



***Royalty Class Action Trial: Lessons Learned***  
**IEL Energy Litigation Conference**  
Nov. 8, 2018

**Chris Lacy**  
Assistant General Counsel  
and Assistant Secretary,  
Southwestern Energy

**Paul Yetter**  
**Robert Woods**  
Yetter Coleman LLP

# WHAT ARE WE TALKING ABOUT?

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- Royalty class action went to trial
  - 12,000+ lessors
  - Common lease
  - Affiliate theory
  - Arkansas jury
  - \$300 million claim
- Defense **win** (\$0)



# WHY IT MATTERS

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- Lessons learned
  - Class action
  - Complex litigation
  - Multi-suit/jurisdiction management
  - Jury trial
- It could happen to you



# PRELUDE

# FAYETTEVILLE SHALE DISCOVERY



# LEASE FORM

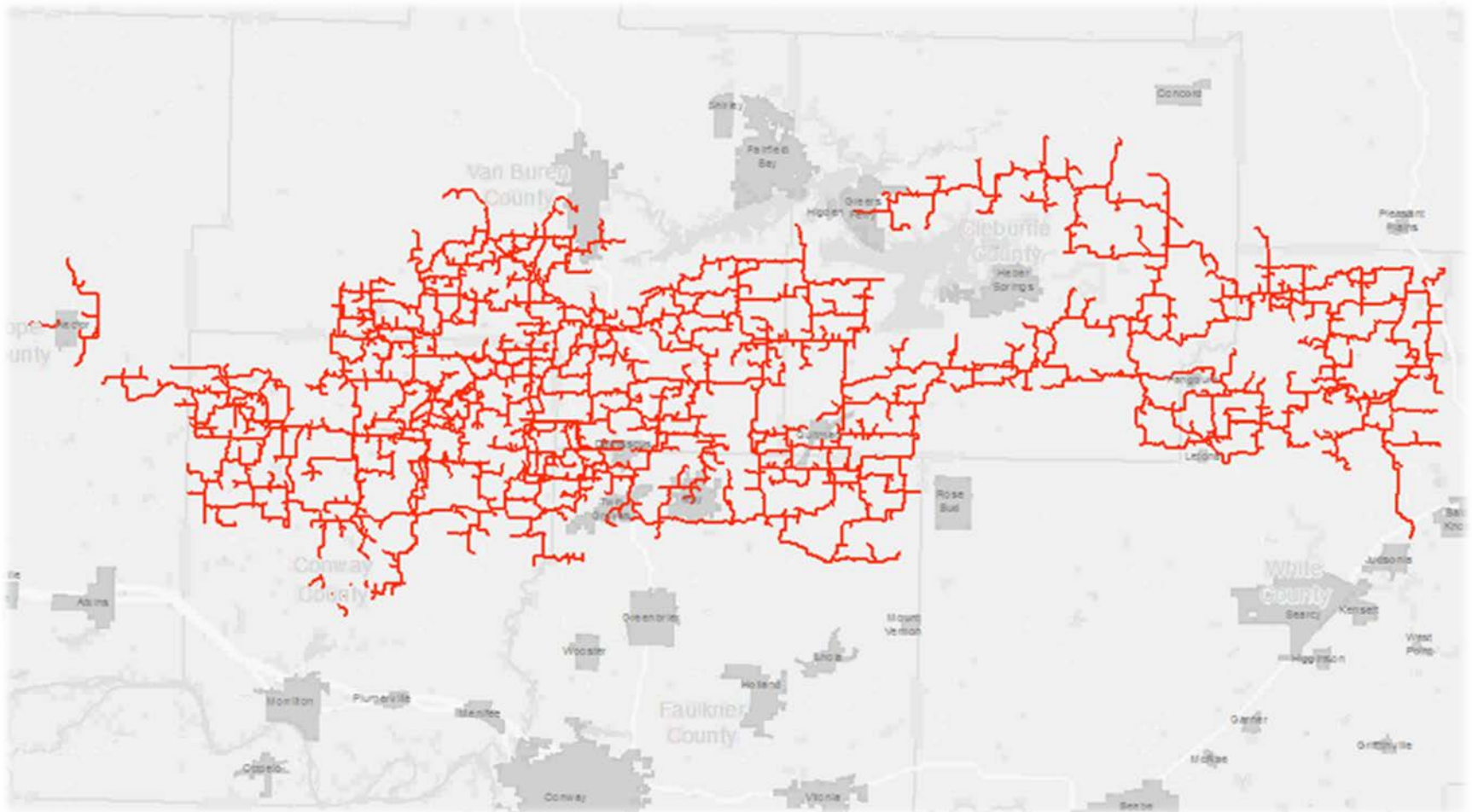
[illegible]

**“[SEECO] shall be entitled to deduct **all reasonable** gathering, transportation, treatment, compression, processing and marketing **costs** that are **incurred** by [SEECO] in connection with the sale of such gas.”**



# DESOTO GATHERING COMPANY

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# LAWSUITS FILED



# OVERLAPPING CLASS ACTIONS

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## State Court

1. *Snow* (2010):  
Arkansas citizens
2. *Stewmon* (2013):  
Arkansas residents

## Federal Court

3. *Smith* (2014):  
non-Ark. leftovers
4. Mass actions



# THEORIES

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1. Incurred

2. Reasonable



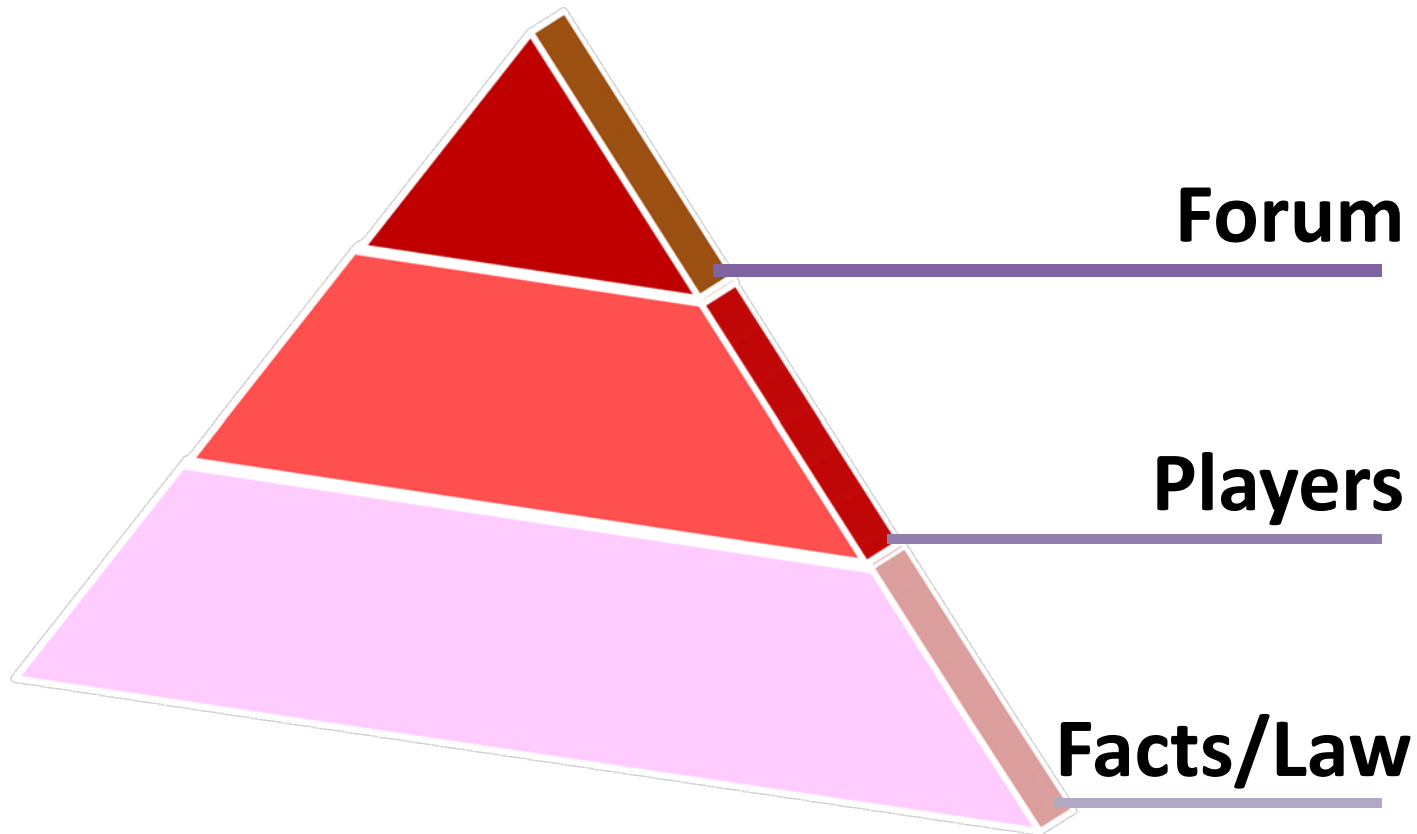
***“Profit is not a cost”***

**“[SEECO] shall be entitled to deduct **all reasonable** gathering, transportation, treatment, compression, processing and marketing **costs** that are **incurred** by [SEECO] in connection with the sale of such gas.”**

# PRETRIAL MANEUVERS

# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

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# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

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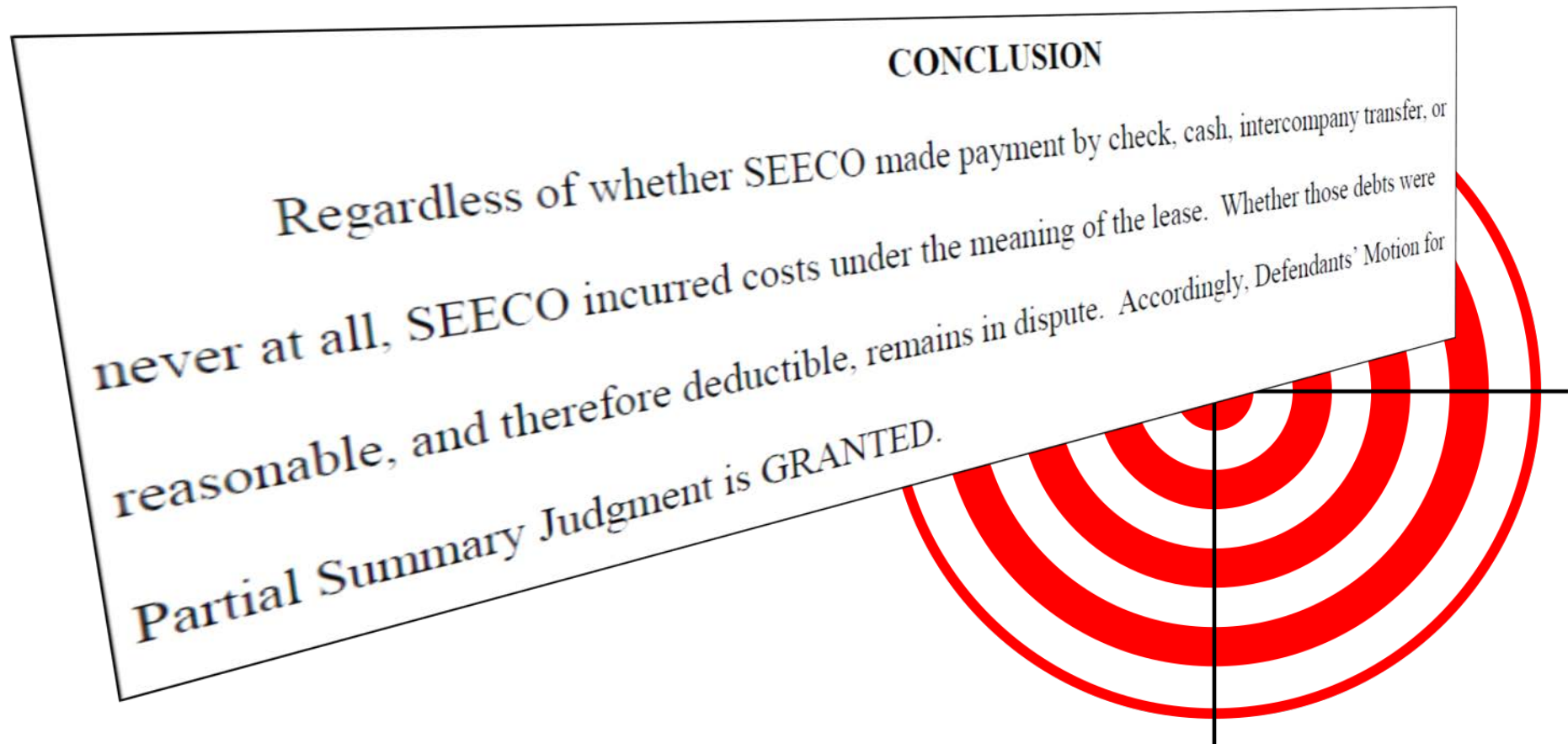
❑ Prioritize the federal case



# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

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- ✓ ☒ Pick off the “incurred” theory

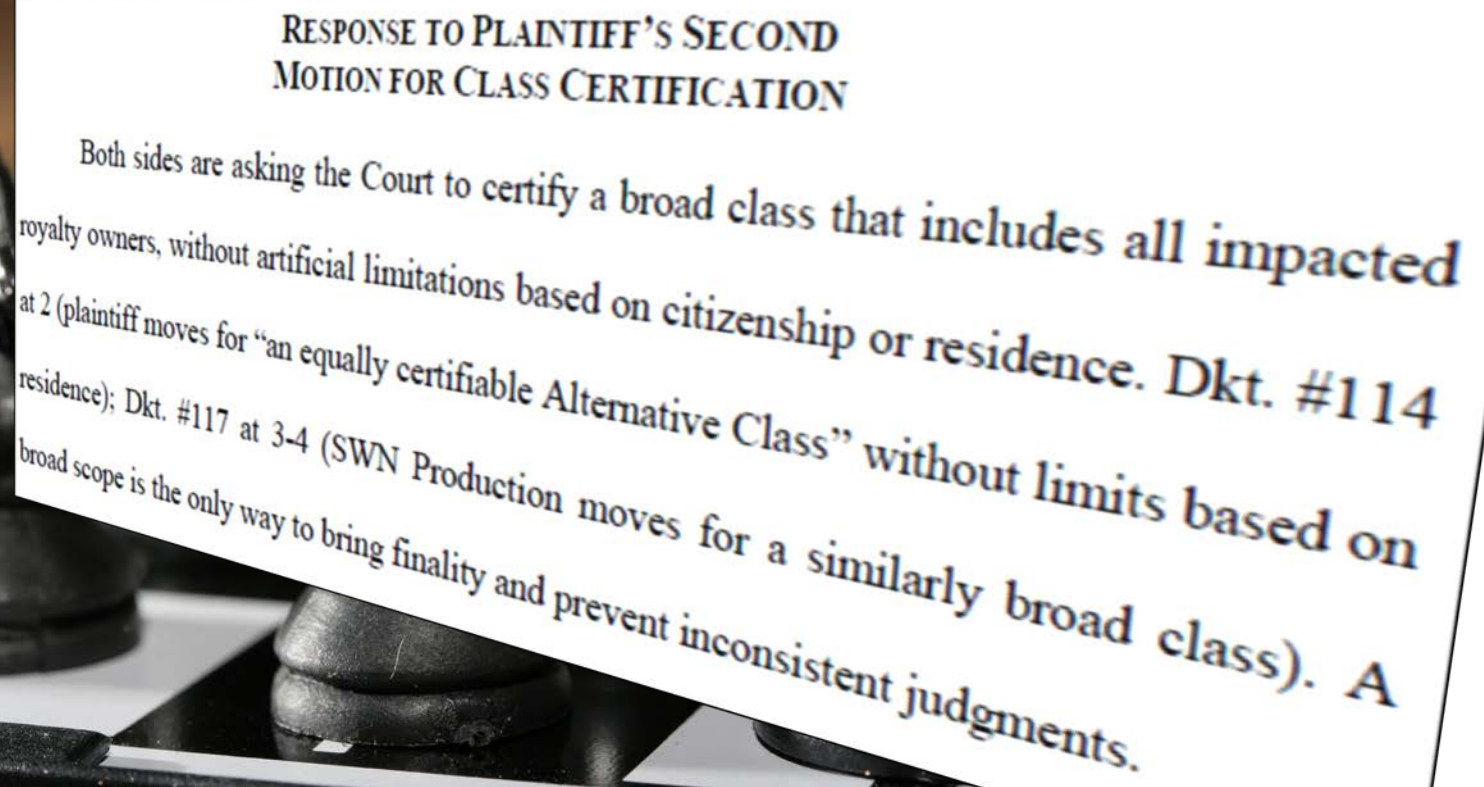




# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

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- ✓ ☒ Resolve all claims in one case



RESPONSE TO PLAINTIFF'S SECOND  
MOTION FOR CLASS CERTIFICATION

Both sides are asking the Court to certify a broad class that includes all impacted royalty owners, without artificial limitations based on citizenship or residence. Dkt. #114 at 2 (plaintiff moves for "an equally certifiable Alternative Class" without limits based on residence); Dkt. #117 at 3-4 (SWN Production moves for a similarly broad class). A broad scope is the only way to bring finality and prevent inconsistent judgments.



# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

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- ✓ ☒ Identify themes and prepare for voir dire
- ✓ ☒ Evaluate and prepare witnesses
- ✓ ☒ Marshal evidence / ensure witness availability



# MAXIMIZING TRIAL/SETTLEMENT OUTCOMES

- ✓ ☒ Ward off shenanigans
  - Rivalry and tension between competing class counsel
  - *Smith* lawyers sued individually

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# AROUND THE FINAL POST

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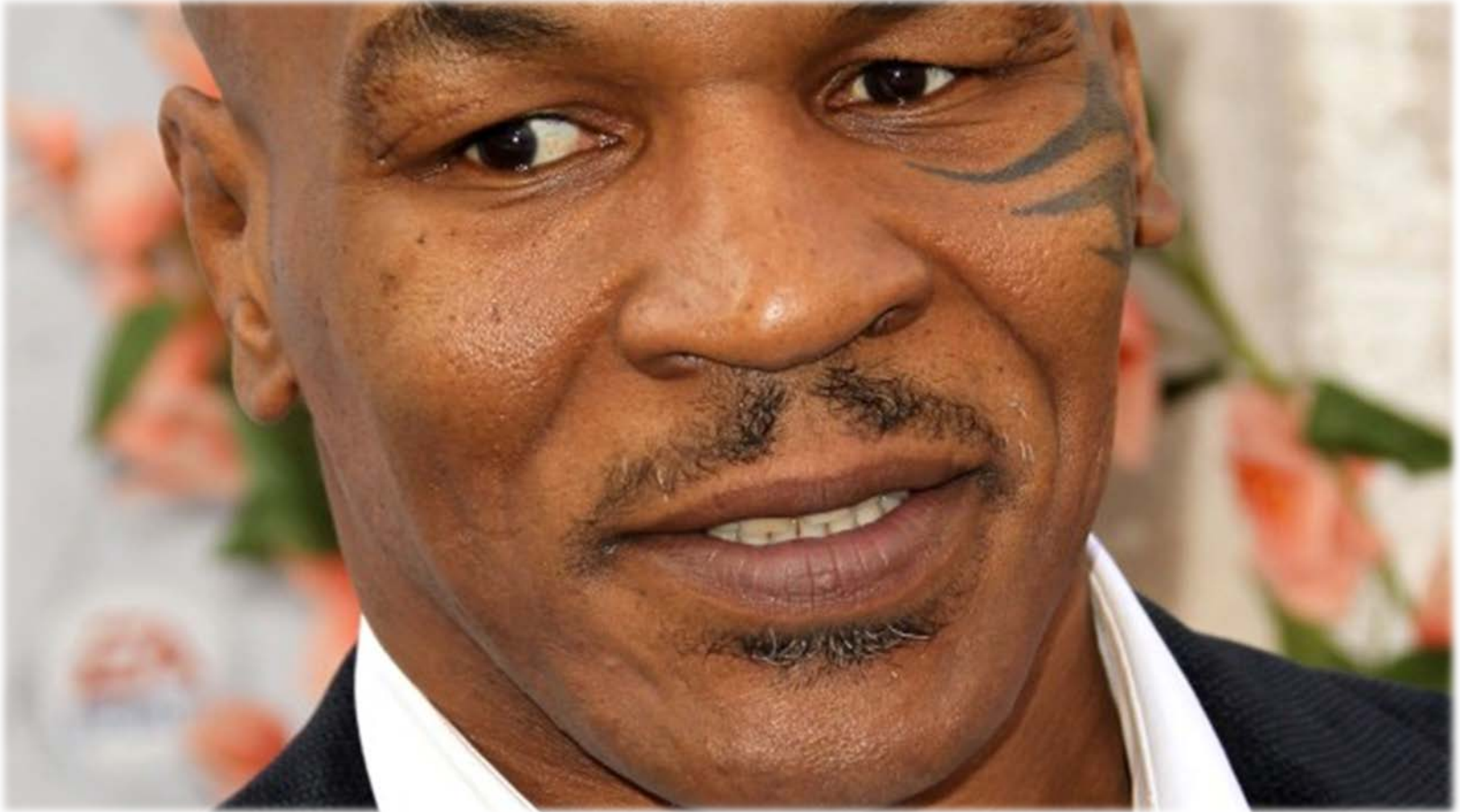
- ✓ Federal case in driver's seat
- ✓ Incurred theory is out
- ✓ Complete class certified
- ✓ Proof of reasonable costs
- ✓ Few deposition soundbites
- ✓ Compelling witnesses
- ✓ Vetted trial themes
- ✓ MSJs pending



# THE HOME STRETCH

# EVERYONE HAS A PLAN . . .

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# THE DILEMMA

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# SUMMARY JUDGMENT DENIED

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- SWN had “control over the subsidiaries, though they **appear** on paper to be separate entities.”
- “As SWN was realizing significant profits as money flowed up from its profiting subsidiaries, the **class lost money**.”
- The “**scheme** was kept hidden until at least 2009 when the affiliate agreements were signed and **backdated** to justify the practice of making deductions.”



# A SETTLEMENT IS REACHED

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Arkansas Democrat  Gazette

**NEWS**

**In shale suit, deal reached**

Payout by driller put at up to \$45M

# BUT...

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“Regardless, the state court judge preliminarily approved settlement, but a trial on the merits here could very well reach a conclusion before that final fairness hearing. The defendants invited a race to judgment . . . and there is nothing standing in the way of allowing that race to continue as has been the case all along.”

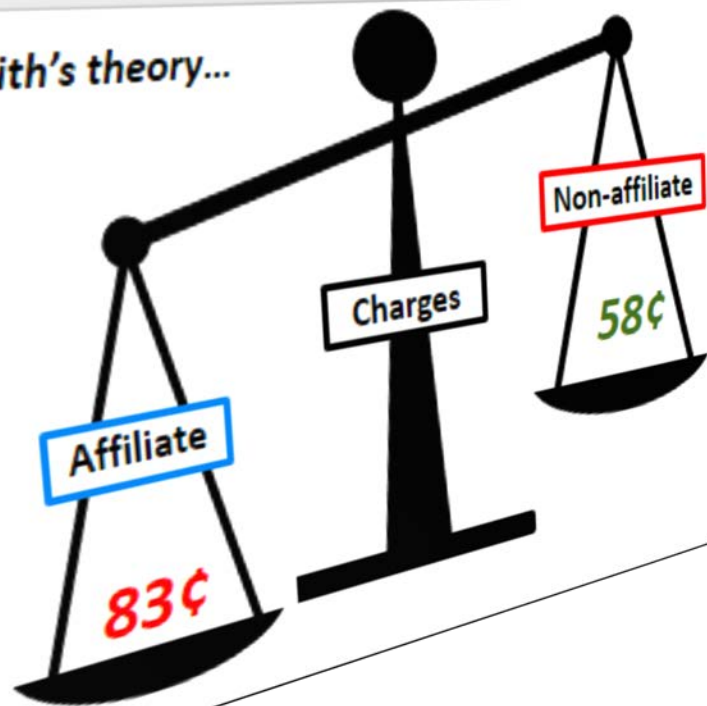
“Rather than delay the inevitable, a federal *trial must move forward.*”

# PHOTO FINISH

# TRIAL THEMES

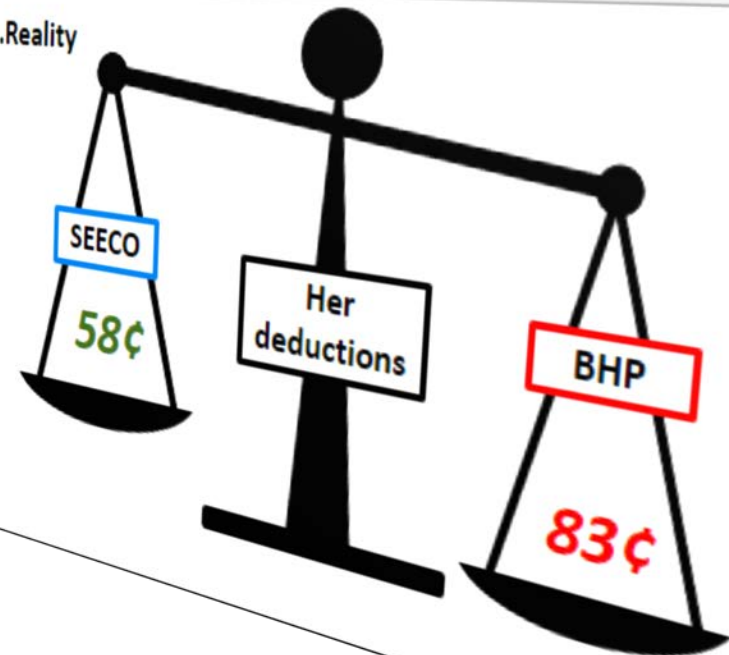
What should we see if Dr. Smith is right?

*Dr. Smith's theory...*



What should we see if Dr. Smith is right?

*...Reality*



# TRIAL THEMES

## DeSoto Gathering attracts top talent, cuts costs, draws new customers



## Industry experts agree that using affiliate is standard practice

- Usual and customary to create separate midstream company
- Not saying DeSoto set up for improper purpose
- No opinion anything evil or bad in the way the Field Services Agreement between SEECO and DeSoto was set up



Agree

Agree

Agree



Agree

Agree

Agree



# TRIAL THEMES

In 2005, SEECO offers the best terms, and Dr. Smith reads/signs the contract

- Upfront **bonus** \$
- **1/8th** royalty \$
- Bears **no** exploration or production costs
- Bears **1/8th** of "reasonable" gathering, treating, etc. costs
- Testified she felt SEECO's lease was reasonable by comparing other companies offered her



6/1/05 Oil & Gas Lease Agreement (DX1)

Nothing in Dr. Smith's lease stops DeSoto or other vendors from making a profit



SEECO hires many local contractors in this project

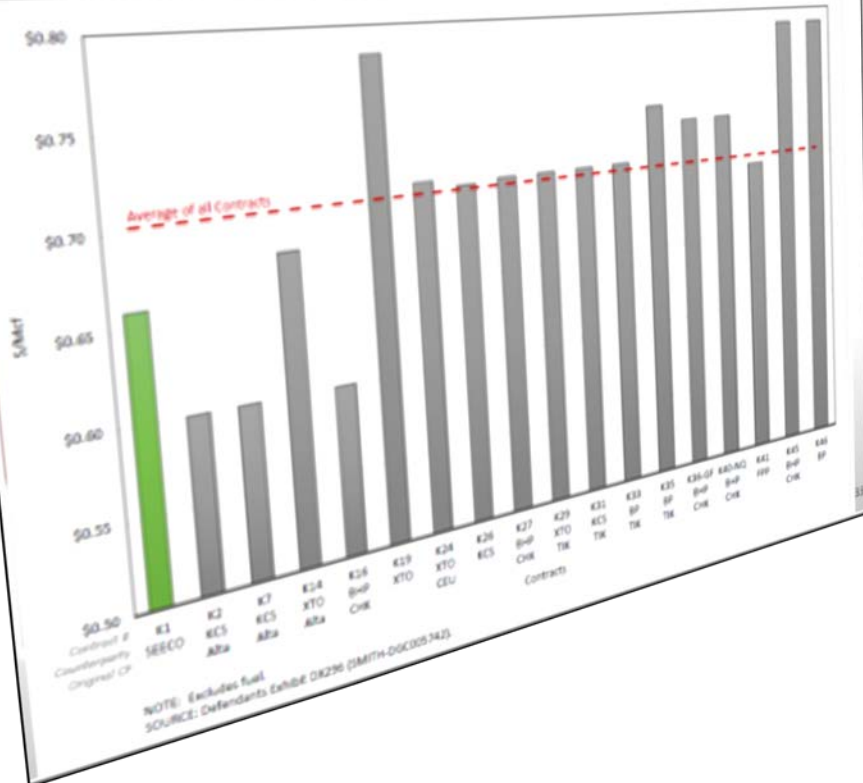
Profit is a normal part of reasonable prices

DeSoto has a profit in its prices to SEECO, just like any other contractor



# TRIAL THEMES

## DeSoto charges SEECO less than other producers in the area



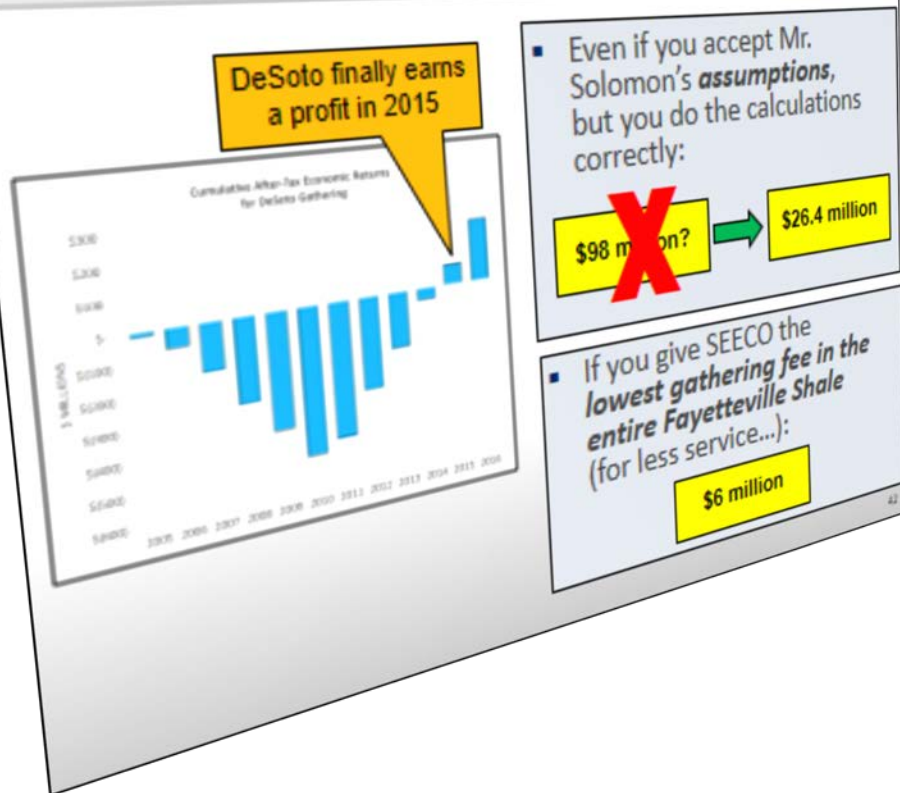
## Smith charged higher price from BHP for the same land



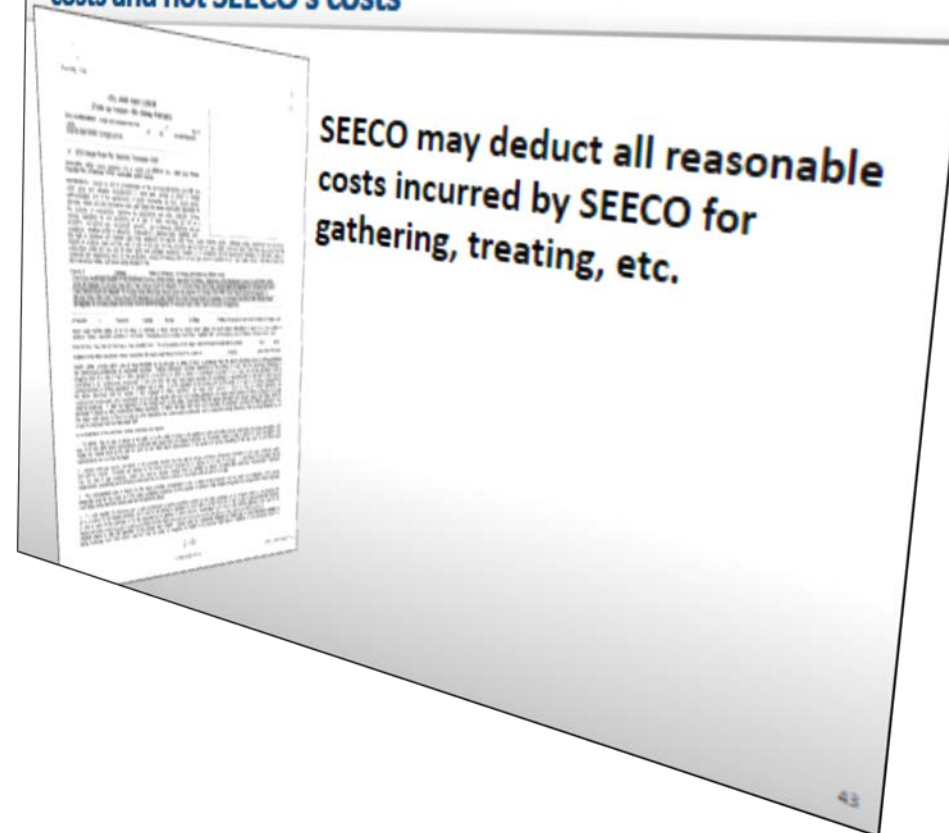


# TRIAL THEMES

## Plaintiff's damages expert Mr. Solomon plays fast and loose with DeSoto's costs



## And asks the wrong question: looks at DeSoto's costs and not SEECO's costs



# VERDICT

Arkansas Democrat  Gazette

## VERDICT FORM

Please provide your verdict by completing the following.

1.) On plaintiff Connie Jean Smith's claim, brought on behalf of the class, for breach of contract as described in Court's Instruction No. 10, we find in favor of:

(Plaintiff Connie Jean Smith)

or

SEECO

(Defendant SEECO, Inc.)

2.) On plaintiff Connie Jean Smith's claim, brought on behalf of the class, for fraud and deceit as described in Court's Instruction No. 11, we find in favor of:

or

SEECO

(Defendant SEECO, Inc.)

Energy firm didn't skim profits from shale in Arkansas, jury finds

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