

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

February 20, 2019

Lyle W. Cayce  
Clerk

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No. 17-10320  
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HENRY SEELIGSON; JOHN M. SEELIGSON; SUZANNE SEELIGSON  
NASH; SHERRI PILCHER,

Plaintiffs - Appellees

v.

DEVON ENERGY PRODUCTION COMPANY, L.P.,

Defendant - Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:16-CV-82  
\_\_\_\_\_

Before WIENER, GRAVES, and HO, Circuit Judges.

PER CURIAM:\*

The petition for rehearing is DENIED and no member of this panel nor judge in active service having requested that the court be polled on rehearing en banc, the petition for rehearing en banc is also DENIED. The following is substituted in place of our opinion.

Plaintiffs-Appellees in this class action case (“Plaintiffs”) are royalty owners who allege that Defendant-Appellant, Devon Energy Production

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Company, L.P. (“DEPCO”), breached its royalty obligations by violating the duty to market implied in the class members’ mineral leases. According to Plaintiffs, DEPCO breached this duty by selling the raw, unprocessed gas to its corporate affiliate at the wellheads at a price artificially reduced by an unreasonably high processing fee. Plaintiffs aver that DEPCO then passed this processing fee on to the royalty owners.

Plaintiffs sought to certify a class comprising royalty owners who claim that their royalty payments were reduced by DEPCO’s pricing scheme. The district court held an evidentiary hearing, then certified the Class as follows:

All person or entities who, between January 1, 2008 and February 28, 2014, (i) are or were royalty owners in Texas wells producing natural gas that was processed through the Bridgeport Gas Processing Plant by Devon Gas Services, LP (“DGS”); (ii) received royalties from Devon Production Company, L.P. (“DEPCO”) on such gas; and (iii) had oil and gas leases that were on one of the [specific forms] . . . (“The Class Lease Forms”).<sup>1</sup>

DEPCO now appeals the district court’s certification decision.

I. FACTS AND PROCEEDINGS

Plaintiffs are royalty owners of natural gas wells operated by DEPCO in the Barnett Shale gas field. DEPCO is an oil and gas exploration and production company that is the lessee under numerous natural gas well leases. Several thousand of the wells that DEPCO operates in the Barnett Shale are serviced by the Bridgeport Rich Gathering System (the “Bridgeport System”), a series of horizontal pipelines that gather natural gas from individual wells and transport it to the Bridgeport Gas Processing Plant (the “Bridgeport Plant”). During the period of class claims, the Bridgeport System and Bridgeport Plant were owned and operated by Devon Gas Services (“DGS”). In

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<sup>1</sup> The court also indicated several persons or entities excluded from the Class.

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turn, DEPCO and DGS are both wholly-owned subsidiaries of Devon Energy Corporation.

A. DEPCO sells gas to DGS

During all relevant times, DEPCO sold all the natural gas that it produced from wells in the Bridgeport System to DGS under a 2005 Gas Purchase and Processing Agreement (the “GPPA”). Under the terms of the GPPA, DEPCO sold “wet” natural gas from the wells to DGS (1) at the wellheads, (2) for a purchase price of “82.5% of the published industry index value of the residue [“dry”] gas and natural gas liquids (“NGLs”).” DGS then transported the wet gas from the individual wells, through the Bridgeport System, to the Bridgeport Plant, where the wet gas was processed into (1) NGLs and (2) dry residue gas. DGS then sold the processed dry residue gas to third parties.

The parties characterize this transaction in different ways. DEPCO says that it transferred ownership of the gas to DGS at the moment of sale at the wellhead. DEPCO claims that, because it no longer owned the gas when it was transported through the Bridgeport System and processed at the Bridgeport Plant, it did not charge Plaintiffs a “processing fee”; neither was it the seller of the NGLs or the residue gas.

According to Plaintiffs, however, these “sales” were sham transactions, as DEPCO and DGS are closely related subsidiaries of the same corporate parent, and DGS never transferred funds to DEPCO in payment for the gas. Plaintiffs contend that DEPCO did not actually “sell” the gas to DGS at the wellhead, but transported the gas to the Bridgeport Plant, where DGS “charged” DEPCO a 17.5% processing fee—a percentage far greater than the market rate for processing. Plaintiffs further contend that this processing fee was passed on to the royalty owners by DEPCO’s artificial lowering of the purchase price at the wellhead by 17.5%, uniformly using this methodology for

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every well within the Bridgeport System. Plaintiffs insist that all royalty owners thus received lower payments as a result of DEPCO's purely internal pricing scheme.

B. Implied Duty to Market in Class Leases

Each Plaintiff's royalty interest was memorialized on one of nine standard oil and gas lease forms (the "Class Lease Forms"). Plaintiffs claim that all Class Lease Forms are "proceeds" leases, in which royalty payments are based on the net proceeds, viz., the amount realized by the lessee—here, DEPCO—when the gas is sold at the well.<sup>2</sup> According to Plaintiffs, when a mineral lease does not contain any provision regarding a duty to market, Texas law *implies* a duty to market. This duty requires producers like DEPCO to act in good faith to obtain "the best price reasonably attainable." Plaintiffs argue that DEPCO breached the implied duty to market when it artificially lowered the price of the natural gas that it sold to DGS at the wellhead. Plaintiffs contend that because (1) all of the Class Lease Forms are deemed to include such an implied duty to market, and (2) DEPCO used a uniform pricing methodology to artificially lower the wellhead price and the resulting royalty payments, all class members have "identical duty-to-market claims."

DEPCO maintains, however, that some of the Class Leases are not subject to an implied duty to market. It claims that the district court did not examine the Class Leases and only assumed that each of them was subject to an implied duty to market. According to DEPCO, three of the named Plaintiffs' nine leases were modified to change the lessee's marketing duty, so that the

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<sup>2</sup> As discussed more fully below, Plaintiffs submitted expert testimony from an "industry veteran" who reviewed more than 10,000 DEPCO leases. He identified 4,143 Leases on the nine Class Lease Forms which did not include any modifications or addenda that would modify the duty to market. Based on this evidence, the district court limited the Class Leases to these 4,143 documents.

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implied duty to market does not apply to each of the named Plaintiff's leases, much less to each of the 4,143 Class Leases.

### C. District Court Decision

Plaintiffs originally filed this suit in the Eastern District of Texas, alleging that DEPCO improperly calculated and intentionally underpaid royalties to Plaintiffs for gas that was processed through the Bridgeport Plant.<sup>3</sup> That court scheduled a day-long class certification hearing to receive evidence on the certification issue. Shortly before the date scheduled for that hearing, however, DEPCO filed an emergency motion to stay the proceedings pending resolution of its motion to transfer venue.<sup>4</sup> The hearing was stayed and the case was eventually transferred to the Northern District of Texas, where Plaintiffs' motion for class certification was eventually denied.<sup>5</sup> Plaintiffs then filed a motion for reconsideration. Their motion requested an opportunity to present evidence in support of certification, and the district court held a class certification evidentiary hearing. After reviewing the additional evidence, including "over one hundred exhibits, sizeable deposition designations, and the testimony of four live witnesses[,]” the district court granted Plaintiffs' motion and certified the class. DEPCO timely appealed.

## II. LAW AND ANALYSIS

### A. Standard of Review

We review a district court's class certification for abuse of discretion.<sup>6</sup> Abuse of discretion occurs only when all reasonable persons would reject the

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<sup>3</sup> These claims include gas that was processed at the Bridgeport Plant from January 1, 2008 until October 24, 2014.

<sup>4</sup> The motion to stay was subsequently granted by a panel of this court. See No. 17-90002, *Henry Seeligson, et al v. Devon Energy Production Co. LP*.

<sup>5</sup> See ECF TX ND 3:16-CV-82, 139.

<sup>6</sup> *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

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view of the district court.<sup>7</sup> “Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court’s inherent power to manage and control pending litigation.”<sup>8</sup> We review *de novo*, however, whether the district court applied the correct legal standard.<sup>9</sup>

### B. Federal Rule of Civil Procedure 23 Requirements

“[T]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.”<sup>10</sup> This requirement is an implied prerequisite of Rule 23.<sup>11</sup> “However, the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding.”<sup>12</sup> If the proposed class is ascertainable, the party seeking certification must also comply with Federal Rule of Civil Procedure 23.<sup>13</sup> That party must first satisfy Rule 23(a)’s requirements of numerosity, commonality, typicality, and adequacy of representation.<sup>14</sup> If successful, that party must then satisfy the provisions of one of Rule 23(b)’s three subsections.<sup>15</sup> In this case, Plaintiffs rely on Rule 23(b)(3), “which requires that questions of law or fact common to the class predominate over questions affecting only individual members, and that a class action is superior to other available methods for the

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<sup>7</sup> *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012).

<sup>8</sup> *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998)).

<sup>9</sup> *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007).

<sup>10</sup> *Union Asset Mgmt. Holding*, 669 F.3d at 639 (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam)).

<sup>11</sup> *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

<sup>12</sup> *Frey v. First Nat. Bank Sw.*, 602 F. App’x 164, 168 (5th Cir. 2015) (unpublished) (quoting William B. Rubenstein, *NEWBERG ON CLASS ACTIONS* § 3:3 (5th ed. 2011)).

<sup>13</sup> FED. R. CIV. P. 23.

<sup>14</sup> FED. R. CIV. P. 23(a).

<sup>15</sup> FED. R. CIV. P. 23(b).

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fair and efficient adjudication of the controversy.”<sup>16</sup> “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”<sup>17</sup> Plaintiffs have the burden of showing that Rule 23’s requirements are met.<sup>18</sup>

*i. Ascertainability*

The district court did not abuse its discretion in determining that the class of royalty owners was ascertainable. DEPCO relied on precedent from the Third Circuit to claim that the Plaintiffs had to demonstrate “by a preponderance of the evidence, that the class is ‘*currently* and readily ascertainable based on objective criteria.”<sup>19</sup> But, this court has not adopted that heightened standard. Instead, a party need only demonstrate—“at some stage of the proceeding”<sup>20</sup>—that the class is “adequately defined and clearly ascertainable.”<sup>21</sup> Here, both DEPCO and the public records provide sufficient objective criteria from which to identify class members.<sup>22</sup> We conclude that the district court did not abuse its discretion in finding that the class is ascertainable.

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<sup>16</sup> *Ahmad v. Old Republic Nat’l Title Ins.*, 690 F.3d 698, 702 (5th Cir. 2012) (citing FED. R. CIV. P. 23(b)).

<sup>17</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

<sup>18</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

<sup>19</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

<sup>20</sup> *Frey*, 602 F. App’x at 168 (quoting William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 3:3 (5th ed. 2011)).

<sup>21</sup> *Union Asset Mgmt. Holding*, 669 F.3d at 639 (quoting *DeBremaecker*, 433 F.2d at 734).

<sup>22</sup> DEPCO claims that it does not record ownership by lease and does not have complete records on past ownership. It contends that Plaintiffs’ proposed alternative—reviewing property and title records—is not administratively feasible and therefore fails to satisfy Rule 23’s ascertainability requirements. We are not convinced. Before any individual class member can recover, he must demonstrate that he was entitled to receive royalty payments. “However, . . . ‘the possibility that some [claimants] may fail to prevail on their individual claims will not defeat class membership’ on the basis of the ascertainability requirement.” *In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014).

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*ii. Commonality*

The parties do not dispute the district court's rulings regarding numerosity, typicality, or adequacy of representation; however, DEPCO does challenge that court's ruling on commonality. To satisfy Rule 23's commonality requirement, Plaintiffs had to demonstrate that there are questions of law or fact common to the class.<sup>23</sup> A common question "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."<sup>24</sup> This requirement "can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse."<sup>25</sup>

The district court determined that the answers to two common questions would determine whether DEPCO violated the implied duty to market: (1) "Did the 82.5% value sale of residue gas and NGLs violate DEPCO's duty to market owed to royalty owners?" and (2) "Did DEPCO violate its duty to market owed to royalty owners by failing to recover profits from DGS for gas sales DGS made to third parties?"

DEPCO contends that these questions are based on incorrect application of Texas law and erroneous factual findings, leading the district court to abuse its discretion in concluding that the proposed class satisfies Rule 23(a)'s commonality requirement. If these questions are not common to the class, or if they are based on incorrect legal conclusions or factual findings, class certification was an abuse of discretion.<sup>26</sup>

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<sup>23</sup> FED. R. CIV. P. 23(a).

<sup>24</sup> *Wal-Mart Stores, Inc.*, 564 U.S. at 350.

<sup>25</sup> *Deepwater Horizon*, 739 F.3d at 810–11.

<sup>26</sup> *Regents of Univ. of Cal.*, 482 F.3d at 380 ("Where a district court premises its legal analysis on an erroneous understanding of governing law, it has abused its discretion.").

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## a. Duty to Market

DEPCO insists that the district court abused its discretion when it determined that each of the Class Leases imposed the same marketing duty without reviewing every individual lease and any “ancillary documents” that might have modified DEPCO’s duty to market the gas. Relying on *Dvorin v. Chesapeake Exploration*, DEPCO contends that, under Texas law, the district court was required to review every Class Lease, as well as any ancillary documents, before determining that all the Class Leases imposed the same duty to market.

The district court in *Dvorin* determined that the leases of the proposed class members were insufficient to demonstrate that the claims could be resolved with a “common answer.”<sup>27</sup> The court explained that, even though the “specific portions of the royalty provisions . . . are substantially the same, the court is required to review the contracts as a whole.”<sup>28</sup> Once the court reviewed the entire document, it was clear that the contracts varied regarding “the point of sale,” and “cost at the well.”<sup>29</sup> Some even contained clauses that limited royalty payments based on the price Chesapeake paid for its share of production.<sup>30</sup> The *Dvorin* court held that, because other terms of the contract modified the royalty clauses, the class members’ claims could not be resolved with a common answer.

There is no evidence that such differences exist here. *Dvorin* did not hold that a court must locate every potential ancillary document before determining that a group of leases imposed the same duty. There, the plain language of the

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<sup>27</sup> *Dvorin v. Chesapeake Expl., LLC*, No. 3:12-CV-3728-G, 2013 WL 6003433, at \*6 (N.D. Tex. Nov. 13, 2013).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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contracts varied so much that it was not possible to reach a “common answer” to the plaintiffs’ claims. Here, in comparison, the court determined that “none of the nine lease forms contain language that modifies the implied covenant to market.”<sup>31</sup> Defendants have not provided any ancillary documents that modify the duty to market in the Class Leases.<sup>32</sup> In fact, even six months after the district court certified a class based on 4,143 individual leases, DEPCO’s expert challenged only five of them.

DEPCO also claims that three of the Class Lease Forms contain express marketing clauses and therefore cannot include the implied duty to market. Those clauses state that DEPCO must “use reasonable diligence to produce, utilize, or market the minerals.” DEPCO is correct that this language precludes the *implied* duty to market; however, it does not necessarily impose a *different* marketing duty on DEPCO. Neither DEPCO nor Plaintiffs cite any case that stands for the proposition that an express duty to market requires either the same or a different marketing duty than the implied duty to market. In *Bowden v. Phillips Petroleum Co.*, the Texas Supreme Court evaluated a similar situation, yet declined to state a categorical rule on this issue.<sup>33</sup> There, the plaintiffs claimed that a group of proceeds leases, some with both express marketing clauses and, others with the implied duty to market, imposed the same duty. The court explained that it could be possible that express and implied duties to market may not “in practice require different conduct.”<sup>34</sup>

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<sup>31</sup> See *Seeligson v. Devon Energy Prod. Co., L.P.*, No. 3:16-CV-00082-K, 2017 WL 68013, at \*17 (N.D. Tex. Jan. 6, 2017).

<sup>32</sup> During the certification hearing, Plaintiffs presented testimony from an industry expert who led a team in reviewing more than 10,000 leases received from DEPCO. The expert testified that any leases which had exhibits or addenda that modified the duty to market were excluded from the class.

<sup>33</sup> 247 S.W.3d 690, 701 (Tex. 2008).

<sup>34</sup> *Id.*

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Here, the express marketing clause in three of the Class Leases Forms imposes a duty to use “reasonable diligence,” which is virtually identical to the implied duty to act as a “reasonably prudent operator.”<sup>35</sup> Given this close similarity and the fact that Texas law acknowledges that express marketing clauses might impose the same duty as the implied duty to market, the district court did not abuse its discretion in holding that DEPCO owed all class members the same duty, under either the express marketing clause or the implied duty to market.<sup>36</sup>

Owing a uniform duty, however, is not necessarily sufficient to establish commonality. The duty DEPCO owed to the royalty owners was “an obligation to obtain the best current price reasonably available.”<sup>37</sup> The court explained in *Bowden* that even if a gas producer owed “an identical duty to market” to a group of royalty owners, the jury would still need to determine “the price a reasonably prudent operator would have received at the wellhead.”<sup>38</sup> The *Bowden* court explained that “variations in well locations, quality of production, and field regulations, among other factors, will require the jury to conduct a well-by-well analysis . . . unless the class offers particular evidence that the gas price at the wells can be evaluated classwide.”<sup>39</sup> For example, “if a class offered evidence that [the defendant] was artificially lowering the prices it charged [its affiliate] for gas sales across the board or that [it] was systematically miscalculating the royalty payments, such claims might be more susceptible to certification.”<sup>40</sup>

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<sup>35</sup> See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567–68 (Tex. 1981).

<sup>36</sup> This determination falls squarely within the “district court’s inherent power to manage and control pending litigation.” See *Monumental Life Ins. Co.*, 365 F.3d at 414 (quoting *Allison*, 151 F.3d at 408).

<sup>37</sup> *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003).

<sup>38</sup> *Bowden*, 247 S.W.3d at 701.

<sup>39</sup> *Id.* at 701–02 (emphasis added).

<sup>40</sup> *Id.* at n.5.

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Plaintiffs argue that such a well-by-well analysis is not necessary here because DEPCO used a uniform pricing structure for every well in the Bridgeport System. Plaintiffs contend that they do not need to adduce evidence of a higher available price at each wellhead, but only evidence that DEPCO could have processed the gas at a fee lower than the 17.5% it paid DGS. The district court held that DEPCO used a classwide pricing structure determined by the uniform processing fee, so that the gas price at the wells could be evaluated using a classwide common damages model.<sup>41</sup>

Plaintiffs have provided some evidence that DEPCO, using an artificial, uniform processing fee, “was artificially lowering the prices it charged [its affiliate, DGS,] for gas sales across the board.” It appears that Devon Energy used its multi-subsidary, uniform pricing gimmick for each and every well in the system, regardless of location, lease differences, etc., so that it might be possible to determine damages on a classwide model. However, on the facts presently before the district court, it is unclear whether a well-by-well analysis might be necessary.

Based on the evidence the district court did have, it is possible that Plaintiffs could demonstrate that DEPCO breached its implied duty to market by basing its price on a higher processing fee than the fee that a “reasonably prudent operator would have received at the wellhead.”<sup>42</sup> If so, this issue is

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<sup>41</sup> *Seeligson*, 2017 WL 68013, at \*10.

<sup>42</sup> *See Bowden*, 247 S.W.3d at 701. As discussed more fully below, the district court made the factual determination that the price was determined based on the processing fee DGS charged DEPCO. This factual finding is reviewed for clear error. *See Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 479 (5th Cir. 2006). Furthermore, given the limit on conducting “merits inquiries” at this stage in the litigation, and the deference granted to the district court’s factual findings, that court did not abuse its discretion in determining that whether DEPCO breached its duty to Plaintiffs was a common question capable of classwide resolution. *See Deepwater Horizon*, 739 F.3d at 810 (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 350) (citations omitted) (holding that an issue is capable of classwide resolution when the “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.”).

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precisely the type of common question “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.”<sup>43</sup> However, this court remains open as to whether damages can be ascertained on a classwide basis. We therefore remand for further consideration whether additional specific evidence supports the conclusion that the breach of the duty to market and damages from any breach can be evaluated classwide or if a well-by-well analysis is required.

## b. Duty to recover downstream profits

The second question the district court found common to all class members was, “Did DEPCO violate its duty to market owed to royalty owners by failing to recover profits from DGS for gas sales DGS made to third parties?” Later in the order, the district court framed this issue as whether DEPCO breached its duty “by not following its own policy to recoup the profits DGS made on subsequent gas sales.” At no point, however, did the district court explain why the implied duty to market includes a duty to recoup profits made on downstream gas sales.<sup>44</sup>

DEPCO insists that neither the Class Leases nor the implied duty to market imposed a duty to recoup downstream profits; and Plaintiffs do not address this alleged duty in their brief. At best, Plaintiffs aver that DEPCO policies instructed that “DGS may not make profit at the expense of [DEPCO by] ... sell[ing] gas to third parties at higher prices than the transfer price under the GPPA.”<sup>45</sup> The district court did not provide any legal basis for

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<sup>43</sup> *Wal-Mart Stores, Inc.*, 564 U.S. at 350.

<sup>44</sup> The court did not expressly find that DEPCO’s sales to DGS were a sham, but, based on the way it phrased the second common question, it certainly seems to *imply* that the sale was a sham. The validity of this possible conclusion, however, is not currently before this panel.

<sup>45</sup> Plaintiffs do not assert that they have standing to enforce these internal guidelines, but contend that standing is a merits question which should not be resolved at this stage of the litigation.

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imposing a duty to recover downstream profits on DEPCO, so it abused its discretion when it determined that this was a common question which could support class certification.

*iii. Predominance*

Federal Rule of Civil Procedure 23(b)(3) requires the court to determine whether “the questions of law or fact common to class members predominate over any questions affecting only individual members.”<sup>46</sup> This “entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.”<sup>47</sup> Absent this analysis, “it [is] impossible for the court to know whether the common issues would be a ‘significant’ portion of the individual trials . . . much less whether the common issues predominate.”<sup>48</sup>

DEPCO insists that each lease raises individual issues regarding tolling and the applicable statute of limitations, precluding predominance. DEPCO explains that the class certification order includes two categories of claims that are time barred: (1) claims that DEPCO breached the implied duty to market when it entered the GPPA in 2005; and (2) claims that DEPCO breached this duty beginning on January 1, 2008, when it failed to recoup profits on DGS’s downstream sales. Plaintiffs counter that the limitations periods were tolled by the discovery rule and fraudulent concealment. DEPCO responds to this by stating that the determination whether the limitation periods were tolled will require “thousands” of mini-trials. DEPCO raised these potential individual

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<sup>46</sup> FED. R. CIV. P. 23(b)(3).

<sup>47</sup> *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)).

<sup>48</sup> *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 557 (5th Cir. 2011).

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issues in the district court, but in its certification order, the court did not discuss how limitations and tolling questions might affect predominance.

Despite the potential for individual questions based on DEPCO's statute of limitations defense, the district court did not mention the role, if any, the tolling or limitations issues would play in this class action litigation. To establish predominance, the district court must identify "the substantive issues that will control the outcome, assess[] which issues will predominate, and then determin[e] whether the issues are common to the class."<sup>49</sup> Absent this analysis, "it [is] impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials . . . much less whether the common issues predominate."<sup>50</sup> The district court did not consider the statute of limitations and tolling questions in its predominance analysis, so it abused its discretion when it determined that common questions would predominate over individual issues and certified the class.<sup>51</sup>

## III. CONCLUSION

Because of the limited evidence before the district court, we remand for further proceedings to determine whether there is sufficient additional evidence to support a finding that breach of the duty to market and damages from any breach can be ascertained on a classwide basis. Additionally, because the district court failed to address whether the applicable statute of limitations and potential tolling questions would raise individual issues, it abused its discretion in certifying the class as written. We therefore REVERSE and REMAND for further proceedings consistent with this opinion.

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<sup>49</sup> *Bell Atl.*, 339 F.3d at 301.

<sup>50</sup> *Madison*, 637 F.3d at 557.

<sup>51</sup> *See id.* ("By failing to adequately analyze and balance the common issues against the individualized issues, the district court abused its discretion in determining that common issues predominated and in certifying the class.").