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

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| ROGER A. SALVATORA, SANDRA E. SALVATORA, D&M MARBURGER FAMILY ENTERPRISES, L.P., HEASLEY'S NURSERIES, INC., RODNEY L. LANG, BONITA A. LANG, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED; | ) | **2:19-CV-01097-CRE-NR** |
| Plaintiffs, | ) | |
| vs. | ) | |
| XTO ENERGY INC., | ) | |
| Defendant, | ) | |

Cynthia Reed Eddy, United States Magistrate Judge.

**<u>REPORT AND RECOMMENDATION</u>**

## I. RECOMMENDATION

This civil action was initiated by Plaintiff putative class members Roger A. Salvatora, Sandra E. Salvatora, D&M Marburger Family Enterprises, L.P., Heasley's Nurseries, Inc., Rodney L. Lang, and Bonita A. Lang (collectively "Plaintiffs") against Defendant XTO Energy Inc. ("XTO") for alleged breaches of natural gas royalty leases.

Before the Court for consideration are the following:

1. An Amended Motion to Certify Class pursuant to Federal Rule of Civil Procedure 23 by Plaintiffs (ECF No. 86);

2. A Motion to Exclude Expert Testimony of John McArthur by XTO (ECF No. 91);

3. A Motion to Exclude Expert Testimony of Barry Pulliam by XTO (ECF No. 92);

4. Motions to Strike the Declarations of: Stephen L. Becker (ECF No. 117); Angela Paslay (ECF No. 119); and Kris L. Terry (ECF No. 121) by Plaintiffs; and

5. A Motion to Approve Confidential Designation by Plaintiffs (ECF No. 159).

The motions are fully briefed. (Amended Motion to Certify Class - ECF Nos. 86, 87, 94, 124); (Motion to Exclude Expert Testimony of John McArthur -ECF Nos. 91, 127, 128, 134); (Motion to Exclude Expert Testimony of Barry Pulliam - ECF Nos. 92, 93, 130, 131, 133); (Motions to Strike Declarations - ECF Nos. 117, 118, 119, 120, 121, 122, 126); and Motion to Approve Confidential Designation - ECF Nos. 160, 165, 167). A class certification hearing was held over a two-day period. (ECF Nos. 163, 164). The matters are now ripe for consideration.

For the reasons that follow, it is respectfully recommended that:

1. Plaintiffs' Motion for Class Certification (ECF No. 86) be granted in part pursuant to Rule 23(b)(3) and denied in part as to Rule 23(b)(2);

2. XTO's Motion to Exclude Expert Testimony of John McArthur (ECF No. 91) be granted in part and denied in part;

3. XTO's Motion to Exclude Expert Testimony of Barry Pulliam (ECF No. 92) be denied;

4. Plaintiffs' Motions to Strike (ECF Nos. 117, 119, 121) be denied; and

5. Plaintiff's Motion to Approve Confidential Designation (ECF No. 159) be granted.

## II. REPORT

### A. Background[1]

XTO controls operations under oil and gas leases in Butler County, Pennsylvania and explores for and produces gas and its constituents from gas wells and pays royalties to royalty interest owners for the gas produced. *See,* Third Amended Complaint ("TAC") at ¶¶1,6 (ECF No.

[1] The Court has jurisdiction pursuant to 28 U.S.C. §1332(d).

79, pp. 1-3, ¶¶1, 6). As part of these operations, XTO collects gas from individual wells on leased properties and moves the gas through a network of pipelines to a central location – a process referred to in industry parlance as "gathering." XTO's wholly owned subsidiary, Mountain Gathering, LLC, gathers gas on three gathering segments relevant to this lawsuit: (1) the Jefferson; (2) the Forward; and (3) the AK Steel. *Id*. at ¶60. The gas from every well is commingled in the gathering segment and cannot be traced to any individual well. *Id*. at ¶58. After Mountain Gathering collects the gas from the wells on one of the three gathering segments, it delivers the gas to the PennCryo processing plant. *Id*. at ¶¶61-63.

As further part of these operations, XTO is responsible for calculating and paying royalties due on the production of gas under those oil and gas leases. *Id*. at ¶1. Plaintiffs and the putative class members are leaseholders of oil and gas leases under which XTO pays production royalties. Plaintiffs generally claim that XTO underpaid royalties owed under the leases by deducting excessive gathering and processing charges (Count II) and deducting post-production charges after the gas is in marketable form (Count III). *Id.* Plaintiffs seek to recover their losses and obtain a restraining order to prevent such future conduct. *Id.*

**1. *Phillips Leases: The Marburger Settlement Class and Market Enhancement Leases***

Phillips Exploration, Inc. (a wholly owned subsidiary of XTO), or its predecessors, drafted and prepared standard form oil and gas leases (the "Phillips Leases") that were entered into by the named Plaintiffs (the Salvatoras, D&M Marburger Family Enterprises, L.P., and Heasley's Nurseries, Inc.) and members of the class certified in *Marburger v. XTO Energy, Inc.*, No. 2:15-cv-910-CRE (the "*Marburger* Settlement Class"). (ECF No. 72-1). XTO administers and is responsible for operations under the Phillips Leases. (ECF No. 79, p. 5, at ¶ 5).

The *Marburger* Settlement Class's original leases with Phillips did not explicitly permit

the deduction of post-production expenses in calculating royalties due under those leases, and the royalty interest owners brought a class action challenging XTO's deduction of post-production expenses in how it calculated royalties under the original leases. *Id*. at ¶16. The parties reached a settlement of the class claims, and the Court certified a settlement class. *Id*. Upon settlement, the terms of the Phillips leases were modified to allow XTO to deduct certain post-production costs going forward. *Id*. at ¶¶16, 22. Specifically, the royalty provision was modified in the original Phillips leases as follows:

> XTO . . . shall make future royalty payments under the Settlement Class members' Phillips Standard Leases using the net-back royalty calculation methodology described in *Kilmer v. Elexco Land Services, Inc*., 990 A.2d 1147 (Pa. 2010).[2] Specifically, to the extent that post-production costs, including: (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise); (ii) all costs from and after the wellhead to the point of sale, including, without limitation, all gathering, dehydrating, compression, treatment, processing, marketing, and transportation costs incurred in connection with the sale of such production, are attributable to Settlement Class members' Phillips Standard Leases, the Settlement Class members will bear their proportionate share of such post-production costs. . . .

(ECF No. 72-1, p. 7, ¶30). According to Plaintiffs, under this provision, XTO essentially calculates royalty payments based upon the wellhead price under the leases. (ECF No. 79, p. 7, ¶23). Since the *Marburger* settlement, XTO has paid royalties to the *Marburger* Settlement Class under the modified Phillips leases.

The Lang Plaintiffs also entered into a gas lease with Phillips but were not members of the *Marburger* class or settlement because their Phillips gas lease expressly permitted XTO to deduct certain post-production expenses. Specifically, the Lang Gas Lease included a "Market Enhancement Clause" that provided:

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[2] Under the net-back method, royalties are calculated as "one-eighth of the sales price of the gas minus one-eighth of the post-production costs of bringing the gas to the market." *Kilmer*, 990 A.2d at 1149.

> MARKET ENHANCEMENT: Notwithstanding anything to the contrary contained herein, it is agreed between the Lessor and Lessee that all oil and gas royalties accruing to the Lessor under this lease shall be net of Lessor's proportionate share of the cost of gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marking the oil, gas or other products produced hereunder to transform the product into marketable form.

*Id*. at ¶48. Plaintiffs claim that all Phillips Leases after approximately 2010 contained this or a substantially similar "Market Enhancement" provision. *Id*. at ¶49. Likewise, Plaintiffs claim that XTO produced and sold gas under the Market Enhancement Leases, the gas was gathered by Mountain Gathering on the Jefferson, Forward, and/or AK Steel gathering segments, and XTO paid royalties to the Market Enhancement Lease leaseholders. *Id*. at ¶¶50-51.

Under both sets of Phillips leases – the *Marburger* Settlement Class and the Market Enhancement Leases – XTO was permitted to deduct certain post-production costs in calculating royalties due. *Id*. at ¶57. However, Plaintiffs allege that XTO breached these leases by deducted excessive post-production costs under the *Marburger* Settlement Class Leases and the Market Enhancement Leases (Count II), and by deducting post-production costs under the Market Enhancement Leases after the product was in marketable form (Count III).

**2. *Deduction of Excessive Post-Production Costs from Royalties – Count II*[3]**

Mountain Gathering is a wholly owned subsidiary of XTO. *Id*. at ¶ 60. Mountain Gathering provides gathering and processing services for oil and gas, including gathering on Jefferson, Forward, and AK Steel gathering segments and charges for these services. *Id*. at ¶61. XTO and Mountain Gathering entered into a Gas Gathering Agreement on January 1, 2013, to provide gathering and processing services in connection with Plaintiffs' leases, and these post-production costs were deducted from Plaintiffs' royalties. *Id*. at ¶62. Plaintiffs claim that the price

[3] Count I was voluntarily dismissed by the Plaintiffs. *See* ECF No. 79, p. 24, ¶¶83-90).

XTO paid to Mountain Gathering for their services were not the result of an arms-length transaction, did not represent reasonable, competitive prices, were excessive, and substantially above prices that would have been determined as a result of arms-length negotiations. *Id*. Plaintiffs therefore argue under Count II that XTO breached their leases because it had a duty to perform the leases in good faith, and because it deducted unreasonable, excessive post-production costs in calculating royalties, it underpaid royalties to the Plaintiffs and shifted a portion of the post-production costs from XTO to Plaintiffs. *Id.* at ¶¶66-65.

To that end, Plaintiffs seek to certify the following class under Count II pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(b)(2) for the deduction of excessive gathering and processing charges:

> Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with Phillips Exploration, Inc., Phillips Production Company, PC, Exploration, Inc., TWP Inc., or Phillips Resources Inc. or any entity affiliated with any of them ("Phillips") covering oil and gas interests at any time during the period of limitations
>
> (a) who received one or more royalty payments from XTO;
>
> (b) whose oil and gas lease covered gas that was or is gathered on the Jefferson, Forward or AK Steel gathering segments of the Mountain Gathering system in Butler County, Pennsylvania; and
>
> (c) who was either
>
> (i) a member of the settlement class in *Marburger v. XTO Energy Inc.*, Civil Action No. 2:15-cv-910-CRE (W.D.Pa.) ("*Marburger* Settlement Class"), or
>
> (ii) whose oil and gas lease based the royalty on a percentage of proceeds and contained a Market Enhancement Clause as defined in Paragraph 79 of the Third Amended Complaint.
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> The Class for Count II excludes:
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> (i) any claims for any member of the settlement class in

*Marburger v. XTO Energy Inc.,* Civil Action No. 2:15-cv-910-CRE (W.D.Pa.), for times before the effective date of the *Marburger* Final Order;

(ii) the United States;

(iii) the Commonwealth of Pennsylvania; and

(iv) all individuals and entities who possessed a royalty ownership interest in an oil and gas lease with Phillips where the royalty provision provided:

> To pay Lessor as a royalty, for the native gas, casing head gas, condensate, hydrocarbons or other gaseous substance, produced from said land and sold or used beyond the well or for the extraction of gasoline or other product, an amount equal to [a percentage] of the gross amount realized by Lessee computed at the wellhead from the sale of such substances from each and every well. Lessor's royalty will never bear any part of the costs or expenses of production, gathering, compression or transportation of the oil or gas produced from the lease premises; SAVE AND EXCEPT that, Lessor's royalty shall bear its proportionate share of all ad valorem taxes and production, severance, and other excise taxes and the actual, reasonable costs paid to or deducted by a non-affiliated third party to gather, transport, compress, process, stabilize or treat the production off the lease Premises or lands pooled therewith in order to market the production saleable, increase its value, or get the production to a market. (referred to as an "ABC Lease").

*Id*. at ¶78.

### 3. *Deduction of Post-Production Costs under Market Enhancement Leases after Product was Marketable – Count III*

In Count III, Plaintiffs claim that under the Market Enhancement Leases, XTO was required to pay royalties without deducting any transportation or other costs after the tailgate of the processing plant. *Id*. at p. 18, ¶70. Plaintiffs allege that XTO breached the Market Enhancement Leases when it deducted transportation and/or other costs incurred after the tailgate

of the processing plant in calculating royalties. *Id.*, ¶71. To that end, Plaintiffs seek to certify the following class under Count III pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(b)(2) for the deduction of transportation and other costs incurred after the product was marketable:

> Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with Phillips covering oil and gas interests at any time during the period of limitations
>
> (a) who received one or more royalty payments from XTO;
>
> (b) whose oil and gas lease covered gas that was or is gathered by the Jefferson, Forward or AK Steel gathering segments of the Mountain Gathering system in Butler County, Pennsylvania, and
>
> (c) whose oil and gas lease based the royalty on a percentage of proceeds and contained a Market Enhancement Clause or an essentially identical provision. A "Market Enhancement Clause" means an oil and gas lease provision that:
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> (i) states "Notwithstanding anything to the contrary contained herein, it is agreed between the Lessor and Lessee that all oil and gas royalties accruing to the Lessor under this lease shall be net of Lessor's proportionate share of the cost of gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marketing the oil, gas or other products produced hereunder to transform the product into marketable form." or that
>
> (ii) uses substantially identical language and includes the words "marketable form."
>
> The Market Enhancement Class excludes:
>
> (i) the United States;
>
> (ii) the Commonwealth of Pennsylvania; and
>
> (iii) all individuals and entities who possessed a royalty ownership interest in an ABC Lease.

*Id*. at ¶79.

In other words, the class for Count II contains the those meeting the criteria from the *Marburger* Settlement Class and those with Market Enhancement Leases. The class for Count III contains only those who have Market Enhancement Leases.

**B. Discussion**

***1. Daubert Motions***

In Support of their Amended Motion for Class Certification, Plaintiffs rely on the expert testimony of John McArthur and Barry Pulliam. XTO filed *Daubert* motions challenging the testimony of both experts. (ECF Nos. 91 and 92). "Courts are [] frequently called upon to consider expert opinion offered to support or oppose class certification." *City of Sterling Heights Gen. Employees' Ret. Sys. v. Prudential Fin.*, Inc., Civ. Action No. 12-5275, 2015 WL 5097883, at *3 (D.N.J. Aug. 31, 2015)(citing, *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 323 (3d Cir. 2008). "Where an expert opinion is critical to class certification and a party challenges the reliability of that opinion, the reviewing court must engage in a two-step analysis before analyzing whether Rule 23's requirements have been met: (1) whether the party's challenges bear upon those aspects of [the] expert testimony offered to satisfy Rule 23 and (2) if so, whether the opinion is admissible as to those aspects under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)." *Id.* (internal quotation marks omitted); *In re Blood Reagents Antitrust Litig.,* 783 F.3d 183, 188 (3d Cir. 2015). There is no doubt XTO's challenges to Mr. McArthur and Mr. Pulliam testimony bear on the class certification analysis under Rule 23. Therefore, the undersigned considers the admissibility of the expert testimony of Mr. McArthur and Mr. Pulliam pursuant to Rule 702 and the principles under *Daubert.*

Federal Rule of Evidence 702 governs the admissibility of expert testimony.

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education my testify in the form of an opinion or otherwise if: (a) the expert's

> scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

F.R.E. 702. These requirements are often referred to as "qualification, reliability, and fit." *See, e.g., In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 156 (3d Cir. 1999). Under the rule announced in *Daubert* and expanded in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), district courts must perform this "basic gatekeeping obligation." *Kumho*, 526 U.S. at 149; *see also Daubert*, 509 U.S. at 590-91. "As gatekeeper, a trial judge has three duties: (1) confirm the witness is a qualified expert; (2) check [to ensure] the proposed testimony is reliable and relates to matters requiring scientific, technical, or specialized knowledge; and (3) ensure the expert's testimony is 'sufficiently tied to the facts of the case,' so that it fits the dispute and will assist the trier of fact." *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832 (3d Cir. 2020) (quoting *Daubert*, 509 U.S. at 591). As set forth above, these standards hold true for admission of expert testimony in the context of class certification as well. *In re Blood Reagents,* 783 F.3d at 187.

As to the first requirement, qualifications, the Court of Appeals for the Third Circuit has "eschewed imposing overly rigorous requirements of expertise and [has] been satisfied with more general qualifications." *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 741 (3d Cir. 1994). "Rule 702's liberal policy of admissibility extends to the substantive as well as the formal qualification of experts." *Id.* "That is, he or she must have some relevant 'skill or knowledge greater than the average layman.' This can be based in 'practical experience as well as academic training and credentials.'" *Stiffler v. Apple Inc.,* No. 21-CV-523, 2023 WL 1996692, at *2 (W.D. Pa. Feb. 13, 2023)(quoting *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000)). Furthermore, "it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed

expert to be the best qualified or because the proposed expert does not have the specialization the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996) (citation omitted). Thus, an expert can be qualify based on a broad range of knowledge, skills, training, and experience.

The second requirement of reliability focuses on methodology. *In re Paoli,* 35 F.3d at 742. There are numerous factors a court may use to assess reliability such as whether: 1) the theory or technique can be tested; 2) the theory to technique has been peer reviewed; 3) there is a high rate of know or potential error; 4) there are standards or controls; 5) the theory is "generally accepted"; 6) there is a sufficient relationship between the technique and methods which have been established to be reliable; 7) the expert's qualifications are sufficient, and 8) the method has been put to non-judicial uses. *Whyte v. Stanley Black & Decker, Inc.*, 514 F.Supp.3d 684, 694 (W.D. Pa. 2021)(citation omitted). Not each factor is relevant and, as such, the flexible reliability test depends on the nature of the issue, the particular expertise, and the subject matter. *Kumho,* 526 U.S. at 141, 150.

This factor concentrates "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. 595. To that end, "[t]he evidentiary requirement of reliability is lower than the merits standard of correctness." *In re Paoli,* 35 F.3d at 744.

> In the end, the "strong preference for admitting any evidence that may assist the trier of fact" guides the Court's analysis. Typically, "an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable." That's because "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Ultimately, "[t]he test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research. Instead, the Court looks to whether the expert's testimony is supported by good grounds. The standard for reliability is not that high. It is lower than the merits standard of correctness."

*Stiffler,* 2023 WL 1996692, at *3 (citations omitted). Good grounds may exist "even if the judge thinks that there are better grounds for some alternative conclusions, and even if the Judge thinks that a scientist's methodology has some flaws such that if they had been corrected, the scientist would have reached a different result." *In re Paoli,* 35 F.3d at 744. "In short, trial courts should determine whether the expert's conclusion is based on valid reasoning and reliable methodology." *Cuffari v. S-B Power Tool Co.,* 80 F.App'x 749, 751 (3d Cir. 2003).

The last requires that the expert's testimony "fit" the facts of the case. F.R.E. 702. "Fit" requires that the proffered expert testimony must assist by providing relevant information necessary to a reasoned decision of the case. *In re Paoli*, 35 F.3d at 742-43.

With these standards in mind, the undersigned now turns to the *Daubert* motions at issue. (ECF No. 91 and 92).

a. Motion to Exclude John McArthur (ECF No. 91)

The crux of XTO's argument related to Mr. McArthur's testimony is that his expert report offers legal conclusions, which is improper and must be stricken in its entirety. (ECF No. 91). XTO is correct that an expert is prohibited from testifying "as to the governing law of the case[,]" *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir.2006), because it is the duty of the court to determine how the law applies. *Id.*; *see also, U.S. v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991). Therefore, where an expert offers a legal opinion, the court must "exclude opinions phrased in terms of inadequately explored legal criteria." F.R.E. 704, advisory committee's note to 1972 proposed rules. An expert may testify, however, as to background, customs, practices, and experience within an industry. *Berckeley,* 455 F.3d at 217-219.

Reading Mr. McArthur's expert report in its entirety and viewing his testimony at the

hearing, it does include references that offer his own legal opinions.[4] *See,* ECF No. 116-1; No. 163, pp. 87-120. However, his expert report and testimony also includes his opinions as to, *inter alia,* industry practices in the oil and gas industry, including how XTO performs under the leases with respect to the commingling of gas, the use of form leases, and how XTO computes a per-unit cost on gathering and processing changes.[5] (ECF No. 116-1 at ¶¶9, 48, 50; No. 163, pp. 93-119). Accordingly, the undersigned finds that to the extent Mr. McArthur's expert opinion attempts to offer legal opinions, his report/testimony will be disregarded in making this Report and Recommendation. However, to the extent that he offers opinions about the oil and gas industry and the practices therein, those opinions are properly considered by the Court.

Therefore, it is respectfully recommended that XTO's *Daubert* motion with respect to Mr. McArthur's testimony/expert report (ECF No. 91) be granted in part and denied in part as set forth above. It is further recommended that the motion be denied without prejudice to reassert, if necessary, at trial.

b. Motion to Exclude Barry Pulliam (ECF No. 92)

XTO also contends that this Court should exclude the testimony of Mr. Pulliam pursuant to *Daubert*. (ECF No. 93). Specifically, XTO challenges Mr. Pulliam's qualifications and the reliability of his opinions. *Id.* As to Mr. Pulliam's qualifications, XTO argues that he is not qualified to offer the opinions he offered on "systems used by oil and gas companies to tie oil and gas leases to royalty owners." *Id*. at 1, 2. The undersigned disagrees. Mr. Pulliam is an

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[4] For example, Mr. McArthur includes his opinion that the class members are ascertainable, typical and adequate, that common issues predominate and class treatment is a superior means to adjudicate the dispute (ECF No. 116-1 at 4-9), all of which require a legal opinion.

[5] At the class certification hearing, Mr. McArthur testified that all of the leases permit deductions, and the question of whether those deductions have to be reasonable is a question of law and fact. (ECF No. 163, p. 96).

"economist." He has 35 years of professional experience in the gas and oil industry. (ECF No. 163, pp. 12-15; No. 129-1, pp. 1-3). In addition, he has testified in other matters regarding "class certification involving natural gas royalties" and damages. (ECF No. 163, p. 13; No. 129-1, p. 2). In so doing, he has worked with crude oil and natural gas producers, refiners, pipeliners, gatherers, chemical manufacturers, regulated utilities, and processers, as well as several federal agencies. (ECF No. 129-1, p. 2; No. 163, p. 13). He has served a co-settlement administrator in class action settlements involving oil royalties and has testified in legislative hearing regarding natural gas and natural gas markets in the United States. (ECF No. 129-1, p. 3). Additionally, he has co-authored "two reports prepared for and published by the Alaska Department of Natural Resources on natural gas production and markets in the U.S. and leasing practices on public lands. As part of that work, [he] reviewed and analyzed royalty provisions on the leases issued by the major oil and gas producing states and the U.S. government." (ECF No. 129-1, p. 3). Under the liberal standard set forth above regarding qualifications, the undersigned finds Mr. Pulliam is qualified as an expert in this case.

XTO next argues that Mr. Pulliam's opinions on class certification are speculative and unreliable in that he did not provide the Court with adequate facts upon which his opinions on class certification could be reliably tested. (ECF No. 93, p. 1). To that end, XTO argues that Mr. Pulliam opinions are unreliable because has not performed individualized lease reviews and relied upon the *Marburger* Settlement Class lease list, that he has no basis for his opinion that post-production charges are unreasonable, and he admits is not an expert on when gas becomes a marketable product. *Id.* at pp. 3-5. After consideration, the undersigned is unpersuaded by this argument.

As to his lease review, Mr. Pulliam testified as to the process he used to identify class lists.

*See*, ECF No. 129-1, pp. 4-7; No. 129-2, No. 116-2, pp. 9-15; No. 72-3, pp. 11-14; No. 163, pp. 32-38). For example, he testified that he reviewed all of the leases that XTO produced in this case to identify what leases had Market Enhancement Clauses. *Id.* (ECF No. 129-2 at p. 5-6; No. 123-1, pp. 3-5; No. 163, p. 36). He further explained why an individual lease review is not necessary for the members of the *Marburger* Settlement Class (because the settlement order modified the language of all royalty provisions in those leases to be identical and Paragraph 30 of the *Marburger* Final Order modified the standard royalty provision in each *Marburger* class member's lease) and how he arrived at his Count II class list. *Id.* Mr. Pulliam further testified about how to identify transfer of royalty interests during the relevant period, either through a computer query of XTO's maintained databases or manually. (ECF No. 129-1, ¶16; No. 163, pp. 33-37).

XTO's contention that doing this manually could require "painstaking" steps (ECF No. 133, p. 2) does not destroy the reliability of Mr. Pulliam's opinion. *See, Kelly v. RealPage Inc.,* 47 F.4th 202, 223 (3d Cir. 2022)(a defendant's lack of record keeping is not a valid argument to an otherwise objectively verifiable class). Based upon review, the Court finds Mr. Pulliam has undertaken a lease review and provided good grounds for his procedure in doing so. *Id.* This is a procedure that can be tested. As such, XTO's arguments that Mr. Pulliam's list review has errors, has some flaws, or should be performed in a different manner are irrelevant. (ECF No. 133, pp. 1-3); *See, In re Paoli,* 35 F.3d at 744 (method need not be perfect or unassailable as it can be cross-examined). Simply put, to the extent XTO believes there is a more appropriate method to perform lease reviews or that their experts' testimony is more believable that is a matter that goes to weight and not admissibility.

Next, XTO argues that Mr. Pulliam's opinion, that the "reasonableness of post-production charges" can be determined on a class-wide basis, is unreliable because he has no basis for this

opinion and it is not supported by any work. (ECF No. 93, pp. 4-5). After a review, the undersigned disagrees. Mr. Pulliam testified as to the basis and the methods that can be used for determining the reasonableness of charges including, *inter alia,* a comparison of the gathering and processing system Mountain Gathering operates and the alternatives available to XTO. (ECF No. 129-1, ¶¶ 22-28; No. 116-2, ¶58-60; No. 123-1, ¶¶31-37; No. 163, pp. 38-41). He specifically discussed the gathering and the processing services for the gas at issue, the charges associated therewith including gathering charges on a "postage stamp" rate basis, and how he determined reasonableness. *Id.* He found the charges to be the same for all class members' gas and testified that it was standard practice in the natural gas industry to charge in this manner. *Id.* The Court finds Mr. Pulliam has provided good grounds for determining the reasonableness of such charges. *Id.* His basis can be tested and cross-examined. Moreover, to the extent that XTO believes there is a more appropriate method to determine the reliability of post-production charges, again, that is a matter that goes to weight and not admissibility.

XTO's final reliability argument is a bit convoluted. (ECF No. 93, p. 5). XTO challenges Mr. Pulliam's opinion that common issues exist because Mr. Pulliam is not an expert on when gas is a marketable product. *Id.* XTO suggests that because Mr. Pulliam is not expert on marketable form, he assumed that the gas was in marketable form at one location – the tailgate of the PennCryo plant. *Id.* XTO submits that there is no evidence to support this assumption. *Id.* Rather, XTO suggests that a well-by-well analysis is necessary to determine the same. *Id.*

Mr. Pulliam admits that he is not an expert on when the gas becomes marketable vis-à-vis its quality on a well-by-well basis and, contrary to XTO's assertion otherwise, he does not offer an opinion on the same. *See,* ECF No. 123-1, pp, 8-9, ¶¶26-30; No. 129-1, p. 9, ¶30. Regardless, the Court finds that it is not necessary for him to provide such an opinion under Plaintiffs' legal

theory. *See, Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 795 (10th Cir. 2019)(predicting Oklahoma state law holding the quality of gas on a well-by-well basis did not matter for purposes of marketability and the determination that a gas became marketable could be made solely upon expert testimony that "all the gas . . . was required to undergo at least one [post-production] service before it could 'reach' and be 'sold into' the pipeline market."). As Mr. Pulliam explained, Plaintiffs' claim that XTO sells no gas at the wellhead and first sells the gas at the tailgate of the processing plant, all of the relevant gas had to undergo some processing to be placed into the pipeline. Therefore, Mr. Pulliam testified when the gas becomes marketable can be determined on a class-wide basis. (ECF No. 123-1, p. 9, ¶¶29-30).

Furthermore, the fact that Mr. Pulliam relied on an assumption that gas is marketable at the tailgate does not by itself make Mr. Pulliam's opinion unreliable. While Mr. Pulliam's opinions rely on an assumption as to when gas in is "marketable form," that assumption is based on procedures that can be tested such that is it not speculative. *In re Paoli*, 35 F.3d at 742. As set forth above, "good grounds" for an opinion can exist even if there are better or alternative conclusions. *Id.* Thus, while XTO may argue that gas may be in "marketable form" at an earlier stage then the tailgate of the processing plant, such an argument does not create a valid challenge to the reliability of Mr. Pulliam's opinions based on that assumption. As a result, the Court finds Mr. Pulliam is not precluded from testifying because he is not an expert as to when gas is a "marketable" product.

Consequently, the undersigned finds that Mr. Pulliam's testimony is based on "good grounds" and is sufficiently reliable to satisfy the standards set forth in Rule 702. As such, his testimony is admissible. Therefore, it is respectfully recommended that XTO's *Daubert* motion as to Mr. Pulliam's testimony (ECF No. 92) be denied.

Accordingly, the undersigned will consider the expert opinions of Mr. McArthur and Mr. Pulliam in deciding Plaintiff's Amended Motion for Class Certification.

### 2. *Plaintiffs' Motions to Strike (ECF Nos. 117, 119 and 121)*

Plaintiffs filed Motions to Strike portions of the expert declarations of: Stephen L. Becker (ECF No. 117); Angela L. Paslay (ECF No. 119); and Kris L. Terry (ECF No. 121). The crux of Plaintiffs' argument for striking the portions of XTO's expert declarations is that XTO's experts set forth opinions, bases and facts therein that were not previously disclosed in their expert or sur-expert reports as required by Rule 26(a)(2)(B) and this Court's case management order. (ECF Nos. 118, 120, and 122). Therefore, Plaintiffs submit that certain portions of the subject declarations violate Federal Rules of Civil Procedure 26 and 37. *Id.* In its omnibus response, XTO submits that the opinions set forth in the declarations are based on prior expert testimony, including those opinions contained in their expert reports/sur-reports, that experts are not required to testify verbatim with the opinions set forth in their reports, they have not violated Rule 26, and there is no justification for imposing the "extreme" sanction under Rule 37 of striking portions of their declarations. (ECF No. 126).

An expert report must contain a "complete statement of all opinions to be expressed," and an expert may not provide opinions that exceed the scope of his or her report. *See,* F.R.C.P. 26(a)(2)(B)(i). Experts, however, are not limited to providing verbatim testimony of their expert report and may provide opinions "consistent with the report" and that are "a reasonable synthesis and/or elaboration of the opinions contained in the expert's report." *Diawara v. U.S.*, Civ. Action No. 18-3520, 2020 WL 6262983, at *6 (E.D. Pa. Oct. 23, 2020) (quoting *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp.2d 568, 581 (D. Del. 2008)). Expert testimony is proper where it is a "logical and reasonable inference from the language contained in the []

report." *U. S. v. Barrett*, 117 F.App'x 216, 219 (3d Cir. 2004).

After a careful comparison of the subject declarations with the expert reports, the undersigned finds that the paragraphs Plaintiffs seek to strike from the declarations appear to be reasonable elaborations comporting with the opinions contained in the experts' reports,[6] and do not appear to be examples of opinions that exceed the scope of their reports warranting the sanction of striking. Specifically, with regard to Dr. Becker, Plaintiffs seek to strike paragraphs 24-27, 29, 31, 39-40, and the graphics set forth at paragraphs 33-34 of Dr. Becker's Declaration. (ECF No. 118). Upon review, the undersigned finds these opinions appear to be reasonable extensions comporting with the opinions given in his expert reports regarding the necessity of fact-specific analyses as to each well and commercial agreement. *Compare* Becker Declaration of April 27, 2022 (ECF No. 116-7, ¶¶24-27, 29, 39-40, and 33-34) *with* Becker Expert Report of Oct. 26, 2021 (ECF No. 116-3, ¶¶22, 65, 69-84) *and with* Becker Sur-Reply Expert Report of Nov. 24, 2021 (ECF No. 116-6).

With regard to Ms. Paslay, Plaintiffs seek to strike paragraphs 19, 25, 27, 29-33, as well as the specific data and demonstrative charts set forth at paragraphs 19 and 25, of Ms. Paslay's declaration. (ECF No. 120). Upon review, the undersigned finds these opinions appear to be reasonable extensions comporting with the opinions given in her expert reports regarding the royalty check detail used to identify class members, or to determine particular royalty deductions

[6] The Court notes the procedural timeline in this case: Plaintiffs submitted their expert reports on September 10, 2021. The Second Amended Complaint was filed September 13, 2021. (ECF No. 56). The XTO submitted initial expert reports on October 26, 2021. Plaintiffs submitted their reply expert reports on November 10, 2021. XTO submitted its sur-reply expert reports on November 24, 2021. The Third Amended Complaint, which voluntarily eliminated Count I, was filed on January 28, 2022. (ECF No. 79). Plaintiffs filed their Amened Motion for Class Certification on March 23, 2022. (ECF No. 86). The declarations at issue are dated April 27, 2022. (ECF Nos. 116-7, 116-10, and 116-13).

or payments. *Compare* Paslay Declaration of April 27, 2022 (ECF No. 116-10, ¶¶19, 25, 27, 29-33, as well as the specific data and demonstrative charts set forth at paragraphs 19 and 25) *with* Paslay Expert Report of Oct. 26, 2021 (ECF No. 116-8, ¶¶ 33-34, 40, 56-60, 63-66, and footnote 27) *and with* Paslay Sur-Reply Expert Report Nov. 24, 2021 (ECF No. 116-9).

With regard to Ms. Terry, Plaintiffs seek to strike Attachment "B" (labeled as Ex. 10 to XTO's Response to Plaintiffs' Amended Motion for Class Certification) and paragraphs 27, 33, 35, 37[7]-42, 65, 72, and Opinion No. 3 at page 16, of Ms. Terry's Declaration. (ECF No. 122). Upon review, the undersigned finds these opinions appear to be reasonable extensions comporting with the opinions given in Ms. Terry's expert reports regarding the need for individual lease review to determine XTO's obligations under the lease, the reasonableness of deductions class-wide, and for a complete lease review of those in the *Marburger* Settlement Class. *Compare* Terry Declarations of April 27, 2022 (ECF No. 116-13, ¶¶27, 33, 35, 40-42, 65, 72, Opinion No. 3 at page 16) and (ECF No. 104-4, pp. 34-39) *with* Terry Expert Report Oct. 26, 2021 (ECF No. 116-11, ¶12, page 8 Opinion 1, ¶21, page 11 Opinion 1, ¶¶22-43, page 20 Opinion 3, ¶¶61-69, Attachment C) *and with* Terry Sur-Reply Expert Report Nov. 23, 2021 (ECF No. 116-12).

Finally, the undersigned finds that Plaintiffs have not met their burden of showing

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[7] The undersigned first notes that paragraph 37 of Ms. Terry's declaration is not addressed by Plaintiffs in their Brief. *See* ECF No. 122. As such, the undersigned makes no ruling regarding paragraph 37.

Second, under section "c." of their brief, Plaintiffs appear to make an argument regarding "Paragraphs 38 and 39," but then go on to quote apparently from "Paragraph 39" and "Paragraph 40." *Id.* at p. 6. At first glance, one might think this is a typographical error. The substance of paragraphs 39 and 40 as quoted by Plaintiffs in their brief, however, are not contained anywhere in Ms. Terry's declarations. *Compare,* (ECF No. 122, p. 6) *with* (ECF No. 116-13). As such, the undersigned makes no ruling regarding section "c." of Plaintiffs' brief.

Third, the undersigned notes under section "d." of their brief, Plaintiffs correctly quote paragraph 40 of Ms. Terry's declaration. Thus, the ruling above does pertain to paragraph 40 as set forth in section "d." of Plaintiff's brief.

exclusion of expert testimony is justified. "[E]xclusion of critical evidence is an "extreme" sanction, and thus, a district court's discretion is not unlimited." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 297 (3d Cir. 2012) (outlining factors the court must consider before excluding evidence); *U.S. Fire Ins. Co. v. Omnova Sols., Inc.,* Civ. Action No. 10-1085, 2012 WL 5288783, at *2 (W.D. Pa. Oct. 23, 2012)(citing *Jackson v. City of Pgh.,* Civ. Action No. 7-111, 2011 WL 3443951, at *13 (W.D. Pa. August 8, 2011). Thus, the undersigned finds that, even if Plaintiffs could demonstrate that the testimony provided in the declarations exceeded the scope of the reports, Plaintiffs' Motions to Strike (ECF Nos. 117, 119, and 121) should still be denied because Plaintiffs provide no analysis as to the factors necessary for exclusion thereby failing to meet their burden of showing that exclusion is justified.

Therefore, it is respectfully recommended that Plaintiffs' Motions to Strike (ECF Nos. 117, 119, and 121) be denied.

**3. *Federal Rule of Civil Procedure 23***

A movant seeking class certification pursuant to Federal Rule of Civil Procedure 23 must demonstrate by a preponderance of the evidence the following factors: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); and (4) the named plaintiffs must fairly and adequately protect the interests of the class (adequacy). F.R.C.P. 23(a); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 190 (3d Cir. 2020) (citations omitted). Where, as here, a movant seeks certification pursuant to Federal Rule of Civil Procedure 23(b)(3),[8] the movant

[8] In addition to Rule 23(b)(3), Plaintiffs are also proceeding under Rule 23(b)(2). (ECF No. 79, p. 18 ¶76 and p. 25, ¶82). To that end, they are seeking a declaration "that XTO breached the oil and gas leases and enjoining XTO from deducting transportation and other costs when

must also show that (i) common questions of law or fact predominate over individual claims (predominance) and (ii) that the class action is the superior method for adjudication (superiority). F.R.C.P. 23(b)(3); *Kelly.*, 47 F.4th at 215; *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d at 190. In addition to the factors promulgated by the Federal Rules of Civil Procedure, the Court of Appeals for the Third Circuit has identified an additional element to the class certification process: ascertainability. *Kelly*, 47 F.4th at 222-225. This requires that the class can be adequately identified through objective proof. *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (citations omitted). Each factor will be addressed in turn.

a. Numerosity

Under Rule 23, numerosity is satisfied when "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requirement does not mean that joinder is impossible, but "refers rather to the difficulties of achieving joinder." *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016). While there is no minimum number of plaintiffs that makes joinder impracticable,

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calculating royalties for Mr. & Mrs. Lang and the Count III class members." (ECF No. 79, p. 27). In addition to satisfying Rule 23(a), certification under Rule 23(b)(2) requires that: 1) the defendant acted in the same manner toward each class member, and 2) a single declaratory judgment would provide relief to the class as a whole. F.R.C.P. 23(b)(2). *See also, Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). In opposition, XTO argues that Rule 23(b)(2) may not be used when each class member is requesting an individualized award of monetary damages such as is requested here. (ECF No. 94, pp. 9-10). Plaintiffs concede in reply that they cannot recover damages under a Rule 23(b)(2) but submit "they can obtain injunctive and declaratory relief that will prevent XTO from continuing to reduce improperly the royalties due the classes in the future." (ECF No. 124, p. 8 n.7). Under the plain language of Rule 23, plaintiffs may attempt to proceed under both Rule 23(b)(2) and 23(b)(3), as one is not exclusive over the other. *See,* F.R. C.P. 23; *see also, Byrd,* 784 F.3d. 163, n. 7; *Slamon v. Carrizo (Marcellus) LLC*, No. 3:16-CV-2187, 2020 WL 2525961, at *25 (M.D. Pa. May 18, 2020). Other than one conclusory statement, however, Plaintiffs here have failed to provide any analysis or discussion as to how they specifically meet the requirements of Rule 23(b)(2). *See,* ECF No. 87, p. 20. The undersigned finds this wholly inadequate and, consequently, declines to consider class certification under Rule 23(b)(2). Therefore, it is respectfully recommended that Plaintiffs' Motion for Class Certification pursuant to Rule 23(b)(2) be denied.

"if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001).

Plaintiffs have provided sufficient evidence to meet the numerosity requirement. Initially, Plaintiffs have identified at least 484 class members.[9] (ECF No. 87, pp. 8-9 n. 6; No. 123-1, pp. 3-5, ¶¶5-16). At the hearing, Mr. Pulliam testified that, while he has not finished identifying the entirety of the class members, so far, he has identified approximately 250 *Marburger* Settlement Class members and approximately 297 Market Enhancement Leases. (ECF No. 163, pp. 36-38).[10] Thus, Plaintiffs contend numerosity has been met. *Id.* XTO does not contest numerosity. *See,* ECF No. 94. The undersigned finds Plaintiffs have shown that the potential class members for both Counts II and III would exceed over 40 plaintiffs. Therefore, it is respectfully recommended that numerosity has been established.

b. <u>Commonality and Predominance</u>

The commonality element for class certification requires that there are common issues of fact or law capable of class-wide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, (2011). In other words, the claims must be based on a common contention that 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 one of the claims in one stroke." *Id.* at 350.

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[9]Plaintiffs arrived at this number as follows: "The *Marburger* class contained 1,135 class members. However, most of those class members did not incur gathering fees or processing fees and suffered no injury. Such person are not included in Count II. There are 236 *Marburger* class members who are included in Count II and 257 class members who have ownership interest in Market Enhancement Leases, which total 493 class members for Count II. Eliminating any overlap between the *Marburger* class members and the Market Enhancement Leaseholders results in a total of 484 class members in Count II." (ECF No. 87, pp. 8-9 n. 6; No. 123-1, pp. 3-5, ¶¶15-16).

[10] Similarly, Mr. McArthur testified at the hearing that there were "a little over 500." (ECF No. 163, p. 101).

Where a moving party seeks certification under Rule 23(b)(3), it is appropriate to consider the predominance element along with the commonality element. *See Walney v. SWEPI LP*, Civ. Action No. 13-102, 2019 WL 1436938, at *4 (W.D. Pa. Mar. 31, 2019) ("The 'predominance' requirement of Rule 23(b)(3) incorporates the Rule's 'commonality' requirement but is 'far more demanding.'"). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (citation omitted). "Rule 23 does not require the absence of all variations in a defendant's conduct or the elimination of all individual circumstances. Rather, predominance is satisfied if common issues predominate." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 489 (3d Cir. 2015) (citing *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002)). "[P]redominance addresses 'whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence.'" *Kelly,* 47 F.4th at 222, n. 17. Predominance is met where a putative class can prove "the essential elements of the claims" through "evidence that is common to the class rather than individual to its members." *Gonzalez v. Corning*, 885 F.3d 186, 195 (3d Cir. 2018) (citations and quotation marks omitted); *Kelly,* 47 F.4th at 215. Thus, the district court looks to the elements of the plaintiffs' claims and then undertakes a 'rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove' those elements." *Id.* (quoting *In re Hydrogen Peroxide,* 552 F.3d at 312); *Walney*, 2019 WL 1436938, at *5.

Essentially, Plaintiffs claim XTO breached the royalty provisions of the Phillips Leases when it deducted excessive post-production costs (Count II) and when it deducted post-production costs after the gas was in "marketable form" (Count III). Under Pennsylvania law, to prove a breach of contract, a plaintiff must demonstrate the existence of a contract, a breach of the contract,

and damages. *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016). Based on the foregoing, this Court will now consider each count separately.

i. *Count II*

In Count II, Plaintiffs aver that "XTO breached the oil and gas leases of the plaintiffs and the Count II class members when it deducted unreasonably high costs from the royalties due plaintiffs and the class members." (ECF No. 79, p. 25, ¶95). In support of the same, Plaintiffs allege that "XTO paid its subsidiary Mountain Gathering unreasonable, above-market amounts for gathering services and processing services provided by Mountain Gathering for gas gathered on Mountain Gathering's Jefferson[,] Forward[,] and AK Steel gathering segments." *Id.* at ¶94. As a result, Plaintiffs claim that the "post-production costs" were excessive and "unreasonably high." *Id*. at ¶ 96.

According to Plaintiffs, "[e]ach class member in Count II has a standard form lease with Phillips that allows deduction of post-production costs, either via Paragraph 30 of the *Marburger* Final Order or the Market Enhancement clause" and the "interpretation of such standardized clauses must be the same for all lessors." (ECF No. 87, pp. 9-10). It is their position that a "controlling question of law or fact common to all class members in Count II is whether XTO's charges per Mcf for gathering and processing are excessive" vis-à-vis the relationship between XTO and Mountain Gathering. *Id.*

Plaintiffs further assert that the issues that must be decided in connection therewith will also require common evidence and yield common answers that will apply on a class-wide basis. For example, Plaintiffs allege "[a]ll of the class members' gas is mixed together and comingled in the gathering process" and, therefore, is treated uniformly. *Id.* at 11. They maintain that there are

"no challenges to the volume of production, pressures at the wellhead or gas quality from any well or to the proceeds that XTO received after it sold the commingled gas." (ECF No. 87, p. 18). Other common issues include the nature of the transactions between XTO and Mountain Gathering, whether there was a breach and, if so, the amount of the excessive charges, and the formula for calculating damages. (ECF No. 87, p. 11). Thus, it is their position that "[t]he answer to whether XTO's charges for gathering and for process are excessive will answer the question for all class members" and predominate over any possible individual issues. *Id*. at pp. 11, 18.

In opposition, XTO argues that in-depth lease review of each lease is required because unique clauses therein may impact its royalty payment obligations. (ECF No. 94, pp. 10-11). With regard to this argument, XTO does not distinguish between the *Marburger* Settlement Class members and the class members with Market Enhancement clauses. Upon review, the undersigned finds this argument unavailing as to the *Marburger* Settlement Class members. The *Marburger* Final Order held "[e]ach Settlement Class member's Standard Phillips Lease had the same royalty provision so that the royalty calculation was the same across the Settlement Class…" and then modified each members' lease to calculate royalties under the language set forth in paragraph 30. (ECF No. 72-1, p. 7, ¶30). While paragraph 30 does not affect other provisions of the *Marburger* leases, the plain and unambiguous reading of paragraph 30 clearly provides that from the effective date of the settlement and forward, paragraph 30 trumps any lease provision regarding royalty payments.[11] Therefore, anyone on the *Marburger* Settlement Class list is now governed by the

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[11] Paragraph 30 of the Final Order in *Marburger* provides:

> 30. XTO and its successors and assigns shall make future royalty payments under the Settlement Class members' Phillips Standard Leases using the net-back royalty calculation methodology described in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010). Specifically, to the extent that post-production costs, including: (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise); and (ii) all costs

same modified lease language regarding royalties by virtue of paragraph 30 of the *Marburger* Final Order. Consequently, the undersigned finds individual lease review for inconsistent royalty provisions is not necessary as to the *Marburger* Settlement Class members. [12]

The next question is whether XTO's argument that individual lease review is required because some leases may include additional language that alters its obligations (such as "sole discretion," "good business practice," or "reasonably prudent operator") applies to the class members with Market Enhancement Leases. First, the undersigned finds such additional language in "some" leases does not negate the need to resolve the common issues of facts and law set forth by Plaintiffs. In particular, the interpretation of the Market Enhancement clause will be common as to all Plaintiffs. Uniform interpretation of form contracts is favored and cases involving the same "are particularly well-suited for class treatment." *Gillis v. Respond Power, LLC,* 677 F.App'x. 752, 756-57 (3d Cir. 2017). Moreover, any such potential individual issues are insufficient to defeat the predominance of the other common issues raised by Plaintiffs above, including: the relationship between XTO and Mountain Gathering, how the gas is gathered, the unit charge for gathering and the unit charge for processing the gas, the formula for calculating damages. The answers to these issues relate to XTO's conduct and will be the same class-wide.

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> from and after the wellhead to the point of sale, including, without limitation, all gathering, dehydration, compression, treatment, processing, marketing, and transportation costs incurred in connection with the sale of such production, are attributed to Settlement Class members' Phillips Standard Leases, the Settlement Class members will bear their proportionate share of such postproduction costs. This provision shall not affect any other provision of the Settlement Class members' Phillips Standard Proceeds Leases.

(ECF No. 72-1, p. 7, ¶30).

[12] While merit determinations are not typical at the class certification stage, Courts may consider and resolve merits disputes to the extent they are relevant in determining whether the requirements of Rule 23 are satisfied. *Gonzalez,* 885 F.3d 186, 200-01 (3d Cir. 2018).

Thus, the undersigned finds these issues predominate over the potential for "some" additional lease language in resolving Plaintiffs' breach of contract claim. *See, Reyes,* 802 F.3d at 489.

XTO next contends that Plaintiffs cannot prove a breach or damages without addressing the differences among the class wells. (ECF No. 94, p. 12). Specifically, with regard to Count II, XTO argues that Plaintiffs have not provided "legal authority explaining what they contend 'reasonable' gathering and processing rates would be or how they plan to prove reasonableness for all wells within a county that were drilled over an 11-year period." (ECF No. 94, p. 12-13). The undersigned rejects this argument. To begin with, the evidence, argument, and resolution of the legal authority that will control the issue of what is "reasonable" is common to all Plaintiffs. Consequently, this argument actually bolsters the commonality/predominance requirement.

Furthermore, Plaintiffs have sufficiently set forth their method for determining the reasonableness of gathering and processing rates. Plaintiff's theory is that an analysis of individual wells is unnecessary because XTO treats all of the commingled gas from the wells the same in terms of gathering and processing. *Id.* To that end, Plaintiffs turn to their experts to show, for example, that "Mountain Gathering's unit-processing charge is the same for all of the gas regardless of the well from which any gas originated. The common processing charge is independent of gas qualities, and the reasonableness of the processing charge is a class-wide issue." *Id*. at 5-6. Additionally, "Mountain Gathering charges the same unit charge for all wells and gathering segments that are at issue." *Id.* at 6. The testimony at the hearing from Mr. Pulliam, Mr. McArthur, Dr. Becker, and Ms. Paslay confirmed this. (Pulliam testimony – ECF No. 163, pp. 24-25, 29; McArthur testimony – (ECF No. 163, pp. 93-94, 100-101; Becker testimony – ECF No. 163, pp. 194-95; Paslay testimony - ECF No. 164, p. 54-55).

Additionally, at the hearing, Mr. Pulliam specifically identified how Plaintiff's plan to

demonstrate reasonableness. (ECF No. 163, pp. 38-39).

> Count 2 involves the question of reasonableness of the deduction of the gathering and the processing charges. As I've talked about earlier, that deduction is the deduction that is uniform across the class members either for gathering or for processing.
>
> The methodology then for determining whether or not that deduction is reasonable would be to look at two things: One, what other options were there to process or gather that gas and what were the available prices or fees. We have talked a little bit about MarkWest as an option. So to look at competitive alternatives.
>
> The other would be to look at the cost involved with operating the plant, building and operating the plan and the gathering system, and look at how those costs compare with the fees that were charges and those – that is the methodology that was used….

(ECF No. 163, pp. 38-39). Mr. Pulliam also noted that the only factor affecting the total gathering charge for a given well is the volume, which Plaintiffs submit is not in dispute. *Id.* pp. 25, 38. According to Mr. Pulliam, this calculation can be performed on a class-wide basis. *Id.* at 39. Mr. McArthur also opined similarly, concluding: "I don't see any issues thar are relevant or disputed that would break down by well." (ECF No. 163, p. 94). Thus, contrary to XTO's argument, Plaintiffs explained how they plan to prove reasonableness for all wells class-wide. Consequently, XTO's individualized assessment argument at this stage will not serve to defeat commonality/predominance.

*ii.* *<u>Count III</u>*

In Count III, Plaintiffs aver that XTO was required to perform its royalty obligations under the Market Enhancement Leases "in good faith and consistent with its duty of fair dealing." (ECF No. 79, p. 26 at ¶99). To that end, Plaintiffs contend that "[t]he class members in Count III share a common Market Enhancement royalty provision" requiring the interpretation of the same. (ECF No. 87, p. 10). The operative language in the Market Enhancement Leases contain a Market Enhancement clause that:

> (i) states "Notwithstanding anything to the contrary contained herein, it is agreed between the Lessor and Lessee that all oil and gas royalties accruing to the Lessor under this lease shall be net of Lessor's proportionate share of the cost of gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marketing the oil, gas or other products produced hereunder to transform the product into marketable form." or that
>
> (ii) uses substantially identical language and incudes the words "marketable form."

(ECF No. 79, p. 20, ¶79). Consequently, the Court will be interpreting virtually identical royalty lease language and the identical lease term of "marketable form."

Plaintiffs submit that XTO treated all Plaintiffs alike by commingling the gas and that all of the commingled gas is in "marketable form" by the tailgate of the processing plant such that XTO was not permitted to deduct post-production costs incurred "after the tailgate of the processing plant in determining royalties." (ECF No. 79, p. 26, ¶¶100-01; ECF No. 163, p. 40). Thus, Plaintiffs argue that the "controlling issue of law or fact common to each class member in Count III is whether the Market Enhancement provision permits XTO to deduct post-production expenses after the gas has been 'transform[ed]…into marketable form.'" (ECF No. 87, p. 11). Additionally, Plaintiffs maintain that the formula for calculating damages will be common among all class members. *Id.* Therefore, they contend XTO's conduct in performing said royalty obligations will require common evidence and the resolution of the whether XTO breached the Market Enhancement royalty provisions will answer the question for all class members. *Id.*

In opposition, XTO argues that an entire review of every lease is required with regard to the Market Enhancement Leases for Count III and Plaintiffs have not done so. (ECF No. 94, p. 12). At the hearing, Mr. Pulliam testified that he reviewed each Market Enhancement lease individually. (ECF No. 163, p. 36; ECF No. 116-5, p. 15, ¶50). Consequently, this argument fails.

XTO further argues that the determination of when gas is "marketable" requires a well-

specific analysis because Pennsylvania has not yet articulated a test for marketability. (ECF No. 94, pp. 14-15). Plaintiffs' theory of recovery, however, does not depend on the exact determination of when gas is first "marketable" as XTO seems to suggest. Rather, Plaintiffs' theory is that all gas at issue is "marketable" at the tailgate of the PennCryo processing plant and that damages will be based from that point. Under such a theory, Plaintiffs submit that a determination of when gas is first "marketable" is immaterial. Regardless, the undersigned finds that the determination of this issue will be a class-wide determination as it will affect each and every Plaintiff. Consequently, XTO's argument in this regard also fails.

In conclusion, after careful review of Counts II and III, the undersigned finds that Plaintiffs have satisfied the commonality and predominance requirements for Rule 23. The undersigned agrees with Plaintiffs that the lease language that will be at issue here will be identical for the *Marburger* Settlement Class members and virtually identical for the Market Enhancement Lease class members. As set forth above, any Plaintiff on the *Marburger* Settlement Class list is now governed by the same operative lease language regarding royalties by virtue of paragraph 30 of the *Marburger* Final Order. As to the Market Enhancement Leases, the Court will be interpreting virtually identical royalty lease language and the identical lease term of "marketable form." Since uniform interpretation of standard form contracts is favored, "claims involving the interpretation of standard form contracts are particularly well-suited for class treatment." *Gillis,* 677 F.App'x. at 756; *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 457 (Pa. Super. 1982) ("Claims arising from interpretations of a form contract generally give rise to common questions."). Thus, the undersigned finds that the interpretation of the lease language here is predominant over Plaintiffs' breach of contract claims.

Additionally, other issues impacting whether XTO breached the leases by deducting

excessive costs in Court II and deducting costs after the gas was in "marketable form" in Count III focus on XTO's conduct (*e.g.* whether the gas is treated the same in terms of gathering and processing, the unit charge for gathering and the unit charge of processing the gas, the transactions between XTO and Mountain Gathering, were the deductions reasonable or excessive, what were the competitive alternatives, and the formula for calculating damages). The evidence to establish the same will be common and the resolution of them will materially advance the litigation as to all class members. As a result, these issues predominate over any individual issues discussed above.[13]

Consequently, the undersigned finds that each class member shares common legal and factual issues that predominate in this case. Therefore, it is respectfully recommended that the commonality and predominance requirements have been established.

c. Typicality

Typicality requires that the class representatives' claims be typical of the class members' claims so that "the action can be efficiently maintained" and the class representative and class members' interests are aligned. *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). The Court of Appeals for the Third Circuit "set a low threshold for satisfying" the typicality requirement, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 183 (3d Cir. 2001), and even distinct "'factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct.'" *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (quoting *Baby Neal,* 43 F.3d at 58). Where the class representatives

[13] XTO has also suggested that individualized defenses impact commonality and predominance. (ECF No. 94, pp. 18-20). Suffice is to say, those issues do not serve to defeat commonality/predominance and have been addressed more thoroughly under the appropriate Rule 23 sections, *infra.*

and class members' claims arise out of the same alleged wrongful conduct and are predicated upon the same general legal theories, the typicality requirement is satisfied. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004). The purpose of the typicality requirement is to "screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 598 (3d Cir. 2012)(citation omitted). For the typicality requirement to be satisfied:

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

*Id*. (quoting *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009)).

Plaintiffs argue that typicality is met because the claims and legal theories of the representative Plaintiffs and the class members are exactly the same. According to Plaintiffs, "[a]ll representative plaintiffs and the class members assert Count II's claim that XTO may not charge excessive costs for gathering and processing, and the damages will be based on the same unit charges that apply to each class member. The representative Plaintiffs for Count III, the Langs, and the class members in Count III assert that XTO may not deduct post-production expenses after the product has obtained marketable form. XTO treats all of the gas alike, and the gas, sold after being commingled, achieves marketable form for all class members at the same time. No unique defenses are asserts against any class representative, and the representatives' pursuit of their claims will establish the claims of the class." (ECF No. 87, pp. 12-13). Therefore, Plaintiffs submit that the typicality requirement has been met. *Id.* at 13.

In response, XTO maintains that a review of a sampling of the leases listed by Plaintiffs as being potential class members contained arbitration provisions and none of Plaintiffs' leases

contained arbitration provisions and, therefore, Plaintiffs' leases are not typical of the class. (ECF No. 94 at 19). Plaintiffs reply that XTO has waived its right to compel arbitration. (ECF No. 124, pp. 11-13). As a preliminary matter, no recommendation will be made as to whether XTO has waived its right to compel arbitration, as there is no pending formal motion to compel arbitration and that matter is not ripe for the Court's consideration.

XTO estimates that approximately thirty-four Phillips Leases contain arbitration provisions. *See,* ECF No. 100-4, p. 15, ¶37. To that end, XTO argues that the arbitration provisions negatively impact the typicality requirement because the Court will be required to determine the arbitrability of disputes like this. (ECF No. 94, pp. 19-20). The undersigned does not agree. To the extent that a minority percentage of Phillips Leases include an arbitration provision, it is not clear whether those provisions apply to the putative class claims and/or would prevent those putative class members as being involved in the class. Plaintiffs' claims are otherwise typical of the putative class members' claims, as the claims and legal theories of the representative Plaintiffs and the class members are identical.[14] XTO's potential arbitration defense would not be subject to the Plaintiffs, as none of Plaintiffs' leases included an arbitration provision and would not become a major focus of this litigation. To the extent that XTO intends to raise the arbitration defense post-certification, a motion may be made to amend the class definition to exclude such members after the expiration of the opt-out period to enable the Court to determine the class composition and analyze "the specific arbitration agreements that [XTO] wishes to enforce[.]" *In Re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litig.*, Civ. No. 12-711, 2016 WL 5508843, at *2 (D.N.J. Sept. 28, 2016); *see also In re Titanium Dioxide Antitrust*

[14] The Court notes that the methodology used by XTO to calculate damages does not differ based on an arbitration provision. (ECF No. 164, pp. 30, 34).

*Litig.*, No. Civ. Action No. RDB-10-0318, 2012 WL 5947283, at *4 (D. Md. Nov. 27, 2012).

Based on the evidence submitted and discussed throughout this Report and Recommendation, the undersigned is satisfied that the legal or factual position of the named Representatives is not markedly different from the putative class member, there is no significant defense that is both inapplicable to many members of the class or likely to become a major focus of the litigation, and the interests and incentives of the named Representative are sufficiently aligned with those of the class. Three is a strong similarity arising from the same alleged course of conduct and are predicated on the same legal theories. Accordingly, it is respectfully recommended that the typicality requirement has been established.[15]

d. Adequacy

The adequacy prerequisite of Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class[,]" and "has two components designed to ensure that absentees' interests are fully pursued." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd, Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). "First, the adequacy inquiry tests the qualifications of the counsel to represent the class[,]" and "[t]he second component of the adequacy inquiry seeks to uncover conflicts of interest between named parties and the class they seek to represent." *In re Schering Plough*, 589 F.3d at 601-02 (internal citations and quotation marks omitted).

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[15] XTO references both typicality and adequacy as being impacted by certain arguments. (ECF No. 94, pp. 16-17). For example, XTO makes arguments regarding named Plaintiffs' representation as it relates to late payment claims and the marketability assumption at a single location and time. *Id.* Similarly, XTO raises an issue with regard to the size of settlement distributions in the *Marburger* case and arbitration clauses. *Id.* at pp. 18-19. These arguments are rejected by this Court, *infra,* when discussing adequacy and need not be restated here. *See,* Discussion on Adequacy, *infra* at II.B.3.d.

"[T]he linchpin of the adequacy requirement is the alignment of interest and incentives between the representative plaintiffs and the rest of the class." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). However, "not all intra-class conflicts will defeat the adequacy requirement[,] . . . [and t]he hard question concerning intraclass conflicts asks which conflicts should matter . . . what divisions should render the class representation so defective in structure as to rise to the level of a constitutional dereliction or violation of Rule 23(a)(4)." *Id.* at 184 (citations and internal quotations omitted). Therefore, a conflict must be "fundamental" to defeat the adequacy requirement. *Id.* A conflict is fundamental when, for example, "some [class] members claim to have been harmed by the same conduct that benefitted other members of the class[,] touches specific issues in controversy[,]" or concerns "the allocation of remedies amongst class members with competing interests." *Id.* (citation and internal quotations omitted; first alteration in original). "A conflict that is unduly speculative, however, is generally not fundamental." *Id.*

As to the qualifications of class counsel, the undersigned appointed David A. Borkovic as class counsel in the *Marburger* case. (ECF No. 72-1, pp. 3-4). Therein, the Court found he "has substantial experience handling complex litigation and is competent in handling…class actions. Counsel has prosecuted this action at arm's length and advanced the interests of the Settlement Class with dedication and competence to date." *Id.* The Court has no reason to doubt that counsel will likewise prosecute this action at arm's length and advance the interests of the classes with competence.

XTO does not challenge to the qualifications of counsel to represent the class *per se*. *See,* ECF No. 94. XTO does submit, however that counsel (and Plaintiffs) cannot represent Butler County Poor District, an alleged potential market enhancement class member, because only the

county solicitor may bring and prosecute actions by the county. (ECF No. 94, p. 20). Plaintiffs do not respond to this argument. *See,* ECF No. 124. Regardless, the undersigned finds this argument to be premature and creates nominal impact on Mr. Borkovic ability to represent the classes in this case. If the County does not opt out, a motion made be made at that time to made to amend the class definition to exclude such member(s). Thus, the undersigned does not find this issue is one that negatively impacts the qualifications of counsel to represent the classes in this case. Therefore, it is respectfully recommended that David A. Borkovic is qualified as class counsel under Rule 23(a)(4).

As to class representatives, Plaintiffs assert that no known conflict between Plaintiffs and the classes exists. (ECF No. 87, pp. 13-14). In response, however, XTO argues that the adequacy requirement is not met because Plaintiffs have abandoned their late payment claim and now such a claim "may be subsequently barred by res judicata" which renders them inadequate class representatives. (ECF No. 94, p. 16). XTO further argues that because Plaintiff assumes that all gas is marketable at a single location, because there are differences among wells, "Plaintiffs cut off certain class members' ability to assert an earlier marketability location" which renders Plaintiffs inadequate class representatives. (ECF No. 94, p. 17). Finally, XTO argues that the *Marburger* Settlement Class representatives accepted "substantial settlement distributions" in the *Marburger* action compared with the other members of the settlement class who only received a $500 settlement payment and, further, that because certain named Plaintiffs testified that they do not want any deductions taken from their royalties, there are conflicts between the Plaintiffs and the putative class members. (ECF No. 94, p. 18).

To begin with, the Court rejects XTO's argument that the Plaintiffs have precluded the putative class members from bringing any late payment claims such that a conflict of interest exists

between the Plaintiffs and putative class. Plaintiffs' voluntary dismissal of their own late-payment claims simply precludes their individual claims and has no impact on any late-payment claims that unnamed putative class members can potentially bring. To be clear, the dismissal of a cause of action by the named Plaintiffs prior to class certification does not have preclusive effect to putative members of that class. *See Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties" under preclusion principals); *see also Stand. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) ("[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified."). Therefore, this argument does not implicate a fundamental conflict of interest.

Additionally, the Court rejects XTO's argument that a conflict exists because Plaintiff's assumption that all gas is marketable at a single location would foreclose other class members' ability to assert that their gas is marketable at an earlier point as this argument does not impact Plaintiffs' adequate representation of the class. Plaintiffs' claim under Count III relies on the legal theory that all the putative class members' gas is marketable at the tailgate of the processing plant. XTO's expert, Dr. Becker, testified at the hearing that the gas at issue here is marketable at the tailgate of the plant. (ECF No. 163, p. 186) ("It may be the case that all of the gas in this system is, in fact, marketable when it gets to the tailgate of the PennCryo Plant, but that does not mean that it was first in the marketable form at the tailgate of the PennCryo Plant.") If putative members of the class disagree with Plaintiffs' legal theory under Count III and instead believe the gas is marketable at an earlier point than the tailgate of the processing plant, they may opt-out of the class and institute their own action to make that determination. Thus, this argument is speculative, at best, and does not create a fundamental conflict of interest that would make Plaintiffs inadequate

representatives of the class. *See Dewey,* 681 F.3d at 184 ("A conflict that is unduly speculative, however, is generally not fundamental.").

Lastly, the Court rejects XTO's argument that a conflict exists for the *Marburger* Settlement Class representatives because they accepted a higher settlement amount in the previous class action than other class members and because certain Plaintiffs believe XTO should not take out any deductions from their royalties. To begin with, the settlement amounts in a prior class action have no bearing on any conflicts between Plaintiffs and the putative class members and does not represent a fundamental conflict of interest. Likewise, a Plaintiffs' subjective opinions on how they believe XTO should perform under the leases is not a fundamental conflict that supports a finding that XTO's conduct benefited some members of the class and harmed others.

Accordingly, the Court finds that no fundamental conflicts of interest exist between Plaintiffs and the putative class members. Therefore, it is respectfully recommended that the representative Plaintiffs meet the adequacy prerequisite under Rule 23(a)(4).

e. Predominance

The requirements of commonality and predominance go hand in hand and were appropriately considered by the undersigned together above. *See* Discussion on Commonality and Predominance, *supra,* at II.B.3.b.

f. Superiority

There is substantial overlap between the superiority and predominance requirements of Rule 23(b)(3). *Kelly*, 47 F.4th at 215 n. 11. "Indeed, they have been described as the 'twin requirements' of Rule 23(b)(3), which were both 'adopted to cover cases in which a class action would achieve economies of time, effort, and expense . . . without sacrificing procedural fairness.'" *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir.

2001) (additional citations and internal quotation marks omitted).

Plaintiffs submit that class treatment is the superior manner to address this controversy. (ECF No. 87, pp. 19-20). XTO does not address this requirement directly. *See,* ECF No. 94. As previously discussed, common issues predominate over individual issues that may arise. The injuries alleged arise from the same conduct. Adjudication of this matter as a class action will resolve common issues as to hundreds of leases at once thereby promoting efficiency for both the litigants and the judiciary. Additionally, class treatment would promote uniform decisions among similarly situated. Any individual issues can be managed within a class action. Class treatment of this case would achieve economies of time, effort, and expense without sacrificing procedural fairness. As such, the undersigned finds that class action treatment is the superior method for adjudication of this controversy. Therefore, it is respectfully recommended the representative Plaintiffs meet the adequacy prerequisite under Rule 23(a)(4).

g. <u>Ascertainability</u>

The last issue for discussion of class certification is ascertainability. "In determining whether the ascertainability requirement is satisfied, [a court] must determine that the plaintiff has (1) 'defined [the class] with reference to objective criteria,' and (2) identified a 'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Kelly,* 47 F.4th at 222 (quoting, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015)). "This requirement allows potential members to receive notice and opt out of the class action, protects defendants' rights, and ensures the parties can identify class members efficiently." *Slamon*, 2020 WL 2525961, at *5 (citing *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). To that end, case law is clear that plaintiffs need only establish that the proposed class members "*can* be identified; they need not definitively identify all class members at the

certification stage." *Kelly,* 47 F.4th at 222, n. 19 (citing *Byrd,* 784 F.3d at 163) (emphasis in original). Plaintiffs must prove ascertainability by a preponderance of the evidence. *Id.* (citing *Hayes*, 725 F.3d at 354.

In *Kelly,* the Court of Appeal for the Third Circuit reiterated that that "ascertainability does not mean that 'no level of inquiry as to the identity of class members can ever be undertaken," and that "'the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.'" 47 F.4th at 224 (quoting *Byrd,* 784 F.3d at 171). *See, Hargrove v. Sleepy's LLC,* 974 F.3d at 467, 470, 480 (3d Cir. 2020) (holding "thousands of pages of contracts, driver rosters, security gate logs, and pay statements" are sufficient to ascertain a class even with gap in the records and work required to synthesize the data). In other words, "review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources." *Id.*

An objection as to the number of records that must be individually review is an objection to the size of the class, which is not a valid reason to deny class certification. *Kelly,* 47 F.4th at 224 (citing *Byrd*, 784 F.3d at 171). If the information is available, then having to synthesize the same does not constitute an infeasible mechanism. *See, id.* at 223 (citing *Byrd*, 784 F.3d at 169-71) (holding ascertainability satisfied by the prospect of matching address from multiple as-of-yet unknown sources) and *Hargrove,* 974F.3d at 480 (holding ascertainability satisfied by the prospect of cross-referencing defendant's voluminous records with affidavits from putative class members). "So long as the review is for information apparent on the face of the document, the number of files [to be reviewed] does not preclude ascertainability." *Id.* at 225 (citing *Byrd* 784 F.3d at 170).

Here, there are two Counts Plaintiffs seek to certify. (ECF No. 79, ¶¶ 78, 79). Count II relates to the deduction of excessive gathering and processing charges and defines class members

to include: 1) Those individuals or entities who has a Phillips lease; 2) Received a royalty payment from XTO; 3) Whose gas was or is gathered on the Jefferson, Forward, or AK Steel gathering segments; and 4) Was a member of the *Marburger* Settlement Class or has a lease that based royalty on a percentage of proceeds and contained a Market Enhancement clause.[16] (ECF No. 79, pp. 18-19, ¶78). The TAC also defines those individuals specifically excluded under Count II. *Id.* Count III relates to the deduction of post-production costs after the product was in marketable form and defines class members to include: : 1) Those individuals or entities who has a Phillips Lease; 2) Received a royalty payment from XTO; 3) Whose gas was or is gathered on the Jefferson, Forward, or AK Steel gathering segments; and 4) Whose lease based royalty on a percentage of proceeds and contained a Market Enhancement clause or used an essentially identical provision as specifically defined therein.[17]

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[16] The TAC specifically provides:

> Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with Phillips Exploration, Inc., Phillips Production Company, PC, Exploration, Inc., TWP Inc., or Phillips Resources Inc. or any entity affiliated with any of them ("Phillips") covering oil and gas interests at any time during the period of limitations
>
> (a) who received one or more royalty payments from XTO;
>
> (b) whose oil and gas lease covered gas that was or is gathered on the Jefferson, Forward or AK Steel gathering segments of the Mountain Gathering system in Butler County, Pennsylvania; and
>
> (c) who was either
>
> (i) a member of the settlement class in *Marburger v. XTO Energy Inc.*, Civil Action No. 2:15-cv-910-CRE (W.D.Pa.) ("*Marburger* Settlement Class"), or
>
> (ii) whose oil and gas lease based the royalty on a percentage of proceeds and contained a Market Enhancement Clause as defined in Paragraph 79 of the Third Amended Complaint.

(ECF No. 79, pp. 18-19 ¶78).

[17] The TAC specifically provides:

> Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with Phillips covering oil and gas interests at any time during the period of limitations
>
> (a) who received one or more royalty payments from XTO;

The TAC also defines those individuals specifically excluded under Count III. *Id.*

According to Plaintiffs, all class members will have Count II claims. (ECF No. 116-2, p. 13-14, ¶34). Market Enhancement lessors also have Count III claims. *Id.* "Claims by *Marburger* lessors are limited to the period after ethe effective date of the *Marburger* Final Order. Claims for Market Enhancement lessors begin September 1, 2015." *Id.* XTO does not dispute the class definitions set forth in either Count II or Count II in its brief.[18] *See,* ECF No. 94, pp. 15-16. Based on the above, the undersigned is satisfied that Plaintiffs have sufficiently defined the class

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(b) whose oil and gas lease covered gas that was or is gathered by the Jefferson, Forward or AK Steel gathering segments of the Mountain Gathering system in Butler County, Pennsylvania, and

(c) whose oil and gas lease based the royalty on a percentage of proceeds and contained a Market Enhancement Clause or an essentially identical provision. A "Market Enhancement Clause" means an oil and gas lease provision that:

(i) states "Notwithstanding anything to the contrary contained herein, it is agreed between the Lessor and Lessee that all oil and gas royalties accruing to the Lessor under this lease shall be net of Lessor's proportionate share of the cost of gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marketing the oil, gas or other products produced hereunder to transform the product into marketable form." or that

(ii) uses substantially identical language and includes the words "marketable form."

(ECF No. 79, pp. 19-20, ¶79).

[18] At the close of the hearing, XTO argued a "very small" point that Plaintiffs did not have a plan for distinguishing damages between the two leases because there is a differing damage period. (ECF No. 164, pp. 85-86). This issue was not briefed by XTO. *See,* ECF No. 94. First, the Court notes this is issue is underdeveloped. Moreover, the undersigned finds this to be an administratively manageable matter such that it will not serve to destroy ascertainability.

Additionally, at the close of the hearing XTO argued that the criteria use to define a Market Enhancement Clause, namely the phrase "substantially identical language," is not objective criteria. (ECF No. 164, pp. 86-87), The undersigned also rejects this argument as underdeveloped. Nonetheless, the undersigned notes that "substantially identical language" refers specifically to the objective language in the subparagraph immediately prior thereto as the control language and further requires that the "substantially identical language" also include the qualifying term "marketable form." (ECF No. 79, pp. 19-20, ¶79). As such, the undersigned finds that this argument is insufficient to destroy ascertainability.

members with reference to objective criteria.

With regard to the mechanism for determining whether putative class members fall within the class definition, as discussed more fully below, the undersigned finds that Plaintiffs identified a reliable and administratively feasible mechanism by identifying the records they require to determine the putative class members, demonstrating where to obtain them, and explaining how those records can be used to verify putative class members. *See, e.g.* ECF No. 163, p. 37 (Mr. Pulliam testified at the hearing that he used XTO's business records, the Court's final order in *Marburger,* and publicly available documents filed with the county).

i. *Ascertainability of the Marburger Settlement Class*

Plaintiffs submit that potential members of Count II can be ascertained, in part, by reviewing the *Marburger* Settlement Class to determine if they meet the class definition. (ECF No. 87, p. 15). The process to do so has been outlined step-by-step by Mr. Pulliam in his report and at the class certification hearing. (ECF No. 116-2, pp. 12-17, ¶¶31-44; No. 163, pp. 32-35). It begins with a review of the *Marburger* Settlement Class leases to determine who had leases in which the gas was gathered on the Jefferson, Forward and AK Steel gathering segments and who had gathering deductions after April 26, 2018 (the date the *Marburger* Final Order took effect). *Id; see also,* ECF No. 87, p. 15; ECF No. 163, pp. 32-33. This included excluding from the *Marburger* Settlement Class those leases that did not have gas gathered on those systems or had no deductions taken because they would not qualify under the definition. (ECF No. 163, p. 34). Additionally, some of those leases had transferred their interest after that date. So, next steps are to identify if there were any successors-in-interest and then "verify that the interests we have identified that flow onto the Jefferson, Forward, and AK Steel systems are governed by a Phillips lease." *Id*. at 35. In other words:

> The Marburger Lessor class members can be readily identified using (a) information from the Marburger Settlement and Final Order, and (b) information produced to date by XTO or in its possession. There are two (2) steps involved in identifying the Marburger Lessor class. The first step is to identify which of the individuals or entities subject to the Marburger Settlement and Final Order were parties to leases that were gathered by XTO's affiliate Mountain Gathering and had deductions taken from their royalty payments for at least gathering charges under those leases. The next step is to identify any successors in interest to the lessors subject to the Marburger Settlement and Final Order and apply the same process to them.

(ECF No. 116-2, p. 14, ¶35). Applying this method, Mr. Pulliam has so far identified approximately 250-252 *Marburger* Settlement Class members though his work is not complete yet.[19] *Id.* at 35; ECF No. 124, p. 8; *see also* 116-2, p. 14, ¶¶31-44.

Plaintiffs acknowledge, however, that there are some potential transferred ownership members they could not identify from the documents XTO produced. (ECF No. 87, p. 15). To complete this process, therefore, Plaintiffs set forth a plan. *Id.* Plaintiffs submit that "[a]t the end of class discovery, XTO revealed that it maintains electronic records that include all ownership, well[,] and lease information that track ownership changes over time. That information includes the owner identification, the ownership transfer date, the well number and name, as well as the lease number. XTO's 30(b)(6) witness [Ms. Sharp] admitted that while *her* department did not have such electronic records, the records existed elsewhere." (ECF No. 87, p. 15)(citations omitted). With this information, Plaintiff maintains that these class members can be ascertained

[19] The undersigned notes that the exact number is evolving. For example, in their opening brief, Mr. Pulliam identified 236 leases from the *Marburger* Settlement Class who meet these criteria. (ECF No. 87, pp. 14-15). In their reply brief, Plaintiffs identified 249 *Marburger* class members. (ECF No. 124, p. 8). By the time of the hearing, Mr. Pulliam identified approximately 250-252 *Marburger* class members. (ECF No. 163, p. 38). The exact number is not troublesome at this point. As stated previously, Plaintiffs do not need to establish the exact number of members the certification stage. *Kelly,* 47 F.4th at 222, n. 19. Thus, mistakes as to this number do not serve to destroy ascertainability.

(electronically by merging of databases and manually). (ECF No. 163, p. 35; No. 116-2, p. 17, ¶44).

In opposition, XTO argues that Plaintiffs' proposed method to ascertain the class members is not administratively feasible. (ECF No. 94, pp. 15-16). Essentially, XTO argues that there are a number of documents to review and steps it believes are necessary to go through to arrive at the class members. *Id.* Notably, XTO does not argue that the information is not available, but rather that it would be a tedious, time-consuming, and expensive process. (ECF No. 163, pp. 199, 201-202, 206-208; ECF No. 116-11, p. 8; ECF No. 164, pp. 35-37). A defendant's poor record keeping, or lack thereof, is not a valid argument to an otherwise objectively verifiable class and will not serve to defeat ascertainability *See, Kelly,* 47 F.4th at 223 (citing *Hargrove*, 974 F.3d at 470)(holding ascertainability will not be defeated based on a defendant's "strategic decision to house records across multiple sources or databases"). In fact, this information (what leases are active, who owns the lease, who gets paid and how much) is basic business record information in this line of business. (ECF No. 163, p. 67). As Mr. Pulliam explained at the hearing, transfer posted reports for every ownership change is standard record keeping that he would expect XTO to maintain. *Id.* In fact, XTO's expert, Ms. Sharp testified that it maintains records of all ownership changes. (ECF No. 163, p. 199). Additionally, Mr. Pulliam testified that so far, he has been able to trace the information necessary based on the records. (ECF No. 163, p. 69). Since the information is available, then having to synthesize the same does not constitute an infeasible mechanism. *See, id.* at 223 (citing *Byrd*, 784 F.3d at 169-71).

Moreover, the undersigned rejects XTO's argument the *Marburger* Settlement Class list is unreliable and should not be used to determine ascertainability because it contains royalty owners who did not meet the lease-based criteria for inclusion in the *Marburger* Settlement Class. (ECF

No. 94, p. 15). To begin with, while there may be a couple of putative class members that were improperly in the *Marburger* Settlement Class list (ECF No. 167, p. 4), the undersigned notes that XTO does not deny that it was the party that supplied the list of class members in *Marburger.* (ECF No. 94, p. 3). Regardless, as discussed above, individual review of said leases is not necessary as it relates to royalty payments. Everyone on the *Marburger* Settlement Class list, regardless of how they arrived on the list, is now governed by the same operative lease language regarding royalties by virtue of paragraph 30 of the *Marburger* Final Order. Consequently, the undersigned finds XTO's argument that the *Marburger* Settlement Class list is unreliable to be unavailing.

***ii.*** *Ascertainability of the Market Enhancement Leases*

Next, Plaintiffs submit that the potential members with Market Enhancement Leases who are included in both Counts II and III can also be ascertained. (ECF No. 87, p. 15). Plaintiffs claim such members have Market Enhancement Leases during the period of limitation in which the gas was gathered on the Jefferson, Forward and AK Steel gathering segments. (ECF No. 87, p. 14.) From the documents produced by XTO and public records,[20] Mr. Pulliam testified at the hearing that as of September 23, 2022, there are 297 Market Enhancement class members. (ECF No. 163, p. 38 referencing ECF No. 149.1).[21]

[20] Mr. Pulliam stated that "XTO has not identified plaintiffs with Market Enhancement Leases, but XTO has produced leases which contain the Market Enhancement language. In my first report, I explained that I reviewed these leases and had identified 411 Phillips' Leases with Market Enhancement clauses. XTO identified 122 of these as inactive, leaving 289 leases associated with 307 potential Plaintiffs. . . . I further explained in my report that XTO maintains computerized records tracking the transfer of interests which allow for quick identification of any transferred interests. Again, my identification here is based on what information XTO has produced to date." (ECF No. 116-5, p. 14, ¶¶45-46). At the hearing, Mr. Pulliam testified he also used publicly available documents filed with the county. (ECF No. 163, p. 37).

[21] Again, this number has evolved and is not exact.

To that end, Mr. Pulliam testified that he went through a similar process to identify these class members as he did with the *Marburger* Settlement Class members set forth above. (ECF No. 163, p. 33-36).

> The Market Enhancement Lessor Class is also readily identifiable from information produced by XTO and/or in XTO's possession. Identification of the Market Enhancement Lessor Class involves the following steps. The first step is identification of Phillips' leases which contain the relevant Market Enhancement language that were active during the relevant period, and their associated lessors and to determine whether they had deductions taken as a part of their royalty payments. The second step is to identify any successors in interest to those lessors.

(ECF No. 116-2, p. 17, ¶45). In other words, the process for identifying the Market Enhancement class members had a different starting point than the *Marburger* Settlement Class. (ECF No. 163, p. 33). For Market Enhancement Leases, Mr. Pulliam identified "parties to Phillips' leases that had Market Enhancement clauses where they had deductions[22] taken from their royalty payments and the gas was gathered on those same system…and where the leases did not contain provisions that were inconsistent with the class definition, and then from there to identify, again any successor in interest." (ECF No. 163, p. 33). He further testified that he reviewed each Market Enhancement Lease individually and was able to exclude those leases that do not meet the class definition. *Id*. at 36; ECF No. 116-5, p. 15, ¶¶51-52.

Additionally, Plaintiffs submit using the same plan as that used for the *Marburger* Settlement Class members to identify successor ownership issues. (ECF No. 87, p. 15). With this information, Plaintiff maintains that these class members can be ascertained (both electronically by merging of databases and manually). (ECF No. 163, p. 35; No. 116-2, p. 17, ¶44).

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[22] Mr. Pulliam stated that "[t]he processes for determining whether deductions have been taken under these leases is the same as described for the *Marburger* Lessors. As I discussed above, this step can be done most efficiently through a query of XTO maintained databases. It can also be done manually, using the Unit Designation…." (ECF No. 116-2, p. 18, ¶47).

XTO does not set forth a separate argument attacking Plaintiffs' mechanism for determining Market Enhancement Lease class members in its opposition to class certification. *See,* ECF No. 94, pp. 15-16. Rather, XTO makes one combined argument for both Market Enhancement Lease members and *Marburger* Settlement Class members. *Id.* The undersigned has addressed and rejected those arguments above. *See, supra.*

Given the above, the undersigned finds the Plaintiffs have identified a reliable and administratively feasible mechanism as outlined by Mr. Pulliam for determining whether class members fall within the class definitions for Counts II and III. Therefore, it is recommended that Plaintiffs have satisfied the requirement of ascertainability.

#### ***4. Plaintiffs' Motion to Approve Confidential Designation (ECF No. 159)***

XTO filed a sealed exhibit in support of its Response to Plaintiffs' Amended Motion for Class Certification. (ECF No. 111, redacted version at 95-2, hereinafter "ECF No. 111"). Pursuant to the Protective Order filed in this matter (ECF No. 27), Plaintiffs designated the sealed document, a spreadsheet excerpt showing the settlement payments made in the *Marburger* class settlement to certain Plaintiffs and two putative class members in this action, as "Confidential." *See,* ECF No. 111. Under the Protective Order, a party can challenge a confidential designation. (ECF No. 27, p. 5, ¶C.2).[23] XTO invoked the ability to challenge the same in accordance with the Protective Order. Thereafter, Plaintiffs filed Motion to Approve Confidential Designation seeking an order that the spreadsheet excerpt was properly designated as "Confidential." (ECF

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[23] Paragraph C.2 of the protective Order provides, in relevant part:

> If a party challenges, in writing, the designation of a document as Confidential, the party asserting its Confidentiality shall have ten (10) days from receipt of the written challenge in which to file an appropriate Motion with the Court for judicial approval of the Confidential designation of the discovery materials.

(ECF No. 27, p. 5, ¶C.2).

No. 159).

The Protective Order defines "Confidential Information" or "Confidential" to mean, *inter alia,* "Information that contains non-public personal or financial information regarding any of the lessors in the proposed class…." (ECF No. 27, p. 3, ¶B.2(b)). "Information" includes, *inter alia,* any part of "documents and things produced" in the action. *Id.* at p. 2, ¶B.1(c). Plaintiffs submit that the expert from the *Marburger* settlement contains the specific dollar amounts that certain Plaintiffs and two putative class members received and, as such, contains "non-public personal or financial information regarding any of the lessors in the proposed class." (ECF No. 160, pp. 2-3). Thus, Plaintiffs conclude that the *Marburger* settlement spreadsheet was properly designated as Confidential and filed under seal. *Id.*

In opposition, XTO challenges the Confidential designation because: 1) the information is already available in the public record and, thus, should be unsealed pursuant to *In re Avandia Marketing, Sales Practices. and Products Liability Litig.,* 924 F.3d 662 (3d Cir. 2019); 2) the "sizable" settlement payments in *Marburger* "impact the adequacy of those proposed class representatives and their ability to represent the class; and 3) information undermines the reliability of Mr. Pulliam's list of Count III class member since it shows two putative member who got settlements in *Marburger* but appear as Count III class members. (ECF No. 165). Plaintiffs filed a Reply. (ECF No. 167).

After careful consideration of the same, the undersigned agree with Plaintiffs that the exact dollar amount certain Plaintiffs and two putative class members received in *Marburger* was properly designated as "Confidential" in accordance with the Protective Order as it contains "non-public personal or financial information regarding" the lessors and is unpersuaded by XTO's challenges to the same. No doubt the public has a right of access to judicial materials, but that

right is not absolute. *In re Avandia*, 924 F.3d at 672. Therefore, the moving party must show "'that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Id.* (quoting *Miller v. Ind. Hosp.,* 16 F.3d 549, 551 (3d Cir. 1994)). To that end, courts must review the specific documents sought to be sealed. *Id.* at 673.

Reviewing this specific document, the undersigned first notes that the entire document at issue is not under seal. *Compare* ECF No. 111 with ECF No. 95-2. Rather, to be clear, the only information filed under seal is the column indicating the exact amounts received. (ECF No. 111).

Furthermore, this is non-public personal financial information. Contrary to Defendant's assertion otherwise, the exact amount each class member received in *Marburger* is not a matter of public record. This Court has held that the privacy interests associated with personal financial information is the type of information subject to sealing/redaction. *See, Reinig v. RBS Citizens, N.A.,* No. 2:15-cv-1541, 2021 WL 6098290, *3 (W.D. Pa. Dec. 22, 2021); *see also, In re Community Bank of Northern Va. Mortgage Lending Prac. Litig.,* MDL No. 1674, No. 3-cv-425 and No. 5-699, 2021 WL 1143611, *3-4 (W.D. Pa. March 25, 2021).

Additionally, while the fact that certain proposed class representative and two putative class member received settlements in the *Marburger* case may have relevance to the issue of class certification, the undersigned finds that the exact amount of the settlement received is irrelevant and unnecessary for the determination of the adequacy of the proposed class representatives and their ability to represent the class.

Finally, while Plaintiffs dispute XTO's claim that Mr. Pulliam's list is incorrect,[24] Mr.

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[24] XTO contends that the *Marburger* Settlement Class list is inaccurate because contains royalty owners who did not meet the lease-based criteria for inclusion in the *Marburger* Settlement Class. This argument was addressed and rejected *supra.*

Pulliam's lists need not be correct but need only be based on good grounds. *In re Paoli,* 35 F.3d at 744. Consequently, the undersigned finds no adjudicatory significance to the exact dollar amounts at issue.

Thus, in balancing the benefit of public transparency with the need to protect sensitive personal financial information, the undersigned finds that Plaintiffs have met their burden. Therefore, it is recommended that Plaintiffs' Motion to Approve Confidential Designation be granted and Exhibit 111 remain under seal.

**C. <u>Conclusion</u>**

Based on the foregoing, it is respectfully recommended as follows:

1. Plaintiffs' Motion for Class Certification (ECF No. 86) be granted in part pursuant to Rule 23(b)(3) and denied in part as to Rule 23(b)(2);

2. XTO's Motion to Exclude Expert Testimony of John McArthur (ECF No. 91) be granted in part and denied in part;

3. XTO's Motion to Exclude Expert Testimony of Barry Pulliam (ECF No. 92) be denied;

4. Plaintiffs' Motions to Strike the Declaration of Stephen L. Becker (ECF No. 117), Angela Paslay (ECF No. 119), and Kris L. Terry (ECF No. 121) be denied;

5. Plaintiffs' Motion to Approve Confidential Designation (ECF No. 159) be granted.

It is further recommended that Plaintiffs Roger A. Salvatora, Sandra E. Salvatora, D&M Marburger Family Enterprises, L.P., Heasley's Nurseries, Inc., and Rodney L. Lang and Bonita A. Lang be appointed as Class Representatives for Count II of the Third Amended Complaint; that Rodney L. Lang and Bonita A. Lang be appointed a Class Representative for Count III of the Third Amended Complaint; and that David A. Borkovic and Jones, Gregg, Creehan & Gerace LLP are

appointed as class counsel.

Therefore, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72, and the Local Rules for Magistrates, the parties have until June 16, 2023 to file objections to this report and recommendation. Unless otherwise ordered by the District Judge, responses to objections are due fourteen days after the service of the objections. Failure to file timely objections will constitute a waiver of any appellate rights. *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: June 2, 2023

Respectfully submitted,

s/ Cynthia Reed Eddy
United States Magistrate Judge

cc: Honorable J. Nicholas Ranjan
United States District Judge
*via electronic filing*

Attorneys of record
*via electronic filing*