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

ROGER A. SALVATORA and **SANDRA E. SALVATORA**, **D&M MARBURGER FAMILY ENTERPRISES, L.P.**, **HEASLEY'S NURSERIES, INC.**, and **RODNEY L. LANG** and **BONITA A. LANG**, individually and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No.2:19-cv-01097-CRE
XTO ENERGY INC.,	)	
Defendant.	)	

THIRD AMENDED COMPLAINT — CLASS ACTION

Plaintiffs Roger A. Salvatora and Sandra E. Salvatora, D&M Marburger Family Enterprises, L.P., Heasley's Nurseries, Inc., and Rodney L. Lang and Bonita A. Lang, individually and on behalf of all persons similarly situated, by their counsel, David A. Borkovic, Esq., file this Third Amended Class Action Complaint against XTO Energy Inc. and in support thereof allege upon personal information and upon information and belief as follows:

INTRODUCTION

1. XTO Energy Inc. ("XTO") controls operations under oil and gas leases covering much of Butler County, Pennsylvania. As part of its operations, XTO is responsible for calculating and paying royalties due on production of gas under those oil and gas leases. XTO, however, abused its position and breached its duties under the oil and gas leases of the representative plaintiffs and hundreds of class members. In particular, XTO charges excessive post-production costs against the royalties owed to the representative plaintiffs and the class members and

impermissibly charges certain royalty interest owners with post-production costs that are incurred after the gas and products have been processed and are in marketable form. Through this action, the representative plaintiffs and the class members seek to recover their losses and to obtain an order restraining such conduct in the future.

THE PARTIES

2. Plaintiffs Roger A. Salvatora and Sandra E. Salvatora, husband and wife, are citizens of the Commonwealth of Pennsylvania who reside in Mercer County, Pennsylvania.

3. Plaintiff D&M Marburger Family Enterprises, L.P. ("D&M Marburger") is a limited partnership formed under Pennsylvania law. D&M Marburger has two limited partners, Richard P. Marburger and Marcia J. Marburger. The Marburgers are citizens of the Commonwealth of Pennsylvania who reside in Butler County, Pennsylvania. D&M has one general partner, D&M Marburger GP Co., LLC. D&M Marburger GP Co., LLC has one member, Tina Marburger Hawkins who is a citizen of North Carolina. D&M Marburger is a citizen of the Commonwealth of Pennsylvania and the State of North Carolina. D&M Marburger is a successor in interest to certain oil, gas, natural gas and mineral rights formerly held by the Olive M. Marburger Living Trust.

4. Plaintiff Heasley's Nurseries, Inc., ("Heasley's Nurseries") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and maintains its principal place of business in Butler, Pennsylvania. Heasley's Nurseries is a citizen of the Commonwealth of Pennsylvania.

5. Plaintiffs Rodney L. Lang and Bonita A. Lang, husband and wife, are citizens of the Commonwealth of Pennsylvania who reside in Butler, Pennsylvania.

6. Defendant XTO Energy Inc. ("XTO") is a corporation organized and existing under

the laws of the state of Delaware. Upon information and belief, XTO's principal place of business is located at 22777 Springwoods Village Parkway, Spring, Texas 77389. XTO is a citizen of the State of Delaware and the State of Texas. XTO is a wholly owned subsidiary of Exxon Mobil Corporation. As described more fully below, XTO administers and is responsible for operations under oil and gas leases covering oil and gas interests in the Western District of Pennsylvania; it explores for and produces gas and its constituents from gas wells located in the Western District of Pennsylvania; and it pays royalties to royalty interest owners for gas produced in the Western District of Pennsylvania.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). The citizenship of the individual and representative plaintiffs is diverse from the citizenship of XTO. Upon information and belief, the number of members of the proposed plaintiff class as defined in this Amended Complaint substantially exceeds 100 and the aggregate amount in controversy exceeds $5,000,000 exclusive of interest and costs.

8. In addition, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). Mr. & Mrs. Salvatora, individually and as representative plaintiffs, are citizens of Pennsylvania. Defendant XTO is a citizen of both Delaware and Texas. The amount in controversy exceeds $75,000.00 exclusive of interest and costs.

9. This Court further has jurisdiction pursuant to 28 U.S.C. § 1332(a). Heasley's Nurseries is a citizen of Pennsylvania. Defendant XTO is a citizen of Delaware and Texas. The amount in controversy exceeds $75,000.00 exclusive of interest and costs.

10. This Court also has jurisdiction over the claims of Mr. & Mrs. Lang, who are citizens of Pennsylvania, the claims of D&M Marburger, which is a citizen of Pennsylvania and

North Carolina, and over the claims of each class member pursuant to 28 U.S.C. § 1367(a).

11. This Court also has jurisdiction by reason of continuing jurisdiction in *Marburger v. XTO Energy Inc*., Civil Action No. 2:15-cv-00910-CRE (W.D. Pa.). The relevant oil and gas leases of Mr. & Mrs. Salvatora, D&M Marburger, Heasley's Nurseries, and the *Marburger* class members were modified by Paragraph 30 of the Final Order and Judgment entered in *Marburger v. XTO Energy Inc*. (the "*Marburger* Final Order"). Under ¶ 34 of the *Marburger* Final Order, Magistrate Judge Eddy reserved and retained continuing jurisdiction for "all matters related to … the interpretation, effectuation or enforcement of … this Final Order and Judgment."

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that: (i) XTO is a resident of this District; (ii) a substantial part of the events giving rise to the claims occurred in this District; and additionally, (iii) the property that is the subject of this action is situated in this District.

EVENTS GIVING RISE TO THE CLAIMS

(a) *The Original Phillips' Proceeds Gas Leases in Marburger v. XTO Energy, Inc.*

13. At all relevant times, Phillips Exploration, Inc., Phillips Production Company, PC Exploration, Inc., TWP Inc. and Phillips Resources Inc. were affiliates. Those affiliated entities drafted and prepared a standard form oil and gas lease that each used at all relevant times, at least until the affiliates revised their leases after *Kilmer v. Elexco Land Services, Inc*., 990 A.2d 1147 (Pa. 2010). The affiliated Phillips entities prepared and used that standard form oil and gas lease for the oil and gas leases of Mr. & Mrs. Salvatora, D&M Marburger, and Heasley's Nurseries and the members of the class certified in the *Marburger* Final Order.

14. Phillips Resources, Inc., was the parent corporation of Phillips Production Company, Phillips Exploration, Inc., PC Exploration, Inc. and TWP, Inc. In June 2011, Phillips

Resources, Inc., merged into and with Exxon Mobil Corporation. In September 2011, Phillips Production Company merged with and into Phillips Exploration, Inc. which had formerly been known as PC Exploration, Inc.

15. Phillips Exploration, Inc. is a wholly owned subsidiary of XTO and holds title to the representative plaintiffs' oil and gas leases. Upon information and belief, XTO and Phillips Exploration, Inc. are parties to an agency agreement pursuant to which XTO administers and is responsible for operations under the representative plaintiffs' oil and gas leases that are attached as Exhibits A through K to the Complaint. Plaintiffs incorporate by reference as though attached hereto Exhibits A through K of the Complaint, ECF Documents 1.2 through 1.12.

16. Phillips Production Company, Phillips Exploration, Inc., PC Exploration, Inc., TWP Inc and Phillips Resources Inc., each used oil and gas leases which contained the same gas royalty provision as is contained in the standard printed form oil and gas leases of the representative plaintiffs, and XTO administers and is responsible for operations under those oil and gas leases. The oil and gas leases of Mr. & Mrs. Salvatora, D&M Marburger, and Heasley's Nurseries in their original form (the "Original Phillips Gas Leases") did not explicitly permit the deduction of post-production expenses in calculating royalties due under those leases though they were modified by the *Marburger* Final Order.

(i) Mr. & Mrs. Salvatora

17. Mr. & Mrs. Salvatora own approximately 158.362 acres of oil and gas interests located in Summit Township, Butler County, Pennsylvania. They entered into a standard form oil and gas lease dated March 17, 2010, which became effective December 19, 2010, with Phillips Exploration, Inc., that covered approximately 158.362 acres of land located in Summit Township, Butler County, Pennsylvania (the "Salvatora Gas Lease"). A true and correct copy of the Salvatora

Gas Lease is attached to the Complaint as Exhibit A, ECF Document 1.2 and is incorporated herein.

18. Under the standard printed form Salvatora Gas Lease, Phillips Exploration, Inc., promised to pay Mr. & Mrs. Salvatora a royalty equal to 14% of the total proceeds Phillips Exploration, Inc., received for all gas sold under the lease less only Mr. & Mrs. Salvatora's pro rata share of any severance or excise tax. Specifically, the Salvatora's Gas Lease provided:

> "Should any well not produce oil, but produce gas … and the gas produced therefrom be sold off the said premises, the consideration to said lessor for the gas from each well completed and from which well gas is produced, metered and sold shall be as follows:
>
> Royalty equal to fourteen percent (14%) of the proceeds received from time to time by lessee for all gas … produced, metered and sold, less lessor's pro rata share of any severance or excise tax imposed by any governmental body. Payment of said royalty shall be made on or about the 25th day of the month for all gas produced, metered and sold during the preceding month."

(Exhibit A, p.2)

19. XTO has produced and sold gas under the terms of the Salvatora Gas Lease and has paid royalties to Mr. & Mrs. Salvatora for such gas. The gas produced under the Salvatora Gas Lease was and is gathered by Mountain Gathering LLC on its Jefferson, Forward and/or AK Steel gathering segments.

20. At all relevant times, XTO administered and has been responsible for operations under Original Phillips Gas Leases and the payment of royalties under those leases.

21. XTO deducted post-production expenses in calculating and paying royalties under the Salvatora Gas Lease and the other Original Phillips Gas Leases.

22. In *Marburger v. XTO Energy Inc.*, No. 2:25-cv-00910-CRE, certain royalty interest owners through a class action challenged XTO's deduction of post-production expenses when calculating royalties under the Original Phillips Gas Leases. After discovery and briefing about

class certification, the parties reached a settlement and compromise under which this Court certified a settlement class and approved the settlement among the representative plaintiffs, the plaintiff class and XTO. Conceptually, the parties agreed that (i) XTO would pay essentially the entire amount of the deductions it had netted-out from royalty payments under the Original Phillips Gas Leases, and (ii) XTO could deduct certain post-production costs going forward.

23. By Final Order and Judgment dated March 27, 2018, this Court approved the Settlement and entered the following provision which modified the royalty provision in the Original Phillips Gas Leases:

> 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 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 attributable to Settlement Class members' Phillips Standard Leases, the Settlement Class members will bear their proportionate share of such post-production costs. This provision shall not affect any other provision of the Settlement Class members' Phillips Standard Proceeds Leases.

Marburger v. XTO Energy Inc., *supra*, Document 85 at p. 7 ¶ 30 (the "*Marburger* Final Order Modification"). Under this provision, XTO essentially calculates royalty payments based upon the wellhead price under the leases.

24. Mr. & Mrs. Salvatora were members of the settlement class; the Salvatora Gas Lease is and was subject to the *Marburger* Final Order Modification; and XTO has paid royalties to Mr. & Mrs. Salvatora after the *Marburger* Final Order Modification became effective.

(ii) <u>D&M Marburger</u>

25. The Olive M. Marburger Living Trust entered into a standard form oil and gas lease with Phillips Production Company that covered approximately 97.697 acres of land located in

Forward Township, Butler County, Pennsylvania (the "Marburger 97 Acre Gas Lease"). A true and correct copy of the Marburger 97 Acre Gas Lease, which states that it is dated February 8, 2007, together with a Lease Modification Agreement, is attached to the Complaint as Exhibit B, ECF Document 1.3 and is incorporated herein. Phillips Production Company had drafted and prepared said standard form oil and gas lease.

26. Under the Marburger 97 Acre Gas Lease, Phillips Production Company promised to pay the Trust a royalty equal to 1/8 of the total proceeds Phillips Production Company received for all gas sold under the lease, less only the Trust's pro rata share of any severance or excise tax. Specifically, the Marburger 97 Acre Gas Lease provides:

> Should any well not produce oil, but produce gas … and the gas produced therefrom be sold off the said premises, the consideration to said lessor for the gas from each well completed and from which well gas is produced, metered and sold shall be as follows:
>
> Royalty equal to one-eighth (1/8) of the proceeds received from time to time by lessee for all gas … produced, metered and sold, less lessor's pro rata share of any severance or excise tax imposed by any governmental body. Payment of said royalty shall be made on or about the 25th day of the month for all gas produced, metered and sold during the preceding month.

(Exhibit B, p.1)

27. The Olive M. Marburger Living Trust also entered into a standard form oil and gas lease with Phillips Production Company that covered approximately 58.11 acres of land located in Forward Township, Butler County, Pennsylvania (the "Marburger 58 Acre Gas Lease"). A true and correct copy of the Marburger 58 Acre Gas Lease, which states that it is dated February 15, 2007, together with a Lease Modification Agreement and an amendment, is attached to the Complaint as Exhibit C, ECF Document 1.4 and is incorporated herein. Phillips Production Company had drafted and prepared said standard form oil and gas lease.

28. Like the Marburger 97 Acre Gas Lease, Phillips Production Company under the

Marburger 58 Acre Gas Lease promised to pay the Trust a royalty equal to 1/8 of the total proceeds Phillips Production Company received for all gas sold under the lease, less only the Trust's pro rata share of any severance or excise tax. The Marburger 58 Acre Gas Lease contains the same royalty provision as the Marburger 97 Acre Gas Lease quoted above.

29. XTO has produced and sold gas under the terms of the Marburger 97 Acre and the Marburger 58 Acre Gas Leases and paid royalties to the Olive M. Marburger Living Trust for such gas. The gas produced under the Marburger 97 Acre and the Marburger 58 Acre Gas Leases was and is gathered by Mountain Gathering LLC on its Jefferson, Forward and/or AK Steel gathering segments.

30. At all relevant times, XTO administered and has been responsible for operations under the Marburger 97 Acre and the Marburger 58 Acre Gas Leases and the payment of royalties under those leases.

31. XTO deducted post-production expenses in calculating and paying royalties under the Marburger 97 Acre and the Marburger 58 Acre Gas Leases and the other Original Phillips Gas Leases.

32. The Marburger 97 Acre and the Marburger 58 Acre Gas Leases are and were subject to the *Marburger* Final Order Modification, and XTO has paid royalties under those leases after the *Marburger* Final Order Modification became effective. D&M Marburger is a successor in interest to the Olive M. Marburger Living Trust's interests in the Marburger 97 Acre and the Marburger 58 Acre Gas Leases.

(iii) <u>Heasley's Nurseries</u>

33. Heasley's Nurseries entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered

approximately 326.438 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 326 Acre Gas Lease"). A true and correct copy of the Heasley 326 Acre Gas Lease is attached to the Complaint as Exhibit D, ECF Document 1.5 and is incorporated herein.

34. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 50.01 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 50 Acre Gas Lease"). A true and correct copy of the Heasley 50 Acre Gas Lease is attached to the Complaint as Exhibit E, ECF Document 1.6 and is incorporated herein.

35. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 27 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 27 Acre Gas Lease"). A true and correct copy of the Heasley 27 Acre Gas Lease is attached to the Complaint as Exhibit F, ECF Document 1.7 and is incorporated herein.

36. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 16.31 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 16 Acre Gas Lease"). A true and correct copy of the Heasley 16 Acre Gas Lease is attached to the Complaint as Exhibit G, ECF Document 1.8 and is incorporated herein.

37. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 13 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 13 Acre Gas Lease"). A true and correct copy of the Heasley 13 Acre Gas Lease is

attached to the Complaint as Exhibit H, ECF Document 1.9 and is incorporated herein.

38. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 10.05 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 10 Acre Gas Lease"). A true and correct copy of the Heasley 10 Acre Gas Lease is attached to the Complaint as Exhibit I, ECF Document 1.10 and is incorporated herein.

39. Heasley's Nurseries also entered into a standard form oil and gas lease dated October 27, 2009, which became effective January 29, 2010, with Phillips Exploration, Inc., that covered approximately 7.44 acres of land located in Summit Township, Butler County, Pennsylvania (the "Heasley 7 Acre Gas Lease"). A true and correct copy of the Heasley 7 Acre Gas Lease is attached to the Complaint as Exhibit J, ECF Document 1.11 and is incorporated herein. (Exhibits D through J shall be known collectively as the "Heasley's Nurseries' Gas Leases")

40. Under each of the standard printed form oil and gas leases with Heasley's Nurseries, Phillips Exploration, Inc., promised to pay Heasley's Nurseries a royalty equal to 12.5% of the total proceeds Phillips Exploration, Inc., received for all gas sold under the lease less only Heasley's Nurseries' pro rata share of any severance or excise tax. Specifically, each of the attached oil and gas leases between Heasley's Nurseries and Phillips Exploration, Inc., provided:

> Should any well not produce oil, but produce gas … and the gas produced therefrom be sold off the said premises, the consideration to said lessor for the gas from each well completed and from which well gas is produced, metered and sold shall be as follows:
>
> Royalty equal to one-eighth (1/8) of the proceeds received from time to time by lessee for all gas … produced, metered and sold, less lessor's pro rata share of any severance or excise tax imposed by any governmental body. Payment of said royalty shall be made on or about the 25th day of the month for all gas produced,

metered and sold during the preceding month."

(See Exhibit D, p.3)

41. XTO has produced and sold gas under the terms of the Heasley's Nurseries' Gas Leases and paid royalties to Heasley's Nurseries for such gas. The gas produced under the Heasley's Nurseries' Gas Leases was and is gathered by Mountain Gathering LLC on its Jefferson, Forward and/or AK Steel gathering segments.

42. At all relevant times, XTO administered and has been responsible for operations under the Heasley's Nurseries' Gas Leases and the payment of royalties under those leases.

43. XTO deducted post-production expenses in calculating and paying royalties under the Heasley's Nurseries' Gas Leases and the other Original Phillips Gas Leases.

44. The Heasley's Nurseries' Gas Leases are and were subject to the *Marburger* Final Order Modification, and XTO has paid royalties under those leases after the *Marburger* Final Order Modification became effective.

(b) *The Post-Kilmer Phillips' Proceeds Gas Leases*

45. Mr. & Mrs. Lang entered into a standard form oil and gas lease dated October 18, 2011, with Phillips Exploration, Inc., that covered approximately 48.64 acres of land located in Jefferson Township, Butler County, Pennsylvania (the "Lang Gas Lease"). A true and correct copy of the Lang Gas Lease is attached to the Complaint as Exhibit K, ECF Document 1.12 and is incorporated herein.

46. Phillips Exploration, Inc., or one of its affiliates drafted and prepared the standard form oil and gas lease with Mr. & Mrs. Lang that is attached as Exhibit K.

47. Under the Lang Gas Lease, Phillips Exploration, Inc., promised to pay Mr. & Mrs. Lang a royalty equal to 15% of the total proceeds Phillips Exploration, Inc. received for all gas sold under the lease. Specifically, the Lang Gas Lease provides:

> Should any well not produce oil, but produce gas and the gas produced therefrom be sold off the said premises, the consideration to said lessor for the gas from each well completed and from which well gas is produced, metered and sold shall be as follows:
>
> Royalty equal to 15% of the proceeds received from time to time by lessee for all gas produced, metered and sold. Lessor shall be responsible for their pro rata share of any severance or excise tax imposed by any governmental body that is specifically established to be the responsibility of Lessor; Lessee shall be responsible for any severance or excise tax imposed by any governmental body that is specifically established to be the responsibility of Lessee. Payment of said royalty shall be made on or about the 25th day of the month for all gas produced, metered and sold during the preceding month.

(Exhibit K, p. 2)

48. The Lang Gas Lease, however, also addressed costs in a so-called "Market Enhancement Clause" that was drafted by Phillips Exploration, Inc. and provides:

> 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 marketing the oil, gas or other products produced hereunder to transform the product into marketable form.

(Exhibit K, p.3)

49. XTO and the Phillips entities adopted and incorporated the above "Market Enhancement" clause contained in the Lang Gas Lease or provisions with essentially identical language as a standard provision in Phillips/XTO oil and gas leases that were signed shortly after the decision in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010). For example, Phillips/XTO also used the following "Market Enhancement" provision in certain oil and gas leases:

> 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 the 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.

This provision differs only slightly from the Market Enhancement clause in the Lang Gas Lease because it uses "shall be the net of Lessor's proportionate share ..." as opposed to "shall be net of Lessor's proportionate share." Another form of "Market Enhancement" clause stated as follows in addenda to Phillips/XTO oil and gas leases:

> Market Enhancement 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 producing, 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.

This "Market Enhancement" clause is essentially identical to the others quoted above. As used in this Amended Complaint, a Market Enhancement clause is essentially identical to the provision in Mr. & Mrs. Lang's lease if it states that the royalties shall be net of lessor's proportion share of identified post-production costs in order to transform the product into "marketable form."

50. XTO has produced and sold gas under the terms of the Lang Gas Lease and paid royalties to Mr. & Mrs. Lang. The gas produced under the Lang Gas Lease was and is gathered by Mountain Gathering LLC on its Jefferson, Forward and/or AK Steel gathering segments.

51. At all relevant times, XTO administered and has been responsible for operations under the Lang Gas Lease.

52. XTO has deducted post-production expenses in calculating and paying royalties under the Lang Gas Lease and other Phillips/XTO leases that contain the "Market Enhancement" clause found in the Lang Gas Lease or that use substantially identical language and that base royalties on proceeds of a sale.

53. Mr. & Mrs. Lang were not members of the class certified in *Marburger v. XTO Energy Inc*., No. 2:25-cv-00910-CRE because their gas lease expressly permitted XTO to deduct certain post-production expenses, and they were not subject to the *Marburger* Final Order Modification. Other lessors similarly situated to Mr. & Mrs. Lang in that they had Phillips/XTO

oil and gas lease that contained a "market enhancement" provision and that based royalties on proceeds of sale were similarly not included in the class certified in *Marburger v. XTO Energy Inc*.

54. At all relevant times after January 3, 2012, XTO calculated and paid royalties under the oil and gas leases attached as Exhibits A through K to this Amended Complaint and those of the class members.

Late Royalty Payments

55. [Withdrawn by removal of Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.]

56. [Withdrawn by removal of Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.]

Excessive Post-Production Costs

57. As described above, XTO was permitted to deduct certain post-production costs in calculating the royalties due (i) under the leases subject to the *Marburger* Final Order Modification and (ii) under leases that contained a Market Enhancement provision.

58. In calculating royalties for plaintiffs and the class members, XTO does not sell gas on a well-by-well basis. XTO's marketing agreements that cover gas gathered by the Jefferson, Forward and AK Steel gathering segments of Mountain Gathering LLC in Butler County, Pennsylvania, are not well-specific but rather apply to the comingled gas on those systems. Gas from wells connected to the Jefferson, Forward and AK Steel gathering segments is not sold at the well. XTO averages its sales over a large area in a month to arrive at a single monthly price for all commingled gas sold at the same point.

59. XTO similarly does not compute post-production costs on a well by well basis. As

is standard in the industry, it determines its annual post-production costs for a large area, typically a field, and then allocates or distributes those costs to all wells in the covered area.

60. Mountain Gathering, LLC, ("Mountain Gathering") is a limited liability company organized and existing under the laws of the State of Delaware. At all relevant times, Mountain Gathering was a wholly owned subsidiary of XTO.

61. Mountain Gathering provides gathering services and processing services for oil and gas, including gathering on its Jefferson, Forward and AK Steel gathering segments and processing services in Butler County, Pennsylvania. Mountain Gathering's charges for gathering and processing and associated services for the Jefferson, Forward and AK Steel gathering segments are set forth in a Gas Gathering Agreement between Mountain Gathering, LLC, and XTO Energy Inc. dated January 1, 2013, as amended.

62. At all relevant times, XTO engaged Mountain Gathering to provide gathering and processing services in connection with the operations under the representative plaintiffs' oil and gas leases. XTO owned and controlled Mountain Gathering, and the prices XTO paid to Mountain Gathering for gathering and processing were not determined as a result of arms' length negotiations and did not represent reasonable, competitive prices. The prices that Mountain Gathering and XTO agreed would be paid to Mountain Gathering for gathering and processing services under a certain Gas Gathering Agreement between Mountain Gathering, LLC and XTO Energy Inc. dated January 1, 2013, as amended, were excessive and substantially above prices that would have been determined as a result of arms' length negotiations.

63. By way of illustration and not limitation, Rex Energy and its successor in interest, PennEnergy, produce gas under oil and gas leases covering areas that are near or essentially adjacent to XTO's operations in Butler County and produce gas that is substantially the same as

XTO's gas. PennEnergy/Rex Energy deducts approximately 24% to 25% of the proceeds as expenses; XTO's deductions normally exceed 36% of the proceeds from the sale of gas. XTO deducts 50% more in post-production costs than does PennEnergy/Rex Energy. Moreover, XTO's processing charges substantially exceed normal processing charges. A third party, MarkWest, gathers and processes the same gas in Butler County that Mountain Gathering processes at its PennCryo plant, but MarkWest charges substantially less than does XTO/Mountain Gathering. MarkWest's charges are not disputed by plaintiffs.

64. XTO deducts unreasonable, excessive post-production costs when it calculates royalties (i) under the leases subject to the *Marburger* Final Order Modification and (ii) under leases that contained a Market Enhancement provision.

65. By deducting unreasonable, excessive post-production costs in calculating royalties, XTO underpaid royalties to lessors and shifted some of the post-production costs from it to plaintiffs and the class members.

66. XTO has a duty to perform the oil and gas leases in good faith.

67. XTO could only deduct reasonable post-production permitted costs when computing royalties under the Salvatora Gas Lease, the Marburger 97 Acre, the Marburger 58 Acre, the Heasley's Nurseries' Gas Leases, the Lang Gas Lease, and oil and gas leases of the class members.

68. XTO could only deduct reasonable post-production permitted costs when calculating royalties under (i) the leases subject to the *Marburger* Final Order Modification, and (ii) the leases that contained a Market Enhancement provision.

69. XTO has breached the Salvatora Gas Lease, the Marburger 97 Acre, the Marburger 58 Acre, the Heasley's Nurseries' Gas Leases, the Lang Gas Lease, and the leases of the other

class members by deducting unreasonably high post-production permitted costs when calculating royalties at all relevant times.

Deduction of Post-Production Costs Under Market Enhancement Leases After the Product Was Marketable

70. Under the terms of the Lang Gas Lease, XTO was required to pay royalties without deducting any transportation or other costs after the tailgate of the processing plant.

71. XTO breached the Lang Gas Lease and the leases of those class members whose leases contain a Market Enhancement provision when it deducted transportation and/or other costs incurred after the tailgate of the processing plant in calculating royalties.

72. [Withdrawn by removal of Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.]

73. [Withdrawn by removal of Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.]

74. At all relevant times plaintiffs have acted in good faith and have otherwise complied with all obligations under the above oil and gas leases.

75. Plaintiffs and the members of the class have been injured by the conduct of XTO described herein.

CLASS ACTION ALLEGATIONS

76. Plaintiffs bring this action as a class action pursuant to Fed.R.Civ.P. 23, including Rules 23(a), 23(b)(3) and 23(b)(2).

77. Plaintiffs withdraw Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.

78. Plaintiffs bring Count II on behalf of themselves and the following class:

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) (i) who was either a member of the settlement class in *Marburger v. XTO Energy Inc*., Civil Action No. 2:15-cv-910-CRE (W.D.Pa.) ("*Marburger*"), or (ii) whose oil and gas lease based the royalty on a percentage of proceeds and contained a Market Enhancement Clause. ["Market Enhancement Clause" is defined in Paragraph 79 of this Third Amended Complaint.] The Class for Count II excludes:

> (i) any claims for any member of the settlement class in *Marburger v. XTO Energy Inc*., Civil Action No. 2:15-cv-00910-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 make the production saleable, increase its value, or get the production to a market. (Such lease is an "ABC Lease")

79. Plaintiffs Rodney & Bonita Lang bring Count III on behalf of themselves and the following class (the "Market Enhancement Class"):

> 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 (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."
>
> 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.

80. The prerequisites for class certification under Fed.R.Civ.P. 23(a) are met in that, among other things,

(A) The members of each class are so numerous that joinder of all class members is impractical. Plaintiffs believe and aver that each class contains substantially more than 100 members. The precise number of class members and their identities can be ascertained from the records of XTO and its subsidiaries and affiliates.

(B) The claims of the representative plaintiffs raise questions of law and fact common to all class members.

(1) Plaintiffs withdraw Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.

(2) Among the questions of law and fact that are common to the class in Count II are the following:

(i) Whether transactions between affiliates must be evaluated against

arm's length transactions and market prices;

(ii) Whether XTO has deducted and is deducting excessive charges for gathering and processing the class members' gas;

(iii) Whether XTO breached the royalty provision in the class members' leases, whether as amended by ¶ 30 of the Final Order or the Market Enhancement provision, when it charged excessive amounts for gathering and processing services performed by Mountain Gathering;

(iv) The amount of the excessive charges for gathering and processing;

(v) If denied by XTO whether Mountain Gathering/XTO used the same unit charges for gathering and processing for each class member in Count II;

(vi) Whether damages under Count II can be determined on a class basis;

(vii) Whether XTO acted honestly and in good faith in determining post-production costs it deducted in determining royalties and specifically in agreeing upon prices that it would pay Mountain Gathering for gathering and processing;

(viii) Whether XTO breached the class' oil and gas leases by deducting excessive, unreasonably high post-production costs in determining the class members' royalties;

(ix) Whether XTO and Mountain Gathering agreed upon the gathering and processing prices in order to inflate the purported post-production costs and thereby shift a portion of such costs from XTO to the class members; and

(x) Whether a declaratory judgment and injunctive relief are necessary to protect the interests of the class.

(3) Among the questions of law and fact that are common to the class in Count III are the following:

(i) Whether XTO acted honestly and in good faith when it deducted transportation and other expenses in determining the class members' royalties;

(ii) Whether XTO breached the Phillips oil and gas leases that contained the Market Enhancement provision when it deducted post-production costs after the class members' gas had been transformed into marketable form;

(iii) Whether XTO deducted post-production expenses for the Count III class members' gas after the products obtained marketable form;

(iv) The measure of damages for the class; and

(v) Whether a declaratory judgment and injunctive relief are necessary to protect the interests of the class.

(C) The claims of the class representatives are typical of, if not identical to, the claims of each class member of the class because the representative plaintiffs and all class members executed the same core standard form oil and gas leases with Phillips and because all class members' claims in each applicable Count arise out of the same relevant portion of the standard form oil and gas lease.

(D) The representative plaintiffs will fairly and adequately protect the interests of all class members. They have retained competent counsel who is experienced in complex litigation, including class action litigation related to oil and gas leases, and who

will prosecute this action vigorously. Representative plaintiffs will fairly and adequately assert and protect the interests of the class. They do not have any interests antagonistic to or in conflict with the applicable class; their interests are antagonistic to the interests of XTO; and they will vigorously pursue the claims of the class. Representative plaintiffs have adequate financial resources to vigorously pursue this action, including an agreement by their counsel to prosecute this action on a contingent fee basis and to advance reasonable and necessary costs and expenses of litigation.

81. Each of Counts II and III of this Third Amended Complaint may be maintained as a class action under Fed.R.Civ.P. 23(b)(3) because the questions of law and fact common to the members of each class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The pertinent factors under Rule 23(b)(3) that demonstrate that a class action is a superior method of litigating this controversy include:

(A) The class members' interests in individually controlling the prosecution or defense of separate actions: In view of the complexities and expense of litigation, it is impractical for class members to bring separate actions, and there is no reason to believe that the class members desire to proceed separately. Moreover, there is a danger of inconsistent decisions interpreting the same lease if individual actions are pursued;

(B) The nature and extent of any litigation concerning the controversy already begun by or against class members: To plaintiffs' knowledge, no other cases are pending against XTO concerning the class members' claims, and thus, certification is appropriate on the grounds of judicial economy. Absent class certification, a significant number of additional individual claims may be filed and pursued causing a burden on judicial

resources;

(C) The desirability or undesirability of concentrating the litigation of the claims in this forum: The Western District of Pennsylvania is the most desirable forum to concentrate all litigation concerning the class members' claims because most, if not all, of the gas leases concern land located in this District; Phillips was headquartered in this District before the Exxon Mobil acquisition; most, if not all, of the transactions took place in this District; and material witnesses are located in this District. There is no better forum;

(D) The likely difficulties in managing a class action: This case presents no unusual management difficulties, and to the contrary, is ideally suited to class treatment. The claims involve matters of contract based on the same or virtually identical contractual provisions. Moreover, the size of the class is too large for individual litigation but not so large as to present an obstacle to manageability as a class action;

(E) This Court has already determined that class action treatment was superior as to the class certified in the *Marburger* Final Order; and

(F) The classes can be ascertained.

82. Each of Counts II and III of this Third Amended Complaint seek declaratory and injunctive relief, and each may be maintained as a class action under Fed.R.Civ.P. 23(b)(2) because the prerequisites of Fed.R.Civ.P. 23(a) are satisfied and because XTO acted or refused to act on grounds that apply generally to the classes so that final injunctive and declaratory relief is appropriate for each class as a whole.

COUNT I

83 – 90. Plaintiffs withdraw Count I because the cost to prosecute Count I may exceed the amount of reasonably recoverable damages.

COUNT II

91. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 90 of this Amended Complaint.

92. At all relevant times, XTO was permitted to deduct certain reasonable post-production costs when it calculated and paid royalties under oil and gas leases of plaintiffs and the Count II class members.

93. XTO had to perform its obligations to pay royalties to the individual plaintiffs and the class members in good faith and consistent with its duty of fair dealing.

94. 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. Such affiliate transactions are to be disregarded, and only reasonable amounts for gathering, processing and other costs can be deducted in the royalty calculations under the plaintiffs' and the Count II class members' oil and gas leases.

95. 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.

96. Plaintiffs and the class members have been harmed because of XTO's deduction of unreasonably high post-production costs from the royalties due plaintiffs and the class members.

WHEREFORE, representative plaintiffs demand the following for themselves and the Count II plaintiff class against XTO:

(A) That the Court certify the above-described class;

(B) That judgment be entered in favor of representative plaintiffs and the Count II

plaintiff class and against XTO Energy Inc. for all compensatory losses and damages allowed by law, including prejudgment and post-judgment interest;

(C) That the Court enter an Order declaring that XTO breached the oil and gas leases and enjoining XTO from deducting unreasonably high costs from affiliate transactions when calculating royalties;

(D) That the Court award counsel fees; and

(E) That the Court award costs and expenses of litigation and such other further relief as may be just and appropriate.

COUNT III

97. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 96 of this Amended Complaint.

98. At all relevant times, XTO has been responsible for operations and for paying royalties under the oil and gas leases of Mr. & Mrs. Lang and the Count III class members whose gas was gathered on the Jefferson, Forward and AK Steel gathering segments of Mountain Gathering's gathering system.

99. XTO had to perform its obligations to pay royalties to the individual plaintiffs and the class members in good faith and consistent with its duty of fair dealing.

100. At all relevant times, the class members' gas and constituents were marketable at or by the tailgate of the processing plant.

101. Under the terms of the oil and gas leases of Mr. & Mrs. Lang and the Count III class members, *i.e.*, those with Market Enhancement provisions, XTO was not permitted to deduct such transportation and other costs incurred after the tailgate of the processing plant in determining royalties.

102. At all relevant times, XTO deducted such transportation and other costs from the royalties it paid Mr. & Mrs. Lang and the Count III class members.

103. XTO breached the leases of Mr. & Mrs. Lang and the Count III class members.

104. Mr. & Mrs. Lang and the Count III class members have been harmed because of XTO's deduction of transportation and other costs from the royalties due plaintiffs and the class members.

WHEREFORE, representative plaintiffs demand the following for themselves and the Count III class members against XTO:

(A) That the Court certify the above-described class;

(B) That judgment be entered in favor of representative plaintiffs and the Count III plaintiff class and against XTO Energy Inc. for all compensatory losses and damages allowed by law, including prejudgment and post-judgment interest;

(C) That the Court enter an Order declaring that XTO breached the oil and gas leases and enjoining XTO from deducting transportation and other costs when calculating royalties for Mr. & Mrs. Lang and the Count III class members;

(D) That the Court award counsel fees; and

(E) That the Court award costs and expenses of litigation and such other further relief as may be just and appropriate.

Dated: January 28, 2022

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all issues so triable.

/s/ David A. Borkovic
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Second Amended Complaint – Class Action was served this 28th day of January 2022, upon all counsel of record through the Court's electronic filing system to:

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