and corresponding royalty interests. Precise number may be ascertained from Ascent's books, records, and

publicly available sources. Class and Subclass members may be notified of the pendency of this action by recognized, Court-approved means of disseminating notice, which may include U.S. Mail, e-mail, Internet postings, and/or public notice in any variety of media.

130. **Commonality and Predominance – Federal Rule of Civil Procedure 23(a)(2) and 23 (b)(3).** There are questions of law and fact common to the putative Class and Subclasses that predominate over any questions affecting individual members. All of the putative Class and Subclass members have oil and gas leases to which Ascent is or was a party. All of the putative Class and Subclass members have also had deductions taken by Ascent from the putative Class and Subclass members' royalty payments during the period October 1, 2012, through the present. In addition, other common questions of law and fact include, but are not limited to:

a. Whether Ascent is entitled to deduct "post-production" expenses as a matter of law;

b. Whether, even if Ascent is entitled to deduct any "post-production" expenses, Ascent may deduct for expenses related to any infrastructure or efforts that occur *before* the product (natural gas, oil, or condensate) reaches the point of sale to the market

c. Whether Ascent is arbitrarily deducting for its own capital expenditures for compression, separation, processing, gathering, and transportation;

d. Whether, even if Ascent is lawfully permitted to deduct any "post-production" expenses, "gathering" expenses (as that term is defined within the industry) may be lawfully deducted from a lessor's royalty;

e. Whether, even if Ascent is lawfully permitted to deduct any "post-production" expenses, "compression" expenses (as that term is defined within the industry) may be lawfully deducted from a lessor's royalty;

f. Whether, even if Ascent is lawfully permitted to deduct any "post-production" expenses, "processing" expenses (as that term is defined within the industry) may be lawfully deducted from a lessor's royalty;

g. Whether, even if Ascent is lawfully permitted to deduct any "post-production" expenses, "transportation" expenses (as that term is defined within the industry) may be deducted from a lessor's royalty for any transportation expenses that occur before the point of sale to the market;

h. Whether, even if Ascent is lawfully permitted to deduct any "post-production" expenses, it is Ascent's burden to establish that: (i) the deduction is reasonable, (ii) the expense was incurred to alter (enhance) an already marketable product, and (iii) that the deduction relates to an expense that caused the lessor's royalty to increase in proportion with the assessed costs;

i. For those leases that Ascent has classified as "Market Enhancement Clause" leases, whether Ascent has properly undertaken any efforts to analyze whether expenses incurred for post-production activities have, in fact, enhanced the value of the product in comparison to a local price and whether Ascent has accordingly paid such lessors based on that analysis.

j. Whether, even if Ascent is lawfully permitted to make deductions, any of the deductions that Ascent has previously made or is currently making satisfy any of the conditions to allow for such deductions;

k. Whether, even if Ascent is lawfully permitted to make deductions, any of the deductions that Ascent has previously made or is currently making satisfy any of the conditions to allow for such deductions and are accurate deductions based upon the reasonable costs and expenses incurred by Ascent;

l. Whether Ascent's actions are wanton, willful, and/or undertaken with malice and conscious disregard for the rights of Plaintiffs and the members of the putative Class and Subclasses.

131. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiffs' claims are typical of the claims of the putative Class. The claims of Plaintiff Cunningham are typical of Subclasses (a), (b), and (c), above. The claims of Plaintiff Eatons are typical of the claims of Subclasses (d) and (e), above. The defenses of Ascent are also typical of the defenses that could be asserted against the members of the Class and the Subclasses. The factual and legal bases of Defendant's liability to Plaintiffs and the other members of the Class and Subclasses are similar if not identical, and Defendant has acted on grounds generally applicable and injurious to all members of the Class and Subclasses, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and Subclasses and making injunctive or corresponding declaratory relief appropriate for the Class and the Subclasses.

132. **Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).** Plaintiff Eatons and Plaintiff Cunningham are adequate Class and Subclass representatives because their interests do not conflict with each other or the interests of the other members of the Class and Subclasses they respectively seek to represent and they will fairly and adequately protective the interests of the putative Class and

Subclasses. Plaintiffs have and will continue to prosecute this action vigorously. Plaintiffs' counsel has substantial experience in prosecuting complex litigation, including class actions, and also have no interest adverse to those of the Class or the Subclasses.

133. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).** Ascent has acted or refused to act on grounds generally applicable to Plaintiffs and the other Class and Subclass members so that final injunctive relief and declaratory relief, as described below, is appropriate respecting the Class and Subclass members as a whole.

134. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** Class treatment of the claims in this case is superior to the litigation of individual claims. Without a class action, Plaintiffs and the other Class and Subclass members would likely have no effective remedy because the cost of litigating their claims would be prohibitive, particularly for those with royalty interests associated with small acreage. Class treatment of these claims also will conserve this Court's resources and the litigants' resources, will promote efficiency, and will ensure consistent treatment of claims. Use of the class action mechanism here presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

VI. CLAIMS FOR RELIEF

CLAIM ONE
REQUEST FOR ACCOUNTING

135. All paragraphs of this First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

136. The above-described conduct entitles Plaintiffs to a complete accounting of Ascent's royalty payments, methods of calculating royalties, and facts underlying the calculation of royalty payments.

137. An action for an accounting seeks a determination by a trial court of what may be due to respective parties by virtue of the relationship between them. *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801, 814 (10th Dist.2000). Given that most if not all of the information relevant to the royalty payments and deductions is peculiarly within the knowledge and/or control of Ascent, Plaintiffs' leases provide an implied right of accounting.

138. Plaintiffs Eatons and Cunningham and the members of the putative Class and Subclasses ask this Court to order Ascent to provide a detailed accounting regarding the royalty payments, methods of calculating royalties, and the facts underlying the calculation of royalty payments to Plaintiffs and the members of the putative Class and Subclasses.

CLAIM TWO
BREACH OF CONTRACT

139. All paragraphs of this First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

140. Plaintiffs and Ascent entered into contracts in the form of leases related to the natural gas produced from the subject properties.

141. The above-described conduct constitutes multiple breaches of the express and implied obligations that Ascent owes to Plaintiffs under the terms of the operative lease agreements by the deductions taken to their royalty payments that are either not

allowed as a matter of law or, alternatively, have been and are being taken in improper amounts.

142. Plaintiffs and the members of the putative Class and Subclasses have suffered monetary damage, both past and future, as a result of these breaches.

CLAIM THREE
UNJUST ENRICHMENT
(PLEADED IN THE ALTERNATIVE TO BREACH OF CONTRACT)

143. All paragraphs of this First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

144. The above-described conduct further provides an unjust enrichment to Ascent. It would be inequitable and unjust for Ascent to retain the benefit of these deductions which rightfully belong to Plaintiffs that are either not allowed as a matter of law or, alternatively, have been and are being taken in improper amounts.

145. Plaintiffs and the members of the putative Class and Subclasses are entitled to all legal and equitable relief, including orders for restitution and equitable disgorgement, necessary to remedy this unjust enrichment.

CLAIM FOUR
FRAUD

146. All paragraphs of this First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

147. The leases executed by Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses represent that lessors will be paid the appropriate royalties required by the leases.

148. The royalty statements directed to Plaintiffs and the members of the putative Class and Subclasses contain fraudulent statements.

149. The statements are fraudulent because they consist of and state intentionally improper and incorrect deductions, with the royalty statements constituting false representations of permissible and correct deductions. The royalty statements present intentionally incorrect statements of the royalties due the lessors.

150. These false representations are made by Ascent, with Ascent's knowledge of their falsity or with Ascent's utter disregard and recklessness about their falsity so that knowledge may be attributed to Ascent.

151. The fraud is apparent from the nature of the deductions taken, the amounts deducted, the unexplained variance in the deductions.

152. The fraudulent statements set forth in the royalty statements are made each time the royalty statement is sent or provided to the lessors, with the lessors receiving the fraudulent statements at their homes, place of business, or other location at which they receive mail.

153. Ascent's knowing concealment of facts, the correct amount of royalties and/or any proper and correct deductions, was and is done despite Ascent's duty to disclose.

154. Ascent's representations are material to the parties' transactions (*i.e.*, the execution and operation of the lease agreements).

155. Ascent's misrepresentations were and are made with the intent of misleading Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses into relying on the misrepresentations.

156. Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses were justified in relying on Ascent's representations and did, in fact, so rely.

157. Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses have been injured and continue to be injured, and the injury was directly caused by their reliance on Ascent's representations.

CLAIM FIVE
REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

158. All paragraphs of this First Consolidated Class Action Complaint are expressly incorporated as if fully rewritten and re-alleged herein.

159. Absent intervention by the Court, Ascent will continue the improper and wrongful practices previously described, and Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses will continue to be damaged by Ascent's wrongful conduct, *i.e.*, the improper deductions taken from royalty payments to Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses.

160. Accordingly, Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses seek a permanent injunction preventing Ascent improperly deducting so-called "post-production" costs from royalty payments to Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses.

161. Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses are without an adequate remedy at law for such future relief, and irreparable harm will be done without such relief.

162. Because Ascent is in the sole possession of these records and denied reasonable requests for months, Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses are being denied substantial sums of proceeds from their leases

with Ascent, for which no remedy has been offered or may be available if Ascent is not immediately ordered to comply with the terms of their leases requiring such accounting.

163. Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses ask this Court to provide declaratory relief regarding the ongoing rights and responsibilities pertaining to Ascent's obligation to pay royalties to Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses.

164. Specifically, Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses ask this Court to issue a declaratory judgment prohibiting Ascent from deduction so-called "post-production" costs from royalty payments to Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Eaton and Cunningham, individually and on behalf of the other members of the Class and on behalf of the Subclasses they respectively seek to represent, request the following relief:

A. Certification of this action as a class action;

B. Certification of the Class and Subclasses as requested herein;

C. Designation of Plaintiffs as Class Representatives as requested herein;

D. Appointment of Plaintiffs' attorneys as Class Counsel for the Class and Subclasses;

E. An Accounting, requiring Defendant to fully account for the royalty payments, methods of calculating royalties, and the facts underlying the calculation of the royalty payments to Plaintiffs Eaton and Cunningham and the members of the putative Class and Subclasses;

F. Compensatory damages;

G. Punitive damages;

H. Injunctive relief, ordering that "post production" costs may no longer be deducted from ongoing royalty payments to Plaintiffs Eaton and

Cunningham and the members of the putative class, whether at all or beyond reasonable amounts;

I. Equitable relief, including an order of restitution and an order for equitable disgorgement;

J. Declaratory judgment, declaring the lease agreements do not permit the lessee to deduct "post production" costs from ongoing royalty payments to Plaintiffs Eaton and Cunningham and the members of the putative class, whether at all or beyond reasonable amounts;

K. Pre-judgment interest;

L. Post-judgment interest;

M. Costs of this action;

N. Attorney's fees and costs involved in prosecution of this lawsuit; and

O. Any other relief this Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs Eaton and Cunningham, individually and on behalf of the other members of the putative Class and Subclasses, demand a jury trial pursuant to Federal Rule of Civil Procedure 38(b) on all issues triable of right by a jury.

Respectfully submitted,

/s/ Ethan Vessels

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 6, 2020, the foregoing was filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ethan Vessels
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Trial Attorney