**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| **RICHARD P. MARBURGER**, Trustee of the Olive M. Marburger Living Trust and **THIELE FAMILY, LP**, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No.2:15-cv-00910-CRE |
| **XTO ENERGY INC**., | ) | |
| Defendant. | ) | |

**BRIEF IN SUPPORT OF MOTION FOR**
**FINAL APPROVAL OF SETTLEMENT OF CLASS ACTION**

Plaintiffs and XTO Energy Inc. ("XTO") spent several years contesting the merits and the appropriateness of class certification in this complex action challenging royalty payments under gas and oil leases. The parties conducted discovery, including production of documents, interrogatories, requests for admissions, analyzed oil and gas leases, deposed lay witnesses and deposed three expert witnesses. As required by this Court's Case Management Order, as amended, plaintiffs filed a Motion for Class Certification which was briefed fully by all parties. The issues in this action are complex and highly disputed, and the outcome is uncertain. Declaration of the Honorable Edward N. Cahn (Ret.) in Support of Motion for Preliminary Approval of Class Action Settlement ("Judge Cahn Declaration") at ¶ 8. The parties and this Court faced years of continued litigation, appeals and substantial litigation costs.

This Court required the parties to mediate this complex action after all class certification briefs and expert reports had been filed. At the Court-ordered mediation, a former Chief Judge of the United States District Court for the Eastern District of Pennsylvania caused the parties to reach a settlement in principle. In general, (i) XTO will pay the Settlement Class nearly all of

the amount of deductions for post-production expenses that it took from royalty payments from January 2012 through September 2017, the time of the settlement in principle, and (ii) XTO can net out certain post-production costs in the future. More concretely, XTO will pay the Settlement Class $11,010,000, nearly all of the damages plaintiffs could recover at trial, and XTO in the future has the ability to net out post-production costs under *Kilmer v. Elexco Land Services, Inc*., 990 A.2d 1147 (Pa. 2010). Plaintiffs in November 2017 submitted the proposed settlement agreement for preliminary approval. On November 17, 2017, this Court entered an Order [Document 69] that preliminarily approved the settlement. Through this Motion and after notice to the Settlement Class, plaintiffs seek to obtain final approval of the settlement.

On or about December 1, 2017, as required by the Preliminary Approval Order, plaintiffs mailed the Court-approved Notice to the members of the Settlement Class by first-class United States mail. Plaintiffs also caused the Court-approved Publication Notice to be published on Sunday, December 10, 2017, in both the Pittsburgh Post-Gazette and in the Butler Eagle. The Notice of this settlement was mailed to 1,142 persons. Those persons fell within the following definition of the Settlement Class:

> Every individual and entity, including every predecessor and successor-in-interest, who possessed a royalty ownership interest at any time between January, 2012 and October 1, 2017, in an oil and gas lease with Phillips Production Company, Phillips Exploration, Inc., PC Exploration, Inc., Phillips Resources or any entity affiliated with them or any of them ("Phillips") covering oil and gas interests in Pennsylvania: (i) which lease states that the royalty for gas shall be "equal to [a specified percentage] of the proceeds received from time to time by lessee for all gas … produced, metered and sold, less lessor's pro rata share of any severance or excise tax imposed by any governmental body; (ii) which lease does not contain any provision that expressly mentions post-production expenses, including any such language in a "Market Enhancement" provision; (iii) which lease has been assigned to or is or was under the direct or indirect control of XTO (a lease that satisfies (i), (ii) and (iii) being a "Phillips Standard Lease"); and (iv) which individuals and entities were identified by XTO on October 16, 2017, in a spreadsheet named "Marburger final numbers," as revised November 15, 2017, which it provided to plaintiffs' counsel and the Settlement Administrator. The

> Settlement Class excludes (a) any lessor under any such lease who has an existing lawsuit against XTO separate from this action related to alleged underpayment of royalties under Phillips Standard Leases by XTO; (b) any oil and gas lease that determines the royalty based on "value;" (c) any person who is an officer, director, employee or agent of Phillips or XTO; (d) any person or entity who has previously released XTO from liability concerning any claims asserted in this action; (e) the United States; and (f) the Commonwealth of Pennsylvania.

The reaction of the Settlement Class to the settlement was overwhelmingly positive. Only sixteen persons, about 1.4% of the class, submitted requests to be excluded from the Settlement Class.[1] After excluding those 16 persons and considering transfers of oil and gas interests, the class currently consists of 1,135 persons who have interests in roughly 900 oil and gas leases. Out of the 1,135 class members, only *one* objection to the proposed settlement was submitted, the objection of class member R & L Kennedy LP [Document 70.1] (the "Kennedy Objection"). The one 'objection,' however, does not object to the terms of the settlement. That is, R & L Kennedy LP does not object to the manner in which XTO will calculate royalties in the future; it does not object to the amount of the damages XTO will pay as a result of netting out post-production costs in the past; and it does not object to the payment of counsel fees, costs and expenses. Instead, it seeks to have this Court — somehow — increase the royalty in one of its oil and gas leases from 12½% to 15%. This requested "relief" (i) is more than anything that could have been obtained in a judgment; (ii) is beyond the power of this Court to award; and (iii) has no direct or indirect relationship to any issue in this litigation. [See Documents 71, 72] From a legal perspective, it seems fair to say that no class member has voiced any relevant objection to the settlement on its merits or its fairness.

[1] The sixteen persons who requested to be excluded from the Settlement Class are identified in Exhibit A to the proposed Final Order and Judgment.

## ARGUMENT

Approving the settlement of a class action involves two separate inquiries. The Court first must find that the requirements for class certification under Fed.R.Civ.P. 23(a) and (b) have been satisfied. If the class can be certified, the Court must then determine whether the settlement is fair and adequate to the class under Rule 23(e). *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 319 (3d Cir. 2011) (*en banc*), *cert. denied*, 566 U.S. 923 (2012).

### I. THE SETTLEMENT CLASS SATISFIES RULE 23(a) AND RULE 23(b)

Rule 23(a) has four threshold requirements for class certification: (1) the class must be so numerous that joinder is impractical; (2) common questions of fact or law exist; (3) the claims of the representative plaintiffs are typical of the claims of the class; and (4) the class will be fairly and adequately represented. If the Rule 23(a) standards are met, the class must also satisfy one of the subsections of Rule 23(b). This is a Rule 23(b)(3) action seeking damages, and the (b)(3) requirements are that (i) common questions predominate over any questions affecting only individual members, and (ii) class treatment is superior to other available methods. *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 426 (3d Cir.), *cert. denied*, 137 S.Ct. 591 (2017) ("In re NFL"). XTO acted in the same manner toward all class members, and the action can also be certified under Rule 23(b)(2).

#### (1) Rule 23(a)(1) Numerosity

The numerosity requirement of Rule 23(a)(1) is straightforward: Is it practicable to join all class members? Within this circuit, numerosity is satisfied if there are more than 40 class members. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). *See also In re Modafinil Antitrust Litigation*, 837 F.3d 238, 249-50 (3d Cir. 2016);

*Marcus v. BMW of N. Am. LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Here, there are roughly 900 leases in the class and 1,135 class members. The numerosity requirement is established.

(2) **Rule 23(a)(2) Commonality**

Rule 23(a)(2) requires the existence of questions of law or fact that are common to the class. The Court of Appeals for the Third Circuit recently summarized this requirement as follows:

> 'A putative class satisfies Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.' *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013) (internal quotation marks omitted). 'Their claims must depend upon a common contention … that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.' *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2545 (2011). Meeting this requirement is easy enough: '[W]e have acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable.' *In re Cmty Bank*, 795 F.3d at 397

*In re NFL*, 821 F.3d at 427. The focus under Rule 23(a)(2) is not on the strength of a class member's claim, but rather on whether the defendant's conduct was common to the class, *In re Community Bank of Northern Virginia*, 795 F.3d 380, 397 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 1167 (2016), that is, whether there are class-wide answers. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015).

Each class member has a Standard Form Lease with Phillips under which XTO is calculating royalty payments. Each lease contains precisely the same controlling contractual provision, and the interpretation should be the same for all lessors.[2] XTO is deducting any post-production expenses incurred under those leases when it calculates any royalties that must be

[2] The royalty provision for each lessor states: "Royalty equal to [a stated percentage] of the proceeds received from time to time by lessee for all gas (except storage gas) produced, metered and sold, less lessor's prorate share of any severance or excise tax imposed by any governmental body." Complaint, Thiele Lease at p.2 [Document No. 1-4 at p.2]

paid. As the Third Circuit recently reiterated, "[b]ecause form contracts should be interpreted uniformly as to all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment." *Gillis v. Respond Power, LLC*, 667 Fed.Appx. 752, 756 (3d Cir. 2017). *See also Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 457 (Pa.Super. 1982); *Cardinale v. R.E. Gas Development, LLC*, 154 A.3d 1275 (Pa.Super. 2017). Thus, at least one common question is whether the standard royalty provision permits XTO to net-out post-production costs in calculating royalties under the leases. *See* Expert Report of John Burritt McArthur on Certification and Fairness of Settlement ("Certification and Fairness Report") §§ 10-22.

(3) **Rule 23(a)(3) Typicality**

Rule 23(a)(3) requires that a class representative's claims be typical of the claims of the class. This ensures that the interests of the class and the representatives align so that the class representatives benefit the entire class when they pursue their own goals. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001). The claims and legal theories of the representative plaintiffs and the class members are precisely the same: The Phillips Standard Form Lease does not permit the deduction of expenses; XTO deducts post-production expenses whenever it incurs them from any affected royalty payments that are due class members; all class members who suffered deductions seek to recover the amount of expenses deducted from his or her royalty payments; and all class members seek to bar future deductions. The class representatives' claims are thus typical of those of the class members, satisfying Rule 23(a)(3). *See* Certification and Fairness Report § 23.

(4) **Rule 23(a)(4) Adequacy**

Rule 23(a)(4)'s requirement that the class representative fairly and adequately protect the interests of the class examines the qualifications of class counsel and the class representatives and searches for conflicts of interest within the class. *See In re NFL*, 821 F.3d at 428.

A. Class Counsel: The adequacy requirement as to counsel "assures that counsel possesses adequate experience, will vigorously prosecute the action, and will act at arm's length from the defendant." *In re Community Bank of Northern Virginia*, 795 F3d at 389. As described in the Declaration of David A. Borkovic in Support of Motion for Award of Attorneys' Fees, Costs and Expenses ("Borkovic Fee Declaration") ¶¶ 3-7, class counsel has 40 years of experience litigating complex litigation throughout the United States; has tried complex commercial disputes, including antitrust, construction, contract claims and contests for control of corporate entities; has defended and prosecuted class actions; has been named lead counsel for plaintiffs in class actions arising out of oil and gas lease disputes; has been a AAA arbitrator in connection with disputed royalties; and has taught class actions and complex litigation at Duquesne University's Law School. *See also* Certification and Fairness Report § 24. Moreover, Class Counsel acted at arm's-length from XTO. Judge Cahn Declaration ¶ 12.

B. Class Representatives: A class representative is adequate even if the representative has only a minimal degree of knowledge about the litigation. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). It is enough if the representative authorizes the filing of the lawsuit and follows the litigation with some participation. *See In re NFL*, 821 F.3d at 430. The class repesentatives, Mr. Marburger and Thiele Family, LP, are clearly adequate.

C. Conflicts of Interest: Rule 23(a)(4) also serves to uncover conflicts of interest between the named representatives and the class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). No known conflicts of interest exist. The class representatives and the class members assert the same claims, and the class representatives are adequate. Certification and Fairness Report § 24.

(5) **Ascertainability**

The Third Circuit has held that "ascertainability" is an implicit requirement for class certification under Rule 23(b)(3). Ascertainability requires a plaintiff to (a) show that the class is defined with reference to objective criteria; and (b) there is a reliable and administratively feasible mechanism for determining whether class members are within the class definition. *Byrd v. Aaron's Inc*., 784 F.3d 154, 163 (3d Cir. 2015). Here, not only do objective criteria exist, the class members have already been identified. All elements, both express and implied, of Rule 23(a) are satisfied.

(6) **Class Certification is Appropriate Under Rule 23(b)(3)**

A class action may be certified under Rule 23(b)(3) if (i) questions of law or fact common to class members predominate over any questions affecting only individual members and (ii) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

A. Predominance. Predominance considers whether a class action would achieve economies of time, expense and effort and promote uniform decisions among similarly situated persons. *Sullivan v. DB Investments, Inc*., 667 F.3d 273, 297 (3d Cir. 2011) (*en banc*), *cert. denied*, 566 U.S. 923 (2012). The test essentially ensures that issues of law or fact common to the class predominate over those affecting only individual members of the class. *Id.*

The Supreme Court recently made clear the difference between individual and common questions.

> An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facia showing [or] the issue is susceptible to generalized class-wide proof.

*Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S.Ct. 1036, 1045 (2016). If proof of the *essential* elements of the class' claims can be established at trial with common as opposed to individual evidence, common issues of law or fact predominate. *In re Community Bank of Northern Virginia*, 795 F.3d at 399. As the Third Circuit explained,

> **[T]he focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct.**

*Sullivan*, 667 F.3d at 298. (Emphasis supplied.) Common issues predominate if the inquiry focuses on what defendant did rather than on what plaintiffs did. *Id*., 667 F.3d at 299.

There is a controlling common question in this action: whether the standard royalty provision permitted XTO to net-out post-production expenses in calculating the royalties. This issue focuses on XTO's conduct and arises from a standard form contract. As such the interpretation of the royalty provision should be the same for all parties, and this issue predominates over any individual questions. *Gillis v. Respond Power, LLC*, 677 Fed.Appx. 752 (3d Cir. 2017). *See also Walney v. SWEPI LP*, 2015 WL 5333541 at *13 (W.D. Pa. 2015) (Conti, C.J.); *Sullivan*, 667 F.3d at 298-99. *See* Certification and Fairness Report §§ 10-22.

B. Superiority. The issues arising from identical form leases and a common course of conduct by XTO predominate over any questions affecting only individual class members. This makes the class-wide treatment of the claims more efficient. Proceeding as a class also ensures that smaller claims are included when they could not be asserted individually on an economically

justifiable basis. *See Walney* at *26. Certification and Fairness Report §§ 25-26. Class treatment is also superior because all claims will be concentrated, promoting efficient and consistent administration of justice. Moreover, a significant majority of the class members reside in the district and the leases are concentrated in this district. *Id*. Class certification is appropriate under Fed.R.Civ.P. 23(b)(3).

For the reasons set forth above, each of the criteria in Rule 23(a), Rule 23(b)(3) and Rule 23(b)(2) are satisfied, and the Settlement Class should be certified. *See* Certification and Fairness Report §§ 27-32.

## II. THE SETTLEMENT IS FAIR AND ADEQUATE UNDER RULE 23(e)

A settlement in a class action is presumed to be fair if (1) the settlement was negotiated at arm's-length; (2) there was adequate discovery for counsel to be aware of the strengths and weaknesses of the case; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. *In re NFL*, 821 F.3d at 436-37; *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 535 (3d Cir. 2004). These standards are easily satisfied. Judge Cahn Declaration ¶ 12. The mediator, Judge Cahn, found that the settlement was aggressively negotiated by experienced and well-informed counsel, at arm's length and in good faith. *Id*. He specifically found that it was not a product of fraud or collusion. *Id*. Class counsel is experienced in similar litigation, Borkovic Fee Declaration ¶¶ 3-7, and there was but one objection from a class of 1,135 members. This settlement is presumed to be fair. But far more than a presumption, this settlement is fair and adequate in fact.

The Court of Appeals in *Halley v. Honeywell International, Inc*., 861 F.3d 481, 488-89 (3d Cir. 2017), recently repeated this Circuit's standard for evaluating the fairness and adequacy

of a settlement under Rule 23(e). District Courts must consider the nine factors that originated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975):

> (1) the complexity, expense, and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
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> (3) the stage of the proceedings and the amount of discovery completed;
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> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
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> (7) the ability of the defendants to withstand a greater judgment;
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> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In addition, trial courts may also consider the additional factors identified in *In re Prudential Ins. Co. America Sales Practices Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999):

> [10] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;
>
> [11] the existence and probable outcome of claims by other classes and subclasses;
>
> [12] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants;
>
> [13] whether class or subclass members are accorded the right to opt out of the settlement;
>
> [14] whether any provisions for attorneys' fees are reasonable; and

> [15] whether the procedure for processing individual claims under the settlement is fair and reasonable.

*See also Sullivan v. DB Investments, Inc*., 667 F.3d at 319-20. A District Court must consider the *Girsh* factors, but the factors 10 through 15 from *Prudential* are only "prudential" and are not mandatory. *In re: NFL*, 821 F.3d at 437. Consideration of the above factors points overwhelmingly in favor of approving the settlement.

(1) **Complexity, expense, and likely duration of the litigation**

The first *Girsh* factor examines the likely costs in terms of time and money of continued litigation. *In re Warfarin*, 391 F.3d at 536. Although the parties obviously dispute the plain meaning of the word "proceeds," the litigation also encompasses other complex issues that likely will have to be resolved. For example, the parties likely will engage in discovery over industry practice, over when the gas produced pursuant to the leases becomes "marketable," the relationship between XTO and its affiliates, and whether XTO could restructure its marketing practices. There likely will be extensive motion practice over the admissibility of extrinsic evidence, the applicability of the marketable product doctrine, and the effect of affiliate sales. Further, given the time, effort and expense that will be incurred, it is almost certain that the losing party will appeal. Each of these would further prolong the litigation and reduce the value to the class of any recovery. Put simply, this is a complex case in a specialized area of law. This *Girsh* factor weighs heavily in favor of approving the settlement. *In re Warfarin*, 391 F.3d at 536. *See* Certification and Fairness Report §§ 34-35. Declaration of The Honorable Edward N. Cahn (Ret.) in Support of Motion for Preliminary Approval of Class Action Settlement ("Judge Cahn Declaration") ¶ 11.

(2) **The reaction of the class to the settlement**

An insignificant number of objections weights in favor of approving the settlement, especially when some of the class members have significant claims. *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d at 536. Here, some members of the class have recoveries in the range of 3% to 5% of total class damages, quite significant amounts. Yet there was only one objection, and it was not an objection to the amount of damages. That objection, it bears repeating, did not argue that the amount of damages XTO will pay for past deductions was not fair; it did not argue against permitting XTO to deduct certain post-production costs in the future; and it did not argue that the request for counsel fees was unreasonable. On a legal basis, there really was no objection to the settlement by any class member. Moreover, only roughly 1.4% of the class sought to be excluded. In *In re NFL*, roughly 1% of the class objected, and about 1% opted out. According to the Court of Appeals, "these figures weigh in favor of settlement approval." 821 F.3d at 438. See also Certification and Fairness Report §36.

(3) **The stage of the proceedings and the amount of discovery completed**

The third *Girsh* factor considers whether counsel had an adequate appreciation of the merits of the case before negotiating. *In re Warfarin*, 391 F.3d at 537. Stated otherwise, "[w]hat matters is not the amount or type of discovery class counsel pursued, but whether they had developed enough information about the case to appreciate sufficiently the value of the claims." *In re NFL*, 821 F.3d at 439. Here, the parties were represented by skilled, experienced counsel. Judge Cahn specifically found that counsel were "zealous, well-informed, experienced and able." Judge Cahn Declaration ¶ 12. The class certification motion had been fully briefed, which necessarily involved the merits, and the three expert witnesses had been deposed. Thus, any

discovery likely to alter any risk assessment has been completed. Certification and Fairness Report § 37.

(4) & (5) **The risks of establishing liability and damages**

"'The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement.'" *In re NFL*, 821 F.3d at 440, *quoting In re Prudential*, 148 F.3d at 319. John Burritt McArthur summarizes the risks faced by the class in the Certification and Fairness Report at §§ 40, 41. As described above, there are many complex issues that will have to be resolved if this action is litigated to a judgment with any resulting appeal including industry practice, when the gas produced becomes "marketable," the applicability of the marketable-product doctrine, the effect of any subsequent changes in state law, the relationship between XTO and its affiliates, and the effect of affiliate sales. Moreover, there are substantial risks concerning the ability to recover damages in the future as a result of XTO restructuring its marketing practices. Here, an immediate settlement gives the class very close to all of the damages the class could have recovered in a judgment at the time of the settlement and eliminates the risk attendant to that recovery. Judge Cahn found that the litigation was highly uncertain and presented significant risks for all parties. Judge Cahn Declaration ¶ 11. These factors overwhelmingly weigh in favor of approving the settlement.

(6) **The risks of maintaining the class action through the trial**

In a settlement class, this factor is essentially irrelevant because there will be no trial. *In re: NFL*, 821 F.3d at 440. If the settlement is not approved, there are risks about whether the class can be maintained through trial which weighs in favor of approving the settlement. Certification and Fairness Report § 42.

(7) **The ability of the defendants to withstand a greater judgment**

This factor generally has little significance and none in this instance. The defendant in any class action against a large corporation is likely to be able to withstand a more significant judgment, and that fact alone has no meaning. *Sullivan v. DB Investments, Inc*., 667 F.3d at 323 This factor becomes relevant when the defendant's professed inability to pay is used as an excuse to justify the amount of the settlement. *In re NFL*, 821 F.3d at 440. Here, XTO has agreed to pay essentially all of the damages that were known when the settlement was negotiated, and it cannot be expected to pay more. *In re Warfarin*, 391 F.3d at 538. ("[T]he fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the … class members are entitled to under the theories of liability that existed at the time the settlement was reached.") Given that XTO has agreed to pay nearly all possible damages, this factor weighs in favor of approving the settlement.

(8) & (9) **The range of reasonableness of the settlement fund in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation**

"These factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Warfarin*, 391 F.3d at 538. In cases seeking primarily monetary damages, the trial court is to compare the present value of the damages plaintiffs would likely recover if successful (discounted for the risk of not prevailing) with the amount of the proposed settlement. *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 806 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). Courts must take care when evaluating a settlement and not demand too high a recovery. *Id*. For example, recoveries between **1.6%** and **14%** are typically approved in securities cases. *In re Cendant Corp. Litigation*, 264 F.3d 201, 241 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002). *Cendant* approved a settlement of **36% -**

**37%** of the damages. *Sullivan v. DB Investments, Inc*. approved a settlement that was **20%** of actual single damages. 667 F.3d at 324. This Court in *Jackson v. Wells Fargo Bank, N.A.*, approved a settlement that was **19.5%** of the best possible recovery for the class. 136 F.Supp.3d 687, 706 (W.D.Pa. 2015).

At the time the parties reached the agreement to settle the instant action, the $11,000,000 settlement payment represented **95%** of the known actual damages of the class. Actual production data is not known for roughly two months after production. By the time the settlement documents were prepared, the $11,000,000 payment represented **86%** of the maximum damages that could be obtained at trial. The flip side is that the class, like any party in litigation, faces the possibility of not recovering anything. This recovery is simply a great result for the class. Certification and Fairness Report § 44.

Under the settlement, XTO will have the right to net-out certain post-production costs in calculating royalties for the Settlement Class. That the settlement is a compromise should not preclude approval of the settlement for several reasons. First, the "cost" of permitting XTO to take such deductions cannot be calculated or estimated with precision and the present value of post-production costs as they extend further and further into the future has increasingly little economic impact today. *Id*. § 45. The further into the future, the more discounted is the present value of those deductions. Second, XTO's claimed ability to change marketing methods or affiliate structures, if established at or before trial, could allow it to pass-on all post-production costs to all class members simply by altering its marketing methods. *Id*. § 46. In that event, any benefits to the Settlement Class from a ban on future deductions would be illusory. Third, the class and XTO share an interest in further development of the resources covered by the Phillips

Standard Leases. To the extent that XTO's future post-production expenses are shared, it has an incentive to develop this area. Id. § 47.

Valued on any economic basis, the settlement is remarkable and provides significant benefits to the class. As the mediator concluded,

> Based on my knowledge of the issues, the extensive efforts of skilled advocacy and arm's-length bargaining of counsel, the intensity of the negotiations, the litigation risks, the uncertainty of certification of a contested litigation class, the uncertainty of the resolution of the legal issues, the litigation expenses, and the substantial benefits obtained for the Settlement Class through the proposed settlement, I believe that the settlement is fair, reasonable, and adequate. I respectfully recommend that the settlement be approved on a preliminary and, ultimately, final basis by this Court.

Judge Cahn's Declaration at ¶ 13. Put simply, the settlement should be approved without question under the *Girsh* analysis. Consideration of the optional *Prudential* factors does not alter the analysis.

(10) [*Optional Prudential Factor 1*] **The maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages**

As described above, the state of Pennsylvania royalty law is relatively undeveloped. The parties, however, have conducted sufficient discovery, including expert witness discovery, that they can assess the risks associated with a trial on the merits. This factor counsels in favor of approving the settlement. Certification and Fairness Report § 53.

(11) [*Optional Prudential Factor 2*] **The existence and probable outcome of claims by other classes and subclasses**

There are no other classes or subclasses, and this factor is irrelevant.

(12) [*Optional Prudential Factor 3*] **The comparison between the results achieved by the settlement for individual class or subclass members and the results achieved — or likely to be achieved — for other claimants**

This factor does not appear to be relevant.

(13) [*Optional Prudential Factor 4*] **Whether class or subclass members are accorded the right to opt out of the settlement**

The class members were afforded the right to opt-out, and a precious few did so. This factor as well supports approval of the settlement.

(14) [*Optional Prudential Factor 5*] **Whether any provisions for attorneys' fees are reasonable**

As set forth in detail in the Brief in Support of Motion for Counsel Fees, Costs and Expenses, the requested attorneys' fees are in or below the normal range for counsel fees.

(15) [*Optional Prudential Factor 6*] **Whether the procedure for processing individual claims under the settlement is fair and reasonable**

All class members have been identified and will receive payment. There are no claims forms that need to be returned in order to obtain payment under the settlement or any coupons that need to be redeemed. This factor weighs in favor of approving the settlement.

Through this settlement, XTO will pay the Settlement Class $11,010,000, nearly all of the damages plaintiffs could recover at trial. In turn, XTO in the future has the ability to net out post-production costs under *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010). The class has overwhelmingly demonstrated its belief that the settlement is a "good deal." Out of roughly 1,142 class members, only 16 opted-out.[3] Only one class member objected, and that objection did not assert that the terms of the settlement were unfair. Given the existing risks, the settlement provides tremendous value, satisfies each of the applicable *Girsh* and *Prudential* factors, and should be approved.

[3] The current class size of 1,135 members resulted from transfers of interests of class members.

**Conclusion**

For the reasons set forth above, the settlement and the settlement class should be approved. Plaintiffs respectfully request that the Court enter the Order attached to the motion.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief in Support of Motion for Final Approval of Settlement of Class Action was served this 28th day of February, 2018, upon all counsel of record through the Court's electronic filing system to:

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