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

DOUGLAS KRILEY, *et al.*,;	Civil Action No.: 2:20-CV-00416-CBB-WSS
Plaintiffs,	
vs.	William S. Stickman IV United States District Judge
XTO ENERGY INC.,	Christopher B. Brown United States Magistrate Judge
Defendant.	

REPORT AND RECOMMENDATION
ON MOTION TO CERTIFY CLASS ECF No. 96

Christopher B. Brown, United States Magistrate Judge.

I. Recommendation

This civil action was initiated by Plaintiff[1] putative class members (collectively "Plaintiffs") against Defendant XTO Energy Inc. ("XTO") for alleged breaches of natural gas royalty leases. Presently before the Court is a motion to certify the class pursuant to Fed. R. Civ. P. 23. ECF No. 96. The motion is fully briefed. ECF Nos. 91, 97, 98. A class certification hearing was held on June 17, 2025. ECF No. 131. The Court ordered supplemental briefing, which the parties submitted. ECF Nos. 137, 138. The matter is ripe for consideration. The Court has jurisdiction pursuant to 28 U.S.C. § 1332(d).

[1] Plaintiffs include Douglas Kriley and Tina Kriley (the "Krileys"), Thomas A. Michel and Carol L. Michel (the "Michels"), Geraldine C. Wiefling, and Charles E. Waddingham, II and Carol G. Waddingham (the "Waddinghams").

For the reasons that follow, it is respectfully recommended that Plaintiffs' motion for class certification be granted in part with respect to Fed. R. Civ. P. 23(b)(3) and denied in part with respect to Fed. R. Civ. P. 23(b)(2) and the Court certify the following class:

Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with XTO 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, (c) whose oil and gas lease states that XTO is

> to pay Lessor as a royalty, for the native gas and casinghead gas or other gaseous substances (including shale gas), produced from said land and sold or used beyond the well or for the extraction of gasoline or other product, an amount equal to [X] percent ([X]%) of the sales proceeds actually received by Lessee from the sale of such production, less [X] percent ([X]%) of all "Post Production Costs" as defined below, less [X] percent ([X]%) of any and all taxes, including without limitation, production, severance, and ad valorem taxes. As used in this provision, Post Production Costs shall include, without limitation, (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise) and (ii) all costs actually incurred by Lessee 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.

or includes essentially identical language, and (d) who had post-production charges deducted from their royalty payment(s) in accordance with the above language.

The United States and the Commonwealth of Pennsylvania are excluded from the classes.

II. Report

a. Background

XTO is a wholly owned subsidiary of Exxon Mobil Corporation and explores for and produces natural gas from gas wells in western Pennsylvania. ECF No. 30 at ¶ 6. Plaintiffs and putative class members are landowners who entered into leases with XTO conveying rights to XTO to produce natural gas on their land. *Id.* at ¶ 1. In exchange, Plaintiffs receive royalty payments for a percentage of the sales proceeds from the gas produced on their land. *Id.* at ¶ 1.

Gas Production

As part of these operations, XTO collects gas from individual wells on the leased properties and moves the gas through a network of pipelines to a central location – a process referred to in industry parlance as "gathering." *Id.* at ¶¶ 35-36. XTO does not perform this "gathering" process, but outsources this process to its wholly owned subsidiary, Mountain Gathering, LLC. *Id.* at ¶¶ 38-39. Mountain Gathering maintains a gathering pipeline system which gathers the natural gas produced from the Plaintiffs' and putative class members' wells on three relevant gathering segments: the Jefferson, Forward and AK Steel gathering segments. *Id.* at ¶ 39. Once the gas moves through the pipeline to the Mountain Gathering segments, it is commingled, or mixed together, with all the gas produced from the other wells connected to the segment and the gas cannot be traced back to an individual well. ECF No. 97 at 4. The gas is then commingled with gas from other segments and is processed by Mountain Gathering at its PennCryo processing plant. *Id.* at 4-5. "Processing" includes the process of separating the natural gas

liquid from residue gas referred to as "dry" gas. *Id.* at 5. The residue gas, which is methane or home heating gas, is delivered into a pipeline. *Id.* The natural gas liquid is further transported to a third-party fractionation plant operated by MarkWest Liberty Midstream & Resources, LLC ("MarkWest") where it is further broken down into ethane, propane, butane, natural gasoline and heavier hydrocarbons. *Id.* Mountain Gathering's PennCryo plant can process 125 million cubic feet of natural gas per day. *Id.* If the volume of gas from the Jefferson, Forward and AK Steel gathering segments exceeds the PennCryo plant's processing capacity, the excess gas is processed at the MarkWest plant. *Id.*

The Royalty Provision and the Class Claims

Plaintiffs entered into leases with XTO between 2014 and 2017 to produce gas on their land. ECF No. 30 at ¶¶ 13, 17, 21, 25. Each lease includes a royalty provision[2] in which XTO pays Plaintiffs a royalty equal to 15% of the sales proceeds

[2] The royalty provisions in Plaintiffs' leases provide that XTO agrees "to pay Lessor as a royalty, for the native gas and casinghead gas or other gaseous substances (including shale gas), produced from said land and sold or used beyond the well or for the extraction of gasoline or other product, an amount equal to fifteen percent (15%) of the sales proceeds actually received by Lessee from the sale of such production, less fifteen percent (15%) of all 'Post Production Costs' as defined below, and less fifteen percent (15%) of any and all taxes, including without limitation, production, severance, and ad valorem taxes. As used in this provision, Post Production Costs shall include, without limitation, (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise) and (ii) all costs actually incurred by Lessee 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. Lessor acknowledges and agrees that this lease (i) expressly provides that the Lessor shall bear part of the costs incurred between the wellhead and the point of sale, (ii) identifies with particularity the specific deductions Lessee intends to take from the royalty, and (iii) indicates the method of calculating the amount to be deducted from the royalty for Post Production Costs[.]" ECF No. 30 at ¶¶ 15, 19, 23, 27.

XTO actually receives less 15% of all post-production costs[3] and applicable taxes (the "Royalty Provision"). *Id*. at ¶¶ 15, 19, 23, 27. Under the Royalty Provision, XTO is permitted to deduct a percentage of the post-production costs from Plaintiffs' royalties, which includes deducting a percentage of the costs incurred for gathering and processing the gas. *Id*.

According to Plaintiffs, because Mountain Gathering is a wholly owned subsidiary of XTO, the costs XTO paid to Mountain Gathering for gathering and processing gas were not determined as a result of an arms' length transaction and do "not represent reasonable, market-based, competitive prices." *Id*. at ¶ 40. Plaintiffs maintain XTO deducts excessive gathering and processing post-production costs from their royalties that are "substantially above prices" a third-party would have charged for the same services. *Id*. at ¶¶ 40-43; ECF No. 97 at 6. For example, Plaintiffs maintain that another natural gas producer that produces gas near or adjacent to XTO's operations in Butler deducts approximately 24% to 25% from the sales proceeds as expenses, whereas XTO's deductions average in excess of 36% from the sale of the Plaintiffs' gas. ECF No. 30 at ¶ 41. Plaintiffs maintain that Mountain Gathering alone determines the fees it charges XTO for gathering and processing, there were no negotiations between the entities over the

[3] In addition to the lease definition, Pennsylvania law considers "post-production costs" as those expenditures from when the gas exits the ground until it is sold. *Kilmer v. Elexco Land Services, Inc*., 990 A.2d 1147, 1157 (Pa. 2010) (post-production costs include "the costs of getting the product from the wellhead to the point of sale"). Such costs usually involve those incurred to make the gas marketable like gathering, the cost of processing the gas and transporting the gas to market for sale, as outlined above. *Id.*

price, and it charges third parties significantly less that it charges XTO for the same services. ECF No. 97 at 5-6.

Plaintiffs claim that XTO has a duty to calculate royalties in good faith and only deduct reasonable post-production costs from their royalties. *Id.* at ¶¶ 44-45. Plaintiffs claim that the wholly owned subsidiary relationship between XTO and Mountain Gathering caused XTO to pay more for gathering and processing costs and passed those higher prices onto Plaintiffs when it deducted these "unreasonably high costs" from their royalties, and in doing so, XTO did not act in good faith and breached their leases. *Id.* at ¶¶ 61-62. This lawsuit followed, and Plaintiffs seek to recover the excessive deductions from their royalties.[4]

b. Fed. R. Civ. P. 23: Applicable Law and Modifying the Proposed Class Definition

As a threshold matter, Fed. R. Civ. P. 23(c)(1)(B) "requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 184 (3d Cir. 2006). A court must set forth "(1) a readily discernable, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernable, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Id.* at 187–88. While Plaintiffs have adequately defined the issues for class treatment, *i.e.*, whether XTO

[4] Plaintiffs originally included a claim against XTO for its failure to pay royalties. *See* ECF No. 30 at ¶¶ 31-33. Plaintiffs confirmed that after this action was initiated, XTO paid those royalties and there is no active dispute as to this claim. ECF No. 97 at 2 n.2.

unreasonably deducted excessive post-production costs from Plaintiffs' royalties by engaging in affiliate transactions to inflate the price for those post-production costs, Plaintiffs' have not defined their class claims with particularity, nor has it precisely defined the class. Therefore, those threshold issues are addressed first.

i. Applicable Law: Implied Covenant of Good Faith and Fair Dealing under Pennsylvania Law

Despite having defined their class and the issues for class treatment, *i.e.*, whether XTO unreasonably deducted excessive post-production costs from Plaintiffs' royalties by engaging in affiliate transactions to inflate the price for those post-production costs, Plaintiffs' have not defined their class claims with particularity. The Court ordered the parties to submit supplemental briefing on this issue. ECF No. 132. A court "must undertake a rigorous analysis at the certification stage and consider some merits-related issues" which at a minimum includes determining the legal basis for the class claims. *Williams v. Jani-King of Philadelphia Inc.*, 837 F.3d 314, 322 (3d Cir. 2016). Unless the court can determine the cause of action upon which a putative class claims rest, it cannot analyze whether class treatment is proper under Fed. R. Civ. P. 23.

Plaintiffs' operative complaint vaguely alleges XTO had a duty to calculate royalties under the implied duty of good faith and fair dealing. *See* ECF No. 30 at ¶ 44 ("duty to calculate royalties in good faith and fairly"); ¶¶ 45-46 (XTO's duty to calculate royalties "reasonably"); ¶¶ 59, 61 (asserting under Count I "XTO had to perform its obligations to calculate and pay royalties to the representative plaintiffs . . . in good faith and with fair dealing[,]" and "breached the oil and gas leases . . .

when it deducted unreasonably high costs from [Plaintiffs'] royalties[.]"). In their brief in support of the motion for class certification, Plaintiffs offer no substantive law to apply to their claims for class treatment, other than generally setting forth the elements for a breach of contract claim, and do not mention the implied duty of good faith and fair dealing. ECF No. 97 at 15. Notably, Plaintiffs do not attempt to explain what essential term of the leases apply and were breached. *Id*. In their reply brief, Plaintiffs visit this issue again, but create even more uncertainty. First, Plaintiffs seemingly alter or add to their original theory of their claim – that XTO deducted excessive costs from royalties because it did not negotiate with Mountain Gathering to set the costs at a market price – by including a theory that "XTO deducted costs that it did not actually incur . . . [b]ecause XTO owned Mountain Gathering, XTO paid itself when it paid Mountain Gathering's charges as a matter of economics." ECF No. 110 at 8, 10. Plaintiffs argue that because their leases only allow XTO to deduct "all costs actually incurred" by XTO, and because XTO did not incur the charges, "XTO could only deduct reasonable amounts, and plaintiffs may recover the difference." ECF No. 110 at 10. Even more confusingly, after relying upon an express term of the leases, Plaintiffs' very next sentence states "this is not an action alleging breach of any provision whatsoever that might appear in a class lease. It is limited to deducting unreasonable post-production charges that resulted

from a parent-subsidiary relationship[]" and then continues to explain the law on the implied duties of good faith and fair dealing.[5] *Id.* at 10.

Given this shifting landscape, the Court asked Plaintiffs at the class certification hearing to explain their breach of contract theory and Plaintiffs responded they are asserting a breach of contract under the implied duty of good faith but also referenced claims under the "Restatement section 34," the Uniform Commercial Code ("UCC") section 2305, and under the Pennsylvania Supreme Court's decision in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010). *See* Tr. ECF No. 139 at pp. 203-204. Given these expanded causes of action, the Court ordered supplemental briefing for Plaintiffs to "set forth the legal basis for their breach of contract claim, including citation to relevant legal authority." ECF No. 132. In their supplemental brief, Plaintiffs did not mention any theory under the Restatement nor any claims under the UCC. Rather, Plaintiffs confirmed they

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[5] Plaintiffs also reference another novel claim that is not pleaded in their amended complaint – the implied duty to market gas – as grounds for their class claims. ECF No. 110 at 11 ("In addition, Pennsylvania has adopted the duty to market gas. The implied covenant protects a lessor from a gas producer's self-dealing. . . Here, XTO's self-dealing with Mountain Gathering caused the class members to received reduced royalties in breach of XTO's duties."). Generally, when an oil and gas proceeds lease is silent, there is an implied duty to market gas reasonably and sell the gas for the best current price reasonably available. *See Diehl v. SWN Prod. Co., LLC*, No. 3:19-CV-1303, 2020 WL 1663342, at *3–4 (M.D. Pa. Apr. 3, 2020) (explaining the implied duty to market gas under Pennsylvania law). A proceeds lease is a technical term referring to a "lease providing for a royalty of a portion of the proceeds of the sale of oil or gas." Williams & Meyers, Manual of Oil and Gas Terms 849; *Chambers v. Chesapeake Appalachia, L.L.C.*, 359 F. Supp. 3d 268, 279 (M.D. Pa. 2019). It is unclear how the duty to sell gas for a reasonable price extends to setting prices for post-production charges and Plaintiffs offer no analysis on that point. Even assuming this theory would apply in these circumstances, the amended complaint does not assert a breach of the implied duty to market gas claim and Plaintiffs cannot amend their complaint through briefs. *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988).

intend to pursue a breach of contract cause of action because XTO acted in bad faith and breached the putative members leases by deducting unreasonable and unincurred post-production costs from their royalties when it inflated post-production costs through affiliate transactions with Mountain Gathering. ECF No. 138 at 5-6. Considering this explanation, Plaintiffs' breach of contract theory appears twofold: First, XTO did not incur the post-production costs at all "[b]ecause XTO owned Mountain Gathering, XTO paid itself when it paid Mountain Gathering's charges as a matter of economics, . . . and the charges were not 'actually incurred' by XTO"; and second, "XTO is charging higher costs than it is actually incurring and is liable for the difference[.]" ECF No. 138 at 5-6.

As for Plaintiffs' assertion that XTO breached the leases by deducting costs it did not incur at all because the affiliate relationship between it and Mountain Gathering resulted in XTO "essentially paying itself" as a "matter of economics," ECF No. 138 at 6, is not supported by the record[6] nor do Plaintiffs offer any legal authority for the proposition that transactions between parent and subsidiary companies are *per se* fraudulent or sham transactions. Given the lack of record evidence and legal support for this breach of contract theory, the Court declines to recommend the certification of any breach of contract claim related to Plaintiffs'

[6] For example, there is no evidence of record that no money was exchanged between XTO and Mountain Gathering for the post-production charges. To support their theory, Plaintiffs simply rely on the conclusive testimony from its expert Barry Pulliam who hypothesized XTO did not incur any post-production costs simply due to the affiliate relationship between it and Mountain Gathering which he speculated resulted in XTO "essentially paying itself." *See* ECF No. 138 at 6. This testimony alone is not enough to support certifying a class based on this legal theory because the Court must make a rigorous analysis and address some merits-based issues to determine the legal basis of the class claims. *See* 837 F.3d at 322.

assertion that XTO did not incur **any** post-production costs because those costs were incurred by its affiliate Mountain Gathering.

Instead, the Court will only consider Plaintiffs' subsequent breach of contract theory: whether XTO performed in bad faith and breached the leases when it deducted higher post-production cots than it actually incurred by inflating these costs through transactions with its affiliate. Importantly, Plaintiffs' leases do not contain an express provision requiring XTO to only deduct post-production costs it incurred based on an arms-length transaction, prohibit transactions with affiliate companies, nor do the leases include any provision that XTO is required to only deduct "reasonable" post-production charges. Rather, Plaintiffs' leases allow XTO to deduct post-production costs it actually incurs. *See* ECF No. 138 at 4. According to Plaintiffs, XTO acted in bad faith when it did not negotiate at arms-length with its affiliate Mountain Gathering to set the price for the post-production costs and instead inflated these costs to its own benefit. ECF No. 138 at 4. As a result, XTO did not "actually incur" all those post-production costs it deducted from Plaintiffs' royalties and breached the leases. *Id.* Therefore, the proper legal basis for the putative class claims is a breach of contract claim for XTO's purported bad faith performance under Pennsylvania law.

In Pennsylvania, a lease is a contract and controlled by the principles of contract law. *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012). The elements of a breach of contract claim include: (1) the existence of a contract; (2) a breach of the duties imposed by the contract; and (3) resultant damages. *Joyce*

v. Erie Ins. Exchange, 74 A.3d 157, 168 (Pa. Super. Ct. 2013). Under Pennsylvania law, "[e]very contract imposes a duty of good faith and fair dealing on the parties in the performance and the enforcement of the contract." *J.J. DeLuca Co., Inc. v. Toll Naval Assocs.*, 56 A.3d 402, 412 (Pa. Super. Ct. 2012). While it is nearly impossible to catalog all types of bad faith in performing under a contract, the duty of good faith and fair dealing generally requires the parties "bring about a condition or . . . exercise discretion in a reasonable way." *USX Corp. v. Prime Leasing Inc.*, 988 F.2d 433, 438 (3d Cir. 1993); Restatement (Second) of Contracts § 205 cmt. d. The purpose of this implied duty "is to prohibit a party from taking advantage of gaps in a contract." *Curley v. Allstate Ins. Co.*, 289 F. Supp. 2d 614, 617 (E.D. Pa. 2003) (cleaned up). However, "[t]he law will not imply a contract different than that which the parties have expressly adopted[,]" *Stonehedge Square Ltd. P'ship v. Movie Merchants, Inc.*, 685 A.2d 1019, 1025 (Pa. Super. Ct. 1996), and the implied duty of good faith cannot displace or override a contract's express terms. *Hutchison v. Sunbeam Coal Corp.*, 519 A.2d 385, 388 (Pa. 1986).

Having established the applicable law for Plaintiffs' class claims, the Court will now turn to whether the class definition is precisely defined.

ii. Modification of Class Definition

Plaintiffs seek to certify the following class:

Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with XTO 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) whose oil and gas lease states that XTO is

> to pay Lessor as a royalty, for the native gas and casinghead gas or other gaseous substances (including shale gas), produced from said land and sold or used beyond the well or for the extraction of gasoline or other product, an amount equal to [X] percent ([X]%) of the sales proceeds actually received by Lessee from the sale of such production, less [X] percent ([X]%) of all "Post Production Costs" as defined below, less [X] percent ([X]%) of any and all taxes, including without limitation, production, severance, and ad valorem taxes. As used in this provision, Post Production Costs shall include, without limitation, (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise) and (ii) all costs actually incurred by Lessee 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.

or includes essentially identical language.

The United States and the Commonwealth of Pennsylvania are excluded from the classes.

ECF No. 96 at ¶ 2 (the "original class definition").

Upon careful review of the arguments set forth in the briefs, and considering the administrative feasibility of the proposed class definition, Plaintiffs' class definition should not be adopted as proposed. "District courts are not bound by a plaintiff's proposed class definition and instead have 'the authority to limit or modify class definitions in order to provide the precision needed for class certification.'" *Rupert v. Range Res. - Appalachia, LLC*, No. 2:21-CV-1281, 2024 WL 4349222, at *4–5 (W.D. Pa. Sept. 30, 2024) (quoting *Chedwick v. UPMC*, 263 F.R.D. 269, 272 (W.D. Pa. 2009)). Courts should exercise their discretion to "reshape the boundaries and composition of the class" when doing so "will better serve the purposes of Rule 23 and the underlying policies of the substantive law than would

denying certification altogether." *Shelton v. Bledsoe*, 775 F.3d 554, 564 (3d Cir. 2015). "Formulating a 'workable class definition' generally requires 'ongoing refinement and give-and-take.'" *Butela v. Midland Credit Mgmt. Inc.*, 341 F.R.D. 581, 591 (W.D. Pa. 2022) (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004)).

In opposing certification, XTO argues that the leases contain material variations which result in destroying several Fed. R. Civ. P. 23 factors. ECF No. 91 at 5-6. In particular, XTO argues that some leases in the putative class contain both the Royalty Provision and addendums which override the Royalty Provision and do not allow XTO to deduct any post-production charges from royalties. *Id.* at 5-6. Plaintiffs generally respond that those leases are excluded from the class definition and its expert Barry Pulliam reviewed all the leases produced by XTO in this action and excluded such leases for class treatment. ECF No. 110 at 2-3.

Despite Mr. Pulliam reviewing and excluding leases that contain material alterations from the Royalty Provision, the original class definition is not precise enough to exclude leases including material alterations with respect to deducting post-production charges from royalties. The original class definition has three key requirements: (1) the putative class member received a royalty payment from XTO pursuant to a lease agreement; (2) the putative class member has a well on the applicable gathering segment; and (3) the lease contains the Royalty Provision. The crux of Plaintiffs' class claims is that XTO deducted inflated and unreasonable post-production charges from their royalties. The class definition does not mention XTO

deducting any post-production charges from class members' royalties and the original class definition would in fact include lessors who have leases that do not allow XTO to deduct post-production charges, because technically their leases include the Royalty Provision, albeit overridden by the addendum.

Because modifying a class definition that otherwise meets the Fed. R. Civ. P. 23 factors is more favorable than outright denial, the class definition should be modified to require a class member had post-production charges deducted from their royalties as follows:

Every individual and entity who possessed a royalty ownership interest in an oil and gas lease with XTO 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) whose oil and gas lease states that XTO is

> to pay Lessor as a royalty, for the native gas and casinghead gas or other gaseous substances (including shale gas), produced from said land and sold or used beyond the well or for the extraction of gasoline or other product, an amount equal to [X] percent ([X]%) of the sales proceeds actually received by Lessee from the sale of such production, less [X] percent ([X]%) of all "Post Production Costs" as defined below, less [X] percent ([X]%) of any and all taxes, including without limitation, production, severance, and ad valorem taxes. As used in this provision, Post Production Costs shall include, without limitation, (i) all losses of produced volumes (whether by use as fuel, line loss, flaring, venting or otherwise) and (ii) all costs actually incurred by Lessee 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.

or includes essentially identical language**, and (d) who had post-production charges deducted from their royalty payment(s) in accordance with the above language.**

The United States and the Commonwealth of Pennsylvania are excluded from the classes.

Having established the substantive applicable law and defined the class more precisely, the Court will now turn to the factors for class certification under Fed. R. Civ. P. 23.

b. Fed. R. Civ. P. 23 Prerequisites

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). Fed. R. Civ. 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), the movant 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). Fed. R. Civ. P. 23(b)(3); *Kelly v. RealPage Inc.*, 47 F.4th 202, 215 (3d Cir. 2022); *In re Lamictal Direct Purchaser Antitrust Litigation*, 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.[7]

i. Numerosity

Under Fed. R. Civ. P. 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), *as amended* (Sept. 29, 2016). While there is no minimum number of plaintiffs that makes joinder impracticable, "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 maintain the class includes approximately 2,208 members. ECF No. 97 at 8. XTO does not dispute the numerosity factor. ECF No. 91 at 24. Given the number of putative class members exceeds 40, the numerosity requirement is met.

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[7] In addition to seeking certification under Fed. R. Civ. P. 23(b)(3), Plaintiffs seek certification under Fed. R. Civ. P. 23(b)(2) seeking a declaration that XTO "acted or refused to act on grounds that apply generally to the class," ECF No. 96 at ¶ 4, because the Royalty Provision applies to all putative class members and because royalty payments are calculated identically. ECF No. 97 at 17-18. In addition to satisfying the factors under Fed. R. Civ. P. 23(a), a movant seeking class certification under Fed. R. Civ. P. 23(b)(2) must show (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. Fed. R. Civ. P. 23(b)(2); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). XTO argues class certification is not proper because Plaintiffs have not shown they are entitled to class certification under Fed. R. Civ. P. 23(b)(2). ECF No. 91 at 24-25. Plaintiffs do not address XTO's argument in their reply brief. XTO is correct. Despite a passing reference to their request for declaratory and injunctive relief, Plaintiffs have not presented any detailed analysis or supporting evidence to show certification under Fed. R. Civ. P. 23(b)(2) is appropriate and have not met their burden. It is therefore recommended to the extent Plaintiffs seek class certification under Fed. R. Civ. P. 23(b)(2), the Court deny their motion in this respect.

ii. Commonality and Predominance

The commonality factor for class certification requires that there are common issues of fact or law capable of class-wide resolution. *Dukes*, 564 U.S. at 349. In other words, the claims must be based on a common contention that is "capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350.

Where, as here, 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*, No. CV 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 Prods., 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 Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008)); *Walney*, 2019 WL 1436938, at *5. *See also* Drummond v. Progressive Specialty Ins. Co, 142 F.4th 149, 156 (3d Cir. 2025) (district court must analyze "whether common issues predominate over individual issues with respect to proving the elements of breach of contract.").

Because a determination of whether common issues predominate requires an analysis of the elements of the class claims, the Court will consider whether Plaintiffs' breach of contract for XTO performing the leases in bad faith can be shown by common proof. As further explained below, the existence of the contract and its essential terms can be shown with common proof. All the putative class leases include the Royalty Provision which allows XTO to deduct post-production charges from royalties it "actually incurs." The class leases are silent as to XTO's performance obligations under the leases, and therefore the implied duty to perform obligations under the lease in good faith applies class wide. The breach can be shown through common proof that it was a breach of XTO's duty to perform under the lease in good faith by contracting with its wholly owned subsidiary and setting above-market prices for gathering and processing the gas produced under the leases

and deducting more charges from royalties than it actually incurred. Damages can also be calculated on a class wide basis because the charges deducted from royalties are the same across the class and only vary based on the volume of gas produced.

As a preliminary matter, XTO argues that Pennsylvania does not recognize "an implied duty of good faith and fair dealing that governs each obligation in an oil and gas lease and does not recognize a separate cause of action for breach of an implied duty of good faith and fair dealing in oil and gas leases." ECF No. 91 at 18 (cleaned up). Even so, this determination of whether Plaintiffs' claims for the implied duty of good faith are legally recognized would be capable of being resolved on a class-wide basis: Pennsylvania either recognizes such a claim in the oil and gas context, or it does not. Predominance "does not require that common issues will be answered, on the merits, in favor of the class . . . but it does require that common issues will generate common answers." *Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp.*, No. 20-3528, 2021 WL 3612155, at *3 (3d Cir. Aug. 16, 2021) (cleaned up).

Plaintiffs argue common issues of law and fact predominate over individualized assessments of their breach of contract claim because each putative class member has a standard form lease that includes the Royalty Provision and the issue of whether XTO deducted excessive gathering and processing charges it did not fully incur from royalties is common to the class. ECF No. 97 at 8-9. Plaintiffs argue all the gas produced under the putative class members' leases is mixed together and commingled in the gathering process; no individual's gas is treated any differently than any other class members' gas, and XTO charges that same unit

charge for gathering and processing. *Id*. at 9. According to Plaintiffs, the only variable is the amount of gas produced at each well. *Id*.

XTO responds that common issues do not predominate and this case is not suitable for class treatment because (1) there are material differences among the proposed class leases and Plaintiffs cannot demonstrate that XTO owes an implied duty of good faith and fair dealing under each class lease; and (2) Plaintiffs have not shown how they will prove "reasonability" of the gathering and processing fees by class-wide proof. ECF No. 91 at 18-25. Each argument is addressed in turn.

Material Differences in Lease Language

First, XTO maintains that the proposed class leases are not "standard form contracts" as Plaintiffs would have the Court believe. ECF No. 91 at 5. Sometime in late 2012 or 2013, XTO began using a standard oil and gas lease that included the Royalty Provision. *See* ECF No. 91 at 5; ECF No. 97 at 3. Despite this standard provision, according to XTO, it "routinely negotiated the terms of its leases" with prospective lessors. ECF No. 91 at 5. XTO maintains some lessors whose leases include the Royalty Provision also contain express amendments to the lease that materially vary from the Royalty Provision, including amended terms that no deductions can be made from royalties.[8] *Id*.

[8] The "Royalties with No Deductions" provision states in pertinent part that XTO "shall pay or cause to be paid to Lessor as royalty, an amount equal to 16% of the revenue realized **without deductions** by [XTO] for the cost of marketing, producing, gathering, storing, separating, treating, dehydrating, compressing, transporting." ECF No. 91 at 5 (emphasis added).

Plaintiffs respond that its expert, Barry Pulliam, reviewed the 3,552 leases and any lease addendums XTO produced in discovery containing the Royalty Provision. ECF No. 85-6 at ¶ 45; ECF No. 139 at pp. 32-33. Upon this review, Mr. Pulliam identified 49 leases that contained additional language that he believed modified the standard royalty payment provision, would not be considered eligible for class treatment, eliminated those leases from class consideration, and included one lease not produced by XTO that he found from public records, which resulted in a total of 3,504 potentially relevant leases that utilize the Royalty Provision to calculate royalties. ECF No. 85-6 at ¶ 45; ECF No. 139 at pp. 32-33. After eliminating leases with terms conflicting the Royalty Provision, Mr. Pulliam further eliminated leases by identifying only those leases governing production from wells connected to the Forward, Jefferson and AK Steel gathering segments from March 2016 forward and further identified lessors who received payments during the damage period, resulting in a total of 2,033 potentially relevant leases. ECF No. 110 at 2-3; ECF No. 85-6 at ¶¶ 46-47.

XTO's general argument that it negotiated with lessors resulting in variable lease language does not defeat commonality and predominance if the negotiated terms are immaterial to the Royalty Provision. "Variations in lease language do not destroy commonality under Rule 23(a)." *Slamon v. Carrizo (Marcellus) LLC*, No. 3:16-CV-2187, 2020 WL 2525961, at *11 (M.D. Pa. May 18, 2020) (considering natural gas leases and collecting cases). Likewise, given the modification of the class definition as outlined above, to be included in the class, post-production

charges must have been deducted from royalty payments, so any lease that includes an addendum prohibiting any deductions from royalties would not be included in the class, and do not appear to be included in the list of leases identified by Plaintiffs for class treatment.

XTO also maintains that the Plaintiffs' leases contain other provisions setting the duty XTO has to Plaintiffs to perform under the leases, and other putative class members' leases contain provisions that altered that standard of care. ECF No. 91 at 5-6. According to XTO, the Plaintiffs' leases provide XTO "shall sell the production of the well on such terms and conditions as Lessee, in its sole discretion, may deem appropriate. [XTO] shall have no duty to obtain production sales terms that maximize the royalties payable to Lessor hereunder[.]" ECF No. 91 at 6. However, like the royalty addendums, XTO maintains that some of the putative class members' leases include addendums explicitly prohibiting XTO from engaging in transactions with an affiliated party or impose a "prudent operator" or "good faith" clause requiring XTO to make reasonable efforts to comply with their lease obligations. ECF No. 91 at 6. According to XTO's expert, Kris Terry, eight leases include the "prudent operator" or "good faith" language, and three impose requirements for affiliate transactions. ECF No. 94 at 286-294. While a dozen leases out of the thousands of putative class members include language that varies from Plaintiffs' leases, the commonality factor "does not require identical claims or facts among class members." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012) (cleaned up). What matters is whether the class claims will "generate

common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. The variations in lease language regarding transactions with affiliates, or imposing a "prudent operator" or "good faith" standard, are immaterial factual differences that do not destroy the common contentions among Plaintiffs and the putative class nor does it disturb the cohesiveness of the class. A determination that XTO breached the leases by deducting partially unincurred post-production costs from royalties by transacting with its affiliate who charged more for those costs than a third-party would have class-wide implications. Accordingly, the commonality factor has been met.

"Reasonability" of the Post-Production Charges

Next, XTO argues that Plaintiffs have failed to show how they can prove the reasonableness of the post-production charges through class-wide proof. ECF No. 91 at 21. Whether XTO acted reasonably in performing under the leases is a question of predominance: the Court of Appeals for the Third Circuit "has been steadfast that the focus of the predominance inquiry is on 'whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct.'" *Rupert*, 2024 WL 4349222, at *10 (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298 (3d Cir. 2011)).

First, XTO argues the duty of good faith and fair dealing requires the court to determine the parties' justifiable expectations when signing the contract and points to deposition testimony of the representative Plaintiffs in which they all have differing opinions on what they expected as post-productions deductions. *Id*. at 22.

XTO provides no authority that a plaintiff's subjective opinions on how they believe XTO should have performed under the leases is required to state such a claim. Further, the focus for whether common issues predominate is not on what Plaintiffs did or did not do, but whether XTO treated members of the putative class alike.

Plaintiffs have shown by a preponderance that XTO treated the class members nearly identically in deducting post-production charges from their royalties and no individual analysis is required. Plaintiffs' theory is that all the putative class members' gas is mixed together and commingled in the gathering process. ECF No. 97 at 9. XTO charges the same unit charge for gathering and the same unit charge for processing each class members' gas under its agreement with Mountain Gathering. *Id.* The only variable is the volume of gas that each well produces, and consequently, the amount of post-production costs deducted from the putative class members' royalties. *Id.* Plaintiffs further indicate they intend to show the post-production costs charged by Mountain Gathering to XTO (and passed onto the putative class) were unreasonable by comparing its charges to those charged by third parties. ECF No. 110 at 9. Plaintiffs point out when Mountain Gathering began processing gas in Butler County, it charged 18% more than a competitor, and continued to increase its charges until at least 2024 when it charged 75% more than that competitor. *Id.* Whether XTO's post-production cost deductions from Plaintiffs' royalties were unreasonable can therefore be determined on a class-wide basis.

Nevertheless, XTO argues that the reasonability of post-production costs cannot be demonstrated by common proof because "in every month, XTO's gathering and processing deductions vary from well to well . . . [and i]n months when low [natural gas liquid] pricing requires XTO to sell its [natural gas liquid] production for less than the processing and fractionation costs incurred . . . XTO deducts less than a royalty owner's proportionate share of the total processing and fractionation costs." ECF No. 91 at 23. XTO also argues that the characteristics and quality of gas produced varies from well-to-well which causes the "actual costs" of gathering and processing charges to vary by well. *Id*. at 8, 25. Plaintiffs' expert, Mr. Pulliam dispels these arguments because there is no evidence that XTO actually deducted gathering and processing charges on a well-by-well basis, and instead calculated these charges using a single per-unit charge for all wells regardless of the well at issue, whether commodity prices for the gas were insufficient to support deductions or supported reduced deductions from royalties and regardless of any differing characteristics of the gas produced such as natural liquid gas composition, heat content, well pressures or location of the well. ECF No. 104-1 at ¶¶ 27-30; ECF No. 101-1 pp. 172; 178-180, 181-183 ¶¶ 15, 33-39, 44-50. Moreover, any facts that tend to show XTO deducted less than a class members' proportionate share of post-production costs is an issue of damage allocation and does not defeat certification, because as stated, there are several central issues common to the class that predominate. *Slamon v. Carrizo (Marcellus) LLC*, 2020 U.S. Dist. LEXIS 87149, at *50, 2020 WL 2525961 (M.D. Pa. May 18, 2020) (damages issues may be tried

separately where common issues otherwise predominate). Accordingly, Plaintiffs have adequately shown common issues predominate.

iii. 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). 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).

The requirement that a class be ascertainable "does not mean that no level of inquiry as to the identity of class members can ever be undertaken," and "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *Kelly*, 47 F.4th at 224 (cleaned up). *See also Hargrove v. Sleepy's LLC*, 974 F.3d 467, 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 gaps 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 reviewed 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*, 974 F.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).

Plaintiffs maintain that the class is ascertainable and its expert, Mr. Pulliam, has identified a two-step approach to ascertain the class members. ECF No. 97 at 13. First, through the leases produced by XTO in discovery, he identified the leases associated with gas production on the Jefferson, Forward and AK Steel gathering segments and that contained the Royalty Provision. *Id.* Mr. Pulliam identified 3,504 potentially relevant leases and further reviewed the leases to

account for production from March 2016 forward and further identified lessors who received payments during the damage period, resulting in a total of 2,033 relevant leases. ECF No. 110 at 2-3; ECF No. 85-6 at ¶¶ 46-47. Next, Mr. Pulliam identified successors in interest to the leases. ECF No. 85-6 at ¶ 47. He did this by matching lessor names and ownership interest from the relevant leases with the same information in XTO's payment data. *Id*. In the cases where that information did not match, he confirmed successors through transfer documentation produced by XTO or public records recorded with Butler County. *Id*. He then identified 2,208 individuals or entities that would be members of the proposed class, including both the original lessors and their successors in interest. *Id*.

XTO has several issues with Mr. Pulliam's approach to ascertaining the class. ECF No. 91 at 24. It argues Mr. Pulliam excluded some leases in error, excluded a royalty owner because he could not find the lease, excluded a royalty owner without reviewing the lease, includes individuals who do not have the leases containing the Royalty Provision and incorrectly relies on XTO's royalty payment data to establish royalty ownership. *Id*.

Plaintiffs need not definitely identify all the class members at the certification stage. *Kelly*, 47 F.4th at 222 n. 19. According to Plaintiffs, the leases identified as being inappropriately identified amounts to 16 leases out of the 2,033 identified by Mr. Pulliam for class treatment. ECF No. 110 at 13. Mr. Pulliam has adequately demonstrated that it is administratively feasible to identify the class through review of the leases produced by XTO and cross-referencing XTO's payment

data and public records to determine whether any successors exist and has in fact undergone this analysis on behalf of the entire class. Any argument that a small number of leases may be inappropriately included or excluded is an issue to raise at the merits stage to resolve who the royalty owners are.[9] *Hargrove*, 974 F.3d at 480–81 (gaps in business records "do not undermine the conclusion that all the evidence taken together could at the merits stage be used to determine" the class members and "a class can still be ascertainable even if it may be slightly overbroad").

Thus, Plaintiffs have adequately shown that class members are ascertainable.

iv. 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 & 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

[9] Plaintiffs also contest XTO's argument that Mr. Pulliam inappropriately excluded certain leases and point out that Mr. Pulliam did not exclude leases in error because the leases identified by XTO were excluded because no royalty payment was made, or no deductions were taken from royalties and therefore those lessors would not be in the class. ECF No. 104-1 at ¶¶ 12, 15. Plaintiffs further contest XTO's argument that Mr. Pulliam inappropriately included certain leases because he did not review the lease because he in fact did review the leases and that review is reflected in his work papers. *Id.* at ¶¶ 14-15.

the same practice or course of conduct.'" *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (quoting *Baby Neal,* 43 F.3d at 58). Where the class representatives 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*, 687 F.3d at 598 (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)).

Representative Plaintiffs maintain their claim is typical of the class because their claim is based on the theory that "XTO may not charge excessive costs for gathering and processing [costs]" it did not fully incur and its claim for "damages will be based on the same unit charges that apply to each class member." ECF No. 97 at 11. XTO again argues "the proposed class wells present a variety of production characteristics causing both 'actual costs' and gathering and processing

alternatives to vary by well[]" which "raises doubts about the presence of intra-class conflicts and whether the names plaintiffs can appropriately represent class members whose wells have very different production characteristics." ECF No. 91 at 25.

As explained above, Plaintiffs have shown that XTO did not deduct gathering and processing charges on a well-by-well basis and calculated these costs using a per-unit charge for all wells regardless of the production characteristics cited by XTO. The Court can discern no material conflicts between the representative Plaintiffs and class members. The claims of the representative Plaintiffs and the class are that XTO charged excessive costs for gathering and processing the gas produced on class members' wells by engaging in affiliate transactions to inflate the price of those costs it did not fully incur and damages are based on claims that XTO deducted these costs on a per-unit basis. There are no identified defenses that are inapplicable to many members yet likely to become a major focus of the litigation,[10] and the interests and incentives of the representative Plaintiffs are sufficiently aligned with those of the class.

Thus, Plaintiffs have satisfied the typicality factor.

v. 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

[10] XTO points out that the class definition does not exclude leases containing arbitration provisions and should any class members with arbitration provisions become part of a certified class and parties to the lawsuit, it will move to compel arbitration under those leases. ECF No. 91 at 26. XTO is free to do so, and the Court independently finds that any arbitration defense is not likely to become a major focus of this litigation.

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 Corp. ERISA Litigation*, 589 F.3d at 601–02 (cleaned up).

"[T]he linchpin of the adequacy requirement is the alignment of interests 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.*

Plaintiffs maintain the adequacy factor has been met because proposed class counsel is qualified, the representative Plaintiffs have participated in this litigation and there are no conflicts of interest between representative Plaintiffs and the class. ECF No. 97 at 11-12. XTO does not challenge this factor and it has been met.

As to the qualifications of class counsel, attorney David A. Borkovic has been appointed as class counsel in two other cases involving breaches of oil and gas leases, including one being actively litigated before this Court. *See Marburger v. XTO Energy, Inc.*, 2:15-cv-910 (W.D.Pa. 2015) and *Salvatora v. XTO Energy, Inc.*, 2:19-cv-1097 (W.D.Pa. 2019). Courts have found Attorney Borkovic "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 . . . Class with dedication and competence to date." *Salvatora v. XTO Energy Inc.*, No. 2:19-CV-01097-CRE-NR, 2023 WL 4137306, at *18 (W.D. Pa. June 2, 2023), *report and recommendation adopted sub nom. Salvatora v. XTO Engergy Inc.*, No. 2:19-CV-1097, 2023 WL 4135570 (W.D. Pa. June 22, 2023). Accordingly, Attorney Borkovic is qualified as class counsel. Further, there are no fundamental class conflicts and the representative Plaintiffs have been actively litigating these cases, have been deposed, and some attended the class certification hearing. Accordingly, Plaintiffs have satisfied the adequacy requirement.

vi. 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*, 259 F.3d at 186) (cleaned up).

Plaintiffs argue that a class action is the superior method for litigating their claims, and any individual issues, like damage calculation can be appropriately managed. ECF No. 97 at 17. XTO does not dispute this factor. The Court agrees this factor has been met. As explained above, the claims alleged by Plaintiffs and the putative class arise from the same alleged conduct by XTO and these common issues predominate over any individual issues related to damage calculation based on the volume of gas produced at each well. "Adjudication as a class action can resolve the common issues that predominate as to all class leases at one time rather than requiring the expenditure of extra time and expense to generate individual decisions among similarly situated individuals." *Rupert*, 2024 WL 4349222, at *11. Plaintiffs have therefore satisfied the superiority requirement.

III. Conclusion

Based on the foregoing, Plaintiffs have shown by a preponderance of the evidence that the requirements of Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b)(3) are satisfied and that the class is ascertainable. Plaintiffs have not shown by a preponderance of the evidence that the requirements of Fed. R. Civ. P. 23(b)(2) are satisfied.

Accordingly, it is respectfully recommended that Plaintiff's motion for class certification be granted in part with respect to Fed. R. Civ. P. 23(b)(3) and denied in part with respect to Fed. R. Civ. P. 23(b)(2) as set forth in the above recommendation.

Therefore, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 72, and the Local Rules for Magistrates, the parties have until **August 18, 2025** to object 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 waive any appellate rights. *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

DATED this 4th day of August, 2025.

Respectfully submitted:

s/Christopher B. Brown
United States Magistrate Judge

cc: Hon. William S. Stickman IV
United States District Judge
via CM/ECF electronic filing

Counsel of record
via CM/ECF electronic filing