APPENDIX TABLE OF CONTENTS

FEDERAL OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA ORDER

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (SEPTEMBER 20, 2024)

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 20-2431 & 23-1291

ANGELO RESCIGNO, SR., Executor of the Estate of Cheryl B. Canfield v. STATOIL USA ONSHORE PROPERTIES, INC.; STATOIL NATURAL GAS, LLC; STATOIL ASA

*ALAN MARBAKER; CAROL MARBAKER, JERRY L. CAVALIER; FRANK K. HOLDREN,

Appellants in No. 20-2431

MARTHA ADAMS and all others OBJECTORS,

Appellant in No. 23-1291

(*Pursuant to Fed. R. App. P. Rule 12(a))

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D. C. No. 3-16-cv-00085)

District Judge: Honorable Malachy E. Mannion

Submitted under Third Circuit L.A.R. 34.1(a) on March 11, 2024

Before: BIBAS, MONTGOMERY-REEVES and ROTH, Circuit Judges

OPINION*

ROTH, Circuit Judge

Statoil USA (Statoil) entered a class settlement with 13,000 natural gas leaseholders, resolving disputes over royalties owed to the leaseholders. The District Court approved the class settlement over the objections of a small number of the leaseholders. The objecting leaseholders appeal the court's orders (1) denying their motion to intervene and (2) certifying the class and approving the settlement. We will dismiss the appeal of the former for lack of jurisdiction and affirm the latter.

I.[1]

Statoil acquired a percentage of natural gas leaseholders' interests in natural gas and sold those interests to its affiliate, Statoil Natural Gas (SNG), for a neutral, third-party "index price."[2] The leases, which require Statoil to pay royalties to the leaseholders, are divided into two camps: the Index Price Leases and the Gross Proceed Leases.[3] The Index Price Leases, which make up the majority of the leases, require Statoil to use the index price to calculate the royalties. By contrast, the Gross Proceed Leases require Statoil to pay a royalty based on the gross proceeds paid to SNG, which usually yields a higher royalty.

---

*This disposition is not an opinion of the full Court and pursuant to I.O.P.

[1] We write primarily for the parties and recite only the facts essential to our decision.

[2] This is a price published in an industry-standard publication specific to natural gas.

[3] The District Court found that any variation among these leases is "immaterial." JA0099.

In 2016, an Index Price Leaseholder, Angelo Rescigno, filed a putative class action against Statoil, challenging the index price methodology that Statoil had used to calculate his royalties. The District Court dismissed all but one of his claims against Statoil: an alleged violation of an implied duty to market. The parties reached a class settlement for which it sought preliminary approval from the District Court. They also sought the appointment of Rescigno and two Gross-Proceeds Leaseholders (Donald and Mary Stine) as class representatives.

The settlement resolved disputes regarding royalty calculations for approximately 13,000 Index Price and Gross Proceeds Leaseholders.[4] Under the settlement, Statoil agreed to create a settlement fund of $7 million. In exchange, the class members agreed to release all claims against Statoil that relate to Statoil's methodology for calculating royalties through the settlement's effective date.[5] Although

---

[4] The class settlement covers "Royalty Owners in Northern Pennsylvania who have entered into oil and gas leases, regardless of the type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom Statoil has (or had) an obligation to pay Royalties on production attributable to Statoil's working interest." JA0460. "'Royalty Owner' means any person who owns a Royalty interest in the Relevant Leases and is entitled to receive payment on such Royalty from Statoil." JA0468. "'Relevant Leases' means each and every oil and gas leases in Northern Pennsylvania owned in whole or part by Statoil from which Statoil produces and sells Natural Gas and pays a Royalty to Royalty Owners." JA0467. The District Court found that the class includes those persons who currently have leases with Statoil and who were or are entitled to a royalty payment.

[5] The Settlement states that Gross-Proceeds Leaseholders, who comprise 7% of the class, are set to receive 18% of the settlement

most class members' leases contained a mandatory arbitration clause, Statoil agreed to forego its right to compel arbitration.[6]

Appellants' counsel has repeatedly tried to thwart the settlement. Before Rescigno filed suit, a group of four Gross-Proceeds Leaseholders represented by Appellants' counsel simultaneously filed an arbitration to challenge the index price methodology[7] and an action in federal court, *Marbaker v. Statoil USA Onshore Props.*, seeking a declaration that they could bring the arbitration as a class.[8] The arbitration and *Marbaker* cases were stayed while the parties engaged in an ultimately unsuccessful mediation. After counsel for the four Gross-Proceeds Leaseholders learned of Rescigno's suit, he reached out to Rescigno's counsel and asked if they could work together on the case. Rescigno's counsel declined the invitation.

In March 2018, after the parties in *Rescigno* sought preliminary approval of the class settlement, the four Gross-Proceeds Leaseholders in *Marbaker* moved to consolidate their case with Rescigno's.[9] The *Marbaker* District Court denied consolidation, and we

---

fund ($1,339 per person); and Index Price Leaseholders, who comprise 93% of the class, are set to receive 82% of the settlement fund ($459 per person). The settling parties agree that these amounts are proportional and proper given the strength of their respective claims. The settlement also provides clarity for calculating royalties going forward.

[6] Rescigno's lease did not contain an arbitration provision.

[7] *Marbaker v. Statoil USA Onshore Props. Inc.*, No. 01-15-0003-1072 (AAA).

[8] No. 15-cv-00700 (M.D. Pa. Apr. 9, 2015).

[9] *Marbaker v. Statoil USA Onshore Props. Inc.*, No. 3:17-cv-1528 (M.D. Pa. Sept. 12, 2018).

affirmed on the ground that the Gross-Proceeds Leaseholders should have moved to intervene instead.[10] The *Marbaker* District Court subsequently dismissed the Gross-Proceeds Leaseholders' claims, holding that their leases did not allow for class-wide arbitration.[11]

In April 2018, counsel for the *Marbaker* Gross-Proceeds Leaseholders formed a group of twenty-three entities and individuals and objected to preliminary approval of the settlement in *Rescigno*.[12] The District Court struck that filing because those entities were not properly before the court. The court also concluded that if they did "not wish to be bound by [the class settlement], they may simply opt out of the class."[13]

In March 2020, the four Gross-Proceeds Leaseholders moved to intervene (Intervenors), and the District Court rejected the motion as untimely.[14]

---

[10] Marbaker v. Statoil USA Onshore Props. Inc., 2018 WL 2981341, at *3, n.4 (M.D. Pa. June 14, 2018); Marbaker v. Statoil USA Onshore Props. Inc., 801 F. App'x 56, 62 (3d Cir. 2020).

[11] *Marbaker v. Statoil USA Onshore Props. Inc.*, 2018 WL 4354522, at *6–9 (M.D. Pa. Sept. 12, 2018).

[12] Around this time, Appellants' counsel brought several other claims against Statoil. *See e.g.*, *Kuffa v. Statoil USA Onshore Props.*, No. 01-17-005-6012 (AAA); *Lake Carey Invs. LLC v. Statoil USA Onshore Props.*, No. 01-0007-3491 (AAA); *Lasher v. Equinor USA*, No. 2017-00595 CP (Pa. C.P.); *Chambers v. Chesapeake Appalachia*, No. 18-cv-00437 (M.D. Pa.). Appellants' counsel has been successful in only one of these cases, and even there, the arbitration costs dramatically exceeded the damages awarded.

[13] JA0023

[14] Intervenors inexplicably waited three years to seek intervention, ignoring warnings from the *Marbaker* District Court and this Court.

The District Court also held that Intervenors were adequately represented in the class. Intervenors appealed. This is one of the two appeals currently before this Court.

In July 2020, the District Court preliminarily approved the class settlement and appointed Rescigno and the Stines as class representatives. Shortly thereafter, settlement notices were mailed to class members. In September 2020, Rescigno moved for final approval of the settlement. A month later, a group of roughly 145 leaseholders, represented by Appellants' counsel and including Intervenors, objected to the settlement (Objectors).

In January 2023, the District Court granted final approval of the class settlement. Objectors then moved for reconsideration, arguing for the first time that the court lacked Article III jurisdiction to approve the settlement under *TransUnion LLC v. Ramirez*.[15] The court denied that motion. Objectors now appeal the District Court's order approving the settlement, which is the second appeal before us.

II.

Intervenors contend that the District Court erred in denying their motion to intervene. Objectors argue that the District Court erred in certifying the class and approving the settlement in *Rescigno* because (1) the District Court lacked Article III jurisdiction to approve the class settlement; and (2) the court "failed in its fiduciary duty to the class in approving the settlement because the settling parties failed to provide evidence to support class certification and failed to prove that the settlement is fair,

---

[15] 594 U.S. 413 (2021).

reasonable, and adequate."[16] We will address each appeal in turn.

A.

We do not have subject matter jurisdiction of the appeal brought by Intervenors because the District Court's order denying intervention is neither a final order within the meaning of 28 U.S.C. § 1291 nor immediately appealable as a collateral order.[17]

In *Carlough v. Amchem Products, Inc*, we held that "anyone who is involved in an action sufficiently to have a right of appeal from its final disposition does not have an immediate right of appeal from a denial or partial denial of intervention."[18] As in *Carlough*, Intervenors here "retain[ed] substantial rights of participation in the lawsuit as objecting class members,"[19] and have a right to appeal from the final disposition. The proper avenue to voice their claims to the court would be to make an objection at the final fairness hearing or to appeal the final approval of the class settlement.[20] Intervenors attempt to distinguish *Carlough* on the grounds that the proposed intervenors in that case sought only to object to the proposed settlement, whereas Intervenors sought to bring a claim on the merits. But that is an irrelevant distinction. The relevant inquiry when determining whether an order denying intervention is final depends on whether the participation of the proposed intervenor ends entirely.

---

[16] Objectors' Br 32.

[17] It is not a final order because it does not resolve the merits of the case. *See Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713 (3d Cir. 1993).

[18] *Id.* at 712–13.

[19] *Id.* at 713.

[20] *See id.*

Thus, we will dismiss Intervenor's appeal and turn to Objectors' appeal.

B. [21]

i.

Objectors first argue that the class does not have standing because, under TransUnion, each class member must show injury.[22] Objectors argue that the settlement parties have not done so because the settlement might include individuals who are only "potentially" owed royalties. We disagree. The District Court correctly found that the class contains only those persons who currently hold a lease with Statoil and who were or are owed a royalty.[23] Objectors fail to identify a single member of the settlement class that has yet to be injured. Moreover, Objectors misconstrue TransUnion. In TransUnion, the Supreme Court held that only a plaintiff who is concretely harmed by a defendant's violation of the Fair Credit Reporting Act has Article III standing to bring a claim under that statute.[24] The Court distinguished consumers whose inaccurate reports were disclosed to third-parties and consumers whose credit files contained inaccuracies but were not disclosed.[25] It reasoned that the former group had a "personal stake" in the controversy and therefore had

---

[21] The District Court had jurisdiction under 29 U.S.C. § 1332(d)(2). We have jurisdiction under 28 U.S.C. § 1291.

[22] We review whether the District Court had subject matter jurisdiction over this litigation (and power to approve the settlement) de novo. *Edmonson v. Lincoln Nat'l Ins. Co.*, 725 F.3d 406, 414 (3d Cir. 2013).

[23] JA0116.

[24] *TransUnion LLC*, 594 U.S. 413.

[25] *Id.* at 432–39.

standing, while the latter group could not show concrete harm and therefore did not have standing.[26]

Here, there is no dispute that the alleged injuries—breach of contract, breach of common-law duty, and underpayments—suffice to establish Article III standing. Put differently, class members alleging a breach of contract and resulting damages satisfies the "personal-stake" test.[27] Moreover, in the context of a class settlement, the "standing inquiry focuses solely on the class representative(s)."[28] And, again, Objectors do not dispute that the class representatives have standing.

ii.

---

[26] *Id.* at 423.

[27] *TransUnion* itself characterized monetary harms as one of "[t]he most obvious" Article III injuries. *Id.* at 425.

[28] *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 478 (3d Cir. 2018). *TransUnion* did not abrogate this basic tenet of class action litigation. Objectors cite our recent decisions in *Huber* and *Lewis*, but neither supports their position that the class lacks standing. *See* Objectors' Not. of Supp. Auth. (Feb. 21, 2024) (citing *Huber v. Simon's Agency, Inc.*, 84 F.4th 132 (3d Cir. 2023)); Objectors' Not. of Supp. Auth. (Apr. 17, 2024) (citing *Lewis v. GEICO*, 98 F.4th 452 (3d Cir. 2024)). In *Huber*, we vacated the district court's orders certifying the class because there was insufficient evidence to show how many members have standing. But *Huber* delt with common law fraud, where plaintiffs must show detrimental action or inaction. This case is about breach of contract and alleged underpayments based on the use of an index price methodology that applied to all members. In *Lewis*, we noted that "standing is not dispensed in gross." 98 F.4th at 459. But we nonetheless made clear that "[i]n a class action, the class's standing turns on the named plaintiffs' standing." *Id.*

Objectors next argue that the District Court abused its discretion when it certified the class.[29] We disagree. There are four threshold requirements for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[30] In a Rule 23(b)(3) class action, courts also consider "whether (1) common questions predominate over any questions affecting only individual class members (predominance) and (2) class resolution is superior to other available methods to decide the controversy (superiority)."[31] The District Court found that each of these factors were met. It did not abuse its discretion by doing so.

Objectors raise three arguments against class certification. First, they argue that the court abused its discretion in certifying the class because the class is "overbroad." Second, they argue that not every class members' lease forms are in the record. And third, they argue that Rescigno is an inadequate class representative.[32] We address each argument in turn, rejecting all three.

Objectors maintain that the class is overbroad because it includes anyone who "entered into" a lease in the past, but some class members may no longer currently hold the lease.[33] We disagree. The plain language of the class definition states that it applies to "Royalty Owners . . . who have entered into oil and gas leases . . . that provide that the Royalty Owner is

---

[29] We review a District Court's decision to certify a class for an abuse of discretion. *In re Nat'l Football League Players Concussion Injury Litig. (NFL)*, 821 F.3d 410, 426 (3d Cir. 2016).
[30] Fed. R. Civ. P. 23(a); *see also NFL*, 821 F.3d at 426.
[31] *NFL*, 821 F.3d at 426.
[32] Objectors' Br. 37.
[33] Objectors' Br. 39–42.

to be paid Royalties and to whom Statoil has (or had) an obligation to pay Royalties."[34] "Royalty Owner" is defined as "any person who owns a Royalty interest in the Relevant Leases and is entitled to receive payment on such Royalty from Statoil."[35] The District Court accordingly found that the class is limited to "those currently holding a lease."[36] That class is not overbroad.

Objectors assert that the court abused its discretion in certifying the class because not every one of the lease forms are in the record. This argument is similarly unpersuasive. The District Court reviewed extensive documentation, including a detailed report that made reasonably clear that any difference in the leases was immaterial and did not have to do with differences in the applied index price methodology. Thus, the court was justified when it found that "[t]he variations in the lease language are immaterial in light of the fact that the question of [Statoil's] liability [for using the index price] is central to all class members and is subject to generalized proof."[37]

---

[34] JA0460.

[35] JA0468.

[36] JA0115. Objectors also contend the class is overbroad because it does not have a class period. This argument is unavailing. The class is limited by the date when Statoil switched to using the index price methodology.

[37] JA0099; *see NFL*, 821 F.3d at 426–27 (holding that commonality is satisfied if "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class"). In fact, Appellants' counsel even alleged that the leases were "materially uniform documents containing standard provisions." Compl. ¶ 25, ECF No. 1, *Marbaker*, 15-cv-700 (Apr. 9, 2015).

Objectors' argument that Rescigno is an inadequate class representative also fails.[38] Objectors insist that the "named plaintiff had no index price method claim."[39] But this is not so. The District Court held that Rescigno could not challenge the Index Prices Methodology as a breach of contract, but it also held that Rescigno stated a claim that the Index Price Methodology violated an implied duty to market. That suffices.

In sum, the District Court did not abuse its discretion, and class certification in this case was proper.

iii.

Finally, Objectors argue that the District Court abused its discretion in granting final approval of the settlement because the settling parties failed to prove that the settlement was "fair, reasonable, and adequate."[40] Again, we disagree.

The decision to approve a class settlement "is left to the sound discretion of the district court."[41] There is also a "strong presumption in favor of voluntary settlement agreements" that "promote the amicable resolution of disputes," conserve judicial resources, and benefit the parties by "avoiding the

---

[38] [38] We also reject Objectors' argument that the Stines should not have been able to be class representatives. They did not need to be named in the complaint in order to serve as class representatives. Moreover, Objectors' assertion that Rescigno's counsel was inadequate because he was "unwilling to pursue claims in arbitration" fails because nothing in the record supports the theory that individual arbitration was a better option for class members.

[39] Objectors' Br. 41.

[40] *NFL*, 821 F.3d at 436.

[41] *Id.*

costs and risks of a lengthy and complex trial."[42] "This presumption is especially strong in class actions."[43]

A class settlement is presumed fair where (1) negotiations were at arms' length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.[44] The District Court properly found that all four factors were met.

Objectors seem to only dispute that the class settlement was negotiated at arms' length. We agree with the District Court that "class counsel has vigorously litigated this case at arms' length [in] investigating the potential claims, responding to two motions to dismiss, reviewing what they represent to be thousands of documents in discovery, and retaining experts to assist and verify data."[45] Indeed, before settlement, the parties engaged in extensive briefing, which resulted in a 73-page decision from the District Court that narrowed the issues in this case. We conclude that the settlement is entitled to a presumption of fairness.

Next, we evaluate whether the settlement was fair and adequate under the nine factors established in *Girsh v. Jepson*.[46] Those factors include:
(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the

---

[42] *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594–95 (3d Cir. 2010).
[43] *Id.* at 595.
[44] *Id.*
[45] JA0065. We reject Plaintiffs' argument that the District Court erred in denying their motion to compel discovery.
[46] 521 F.2d 153 (3d Cir. 1975).

amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[47]

The District Court thoroughly considered each factor and found that, "[i]n light of the complexity of this case and the potential obstacles to establishing liability and damages," the settlement was reasonable.[48]

Objectors primarily argue that District Court improperly disfavored arbitration, as shown by its acknowledgement that the class members' arbitration agreements posed challenges to recovery. Not so. The court acted entirely within its bounds when it simply noted that most class members were unlikely to achieve any relief without the settlement.[49]

---

[47] *Id.* at 157. This is not an exhaustive list. *See NFL*, 821 F.3d at 437

[48] JA0087.

[49] As the District Court noted, most of the class signed agreements that do not allow for class arbitration, which meant that most of the class would have to arbitrate claims individually. Those arbitrations would require individualized expert testimony on numerous concepts (*e.g.*, marketability of the gas at specific wells and post-production deduction calculations) and ultimately would result in small recoveries. Moreover, each plaintiff would bear the costs of arbitration. Thus, the District Court did not improperly "disfavor" arbitration in its analysis. *See NFL*, 821 F.3d at 440 (considering the class' arbitration agreements in concluding that

Ultimately, our review of the record leads us to conclude that the District Court exercised its discretion soundly when it approved the class settlement.

CONCLUSION

For these reasons, we will dismiss, for lack of jurisdiction, the Intervenors' appeal (20-2431), and affirm the District Court's order granting Rescigno's motion for final approval of the settlement and plan of allocation (23-1291).

"the settlement represents a fair deal for the class when compared with a risk-adjusted estimate of the value of plaintiffs' claims.").

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (FEBRUARY 13, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Presently before the court is the objectors' motion for reconsideration, (Doc. 237). The objectors filed a brief in support, (Doc. 238), on January 1, 2023. The plaintiff filed a brief in opposition, (Doc. 239), on February 2, 2023. The objectors then filed a reply brief, (Doc. 240), on February 8, 2023. The matter is now ripe for disposition.

I. Standard of Review

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985).

"Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Howard Hess Dental Labs. Inc. v. Dentsply Intern., Inc.*, 602 F.3d 237, 251 (3d Cir. 2010) (quoting *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros,* 176 F.3d 669, 677 (3d Cir. 1999)); *Chesapeake Appalachia, LLC v. Scott Petroleum, LLC*, 73 F. Supp. 3d 488, 491 (M.D. Pa. 2014) (Generally, reconsideration motions should be granted sparingly). "The standard for granting a motion for reconsideration is a stringent one ... [A] mere disagreement with the court does not translate into a clear error of law." *Chesapeake Appalachia, LLC*, 73 F.Supp. 3d at 491 (quoting *Mpala v. Smith*, 2007 WL 136750, at *2 (M.D. Pa. Jan. 16, 2007), affd, 241 Fed.Appx. 3 (3d Cir. 2007)) (alteration in original).

The burden for reconsideration is on the moving party.

II. Discussion

Objectors have filed the present motion arguing the need to correct a clear error of law or to prevent manifest injustice in light of the Supreme Court's decision in *TransUnion LLC v. Ramirez.* 141 S.Ct. 2190 (2021).[1] In *TransUnion*, the Supreme

[1] While objectors claim *TransUnion* establishes a clear error of law or to prevent manifest injustice, they knew of the pending case in December of 2020. The decision by the Supreme Court was issued in June of 2021. Since then, objectors did not file any

Court had to address whether a portion of class members suffered an injury without a "potential match" report being sent to a third-party entity. TransUnion created a service for businesses where a program would determine if an individual's name was a "potential match" to a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals. The class contained individuals whose names were similar to those on the OFAC list and TransUnion had listed these individuals as "potential matches" to the list through their service. There were two groups within the class: individuals whose names were sent to third-party businesses and individuals whose names were marked as a "potential match," but not sent to a third-party business. A question arose as to whether the portion of the class whose name was not sent outside of TransUnion ever suffered an injury to therefore have standing. The court held that the portion of the class who did not have their name sent outside of TransUnion did not suffer a concrete injury. Without suffering a concrete injury, there can be no standing.

Objectors now file a motion for reconsideration to claim some sort of "injustice." Objectors' motion is nothing more than an ill-fated effort to challenge the results of the court's prior order. Objectors claim one paragraph of the settlement proves faulty to the entire agreement. The settlement agreement defines the class as:

---

update with the court indicating the case's impact. The court ruled on the motion for final approval of the settlement and attorneys' fees well after *TransUnion* was decided. (Doc. 234 & 235).

> Royalty Owners in Northern Pennsylvania who have entered into oil and gas leases, regardless of the type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom Statoil [SOP] has (or had) an obligation to pay Royalties on production attributable to Statoil [SOP]'s working interest.

(Doc. 137, p.5). Additionally, objectors claim that the class notice includes "people whom EOP 'potentially' will pay royalties." (Doc. 238, p.2).[2]Objectors seize upon the phrase "Royalty Owner is *to be paid* Royalties" in order to craft the argument that there is some futuristic nature to the defined class. In isolating one paragraph of the settlement agreement, objectors attempt to compare the defined class to the portion of the class in *TransUnion* that was deemed to not have suffered an injury. As commonly arises when one reads one paragraph of an agreement without reading it in context of the full agreement, issues can arise.

Within the definition of the class, the phrase "to be paid" is used to clarify the type of lease agreement. While objectors misconstrue the phrase to craft some more grandiose argument about potential harm, the full phrase describes the type of lease the Settlement covers. As read in context, "oil and gas

---

[2] Objectors' argument related to the notice including the word "potential" lacks any basis. Courts have routinely approved settlement notices with "potential" because the purpose of a notice is to identify potential class members. *In re Cendant Corp. Litig.,* 264 F.3d 201,226 (3d Cir. 2001) ("[T]he court approved the form of the notice of the class action to be sent to potential class members.")

leases ...that provide that the Royalty Owner is to be paid Royalties[.]" (Doc. 137, p.5). The objectors improperly seize upon three words within the definition that merely serve to clarify the leases to which the settlement refers.

Several other definitions provided within the Settlement must be stated to understand the full context of the agreement. A class member is defined as:

> [A] member of the Class, and any of their respective past, present, or future officers, directors, stockholders, agents, employees, legal or other representatives, partners, associates, trustees, subsidiaries, divisions, affiliates, heirs, executors, administrators, purchasers, predecessors, successors, and assigns, who does not submit a valid Request for Exclusion pursuant to the Notice or is otherwise excluded pursuant to, ¶1.2.

(Doc. 137, ¶1.4). Royalty is defined as "the amount owed to a lessor by Statoil pursuant to an oil and gas lease (including any fractional interest therein) or an overriding royalty derived from the lessor's interest in such an oil and gas lease." (Doc. 137, ¶1.33). Royalty Owner is defined as "any person who owns a Royalty interest in the Relevant Leases and is entitled to receive payment on such Royalty from Statoil." (Doc. 137, ¶¶1.33, 1.34). Northern Pennsylvania is defined as:

> [T]he area of Pennsylvania in which Statoil owns working interests in oil and gas leases and from which it produces and sells Natural Gas production for delivery into Rome, Liberty, Allen, Meadow, Warrensville, Seely,

> Canoe Run, Tombs Run, and PVR Wyoming gathering systems and includes oil and gas leases owned in whole or part by Statoil in the following counties: Bradford, Lycoming, Sullivan, Susquehanna, and Wyoming.

(Doc. 137, ¶1.19). The definitions in the Settlement read together, as class counsel explains in their brief, means the Class contains those currently holding a lease ("who have entered into oil and gas leases") entitling them to royalty payments owed by SOP ("that provide the Royalty Owner is to be paid royalties") in the relevant area ("Northern Pennsylvania"), as well as their predecessors, successors, agents, and other representatives. (Doc. 239, p.6-7).

Turning to the objectors' arguments, objectors remain in the hypothetical realm arguing that the class definition may contain an individual that holds or held a lease agreement with Statoil but was never paid a royalty. Working against the objectors' argument are the definitions within the Settlement. Royalty is defined as "the amount owed to a lessor by Statoil pursuant to an oil and gas lease (including any fractional interest therein) or an overriding royalty derived from the lessor's interest in such an oil and gas lease." (Doc. 137, ¶1.33). The definition of Royalty does not include an amount yet to be paid, but rather, is defined as "the amount *owed."* (Doc. 137, ¶1.33) (emphasis added). Therefore, no current leaseholder can argue they *will* be owed a royalty payment and therefore can qualify. The Settlement's definition of Royalty requires an amount already owed based on a previously formed contract. Objectors could contend that an amount owed but not

yet paid would constitute a future harm. However, the circumstances would still generate a concrete harm based upon the amount owed and never paid was required by the lease. Furthermore, the objectors do not identify a single party in the settlement that would fall into this realm of a yet to be injured plaintiff. They remain purely in the hypothetical alone.

Additionally, a royalty is only generated when gas is taken. It is the very act of gas being removed that creates the obligation to pay a royalty. This is why royalty is defined in the past tense as amount owed. While it may be true that the amount to be paid on the gas is determined at a later point once the gas is sold to another party, the obligation to pay a royalty immediately arises once the gas is removed. The argument that you can have a lease, but not suffer an injury yet again attempts to create a hypothetical situation lacking an understanding grounded in the reality of the process. Thus, when the class is defined as has or had an obligation to pay royalties, this means gas has already been removed and an obligation to pay a royalty simultaneously emerged with the gas removal. There is no "future" harm that has yet to arise as objectors contend.

Even comparing the objectors' argument with *TransUnion* displays the clear differences between the cases. In *TransUnion,* some of the class members never had their "potential match" sent out to a third party. The status remained within TransUnion and did not create any sort of harm. It was only a potential unrealized harm. Here, class members entered into lease agreements with SOP. As the settlement explained, the class members were to be paid

royalties.[3] As the Settlement defined royalties as an amount *owed,* the term described a previous obligation that arose in the past, not the future. The royalty obligation arose simultaneous with the removal of gas from the property. While *TransUnion* described a yet to be realized harm, the harm here occurred when SOP violated the obligation to pay the royalties according to the lease.

The objectors claim one final point about the full range of leases not being contained within the record. The argument critiques the class definition since it is not tied to specific lease language, which objectors state could lead to uninjured persons being granted relief. Objectors fail to cite any case law or statutory requirement that the full range of leases must be submitted on the record. Yet again, objectors hyper fixate on one definition without reading the Settlement in its full context. The Settlement defines "Relevant Leases" as "each and every oil and gas lease in Northern Pennsylvania owned in whole or part by Statoil from which Statoil produces and sells Natural Gas and pays a Royalty to Royalty Owners." (Doc. 137, ¶1.30). Northern Pennsylvania is defined as:

> [T]he area of Pennsylvania in which Statoil owns working interests in oil and gas leases and from which it produces and sells Natural Gas production for delivery into Rome, Liberty, Allen, Meadow, Warrensville, Seely, Canoe Run, Tombs Run, and PVR Wyoming gathering systems and includes oil and gas leases owned in

---

[3] The "to be paid" language describing the nature of the agreements.

> whole or part by Statoil in the following counties: Bradford, Lycoming, Sullivan, Susquehanna, and Wyoming.

(Doc. 137, ¶1.19). Additionally, the Settlement even further refines the lease agreements into two groups: L-29 Group and the other lease group. The two groups are based off the strength of the language contained within the lease agreements. This is a thinly veiled attempt by objectors to again litigate the differences between the two groups. While the court held that the index pricing method did not breach the royalty terms of plaintiff's "at the well" lease, the court allowed a claim pertaining to the duty to market to proceed, which is a basis for relief in the Settlement. Objectors' own argument serves as evidence that there is a difference between the L-29 Group and the Other Lease Group pertaining to the language contained within each agreement. Objectors only argument pertains to the royalty pricing methodology and ignores the other claims that survived the motion to dismiss.

Objectors clearly do not demonstrate that any of the three grounds exist in this case, which are required for the court to grant reconsideration. Further, since this court's Memorandum and Order, (Doc. 234 & 235), which are the subject of the objectors' instant motion, gave thorough explanations, the court will not repeat this discussion. Also, simply because objectors are unhappy with the results of the court's Order, "is an insufficient basis to grant [them] relief." *Kropa v. Cabot Oil & Gas Corp.,* 716 F.Supp.2d 375, 378 (M.D. Pa. 2010) (citation omitted).

s/ *Malachy E. Mannion*
MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE
DATE: February 13, 2023

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (FEBRUARY 13, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

ORDER

In accordance with the court's memorandum issued this same day, IT IS HEREBY ORDERED THAT:

1. Objectors' motion for reconsideration, (Doc. 235), is DENIED.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE

DATE: February 13, 2023

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JANUARY 18, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

other: IT IS HEREBY ORDERED THAT: (1) Plaintiffs motion for Final Approval of Class Action Settlement and Plan of Allocation, (Doc. 175), and motion for Attorneys' Fees and Expenses and Service Award to Plaintiff and Class Representatives, (Doc. 179) are GRANTED

This action was *(check one):*

decided by Judge Malachy E. Mannion on a motion for Settlement Motion for Final Approval of Class Action Settlement and Plan of Allocation (Doc. 175).

Date: 1/18/2023 CLERK OF COURT

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JANUARY 10, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Presently before the court is the lead plaintiff Angelo R. Rescigno, Sr.'s ("Rescigno") motion for final approval of the settlement and plan of allocation, (Doc. 175), as well as a motion for attorneys' fees and expenses and a service award to Rescigno and the class representatives, (Doc. 179). Several class members have filed objections to the settlement agreement, plan of allocation, and motion for attorneys' fees. (Doc. 188). Upon review, the motion for final approval will be **GRANTED,** as will the motion for attorneys' fees and expenses, as modified.

I. BACKGROUND

The court has set forth the extensive factual background of this case in its prior memoranda and need not repeat it herein. Pertinent here, Rescigno brought this class action against Statoil USA Onshore Properties, Inc. ("SOP") and two other defendants. His Complaint alleged seven claims which revolved around the royalty clause in the lease agreements of Rescigno and other property owners in Northern Pennsylvania and challenged the way in which SOP calculated the royalties. (Doc. 1). Ultimately, the court dismissed all claims against the two other defendants besides SOP and dismissed all but one claim against SOP: breach of the implied duty to market. (Doc. 72; Doc. 73).

The parties reached a settlement agreement, and, on July 8, 2020, the court granted preliminary approval of the settlement agreement and appointment of class representatives and class counsel. (Doc. 152; Doc. 153).

On August 5, 2020, 13,445 notices were mailed to the Class Members and the parties have maintained a toll-free helpline and website to accommodate inquiries. (Doc. 184). On September 25, 2020, Rescigno moved for final approval of the settlement and plan of allocation, (Doc. 175), as well as for attorneys' fees and expenses and a service award to Rescigno and the class representatives, (Doc. 179).

a. Terms of Settlement

The settlement agreement identifies the class as "Royalty Owners in Northern Pennsylvania[1] who have entered into oil and gas leases, regardless of the type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom [SOP] has (or had) an obligation to pay Royalties on production attributable to [SOP]'s working interest." (Doc. 137 p.5).

The settlement agreement divides all plaintiffs and named plaintiffs into two groups. The first group, termed the "Lease Form 29 Group," or "L-29 Group," includes those class members whose leases contain the following provision governing valuation of royalty on natural gas:

> To pay Lessor on gas and casinghead gas produced from the leased premises, percentages of proceeds . . . based on: (1) the Gross Proceeds paid to Lessee from the sale of such gas and casinghead gas when sold by Lessee in an arms-length sale to an unaffiliated third party, or (2) the Gross Proceeds, paid to an Affiliate of Lessee, computed at the point of sale, for gas sold by lessee to an Affiliate of Lessee . . . .

---

[1] Northern Pennsylvania is defined in the settlement agreement as: "The area of Pennsylvania in which [SOP] owns working interests in oil and gas leases and from which it produces and sells Natural Gas production for delivery into Rome, Liberty, Allen, Meadow, Warrensville, Seely, Canoe Run, Tombs Run, and PVR Wyoming gathering systems and includes oil and gas leases owned in whole or in part by [SOP] in the following counties: Bradford, Lycoming, Sullivan, Susquehanna, and Wyoming." (Doc. 137, at 10).

(Doc. 137 p.9-10). The L-29 Group comprises approximately 7% of the class and the settlement agreement provides that they will be allocated 18% of the net settlement fund. (Doc. 137-2 p.7).

The second group, termed the "Other Lease Group," includes those class members with interests under all other lease forms. The Other Lease Group comprises approximately 93% of the class and the settlement agreement provides that they will be allocated approximately 82% of the net settlement fund. (Doc. 137-3 p.4).

SOP has agreed to pay $7,000,000, plus interest, to settle all claims relating to SOP's use of the index pricing methodology as the basis for calculation of royalties. The class has agreed to a release which will permit SOP to continue using the index pricing methodology to calculate royalties for a period of five years from the effective date of the settlement for the Other Lease Group. However, for those in the Lease Form 29 Group, SOP agrees to base the royalties on the resale price and to no longer use the index pricing methodology going forward. Upon final approval of the settlement, SOP will make this change effective retroactively to the first full production month after preliminary approval of the settlement. (Doc. 137 p.7, 17-18).

Ultimately, all class members who are eligible and participate in the agreement will release all claims asserted in the complaint or that relate to the methodology of determining royalties paid on natural gas produced from the class members' wells. (Doc. 137 p.23).

b. Objections

A small group of class members, Jerry J. Cavalier, Alan Marbaker, and Carol Marbaker, have repeatedly made their disagreement with the settlement in this case clear through their brief in opposition to the motion for preliminary approval, (Doc. 111), and their motions to consolidate, (Doc. 108), intervene, (Doc. 138), and stay the proceedings, (Doc. 155). Most recently, those four class members, as well as 141 other class members (collectively, "Objectors"), raise 13 objections to all aspects of the settlement agreement in a 50-page document, attached to which are 180 pages of exhibits. (Doc. 188). Rescigno and SOP filed responses. (Doc. 218; Doc. 224).

After numerous COVID-19-related delays, the court held a final fairness hearing on April 22, 2021, at which Objectors appeared and presented argument.

II. MOTION FOR FINAL APPROVAL

a. Whether Certification is Reasonable

i. Rule 23(a) Factors

a) Numerosity, Commonality, and Typicality

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). The class here satisfies the numerosity requirement since it includes approximately 13,445 individuals, and therefore joinder of all these plaintiffs would be impractical.

As to commonality, Rule 23(a)(2) requires that class members' claims share common questions of law or common questions of fact. "The standard is not stringent; only one common question is required." *In*

re Nat. Football League Players' Concussion Injury Litigation, 307 F.R.D. 351, 371 (E.D.Pa. 2015), *aff'd,* 821 F.3d 410 (3d Cir. 2016); *see also Rodriguez v. National City Bank,* 726 F.3d 372, 382 (3d Cir. 2013) (concluding the bar commonality sets "is not a high one"); *In re Prudential Ins.* Co. *of Am. Sales Practice Litig.,* 148 F.3d 283, 310 (3d Cir.1998) (holding this factor is satisfied "if the named plaintiffs share at least one question of fact or law" with the prospective class (internal quotation marks omitted)). To satisfy commonality, class claims "must depend upon a common contention . . . of such a nature that it 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." *Wal—Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011).

Here, there are factual issues common to all class members regarding whether SOP used an index pricing methodology to calculate royalties.

Finally, Rule 23(a)(3) requires that the class representatives' claims be typical of the class members' claims such that "the action can be efficiently maintained" and the class representatives have incentives that align with the class members. *Baby Neal v. Casey,* 43 F.3d 48, 57 (3d Cir. 1994).

The Third Circuit has "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). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct."

Prudential, 148 F.3d at 311 (internal quotation marks omitted); *see also /n re Warfarin Sodium Antitrust Litigation,* 391 F.3d 516, 532 (3rd Cir. 2004) (finding no abuse of discretion in a finding that the typicality requirement was satisfied where the claims of the representative plaintiffs arose "from the same alleged wrongful conduct . . . [and] the same general legal theories").

Here, although the specific language of the individual leases may vary, the claim of the class representatives, like those of the putative class members, is that SOP should not have used the index pricing methodology and, therefore, the requirement of typicality is present.

b) Adequacy of Representation

With regard to the adequacy of representation, the court finds that both the proposed class representatives and class counsel satisfy this requirement.

a.Class Representatives

"[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). "The purpose of the adequacy requirement is to identify intra-class conflicts that may prevent the representative plaintiffs from adequately representing the entire class." *In re Comcast Set-Top Cable Television Box Antitrust Litigation,* 333 F.R.D. 364, 376 (E.D.Pa. 2019). But, "[o]nly a fundamental intra-class conflict will violate Rule 23(a)(4)." *Id.*

"A fundamental conflict exists where some [class] members claim to have been harmed by the

same conduct that benefitted other members of the class." *Dewey,* 681 F.3d at 184. Alternatively, "[a] conflict concerning the allocation of remedies amongst class members with competing interests can be fundamental." *Id.* Thus, in determining whether representative plaintiffs may adequately represent the class, a court must address: "(1) whether an intra-class conflict exists; and if so, (2) whether that conflict is `fundamental." *Id.*

The class representatives are Rescigno and Donald Keith Stine and Mary Stine ("the Stines"). The court finds that the class members' interests have been adequately represented by Rescigno and the Stines. Ninety-three percent of the leases at issue, like Rescigno's, require royalties to be paid on revenue realized. The remaining leases contain a provision with language more favorable to the royalty owners. The Stines' lease contains this more favorable provision and, thus, the L-29 Group has adequate representation in the Stines. Finally, Rescigno and the Stines capably discharged their duties, having indicated that they were informed of and approved all significant developments in the case. *See In re Nat. Football League Players' Concussion Injury Litigation,* 307 F.R.D. 351, 375 (E.D.Pa. 2015), *aff'd,* 821 F.3d 410 (3d Cir. 2016).

b. Class Counsel

"Class counsel must fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(4). In considering the adequacy of class counsel, courts must assure that class counsel "(1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant." *In re General Motors Corp. Pick-Up*

Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 801 (3d Cir. 1995).

As previously stated when preliminarily certifying the class, the court is satisfied that class counsel have fairly and adequately represented the interests of the class pursuant to Rule 23(g)(4). The class is represented by Francis P. Karam of the law firm Robbins Geller Rudman & Dowd LLP (hereinafter "Robbins Gellar"), who provided a declaration to the court, (Doc. 104), along with the firm's resume, (Doc. 104-2). Attorney Karam has had prior experience in representing clients in oil and gas matters both before this court and in state court. Robbins Gellar Rudman & Dowd LLP has litigated numerous actions against oil and gas companies in both state and federal courts around the country. Attorney Karam's co-counsel, Douglas Clark of the Clark Law Firm, P.C (hereinafter "Clark Law Firm"), and John F. Harnes of the Law Offices of John F. Harnes PLLC (hereinafter "John F. Harnes PLLC"), also provided their firms' resumes. (Doc. 104-3; Doc. 1044).

Since 2016 when this case was filed, class counsel has vigorously litigated this case at arms' length, investigating the potential claims, responding to two motions to dismiss, reviewing what they represent to be thousands of documents in discovery, and retaining experts to assist and verify data. Further, class counsel has had to defend this against numerous attacks on its fairness by the Objectors in, for example, a later-stricken brief in opposition to the motion for preliminary approval, a motion to consolidate, a motion to intervene, a motion to stay, and a motion for discovery. No doubt that the questions raised by

Objectors—many of which are reiterated in their present Objections—have required class counsel to investigate the claims and become all the more confident in the strengths and weaknesses of their case and the fairness of the settlement.

In their Objection Number 4, Objectors contend that class counsel's interests are not aligned with those of all class members and that they have not adequately represented the class. Objectors argue this is because class counsel: (1) did not pursue claims in arbitration against SOP, (2) did not use an arbitration award issued to L-29 lessors Richard and Denise Kuffa on November 8, 2019 (the *"Kuffa* arbitration award") to improve the settlement terms on behalf of L-29 class members, (3) failed to inform class members of the *Kuffa* arbitration award, and (4) reached a settlement that provides L29 class members with "materially" less money than an amount SOP had offered in May 2017, and (4) failed to inform (Doc. 188 at 17-25).

The court finds the Objectors' arguments unconvincing and that their concerns tend to mitigate in favor of the conclusion that the class's interests were sufficiently pursued by class counsel. First, while class counsel opted to not pursue claims in arbitration against SOP, such a decision could be reasonably construed as one which benefits members of the class whose leases contain arbitration clauses. At the time of the commencement of this class action in January 2016, a separate suit filed in this district was litigating the issue of whether certain standard arbitration clauses in oil-and-gas leases allow for class arbitration. *See Chesapeake Appalachia, LLC v. Scout Petroleum, LLC,* No. 4:14-cv-0620, 2017 WL 1541659, at *5 (M.D. Pa. Apr. 28, 2017). The issues litigated in the *Scout Petroleum*

action, which was pending a decision on appeal during settlement negotiations in this case, called into question whether class arbitration may arise from leases containing arbitration clauses in the instant action. Because the class arbitrability of certain leases in this action was unclear, class counsel's decision to not pursue arbitration against SOP could reasonably be construed as advancing the interests of class members to pursue their claims on a class basis.

Second, even if class counsel did not use the *Kuffa* arbitration award to improve the settlement terms, such conduct does not meaningfully suggest that class counsel failed to adequately represent the interest of class members with L-29 leases under the present circumstances. The Kuffas, who held L-29 leases, litigated their royalty payment claim against SOP in an arbitration proceeding before the American Arbitration Association ("AAA"). (Doc. 188-3, at 5-6). The *Kuffa* arbitration resulted in an arbitration award which, as relevant here, concluded that SOP breached the L-29 lease and awarded the Kuffas injunctive relief to prohibit SOP from using index prices to calculate royalties, as well as $3,611.74 in damages. *Id.*

As to L-29 leases, the settlement agreement provides that SOP will not use the index pricing methodology and will instead base royalty calculations on resale price going forward. (Doc. 137, at ¶2.4). Further, the settlement agreement provides for a settlement amount of $7 million, the proceeds of which are to be distributed equally among class members, with the exception of members with L-29 leases, who will receive payment twice as that of other class members. (Doc. 138, at ¶1.e(i)). As such, the settlement agreement contains terms favorable to L-

29 class members and comparable to corresponding awards issued in the *Kuffa* arbitration. This suggests that class counsel, in reaching such settlement terms, adequately advanced the interest of L-29 class members.

Third, we find that the class counsel adequately represented the interest of the class even if they did not notify class members of the *Kuffa* arbitration award. Objectors argue that class counsel breached their fiduciary duty to the class by failing to notify class members of the *Kuffa* award. They argue this is because the *Kuffa* arbitration award collaterally estops SOP from relitigating the legal determinations made in the *Kuffa* arbitration.

Class counsel are fiduciaries to absent class members. *Greenfield v. Villager Indus., Inc.,* 483 F.2d 824, 832 (3d Cir. 1973) ("... in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court."). Initially, the Objectors do not cite to any caselaw in support of breach of fiduciary duty claim.[2] Moreover, the record as a whole suggests that class counsel has treated class members fairly. As the settlement agreement provides that SOP will not use the index pricing methodology as to L-29 leases, and members with L-29 leases will receive payment twice as that of other class members from the proceeds of the settlement amount, the court is satisfied that

---

[2] Further, insofar the Objectors assert that collateral estoppel should be applied in the above-captioned action, they do not make such an argument in a proper motion. Accordingly, the court does not reach the issue of whether collateral estoppel could apply in this suit.

class counsel has adequately represented the interests of the class members.

Fourth, the court is not persuaded that class counsel's agreement to a settlement which allocates less money to L-29 than what SOP offered in May 2017 indicates their failure to adequately represent the class. (Doc. 188 at 23). Class counsel points out that the disparity between the sum of the instant settlement and that of SOP's May 2017 offer is attributable to rulings in this case and other relevant cases which made legal risks more favorable to SOP by the time settlement was reached.

The court finds class counsel's position persuasive. The settlement agreement was filed with the court in March 2020, about three years after SOP made its May 2017 offer. (Doc. 188 p.24). Over the course of the three years, this court denied plaintiff's motion for reconsideration of its dismissal of two claims against SOP, (Doc. 85), and courts in the Third Circuit issued rulings which called into question the arbitrability of class claims arising from oil-and-gas leases. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC,* No. 4:14-cv-0620, 2017 WL 1541659, at *5 (M.D. Pa. Apr. 28, 2017), *aff'd* 727 F. App'x 749 (3d Cir. 2018). It thus appears plausible that the settlement amount is less than the amount SOP offered in May 2017 and the court does not find that the settlement amount suggests that class counsel failed to adequately pursue the class's interest.

Accordingly, the court is satisfied that class counsel fairly and adequately represented the interests of the class.

ii. Rule 23(b)(3)

Under Rule 23, the court must find that one of three grounds justifying this class action. Here, the parties rely on Rule 23(b)(3), which applies when (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) when "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

The "predominance inquiry" tests "whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 298 (3d Cir. 2011). Furthermore, the Third Circuit explained, "'Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test"; rather, "'[a]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application" of applicable laws will not foreclose" the commonality of the class. *Id.* at 301 (quoting *In re Linderboard Antitrust Litig.,* 305 F.3d 145, 162-63 (3d Cir. 2002).

The defendant's conduct was common to all class members regarding whether SOP used an index pricing methodology to calculate royalties. Each class member was allegedly harmed by the defendant's conduct. Although the Objectors argue that there are varying remedies contained within the Settlement, the Third Circuit has explained that "variations in the rights and remedies available to injured class members ... [do] not defeat commonality and predominance." *Sullivan v. DB Investments, Inc.,* 667

F.3d 273, 302 (3d Cir. 2011) (en banc) (quoting *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 529 (3d Cir. 2004)).

In this matter, a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. With a class of over 13,000 members, a class action favors efficiency over individually filing suit through the courts or arbitration. Objectors contend that arbitration would prove more promising to L-29 class members with arbitration clauses. However, this argument is unconvincing. First, the Defendant's contend that collateral estoppel would be extended from the first arbitration proceeding to subsequent proceedings, which would therefore reduce the cost for each arbitration. Assuming collateral estoppel between each arbitration proceeding would be possible, SOP correctly explains from *Lake Carey* that every arbitration would still involve the defendant arguing at which stage the gas was marketable, which requires expert testimony to determine. Objectors would not be able to simply apply the previous holding of one arbitrator and immediately succeed in a subsequent case. Each case would require expert testimony pertaining to the marketability of the gas, which in turn would drive up costs for each plaintiff. *See Lake Carey Investments, LLC v. Statoil USA Onshore Properties, Inc.,* AAA Case No. 01-17-00073491 (noting that while the *Kuffa* arbitration decision would extend collateral estoppel as to SOP violating the lease agreement, but damages would require additional evidence and expert testimony pertaining to the marketability of the gas out of the wellhead and post-production deductions). Second, as this Court already expressed during the fairness

hearing, the recovery by each plaintiff during arbitration would likely be so small that no attorney would accept the case without some sort of prior connection to the plaintiff, essentially doing them a favor. Third, each plaintiff would be responsible for the costs of arbitration, which likely outweigh the cost of arbitrating the case in the first instance. *See Richard & Denise Kuffa v. Statoil USA Onshore Properties, Inc.,* AAA Case No. 01-170005-6012 (awarding Kuffas $3,611.74 plus interest).

Objectors argue that other class members would benefit from the collateral estoppel that emerged from the *Kuffa* arbitration. However, this fails to take into account the inherent cost of an arbitrator and the cost of experts. The court finds that fairness and efficiency would better be served through a class action rather than arbitrating on an individual basis. It should also be noted that although Objectors challenge the class action settlement, they have not opted-out of the settlement to proceed with individual arbitration. This is puzzling to the court because they argue that individual arbitration is a viable and better option, but are unwilling to proceed with this process on their own accord.

b. Whether Notice to the Class Was Reasonable

As noted above, the court previously approved the notice scheme and, according to the parties, they have successfully followed that procedure. On August 5, 2020, 13,445 notices were mailed to the Class Members and the parties have maintained a toll-free helpline and website to accommodate inquiries. (Doc. 184).

Objectors contend the notice to the class was improper on the basis that it omitted "critical

information" and did not "provide class members with the information they need[ed] to make informed decisions about the settlement." (Doc. 188, at 24). Namely, Objectors argue that the notice did not "disclose that the Court dismissed all but one of Plaintiff's claims." (Doc. 188, at 25). Obviously, there is no such requirement that a notice provide detailed information regarding the court's disposition on a prior motion to dismiss and, unsurprisingly, Objectors do not cite to any authority for this proposition.

They also argue that the website maintained by the settlement administrator is deficient because it does not contain various case filings that a notice checklist created by the Federal Judicial Center indicates are "reasonable to post" such as the complaint, nor does it post "[o]ther orders, such as [] rulings on motions to dismiss," that "should ordinarily be made available." Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (fjc.gov). Clearly, the checklist referenced by Objectors is not a set of mandatory legal requirements for certification but merely an aid to assist judges in managing class actions. The court declines to find the notice, which contains all of the information required by Rule 23(c)(2)(B), deficient where an optional website maintained by the administrator does not contain all case documents referenced in a judicial checklist guide.[3] Moreover, the notice indicates that all

[3] Objectors also argued that the website did not contain Rescigno's motion for final approval or motion for attorneys' fees; however, upon review, the website does indeed have Rescigno's briefs in support of these motions as well as the attached

court records were available for inspection and provides the contact information of class counsel and the settlement administrator, as well as the court's address.

Objectors also argue that the notice is not in plain, easily understandable language. To the contrary, the notice is written in clear, concise, and easily understood language, contains appropriately bolded headings, and provides the contact information of class counsel in the event class members had any questions. Class counsel reports that no class members reached out to them. Moreover, as Rescigno observes, there is no basis to suggest that class members, who are parties to complex leases, could not understand the simple concepts addressed in the notice.

"Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Baby Prods. Antitrust Litigation,* 708 F.3d 163, 180 (3d Cir. 2013). The notice did so here. Therefore, in accordance the court's earlier approval of the notice scheme, the court finds that notice to the class was reasonable.

c. Whether the Proposed Settlement Is Fair

The Third Circuit directed district courts to consider the following nine factors in *Girsh v. Jepson:*

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of

---

declarations. *See Statoil Class Action Website: Case Documents,* http://www.statoilsettlement.com/case-documents.aspx.

> establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (internal quotation marks and ellipses omitted). Later, the Third Circuit held that, "because of a "sea-change in the nature of class actions," it might be useful to expand the *Girsh* factors to include several permissive and non-exhaustive factors:

> Courts should also apply the following *Prudential* factors where applicable:
>
> > the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing

> individual claims under the settlement is fair and reasonable.

In re Prudential Ins., 148 F.3d at 323.

Finally, in *In re Baby Products Antitrust Litigation*, the Third Circuit set forth additional considerations:

> one of the additional inquiries for a thorough analysis of settlement terms is the degree of direct benefit provided to the class. In making this determination, a district court may consider, among other things, the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards.

708 F.3d at 174. The Third Circuit made clear that a district court must have specific details about the value of the settlement to class members.

i. The *Girsh Factors*

a) Complexity, Expense, and Likely Duration of Litigation

This factor "captures the probable costs, in both time and money, of continued litigation." *In re Warfarin Sodium Antitrust Litigation,* 391 F.3d 516, 535-36 (3rd Cir. 2004) (internal quotation marks omitted).

This action has been pending since 2016 and, since then, the docket of this case has over 230 filings. If litigation continued in this action, the parties would have to engage in protracted discovery, extensive pretrial motions, and a lengthy and likely complicated trial involving numerous experts with

significant expert fees. Accordingly, the complexity, expense, and likely duration of litigation all weigh in favor of approval of the settlement.

b) Reaction of the Class to the Settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *Warfarin,* 391 F.3d at 536 (quoting *Prudential,* 148 F.3d at 318). Out of an estimated 13,445 class members, 194 have timely opted out and 144 have objected to the settlement.[4]

The objections are addressed throughout the court's analysis but ultimately do not provide a legitimate reason to disturb the settlement in this action.

The very small percentage of objectors and opt-outs, approximately 2.5% of class members, weighs in favor of the conclusion that the reaction of the class is strongly favorable. *See Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1314 (3d Cir. 1993) (holding that the "small proportion of objectors does not favor derailing settlement."). Accordingly, this factor weighs in favor of approving the settlement.

---

[4] Counsel indicates that the settlement administrator received 194 timely requests for exclusion, as well as eight untimely requests. (Doc. 219). One class member who opted out later wrote to rescind that decision. Additionally, the settlement administrator indicates that he was in receipt of 23 requests for exclusion that could not be identified on the list of class members.

c) The Stage of the Proceedings and Amount of Discovery Completed

"The third *Girsh* factor captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *NFL Concussion Litig.,* 821 F.3d 410, 438-39 (3d Cir. 2016) (internal quotation marks omitted). "[F]ormal discovery is not a requirement for the third *Girsh* factor. What matters is not the amount or type of discovery class counsel pursued, but whether they had developed enough information about the case to appreciate sufficiently the value of the claims." *Id.* at 439.

Here, during the two years leading up to the settlement, the parties engaged in significant formal and informal discovery related to royalties and pricing which allowed them to adequately appreciate the merits of the case before negotiating the settlement. Class counsel indicates they received and reviewed thousands of pages of documents over the course of several months, including complex data setting forth the actual revenues received by SOP, the costs incurred, the terms of the various leases of class members, and the potential damages incurred by each individual class member. Additionally, they state they retained experts with whom they reviewed monthly index pricing data and back-up; monthly resale pricing calculations, worksheets, and supporting data; sales invoices and statements; lease records; pipeline invoices and statements; royalty payment records; and index price methodology supporting documentation.

Further, the settlement agreement was reached after briefing on the two motions to dismiss filed by the two dismissed defendants and SOP. As a result, the parties gained a complete understanding of the strengths and weaknesses of their cases and they indicate that the settlement represents informed resolution of this case. Therefore, this factor weighs in favor of approving the settlement.

d) Risk of Establishing Liability and Damages and the Risk of Maintaining a Class Through Trial

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *Id.* (quoting *Prudential,* 148 F.3d at 319). The sixth factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin,* 391 F.3d at 537. "Because class certification is subject to review and modification at any time during the litigation, *see, e.g., Zenith Labs., Inc. v. Carter-Wallace, Inc.,* 530 F.2d 508, 512 (3d Cir. 1976), the uncertainty of maintaining class certification favors settlement." *In re Comcast Set-Top Cable Television Box Antitrust Litigation,* 333 F.R.D. 364, 383 (E. D. Pa. 2019).

Rescigno indicates that litigating the claim that SOP improperly calculated the royalty paid would be complex and may involve evidence regarding the alleged sham nature of SOP's intra-company sales, good faith, the prices the natural gas sold for, and SOP's efforts to market the natural gas. This

would require testimony of experts, fact witnesses, and a voluminous discovery record.

Beyond prevailing on their claims, class members additionally would have to overcome the affirmative defenses raised by SOP—the primary one being that, in using an index price, it only deducted a small portion of the costs incurred in post-production and thus it is entitled to offset any such expenses against any recovery. SOP has argued that, for several years after it acquired the leases, its use of the index prices resulted in SOP paying a higher price than it actually received when selling to third parties. SOP has maintained that class members should not be able to keep the benefit of the index price when it was higher while being compensated for the index price when it was lower.

Proving these claims at trial would require expert testimony to determine what costs were incurred to make the gas marketable, the deductions SOP took from royalties, and the costs that enhanced the market value of the gas. Moreover, this defense has force since courts, including the Fifth Circuit, have held favorable on this counterclaim. *See Potts v. Chesapeake Exploration, LLC,* 760 F.3d 470, 474-75 (5th Cir. 2014) (holding that deduction of post-production costs incurred between the wellhead and the downstream point at which market value could be ascertained was required).

Additionally, the largest obstacle identified by the parties in proceeding with litigation is that the vast majority of the class signed arbitration agreements that "could potentially preclude them even from participating in this [a]ction and would relegate them to individual arbitrations that [would

be] uneconomic to pursue." (Doc. 176 p.9). In fact, in *Marbaker v. Statoil USA Onshore Properties, Inc.,* 801 Fed.App'x 56, 60 (3d Cir. 2020), the Third Circuit stated that the five original objectors' leases did not permit class arbitration.

As a result, Rescigno notes that, without settlement, many class members would be left to arbitrate their claims on an individual basis, the cost of which would exceed the potential damages they received from the use of an index pricing methodology instead of a resale price. That is precisely what occurred in the Kuffas' arbitration that Objectors have repeatedly referenced throughout this case (and do so again here) as an example of a better potential individual outcome. There, while Objectors note that they were awarded 100% of their damages, Richard and Denise Kuffa spent $17,625.00 to arbitrate their claims against SOP and but ultimately recovered only $3,611.74 plus interest. (Doc. 138-2; Doc. 138-7p.3). This is the likely scenario for all class members with arbitration provisions who elect to opt out and pursue their claims against SOP individually. Accordingly, Objectors' contention that the settlement is inadequate for those with L-29 leases because they stand to receive 100% of their claims simply does not hold water.

While Objectors argue that some class members have lease provisions allowing for the recovery of attorneys' fees, which would make it more economical to pursue individual arbitration, the settlement allocation plan accounts for this. Rescigno's lease, like those in the Other Lease Group, do not have the L-29 language but also do not have arbitration provisions. The Stines' lease, like the rest of the L-29 Group, has

L-29 language but also a compulsory arbitration clause, as does most of the class. Consequently, the settlement accounts for this difference by apportioning a higher recovery for those in the L-29 Group with the more favorable language. The differing levels of compensation reflects the underlying strength of the two groups of class members' claims. *See Pet Food,* 629 F.3d at 347 (affirming district court's conclusion that differing awards to class members "reflect[s] the relative value of the different claims," not "divergent interests between the allocation groups"). Contrary to Objectors' arguments, this apportionment is not indicative of a conflict of interest. *See Petrovic v. Amoco Oil* Co., 200 F.3d 1140, 1146 (8th Cir.1999) ("If the objectors mean . . . that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable.").

Therefore, in light of the difficulties faced by the class in establishing liability and damages, and the alternatives available, the court agrees that the risks of continued litigation weigh in favor of an early resolution.

As to the risk of maintaining the class action through trial, Third Circuit has recognized that "[t]here will always be a `risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential,* 148 F.3d at 321. Consequently, this factor "deserve[s] only minimal consideration." *In re Nat'l Football League,* 821 F.3d 410. Therefore, this factor weighs in favor of

approving the settlement; however, its weight merits only minimal consideration.

e) Ability of Defendants to Withstand Greater Judgment

This factor "is most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *NFL Concussion Litig.,* 821 F.3d at 440. Such is not the case here as the court has not been presented with evidence that SOP is at risk of insolvency. Further, district courts in this Circuit "regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts." *McDonough v. Toys R Us, Inc.,* 80 F.Supp.3d 626, 645 (E.D. Pa. 2015) (internal quotation marks omitted). Moreover, other *Girsh* factors far outweigh the question of whether SOP can withstand a greater judgment. Accordingly, this factor is neutral and neither supports nor undercuts approval of the settlement.

f) Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and Attendant Risk of Litigation

In evaluating the final two *Girsh* factors, the court asks "whether the settlement represents a good value for a weak case or a poor value for a strong case." *NFL Concussion Litig.,* 821 F.3d at 440 (internal quotation marks omitted). These factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Id.* Notably, "[t]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not

prevailing, should be compared with the amount of the proposed settlement." *Id.*

"The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. Rather, the recovery percentage must represent a material percentage recovery to plaintiff, in light of all the risks considered under *Girsh." McDonough,* 80 F.Supp.3d at 645-46 (internal citations and quotation marks omitted).

In this case, the settlement amount represents 12.08% of the $58 million possible recovery the aggregate of the difference between the index price and the resale price that SOP received for all class members. Other courts have found reasonable percentages ranging from 1.6% to 37%. *Id.* As discussed, even if the full recovery were proven at trial, it could be reduced by SOP's affirmative defenses. If successful, SOP would be entitled to recover $4.5 million. In that case, the settlement represents 13.08% of possible recovery. Thus, this recovery is well within the range of reasonableness.

In light of the complexity of this case and the potential obstacles to establishing liability and damages, the court concludes the amount of the settlement is reasonable.

Objectors present varying arguments that work against each other. First, Objectors contend that it is unreasonable for this court to award a greater percentage of the settlement to the L-29 leases because the court found that SOP did not violate certain portions of the L-29 leases. (Doc. 72 & 73). Second, Objectors contend that the L-29 leases should not settle

for anything less than 100% of their claim. (Doc. 188 p.38). Objectors specifically support this argument by citing to the *Kuffa* and *Lake Carey* decisions as they provide that collateral estoppel could be utilized by L-29 lease holders against SOP. However, as this court previously explained, the *Kuffa* and *Lake Carey* decisions may provide collateral estoppel grounds for a violation of the lease, but each decision specifically withheld a damages determination because it required the testimony of experts and the submission of evidence. The *Lake Carey* decision even specifically noted how the damages hearing would be necessary because it is a fact determination dependent upon the marketability of the gas at each wellhead. The *Kuffa* decision hardly resolved this point because it also held a damages hearing and needed to resolve the question of post-production deduction costs.

The *Kuffa* and *Lake Carey* decisions more aptly illustrate that the settlement is reasonable because L-29 leaseholders proceeding with arbitration would need to present expert testimony and evidence about the marketability of the gas at their specific well and present arguments about post-production deductions. While Objectors portray the arbitration process as a simple task due to the collateral estoppel emerging from the *Kuffa* and *Lake Carey* decisions, in reality, this process will be much more expensive than portrayed on paper. Experts and counsel will be required all adding expense to each individual plaintiff.

Objectors again contradict themselves by presenting the argument that "arbitration cannot be disfavored even when it is not a not feasible forum for the vindication of legal rights because the amounts at

issue do not warrant the costs of arbitration." (Doc. 188 p.32) (citing *American Express* Co. v. *Italian Colors Restaurant,* 570 U.S. 228 (2018). It is irrational that leaseholders would go forward with claims that may cost them thousands of dollars more to vindicate their legal interests than if they were simply to not bring forward their claims. While *Italian Colors* does present that a plaintiff's claims cannot be removed from arbitration simply because the recovery would be outweighed by the costs to proceed through arbitration, the case is easily differentiated. 570 U.S. 228 (2018). *Italian Colors* represented small restaurants suing American Express based on a breach of the contract between the parties. Italian Colors Restaurant sought to proceed with class arbitration, but the contract included a waiver of class arbitration. American Express argued enforcement of the contract required individual arbitration by the class members regardless of the cost each individual restaurant would face. The Supreme Court's holding reflects this factual background because it is based on the enforcement of the contractual provision between the two parties. This case is distinctly different because both parties to the lease agreement are seeking to avoid arbitration. It is now the Objectors arguing in favor arbitration, which this court has dissected on several grounds as not being as reasonable or fair as the presented settlement.

ii. The Prudential Factors

Here, the relevant *Prudential* factors that have not been addressed above or that will not be addressed below lend further support for approving this settlement. Namely, the comparison between results achieved by settlement and results achieved,

and likely to be achieved, by others support the fairness of the settlement.

iii. Rule 23(e)(2) Factors

a) Whether the Class Representatives and Class Counsel have Adequately Represented the Class

As discussed above in connection with the adequacy of the class representatives and class counsel, it is clear that class counsel is well informed, and their actual performance has been commendable.

b) Whether the Proposal was Negotiated at Arm's Length

Once again, as was discussed above in connection with the adequacy of class counsel, the court is convinced that the settlement was negotiated at arms'-length.

c) Whether the Relief Provided for the Class Was Adequate

Rule 23(e) lists four factors to consider regarding this requirement:

> (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Fed.R.Civ.P. 23(e)(2)(C). Consistent with the court's discussion of the first *Girsh* factor, as well as the *Prudential* factors, the first two factors have been met. The third factor will be discussed below in the analysis of class counsel's motion for attorneys' fees.

The final factor is inapplicable since the parties represent that there "are no other agreements or any additional settlement terms, not fully disclosed in the Settlement Notice and public filings." (Doc. 176 p.23).

d) Whether the Proposal Treats Class Members Equitably Relative to Each Other

This factor "calls attention to a concern that may apply to some class action settlements--inequitable treatment of some class members vis-a-vis others." Fed.R.Civ.P. 23(e)(2), advisory committee's note to 2018 amendment. "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Id.*

As noted above, under the terms of the settlement, the L-29 Group, which comprises approximately *7%* of the class, will be allocated 18% of the net settlement fund. The Other Lease Group, which comprises approximately 93% of the class will be allocated approximately 82% of the net settlement fund.

The court concludes that this distribution plan treats class members equitably relative to each other because it appropriately accounts for the differences in their leases and, consequently, their claims.

III. MOTION FOR AWARDS OF ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS

The court is required to approve the amount of requested attorneys' fees in the proposed settlement agreement. *See In re Gen. Motors Corp.,* 55 F.3d at

819. Pursuant to 42 U.S.C. §1988(b), the Court may award the prevailing party reasonable attorneys' fees. *See also* Fed.R.Civ.P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").

The starting point for determining "reasonable" attorneys' fees is the lodestar amount, which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *McKenna v. City of Phila.,* 582 F.3d 447, 455 (3d Cir.2009). The lodestar is calculated according to prevailing market rates in the community for attorneys of comparable skill, reputation, and ability. *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 199 (3d Cir. 2000). The petitioner bears the burden of showing that the fees and costs requested are reasonable by producing evidence that supports the hours and costs claimed. *See In re Diet Drugs,* 582 F.3d 524, 538 (3d Cir.2009).

Plaintiffs' counsel has submitted a motion for attorneys' fees, litigation expenses, and costs in the amount of 25% of the settlement, which amounts to $1,750,000. Utilizing the lodestar method, Plaintiff's counsel submitted their billable hours with rates prior to the fairness hearing. Robbins Geller submitted a bill with attorney's fees amounting to $1,335,007.50 and expenses of $122,087.35. (Doc. 181).[5] John F. Harnes PLLC submitted a bill with attorney's fees totaling $1,325,887.50 and expenses of $1,897.93. (Doc. 183). The Clark Law Firm submitted

---

[5] Robbins Geller retained experts in the case, which amounted to $115,921.56 of their submitted expenses of $122,087.35.

a bill with attorney's fees amounting to $177,000 with expenses of $1,480.75. (Doc. 182). Therefore, attorney's fees totaled $2,837,895 and expenses amounted to $125,466.03. Therefore, using the attorney's fees as submitted would result in a lodestar multiplier of .62. While the court does note the excessive rates presented in this case (upwards of $1,325 per hour), even with a reduction of all hourly rates over $500 reduced to $500 per hour, the resulting lodestar multiplier would still only be 1.18. This is well within the acceptable range when the lodestar method is applied. *See In re Veritas Software Corp. Sec. Litig.,* 396 F. App'x 815, 819 (3d Cir. 2010) (finding lodestar of 1.51 was "well within the range of attorneys' fees awarded and approved by this Court"); *see also In re Cendant Corp.,* 243 F.3d , 742 (holding a lodestar multiplier of three would be reasonable and appropriate); *In re Prudential* Co. *Am. Sales Practice Litig Agent Actions,* 148 F.3d 283, 341 (3rd Cir. 1998) ("Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied").[6]

[6] The court notes that it has reviewed the supplemental authority provided by the Objectors, *Briseno v. Henderson,* 998 F.3d 1014 (9th Cir. 2021), in which the Ninth Circuit reversed approval of a class action settlement because the district court did not apply the *Bluetooth* factors to scrutinize the fee arrangement and determine if collusion "may have led to class members being shortchanged." *Id.* at 1026 (citing *In re Bluetooth Handset Products Liability Litigation,* 654 F.3d 935 (9th Cir. 2011)). The court does not find that the *Bluetooth* factors, even if a required part of the analysis here, suggest collusion.

IV. OBJECTIONS

The court has addressed some of the objections above but will address the remaining ones here.

a. Objection Regarding the Existence of a Motion for Certification

Initially, Objectors contend that the court cannot consider the settlement terms because "[t]here is no motion for class certification before the court." (Doc. 188 p.5). This is because Rescigno's motion purportedly makes no mention of Rules 23(a) and (b), which must be considered independently of Rule 23(e).

Unsurprisingly, Objectors present no authority for the notion that a court cannot finally certify a class action for purposes of settlement unless the plaintiff's brief in support of final approval sufficiently mentions Rule23(a) and (b), where those factors were discussed at the fairness hearing and have been thoroughly addressed by the court in the above analysis.

b. Objections Regarding Individual Issues and Ascertainability, commonality, predominance:

First, Objectors challenge the Rule 23(a) adequacy, typicality, commonality, and predominance of the class on the basis that the leases of the class members differ. According to them, this "matters here" because, in ruling on the motions to dismiss, "other tribunals looking at other leases different from Rescigno's have reached different conclusions on issues such as whether the lease is ambiguous or not." (Doc. 188 p.9).

Essentially, the Objectors note that particular provisions in Rescigno's lease, including "at the well"

language, were the basis for the court's dismissal of all but one of the claims against SOP; however, Objectors contend that many of the other class members' leases do not contain such language which directly pertains to the key issue in this case of whether the leases permit transfers to an affiliate and an `index price' to be the basis for the royalty payment. Thus, Objectors contend that other class members would have potentially successful breach of contract claims against SOP where Rescigno does not.

Objectors observe that while the parties have referred to two subclasses—the L-29 Group, whose leases have a specific provision regarding royalties, and the Other Lease Group whose leases have all other lease forms-SOP had provided Rescigno with thirty different lease forms that Rescigno organized into five different categories. Consequently, they contend that Rescigno cannot show his lease is typical of all leases, there is no common question because answering questions about Rescigno's lease does not answer questions about other lease forms, and that the record does not show that class members can prove their claims using predominately common evidence.

Relatedly, Objectors dispute the adequacy of the Stines as class representatives, arguing that they are not parties, have never asserted claims in this case, and "appeared only after there was a settlement." (Doc. 188 p.14). Objectors note that, in evaluating adequacy of a class representative, a court should consider whether the class member merely lent his name after settlement has been negotiated. *See Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 856 n.31 (1999).

With respect to their claims about the Rule 23(a) and (b)(3), there is indeed a difference between certification of a class for settlement and certification of a class for litigation. *See Sullivan v. DB Investments, Inc.,*667 F.3d 273, 303 (3d Cir. 2011). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620 (1997).

The Third Circuit has stated, "We have never required the presentation of identical or uniform issues or claims as a prerequisite to certification of a class." *Sullivan,* 667 F.3d at 301. The Third Circuit continued:

> Nothing in our case law or the language of Rule 23 commands that everyone in a class must allege precisely identical or "uniform" causes of action, *see Sullivan,* 613 F.3d at 149, and statutory variations do not defeat predominance in the presence of other exceedingly common issues. Instead, as *Prudential* and *GM Truck* explain, where a defendant's singular conduct gives rise to one cause of action in one state, while providing for a different cause of action in another jurisdiction, the courts may group both claims in a single class action. This tactic in litigation advances the laudatory purposes of the class action device, preserv[ing] the resources of both the courts and the parties by permitting issues affecting all class

> members to be litigated in an efficient, expedited, and manageable fashion.

Id. at 302 (internal citations and quotation marks omitted).So too is the case with the variations in contact provisions here. There is indeed a common question amongst the class members—whether the sale of gas by SOP to its affiliate, Statoil Natural Gas, LLC, was not a bona fide sale and whether SOP inappropriately used an index price for calculating royalties. (Doc. 1 p.4-5). The variations in the lease language are immaterial in light of the fact that the question of SOP's liability is central to all class members and is subject to generalized proof. *See Fankhouser v. XTO Energy, Inc.,* NO., 2010 WL 5256807, at *6 (W.D.Okla. Dec. 16, 2010) ("All members of the class base their claims on the same legal theory: that defendant's royalty payment formula has at its heart a price component that is improper under Oklahoma and Kansas law. The question of defendant's liability is central to all class members and is subject to generalized proof. The variations in . . . lease language are immaterial given defendant's identical treatment of all class members for royalty purposes.").

As with commonality, the typicality does not "mandate[] that all putative class members share identical claims." *Neal,* 43 F.3d at 56. "Cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Id.* at 58.

Although Objectors contend that some class members may have more favorable lease language

than Rescigno, "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Id.* at 58.

As to the Stines in particular, this is not a case in which they appeared only after a settlement was reached since the parties filed a stipulation to include the Stines as lead plaintiffs and class representatives, simultaneously with the motion for settlement and preliminary approval was filed. (Doc. 101; Doc. 103). Additionally, the court specifically discussed the Stines in its memorandum granting the motion for preliminary approval and found them adequate representatives. (Doc. 152 p.13). Thus, the notion that they somehow escaped this court's review or that the court did not appoint them class representatives is plainly unsubstantiated.

Significantly, although Objectors contend the Stines "have not asserted claims," Objectors do not argue the Stines are not part of the class or the L-29 Group. Moreover, as Rescigno previously noted in this case, in applying Rule 23, other courts have appointed individuals as class representatives who were not named in the complaint. *In re Facebook, Inc., IPO Sec. & Derivative Litig.,* 312 F.R.D. 332, 345 (S.D.N.Y. 2015); *In re Oxford Health Plans, Inc.,* 191 F.R.D. 369, 380 (S.D.N.Y. 2000) (determining that the court had the power to designate a class representative who was not also a lead plaintiff since nothing in Rule 23 prevented it). Thus, Objectors concern that the Stines are not named plaintiffs does not defeat a finding of adequacy.

Moreover, "[c]ourts rarely deny class certification on the basis of the inadequacy of class representatives"

and do so "only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit, display an unwillingness to learn about the facts underlying their claims, or are so lacking in credibility that they are likely to harm their case." *In re Facebook, Inc.,* 312 F.R.D. at 345 (internal quotation marks omitted). Those circumstances are not present here.

Finally, with respect to Objectors' contentions that the class is not ascertainable, as Rescigno notes, that the class has been ascertained given that 13,445 notices have been sent out to the class members.

Consequently, the court has no hesitation in holding that the requirements of Rule 23(a) and Rule 23(b)(3) are met.

c. Objection that the record does not support the request for incentive awards.

Objectors contend that the record does not establish an incentive award of $5,000 for Rescigno and $2,500 each for the Stines. Class Counsel present a declaration explaining the involvement of Rescigno and Canfield. The declaration explains the involvement of Rescigno throughout the development of the case. The Stines participated from the preliminary approval of the Settlement and worked with Class Counsel to assist in this process. As was previously explained, Objectors do not contend that the Stines are not part of the class or the L-29 Group. Courts have appointed individuals as class representatives who were not named in the complaint. *In re Facebook, Inc., IPO Sec. & Derivative Litig.,* 312 F.R.D. 332, 345 (S.D.N.Y. 2015); *In re Oxford Health Plans, Inc.,* 191 F.R.D. 369, 380 (S.D.N.Y. 2000). The court finds that the Stines

participated and provided the Class and Class Counsel with valuable assistance in this matter.

d. Objection that Plaintiff offers no rationale or analysis justifying the plan of distribution's proposed allocation of the Settlement.

Objectors contend that the different treatment between the two lease groups is improper. However, Objectors' argument plainly misses the mark. The differing levels of compensation reflects the innate strength of the two groups of class members' claims. *See Pet Food,* 629 F.3d at 347 (affirming district court's conclusion that differing awards to class members "reflect[s] the relative value of the different claims"). Objectors' attempt to argue some impropriety by Class Counsel in sorting the thirty different lease forms into five categories and then eventually forming two sub-groups: L-29 Group or the Other Lease Type Group. As already explained, the L-29 leases contain stronger lease language than all the other lease types, which is the exact reason why the L-29 leases were separated into their own group receiving more compensation. Objectors even argue in their very next objection the strength of the L-29 lease claims. (Doc. 188 p.38).

e. Objection that the going-forward terms of the settlement unfairly rewrite the L-29 leases.

The Settlement provides that the L-29 leases will be paid based upon a "Resale Price" instead of the "Gross Proceeds." Objectors challenge this transformation by claiming this is a radical change rewriting the L-29 leases. However, Class Counsel explains that the current L-29 leases already contain a

"Market Enhancement Clause" that expressly allows for the deduction of costs after the gas is marketable.

"Resale Price" is defined in the Settlement as the "net weighted average sales price *(net of mainline interstate pipeline tariffs, fees, and costs).* (Doc. 137, ¶1.32 (emphasis added). "Gross Proceeds" is defined as "the total consideration paid for oil, gas, associated hydrocarbons, and marketable by-products, produced from the leased premises..." (Doc. 1386, ¶4(d)). As the L-29 leases are currently written, most contain a "Market Enhancement Clause." The "Market Enhancement Clause" allows for deductions of costs after the gas is marketable. One clear point that the parties explained at the fairness hearing is that marketability is a contested issue requiring experts to determine. The transformation in the Settlement establishes a clear point in time as defined as "net of mainline interstate pipeline tariffs, fees, and costs." (Doc. 137, ¶1.32). While the parties may contest when the gas is actually considered marketable, it is hardly farfetched to believe gas is marketable at the interstate pipeline, which quite literally is the market. *See Devon Energy Corp. v. Kempthorne,* 551 F.3d 1030, 1037 (D.C. Cir. 2008) (holding that for federal leases, gas is in marketable condition when it meets interstate pipeline specifications "that serve its typical purchasers"); *Anderson Living Tr. v. WPX Energy Prod., LLC,* 306 F.R.D. 312, 326 (D.N.M.), *adhered to on reconsideration,* 312 F.R.D. 620 (D.N.M. 2015) ("natural gas generally comes into marketable condition when it is of sufficient quality to be accepted into the interstate pipeline system").There is no prohibition "forever" as the Objectors hyperbolize, but rather, the Settlement

contains a clear provision allowing for class members to challenge deductions from the royalty payments. The Settlement states:

> Nothing in this Settlement addresses or affects the Parties' rights concerning deductions from the price of Royalty for post-production costs, including the Parties' respective rights and positions as to whether "market enhancement," "ready for sale or use," or similar clauses allow for deductions of post-production costs, and no compromise, settlement, or release is intended by any Party as to prior or future taking of post-production cost deductions.

(Doc. 137, ¶2.6). L-29 leaseholders still have the ability to challenge any post-production deductions that occur. The Settlement creates a more clearly establishment point at which the gas can be considered "marketable." Notwithstanding the previous discussion, Objectors do not present any meaningful argument that the Settlement becomes "unfair" to L-29 leaseholders, who are being compensated at an increased amount due to the more favorable terms within their leases.

f. Objection that the going-forward terms of the settlement that apply to non-L-29 leases are unfair

Objectors contend that the release for non-L-29 class members is unfair because of the five-year release. The Objectors' argument misconstrues ¶2.5 of the Settlement. The release allows for SOP to use the "Index Pricing Methodology to calculate and pay Royalties for a period continuing until the Sunset Date." (Doc. 137, ¶2.5). The release is for the specific

methodology used. If SOP does not use the Index Pricing Methodology or does not pay the Class Members correctly based on Index Pricing Methodology, then class members still maintain their right to sue.

As was just explained with ¶2.6 of the Settlement, the parties still have the ability to challenge post-production costs and the release is not intended by any party to impact prior or future taking of post-production cost deductions. (Doc. 137, ¶2.6).

V. CONCLUSION

Pursuant to the above analysis, the court has determined that Rule 23(a) and (b)(3) have been met and, consequently, certification is proper. After review of the *Girsh, Prudential,* and Rule 23(e)(2), the terms of settlement appear fair, reasonable, and adequate. Consequently, the motion for final certification is **GRANTED.** Additionally, the court will grant the motion for attorneys' fees and expenses and a service award to Rescigno and the class representatives.

An appropriate order follows.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE

DATE: January 10, 2023

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JANUARY 10, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

ORDER

In accordance with the court's memorandum issued this same day, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for Final Approval of Class Action Settlement and Plan of Allocation, (Doc. 175), and motion for Attorneys' Fees and Expenses and Service Award to Plaintiff and Class Representatives, (Doc. 179) are GRANTED.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE

DATE: January 10, 2023

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (APRIL 20, 2021)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Presently before the court is Alan and Carol Marbaker, Jerry L. Cavalier, and Frank K. Holdren's ("Objectors") motion for discovery and request for an expedited briefing schedule. (Doc. 166). For the reasons set forth below, the motion will be **DENIED.**

I. BACKGROUND

The court has set forth the background of this case in its prior memoranda and need not repeat it herein. What is pertinent to the present motion is that a final fairness hearing is presently set for Thursday, April 22, 2021. Objectors have made their disagreement with the settlement in this case clear through their brief in opposition to the motion for preliminary

approval, (Doc. 111), their motions to consolidate, (Doc. 108), to intervene, (Doc. 138), to stay the proceedings, (Doc. 155), and finally through their formal objections to the plaintiff's motion for final approval, (Doc. 188). In the present motion, Objectors move for leave to take discovery as well as for an expedited briefing schedule. (Doc. 167). Both the plaintiff Angelo Rescigno, Sr. and the defendant Statoil USA Onshore Properties, Inc. ("SOP") filed briefs in opposition. (Doc. 169; Doc. 170). Objectors filed a reply brief. (Doc. 172)

II. DISCUSSION

With respect to objectors' right to discovery in a class action, the Third Circuit has stated,

> [O]ur precedent [] holds objectors are "entitled to an opportunity to develop a record in support of [their] contentions by means of cross examination and argument to the court." *Greenfield v. Villager Indus., Inc*, 483 F.2d 824, 833 (3d Cir. 1973); see also *Grimes v. Vitalink Communications Corp.*, 17 F3d 1553, 1558 (3d Cir. 1994) ("[T]he objecting class members mst be given an opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate."); Fed.R.Civ.P. 23©(2)(B) ("[A] class member may enter an appearance through counsel if the member so desires.") In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), we reversed the district court's final approval of a class action settlement and remanded for clarification of the record, noting, inter alia, that the "objector … was not afforded an adequate opportunity to test by discovery the

> strengths and weaknesses of the proposed settlement." Id. at 157. Although we found that the objector was "entitled to at leas a reasonable opportunity to discovery" against the plaintiffs and defendants, that finding was predicated on the total inadequacy of the record upon which the settlement was approved and the "totality of the circumstances surrounding the settlement hearing" in which the objector was denied meaningful participation. Id. We therefore conclude that *Girsh* cannot stand for the proposition that, as a general matter, objectors have an absolute right to discovery, See, e.g., In re *Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 24 (D.D.C. 2001).

In re Cmty. Bank of N. Va., 418 F3d 277, 316 (3d Cir. 2005). However, "discovery may be appropriate if lead counsel has not conducted adequate discovery or if the discovery by lead counsel is not made available to objectors." Id. Thus, the court must "employ the procedures that it perceives will best permit it to evaluate the fairness of the the settlement" and in doing so should evaluate "the nature and amount of previous discovery, reasonable basis for the evidentiary requests, and number and interests of objectors." Id. (internal quotation marks omitted).

Here, Objectors seek eleven exceptionally broad categories of documents, many of which are overlap, including:

(1) "all documents, data and information exchanged between the settling parties," (Doc. 167, at 19);

(2) Expert opinions and analysis "any party relied upon in negotiating the settlement or expects to introduce" to support final approval, (Doc. 167, at 20);

(3) All the discovery Objectors previously obtained during their two-year period of mediation with SOP but were subsequently required to destroy when negotiations broke down;

(4) The Stine's lease;

(5) The Stine's retention agreement and documentation showing when and how they became involved in the case;

(6) "all of the documents either party intends to rely on or might rely on the final fairness hearing," (Doc. 167, at 25) (emphasis added);

(7) Any witnesses either party intends to present "or might present" at the final fairness hearing," (Doc. 167, at 27) (emphasis added);

(8) Documents and dates showing all forms of leases within the settlement class and "information about damages calculations and the allocation of the monetary portion of the settlement among the lease forms." (Doc. 167, at 28);

(9) Information and communications between the parties concerning settlement terms, the Marbaker case, and the Marbaker mediation—in particular "class counsel's failure to response to Objectors' July 2017 offer to

assist class counsel to prevent SOP from taking advantage of them." (Doc 167, at 29);

(10) "documents showing dates and substances of all communications with the court concerning settlement, scheduling of settlement, scheduling of settlement proceedings or settlement negotiations," (Doc. 167, at 30); and

(11) Documents sufficient to show terms of other settlement agreements between SOP and any other person regarding disputes about royalty terms of lease forms included within the class.

The overarching reason Objectors provide for seeking these items revolves around their desire to gauge whether the settlement amount is a fair compromise of the class's claims.

In response, SOP asserts that this is yet another attempt by Objectors to "gain control of the *Rescigno* litigation and settlement through ever procedural contrivance available." (Doc. 169, at 5). SOP states that, while it is not opposed to producing limited discovery, Objectors' discovery greatly exceeds the breadth and volume of discovery available to them per Third Circuit precent and, as such, suggests that Objectors are yet again attempting to relitigate this matte in its entirety. Thus, SOP proposes that the court hold the motion in abeyance until the parties have filed their papers in support of final approval after which the parties can evaluate whether Objectors should be afforded additional discovery. The court agrees.

Since Objectors' motion, Rescigno filed a motion for final approval as well as a motion for attorneys' fees. (Doc. 175; Doc. 179). Objectors filed their objections. (Doc. 188). Rescigno and SOP filed reply briefs. (Doc. 218; Doc. 223).

This court has previously observed that "[d]iscovery of evidence pertaining to settlement negotiations is appropriate only in rare circumstances," such as where there is collusion between the parties. *Demchak Partners Ltd. V. Chesapeake Appalachia, LLC*, No. 3:13-2289, 2014 WL4955259, at *6 (M.D.Pa. Sept. 30, 2014) (internal quotation marks omitted). Although Objectors reiterate their concerns regarding a collusive settlement process and a possible reserve auction, "courts presume the absence of fraud or collusion in negotiating a settlement unless evidence to the contrary is offered." Id. To date, Objectors have produced no such evidence.

Further, nothing in the Objectors' filings convinces the court that lead counsel has not conducted adequate discovery or that the record available to Objectors is inadequate for them to raise objections. Although discovery may be appropriate where the totality of the circumstances indicate that an objector has been effectively denied any meaningful participation, that is definitively not the case here. *Gish v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). In fact, their 50-page objections, raising all manner of arguments on all manner of tops from Rescigno's purported failure to move for class certification to decencies in the notice, suggests just the opposite.

The court agrees with SOP that Objectors' situation is more akin to that of the objector in *Bell*

Atlantic Corp. v. Bolger, wherein the Third Circuit rejected a discovery request because the objectors was "in a good position to develop an evidentiary record on the adequacy of the settlement." 2 F.3d 1304, 1315 (3d Cir. 1993). Like the objector in *Bell Atlantic*, Objectors had early notice of this litigation, participated in it for well over two years, and independently engaged in their own parallel litigation against SOP. Thus Objectors have indeed been able to test the strength of the proposed class settlement insofar as they have been given an opportunity to address the reasons the proposed settlement is unfair or inadequate in their lengthy objections, and they will be permitted to "participate effectively in the settlement hearing, through cross-examination and argument." *Girsh*, 521 F.2d at 157.

Perhaps more significant is Objectors' decision to draft their requests in such an overbroad and unserious manner. Objectors' attempts to classify their sweeping requests as "necessary" and "specifically tailored to their right to develop th[e] record," (Doc. 167, at 19), verges on farcical. It is plain that Objectors' demands are no in any way fashioned in a manner that would enable them to easily elicit the specific information that would aid in their ability to determine the fairness of the settlement. In particular, Objectors desire to obtain all communications regarding settlement of the Marbaker case and mediation, aside from being minimally, if at all, relevant to the present certification issue, appears to be a thinly veiled attempt to relitigate the merits of their own case within the context of the present one. Moreover, as Rescigno observes, by their own admission, Objectors

have committed over 2,000 hours "to develop the[ir] class claims, analyze SOP documents and databases, research legal issues, and assess class damages." (Doc. 111, at 3). Thus, Objectors are in a far better position than most to ascertain the fairness of the settlement and as a result they should have, at a minimum, been able to describe with some specificity the documents they require to prove their claims of unfairness.

Accordingly, because Objectors have produced no evidence of collusion, because they have not demonstrated lead counsel did not engage in adequate discovery or that the record available is inadequate for them to raise objections, and because they have not been and will not be denied meaningful participation in the determination of the fairness of the settlement, the motion discovery and expedited briefing, (Doc. 166), is **DENIED**.

An appropriate order will follow.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

DATE: April 20, 2021

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (APRIL 20, 2021)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

ORDER

In accordance with the court's memorandum issued this same day, **IT IS HEREBY ORDERED THAT**:

(1) Objectors' motion for leave to take discovery, (Doc. 166), is **DENIED**.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE

DATE: April 20, 2021

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JULY 8, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Currently before the court is a motion to intervene filed by Alan Marbaker, Carol Marbaker, Jerry L. Cavalier, and Frank K. Holdren ("Intervenors"). (Doc. 138). Also before the court is the defendant Statoil USA Onshore Properties, Inc.'s ("SOP") motion to strike the Intervenors' brief in opposition to a motion for preliminary approval of proposed settlement. (Doc. 114).[1]

[1] Throughout their motion and briefs, Intervenors refer to SOP as "Equinor USA Onshore Properties, Inc." or "EOP." (Doc. 139). Although Intervenors have not indicated as much, it appears that SOP has changed its name to "Equinor." "Statoil to Change Name

For the reasons set forth below, the motion to intervene, (Doc. 138), will be **DENIED**, the motion to strike the Intervenors' brief in opposition, (Doc. 114), will be **GRANTED**, and the Intervenors' brief in opposition, (Doc. 111), will be **STRICKEN FROM THE RECORD**.

I. BACKGROUND[2]

Since the court set forth the complex factual background of this case in its prior memoranda and orders, it need not repeat it in detail herein. (Doc. 72; Doc. 73; Doc. 85; Doc. 86). Briefly, the plaintiff Angelo R. Rescigno, Sr. ("Rescigno") filed a putative class action complaint against SOP and other related entities on January 15, 2016, alleging seven causes of action primarily revolving around the royalty clause in a lease agreement he entered into with Cabot Oil Gas Corporation that was later acquired in part by SOP. By memorandum and order dated March 22, 2017, the court dismissed several of Rescigno's claims

---

to Equinor," EQUINOR (March 15, 2018), https://www.equinor.com/en/news/15mar2018-statoil.html; Fed.R.Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources who accuracy cannot reasonably be questioned."). Nevertheless, the court will continue to refer to the defendant as "SOP."

[2] The former lead plaintiff in this case was Cheryl B. Canfield ("Canfield"). On September 13, 2019, Canfield's counsel filed a document notifying the court and parties that Canfield passed away on July 7, 2019. (Doc. 126). Canfield's counsel also filed a motion to substitute party, requesting that Canfield's son and executor of her estate, Rescigno, be substituted as the plaintiff in this matter. (Doc. 127). By order dated September 16, 2019, the court granted the motion to substitute. (Doc. 131). For the sake of simplicity, the court will refer to both Canfield and Rescigno interchangeably as "Rescigno."

against SOP, as well as all claims against all defendants other than SOP. (Doc. 72; Doc. 73). Rescigno moved for reconsideration, which this court denied by memorandum and order dated June 12, 2017. (Doc. 85; Doc. 86). In July 2017, after settlement discussions between Intervenors and SOP were terminated, Intervenors' counsel emailed Rescigno's counsel, offering to coordinate, but Rescigno declined. (Doc. 109-2, at 3).

On March 27, 2018, Rescigno filed a motion for preliminary approval of settlement. (Doc. 101). The proposed class includes two groups: the "Lease Form 29 Group" or "L-29" lessors, whose leases contain a specific royalty provision, and the "Other Lease Group," whose do not. (Doc. 137, at 9-10). On March 30, 2018, Intervenors filed a motion to consolidate this case with *Marbaker v. Statoil USA Onshore Properties, Inc.*, No. 3:17-cv-1528, (Doc. 108).

Intervenors, who possess leases with SOP that require the arbitration of disputes, (Doc. 144, at 5), originally commenced litigation against SOP in April 2015, with a class demand and complaint in arbitration, wherein they brought virtually identical claims as Rescigno has in the instant action. *See Marbaker v. Statoil USA Onshore Properties, Inc.*, No. 15-700 (M.D.Pa. Apr. 9, 2015). Intervenors sought to represent "all other lessors who entered into a lease in the Marcellus Region in which [SOP] has acquired an interest that, by its terms, requires royalties to be calculated based on 'revenue realized' or 'gross proceeds' and who, within the past six years, have received royalty payments from [SOP]." *Marbaker v. Statoil USA Onshore Properties, Inc.*, No. 3:17-CV-1528, 2018 WL 4354522, at *1 (M.D.Pa. Sept. 12,

2018). Intervenors concurrently filed a declaratory action in this court to determine whether their lease agreements permitted class action arbitration. Subsequently, Intervenors executed a mediation protocol with SOP and agreed to dismiss their declaratory action. The matter was dismissed without prejudice on June 5, 2015. Mediation lasted for approximately two years until July 2017, when SOP purportedly ceased settlement discussions with Intervenors.

As noted, that same month, Intervenors' counsel reached out to Rescigno's counsel seeking to "coordinate," but Rescigno's counsel declined. (Doc. 109-2, at 4). In August 2017, Intervenors refiled their declaratory action, and the matter was assigned to the Hon. A. Richard Caputo. In March 2018, Intervenors filed a motion to consolidate, identical to the one in the instant case, which was denied on June 14, 2018. Ultimately, on September 12, 2018, Judge Caputo granted a motion by SOP to dismiss both counts. The Third Circuit recently affirmed the dismissal in *Marbaker v. Statoil USA Onshore Properties, Inc.*, 801 Fed. App'x 56, 59 (3d Cir. 2020). In doing so, the court noted,

> The Marbakers did not have to use a motion to consolidate as a back door into the Canfield suit. They could have easily protected their interests in that case by following the ordinary course: moving to intervene and objecting to the proposed settlement. . . . Or they could just opt out of the settlement, retaining their rights.

Id. at 62. After the Third Circuit's holding became final, this court, by separate order, denied Intervenors' motion to consolidate.

Meanwhile, subsequent to filing the motion to consolidate in this case, on April 10, 2018, Intervenors filed a brief in opposition to the motion for preliminary approval of settlement. (Doc. 111). This prompted SOP to file the present motion to strike the brief in opposition on April 16, 2018, (Doc. 114), and a brief in support, (Doc. 115). Rescigno filed a memorandum of law in support of SOP's motion to strike. (Doc. 123). Intervenors filed a brief in opposition. (Doc. 121). SOP filed a reply brief. (Doc. 122).

Pertinent here, in November 2019, two members of the proposed class in this case, Richard and Denise Kuffa ("Kuffas"), won an arbitration award against SOP. Intervenors contend that the award conclusively determined that SOP breached the plain language of the Kuffas' L-29 lease. The arbitrator found in favor of the Kuffas and held that SOP must pay royalties using the actual "gross proceeds" received at the point of sale. The award granted the Kuffas $3,611.74 in damages plus penalty and statutory interest under the lease terms, as well as declaratory and injunctive relief prohibiting SOP from using its transfer price to pay royalties under the lease. (Doc. 138-7, at 2-3). By order dated January 23, 2020, the Philadelphia Court of Common Pleas confirmed the arbitration award. (Doc. 138-7, at 1).

On February 21, 2020, this court ordered the parties to file updated settlement documents reflecting the change in the lead defense counsel and lead plaintiff. (Doc. 136). After the parties complied,

(Doc. 137), on March 10, 2020, Intervenors filed the present motion to intervene as plaintiffs, (Doc. 138), as well as a brief in support, (Doc. 139). SOP and Rescigno filed briefs in opposition, (Doc. 144; Doc. 145), and Intervenors filed a reply brief, (Doc. 148).

II. DISCUSSION

a. Motion to Intervene

Intervenors move to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2), which provides, "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed.R.Civ.P. 24(a)(2).

In the absence of a federal statute conferring a right to intervene, as is the case here, Rule 24 authorizes a party to intervene as of right if the movant can establish (1) a timely application for leave to intervene has been filed; (2) a sufficient interest in the underlying litigation; (3) a threat that the interest will be impaired or affected by the disposition of the underlying action, and (4) that the existing parties to the action do not adequately represent the prospective intervenor's interests. *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005). The movant's failure to establish any factor is fatal. *Id.* "In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry are satisfied by the very nature of Rule 23 representative litigation. Therefore, when absent class members seek intervention as a matter of right, the gravamen

of a court's analysis must be on the timeliness of the motion to intervene and on the adequacy of representation." *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir.2005).

When analyzing the first timeliness prong, a court must consider the totality of the circumstances and evaluate three things: "(1) the stage of the proceedings; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Id.*

This court was presented with a similar issue in *Brennan v. Community Bank*, 314 F.R.D. 541 (M.D.Pa. 2016), wherein the proposed intervenors initially filed an objection to the plaintiff's motion for preliminary approval of class settlement, which the court struck on motion by both the plaintiff and defendant. In the same order, the court granted the motion for preliminary approval of the class. The intervenors then filed a motion to intervene, which was opposed by both plaintiffs and defendants on the basis that the motion was untimely. The court agreed, observing that the intervenors were aware of the action and had the ability to file a motion for intervention for "over a year before they eventually filed the motion." *Id.* at 544.

Here, like the intervenors in *Brennan*, Intervenors argue that their motion is timely under *In re Community Bank of Northern Virginia*, where the court stated that "[t]he time frame in which a class member may file a motion to intervene challenging the adequacy of class representation must be at least as long as the time in which s/he may opt-out of the class." 418 F.3d at 314.

However, "Intervenors' strict interpretation of the Third Circuit text in *In re Community Bank of*

Northern Virginia fails to take into account the totality of circumstances analysis and further fails to address the factual distinctions between *In re Community Bank of Northern Virginia* and the case at bar." *Brennan*, 314 F.R.D. at 544. "[A]ccording to the Third Circuit, an essential aspect of the timeliness analysis is when the intervenor became aware of the action." *Id.* Namely, "when analyzing timeliness in this context, 'the delay should be measured from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported representative's shortcomings.'" *Id.* (quoting *Benjamin v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 950 (3d Cir. 2012)).

Here, by their own admission, Intervenors were aware of this suit, including its purported shortcomings, by July 2017 at the latest, which was when SOP ceased settlement discussions with Intervenors and Intervenors sought to "coordinate" with Rescigno—a time period of over three years.[3] (Doc. 109-2). Intervenors have put forth no compelling reasons for this delay.

Further, as SOP points out, Judge Caputo, in his June 14, 2018 memorandum denying their motion to consolidate in the *Marbaker* case, suggested that Intervenors arguments would be "better suited for a motion to intervene, not a motion to consolidate." *Marbaker*, 2018 WL 2981341, at *3 n.4. Despite Judge Caputo's observation, Intervenors elected not to move to intervene until March 10, 2020.

---

3 Notably, in the July 2017 email, Intervenors' counsel suggested they were aware of this case even earlier, stating, "We have been following developments in your Canfield v. Statoil case with interest." (Doc. 109-4, at 2).

It is also significant that Intervenors elected not to intervene after SOP filed its motion to strike Intervenors' brief in opposition to preliminary approval of settlement in April 2018, since SOP's argument largely focused on the fact that Intervenors were not parties to the action and, given that they had not sought to intervene, were not entitled to be heard. In response, Intervenors, did not seek to intervene but, instead, attempted to justify their filing by arguing that they were "uniquely situated" to inform and assist this court in scrutinizing the proposed settlement. (Doc. 121, at 9).

Presently, instead of explaining their obvious delay in moving to intervene, Intervenors simply argue there was none. More particularly, they contend that, because they filed the motion approximately a month after the judicial confirmation of the Kuffas' arbitration award, there was no meaningful delay. It is unclear, however, why the confirmation of that award is significant with respect to Intervenors' legal interests in this case given that they continue to rely on many of the same arguments they have asserted since their first filing in this case. It is further unclear why the confirmed award is an appropriate benchmark for determining the timeliness of their motion where the Third Circuit has made clear that timeliness is measured from the time Intervenors "know or should have known of the alleged risks to [their] rights or the purported representative's shortcomings." *Benjamin*, 701 F.3d at 950. Once again, by their own admission, that was in July 2017. Thus, it appears that Intervenors are merely pointing to a recent development in one of many similar arbitration cases against SOP as

justification for their multi-year delay in seeking to intervene. Accordingly, the court finds that the lack of explanation for the delay weighs in favor of a finding of untimeliness.[4] *See Brennan*, 314 F.R.D. at 544 (finding the intervenors' delay of over a year weighed in favor of a fining of untimeliness).

With respect to the stage of the proceedings, the court agrees with Intervenors that this factor does not weigh in favor of a finding of untimeliness insofar as the case has not progressed beyond a motion for preliminary approval of class settlement. However, the court finds that the prejudice which would result to the parties does weigh in favor of a finding of untimeliness. As SOP observes, settlement discussions between the parties transpired for nearly a year and ultimately resulted in a settlement that appealed to both parties. Intervenors, if permitted to intervene, have evidenced their intent to significantly modify the settlement agreement that the parties reached after several years of litigation. As SOP notes, this will inevitably increase the parties' litigation costs, which they sought to curb through settlement. The court agrees that this factor is not insignificant in light of the time the parties have

---

[4] Relatedly, although they argue that the Kuffas' award preempts this action, Intervenors, whose members do not include the Kuffas, have not explained why they are better suited than Rescigno or the Kuffas themselves to raise this argument. Moreover, even if a motion to intervene were an appropriate forum in which to litigate whether an arbitration award is binding on this action, Intervenors fail to explain how the award, which pertained only to the Kuffas' L-29 lease, applies to the "Other Lease Group," whose members compose 93% of the class, and whose leases contain different language. (Doc. 137-3, at 4).

already spent litigating Intervenors' prior attempts to enter the case via the motions to consolidate and the opposition to the motion for preliminary approval. *See In re Safeguard Scientifics*, 220 F.R.D. 43, 47 (E.D.Pa. 2004) (holding the parties would be prejudiced by further delay in the proceedings and the additional attorneys' fees and legal expenses if an untimely motion to intervene were granted).

Additionally, class members will be prejudiced by the intervention because their recovery will be delayed and, ultimately, they may receive less favorable terms of settlement if Intervenors succeed in disrupting the current settlement agreement. *See Demchak Partners Ltd. Partnership v. Chesapeake Appalachia, LLC.*, No. 3:13-2289, 2014 WL 4955259, at *4 (M.D.Pa. 2014) (declining to grant intervention since "it would certainly prejudice the adjudication of the rights of the original parties, all of whom seek to settle the instant litigation," since it "would add unnecessary complexities that could cause undue delay in the resolution of th[e] case"). Indeed, this Circuit "favor[s] the parties reaching an amicable agreement and avoiding protracted litigation." *In re: Google Inc. Cookie Placement Consumer Privacy Litigation, 934 F.3d 316, 326 (3d Cir. 2019);* see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 784 (3d Cir. 1995) (noting that "[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved," and where the parties can "avoid[] the costs of litigating class status—often a complex litigation within itself").

Thus, in light of the prejudice to the parties and class member, Intervenors' early awareness of this action, and Intervenors' unjustified multiyear delay in moving to intervene, the court finds that, despite having filed the motion to intervene within the opt-out period, Intervenors' motion to intervene is nevertheless untimely under the totality of the circumstances.

Intervenors' failure to meet the timeliness prong is fatal to their motion. See *Liberty Mutual,* 419 F.3d at 220; *Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc.,* 72 F.3d 361, 366 (3d Cir. 1995) ("Each of these requirements must be met to intervene as of right."). Even if they could establish timeliness, however, Intervenors' arguments regarding inadequate representation are similarly unpersuasive. Despite their criticisms of the class representatives, it appears that Intervenors themselves would be unable to represent the class given that their leases contain mandatory arbitration clauses which SOP has indicated it intends to invoke should they be permitted to intervene.

Moreover, although Intervenors argue that they do not have L-29 leases, upon close review, Cavalier's lease as well as one of Holdren's leases contain the specific language that qualifies a lease as an L-29 lease pursuant to the proposed settlement. *Compare* Doc. 138-4, at 4, *and* Doc. 138-6, at 3-4, *with* Doc. 137, at 9-10. Thus, they would be adequately represented by the Stines, who are class representatives with L-29 leases. As to the Intervenors' leases that are not L-29 leases, even if the court were to find that the slight variations in their lease language were significant for purposes of recovery against SOP, Intervenors

continue to have the option of opting out of the class and pursuing their allegedly stronger case against SOP outside of this action. *See Demchak*, 2014 WL 4955259, at *3 ("If the court grants preliminary approval of the class action settlement in the above-captioned matter, and if the proposed intervenors choose not to be bound by the terms of the settlement, they can opt out of the settlement class and reserve all of their rights to proceed with arbitration.").

Intervenors repeatedly argue that Rescigno's failure to include information about the Kuffas' award in the updated settlement documents demonstrates that they are *ipso facto* inadequately represented. However, Intervenors fail to explain why this is so. *See In re Cmty. Bank*, 418 F.3d at 315 (noting that where, as in this case, the intervenors are a class members and have the same objective as the parties to the suit, there is a presumption of adequate representation). Intervenors' argument is particularly curious where the updated settlement documents were filed in response to the court's February 21, 2020 order which stated only that the parties were to update the name of one of defense attorneys and the name of the lead plaintiff since those names would appear in the notice to be sent to class members. *See* Doc. 136.

Finally, with respect to their remaining arguments on inadequate representation, as in *Brennan*, much of Intervenors' focus is on their disagreement with aspects of the settlement agreement or with SOP's and Rescigno's litigation strategy, most of which was set forth in their brief opposing preliminary class approval. "The Third Circuit has clearly stated that dissatisfaction with a

settlement cannot provide the basis for granting intervention as of right." *Brennan*, 314 F.R.D. at 546.

> To be clear, we are in no way suggesting that absent class members who merely express dissatisfaction with specific aspects of the proposed settlement or that attorneys (who, after finding one or more class members as clients, and wish to share in the forthcoming fee), have the right to intervene. The goals of Rule 23 would be seriously hampered if that were permitted.

In re Cmty. Bank, 418 F.3d at 315.

Accordingly, for all of these reasons, Intervenors' motion to intervene pursuant to Rule 24(a) is **DENIED**.

b. Motion to Strike

Rule 12(f) of the Federal Rules of Civil Procedure generally governs motions to strike pleadings and provides, in part,

> (f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f).

In its motion to strike Intervenor's brief in opposition to preliminary approval of the settlement, SOP asserts that Intervenors have failed to set forth a basis for why they, as nonparties,[5] are permitted to

[5] Significantly, as noted above, Intervenors did not move to intervene in this action until March 10, 2020. Thus, at the time they filed their brief in opposition, they were nonparties and, accordingly, the parties' arguments regarding SOP's motion to strike largely revolve around whether Intervenors are entitled to be heard.

file a brief in opposition to the motion for preliminary approval of settlement. SOP observes that Local Rule 7.6 limits the filing of briefs in opposition to "[a]ny *party*," and argues that Intervenors are not a party to this action since they had not attempted to intervene as of the time of the filing of their brief, nor are they class members given that the class has not yet been certified.

SOP argues that the court's reasoning in *Demchak* applies equally here. In *Demchak*, this court denied a motion to intervene holding that, to the extent the proposed intervenors desired to raise a substantive challenge to the settlement, they could object at the proper time—*i.e.*, at the fairness hearing after preliminary approval of class settlement[6] —or they could opt out of the class settlement and proceed to arbitration. *Demchak*, 2014 WL 4955259, at *4. Likewise, here, SOP argues that any objections Intervenors have to the proposed settlement can be fully addressed at the fairness hearing or by opting out and pursuing separate litigation.

Intervenors argue several points in response. First, they assert that they are "uniquely situated" to

---

[6] Settlement of a class action occurs in two stages. First, the parties submit a proposed settlement to the court, which makes a preliminary fairness evaluation. If the court deems the proposed settlement preliminarily acceptable, the court will direct that notice be provided to all class members who would be bound by the proposed settlement in order to afford them an opportunity to be heard on, object to, and opt out of the settlement. In the second stage, after class members have been notified, the court holds a formal "fairness hearing" wherein class members may object to the settlement. *In re National Football League Players' Concussion Injury Litigation*, 301 F.R.D. 191, 197 (E.D.Pa. 2014); Fed.R.Civ.P.23(c)-(e).

inform and assist this court in scrutinizing the proposed settlement and should be permitted to be heard now because courts are required to "independently scrutinize" the record. (Doc. 121, at 9). They contend that "nothing in Rule 23 or elsewhere prohibits courts from considering criticism of a settlement from objectors at the preliminary approval stage." (Doc. 121, at 12).

Next, Intervenors argue that their objections to the proposed settlement should be heard now because they would be bound by the injunction in the proposed preliminary settlement approval order. Specifically, they argue that they are pursuing various arbitration actions in state and federal court which would be derailed by the injunction. They contend that they did not receive notice from the parties of this proposed injunction in violation of Rule 65(a)(1), which provides that a court "may issue a preliminary injunction only on notice to the adverse party." Fed.R.Civ.P. 65(a)(1). Intervenors devote the remainder of their brief to address what they consider to be insufficiencies in the substance of the proposed settlement.

Here, having denied Intervenors' motion to intervene, the court will **GRANT** the motion to strike Intervenors' brief in opposition to the motion for preliminary approval since it is not properly before this court. As noted, at the time Intervenors' filed the brief in opposition, they were nonparties and, their subsequent motion to intervene having been denied, they remain so. As in *Demchak*, Intervenors have not provided a sufficient explanation as to why their objections cannot be addressed after preliminary certification during the fairness hearing.

To the extent that Intervenors contend that preliminary approval is inappropriate because they have not received notice of the proposed injunction that would apply to them, this argument is unavailing. Given that Intervenors have identified the applicable portion of the proposed settlement that would impose an injunction on them, as well as offered argument on it, they are plainly on notice of the potential injunction in the proposed preliminary approval order. Once again, as with their other concerns about the proposed settlement, if Intervenors do not wish to be bound by its terms, they may simply opt out of the class. Accordingly, the motion to strike Intervenors' brief in opposition, (Doc. 114), is **GRANTED**, and the brief in opposition, (Doc. 111), will be **STRICKEN** from the record.

III. CONCLUSION

In light of the foregoing, Intervenors' motion to intervene, (Doc. 138), is **DENIED**, SOP's motion to strike Intervenors' brief in opposition to the motion for preliminary approval of settlement, (Doc. 114), is **GRANTED**. Intervenors' brief in opposition, (Doc. 111), is **STRICKEN FROM THE RECORD**.

An appropriate order will follow.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

DATE: July 8, 2020

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JULY 8, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

ORDER

In accordance with the court's memorandum issued this same day, **IT IS HEREBY ORDERED THAT**:

(1) Intervenors' motion to intervene, (Doc. 138), is **DENIED**.
(2) SOP's motion to strike Intervenors' brief in opposition to the motion for preliminary approval of settlement, (Doc. 114), is **GRANTED**; and
(3) Intervenors' brief in opposition to the motion for preliminary approval of settlement, (Doc . 111) is **STRICKEN FROM THE RECORD.**

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

DATE: July 8, 2020

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JULY 8, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Currently before the court is the plaintiff Angelo R. Rescigno, Sr.'s ("Rescigno") motion for preliminary approval of the parties' settlement agreement and appointment of class representatives and class counsel. (Doc. 101). Having reviewed and considered the motion, the brief in support of the motion, (Doc. 102), the parties settlement agreement, (Doc. 137), and notice of class settlement, (Doc. 137-2), and pertinent portions of the record of this case, Rescigno's motion is **GRANTED** and the court will preliminarily approve the parties' settlement agreement. The court will also preliminarily certify

the class named in the parties' agreement, and appoint class counsel and class representatives.

I. BACKGROUND[1]

Rescigno owns property in the Marcellus Shale region within Pennsylvania. On May 6, 2008, Rescigno entered into an oil and gas lease with Cabot Oil & Gas Corporation ("Cabot Oil") for the exploration of oil and natural gas on his land. His lease was subsequently acquired, in part, by defendant Statoil USA Onshore Properties, Inc. ("SOP"). His dispute primarily revolves around the royalty clause in his lease agreement.

In his complaint, Rescigno challenged SOP's calculation of royalties. SOP's calculation is based on the sale of Rescigno's natural gas at the well, with that sale price calculated using an index price. SOP takes title to its in-kind percentage of the natural gas extracted at the well and immediately sells the natural gas to an affiliate, Statoil Natural Gas ("SNG"), pursuant to an agreement between the two entities. Under this agreement, SNG takes title to the raw product at the wellhead and then contracts with

---

[1] As noted in this court's prior memoranda and orders, the former lead plaintiff in this case was Cheryl B. Canfield ("Canfield"). On September 13, 2019, Canfield's counsel filed a document notifying the court and parties that Canfield passed away on July 7, 2019, (Doc. 126). Canfield's counsel also filed a motion to substitute party, requesting that Canfield's son and executor of her estate, Rescigno, be substituted as the plaintiff in this matter. (Doc. 127). By order dated September 16, 2019, the court granted the motion to substitute. (Doc. 131). By order dated February 21, 2020, the court directed the parties to update the filings pertinent to the pending motion for preliminary approval to reflect, *inter alia*, the change in lead plaintiff. (Doc. 136). For the sake of simplicity, the court will refer to both Canfield and Rescigno interchangeably as "Rescigno."

third parties for post-production services. SNG also contracts with pipeline companies to transport the natural gas through the interstate pipeline system and, ultimately, resells the final product to third-party buyers at receipt/delivery gates along the interstate system. Thus, SOP holds the lease interests for immediate sale and SNG serves as a marketing company, taking title at the well, transforming the product into a finished one, and then selling the post-production product to distribution companies, industrial customers, and power generators downstream.

At issue in this action is the agreement between SOP and SNG for the price of the raw natural gas at the wellhead where title is transferred from SOP to SNG. Their agreement fixes the price of the natural gas to a uniform hub price or index price for natural gas, regardless of whether the natural gas is ever delivered to that particular hub on the interstate pipeline system. These index prices are influential in natural gas markets and purport to represent the price of natural gas at different delivery points in the country. Around April 2010, SOP and SNG began using a chosen index price as opposed to what Canfield describes as an "actual negotiated price." (Doc. 1, at 10).

On January 15, 2016, Rescigno filed a putative class action complaint against SOP, SNG, and the indirect parent of these entities, Statoil ASA. Rescigno brought six separate claims against SOP specifically. In his first claim, Rescigno alleged that SOP breached the express terms of the royalty clause in his lease agreement by using an index price. In his second claim, Rescigno alleged that SOP breached the

lease by engaging in an affiliate sale with SNG. In his fourth claim, Rescigno alleged that SOP breached the implied covenant of good faith and fair dealing in the lease by engaging in an affiliate sale. In this claim, he also alleged that SOP "had an obligation to use reasonable best efforts to market the gas to achieve the best price available." (Doc. 1, at 17). The court construed this fourth claim as a duty of good faith claim and/or a duty to market claim. Rescigno also alleged civil conspiracy (third claim) and unjust enrichment (fifth claim). He also requested an accounting as a specific form of relief (seventh claim).

On June 9, 2016, SNG filed a motion to dismiss Rescigno's complaint. (Doc. 25). Also on June 9, 2016, SOP and Statoil ASA, collectively, filed a motion to dismiss. (Doc. 31). By memorandum and order dated March 22, 2017, the court dismissed all but one of Rescigno's claims against SOP, as well as all claims against SNG and Statoil ASA. (Doc. 72; Doc. 73). Rescigno moved for reconsideration, which this court denied by memorandum and order dated June 12, 2017. (Doc. 85; Doc. 86).

On March 27, 2018, Rescigno filed the present motion for preliminary approval of settlement, (Doc. 101), and a brief in support, (Doc. 102).[2]

---

[2] Relatedly, March 30, 2018, Alan Marbaker, Carol Marbaker, Jerry L. Cavalier, and Frank K. Holdren ("Marbaker Plaintiffs"), plaintiffs in a related action, *Marbaker v. Statoil USA Onshore Properties, Inc.*, No. 3:17-cv-1528, filed a motion to consolidate this case with theirs, (Doc.108), and, subsequently, a brief in opposition to the present motion for preliminary approval of the parties' settlement agreement, (Doc. 111). Both Canfield and SOP opposed the motion to consolidate. (Doc. 112; Doc. 113). SOP additionally filed a motion to strike the Marbaker Plaintiffs' brief in opposition to the motion for preliminary approval. (Doc.

II. TERMS OF THE SETTLEMENT AGREEMENT

The settlement agreement, which was originally attached to the motion for preliminary approval, (Doc. 102-1, at 1-38), was updated by order of the court on March 6, 2020, (Doc. 137), to reflect the change in lead plaintiff and defense counsel. Attached to the settlement agreement is the notice of proposed settlement, (Doc. 137-2), a plan of administration and distribution, (Doc. 137-3), and a proposed final judgment and order of dismissal with prejudice, (Doc. 137-4). Together, the documents contain the following pertinent provisions.

a. Settlement Groups and Distribution

The settlement agreement identifies the class as "Royalty Owners in Northern Pennsylvania[3] who have entered into oil and gas leases, regardless of the type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom [SOP] has (or had) an obligation to pay Royalties on production attributable to [SOP]'s working interest." (Doc. 137, at 5).

---

114). By separate memorandum and order, this court denied the motion to consolidate and granted SOP's motion to strike the Marbaker Plaintiffs' brief in opposition.

[3] Northern Pennsylvania is defined in the settlement agreement as the area of Pennsylvania in which [SOP] owns working interests in oil and gas leases and from which it produces and sells Natural Gas production for delivery into Rome, Liberty, Allen, Meadow, Warrensville, Seely, Canoe Run, Tombs Run, and PVR Wyoming gathering systems and includes oil and gas leases owned in whole or in part by [SOP] in the following counties: Bradford, Lycoming, Sullivan, Susquehanna, and Wyoming. (Doc. 137, at 10)

The settlement agreement divides all plaintiffs and named plaintiffs into two groups. The first group, termed the "Lease Form 29 Group," includes those class members whose leases contain the following provision governing valuation of royalty on natural gas:

> To pay Lessor on gas and casinghead gas produced from the leased premises, percentages of proceeds . . . based on: (1) the Gross Proceeds paid to Lessee from the sale of such gas and casinghead gas when sold by Lessee in an arms-length sale to an unaffiliated third party, or (2) the Gross Proceeds, paid to an Affiliate of Lessee, computed at the point of sale, for gas sold by lessee to an Affiliate of Lessee . . . .

(Doc. 137, at 9-10). The Lease Form 29 Group comprises approximately 7% of the class and the settlement agreement provides that they will be allocated 18% of the net settlement fund. (Doc. 137-2, at 7).

The second group, termed the "Other Lease Group," includes those class members with interests under all other lease forms. The Other Lease Group comprises approximately 93% of the class and the settlement agreement provides that they will be allocated approximately 82% of the net settlement fund. (Doc. 137-3, at 4).

SOP has agreed to pay $7,000,000, plus interest, to settle all claims relating to SOP's use of the index pricing methodology as the basis for calculation of royalties. The class has agreed to a release which will permit SOP to continue using the index pricing methodology to calculate royalties for a period of five

years from the effective date of the settlement for the Other Lease Group. However, for those in the Lease Form 29 Group, SOP agrees to base the royalties on the resale price and to no longer use the index pricing methodology going forward. Upon final approval of the settlement, SOP will make this change effective retroactively to the first full production month after preliminary approval of the settlement. (Doc. 137, at 7, 17-18).

Ultimately, all class members who are eligible and participate in the agreement will release all claims asserted in the complaint or that relate to the methodology of determining royalties paid on natural gas produced from the class members' wells. (Doc. 137, at 23).

b. Notice and Final Check Distribution

The settlement agreement indicates that SOP will provide the settlement administrator the necessary records and information to prepare a list of class members. (Doc. 137, at 16).

Within fourteen days of this court's order preliminary approving the settlement agreement, the settlement administrator will mail copies of the settlement notice to all members and post notice on its website at www.statoilsettlement.com. If a notice is returned, the settlement administrator will take reasonable steps to obtain a valid address and re-mail the notice. (Doc. 137, at 25).

One year after final approval of the settlement, the settlement administrator will determine the amount of all unclaimed checks and the unclaimed monies will be donated to a non-profit organization agreed to by the parties—to wit, the Environmental Defense Fund. (Doc. 137, at 25; Doc. 137-3, at 6-7).

c. Fees, Costs, and Service Awards

The settlement administrator has been identified as Gilardi & Co. LLC ("Gilardi"). The settlement agreement indicates that up to $250,000 of the settlement fund may be used by class counsel to pay notice and administration costs. After the court has entered final judgment in this case, class counsel may pay all further reasonable notice and administration costs without further order of the court. (Doc. 137, at 19; Doc. 137-1, at 6).

The settlement agreement also indicates that the lead plaintiffs may submit an application for incentive awards for representing the class in the prosecution of this action. The notice states that the incentive awards will not exceed $5,000 each. (Doc. 137-2, at 10).

Class counsel will receive attorneys' fees in the amount of 25% of the settlement amount and expenses not to exceed $125,000, plus interest on both amounts. Class counsel will file a separate motion for approval of attorneys' fees and costs prior to the court's final fairness hearing. The settlement agreement provides that the allowance or disallowance by the court of any applications for attorneys' fees or expenses or incentive awards are not part of the settlement and any order regarding these will not operate to terminate the settlement or affect the finality of a judgment approving the settlement. (Doc. 137, at 28; Doc. 137-2, at 9).

III. STANDARD

a. Preliminary Certification of a Rule 23 Class for Settlement

Federal Rule of Civil Procedure 23(d) enables a court to certify a Rule 23 class for settlement

purposes. In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 794 (3d Cir. 1995). When presented with a request for preliminary certification of a class and settlement of that class simultaneously, the court should be mindful of the requirements of Rule 23(e). Rule 23(e) allows a settlement of a Rule 23 certified with class with court approval only. Fed.R.Civ.P. 23(e). Rule 23(e) also directs the court to send notice to all class members who would be bound by the settlement. Fed.R.Civ.P. 23(e)(1).

The process for certification of a settlement class is not specified in the rule. Courts are often guided by the Judicial Center's Manual for Complex Litigation (Fourth) in directing these type of proceedings. See In re Nat'l Football League Players Concussion Litig., 775 F.3d 570, 580-81 (3d Cir. 2014). Looking to the Manual for Complex Litigation, the Third Circuit has approved of courts making a preliminary finding that the proposed class meets the requirements of Rule 23. Id. at 582 (citing Manual for Complex Litigation §21.632 (4th ed. 2004)). This preliminary determination allows the court to direct notice to the proposed class. "The preliminary determination of a proposed class is therefore a tool for settlement used by the parties to fairly and efficiently resolve litigation." *Id.* at 583. A final certification can then be issued at a later date, after notice has been provided to those included in the proposed settlement class. *Id.* at 583.

b. Preliminary Approval of Class Action Settlement Agreements

Preliminary approval of a class action settlement "establishes an initial presumption of fairness when

the court finds that (1) the negotiations occurred at arms'-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a fraction of the class objected." In re Gen. Motors Corp., 55 F.3d at 785. A preliminary approval, however, is just that, preliminary. It is not a finding that definitively determines the elements of fairness, adequacy, and reasonableness needed for final approval of class action settlements under Girsch v. Jepsen, 521 F.2d 153 (3d Cir. 1975).

IV. DISCUSSION

a. Preliminary Certification of the Class

The settlement class included in the parties' settlement agreement appears, upon preliminary review, to meet the requirements of Rule 23. In order to certify a settlement class under Federal Rule of Civil Procedure 23, the court must find that the settlement class satisfies the requirements of Rule 23. In re Gen. Motors Corp., 55 F.3d at 799. These requirements include that of numerosity, commonality, typicality, and adequacy of representation. Fed.R.Civ.P.23(a).

In addition, the proposed class must meet one of the requirements of Rule 23(b). Rescigno, here, seeks certification under Rule 23(b)(3), which allows certification where "questions of law or fact common to class members predominate over any questions affecting only individual members" and where the court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). These two requirements are commonly referred to as

predominance and superiority. *In re Constair Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009).

The class here appears to satisfy the numerosity requirement since it includes approximately 13,900 individuals, and therefore joinder of all these plaintiffs would be impractical. As to commonality, there are factual issues common to all class members regarding whether SOP used an index pricing methodology to calculate royalties. Additionally, the proposed class representatives' claims are typical of the class members' claims such that "the action can be efficiently maintained" and the class representatives have incentives that align with the class members. *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). Although the specific language of the individual leases may vary, the claim of the class representatives, like those of the putative class members, is that SOP should not have used the index pricing methodology and, therefore, the requirement of typicality is present.

With regard to the adequacy of representation, the court finds that both the proposed class representatives and class counsel satisfy this requirement. The proposed class representatives are Rescigno and Donald Keith Stine and Mary Stine ("the Stines"). Upon review of their declarations, (Doc. 105; Doc. 106), the court finds that the class members' interests are adequately represented by Rescigno and the Stines. Ninety-three percent of the leases at issue, like Rescigno's, require royalties to be paid on revenue realized. The remaining leases contain a provision with language more favorable to the royalty owners. The Stines' lease contains this favorable provision and, thus, the Lease Form 29 Group has adequate

representation in the Stines. Finally, Rescigno and the Stines have attested that they understand their fiduciary responsibilities and will adequately represent the class members.

As to counsel, the court is satisfied that class counsel will fairly and adequately represent the interests of the class pursuant to Rule 23(g)(4). The class is represented by Francis P. Karam of the law firm Robbins Gellar Rudman & Dowd LLP, who provided a declaration to the court, (Doc. 104), along with the firm's resume, (Doc. 104-2). Attorney Karam has had prior experience in representing clients in oil and gas matters both before this court and in state court. Robbins Gellar Rudman & Dowd LLP has litigated numerous actions against oil and gas companies in both state and federal courts around the country. Attorney Karam's co-counsel, Douglas Clark of the Clark Law Firm, P.C, and John F. Harnes of law firm Chitwood Harley Harnes LLP, also provided their firms' resumes. (Doc. 104-3; Doc. 104-4).

In reviewing these documents, the court is satisfied that the attorneys in this action have diligently investigated the potential claims and have experience in handling class action litigation, as well as knowledge of applicable law and, thus, the they are able to fairly and adequately represent the interests of the class. *See* Fed.R.Civ.P. 23(g).

The superiority and predominance requirements of Rule 23(b)(3) also appear to be satisfied. Treatment of this litigation as a class action is superior to resolution through hundreds of separate, individual proceedings throughout Pennsylvania. Class treatment enhances judicial efficiency and will likely maximize recovery. Predominance is also present as

the class representatives' and class members' claims involve the same legal theory and are based on the payment of royalties using an index pricing methodology in similarly-worded, if not identically-worded, contracts.

In light of the above, the court will preliminarily certify the class for settlement purposes and for the purpose of sending notice under Rule 23(e). The court reserves its finding on final certification until after the fairness hearing. A more thorough certification analysis will be provided after the class members have been provided with notice of the action and have had an opportunity to object to the settlement.

b. Preliminary Approval of the Settlement Agreement

The court will also preliminarily approve the settlement agreement. (Doc. 137). In making this determination, the court has considered the following: (1) the negotiations occurred at arms'-length; (2) there was sufficient discovery; and (3) the proponents of the settlement are experienced in similar litigation. In re Gen. Motors Corp., 55 F.3d at 785.

As Rescigno notes in his brief, the settlement is the result of arms'-length negotiations that followed significant contested litigation on the defendants' two motions to dismiss, which allowed class counsel to test and evaluate their case in light of the defendants' arguments and the court's decisions. The litigation also permitted a sufficient exchange of discovery that would allow the parties to come to a fair agreement in this particular royalties dispute with SOP. Attorney Karam's declaration indicates that counsel conducted a thorough investigation into this action both prior to and after being retained by Rescigno in early 2016,

which included legal and factual research, as well as communication with SOP. Settlement discussions began in mid-2017 and the parties executed the present settlement agreement on March 26, 2018. Finally, as noted above, the court has found that class counsel are experienced in this type of litigation.

c. Proposed Schedule and Notice

Lastly, the court will preliminarily approve Gilardi as the settlement administrator to proceed with the settlement process agreed to by the parties and as set forth in their proposed schedule for completing settlement. (Doc. 102, at 25). The court will also direct notice to the class members as set forth in the parties proposed notice. (Doc. 137-2).

The court finds that the proposed notice to class members satisfies the requirements of Rule 23(c)(2)(B) and Rule 23(e)(1). (Doc. 137-2). The form advises the members about the settlement and release and how to object, comment, or opt-out. It also provides the contact information of class counsel in the event a class member has questions.

In light of these circumstances, the court finds that the proposed notice is the best practicable form of notice to inform the members of the settlement and to proceed with the settlement for all claims in a timely and efficient manner.

V. CONCLUSION

Accordingly, the motion for preliminary approval of the parties' settlement agreement, (Doc. 101), is **GRANTED**. The parties' settlement agreement is preliminarily approved and the class identified in the agreement is preliminarily certified as a Rule 23 class. A final fairness hearing will be scheduled by the court. In accordance with the parties proposed

schedule, 35 days prior to the final fairness hearing, the parties shall file motions in support of final approval. An appropriate order will issue.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

DATE: July 8, 2020

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JULY 8, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

ORDER

In accordance with the memorandum issued the same day, **IT IS HEREBY ORDERED THAT** Rescigno's motion for preliminary approval of the parties' settlement agreement and appointment of class representatives and class counsel, (Doc. 10), is **GRANTED** as follows:

(1) The class referenced in the parties' settlement agreement, Doc. 137), is preliminarily certified as a settlement class as follows: Royalty Owners in Northern Pennsylvania who have entered into oil and gas leases, regardless of the

type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom [SOP] has (or had) and obligation to pay Royalties on production attributable to [SOP]'s working interest. All named plaintiffs are preliminary appointed as class representatives for the settlement class;

(2) Robbins Gellar Rudman & Dowd LLP, The Clark Law Firm, P.C. and Chitwood Harley Harnes LLP are preliminary approved as class counsel;

(3) The settlement agreement, (Doc. 137), is preliminarily approved, subject to final approval at a final fairness hearing;

(4) Gilardi & Co. LLC is preliminarily approved as the settlement administrator;

(5) The proposed class notice form, attached to the settlement as Exhibit A-1, (Doc. 137-2), is approved and shall be sent out pursuant to the terms of the settlement agreement;

(6) The following schedule and procedures for completing the final approval process as set forth in the parties; settlement agreement are hereby approved as follows:

Deadline to mail notices ("the Notice Date")	Fourteen (14) calendar days after entry of the court's preliminary approval order
Deadline to file motions in support of final approval of settlement, plan of	Thirty-five (35) calendar days prior to the final fairness hearing

administration, and any application(s) for attorneys' fees and expenses	
Deadline to submit requests for inclusion or objection to settlement, plan of administration, and/or attorneys' fees and expenses	Twenty-one (21) calendar days prior to the final fairness hearing
Class counsel to provide SOP copies of all requests for exclusion	Fourteen (14) calendar days prior to the settlement hearing
Deadline to file replies in support of the settlement, plan of administration, and/or any attorneys' fees and expenses; and Deadline to file proof of notice	Seven (7) calendar days prior to the settlement hearing
Final fairness hearing	At the court's convenience, but no few than one-hundred (100) days after the court's preliminary approval order

(7) The final approval hearing is hereby preliminarily set for October 16, 2020 at 10:30 a.m., in Courtroom 3, William J. Nealon Federal Building & Courthouse, 235

N. Washington Avenue, Scranton, PA 18501; and

(8) In accordance with the above schedule provided by the parties, **thirty-five (35) days prior** to the final fairness hearing, the parties shall file motions and memoranda in support of final approval of the settlement agreement.

s/ ***Malachy E. Mannion***
MALACHY E. MANNION
United States District Judge

DATE: July 8, 2020

ORDER OF THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS (JANUARY 23, 2020)

PHILADELPHIA COUNTY COURT OF COMMON PLEAS – TRIAL DIVISION

RICHARD L. KUFFA and DENISE D. KUFFA, as husband and wife,
Petitioners,

v.

EQUINOR USA ONSHORE PROPERTIES, INC. f/k/a STATOIL USA ONSHORE PROPERTIES, INC.,
Respondent.

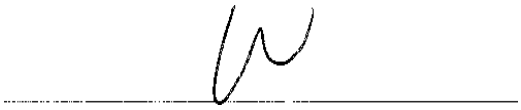
December Term, 2019
Case No. 2572

ORDER

AND NOW, this 23rd day January, 2020 consideration of the Petition to Confirm Arbitration Award, it is hereby ORDERED and DECREED that the Arbitration Award in the amount of $3,611.74, plus statutory and contract interest, and granting equitable and declaratory relief, entered on November 8, 2019, in favor of Petitioners, Richard and Denise Kuffa, and against Respondent, Equinor USA Onshore Properties, Inc. (f/k/a Statoil USA Onshore Properties, Inc.) is confirmed, and that

judgment be entered by the Office of Judicial Records upon Praecipe filed by Petitioners.

BY THE COURT.



AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

RICHARD L. KUFFA
AND DENISE D.
KUFFA,
Claimants,

v.

Case No. 01-17-0005-6012

STATOIL USA
ONSHORE
PROPERTIES INC.
f/k/a STATOILHYDRO
USA ONSHORE
PROPERTIES, INC.
Respondent.

AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Lease Agreement entered into between the above-named parties on September 24, 2009 ("Agreement"), and having been duly sworn, and having duly heard the proofs and allegations of Ira Richards, Esq., on behalf of Claimants, and Robert Theriot, Esq., on behalf of Respondent, in a two-day evidentiary hearing and having considered the pre-hearing and post-hearing submissions, and Claimants having made a motion to amend their claim and the Arbitrator having considered same, hereby AWARD, as follows:

1. In Order No. 4, I found that Respondent breached the lease agreement by paying royalties based upon a methodology different than the "gross proceeds" required by the Agreement. The calculation

of damages was reserved for proof at hearings. Order No. 4 is incorporated by reference herein.

2. On Count III, alleging breach of contract, I find in favor of Claimants and against Respondent and award damages in the amount of $3,611.74 based upon the "Achieved Price" calculations of Claimants' expert. Having given notice under Paragraph 4(g) of the Agreement, Claimants are also entitled to penalty interest at the rate provided in the Agreement, (Prime Rate +5%) plus legal interest at the statutory rate of 6% computed from the date of notice June 12, 2018.

3. On Count I, alleging breach of fiduciary duty, I find in favor of Respondent and against Claimants.

4. On Count II, alleging breach of express duties of good faith and fair dealing, I find in favor of Respondent and against Claimants.

5. On Counts IV and V, seeking declaratory and injunctive relief, I find in favor of Claimants and against Respondent for the reasons set forth above.

6. Claimants' claim for punitive damages is denied.

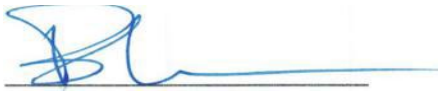
7. Accordingly, Respondent shall pay to Claimants, within thirty days of the date of this Award, the sum of $3,611.74, plus penalty interest of prime plus 5% and legal interest at the rate of 6% computed from June 12, 2018.

8. The administrative fees totaling $1,550.00 shall be paid as incurred and the compensation of the arbitrator totaling $33,700.00 shall be borne equally and has been paid.

9. This Award fully and finally adjudicates claims of Claimants and Respondent submitted for decision by the Arbitrator.

B. Christopher Lee, Esq. Arbitrator
Date: November 8, 2019

I, B. Christopher Lee, Esq., do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.



B. Christopher Lee, Esq. Arbitrator
Date: November 8, 2019

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

RICHARD L. KUFFA
AND DENISE D.
KUFFA,
Claimants,

v.

Case No. 01-17-0005-6012

STATOIL USA
ONSHORE
PROPERTIES INC.
f/k/a STATOILHYDRO
USA ONSHORE
PROPERTIES, INC.
Respondent.

ORDER NO. 4

By email dated November 11, 2018, the parties agreed to the following procedure for resolution of the issue of interpretation of the Lease:

> Claimants' motion will address what they believe to be the threshold lease construction issue under paragraph 4 of the Lease that they contend entitles them to a finding that Respondent is in breach of its obligation to calculate and pay royalties as required by the Lease. Respondent reserves its right to dispute how Claimants frame the issue in their dispositive motion and to otherwise make any arguments that it believes show that Claimants are not entitled to judgment as a matter of law on their breach of contract

> claim. The parties have agreed that while they may as they deem necessary for their positions on the dispositive motion make arguments about whether matters relating to the marketability of gas are material to the arbitrator's determination of the dispositive motion neither side will seek factual determinations through dispositive motion on issues of whether the gas is in fact marketable at the wellhead. Also, the dispositive motion will not address Claimants' causes of action for breach of the duty of good faith and fair dealing or breach of fiduciary duty, although Claimants and Respondents each reserve their rights to cite any language in the Lease in support of their arguments about the royalty provision.

Upon consideration of extensive briefing, the undersigned Arbitrator finds as follows:

1. The parties entered into a Joint Stipulation of Fact dated September 28, 2018 in which Equinor USA Onshore Properties, Inc. (f/k/a Statoil USA Onshore Properties, Inc. (SOP") admits that:
    a. Its only marketing effort was to deliver the gas to its affiliate, Equinor Natural Gas (f/k/a Statoil Natural Gas ("SNG");
    b. It did not seek a different purchaser;
    c. It paid Claimants based on index prices, not based on the gross proceeds received by SNG for gas sold to unaffiliated third parties.
2. Paragraph 4(a) of the Lease provides

> T] he royalties paid to Lessor shall be twenty percent (20%) of all the …gas and casinghead gas removed or recovered from the leased premises or, at Lessor's option …the Gross Proceeds... of the total gross production attributable to the applicable well.

3. If SOP elects to hand off gas at the wellhead to an affiliate for sale downstream in the interstate pipeline, the Lease dictates that royalties paid to Claimants "shall be" twenty percent of the Gross Proceeds, paid to an Affiliate of Lessee, computed at the point of sale, for gas sold by lessee [sic] to an affiliate of Lessee[.]

4. Paragraph 4(d) of the lease defines Gross Proceeds as:

> total consideration paid for oil, gas, associated hydrocarbons, and marketable by-products, produced from the leased premises or consideration for relinquishing any rights relating to this Lease whether in the form of payments, bonuses, prepayments for future production or delivery of production at a future time, or sums paid to compromise claims....

5. SOP admitted in the Stipulation that it paid claimants based upon an index price and not based upon gross proceeds referenced in the Lease. Nowhere in the Lease is there any mention of payment based upon index prices. Accordingly, SOP has admitted that it breached the Lease Agreement, but the parties disagree upon the how the Lease should be interpreted to determine the proper calculation of royalty payments.

6. Paragraph 4(e), about which the parties disagree, provides:

> Lessee shall place oil and gas produced from the leased premises in marketable condition and shall market same as agent for Lessor, at no cost to Lessor. Except as expressly provided in (d) above, Lessor's royalty shall not be charged directly or indirectly with any expense required to make the gas marketable, including but not limited to the following: expenses of production, gathering, dehydration, compression, manufacturing, processing, treating, transporting or marketing of gas, oil, or any liquefiable hydrocarbons extracted therefrom; provided however, that reasonable, actual costs paid to nonaffiliated third parties for gathering, compression and transportation necessary to enhance the value of otherwise marketable gas may be deducted from Lessor's royalty proportionately to Lessor's royalty percentage. However, those costs shall never cause the royalty due to Lessor to be less than what the royalty would have been if enhancements and associated costs had never been made. The burden of proving marketability and enhanced value shall be upon the Lessee.

7. The following phrase in paragraph 4(e) established the default for payment of royalties:

> Except as expressly provided in (d) above, Lessor's royalty shall not be charged directly or indirectly with any expense required to make the gas marketable, including but not

> limited to the following: expenses of production, gathering, dehydration, compression, manufacturing, processing, treating, transporting or marketing of gas, oil, or any liquefiable hydrocarbons extracted therefrom;

The parties have not asserted that any of the exceptions set forth in paragraph 4(d) are applicable. Therefore, the Lease provides that, absent any other exception, there would be no deduction for the costs incurred by Statoil or its affiliate for activities leading up to the sale of the gas to a third party.

8. In addition to the exceptions in paragraph 4(d), the Lease includes one additional exception to the default that no costs shall be deducted from the twenty percent (20%) royalty. That section immediately follows the default and states:

> provided however, that reasonable, actual costs paid to non-affiliated third parties for gathering, compression and transportation necessary to enhance the value of otherwise marketable gas may be deducted from Lessor's royalty proportionately to Lessor's royalty percentage.

9. Particularly because the added exception immediately follows the default language, the added exception applies only to situations where there is additional payment to third parties for "gathering, compression and transportation necessary to enhance the value of otherwise marketable gas..." The fact that the terms "gathering, compression and transportation" are also included in the default provision can only mean that deduction for such costs is allowed when there is some out of the ordinary

process to "enhance" the value of the gas, in addition to gathering, compressing and transporting the gas. This interpretation is confirmed by the phrase that puts the burden on Statoil to prove "marketability" and "enhanced value".

10. As set forth in paragraph 1 herein, the parties have agreed that the "neither side will seek factual determinations through dispositive motion on issues of whether the gas is in fact marketable at the wellhead."

11. Based upon the foregoing, Partial Summary Judgment is granted in favor of Claimant on contractual liability as Respondent has admitted that it breached Lease Agreement in computing the royalty payments based upon an index.

12. This Order is limited to resolution of liability for Count III of Claimant's demand (Breach of Contract) and does not address the computation of damages which shall be decided upon presentation of evidence at hearing.

13. This Order also does not address any other claims asserted by Claimant, including those asserted in Counts I, II and IV of Claimant's Demand.

14. The AAA Case Manager shall promptly arrange a conference call to discuss a pre-hearing schedule and hearing date to address Claimant's remaining claims and damages.

B. Christopher Lee
B. Christopher Lee, Arbitrator
Date: April 12, 2019

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (MARCH 22, 2017)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

MEMORANDUM

Currently before the court are a motion to dismiss filed by defendant Statoil Natural Gas LLC ("SNG"), (Doc. 25), and a motion to dismiss filed by defendants Statoil USA Onshore Properties, Inc. ("SOP") and Statoil ASA ("Statoil ASA"), (Doc. 31). The defendants' motions seek dismissal of all of the putative class actions claims brought by plaintiff Cheryl B. Canfield ("Canfield"), as detailed in her complaint, (Doc. 1). SOP and SNG are both wholly owned, indirect subsidiaries of Statoil ASA.[1] Canfield is the

[1] According to the disclosure statement filed with the court pursuant to Federal Rule of Civil Procedure 7.1, SOP's direct

lessor of a lease currently held, in part, by lessee SOP. Having reviewed the parties submissions regarding Canfield's putative class action claims, and based on the foregoing, SNG's motion, (Doc. 25), is **GRANTED** in its entirety and Statoil ASA's and SOP's motion, (Doc. 31), is **GRANTED IN PART** and **DENIED IN PART**.

FACTUAL BACKGROUND[2]

Canfield is the owner of property located at 3835 State Route 3004, Meshoppen, Pennsylvania in the Marcellus Shale region. The Marcellus and Utica shale regions in and around Pennsylvania contain one of the largest natural gas formations in the world. On May 6, 2008, Canfield entered into an oil and gas lease with Cabot Oil & Gas Corporation ("Cabot Oil") for the exploration of oil and natural gas on her land. Her lease was subsequently acquired in part by defendant SOP, in part by Chesapeake Appalachia, L.L.C. ("Chesapeake"), and in part by Epsilon Energy Ltd.

---

parent is Statoil USA Properties Inc. and Statoil ASA indirectly owns stock in SOP, presumably through ownership of Statoil USA Properties Inc. (*See* Doc. 13). The court will presume that Statoil ASA wholly owns SOP's parent corporation, Statoil USA Properties Inc., in accordance with the facts stated in Canfield's complaint. SNG's Rule 7.1 disclosure statement indicates that SNG is jointly owned by two entities, Statoil US Holdings Inc. and Statoil Norsk LNG AS. (*See* Doc. 12). Both of these entities are wholly owned by Statoil ASA. (*Id.*).

[2] All facts are taken from the plaintiff's complaint, (Doc. 1), unless otherwise noted. The facts alleged in the complaint must be accepted as true in considering the defendants' motions to dismiss. *See Dieffenbach v. Dept. of Revenue*, 490 F. App'x 433, 435 (3d Cir. 2012); *Evancho v. Evans*, 423 F.3d 347, 350 (3d Cir. 2005). The court will, however, look outside the pleadings and look to other evidence submitted by the parties to establish any facts needed to rule on Statoil ASA's jurisdictional arguments.

Although Canfield's complaint, (Doc. 1), asserts various claims against the defendants, her dispute primarily revolves around the royalty clause in her lease agreement as it has been interpreted by lessee SOP.

A. Canfield's Oil & Gas Lease

The royalty clause in Canfield's lease provides for both an in-kind percentage of oil or natural gas products to be delivered to Canfield's tank and for a percentage of the "amount realized" from the sale of any oil or natural gas products extracted from her land.[3] Specifically, clause three of the lease provides as follows:

> Lessee . . . **shall pay the Lessor** on gas, including casinghead gas and other gaseous substances, produced and sold from the premises **fifteen percent (15%) of the amount realized from the sale of gas at the well. "The amount realized from the sale of the well" shall mean the amount realized from the sale of the gas after deducting gathering, transportation, compression, fuel, line loss, and any other post-production costs and/or expenses incurred for the gas whether provided by a third party, Lessee or by a wholly owned subsidiary of Lessee.** Lessee is authorized by Lessor to provide gathering, transportation, compression, fuel, and other services for

[3] It is unlikely that Canfield receives her in-kind percentage of natural gas. (*See* Doc. 1-2, at 3 ¶10 (providing for payment "in lieu of supplying 'free gas'")). Generally, it is impractical for a landowner to take an in-kind portion of natural gas as it is a raw, unfinished product that is not suitable for usage. *See, e.g., Akin v. Marshall Oil Co.*, 41 A. 748 (Pa. 1989).

> Lessor's gas either on its own or through one or more wholly owned subsidiaries of Lessee and to deduct from the royalty to be paid to the Lessor the costs and/or expenses of providing such services including, without limitation, line-loss.

(Doc. 1-2, at 1, ¶3) (emphases added).

The above language in Canfield's royalty clause allowed for the deduction of post-production fees. Post-production fees are normally incurred in order to transform the raw natural gas product into a finished, marketable product to be sold downstream in the commercial chain. (*See* Doc. 1, at ¶30). A superseding addendum to the primary lease document that was attached to the lease and signed and dated the same day as the initial lease document modified the original lease terms. (Doc. 1-2, at 3–4). The addendum states that if there are any inconsistences between the added terms in the addendum and the printed lease terms, the added terms will control and supersede the printed terms of the lease. (*Id.* at 3). Within this addendum is a "ready for sale or use clause" directing the lessee to exclude any production or post-production costs in its calculation of royalties, stating as follows:

> Royalties shall be paid without deductions for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, transporting, or otherwise making the oil and/or gas produced from the lease premises ready for sale or use.

(*Id.* at 4, ¶13)[4]. This language modified the royalty provision of the lease, and expressly provides that the lessee shall not deduct certain post-production fees.

B. The Relationship Between Canfield and the Statoil Entities

Though Canfield originally entered into the lease agreement with Cabot Oil, at some time in or around 2006, Chesapeake engaged in an aggressive lease acquisition program to exploit natural gas from properties in the Marcellus shale region, which included Canfield's property. At some point after she had entered into the agreement with Cabot Oil in 2008, Canfield's lease was transferred to Chesapeake, presumably as part of Chesapeake's overall plan to acquire leasehold interests in the area. In or around November 2008, Chesapeake also entered into industry participation agreements or joint venture agreements with SOP.[5] Under this agreement, SOP was to receive

---

[4] Canfield describes this clause as a "Market Enhancement Clause" and suggests that this clause allows lessee Chesapeake to deduct costs incurred between the well and the downstream sale. (Doc. 1, at 12 n. 3). However, the express language of the clause provides that "[r]oyalties shall be paid *without deductions* for the cost . . . [to make] the oil and/or gas produced from the lease premises *ready for sale or use*." (*Id.* at 4 ¶13) (emphases added). While the lessee may be entitled to deduct any costs after the product is "ready for sale or use" or marketable, this clause expressly disallows any deductions before that point. Thus, what Chesapeake is allowed to deduct requires a more thorough inquiry and precise knowledge of the point at which the product is ready for sale or use. More importantly, this clause does not verify Chesapeake's alleged method of computing royalties.

[5] Canfield frequently refers to the defendants collectively as Statoil, with no distinction between the entities. However, based on the extensive arguments by the parties it is clear that neither Cabot Oil or Chesapeake assigned any part of Canfield's lease interest to SNG or Statoil ASA. The only party to the assignment

a minority interest in Chesapeake's holdings, including its lease interests. In return, SOP was to provide Chesapeake with an up front cash payment and would finance 75% of Chesapeake's drilling and completion costs until $2.125 billion had been paid. Canfield is unsure whether her specific lease was assigned to SOP from Chesapeake pursuant to this joint venture agreement or if an assignment to SOP occurred simultaneously with the assignment to Chesapeake from Cabot Oil. In any event, both companies now own a partial interest in her lease originally entered into with Cabot Oil.

SOP's natural gas operations are distinct, however, from Chesapeake's operations, which ultimately results in noticeably different royalty payments to Canfield. Upon extraction at the wellhead, SOP takes title to its in-kind percentage of the natural gas extracted from Canfield's land and immediately sells the natural gas to its own affiliate, defendant SNG, pursuant to an agreement between the two entities.[6] Under this agreement, SNG takes title to the raw product at the wellhead and then contracts with third parties for post-production services, transforming the raw product into a finished

---

was SOP and the remaining defendants are implicated by virtue of their corporate relationship to SOP. (*See also* Doc. 1, ¶1).

[6] Canfield's complaint is unclear with respect to SOP's role. Canfield is unsure if her own lease was acquired by virtue of the industry participation agreement with Chesapeake or through an assignment from Cabot Oil. (Doc. 1, at ¶15). Thus, with respect to her lease, it is unclear if SOP actually produces the gas or simply holds title to the product and allows Chesapeake to serve as producer or "operator" and bear all production costs—costs incurred to extract the product from the land. This should, ultimately, be clarified through discovery.

product. SNG also contracts with pipeline companies to transport the natural gas through the interstate pipeline system. SNG, ultimately, resells the final product to third-party buyers at receipt/delivery gates along the interstate system, at Citygates. Thus, SOP holds the lease interests for immediate sale and SNG serves as a marketing company, taking title at the well, transforming the product into a finished one, and then selling the post-production product to distribution companies, industrial customers, and power generators downstream.

Partly at issue in this action is the agreement between SOP and SNG for the price of the raw natural gas at the wellhead where title is transferred from SOP to SNG. Their agreement fixes the price of the raw natural gas to a uniform hub price or index price for natural gas, regardless of whether the natural gas is ever delivered to that particular hub on the interstate pipeline system. SOP does not dispute that it fixes the price at the wellhead to an index price. The Fifth Circuit Court of Appeals has explained the use of index prices as follows:

> Natural gas is transported throughout North America via a network of pipelines. The gas transportation network is centered around 'hubs,' which are geographical locations where major pipeline systems interlink. These hubs act as separate markets, at which supply and demand dictate prices that may differ between the hubs.
>
> * * *
>
> The market index prices for physical gas are most prominently published in two privately owned newsletters: [Platts'] *Inside FERC Gas*

> *Market Report* ("*Inside FERC*") and *Natural Gas Intelligence* ("*NGI*"). Both of these publications publish the natural gas price marketing indicators at the major pipeline hubs and market centers in the United States, and it is undisputed that both publications are highly influential to market prices for physical gas. The indexes are also are used to determine royalties and public gas contracts, among other things. The publications gather pricing information about the various markets and pipeline hubs by requesting data about physical gas transactions from natural gas traders. After receiving data from the gas traders, and taking a variety of other factors into account, the publications release indexes that purport to represent the price of natural gas at different delivery points.

United States v. Brooks, 681 F.3d 678, 685 (5th Cir. 2012).

In or around April 2010, SOP and SNG began using this index price as opposed to what Canfield describes as an "actual negotiated price" at the direction of Statoil ASA. (Doc. 1, at 26). Canfield alleges that the original hub price was set at the Dominion South Point Hub ("DSPH"), with this hub changing to the Tennessee Zone 4 "300 Leg" index price or hub in or around September 2013. Canfield's royalties are calculated using this fixed, index price.

In contrast to SOP, Chesapeake pays a royalty to leaseholders based on a price paid by third-parties downstream of the wellhead. Chesapeake's royalty price is, thus, based on the final natural gas product after the deduction of post-production costs and is

calculated using the sale price of the finished product. Like SOP, Chesapeake also deals with an affiliate marketing entity. This marketing entity aggregates all the natural gas held under various leases and sells it downstream from the well. To calculate royalties to landowners, Chesapeake uses a weighted average sales price ("WASP") that uses prices paid by downstream buyers. According to Canfield, Chesapeake also deducts any costs incurred for post-production services before calculating royalties—*i.e.*, usage of the net-back method to arrive at a wellhead price.

The differences in Chesapeake's royalty calculation compared to SOP's calculation results in a different price paid to leaseholders, including Canfield, dependent on whether or not the lessee is Chesapeake or SOP. This is true even though the underlying lease is the same. As an illustration of this point, Canfield provided tables of her royalty unit payments for the months of September 2013 through September 2015. These payments were calculated using a per metric cubic foot (mcf) measurement of natural gas extracted from Canfield's land. The tables indicate that during nearly all of the months from September 2013 to September 2015, with the exception of December 2014, Canfield received a higher royalty per mcf of natural gas extracted from her land from Chesapeake as compared to SOP. Thus, Chesapeake's different interpretation of the same lease agreement has led to a divergence in royalties payments to Canfield for the same quantities of natural gas even though both entities' lease document is held by the same lessor and contains the same royalty provision.

PROCEDURAL BACKGROUND

On January 15, 2016, Canfield filed a putative class action complaint against Statoil ASA, SOP, and SNG alleging seven separate causes of action. Three of these claims were solely against SOP. In her first claim, Canfield alleged that SOP breached the express terms of the royalty clause in her lease agreement by using an index price that did not reflect an actual market price for natural gas. In her second claim, Canfield alleged that SOP breached the lease by engaging in an affiliate sale with SNG which did not constitute an "arms'-length transaction." (Doc. 1, ¶40). In her fourth claim, Canfield alleged that SOP breached the implied covenant of good faith and fair dealing in the lease by engaging in an affiliate sale. She also alleged that SOP "had an obligation to use reasonable best efforts to market the gas to achieve the best price available." (*Id.* ¶50). Thus, the fourth claim is a duty of good faith claim and/or a duty to market claim.

Several claims were brought against all the defendants collectively. In her third claim, Canfield brought a civil conspiracy claim, alleging that the defendants "acted together with a common purpose to unlawfully cheat Landowners and their contractual rights" by orchestrating "sham sale transactions among themselves." (*Id.* ¶¶45–50). In her fifth claim, Canfield brought a quasi-contract claim against all the defendants alleging they were unjustly enriched. In her seventh claim, Canfield sought an accounting against all of the defendants for gas and royalty calculations.

Canfield brought one claim against Statoil ASA and SNG alone. In this sixth claim, Canfield alleged

that Statoil ASA and SNG tortiously interfered with her contract/lease with SOP by "deliberately and without justification" causing SOP to breach the gas lease. (*Id.* ¶59).

In response to Canfield's complaint, on July 9, 2016, SNG filed one of the current motions to dismiss and a supporting brief. (Doc. 25, Doc. 26). Also on July 9, 2016, SOP and Statoil ASA, collectively, filed a motion to dismiss with a supporting brief. (Doc. 31, Doc. 32). The defendants' motions seek dismissal of all the claims in Canfield's complaint. Unique among the defendants, Statoil ASA primarily seeks dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(5), arguing that this court lacks subject-matter over claims against the entity and lacks personal jurisdiction over the entity. Statoil ASA's subject-matter jurisdiction argument is premised on its alleged immunity from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), PUB. L. NO. 94-583, 90 STAT. 2891 (codified at and amending scattered sections of 28 U.S.C.). In addition, and in the alternative for Statoil ASA, the defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Canfield has failed to state any plausible claim.

On August 22, 2016, after requesting and receiving an extension of time, Canfield filed a brief in opposition to the defendants motions. (Doc. 40). On September 30, 2016, after requesting and receiving an extension of time, SNG filed a reply brief in support of its motion, (Doc. 45), and SOP and Statoil ASA filed their own, separate reply brief in support of their motion, (Doc. 46). On November 23, 2016, over six weeks after the defendants had filed their reply

briefs, Canfield filed a motion for leave to file a sur-reply to the defendants' reply briefs. (*See* Doc. 56). SOP and Statoil ASA opposed this request. (*See* Doc. 57, Doc. 60). The court denied Canfield's request to file a sur-reply because it was untimely, not in compliance with local rules, and not warranted. (*See* Doc. 66, Doc. 67). The defendants' motions are, thus, ripe for review.

STATOIL ASA'S JURISDICTIONAL CHALLENGE

Statoil ASA challenges the subject-matter and personal jurisdiction of this court. Canfield alleges in her complaint that subject-matter jurisdiction is premised on 28 U.S.C. §1332 and that all of the defendants' business activities are "within the flow of, and have affected substantially, interstate trade and commerce." (Doc. 1, ¶7). However, Statoil ASA is a Norwegian corporation with its principle office located in Stavanger, Norway and, based on a 2014 Form 20-F SEC filing attached to Statoil ASA's motion to dismiss, the Kingdom of Norway owns a two-thirds direct ownership interest in the company. (Doc. 32-2, at 10). Based on this information, both parties agree that Statoil ASA is an instrumentality of the Kingdom of Norway as defined by the FSIA[7] and that jurisdiction over such an entity is only proper under 28 U.S.C. §1330. Thus, Canfield's jurisdictional statement is clearly deficient.

Assuming this court would allow the plaintiff to cure the technical deficiency in her jurisdictional

---

[7] *See* 28 U.S.C. 1603(a)(b)(2) (including an instrumentality of a foreign state within the definition of a "foreign state" and defining an instrumentality of a foreign state as any entity with a majority share owned by a foreign state or political subdivision of a foreign state).

statement, the only remaining issue is whether Canfield's claims against Statoil ASA fit within an exception to FSIA immunity, vesting this court with subject-matter jurisdiction. Also at issue is whether Statoil ASA was properly served and whether Statoil ASA maintained sufficient minimum contacts with the forum to satisfy the constitutional requirements of personal jurisdiction. Based on the foregoing, the court finds that it lacks subject-matter over Canfield's claims against Statoil ASA and lacks personal jurisdiction over Statoil ASA.

A. Standards of Review

i. Rule 12(b)(1)

Rule 12(b)(1) provides for the dismissal of a complaint based on a "lack of subject-matter jurisdiction." FED. R. CIV. P. 12(b)(1). "A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 537 (M.D. Pa. 2002). Because the district court is a court of limited jurisdiction, the burden of establishing subject-matter jurisdiction always rests upon the party asserting it. *See Kokkonen v. Guardian Life. Ins. Co. of America*, 511 U.S. 375, 377 (1994). Generally, however, district courts "enjoy substantial flexibility in handling Rule 12(b)(1) motions." McCann v. Newmann *Irrevocable Trust*, 458 F.3d 281, 290 (3d Cir. 2006).

An attack on the court's jurisdiction may be either "facial" or "factual" and the "distinction determines how the pleading must be reviewed." *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014). A facial attack tests the sufficiency of the pleadings, while a factual attack

challenges whether a plaintiff's claims fail to comport factually with jurisdictional prerequisites. *Id.* at 358; *see also S.D. v. Haddon Heights Bd. of Educ.*, 833 F.3d 389, 394 n. 5 (3d Cir. 2016). If the defendant brings a factual attack, the district court may look outside the pleadings to ascertain facts needed to determine whether jurisdiction exists, which is distinct from a facial attack. *Id.* If there are factual deficiencies, the court's jurisdictional determination may require a hearing, particularly where the disputed facts are material to finding jurisdiction. *McCann*, 458 F.3d at 290.

With regard to facial deficiencies, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" to fix jurisdictional defects in a pleading. 28 U.S.C. §1653. "Section 1653 gives both district and appellate courts the power to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 204 (3d Cir. 2003). Further, a district court may be abusing its discretion by not allowing a plaintiff the opportunity to cure technical deficiencies in the jurisdictional statements found in the plaintiff's complaint. *See Scattergood v. Perelman*, 945 F.2d 618, 627 (3d Cir. 1991)."The court should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2).

ii. Rule 12(b)(2) and Rule 12(b)(5)

Rule 12(b)(2) provides for the dismissal of a complaint due to a "lack of personal jurisdiction." FED. R. CIV. P. 12(b)(2).

> To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden of establishing the court's jurisdiction

> over the moving defendants. However, when the court does not hold an evidentiary hearing on the motion to dismiss, the plaintiff need only establish a prima facie case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor.

Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004) (internal citation omitted). "Once these allegations are contradicted by an opposing affidavit, however, plaintiff must present similar evidence in support of personal jurisdiction." *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d 580, 595 (M.D. Pa. 2009). The plaintiff will not be able to rely on the bare pleadings alone. *Id.* "Once the motion is made, plaintiff must respond with actual proofs, not mere allegations." *Patterson ex rel. Patterson v. F.B.I.*, 893 F.2d 595, 604 (3d Cir. 1990) (quoting *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 67 n. 9 (3d Cir. 1984)). Courts may look beyond the pleadings when ruling on a motion brought under Rule 12(b)(2). *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d at 595. "A Rule 12(b)(2) motion . . . is inherently a matter which requires resolution of factual issues outside the pleadings." *Patterson*, 893 F.2d at 603 (quoting *Time Share Vacation Club*, 735 F.2d at 67 n. 9). Thus, "[c]onsideration of affidavits submitted by the parties is appropriate and, typically, necessary." *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d at 595.

Rule 12(b)(5) provides for the dismissal of a complaint based on "insufficient service of process." FED. R. CIV. P. 12(b)(5). "The party asserting the

validity of service bears the burden of proof on that issue." *Kohar v. Wells Fargo Bank, N.A.*, No. 15-1469, 2016 WL 1449580, at *2 (W.D. Pa. April 13, 2016) (quoting *Grand Entm't Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993)). "That party must do so by a preponderance of the evidence using affidavits, depositions, and oral testimony." *Id.*

However, where an objection has been raised under Rule 12(b)(2) based on a lack of personal jurisdiction, a defendant need not raise a separate personal jurisdiction objection based on insufficient service; a defendant is not required to raise an identical objection twice. *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir. 1998). "Where personal jurisdiction is lacking, '[c]learly, a Rule 12(b)(2) motion . . . [is] more appropriate' than one under Rule 12(b)(5)." *Id.* (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* §1353 at 278–79 (2d ed. 1990)) (alterations in original). Under the FSIA, proper service is a prerequisite to personal jurisdiction. *See* 28 U.S.C. §1330(b). Thus, Statoil ASA's service argument is simply an alternative basis for finding a lack of personal jurisdiction and will be treated as such.

B. Subject-Matter Jurisdiction

Statoil ASA's attack on subject-matter jurisdiction is both facial and factual. Statoil ASA argues that Canfield's complaint is deficient with respect to asserting jurisdiction over a foreign instrumentality. Statoil ASA also argues that it is presumptively entitled to immunity under the FSIA. Canfield has argued that an exception to immunity applies based on the relationship between Statoil ASA and its indirect subsidiaries. The court, however,

finds that it lacks subject-matter jurisdiction over the claims against Statoil ASA.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state[, including an instrumentality of a foreign state,] in the courts of this country." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)). Once an entity is determined to be a foreign state for purposes of the FSIA, the entity is "presumptively immune from the jurisdiction of United States courts" unless an exception to the FSIA applies. *Id.* (quoting *Saudi Arabia v. Nelson,* 507 U.S. 349, 355 (1993)); *see also Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 (3d Cir. 1993). After presumptive immunity is found, the burden of production then shifts to the plaintiff to show an exception applies. *Fed. Ins. Co.*, 12 F.3d at 1285; *see also Richardson v. Donovan*, No. 14-3753, F. App'x, 2016 WL 7240172, at *2 (3d Cir. Dec. 15, 2016) (non-precedential). However, the ultimate burden of proving immunity, that of persuasion, always remains with the party seeking immunity. *Id.* The parties agree that Statoil ASA is an instrumentality of a foreign state and is, therefore, presumptively immune from suit.

Based on the above alone, the court agrees with Statoil ASA that Canfield's complaint is facially deficient. It does not reference the FSIA or the specific exception that applies. *See* FED. R. CIV. P. 8(a)(1) (providing that a pleading must contain "a short and plain statement of the grounds for the court's jurisdiction"). However, as further discussed below, an exception may or may not apply based on the

allegation in Canfield's complaint that Statoil ASA "exercised complete control" over SNG and SOP and "directed the activities" of these indirect subsidiaries to "maximize its own corporate profits." (Doc. 1, ¶3). Canfield has argued extensively in her opposition brief that an exception does apply, in part, based on this language. If the facial deficiency were the end of the matter the court would grant Canfield leave to amend her complaint to include an FSIA exception in the spirit of Rule 15(a)(2). However, based on the arguments presented by both parties, the court finds that Canfield's argument for subject-matter jurisdiction is also factually deficient and that no FSIA exception applies.

Canfield argues that the commercial activity exception, 28 U.S.C. §1605(a)(2), applies to save her claims against Statoil ASA. Despite the varying degrees of ownership and their separate corporate status, Canfield asserts in her complaint that Statoil ASA "exercised complete control" over SNG and SOP and "directed the activities" of these indirect subsidiaries. (Doc. 1, ¶3). Canfield argues that this conduct is sufficient to satisfy the commercial activity exception. Statoil ASA argues that this conduct is not sufficient and that in the event Canfield seeks to use an alter ego theory to impute the actions of SOP and SNG to Statoil ASA this attempt should fail.

The FSIA provision granting courts with subject-matter jurisdiction provides as follows:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of

> this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

28 U.S.C. §1330(a). Thus, subject-matter jurisdiction is defined in the negative to capture all foreign states who are not immune based on an enumerated exception. Canfield relies on the commercial activity exception to save her claims. *See* 28 U.S.C. §1605(a)(2). This exception provides three distinct circumstances where a foreign state will not be immune. It provides that a foreign state will not be immune when the action is:

> (1) based upon a commercial activity carried on in the United States by the foreign state; or
>
> (2) based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
>
> (3) based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

The phrase "commercial activity" arises in each of the three types of conduct described in the commercial activity exception and is a crucial element to obtaining subject-matter jurisdiction. *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3d Cir. 1981). The FSIA defines commercial activity as "either a regular

course of commercial conduct or a particular transaction or act." 28 U.S.C. §1603(d). The definition goes on to state that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court of the United States has defined this phrase further, particularly the term commercial, to comply with the restrictive theory of foreign sovereign immunity that was prevalent during the time of the statute's enactment. *Republic of Argentina v. Weltover*, 504 U.S. 607, 612–13 (1992). Under the Supreme Court's definition of the term, "when a foreign government acts, not as regulator of market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning if the FSIA." *Id.* at 614. The important inquiry is not the profit motive or lack thereof of the foreign state, but whether the particular action is the type of action a private party would engage in. *Id.*; *Nelson*, 507 U.S. at 358–362.

Each of the three clauses also requires that the action be "based upon" the activity or act conferring jurisdiction. 28 U.S.C. §1605(a)(2). In *Saudi Arabia v. Nelson*, the Court compared the phrase "based upon a commercial activity" in the first clause to the "based upon" language as applied to the second and third clause. 507 U.S. at 358. Unlike the first clause, the second and third clauses simply require an action "based upon" acts performed "in connection with" some commercial activity. 28 U.S.C. §1605(a)(2). Analyzing these distinctions, the Court found that the "based upon" language as applied to the first clause required that there be "more than a mere connection

with, or relation to commercial activity." *Id.* In *OBB Personenverkehr AG v. Sachs*, the Court further defined the "based upon" language as applied to the first clause to mean that, in order to fall within the first clause, the commercial activity must form the "gravamen" or "core" of the claim when looking at the particular activity or conduct underlying the plaintiff's claim. 136 S. Ct. at 395–97. Canfield relies on the first clause of the commercial activity exception.[8] Canfield's brief in opposition provides various types of activities engaged in by the defendants to try and qualify Statoil ASA's conduct under this particular exception. Some of these activities include:

(1) Statoil ASA's "directing" or "controlling" the conduct of SOP and SNG, (Doc. 40, at 8);
(2) SOP's purchase of natural gas from landowners, (*Id.* at 9);
(3) SOP's resale of natural gas to SNG, (*Id.*);
(4) SOP's royalty payment to Canfield, (*Id.*); and
(5) Statoil ASA's alleged tortious

[8] As Statoil ASA notes in its reply brief, in a single instance Canfield suggests that "at a minimum" Statoil ASA "caused a direct injury in the United States." (Doc. 40, at 10). Even if the court were to construe this single allegation as an argument under the third clause of the commercial activity exception it would fail. The third clause requires activity outside of the United States. 28 U.S.C. §1605(a)(2). Canfield has not explained what outside commercial activity she might be referring to. Instead, the majority of Canfield's argument and the subheading in her brief suggest that all of the alleged activity occurred within the United States, bringing it under the first clause alone.

> interference with Canfield's gas lease, (*Id.*).

Statoil ASA's alleged tortious interference itself is not commercial activity and, thus, can never qualify under the commercial activity exception. *See Nelson*, 507 U.S. at 358 (finding that the defendant's "tortious conduct itself fail[ed] to qualify as 'commercial activity' within the meaning of the [FSIA]"). Statoil's "directing" or "controlling" of Statoil ASA are, allegedly, the tortious actions. Again, this tortious conduct itself cannot qualify under the commercial activity exception.[9]

The remaining activities that Canfield cites to—*i.e.*, those not relating to alleged tortious activity—are plausibly within the commercial activity exception, but only when using an alter ego or veil piercing theory to impute the activities of SOP to Statoil ASA. The purchase of natural gas, resale of the natural gas, and the payment of royalties are all part of the actions that form the basis of Canfield's claims. *See Sachs*, 136 S. Ct. at 395. However, these actions were all performed by SOP, not Statoil ASA, a separate entity. Thus, the only way to fit Statoil ASA's conduct within the commercial activity exception in accord with

---

[9] Although not argued by Canfield, this activity also does not fall within the non-commercial tort exception. 28 U.S.C. §1605(a)(5). This exception denies immunity if the foreign state has engaged in a tort causing personal injury or property loss *unless* that claim is based on (1) the performance or failure to exercise or perform a discretionary function or (2) malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*. 28 U.S.C. §1605(a)(5). Thus, to assert subject-matter jurisdiction over Canfield's tortious interference claim against Statoil ASA would be contrary to the clear guidance of the non-commercial tort exception.

Sachs is to impute the commercial conduct of SOP to Statoil ASA.

Imposing an alter ego theory on Statoil ASA would make more sense if Canfield had sued both SOP and Statoil ASA for breach of contract and unjust enrichment in the alternative. Looking to the alleged facts that might establish Canfield's entitlement to relief, the "gravamen" or "core" of Canfield's claims are based on SOP's usage of an index price to calculate royalties and SOP's engagement in affiliate sales with SNG. Thus, the gravamen of the complaint against SOP is the breach of her gas lease. It follows that imputing the actions of SOP to Statoil ASA would mean that the gravamen of that claim is also breach of contract. However, Canfield did not bring a claim of breach of contract claim against Statoil ASA. Her claim against Statoil is solely premised on unjust enrichment. Canfield cannot have it both ways. Canfield cannot impute the actions of SOP to Statoil ASA for jurisdictional purposes, but then sue Statoil ASA on a different theory than that asserted against the subsidiary.

Under different circumstances the court might allow Canfield to amend her complaint to include a breach of contract action against Statoil ASA for logical clarity. However, the court would have to allow Canfield to assert this claim using the alter ego theory announced by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983). This would effectively breach Statoil ASA's corporate veil as an indirect parent. The court finds that such an extreme measure is not warranted in this case.

The *Bancec* case is the Supreme Court's seminal case on using alter ego theories under the FSIA. The *Bancec* decision set out, as a basic principle, that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." 462 U.S. at 627. Breaking from this proposition, the Court used equitable principles to hold that the separate status of a foreign state and its instrumentality would be disregarded where doing so would be an injustice, particularly where the foreign state would reap the benefits of filing suit in a United States court while avoiding its obligations under international law. 462 U.S. at 632–33. The Supreme Court was guided by private law principles between corporations and their subsidiaries in reaching this conclusion. *Id.* at 623.

Again turning to private law principles, the Court found an exception to separate corporate identity would be made where the "corporate entity is so extensively controlled by its owner that a relationship of principle and agent is created" or where adhering to the entities separate state would "work fraud or injustice." *Id.* at 628–29. The Supreme Court noted that these exceptions were especially applicable in cases where the corporate form was used to evade legislative policies. *Id.* at 630. Ultimately, the exception was equitable in nature and was used to avoid an injustice. *Id.* at 630–31. Though *Bancec* did not specifically involve the commercial activity exception under the FSIA, appellate courts, including the Third Circuit Court of Appeals, have applied the principles in *Bancec* when making jurisdictional determinations under the FSIA commercial activity exception. *Fed. Ins. Co.*, 12 F.3d at 1287 (collecting

cases). In addition, although *Bancec* did not deal directly with an instrumentality and its subsidiary, and instead with a foreign state and its instrumentality, the Third Circuit has applied the *Bancec* principles to such a case. *See id.* at 1286–1287.

The only way for this court to have subject-matter jurisdiction over contract claims against Statoil ASA based on the commercial conduct of SOP is if one of the two exceptions in *Bancec* applies. The only relevant exception, based on Canfield's own arguments, would be that of control, that is, that SOP "is so extensively controlled by [Statoil ASA] that a relationship of principle and agent is created." *Bancec*, 462 U.S. at 629. This might be true if Statoil ASA "exercised complete control" over SNG and SOP and "directed the activities" of SOP, as Canfield asserts. (Doc. 1, ¶3). Canfield has not, however, presented any evidence to suggest this allegation might plausibly be true.

There are several alter ego tests within this circuit,[10] with varying names, but all seek the same

---

[10] The Supreme Court did not provide factors to be used to determine control and explicitly refused to provide a mechanical formula. *Bancec*, 462 U.S. at 633–34. Courts applying *Bancec* have looked to private corporate law for guidance. *See, e.g., Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411, 481 (5th Cir. 2006). In *Bancec*, the court looked specifically to federal common law as the Court found this body of law to comport with international law. 462 U.S. at 623; *see also Kirschenbaum v. 650 Fifth Avenue & Related Props.*, 830 F.3d 107, 130 (2d Cir. 2016) (citing its own circuit case law to establish factors relevant to the alter ego analysis under *Bancec*). As such, although the inquiry is governed by "internationally recognized equitable principles," the court looks to federal common law and alter ego or veil piercing case law in the private context within this circuit for guidance. *Bancec*, 462 U.S. at 633.

purpose of holding a parent liable for the actions of a subsidiary or a corporation responsible for the actions of its shareholders. *See Vacaflor v. Pennsylvania State Univ.*, No. 4:13-CV-00601, 2014 WL 3573593, at *3 n. 2 (M.D. Pa. July 21, 2014). The traditional alter ego test in this circuit assesses the following factors: "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484–85 (3d Cir. 2001). Where the relationship is one between two corporations and the "shareholder" is actually another corporate entity, the plaintiff "must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity." *Id.* at 485. In addition, there must be "some overall element of injustice or unfairness" present. *Trevino v. Merscopr, Inc.*, 583 F. Supp. 2d 521, 529 (D. Del. 2008) (quoting *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988)); *see also Vacaflor*, 2014 WL 3573593, at *3 (concluding that all applicable alter ego tests in the circuit require "some impropriety or injustice").

No one factor in the traditional test is dispositive. *Trevino*, 583 F. Supp. 2d at 529. Holding complete ownership over the entity is also not dispositive. "A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475

(2003). While the court should look at the circumstances as a whole, generally, veil piecing or alter ego theory should only be used as a "rare exception, applied in the case of fraud or certain other exceptional circumstances." *Id.*

Here, Canfield has not presented a single allegation that would link the conduct of Statoil ASA to SOP under the traditional test, nor has she asserted any exceptional circumstance that would warrant holding Statoil ASA responsible for SOP's actions. Canfield did attach Statoil ASA's 2011 Schedule 13D filed with the Securities Exchange Commission to try to establish an alter ego theory for purposes of personal jurisdiction. (Doc. 40-1, Ex. 3). The court carefully reviewed this document for any indication of control. However, not a single board member (ten total) or executive officer (ten total) listed for Statoil ASA were shown to have any connection to SOP, either as a board member or executive officer of SOP. (*Id.*, Ex. 3). Only three out of the twenty Statoil ASA board members and executive officers had any connection with the United States at all, one through citizenship alone and the other two based on business addresses listed on the schedule. One executive officer was shown to have a connection with Statoil USA Properties Inc. as an executive officer, but not SOP. Statoil USA Properties Inc. is SOP's direct parent.[11] As indicated by Canfield's own documentation, none of the board members and executives listed for Statoil ASA were shown to have a connection to SOP. Thus, at this stage, the allegation that Statoil ASA "controlled" and "directed" SOP, a separate entity, is pure speculation.

---

[11] *See supra*, n. 1.

The court is also not convinced that equity would be best served by imposing an alter ego theory on Statoil ASA. The court can see no "element of injustice or unfairness" present to warrant imposing such an extreme measure over the foreign instrumentality. *Trevino*, 583 F. Supp. 2d at 529 (quoting *Golden Acres*, 702 F. Supp. at 1104). There is no injustice in forcing Canfield to proceed with her claims without Statoil ASA present. She has not alleged a claim of fraud against Statoil ASA or SOP, a typical circumstance justifying piercing the corporate veil. Nor has she indicated that she would be deprived of a remedy if forced to assert her contract claims without Statoil ASA.

Canfield requested jurisdictional discovery in her brief in opposition. (Doc. 40, at 16). Currently, the parties are engaged in fact discovery. (*See* Doc. 64). If Canfield had alleged some plausible basis for veil piercing, the court would be more willing to allow additional time for jurisdictional discovery. Generally, "the parties should be granted a fair opportunity to engage in jurisdictional discovery so as to adequately define and submit to the court facts necessary for a thorough consideration of the [immunity] issue." *Fed. Ins. Co.*, 12 F.3d at 1284 n. 11. However, as other courts have noted, there is tension between permitting discovery and protecting a foreign state's or its instrumentality's claim to immunity, including immunity from discovery. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992). The court must attempt to balance the need for discovery to substantiate the plaintiff's claim that an exception to sovereign immunity exists and the sovereign's claim to immunity altogether. *Butler v. Sukhoi Co.*, 579

F.3d 1307, 1314 (11th Cir. 2009); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("[A] district court authorizing discovery . . . must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure."). Moreover, it is also not an abuse of discretion to deny jurisdictional discovery where the complaint utterly fails to provide a prima facie case that the district court has jurisdiction. *Id.*

Here, the complaint fails to show any facts that would lead this court to conclude that SOP is or was the alter ego of Statoil ASA in the underlying natural gas transactions. The briefing also fails to allege any specific facts that might be used to show that SOP was the alter ego of Statoil ASA. Canfield also has not come forward with any supplemental facts to indicate jurisdiction is proper. Thus, at this stage, Canfield's ability to ever meet the requirements of *Bancec's* control test is pure speculation. Meanwhile, discovery into Statoil ASA's business operations will be highly intrusive. Further, the court can see no equitable basis for imposing such a burden. Accordingly, the court will deny Canfield's request for any additional jurisdictional discovery.

C. Personal Jurisdiction

In addition to lacking subject-matter jurisdiction, the court finds it also lacks personal jurisdiction over Statoil ASA. The FSIA provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. §1330(b). Thus, under the FSIA, a finding of personal jurisdiction requires a finding of

subject-matter jurisdiction and proper service. Though not in the language of the FSIA, the Due Process Clause of the United States Constitution also limits the exercise of personal jurisdiction over foreign defendants. The court may only exercise personal jurisdiction where the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[12] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The court has already found that subject-matter jurisdiction is lacking. In addition, Statoil ASA has not been properly served.

Normally, service must occur within 90 days after the filing of a complaint, but this rule does not apply where the defendant is a foreign instrumentality. FED. R. CIV. P. 4(m). Courts are also more flexible in allowing extra time for service where the plaintiff has made a good faith effort to attempt service. *See, e.g., Allstate Ins. Co. v. Hewlett-Packerd Co.*, No. 113-cv-02559, 2015 WL 179041, at *3 (M.D.

---

[12] The court will not address Statoil ASA's minimum contacts argument and, instead, rules on other grounds. However, the same reasons that lead the court to conclude it lacks subject-matter jurisdiction—the absence of a plausible alter ego theory—would likely lead the court to conclude that Statoil ASA did not have sufficient contact with the United States to warrant asserting personal jurisdiction, under either a specific or general subject matter jurisdiction analysis. *See In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d 580, 595 (M.D. Pa. 2009). Canfield has not shown that Statoil ASA had any actual contact with the United States. Simply creating a United States entity, Statoil USA Properties Inc., that later created another entity, SOP, is not enough. Thus, Canfield would need to impute the activities of those United States entities to Statoil ASA, which, thus far, she cannot do.

Pa. Jan. 14, 2015); *Lewis v. Vollmer of Am.*, No. 15-1632, 2006 WL 3308568, at *3 (W.D. Pa. Oct. 25, 2006). This flexibility will not be applied where the plaintiff has made no attempt at service. *See Allstate Ins. Co. v. Funai Corp.*, 249 F.R.D. 157, 161 (M.D. Pa. 2008).

Canfield has made no actual attempt at service and flexibility under the rules would not be justified. Canfield admits that she has not properly served Statoil ASA. Canfield requests that the court excuse this failure and allow more time because she believes she has made a good faith attempt to serve Statoil ASA. In support of this, Canfield submitted an affirmation from her attorney, John F. Harnes, explaining his attempts at service. (Doc. 40-1). However, this document does not show that any actual attempt at service was made.

In his affirmation, Attorney Harnes first explains that he believed Statoil ASA would waive service based on a review of other dockets where Statoil ASA was listed as a defendant. (*Id.* ¶4). He did initially provide Statoil ASA's counsel with a copy of the complaint. (*Id.* ¶5). Realizing that Statoil ASA would contest service, he attempted to locate agents within the United States to serve Statoil ASA because service under the Hague Convention[13] would be time-consuming and expensive. (*Id.* ¶7). After determining that this could not be accomplished, he spoke to the Clerk of Court in this district to find out more information about serving Statoil ASA by mail. (*Id.* ¶9). Concluding this would not be enough, Attorney

[13] The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1969, 20 U.S.T. 361, T.I.A.S. No. 6338

Harnes hired a process server and retained a company well versed in international service of process. (*Id.* ¶12). His efforts to locate a company were delayed by the defendants' motions to dismiss. (*Id.*). Attorney Harnes did not state that the third-party service company he hired has actually attempted or completed service.

Nothing in the affirmation suggests that there was an actual attempt to serve Statoil ASA. It shows that Attorney Harnes engaged in research to determine how service should be made and that he ultimately hired a process server, but it does not show that there was any actual attempt to serve the company. Attorney Harnes' research regarding service is not enough. Canfield's complaint was filed on January 13, 2016 and, to date, there is no indication in the docket or other indication from Canfield that service has been completed. The court sees no justification for such a delay, even under the most liberal reading of Rule 4(m). Without proper service, and without subject- matter jurisdiction, the court lacks personal jurisdiction over Statoil ASA.[14]

---

[14] Had Canfield asserted some plausible basis for the court to find that Statoil ASA was the alter ego of SOP, the court would be more inclined to allow Canfield's claim to proceed at this stage. Service on a subsidiary is effective to complete service on a parent corporation where the subsidiary is the alter ego of the parent. *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 519 (E.D. Pa. 2010); *Akzona Inc. v. E.I. Du Pont De Nemours & Co.*, 607 F. Supp. 227, 237 (D. Del. 1984). SOP waived service. (*See* Doc. 14). However, as discussed in part III.B, *supra*, Canfield has not asserted any facts, either in her complaint or her brief, to plausibly suggest that SOP was the alter ego of Statoil ASA. Thus, SOP's waiver is not sufficient to find that Statoil ASA also waived service.

Accordingly, Canfield's tortious interference, civil conspiracy, unjust enrichment, and accounting claims against Statoil ASA are dismissed with prejudice.

FAILURE TO STATE A CLAIM

A. Standard of Review - Rule 12(b)(6)

Rule 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). In reviewing such a motion, the court must "accept all factual allegations as true, construe the [c]omplaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the [c]omplaint, the plaintiff may be entitled to relief." *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012) (internal quotation marks and citation omitted). It is the moving party that bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). Dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). This "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Ultimately, the plaintiff must be able to "provide the grounds of his entitlement to relief," requiring more than bold-faced labels and conclusions. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (brackets and internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555). "[A] formulaic

recitation of the elements of a cause of action will not do." *Id.*

The Third Circuit has announced a three-part inquiry to apply the pleading principles announced in *Iqbal* and *Twombly*.

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Connelly v. Steel Valley Sch. Dist., 706 F.3d 209, 212 (3d Cir. 2013). Also, the court should grant leave to amend a complaint before dismissing it as merely deficient. *See, e.g.*, *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002); *Shane v. Fauver*, 213 F.3d 113, 116-17 (3d Cir. 2000). "Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." *Alston v. Parker*, 363 F.3d 229, 236 (3d Cir. 2004).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. *See Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007). The court may, however, consider "undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." *Pension Benefit*

Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir. 2002) (quoting 62 Fed. Proc., L. Ed., §62:508).

B. Breach of Contract and Accounting Claims Against SOP

Canfield's complaint contains three separate breach of contract claims against SOP, along with an accounting claim premised on the contract claims. Canfield's first claim against SOP alleges that SOP's sale at the well using an index price was a breach of the express terms of the royalty provision. Canfield's second claim also alleges a breach of the lease's royalty provision based on SOP's sale to an affiliate entity, though Canfield does not clarify if this allegation is based on express or implied terms in the lease. Canfield's fourth claim against SOP is based on an alleged breach of implied terms in the lease.

SOP argues that all of Canfield's contract claims are barred by Pennsylvania's statute of limitations and that SOP has fully complied with the terms of the lease, express and implied. SOP's statute of limitations argument fails at this time. Canfield's fourth claim based on a breach of the implied duty to market survives, along with her accounting claim, her seventh claim. Her first and second claim against SOP will be dismissed with prejudice.

i. Statute of Limitations

Canfield's breach of contract claims plausibly fall within Pennsylvania's statute of limitations. Under Pennsylvania law,[15] "a lease is in the nature of a contract and is controlled by principles of contract law." *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012). A *prima facie* case for breach of contract in Pennsylvania requires three elements: (1) the existence of a contract, (2) breach of the duties imposed by the contract, and (3) damages. *Joyce v. Erie Ins. Exchange*, 74 A.3d 157, 168 (Pa. Super. Ct. 2013). The limitations period for a breach of contract action in Pennsylvania is four years. 42 PA. CONS. STAT. ANN. §5525(a). "[This] statute of limitations begins to run as soon as a right to institute and maintain suit arises." *Crouse v. Cyclops Indus.*, 745 A.2d 606, 611 (Pa. 2000). When the right to institute a suit arises is a legal question for the court. *Id.* at 611. In general, for a breach of contract action, this date is based on the date that the breach occurs.

---

[15] A district court sitting in diversity must apply the choice of law principles of the forum state to determining the controlling law to be applied. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941); *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013). "[U]nder Pennsylvania choice-of-law principles, the place having the most interest in the problem and which is the most intimately concerned with the outcome is the forum whose law should be applied." *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984). Pennsylvania has the greatest interest here as the place of the contracting of the lease, the place of performance, and the place of the real property interest. Canfield's lease provides no alternative choice of law provision. Accordingly, the court applies Pennsylvania law, including its statute of limitations. *See Ross v. Johns- Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985).

S.T. Hudson Engineers, Inc. v. Camden Hotel Devel. Assoc., 747 A.2d 931, 934 (Pa. Super. Ct. 2000).

Pennsylvania also applies the discovery rule to breach of contract actions, except those relating to the sale of goods. *See, e.g., Morgan v. Petroleum Prods. Equip. Co.*, 92 A.3d 823, 828 (Pa. Super. Ct. 2014); *see also* 13 PA. CONS. STAT. ANN. §2725(b). "The discovery rule is a judicially created device which tolls the running of the applicable statute of limitations until the point where the complaining party knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct." *Crouse*, 745 A.2d at 611. This inquiry is typically a question of fact for a jury. *Id.* The court may determine this date as a matter of law only where reasonable minds would not differ in finding that a plaintiff knew or should have known of his or her injury and its cause on that particular date. *Fine v. Checcio*, 870 A.2d 850, 858–59 (Pa. 2005).

The court cannot state at this time when the cause of action accrued for purposes of the statute of limitations. Canfield's complaint was filed on January 15, 2016. SOP alleges that the statute of limitations had passed based on the allegation in Canfield's complaint that "beginning in or about April 2010 . . . [SOP] began selling all of its production to [SNG]" at a unit index price. (Doc. 1, ¶26). This date is the date of the alleged breach and the date on which Canfield was entitled to sue. However, the court also finds it plausible that the discovery rule should be applied to toll this initial date. The April 2010 date in the complaint appears to have been provided by the defendants and is likely not based on Canfield's own knowledge. (*Id.* ¶26 n. 2). It is unlikely that Canfield

knew of SOP's private agreement with SNG to use an index price. Instead, it is plausible that she would have been put on notice of the breach at the time she noticed a reduced royalty payment as compared to Chesapeake's royalties. Canfield noticed a difference in the royalties being paid to her in or around September 2013. (*Id.* ¶31). Thus, it is plausible that the limitations period should be tolled to September 2013 or shortly after, which would make Canfield's January 2016 complaint timely. This may be, ultimately, a fact question. After discovery, reasonable minds may or may not differ as to whether or not Canfield should have noticed other signs of the alleged breach earlier. At this stage, however, Canfield is entitled to proceed with her claim as the face of the complaint suggests that the discovery rule should be applied to toll the statute of limitations period.

It is also plausible that Canfield's lease is divisible such that each obligation to pay her royalties triggered a new statute of limitations period. Where a contract is divisible, such as an installment contract, the limitations period begins to run at each new breach. *See Bush v. Stowell*, 71 Pa. 208, 212 (1872); 14 Samuel Williston, *A Treatise on the Law of Contracts* §45:20 (Richard A. Lord ed., 4th ed. 1990) (hereinafter *Williston on Contracts*). "A contract is divisible if one portion or segment of the contract is enforceable independent from the other portions or segments." *Stone v. City of Phila.*, No. 86-1877, 1987 WL 8538, at *1 (E.D. Pa. Mar. 27, 1987). "[T]he parties' performances must be apportionable into corresponding parts of part performances and the corresponding pairs must be properly regarded as agreed upon equivalents." *Id.* (citing *Producers' Coke*

Co. v. Hillman, 90 A. 144, 145 (Pa. 1914)); *see also* RESTATEMENT (SECOND) OF CONTRACTS §240 (1981). Divisibility is also related to the doctrine of partial performance as it is "a mitigating doctrine which reduces the risk of forfeiture" where a party has partially performed an obligation under a contract. 15 *Williston on Contracts* §45:1.

In *Jacobs v. CNG Transmission Corp.*, 772 A.2d 445, 450 (Pa. 2001), the Pennsylvania Supreme Court explained that it is the intention of the parties that governs whether a contract is entire or severable. The severability concept announced in *Jacobs* is a distinct, but interrelated concept to that of divisibility. *See* 15 *Williston on Contracts* §45:1. In line with *Jacobs*, the divisibility determination is also guided by the intention of the contracting parties. *Hillman*, 90 A. at 145; *see also Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 466 (6th Cir. 2013); 15 *Williston on Contracts* §45:1.

Reviewing the SOP-Canfield lease, it is plausible that the royalty provision is divisible. Other courts have found royalties to be owed under an oil and gas lease to be divisible obligations subject to a new limitations period with each payment. *See, e.g.*, *Lutz*, 717 F.3d at 466–470 (6th Cir. 2013) (collecting cases). No Pennsylvania court has addressed this specific issue. However, in the event the discovery rule is not applicable or able to save Canfield's contract claims, Canfield may still be entitled to argue that the parties intended the royalty obligation to be divisible such that each new breach restarted the statute of limitations. If the obligations were divisible, those breaches falling within the limitations period could then proceed. While the court declines to rule on this

novel issue now, Canfield may reassert this argument at a later time if necessary.

ii. Breach of Express Terms in the Lease

Canfield has not alleged a plausible claim for breach of the express royalty provision in her lease. In her first claim for relief, Canfield alleges that SOP breached the express terms of her royalty clause because SOP did not base their royalty calculation on a "an actual market price" and, instead, based their royalty calculation on a "published index price, whether or not such index price [had] any relation to the actual market price conditions pertinent to the gas in question and whether the Landowners' gas was ever transported to the Hub point where the index price was published." (Doc. 1, at ¶36). This argument assumes that either: (1) the lease required royalties be based on a market price from a downstream sale (an "express market price/downstream sale claim") and/or (2) that SOP could not use an index price unrelated to the location where the natural gas was eventually sold to end-users (an "express index-price claim"). Having read the lease, the court finds that SOP's method of calculating royalties complied with the lease's express and unambiguous terms. Thus, Canfield's first claim based on either a market price/downstream sale theory or index-price theory must be dismissed.

In Pennsylvania, a lease "must be construed in accordance with the terms of the agreement as manifestly expressed, and '[t]he accepted and plain meaning of the language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement.'" *Jedlicka*, 42

A.3d at 267 (quoting *J.K. Willison v. Consol. Coal Co.*, 637 A.2d 979, 982 (Pa. 1994)). Generally, a contract should be construed as a whole and all of its parts and provisions should be given effect if possible. 16 SUMM. PA. JUR. 2D *Commercial Law* §1:124 (2d ed.).

In addition, "[d]etermining the intention of the parties is a paramount consideration in the interpretation of any contract." *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 389 (Pa. 1986). In accordance with the first principle, the intention of the parties should be determined based on the language of the contract itself if that language is clear and unambiguous. *Id.* at 390. If the language is ambiguous, "parol evidence is admissible to explain or clarify or resolve that ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstance[—*i.e.*, a latent or patent ambiguity]." *Id.* (quoting *In re Herr Estate*, 191 A.2d 32, 34 (Pa. 1960)).

"A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* "[A]mbiguity in a written oil and gas lease is construed in favor of the lessor and against the lessee." *Mason v. Range Resources-Appalachia LLC*, 120 F. Supp. 3d 425, 440 (W.D. Pa. 2015) (citing *Jacobs v. CNG Transmission Corp.*, 332 F. Supp. 2d 759, 773–74, n. 6 (W.D. Pa. 2004)). This rule only applies where parol evidence fails to clarify the ambiguity. *Id.* Whether an ambiguity exists is a question left for the court. *Hutchinson*, 519 A.2d at 390. But, generally, the determination of the intent of the contracting parties based on conflicting parol evidence is left to a jury. *Id.*

Canfield's royalty provision unambiguously provides that her royalties shall be calculated based on "the amount realized from the sale of gas at the well." (Doc. 1-2, at 1 ¶3). SOP argues that this expressly means that they must calculate royalties based on the actual sale price at the well, irrespective of whether or not this sale price is based on an index price. The court agrees that SOP's inter-affiliate sale to SNG at the physical location of the well complied with the express lease terms.

The phrase "amount realized" in an oil and gas royalty clause has acquired a technical meaning. "Technical terms and words of art are [to be] given their technical meaning unless the context or a usage which is applicable indicates a different meaning." *Fischer & Porter Co. v. Porter*, 72 A.2d 98, 101 (Pa. 1950) (quoting RESTATEMENT (FIRST) OF CONTRACTS §235 (1932)) (alteration in original). In the oil and gas industry, the phrase amount realized "is commonly viewed as synonymous with proceeds." 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law, Manual of Oil & Gas Terms A* (LexisNexus Matthew Bender 2016) (hereinafter *Williams& Meyers*)[16] (citing *Sondrol v. Placid Oil Co.*, 23 F.3d 1341, 1343 (8th Cir. 1994); *see also Tana Oil & Gas Corp. v. Cernosek*, 188 S.W.3d 354, 360 (Tex. App. 2006) ("The term 'amount realized' or 'net proceeds' has been construed by Texas courts to mean

[16] As explained by the Third Circuit and the Western District of Pennsylvania, *Williams and Meyers, Oil and Gas Law* and its *Manual of Oil and Gas Terms* is "the foremost authoritative treatise on the law relating to oil and gas." *Smith v. Steckman Ridge, LP*, 590 F. App'x 189, 194 n. 5 (3d Cir. 2014) (quoting the district court). Pennsylvania courts frequently cite to and rely on this treatise for guidance. *Id.*

the proceeds received from the sale of the gas or oil."). Proceeds is defined as "the money obtained by an actual sale." *Williams & Meyers, Manual of Oil & Gas Terms P.*

In comparison, "market value" refers to the value of the product in the relevant market. *Williams & Meyers, Manual of Oil & Gas Terms M.* A proceeds or amount realized royalty clause must be distinguished from a market value royalty clause. *See Sondrol*, 23 F.3d at 1343; *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 245 (Tex. 1981). "Market value is the price a willing seller obtains from a willing buyer." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 122 (Tex. 1996). Market value is more difficult to determine than a simple account of proceeds. There are two primary methods used to determine market value, one uses the net-back method, but the best method is based on comparable sales. *NationsBank*, 939 S.W.2d at 122*; see also Tex. Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 872 (Tex. 1968).

The phrase "at the well" is "commonly understood to mean that the oil and gas is to be *valued* in its unprocessed state as it comes to the surface at the mouth of the well." *Williams & Meyers, Manual of Oil & Gas Terms A* (emphasis added). Thus, the phrase "at the well" relates to the proper valuation of the natural gas product, but does not necessarily dictate where the sale is to be made, the point of sale.

Canfield, in several instances, alleges that her lease required royalties based on a "market price." The court construes this to mean a sale within the market—*i.e.*, the downstream market—not market value. Canfield's royalty provision was clearly not a market value lease; it unambiguously provides that

royalties will be based on the amount realized from the sale of gas at the well, or proceeds. If Canfield intended to convert her proceeds lease into a market value lease, this would fail. The price paid by SNG to SOP at the well are the proceeds SOP received for the sale of Canfield's natural gas. There is no allegation that SOP misrepresented the price paid by SNG. Thus, SOP's usage of the sale price to calculate royalties was clearly proper under the lease.

Next, the court addresses whether the physical location of the sale was proper. As explained above, "at the well" refers to value, not the point of sale. Canfield's lease does not indicate where the sale was to be made. The parties could have made clear where the sale was to be made or clarified in the royalty provision the method of calculation when the sale occurred at the well versus downstream of the well. *Cf. Hall v. CNX Gas Co.*, 137 A.3d 597, 599 (2016) (construing lease language that explained differing royalty calculations when the gas was "sold or used beyond the well" and when gas was sold "at the well"). The parties did not do this and, perhaps confusingly, Canfield is now left with two lessees, SOP and Chesapeake, who have determined the point of sale should be in different locations—one at the well and one downstream. The court is not convinced that Chesapeake's interpretation of Canfield's lease is proper and, instead, finds that SOP's sale at the actual location of the well complied with the lease's royalty provision.

The court carefully reviewed the lease and could not find any language indicating SOP's sale to third-parties was required to be downstream. The only indication in the lease that the parties might have intended a downstream sale was found in language

that was modified and superseded by the parties' addendum to the lease. In addition to the "amount realized at the well" language, Canfield's royalty provision states that "'[t]he amount realized from the sale of gas at the well' shall mean the amount realized from the sale of the gas after deducting . . . post-production costs" and the clause authorizes the lessee and/or its affiliates to provide post-production services. (Doc. 1-2, at 1 ¶3). Thus, the initial lease language utilized the net-back method of calculating royalties based on a downstream sale to determine a wellhead price. This suggested that the actual sale was to be made at some point downstream and would verify Chesapeake's usage of the net-back method. In the superseding addendum attached and made part of the lease, however, the lessee agreed that royalties would be paid without deductions for either production or post-production costs incurred to make the natural gas ready for sale or use. This provision states as follows:

> Royalties shall be paid without deductions for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, transporting, or otherwise making the oil and/or gas produced from the lease premises ready for sale or use.

(*Id.* at 4 ¶13). This ready for sale or use clause completely abrogated the initial lease language discussing post-production costs. Thus, the final lease provides for royalties to be calculated based on the amount realized at the well and also provides that the lessee cannot deduct post-production costs.

The only way to construe the "at the well" language and ready for sale or use clause together is

to require a sale at the physical location of the well. If the sale was to made downstream, as Canfield suggests, without deductions for post-production costs, as the explicit lease language suggests, then the resulting royalty could not be a wellhead price. This interpretation would render the phrase "at the well" meaningless as this phrase indicates royalties should be based on the wellhead value, not the value of the product downstream. Instead, the court interprets Canfield's royalty provision to unambiguously require royalties calculated using the wellhead value, which is determined based on an actual sale at the well. Where the lessee is selling at the well, the lessee need not incur post-production costs and, therefore, would not be forced to deduct these costs in defiance of the ready for sale or use clause. The addendum language is redundant when the lessee is selling at the well. This added language can be viewed, however, as mere surplusage, without violating any of the lease terms. *Cf. NationsBank*, 939 S.W.2d 118, 122–23 (construing a market value, at the well clause and no deductions clause as consistent with each other). This interpretation takes into account all of the lease terms, complies with the express lease language, and does not render any phrase meaningless. SOP's interpretation was, thus, proper. SOP, quite literally, complied with the lease terms when selling to SNG at the well to arrive at a wellhead price. Accordingly, Canfield's claim based on an breach of the express terms of her lease based on a market price/downstream sale theory must fail.

With respect to Canfield's express index-price claim, there is no express language in the contract to suggest that SOP was prohibited from using an index

price or that SOP's usage of an index price was required to be tied to the location where the natural gas was sold. The contract simply requires that royalties be based on "the amount realized"—*i.e.*, proceeds— and is entirely silent with respect to how SOP must negotiate a price when selling to third-parties. If such an obligation exists, it must be implied. Thus, SOP's usage of an index price is not an express breach of the contract and any express index-price claim must fail as a distinct claim. SOP's transaction, while distinct from Chesapeake, complied with the literal terms of the lease. Accordingly, Canfield's first claim premised on a breach of the express terms of the royalty provision must be dismissed with prejudice.

In her second claim for relief, Canfield alleges a breach of the lease occurred based on SOP's sale of natural gas to an affiliate because it was not an arms'-length transaction (the "affiliate claim"). It is unclear if this claim was intended to be a separate breach of contract claim based on an express term or an implied term. Her claim does not state what term or phrase in the lease SOP allegedly breached by engaging in an affiliate sale. If Canfield intended to bring an express breach of contract claim based on the sale of gas to an affiliate, this would fail.

The court has carefully reviewed the lease and can find no express provision requiring SOP to make royalties based on an arms'-length sale or a sale to a non-affiliate. Thus, SOP's actions do not amount to breach of an express obligation. If the parties intended to require sales to a non-affiliate then they certainly could have agreed to do so expressly. *See Trinity Valley Sch. v. Chesapeake Operating, Inc.*, No. 3:13-cv-01082-k, 2015 WL 4945911, at *4 (N.D. Tex.

Aug. 19, 2015), *vacated due to settlement*, 2015 WL 9269774. Accordingly, Canfield has failed to assert a plausible express affiliate claim and any such claim must be dismissed with prejudice.

With respect to an implied claim, Canfield's fourth claim includes similar allegations regarding affiliate sales, alleging that SOP's sale to an affiliate breached implied terms. Thus, if Canfield's second claim was intended to be interpreted as an implied breach claim, in addition to an express breach claim, this allegation would be redundant. Accordingly, the court will dismiss Canfield's second claim with prejudice and will deal, separately, with the alleged breach of implied obligations as stated in the fourth claim.

iii. Breach of Implied Terms in the Lease

Canfield has asserted a plausible breach of contract claims based on implied obligations. In her fourth claim for relief, Canfield asserts that SOP had "an obligation to use reasonable best efforts to market the gas and achieve the best price available" as well as an "implied duty of good faith and fair dealing." (Doc. 1, at ¶¶50–51). Canfield argues that these obligations/duties were breached, again, because SOP sold the natural gas extracted from her land to an affiliate (an "implied affiliate claim") and at an index price that was unconnected to comparable sales at the location of the well (an "implied index-price claim").

The Pennsylvania Supreme Court is cited as the first court to recognize implied covenants in oil and gas leases. *See* James W. Adams et al., *Pa. Oil & Gas Law & Practice* §18.1, at 18-1 (2d ed. 2015). In *Stoddard v. Emery*, 18 A. 339 (Pa. 1889), the court found that an

implied covenant to bore wells on property existed in a lease, but that this implication would not dictate the amount of wells required where that number was expressly fixed in the contract. The court explained that "[h]ad there been nothing said in the contract on the subject, there would of course have arisen an implication that the property should be developed reasonably." *Id.* at 442. This general principle of implied covenants was recently restated, again in dicta, in a more recent Pennsylvania Superior Court case as follows:

> In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract. Accordingly, a promise to do an act necessary to carry out the contract must be implied.

Katzin v. Central Appalachia Petroleum, 39 A.3d 307, 309 (Pa. Super. Ct. 2012) (quoting *Daniel B. Van Campen Corp. v. Bldg. & Constr. Trades Council of Phila. & Vicinity*, 195 A.2d 134, 136–137 (Pa. Super. Ct. 1963)). However, importantly, "[t]he law will not imply a different contract than that which the parties have expressly adopted." *Hutchinson*, 519 A.2d at 388.

Pennsylvania currently recognizes three implied covenants in oil and gas leases: (1) an implied duty to reasonably develop the land; (2) an implied duty to protect the land from drainage due to adjoining

operations; and (3) an implied duty to bring extracted gas to market. *See Jacobs v. CNG Transmission Corp.*, 772 A.2d 445, 244–45 (Pa. 2001); *Kleppner v. Lemon*, 35 A. 109 (Pa. 1896); *Iams v. Carnegie Natural Gas Co.*, 45 A. 54, 55 (Pa. 1899); *Pa. Oil & Gas Law & Practice* §18.1, at 18-1. It is said that these implied obligations rest on the general principle of cooperation between contracting parties, which is similar to the implied duty of good faith in contracts. *Williams & Meyers*, §802.1 at 6.1–10; *see also Iams*, 45 A. at 55 (describing the implied covenant to market as an "obligation to operate for the common good of both parties") (quoting *Glasgow v. Chartiers Oil Co.*, 25 A. 232 (Pa. 1892)). The Pennsylvania Supreme Court has not addressed whether an implied duty of good faith is imposed on all contracts or whether it should be applied to oil and gas leases, specifically. *See Ash v. Continental Ins. Co.*, 932 A.2d 877, 883 n. 2 (Pa. 2007). Because Pennsylvania has not expressly adopted the implied duty of good faith in an oil and gas lease as a distinct claim, but has adopted other specific covenants, the court will analyze Canfield's claim under the implied duties recognized by the Pennsylvania Supreme Court.

Moreover, the duty of good faith is premised on the same principle of cooperation forming the foundation of the current, implied duties in oil and gas leases. *Williams & Meyers*, §802.1, at 6.1–8. Some scholars have noted that the standard of good faith implied in relational contracts and the standard implied in oil and gas leases are the same. *Id.* at p. 12 (citing C. Meyers & S. Crafton, *The Covenant of Further Exploration—Thirty Years Later*, 32 Rocky Mt. Min. L. Inst. 1-1-, 1-22 (1986)). Some

Pennsylvania case law suggests this is true. *See T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 275–77 (Pa. 2012) (where a contract calls for production from a well only producing "in paying quantities" the court must consider the good faith judgment of the operator); *Colgan v. Forest Oil Co.*, 45 A. 119, 121 (Pa. 1899) (applying a subjective, good faith standard to the implied duty to develop land in stating that the court's "right to interference [with the operator's decision to develop or not develop wells on land] does not arise until it has been shown clearly that he is not acting in good faith on business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract.").

While the two concepts may intertwine, it is likely that the Pennsylvania Supreme Court would view them as distinct. This is so because, although using "good faith" language in its earliest case law on the topic of implied duties, the Pennsylvania Supreme Court also made clear that a lessor and lessee in an oil and gas lease do not share a special or fiduciary relationship. Colgan, 45 A. at 120.

> There is no relation of special trust or confidence between the lessor and lessee in oil or gas leases, any more than in any other. Like all other contracting parties, they deal at arm's length, each with his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor; and the parties must be left, as in other cases, to their own ways. It is only when a manifestly fraudulent use of

> opportunities and control is shown that courts are authorized to interfere.

Id. Thus, while there may be some instances where Pennsylvania court's impose a subjective standard that aligns more closely with the standard of good faith and fair dealing, it is unlikely that this sets forth a separate, cognizable claim under Pennsylvania law. Accordingly, Canfield's implied affiliate claim and implied index-price claim premised on a breach of a generalized duty of good faith and fair dealing fails as a matter of law.

Next, Canfield asserts that her implied breach claim is based on the implied duty to market, which is a cognizable claim under Pennsylvania law. *See Iams*, 45 A. at 54–55. In *Iams v. Carnegie Natural Gas Co.*, the Pennsylvania Supreme Court held that where gas was obtained from the lessor's property in sufficient quantities, a landlord/tenant relationship was established and the defendant lessee would be required to market the gas found "but only at a reasonable profit[,]" taking into consideration "the distance to market, the expense of marketing, and everything of that kind." 45 A. at 54. At that point, the lessee is "under an 'obligation to operate for the good of both parties, and to pay the rent or royalty reserved.'" *Id.* at 55 (quoting *Glasgow*, 25 A. at 232).

The Pennsylvania Supreme Court's explanation of the lessee's marketing obligation in *Iams*, decided in 1899, could not have taken into consideration the restructuring of the oil and gas industry in the 1980s and 1990s. *See* John S. Lowe, *Defining the Royalty Obligation*, 49 SMU L. REV. 223 (1996). Prior to this restructuring, producers extracted gas from the land and sold it to pipelines at

the well or in the field under long-term contracts; the pipelines then sold to regulated, local distribution companies who served as retailers under a price-regulated scheme. *Id.* at 224. Under this framework, the lessee's obligation was to find a buyer, a pipeline, if one could be found. Today, pipelines are open-access transporters, not merchants; natural gas is no longer price fixed; and markets are not fixed, they can be created by those operating within the industry. *See id.*

Without recent Pennsylvania Supreme Court guidance, this court must consider what Pennsylvania's duty to market means in the current natural gas context, if Canfield's implied index-price claim or implied affiliate claim is recognized under Pennsylvania law, and if the facts alleged state a plausible claim. Where the Pennsylvania Supreme Court has not addressed an issue, this court is guided by state intermediate appellate courts, other federal courts applying Pennsylvania law, state supreme courts addressing the issue, analogous decisions, dicta, scholarly work, and "any other reliable data tending convincingly to show how the highest court of the state would decide the issue at hand." *Mason*, 120 F. Supp. 3d at 439 (quoting *Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 216–217 (3d Cir. 2010) (quoting *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir. 2008)).

First, the court must address the scope of *Iams* after the Pennsylvania Supreme Court's decision in *Kilmer v. Elexco Land Srvs., Inc.*, 990 A.2d 1147 (2010). In *Kilmer*, the court was tasked with interpreting Pennsylvania's Guaranteed Minimum Royalty Act ("GMRA"), 58 PA. STAT. §33, *repealed and replaced by* Oil and Gas Lease Act, 58 PA. STAT. §33.1 *et seq.*

(2013). The GMRA imposed a statutory requirement that a lessee pay at least a one-eight royalty to the landowner. The court specifically held that lease terms requiring royalties to be paid after the deduction of post-production costs—usage of the net-back method to calculate a wellhead price—did not violate the GRMA. *Kilmer*, 990 A.2d at 1158. The court interpreted the term "royalty" in the GMRA to be consistent with the industry standard that royalties bear post- production costs. *Id.* at 1157.

Notably, one of the landowner/lessor arguments in *Kilmer* opposing this interpretation was that the duty to market referenced in *Iams* imposed an obligation on the lessee to bear all the costs to get the natural gas to the point of sale. *Id.* at 1152–53. This is commonly referred to as the First Marketable Product Doctrine and this doctrine has been adopted in a minority of states. The court rejected this argument. Post-*Kilmer,* it is clear that Pennsylvania does not follow the First Marketable Product Doctrine and that Pennsylvania allows lessors and lessees to contract royalties based on a wellhead price. *See id.* at 1158.

While the Pennsylvania Supreme Court refused to apply the interpretation urged by the landowners in *Kilmer* based on *Iams*, the court did not expressly overturn the *Iams* decision. As such, *Iams* remains good law, but it may not be interpreted to impose a duty on the lessee to bring the natural gas to its final point of sale. The court notes, however, that *Kilmer* will not be extended beyond its reach. *Kilmer* was a statutory construction case; it did not dictate how a lease would be construed or overturn the validity of all implied duties. But, in line with *Kilmer's* holding, this court will refrain from looking

to the laws of states that impose the First Marketable Product Doctrine, such as Colorado, Oklahoma, and Kansas. *See Kilmer*, 990 A.2d at 1152. These states impose a higher duty on the lessee and likely do not accurately reflect how the Pennsylvania Supreme Court would apply the current, implied duty to market.

The court must also address what standard of conduct should be applied to the implied duty to market. The Pennsylvania Supreme Court has not clarified what standard should be applied to the lessee's conduct in the performance of his or her implied duty to market, and case suggests a mixture of both the subjective standard—that of good faith—and an objective standard or the reasonably prudent operator standard. James W. Adams et al., *Pa. Oil & Gas Law & Practice* §18.1, at 18-1, 18-2; *see also* George A. Bibikos and Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 TEX. J. OF OIL, GAS, & ENERGY L. 155, 173–76 (2008–2009). In *Colgan v. Forest Oil Co.,* the court imposed a subjective good faith standard on the lessee when discussing what today is referred to as the implied duty to reasonably develop the land for production. 45 A. at 119. In *Kleppner v. Lemon,* addressing the same duty to develop the land by drilling wells, the Pennsylvania Supreme Court applied a more objective standard to the lessee's conduct stating that "[w]hatever ordinary knowledge and care would dictate as the proper thing to be done for the interest of both lessor and lessee, under any given circumstances, is that which the law requires to be done as an implied stipulation of the contract." 35 A. at 109. This enunciation is similar to that stated in *Iams*

which directs courts, when assessing the lessee's duty to market, to take into consideration "the distance to market, the expense of marketing, and everything of that kind." 45 A. at 54.

More recently, however, in *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 263 (Pa. 2012), the Pennsylvania Supreme Court held that a lease habendum clause that stated the term of the lease would be held so long as the oil or gas produced "in paying quantities" would be construed in light of the operator's good faith judgment. The court's analysis was neither purely subjective or purely objective, but a mixture. Under *Jedlicka*, if a well consistently pays a profit, an objective inquiry, it will be deemed to be producing in paying quantities. *Jedlicka*, 42 A.3d at 276. Only where this objective test is not met must the court resort to the operator's good faith judgment. *Id.* Although the issues surrounding habendum clauses and when the lease terminates are distinct from the duty to market, there does appear to be some theoretical overlap between in the two. *Williams & Meyers*, §854 at 396.3–396.6. In light of this, the mixed standard in *Jedlicka* would likely apply to the implied duty to market. *See also id.* §856.3 at 415. Thus, the court must assess objective factors, but may also consider whether the lessee's business judgment was exercised in good faith.

The Pennsylvania Supreme Court also has not addressed the scope of the implied duty to market in any recent decisions, but the court finds adequate explanation of the duty in Texas Supreme Court decisions. Texas is a majority state that does not impose the First Marketable Product Doctrine and allows parties to calculate royalties based on a

wellhead price. In *Yzaguirre v. KCS Resources, Inc.*, the Texas Supreme Court explained that "[t]he implied covenant to reasonably market oil and gas serves to protect a lessor from the lessee's self-dealing or negligence." *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 374 (Tex. 2001). Accordingly, where the lease is silent, the lessee has a duty to market the oil and gas reasonably. 53 S.W.3d at 373. Where the lease is a proceeds lease, this obligation includes an "obligation to obtain the best current price reasonably available." *Union Pacific Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003) (quoting *Yzaguirre*, 53 S.W.3d at 374). This same protection is not needed in a lease requiring royalties based on a market value. *Id.*

A central inquiry in determining whether the duty has been breached is whether the transaction was a fraud or a sham, particularly where the allegation is based on an inter-affiliate sale. *Id.* at 74. This list is not exhaustive and the implied duty may extend beyond allegations of fraud or a sham, however. *See Occidental Permian Ltd. v. Helen Jones Found.*, 333 S.W.3d 392, 401 (Tex. App. 2011). The ultimate purpose of the duty is "to protect a lessor from the lessee's self-dealing or negligence." *Yzaguirre*, 53 S.W.3d at 374. However, at no point does the implied duty convert the proceeds clause into a market value clause as "[u]nder some circumstances, a reasonable marketer may sell gas for more or less than market value." *Hankins*, 111 S.W.3d at 74.

Canfield's implied breach claims are based on SOP's usage of an index- price and based on the inter-affiliate sale between SOP and SNG. Simple allegations of one affiliate selling to another do not state a plausible claim for breach of the implied

duty to market. *See Flanagan v. Chesapeake Exploration, LLC*, No. 3:15-CV-0222-B, 2015 WL 6736648, at *2–3 (N.D. Tex. Nov. 4, 2015); *see also Gottselig v. Energy Corp. of Am.*, No. 15-971, 2015 WL 5820771, at *6 (W.D. Pa. Oct. 5, 2015) (holding there is no obligation on the part of the lessee to inform the lessee of the relationship between the lessee and its marketing affiliate). Here, however, Canfield not only alleges that SOP and SNG were affiliates, but that SOP used an index price to calculate royalties. The court construes Canfield's implied index-price claim and affiliate claim as one claim implicating the implied duty to market. Her claim is virtually identical to the claim made by Texas landowners in *Union Pacific Resources Group, Inc. v. Hankins*. The *Hankins* action was also a putative class action. 111 S.W.3d at 70. Though, ultimately, the Texas Supreme Court found that the proposed class could not be certified, 111 S.W.3d at 75, notably, the action made it to the class certification stage.

In addition to alleging that SOP used an index price and sold to an affiliate, Canfield alleges that SOP changed the hub for this index price around September of 2013 from the Dominion South Point Hub near Pittsburgh, Pennsylvania to the Tennessee Zone 4 "300 Leg" Hub. SOP does not dispute this fact. At this stage, the court cannot conclude that the original hub price or the changed hub price reflected "the best current price reasonably available." *Hankins*, 111 S.W.3d at 72. Under the standard of care enunciated in *Jedlicka*, the court must assess objective factors, but also consider the lessee's good faith business judgment. The court has no

information to attempt to make that assessment at this stage.

Moreover, in several instances, Canfield suggests that SNG was a "sham intermediary" and that the sale between SOP and SNG was a "sham sale." (Doc. 1, at ¶¶29, 46). A sham sale would suggest SOP and SNG were one and the same. A sham sale would most certainly violate the implied duty to market under either a reasonably prudent operator or a good faith standard. *See Hankins*, 111 S.W.3d at 72; *see also Texas Oil & Gas Corp. v. Hagen*, 683 S.W.2d 24 (Tex. App. 1984), *dismissed as moot*, 760 S.W.2d 960 (Tex. 1988). Canfield's complaint contains no facts to indicate that there was a sham sale between SOP and SNG by using similar allegations as those in the veil piercing and alter ego context. SOP suggests that this is fatal. The court disagrees. The court will assume the veracity of this allegation and allow discovery to proceed. The "sham sale" allegation, when coupled with the inter- affiliate nature of the sale and the fluctuating index price used by SOP, states a plausible claim for breach of the implied duty to market. Thus, Canfield may proceed with her fourth claim.

iv. Accounting

Because Canfield's breach of contract claim as stated in her fourth claim for relief survives, her accounting claim also survives at this stage. Pennsylvania recognizes the right to a legal or equitable accounting in certain circumstances. *See Precision Indus. Equip. v. IPC Eagle*, No. 14-3222, 2016 WL 192601, at *8–9 (E.D. Pa. Jan. 14, 2016). A legal accounting is not a claim, but a demand for relief. *See* PA. R. CIV. P. 1021(a). It is incident to a proper contract claim. *Buczek v. First Nat'l Bank of*

Mifflintown, 531 A.2d 1122, 1123 (Pa. Super. Ct. 1987). Thus, a legal accounting requires a valid contract, either express or implied, and a breach of that contract. *Precision Indus. Equip.*, 2016 WL 192601, at *8–9. It also requires that either:

> (1) the defendant received monies as agent, trustee or in any other capacity whereby the relationship created by the contract imposed a legal obligation upon the defendant to account to the plaintiff for the monies received by the defendant, or
>
> (2) . . . the relationship created by the contract between the plaintiff and defendant created a legal duty upon the defendant to account and the defendant failed to account and the plaintiff is unable, by reason of the defendant's failure to account, to state the exact amount due him.

Id. at *8 (quoting Haft v. U.S. Steel Corp., 499 A.2d 676, 677–78 (Pa. Super. Ct. 1985)).

Here, Canfield has alleged a plausible breach of contract claim based on the implied duty to market and may be entitled to a legal accounting as an equitable remedy.[17] SOP had a contractual duty to obtain the best price reasonably available in accordance with the implied duty to market. Having found a plausible breach of contract claim, the court will allow Canfield's demand for an accounting to stand.

---

[17] Canfield's complaint does not specify whether she seeks a legal or equitable accounting. However, her brief in opposition suggests that she seeks a legal accounting, specifically, not an equitable accounting. (*See* Doc. 40, at 50–51).

C. Canfield's Remaining Claims Against SOP

Canfield's remaining claims against SOP must be dismissed. In her fifth claim for relief, Canfield alleges SOP was unjustly enriched. In her third claim for relief, Canfield alleges that SOP, SNG, and Statoil ASA engaged in a civil conspiracy. With respect to her unjust enrichment claim, the court agrees that this claim, pleaded on an alternative theory of liability, is improper where no party disputes the existence or applicability of the underlying contract, the lease. Canfield's civil conspiracy claim is barred by the gist of the action doctrine. Thus, SOP's motion to dismiss is granted with respect to these claims and they are dismissed with prejudice.

i. Unjust Enrichment

Under Pennsylvania law, the doctrine of unjust enrichment applies only in the absence of a contract. *Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006). "[P]arties in contractual privity . . . are not entitled to the remedies available under a judicially-imposed quasi-contract . . . because the terms of their agreement (express or implied) define their respective rights, duties, and expectations." *Id.* (quoting *Curley v. Allstate Ins. Co.*, 289 F. Supp. 2d 614, 620–21 (E.D. Pa. 2003)). While plaintiffs may plead unjust enrichment as an alternative theory to breach of contract, they may do so only where there is doubt as to the contract's validity. *Gottselig*, 2015 WL 5820771, at *7; *Montanez v. HSBC Mortg. Corp. (USA)*, 876 F. Supp. 2d 504, 516 (E.D. Pa. 2012); *AmerisourceBergen Drug Corp. v. Allstate Healthcare, LLC*, No. 10-6087, 2011 WL 3241356, at *3 (E.D. Pa. July 29, 2011).

Here, there is no doubt regarding the validity of the lease between Canfield and SOP. SOP does not dispute that it is obligated to perform under the lease. Thus, the relationship between the parties is wholly defined by the lease terms and the obligations imposed by those terms. Accordingly, the unjust enrichment claim will be dismissed with prejudice.

ii. Civil Conspiracy

Canfield's civil conspiracy claim must also be dismissed. In Pennsylvania, a civil conspiracy requires "two or more persons [who] combined or agreed with intent to do an unlawful act by unlawful means." *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979). It is a claim premised on the existence of some underlying tort. *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 405 (3d Cir. 2000). The only tort action in Canfield's complaint is tortious interference with a contract. This claim was not asserted against SOP. If asserted against SOP, this claim would, ultimately, be barred by Pennsylvania's "gist of the action" doctrine. The related civil conspiracy claim must also be barred by this doctrine.

The gist of the action doctrine "precludes plaintiffs from casting ordinary breach of contract claims as tort claims." *McShea v. City of Phila.*, 995 A.2d 334, 339 (Pa. 2010). Thus, a court must determine whether a plaintiff's actions lie in tort or contract where an underlying contract exists. *See Bruno v. Erie Ins. Co.*, 106 A.3d 48, 68 (Pa. 2014). Only where the contract claim is collateral to the tort claim will the tort claim be allowed to proceed. *Egan v. USI Mid-Atlantic, Inc.*, 92 A.3d 1, 18 (Pa. Super. Ct. 2014).

> In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Bruno, 106 A.3d at 68 (internal citations omitted). The claim of tortious interference against the contracting party is barred by this doctrine if it is not independent of the contract claim. *Alpart v. General Land Partners, Inc.*, 574 F. Supp. 2d 491, 505 (E.D. Pa. 2008).

The court has already determined that a valid breach of contract claim exists against SOP. Canfield's allegations against SOP all relate to the alleged breach of the royalty provision in her oil and gas lease, including the implied duties within that provision. Because Canfield's claims all relate to duties imposed by the lease, she cannot bring a tortious interference claim based on these same allegations. Canfield appears to admit as much in her

brief in opposition. (*See* Doc. 40, at 45 n. 15). It follows that she cannot bring a civil conspiracy claim where that claim is entirely premised on the tortious interference claim. If Canfield is precluded from bringing the tortious interference claim, it logically follows that she is precluded from bringing the related, tort-based civil conspiracy claim. This logic has even more force where no actual tort claim has been asserted against the defendant. *Cf. Alpart*, 574 F. Supp. 2d at 506 (allowing civil conspiracy claim to proceed only against those defendants with corresponding tort claims).

If Canfield had alleged a fraud then the court would be more reluctant to dismiss the civil conspiracy claim at this early stage. *Cf. Telwell Inc. v. Grandbridge Real Estate Capital, LLC*, 143 A.3d 421, 429–430 (Pa. Super. Ct. 2016) (finding it "far from clear" that the plaintiff's fraudulently misrepresentation claim was barred by the gist of the action doctrine based on the complaint alone). The existence of a fraud claim would make the court's determination of whether the claim is truly in tort or contract more difficult. *See also Mendelsohn, Drucker & Assocs. v. Titan Atlas Mfg., Inc.*, 885 F. Supp. 2d 767, 790 (E.D. Pa. 2012) (collecting cases and concluding that plaintiff's fraud claim was not barred by the gist of the action doctrine). However, Canfield has not asserted a fraud claim. Thus, the court has no trouble concluding that the action against SOP is truly based on a contract theory, not a tort theory. Accordingly, Canfield's civil conspiracy claim against SOP will be dismissed with prejudice.

D. Canfield's Claims Against SNG

SNG seeks dismissal of all of the claims against it in Canfield's complaint, which includes claims for tortious interference (the sixth claim), civil conspiracy (the third claim), unjust enrichment (the fifth claim), and a claim for an accounting (the seventh claim). In addition to other arguments, SNG argues that all of Canfield's allegations fail to state legally cognizable claims against the entity. The court agrees that the claims against SNG are legally deficient and should be dismissed.

i. Tortious Interference

Canfield has not alleged a plausible tortious interference claim against SNG. A claim for tortious interference with an existing contractual relationship requires the following four elements:

(1) the existence of a contractual relationship between the complainant and a third party;

(2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual damages as a result of defendant's conduct.

Phillips v. Selig, 959 A.2d 420, 429 (Pa. Super. Ct. 2008) (citing RESTATEMENT (SECOND) OF TORTS §766 (1979)); *see also Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183 (Pa. 1978). The second element is sometimes stated as "purposeful action on the part of the defendant, specifically intended to harm the existing relation." *Remick v. Manfredy*, 238 F.3d 248, 263 (3d Cir. 2001)

(citing *Pelagatti v. Cohen*, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987). The second and third element of tortious interference are interwined with the primary inquiry being whether or not the conduct was proper. *Corrections U.S.A. v. McNany*, 892 F. Supp. 2d 626 (M.D. Pa. 2012). Here, Canfield pleads that SNG "deliberately and without justification" caused SOP to breach the oil and gas lease at issue. (Doc. 1, at ¶59). This is a mere legal conclusion without any well-pleaded, factual allegations. Canfield has not alleged what wrongful conduct or "interference" or "purposeful action" SNG allegedly engaged in to "cause" the breach. The comments to Section 766 of the Restatement (Second) of Torts, which the Pennsylvania Supreme Court has adopted, provide a non-exclusive list of possible means of interference as follows:

> There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the

> promise of a benefit to the third person if he will refrain from dealing with the other.
>
> [I]t is not necessary to show that the third party was induced to break the contract. Interference with the third party's performance may be by prevention of the performance, as by physical force, by depriving him of the means of performance or by misdirecting the performance, as by giving him the wrong orders or information.

RESTATEMENT (SECOND) OF TORTS §766 cmt. k. (1979). At a minimum, the conduct must be improper. *Epstein*, 393 A.2d at 431.

Here, Canfield has not made any allegations that plausibly lead this court to find inducement, prevention of performance, or fraud or misrepresentations made by SNG. While Canfield describes SNG's conduct as "wrongful," (Doc. 1, at ¶59), she does not explain what constituted the wrongful conduct. *Cf. ClinMicro Immunology Center, LLC v. PrimeMed, P.C.*, No. , 2012 WL 3011698, at *7 (M.D. Pa. July 23, 2012) (dismissing tortious interference claim where the plaintiff failed to allege any conduct on the part of the defendant). The only conduct alleged is SNG's purchase of natural gas at an index price. Assuming that Canfield intends for this conduct to serve as the interference, it is not plausible that this conduct alone, was improper or wrongful, therein satisfying the second and third element.

Conduct is proper where it has been "sanctioned by the rules of the game which society has adopted." *Epstein*, 393 A.2d at 1184 (internal quotation marks omitted). Generally the court gives consideration to the following factors to determine if

conduct is improper: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the proximity or remoteness of the actor's conduct to the interference; and (6) the relations between the parties. *Id.*

Here, it is not plausible that simply buying natural gas at a favorable price and reselling that product for a profit is wrongful or improper. The buying and selling of natural gas are normal business activities for those entities marketing natural gas. The only motive alleged by Canfield is that of a profit motive for the benefit of the SNG; a simple profit motive would be proper for all corporate entities. There was no relationship between SNG and the leaseholders that would impose a higher negotiating standard on SNG. There is nothing in the complaint to suggest that SNG's conduct in obtaining the index-price deal with SOP was somehow improper, either through misrepresentation or some other conduct. Thus, without more, Canfield's claim fails under the second and third element for tortious interference.

The court also finds that amendment to Canfield's complaint would be futile. *See Alston*, 363 F.3d at 236. Despite having been granted leave to file a brief in opposition in excess of page limitations, Canfield did not directly address SNG's argument that her tort claim was deficient because it did not allege improper conduct. (*See* Doc. 40, at 38). Instead, she cited to and relies on a decision involving a fraud claim and related civil conspiracy claim, not a tortious interference claim. *See Strayer v. Bare*, No. 3:06cv2068, 2008 WL 1924092 (M.D. Pa. April 28,

2008). This case does not save her tortious interference claim. More importantly, in all of her briefing, Canfield did not allege any conduct by SNG that this court might plausible construe as wrongful. Like her complaint, the only conduct alleged was SNG's purchase and resale of natural gas. Thus, Canfield's claim appears to be premised entirely on this conduct and nothing else. This is not sufficient under Pennsylvania law. Accordingly, her claim against SNG for tortious interference with a contract will be dismissed with prejudice.

ii. Civil Conspiracy

SNG also seeks dismissal of Canfield's related, civil conspiracy claim because she failed to plead an actionable underlying tort, among other arguments. The court agrees. Having dismissed Canfield's tortious interference claim, the court must also dismiss her civil conspiracy claim.

Civil conspiracy is a claim premised on the existence of some underlying tort. *Boyanowski*, 215 F.3d at 405. The only tort claim in Canfield's complaint is intentional interference with a contract. The court has dismissed this claim with respect to Statoil ASA based on a lack of subject-matter and personal jurisdiction. As discussed above, the court has found that Canfield failed to allege an actionable tort against SNG. Canfield did not bring an intentional interference claim against SOP, and rightly so. Accordingly, there is no remaining tort claim and the civil conspiracy claim must be dismissed.

iii. Unjust Enrichment

Canfield also has not alleged a plausible unjust enrichment claim against SNG. "An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law." *Roethlein v. Portnoff Law Assocs., Ltd.*, 81 A.3d 816, 825 n. 8 (Pa. 2013) (citing *Schott v. Westinghouse Elec. Corp.*, 259 A.2d 443, 448 (Pa. 1969)). It is an obligation "created by law for reasons of justice." *Schott*, 259 A.2d at 449. It is defined as "the retention of a benefit conferred on another, without offering compensation, in circumstances where compensation is reasonably expected, and for which the beneficiary must make restitution." *Id.* (quoting *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 593 n. 7 (Pa. 2010)). The proper remedy for this claim is restitution. *See id.* (citing to RESTATEMENT (FIRST) OF RESTITUTION §1 (1937)).

In accordance with its definition, a claim for unjust enrichment is sometimes stated as requiring three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation of such benefit by the defendant; and (3) acceptance and retention of such benefit by the defendant under such circumstances that it would be inequitable for the defendant to retain the benefit without some payment of value. *Stoeckinger v. Presidential Fin. Corp. of Del. Valley*, 948 A.2d 828, 833 (Pa. Super. Ct. 2008); *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §1 cmt. d (2011) (describing this formulation as "not helpful"). The most important inquiry in this analysis is whether the enrichment was unjust. *Id.*; *id.*

SNG argues that there has been no benefit conferred on SNG by Canfield. SNG also argues that there is no misleading behavior that would justify shifting Canfield's royalty losses due to SOP's alleged conduct onto SNG. This would mean that her claim fails under the traditional definition of unjust enrichment and the first element of the restated three-part formulation for unjust enrichment—the benefit conferred prong. The court agrees.

The First Restatement of Restitution provides as follows:

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word benefit, therefore, denotes any form of advantage.

RESTATEMENT (FIRST) OF RESTITUTION §1 cmt. b. "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." *Id.* §110 (cited with approval in *Meehan v Cheltenham Twp.*, 189 A.2d 593, 596 (Pa. 1963)). An exception from this principle will be made where there is some misleading behavior. *D.A. Hill Co. v. Cleveland Realty Investors*, 573 A.2d 1005, 1009 (Pa. 1990); *Meehan*, 189 A.2d at 596; *see also* RESTATEMENT

(FIRST) OF RESTITUTION §110 cmt. a. Thus, without misleading behavior, a plaintiff cannot shift his or her loss from the breaching party to the party who indirectly benefitted from the breach. Canfield did not confer a benefit on SNG. If SOP breached the lease as Canfield alleges, then SOP retained a benefit from the breach in the form of lower royalty payments to Canfield. SOP then transferred this benefit to SNG, a transferee of the benefit. Canfield cannot shift the loss she suffered due to SOP's breach onto SNG in the absence of any misleading behavior from SNG. Canfield has not alleged any misleading behavior from SNG in her complaint. In her brief in opposition, Canfield did not directly address SNG's argument and simply concludes that SNG was unjustly enriched because the "[d]efendants manipulated gas sales." (Doc. 40, at 50). However, there is nothing in the complaint or briefing to verify this characterization of SNG's conduct. There is no allegation that SNG induced or made misrepresentations to SOP to use an index price. Again, Canfield attempts to impute the conduct of SOP to SNG without justification. Without any misleading behavior, her claim fails. Accordingly, the unjust enrichment claim against SNG will be dismissed with prejudice.

iv. Accounting

Lastly, Canfield is not entitled to a legal accounting from SNG. There is no contractual relationship between the two parties. *See Precision Indus. Equip.*, 2016 WL 192601, at *8–9. There is nothing in the complaint or brief in opposition to suggest that Canfield requests an equitable accounting. Canfield suggests the opposite.[18] Thus,

[18] *See, supra* n. 17.

the court will not address this argument and Canfield's claim for a legal accounting against SNG will be dismissed with prejudice.

CONCLUSION

In light of the above, SOP's and Statoil ASA's collective motion to dismiss, (Doc. 31), is **GRANTED IN PART** and **DENIED IN PART**. The court lacks subject-matter jurisdiction over the claims against Statoil ASA and lacks personal jurisdiction over Statoil ASA. Accordingly, the claims against Statoil ASA are **DISMISSED WITH PREJUDICE** and Statoil ASA will be dismissed as a party. Canfield's first, second, third, fifth, and sixth claim for relief against SOP are also **DISMISSED WITH PREJUDICE**. Her fourth claim for relief premised on an alleged breach of the implied duty to market survives. Canfield may proceed with this claim.

Further, SNG's motion to dismiss, (Doc. 25), is **GRANTED** in its entirety. The claims against SNG are **DISMISSED WITH PREJUDICE** and SNG will be dismissed as a party.

An appropriate order shall follow.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Dated: March 22, 2017

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (OCTOBER 16, 2024)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 20-2431 & 23-1291

ANGELO RESCIGNO, SR., Executor of the Estate of Cheryl B. Canfield v. STATOIL USA ONSHORE PROPERTIES, INC.; STATOIL NATURAL GAS, LLC; STATOIL ASA

*ALAN MARBAKER; CAROL MARBAKER, JERRY L. CAVALIER; FRANK K. HOLDREN,

Appellants in No. 20-2431

MARTHA ADAMS and all others OBJECTORS,

Appellant in No. 23-1291

(*Pursuant to Fed. R. App. P. Rule 12(a))

(D. C. No. 3-16-cv-00085)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG and *ROTH, Circuit Judges

---

* The vote of the Honorable Jane R. Roth is limited to panel rehearing only.

The petition for rehearing filed by **appellants** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ Jane R. Roth
Circuit Judge

Date: October 16, 2024

CJG/cc: Douglas S. Clark, Esq.
Jacob Coate, Esq.
John G. Dean, Esq.
Nicolle R. Bagnell, Esq.
Lucas Liben, Esq.
Ira N. Richards, Esq.
Lisa J. Rodriguez, Esq.
John F. Harnes, Esq.
Ryan A. Shores, Esq.

MATERIAL REQUIRED BY RULE 14(i)(v) PURSUANT TO RULE 14(1)(f)

U.S.C.A. Const. Art. III
ARTICLE III. THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

* This clause has been affected by the Eleventh Amendment.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S.C.A. Const. Art. III, USCA CONST Art. III
Current through P.L. 118-106. Some statute sections may be more current, see credits for details.

MATERIAL REQUIRED BY RULE 14(i)(v) PURSUANT TO RULE 14(1)(f)

Federal Rules of Civil Procedure Rule 23
Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding

declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or
(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for

motions by class counsel, directed to class members in a reasonable manner.
(2) A class member, or a party from whom payment is sought, may object to the motion.
(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018.)

ADVISORY COMMITTEE NOTES

2018 Amendments

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to

send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of

class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice--that it likely will be able both to approve the settlement proposal under Rule

23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently

left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors--perhaps many--may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3).

Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the

terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements--inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure

to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors--or their counsel--have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or

withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the

procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes--as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)--that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

ESSENTIAL MATERIALS PURSUANT TO RULE 14(i)(vi)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD,
Plaintiff,

CIVIL ACTION NO. 3: 16-85

v.

STATOIL USA ONSHORE PROPERTIES INC, et al
Defendant.

KARAM DECLARATION EXHIBIT A – EXPERTS' REPORT IN SUPPORT OF SETTLEMENT AGREEMENT

1. March 22, 2017, this Court issued an opinion in above cited litigation that granted in part, and denied in part, the defendants' motions to dismiss.

2. Plaintiff's counsel has retained Ammonite Resources Company ("Ammonite"), a firm of petroleum consultants, to review the data and documents produced in discovery by defendants Statoil USA Onshore Properties Inc. ("SOP"), Statoil Natural Gas LLC ("SNG"), and Statoil ASA, and to verify the data sources, methodology and computations of defendants in determining the monetary damages agreed in settlement of the

Rescigno v. Statoil et al. litigation. On May 15, 2018 Statoil changed its corporate name to Equinor (collectively "Statoil/Equinor").

3. Mr. Rescigno is the executor of the estate of Cheryl B. Canfield, the original plaintiff in this matter, who passed away after the settlement was agreed on, but before preliminary approval.

4. This litigation concerns a claim by mineral lessors/owners that defendant Statoil breached the terms of mineral leases. Plaintiff alleged that royalty payments were less than the lease required because the average monthly gas price, on which the royalty payment was determined by Statoil based on what was alleged to be an arbitrary "index price", and not the higher price which Statoil actually received for the gas it delivered to customers on interstate pipelines.

5. Mr. Rescigno is one of thousands of mineral lessors who allegedly suffered similar damages as claimed by Mr. Rescigno regarding royalty payments made by SOP for production of natural gas from mineral leases in the Marcellus Shale trend in Northeastern Pennsylvania. The Complaint included certain putative class action claims. The class of royalty owners has been preliminarily certified by the Court for purposes of the settlement. Ammonite has further been tasked with assisting in the creation of a plan of allocation to distribute the settlement damages to the aggrieved royalty owners.

6. Ammonite has extensive professional experience in oil and gas exploration and production, including experience in the Marcellus play in Pennsylvania, and is qualified to render this opinion.

No conflicts of interest were created in accepting this engagement, and Ammonite's compensation has been at the firm's normal hourly rate for such services. Ammonite's compensation is not in any way contingent on the outcome of this litigation. The professional qualifications of the Ammonite experts who prepared this report are attached here as Appendix 1.

7. The time-frame for the damages calculation for the purposes of settlement is from the inception of gas production by Statoil from its Northern Pennsylvania Marcellus wells in April 2010 through September 2017 (the "Settlement Period").

8. There are a total of approximately 13,445 mineral leases involved in the putative class action claim. Multiple lease forms with different terms and conditions were used by the companies that acquired leases in the Northern Marcellus Trend. The leases were ultimately assigned to SOP by Chesapeake Energy and Anadarko Petroleum for purposes of a joint venture exploration program. Statoil counsel has analyzed the leases and has identified 30 different forms of lease.

9. These 30 lease forms have been aggregated by counsel into five groups with reasonably similar terms. Differences between the leases include: determination of the point of sale; determination of the price of the oil and gas sold; whether deductions may be made, or not,[1] from the

[1] One of the considerations in the settlement of this case is the counter claim by Statoil for post-production costs. Statoil did not during the class period deduct a large portion of those costs from royalties. The counter claim alleges that Statoil has the right to

gross royalty amount for post-production expenses such as the cost for gathering, treating, compressing, transporting and marketing the production; and terms regarding sales to an affiliated company. Ammonite renders no opinion regarding the grouping of these lease forms.

10. SOP sells the gas it produces at the lessor's wellhead to SNG, an affiliated company. SNG subsequently aggregates the gas produced from multiple wells, and pays third-party operators of five local gathering gas pipeline systems to deliver the gas to sales points on several major interstate gas pipelines that transverse Northern Pennsylvania. SNG is paid for the gas by its customers either upon delivery to the interstate pipeline, or by customers, such as a local gas utility on the mainline, downstream from the connection point.

11. The price per million BTU's (MMBtu) heating value of the gas sold by SOP to SNG during the Settlement Period, and the price on which the mineral owner's royalty was based, is called the "transfer price" by Statoil. The transfer price was based on a daily spot "index price" posted by the regional interstate pipelines for specific geographic connection points to the interstate pipeline, less any post-production fees billed by the gathering system to deliver the gas to the interstate pipeline. The daily index price at each delivery point is published by S&P Global Platts "*Inside FERC's Gas Market Report*", available by subscription.

12. Interstate pipelines charge a variety of fees to transport natural gas from the producer's

---

deduct these costs and to recover past deductions that it did not take out of royalties.

gathering system connection point to the customer, who might be hundreds of miles downstream. These fees include: a demand or "reservation" fee for pipeline capacity, which is paid whether the capacity is used or not; a commodity price, which is based on the actual gas volume delivered and transported by the pipeline; a fuel and/or electricity cost; and a Federal Energy Regulatory Commission (FERC) Annual Charges Adjustment or ACA surcharge. These fees are based on cents or fractions of a cent per MMBtu or Dekatherm (Dth) of throughput.

13. Statoil has defined what it calls its net "achieved price" (also called its "resale price") as the gross price paid by the end customer for the delivered natural gas, less any gathering and interstate charges described in the preceding paragraph. There were five major gathering systems used by Statoil, each with different interstate mainline connection points. Each system had its own price structure.

14. Because of the significant differences in monthly gas volume sold, and gas commodity price volatility during the Settlement Period, weighted averages were used by Statoil in determining an average index price and the achieved prices. Calculations were made for each royalty group, and for each of the five different gathering systems. The database is extensive and archived electronically. Statoil utilizes what it calls a "personal royalty accounting", or PRA software, which shows the pay history by royalty owner and well. The difference between the transfer price paid by SOP to the lessors for gas produced, and the net achieved or resale price obtained by SNG, is called the "Delta". Statoil made a

determination of the cumulative Settlement Period Delta for each individual royalty owner.

15. Annexed as Exhibits 1(*a*) through 1(*i*) are a series of graphs prepared by Ammonite which show the transfer and net resale price and the difference between them (Delta) during the Settlement Period for each of the five gathering systems utilized by SNG. Exhibit 1(*a*) is the aggregate weighted average of the sales prices for all five systems. Exhibit 1(*b*) includes a plot of the benchmark Louisiana Henry Hub spot gas price for comparison. The Marcellus gas prices were generally much lower than the Henry Hub price beginning in late 2013 as rapidly increasing Marcellus production was constrained by a lack of sales pipeline takeaway capacity. Note that the SOP transfer price declined significantly from mid-2013 to late 2016, and then improved significantly during the period October 2016 through July 2017.

16. The five royalty groups as defined by counsel are listed in Exhibits 2 and 3. Exhibit 2 tabulates sales data through August 2016. It is Ammonite's understanding from Plaintiff's counsel that the settlement amount was negotiated on the basis of the data available through August 2016. As the settlement period extends through September 2017, Ammonite has evaluated the available data through July 2017 - essentially an additional year of data, to determine whether there are any material changes in the sales that might affect the settlement. Exhibit 3 summarizes the data through July 2017.

17. Column 2 of Exhibits 2 and 3 lists the general terms which the leases have in common. Also indicated in the table is the royalty volume by million

BTU sold during the Settlement Period and the percent of the total volume by royalty group[2] indicated in column 1; the gross royalty paid to lessors by the production company SOP; the average price paid by SOP to lessors for the gas produced; the price at which SNG sold the gas to interstate pipelines; the total difference in sales between the two gas prices (the "Delta"); gathering deductions incurred by Statoil; cumulative deductions charged against lessor royalties; cumulative deductions paid by SOP and SNG to third parties, but not deducted from lessor royalty payments. The second last column to the right titled "affiliate claim less deducts not taken", is the difference between the SOP transfer price and the SNG resale price (Delta), less gathering deductions not charged to the royalty owners. This is the number on which the settlement negotiations have been based.

18. Statoil engaged Applied Economics Consulting Group, Inc., Austin, Texas, to analyze the production and pricing data for purposes of determining the Delta, and to prepare the summaries presented in Exhibits 2 and 3. As the exhibits are color coded by royalty category, they have been referred to as the "Rainbow Chart" during settlement discussions.

19. The damages claim of Plaintiff in this litigation is based on the assertion that lessors should

---

[2] There is an error in Exhibit 3 as produced by Statoil. Differences in the production of the different lease groups in the period after August 2016 changed the relative percent of cumulative total produced gas volume during the Settlement Period from 16% to 13% for the Miscellaneous Form; from 16% to 18% for the L3 Form; and from 7% to 9% for the L29 Form.

have been paid the resale price obtained by SNG, an affiliate of SOP, not the alleged arbitrary transfer price they were paid by SOP. The cumulative Delta through August 2016 was $58,964,980. Statoil has counterclaimed that it is entitled to deduct from the lessor's royalty payment all gathering and transportation charges to the point of sale, but has not done so. Deductions not charged by SOP and SNG through August 2016 were $43,333,059.

20. If Statoil were to prevail in its counterclaim, the "affiliate claim less deducts not taken" would be $15,631,921 ($58,964,980 underpayment claim less $43,333,059 non-deducts). The $15.6 million figure would be the amount available for damages if Statoil were to prevail in its counterclaim, as of August 2016.

21. Exhibit 3 is an update of the Rainbow Chart summary table through July 2017. As part of its analysis in preparation of this opinion letter, Ammonite examined the impact of basing a settlement on the data available as of July 2017 instead of August 2016. Exhibits 4(a) through 4(h) summarize this analysis. The data are broken out by lease category. Statoil did not provide us with data through September 2017 as their counsel said that the additional two months of data had not been added to the Rainbow Chart summary, and would not make any material difference to the settlement.

22. As indicated in Exhibit 4(a), during the period August, 2016 through July 2017, an additional 22,945,066 MMBtu was sold on behalf of the lessors with payment of an additional royalty in the amount of $62,072,803. The average transfer price was $0.63/MMBtu, which was significantly (37%) higher

than the proceeding 6-year average transfer price. Gas prices increased substantially nationally and regionally during the latter half of 2016 into 2017 as shown in Exhibit 1(b).

23. During the additional year, the average SNF resale price declined by $0.02/MMBtu, and the cumulative Delta actually declined by a total of $1,022,225 to a cumulative $57,942,755. Gathering deductions incurred by Statoil increased by $13,261,846, of which only $3,209,546 was charged against royalties, resulting in a net increase of $10,082,712 in deducts not charged. This brought the cumulative deductions not charged to lessor royalties to a total of $53,415,771 as of the end of July 2017. The increase in deductions not charged to royalty is a material difference between Exhibits 2 and 3, and would be the basis for a significant reduction in the funds available for damage payments if Statoil prevailed in its counterclaim.

24. The relative proportion of gas sold under the five lease categories experienced only a 2% to 3% variance in the additional year as shown in Exhibit 4(b). Notably, the L29 leases increased from 7% to 9% of total production, which is an increase of 28%. L29 lessors also benefited from a 17% increase of the transfer price from an average $1.68/MMBtu to $1.97/MMBtu in Exhibit 4(c). Gross royalty paid to the L29 lessors increased 70% from a cumulative $13,293,045 to $22,578,243 as a result of increased monthly production and higher gas prices. The Delta faced by L29 lessors was reduced 46% from $0.61/mcf to $0.33/mcf. The average Delta for all lessors declined $0.10/mcf in the additional year, or 19.5% compared

with the 46% reduction experienced by the L 29 lessors.

25. As shown in Exhibit 3, the cumulative Delta had decreased to $57,942,755 by July 2017. The cumulative deductions not charged had increased to $53,415,771, resulting in a net $4,526,984 "affiliate claim less deducts not taken". Accordingly, if settlement negotiations had taken place after July 2017, and the Statoil counterclaim prevailed, the amount available for damages would have been reduced to $ 4.5 million. L1 and L29 lessors would owe Statoil money as of the end of July 2017 if Statoil prevailed in its counterclaim as shown in the column titled "affiliate claim less deducts not taken" in Exhibit 3. As of August 2016, all lease categories would receive some damage payment if Statoil were to prevail in its counterclaim as shown in Exhibit 2.

26. An important factor in settlement discussions was the risk that Statoil could prevail on its counterclaim and offset by a significant amount, recovery by the Plaintiff on his claims. Further, as described in the preceding Paragraph 14 of this opinion, the Plaintiff and the class will benefit if the Settlement is based on data available as of August 2016, compared with the end of the Settlement Period in 2017, should Statoil prevail with its counterclaim.

27. The parties involved in this litigation have agreed to a settlement that is based on a proportion of the difference (the "Delta") between the transfer price utilized by SOP for paying its royalty owners, and the actual gas price achieved by SNG from its customers. Post-production or market enhancement expenses charged by the gathering systems are no longer in dispute. Accordingly, the

transfer price for purposes of the settlement, is the same as the index price.

28. Counsel for Statoil and plaintiff Rescigno and the putative class of royalty owners have agreed to settle this litigation in the amount of $7 million.

29. Ammonite, as technical expert in this settlement, has had full access to all documentation relevant to this litigation. We have reviewed the Complaint and Judge Mannion's March 22, 2017 ruling. In August and September 2017, Statoil counsel provided Ammonite: hard copy and online access to the entire Statoil gas marketing database for the Settlement Period; access to the S&P Global Platts "*Inside FERC's Gas Market Report*" with pricing data for each pipeline sales point; reports prepared by the consulting firm Compass Lexecon for Statoil, which explained the gas market dynamics in Northern Pennsylvania in 2010 and subsequent years, and the rationale for using an index gas price; gathering system and interstate pipeline maps covering Statoil's Northern Marcellus leasehold; and the sales summary through August 2016, included herein as Exhibit 2. We were also sent 79 lease forms as representative of the different lease categories. Ammonite has also examined interstate pipeline operator monthly invoices showing the fees charged to Statoil, from which SNG calculated its achieved price.[3]

30. Between August and December 2017, we had numerous conference calls with counsel for both

---

[3] The extensive production and marketing data produced by the Statoil defendants, and as discussed and reproduced in this Expert's Opinion, is subject to a Confidentiality Agreement between the parties dated June 22, 2017.

Statoil and the Plaintiff to request further data and to ask for clarification of certain operational and market issues.

31. A meeting was held in Stamford, Connecticut on December 12, 2017 with counsel for Statoil and the Plaintiff, Statoil's marketing representatives, and Statoil's expert consultant Angela Paslay of Applied Economics Consulting Group, Inc, to answer remaining questions that we had about the market data and computations prepared by Statoil and its consultant. Follow-up e-mail communications and telephone calls were made to the Statoil consultant following the December 12th meeting for further information. All our questions were answered without hesitation and all requested follow-up data were sent to us in a timely manner.

32. Between January 2018 and July 2020 there was a hiatus in Ammonite's work on this litigation as the case moved through the court system. In July 2020, Ammonite was re-engaged to verify that the production, sales and pricing data, and the methodology and conclusions of Statoil in preparing the summary of Statoil royalty volumes and payments in the Northern Marcellus, as presented in Exhibits 2 and 3, are accurate and verifiable. A conference call was held on August 28, 2020 in which counsel for both parties and their consultants participated. Counsel for Plaintiff provided Ammonite with an updated summary Rainbow Chart through July 2017 (Exhibit 3); an update of the FERC pricing for each sales point, and renewed access to the updated Statoil online market database.

33. Because of the voluminous amount of market data over the seven-year Settlement Period, it

simply was not possible for Ammonite to fully audit the Statoil database, nor, we believe, necessary to do so. We reviewed and confirmed the FERC index price used by SNG for each month for the Rome, Liberty, General, Leidy, PVR Wyoming pipeline system points of sale during the April 2010 through July 2017 period; and randomly selected and examined 18 interstate pipeline invoices to confirm the charges made on each of the different gathering systems. We tracked 200 individual pipeline charges and gross sales figures through the Statoil Excel spreadsheets to verify the Statoil monthly achieved-price calculation. The random checks of monthly invoices we made across multiple years are believed to be a representative sampling of the data. We confirmed that the aggregate average index and transfer price for the settlement period were indeed weighted averages by manually recalculating the weighted average from price data shown in Exhibits 2 and 3. Ammonite has assumed that the gas production figures are correct as reported. Our investigation did not cause Ammonite to suspect or conclude that Statoil had omitted material information or misrepresented its market data.

34. Based on (i) the material we have reviewed; (ii) our discussions with counsel, and Statoil's consultant; as well as our (iii) extensive experience in the petroleum industry; Ammonite has developed a good comprehension of the issues in the subject litigation. We understand the differences in the lease terms and how the lease forms have been grouped; the rationale for the use of index pricing given gas market conditions in Northern Pennsylvania when the Marcellus was initially

drilled and produced, and as Marcellus development and infrastructure has evolved; and we understand the Statoil marketing process and price structure. Statoil has a comprehensive gas sales database, and has used an experienced independent market consultant to analyze the data to compute potential damages. Our analysis of the data permits us to confirm that for purposes of the damages calculations: a) the index prices utilized by SNG are consistent with those reported by Platts; and b), the achieved prices calculated by SNG are correct. The aggregate gas resale less transfer price (Delta) sum of $58,964,980, less deductions not taken in the amount of $43,333,059, resulting in the amount of $15.6 million as of August 2016, the calculation on which the settlement is based, is correct as far as Ammonite can determine.

35. A total settlement in the gross amount of $7 million has been agreed by the parties to this litigation. This amount is 45% of the total $15.6 million calculated in the preceding paragraph (royalty owners underpayment claim less Statoil claim for deducts not taken) as of August 2016.

36. The L29 lease category listed in Exhibit 2 has terms which specified that sales through an affiliate would be treated the same as if the sale had been by the lessee. Accordingly, mineral owners with Statoil L29 leases should have been paid the net achieved (resale) price, not the transfer price. Nevertheless, a Delta in the amount of $ 4,855,056 as of August 2016 was deducted from payments to L29 royalty owners as indicated in Exhibit 2. As shown in Exhibit 4(h) the L29 lessors had the highest proportional deductions taken against royalty paid.

The $4,855,065 Delta divided by the royalty paid of $13,293,045 was 36.5% for the L29 lessors, versus an average of 24% for the other lessors. The production from L29 mineral owners was a total 7,917,568 MMBtu, representing only 7.3 % of the total royalty gas volume sold; however, the L29 lessors were penalized by the difference between the transfer price and net achieved price more than any other lessor group.

37. Plaintiff's counsel has advised Ammonite that the holders of L29 leases will receive 18% of the Settlement Fund, and that the remaining lessors will receive 82% of the settlement funds distributed proportionally. Co-lead counsel arrived at a judgement for the allocation of the funds between L-29 lessors and other leases in the class after considering the L-29 lease terms relating to affiliate sales, and compulsory arbitration clauses, as well as the proportion of recoverable damages. Ammonite's analysis supports the fairness of this allocation.

Respectfully submitted to the Court by,

AMMONITE RESOURCES COMPANY
Dated this 24th day of September, 2020

By: G. Warfield Hobbs
Managing Partner
Pennsylvania Professional Geologist License #PG002685G
AAPG Certified Petroleum Geologist CPG #2844

By: Betsy M. Suppes
Senior Geoscience Consultant
AAPG Certified Petroleum Geologist CPG #6138
Certified Minerals Appraiser CMS #2020-1

ESSENTIAL MATERIALS PURSUANT TO RULE 14(i)(vi)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD, Plaintiff, VS. STATOIL USA ONSHORE PROPERTIES INC., STATOIL NATURAL GAS LLC and STATOIL ASA, Defendants.	Case No. 3:16-cv-00085-MEM **STIPULATION AND AGREEMENT OF SETTLEMENT**

This CLASS ACTION SETTLEMENT AGREEMENT ("Settlement Agreement") is entered into by, between, and among, Lead Plaintiffs Angelo R. Rescigno, Sr., As Executor of the Estate of Cheryl B. Canfield, Donald Keith Stine and Mary Stine, for themselves and on behalf of the putative Class defined below ("Lead Plaintiffs") and Defendant Statoil USA Onshore Properties Inc. ("Statoil" or "Defendant") in *Rescigno v. Statoil USA Onshore Properties Inc., et al.,* Case No. 3:16-cv-00085-MEM (M.D. Pa.) (the "Action").

This Settlement Agreement is entered into to effect a full and final settlement and dismissal with prejudice of all claims in the Action as to Defendant in connection with the payment of royalties and/or the interpretation of royalty provisions of certain oil and

gas leases, on the terms set forth below, subject to the approval of the Court.

1. RECITALS

1. Lead Plaintiffs and the Class, as lessors, and Statoil, as lessee, are parties to oil and gas leases governing leaseholds in the Northern region of the Commonwealth of Pennsylvania. The leases obligate Statoil to make Royalty payments to Lead Plaintiffs and the Class on Gas produced and sold by Statoil.

2. Lead Plaintiffs allege that Defendant underpaid Royalties to Lead Plaintiffs and the Class by, among other things, using an Index Pricing Methodology rather than a Resale Price. Defendant denies the claims and further seeks offsets for the deduction of post-production expenses from Royalties.

3. Class Counsel and Defendant engaged in arm's-length negotiations in the interest of resolving this dispute. Lead Plaintiffs and Class Counsel have concluded that it is in the best interests of Lead Plaintiffs and the Class to enter into this Settlement Agreement to avoid the uncertainties of litigation, particularly complex litigation such as this. Defendant has agreed, despite its belief that it is not liable for the claims asserted and has good defenses and offsets thereto, and without admission of any wrongdoing of any kind, to enter into this Settlement Agreement in order to avoid the time, expense and uncertainty of litigation and to further its relationship with its lessors.

4. In light of the investigations undertaken and conclusions reached by the Parties, the Parties agree, subject to approval by the Court, to fully and finally compromise, settle, extinguish and resolve the Settled Claims and to dismiss with prejudice the Action

under the terms and conditions set forth in this Settlement Agreement.

2. AGREEMENT FOR SETTLEMENT PURPOSES ONLY

This Settlement Agreement is for settlement purposes only. Neither the fact of nor any provision contained herein, nor any negotiations or proceedings related thereto, nor any action taken hereunder shall constitute, or be construed as, any admission of the validity of any claim or any fact alleged by Lead Plaintiffs in the Action or of any wrongdoing, fault, violation of law, breach of contract, or liability of any kind on the part of Defendant; any admission by Defendant of any claim or allegation made in any demand of, action against, or proceeding against Defendant; or as a waiver of any applicable defense, including, without limitation, any applicable statute of limitations, the right to challenge class certification, and the right to insist on individual arbitration or litigation of Lead Plaintiffs' and each Class Member's dispute. This Settlement Agreement and its exhibits shall not be offered or be admissible in evidence against Lead Plaintiffs or Defendant or Class Members in any action or proceeding in any forum for any purpose whatsoever, except in any action or proceeding brought to enforce its terms.

3. SETTLEMENT AGREEMENT

In consideration of the mutual promises and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lead Plaintiffs, on behalf of themselves and as the class representatives, and Defendant hereby contract, covenant and agree that the Settled Claims are fully resolved, settled,

compromised, extinguished and dismissed on the merits and with prejudice, subject to the approval of the Court, on the following terms and conditions:

A. Definitions.

When used in this Settlement Agreement, unless otherwise specifically indicated, the following terms shall have the respective meanings assigned to them:

1.1 "Action" means *Rescigno v. Statoil USA Onshore Properties Inc., et al.*, Case No. 3:16-cv-00085-MEM (M.D. Pa.).

1.2 "Class" means Royalty Owners in Northern Pennsylvania who have entered into oil and gas leases, regardless of the type of lease, that provide that the Royalty Owner is to be paid Royalties and to whom Statoil has (or had) an obligation to pay Royalties on production attributable to Statoil's working interest. Excluded from the Class are the following:

(a) Statoil, Statoil's affiliates, and their respective predecessors and successors;

(b) any person or entity who owns a working interest in the Relevant Leases;

(c) the interest of any Royalty Owner to the extent and for any time period in which that Royalty Owner receives its Royalty in kind;

(d) the interest of any Royalty Owner to the extent and for any time period in which that interest was transferred or assigned to another;

(e) any Royalty Owner who has previously released Statoil from any liability concerning or encompassing any or all Settled Claims;

(f) the federal government;

(g) the Commonwealth of Pennsylvania;
(h) legally-recognized Indian Tribes; and
(i) any person who serves as a judge in this Action and his/her spouse.

1.3 "Class Counsel" means the following attorneys:

Douglas A. Clark
The Clark Law Firm, P.C.
Main Street
Peckville, PA 18452

John F. Haynes
Law Offices of John F. Harnes PLLC
Lexington Avenue, 9th Floor
New York, NY 10022

Francis P. Karam
Robbins Geller Rudman
& Dowd LLP
South Service Rd., Suite 200
Melville, NY 11747

1.4 "Class Member" means a member of the Class, and any of their respective past, present, or future officers, directors, stockholders, agents, employees, legal or other representatives, partners, associates, trustees, subsidiaries, divisions, affiliates, heirs, executors, administrators, purchasers, predecessors, successors, and assigns, who does not submit a valid Request for Exclusion pursuant to the Notice or is otherwise excluded pursuant to ¶1.2.

1.5 "Court" means the United States District Court for the Middle District of Pennsylvania.

1.6 "Defendant" means Statoil USA Onshore Properties Inc.

1.7 "Defendant's Counsel" means the following attorneys:

David A. Higbee
Shearman & Sterling LLP
401 9th Street NW, Suite 800
Washington, DC 20004

John G. Dean
Elliott Greenleaf & Dean
201 Penn Avenue, Suite 202
Scranton, PA 18503

Robert L. Theriot
Liskow & Lewis
Fannin Street, Suite 1800
Houston, TX 77002

1.8 "Effective Date" shall be the date when each and all of the following conditions have occurred:

1. The Settlement Agreement has been fully executed;

2. The Preliminary Approval Order has been entered by the Court certifying a Class, granting preliminary approval of this Settlement Agreement, and approving the Notice;

3. The Court-approved Notice has been mailed as ordered by the Court;

4. The Court has approved and entered the Judgment, thereby approving this Settlement Agreement and dismissing the Settled Claims with prejudice; and

5. The Judgment has become Final as defined in ¶1.11, below.

1.9 "Escrow Account" means the segregated escrow account maintained by the Escrow Agent.

1.10 "Escrow Agent" means the law firm of Robbins Geller Rudman & Dowd LLP or its successor.

1.11 "Final" means that (a) the Judgment is a final, appealable order; and (b) either (i) no appeal has been taken from the Judgment as of the date on which all times to appeal therefrom have expired, or (ii) an appeal or other review proceeding of the Judgment having been commenced, such appeal or other review is finally concluded and no longer is subject to review by any court, whether by appeal, petitions for rehearing or argument, petitions for rehearing en banc, petitions for writ of certiorari, or otherwise, and such appeal or other review has been finally resolved in such manner that affirms the Judgment in all material respects.

1.12 "Final Awards" means the amount distributed to Class Members from the Net Settlement Fund as described in ¶¶9.1 and 9.2.

1.13 "Gas" or "Natural Gas" means natural gas, including entrained liquid hydrocarbons, which is separated at the well and delivered from the well and sold as natural gas.

1.14 "Index Pricing Methodology" means the methodology currently used (as has been adjusted previously from time to time) by Statoil for valuing or pricing Natural Gas produced by Statoil from Northern Pennsylvania and sold to its affiliated purchaser and for purposes of determining Royalty value or price. For purposes of this Agreement and prospectively, it is defined as the method for calculating and determining the price or value for Natural Gas produced by Statoil and delivered for sale to its purchaser (including any affiliated purchaser) at any point between the well and the

interconnect of the gathering system to the mainline interstate transmission line and which uses reference to published prices (as adjusted for MMBtu) reported in Platt's Inside FERC publication (or, should Platt's discontinue such publication, then the industry accepted replacement for such) for Natural Gas delivered into the interstate pipeline segment or segments into which Statoil or its purchaser delivers Natural Gas from the specific gathering system to which the wells of the Royalty Owner are connected.

1.15 "Judgment" means the Judgment and Order of Dismissal with Prejudice to be entered by the Court, substantially in the form attached hereto as Exhibit C, upon final approval of the Settlement. It is understood and agreed that the Judgment shall have no res judicata, collateral estoppel, or other preclusive effect as to any claims other than the Settled Claims.

1.16 "Lead Plaintiffs" means Angelo R. Rescigno, Sr., As Executor of the Estate of Cheryl B. Canfield, Donald Keith Stine and Mary Stine.

1.17 "Lease Form 29" means leases that include the following, or substantially the same, express language governing the valuation of Royalty on Natural Gas:

> To pay Lessor on gas and casinghead gas produced from the leased premises, percentages of proceeds . . . based on: (1) the Gross Proceeds paid to Lessee from the sale of such gas and casinghead gas when sold by Lessee in an arms-length sale to an unaffiliated third party, or (2) the Gross Proceeds, paid to an Affiliate of Lessee, computed at the point of sale, for gas sold by lessee to an Affiliate of Lessee . . . .

1.18 "Net Settlement Fund" means the Settlement Fund less Notice and Administration Costs, any attorneys' fees, expenses, any incentive award granted to Lead Plaintiffs, to the extent awarded by the Court, and less Taxes, Tax Expenses and any other Court-approved deductions.

1.19 "Northern Pennsylvania" means the area of Pennsylvania in which Statoil owns working interests in oil and gas leases and from which it produces and sells Natural Gas production for delivery into Rome, Liberty, Allen, Meadow, Warrensville, Seely, Canoe Run, Tombs Run, and PVR Wyoming gathering systems and includes oil and gas leases owned in whole or part by Statoil in the following counties: Bradford, Lycoming, Sullivan, Susquehanna, and Wyoming.

1.20 "Notice" means the Notice of Proposed Settlement of Class Action, substantially in the form attached hereto as Exhibit A-1, or such other comparable notice(s) approved by the Court, which is to be given to the Class as provided in ¶¶8.1-8.3, below.

1.21 "Notice and Administration Costs" means expenses incurred in carrying out the terms of the Settlement Agreement, including fees and expenses by the Settlement Administrator in administering and carrying out the terms of the Settlement Agreement, including expenses for printing and mailing of the Notice, post office box rental costs, responding to inquiries by persons receiving or reading the Notice, implementing the Plan of Administration, and costs of the Escrow Account. Notice and Administration Costs shall not include Taxes, Tax Expenses, Class Counsel's attorneys' fees

and litigation expenses, or any incentive award the Court may grant for Lead Plaintiffs.

1.22 "Parties" means Lead Plaintiffs, the Class and Defendant.

1.23 "Pennsylvania" means the Commonwealth of Pennsylvania.

1.24 "Plan of Administration" means the Plan of Administration and Distribution as set forth in Exhibit B hereto, describing the specific procedures and processes for the administration and distribution of the Net Settlement Fund to Class Members.

1.25 "Plan of Allocation" means the methodology pursuant to which the Net Settlement Fund will be allocated among Class Members as provided in the separately filed Plan of Administration.

1.26 "Preliminary Approval Order" means the order entered by the Court pursuant to the motion for preliminary approval, as described in ¶7 below and in the form attached hereto as Exhibit A, preliminarily approving the Settlement, approving the form and manner of the Notice, and setting a date certain for the Settlement Hearing.

1.27 "Record Date" means the last day of the most recent production month for which Statoil is reasonably able to determine from its royalty accounting payment records the Royalty Volume for each Class Member at the time such information must be provided to the Settlement Administrator for purposes of computing the Plan of Allocation and implementing the Plan of Administration.

1.28 "Related Parties" means Statoil's past and present parents, subsidiaries, affiliates, officers,

directors, employees, and assigns (including, but not limited to, Statoil ASA and Statoil Natural Gas LLC).

1.29 "Released Persons" means Statoil and its Related Parties.

1.30 "Relevant Leases" means each and every oil and gas lease in Northern Pennsylvania owned in whole or part by Statoil from which Statoil produces and sells Natural Gas and pays a Royalty to Royalty Owners.

1.31 "Request for Exclusion" means a timely and properly submitted written request to be excluded from the Class. A Request for Exclusion is not timely and properly submitted unless it is in writing, is signed by the person or entity requesting exclusion, is mailed in a postage-paid envelope to the Settlement Administrator, postmarked no later than the due date established by the Court in the Preliminary Approval Order, and otherwise complies with the instructions contained in the Notice. The Request for Exclusion must be personally signed by any natural person requesting exclusion; it cannot be signed by that person's lawyer or other agent, unless the person is incapacitated. Requests for Exclusion may not be made on a class or representative basis. If the entity requesting exclusion is a corporation, partnership, or other legal entity, the request must be personally signed by a duly-authorized officer, partner, or managing agent. A Request for Exclusion is also not properly submitted or valid if it requests a qualified or partial exclusion or any other qualification.

1.32 "Resale Price" means the net weighted average sales price (net of mainline interstate pipeline tariffs, fees and costs) received on Gas sold by Statoil Natural Gas LLC ("SNG") (or another

purchaser affiliated with Statoil) to unaffiliated third parties, which Gas was acquired in whole or in part from Statoil production in Northern Pennsylvania. The Resale Price shall be computed separately for each gathering system.

1.33 "Royalty" means the amount owed to a lessor by Statoil pursuant to an oil and gas lease (including any fractional interest therein) or an overriding royalty derived from the lessor's interest in such an oil and gas lease.

1.34 "Royalty Owner" means any person who owns a Royalty interest in the Relevant Leases and is entitled to receive payment on such Royalty from Statoil.

1.35 "Royalty Volume" shall mean the volume of Natural Gas attributable to each Class Member, measured in McF on the same basis as which Statoil reports Royalty to the Royalty Owners, and measured for each month of production, commencing with the first production month for which Statoil paid Royalty to the
Class Member and concluding on the Record Date. "Total Royalty Volume," for purposes of this Agreement, the Plan of Administration and the parties' Supplemental Agreement Regarding Requests for Exclusion, shall mean the total sum of all Royalty Volumes attributable to every Class Member.

1.36 "Settled Claims" means any and all claims, as well as any known or unknown claims, that (a) were asserted in or that could have been asserted in any complaint (including any amended complaint) in this Action, or that in any way relate to the Index Pricing Methodology used by Statoil to calculate Royalties prior to the Effective Date for Royalty

Owners within the Class, and (b) involve the methodology for determining or valuing the Royalty price paid on Natural Gas produced from Class Members' wells and attributable to and taken by Statoil's working interest for sale, subject to the exceptions articulated immediately below. Settled Claims shall include Statoil's use of the Resale Price to calculate Royalties going forward for Class Members who have a Lease Form 29, discussed at ¶2.4, and Statoil's use of an Index Price through the Sunset Date for other owners, discussed at ¶2.5. Settled Claims shall not include:

1. claims concerning post-production expense deductions;

2. ordinary and prior period adjustments to Royalty payments not related to the pricing methodologies settled in this Agreement (e.g., due to title issues, decimal interests, purely mathematical computations, clerical issues, measurement issues, or corrected invoices from pipelines or purchases);

3. claims involving Royalty payments made separately by any co-working interest owner of Statoil for production taken and sold by such co-working interest owner, except that, to the extent that claims against Statoil for production taken and marketed by Statoil are released by this Agreement, Class Members shall not seek to recover such claims against other co-owners under a theory of vicarious liability, joint and several liability, or otherwise; and

4. non-Royalty-related claims such as claims for property damage, contamination, or personal injury.

1.37 "Settlement" means the settlement embodied in this Settlement Agreement and the Judgment.

1.38 "Settlement Administrator" means the firm of Gilardi & Co. LLC.

1.39 "Settlement Agreement," "Stipulation," or "Agreement" means this Stipulation and Agreement of Settlement, including all exhibits hereto.

1.40 "Settlement Amount" means the principal amount of $7,000,000.00 to be paid pursuant to ¶2.1 of this Settlement Agreement.

1.41 "Settlement Fund" means the Settlement Amount plus all interest and accretions thereto.

1.42 "Settling Parties" means Statoil and the Released Persons, Lead Plaintiffs, and any Class Member who does not submit a valid Request for Exclusion or who is not otherwise excluded from the Class pursuant to ¶1.2.

1.43 "Statoil" means Statoil USA Onshore Properties Inc.

1.44 "Sunset Date" means the last day of the production month following the five (5) year anniversary of the Effective Date.

1.45 "Tax" or "Taxes" mean any and all taxes, fees, levies, duties, tariffs, imposts, and other charges of any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any governmental authority.

1.46 "Tax Expenses" means expenses of tax attorneys and/or accountants and mailing and

distribution costs and expenses relating to filing (or failing to file) Tax returns described in ¶4, below.

B. The Settlement

The Settlement Amount. Defendant shall cause the Settlement Amount to be paid or deposited into the Escrow Account within 20 calendar days after notice of entry of the Preliminary Approval Order.

Records of Class Members. Defendant shall provide such records and information, including electronic data, in its possession, custody, or control, as may be reasonably necessary for the Settlement Administrator to prepare a list of the members of the Class, mail the Notice to the members of the Class, allocate the Net Settlement Fund among the Class Members in accordance with the Plan of Allocation, and otherwise properly administer the Settlement in accordance with the Plan of Administration set forth in Exhibit B.

No Further Payment Obligations. Upon paying the Settlement Amount required under ¶2.1 and under the Plan of Administration attached as Exhibit B, Defendant shall have no further payment obligations to Class Members, Class Counsel, or any other person whatsoever under this Settlement Agreement.

Pricing under Lease Form 29 Subsequent to the Effective Date. In exchange for the consideration set forth in this Agreement, including, but not limited to, the release set forth in ¶5, the Parties agree, and the Judgment shall so reflect, that as to Class Members who have a Lease Form 29, beginning effective retroactively to the first full production month following the date of preliminary approval of this Agreement by the Court and continuing for the

duration of Statoil's obligation to pay Royalties pursuant to such a lease form, Statoil agrees that should it sell Natural Gas production to SNG or another affiliated purchaser then Statoil will value and pay such Royalties based on the Resale Price applicable to the gathering system to which that Royalty Owner's Natural Gas is delivered. The Class Members operating under Lease Form 29 agree to release the Released Persons from any claims or liability associated with the use of the Resale Price to calculate Royalties.

Pricing under other Lease Forms Subsequent to the Effective Date. To the extent Class Members have any lease form other than Lease Form 29, the Parties agree that Statoil may use the Index Pricing Methodology to calculate and pay Royalties for a period continuing until the Sunset Date. The Class Members operating under such lease forms agree to release the Released Persons from any claims or liability associated with use of the Index Pricing Methodology to calculate Royalties through the Sunset Date.

Nothing in this Settlement addresses or affects the Parties' rights concerning deductions from the price of Royalty for post-production costs, including the Parties' respective rights and positions as to whether "market enhancement," "ready for sale or use," or similar clauses allow for deductions of post-production costs, and no compromise, settlement, or release is intended by any Party as to prior or future taking of post-production cost deductions.

C. The Escrow Agent

3.1 The Escrow Agent shall invest the Settlement Amount deposited pursuant to ¶2. 1

hereof in United States Agency or Treasury Securities or other instruments backed by the Full Faith & Credit of the United States Government or an Agency thereof, or fully insured by the United States Government or an Agency thereof and shall reinvest the proceeds of these instruments as they mature in similar instruments at their then-current market rates. All risks related to the investment of the Settlement Fund in accordance with the investment guidelines set forth in this paragraph shall be borne by the Settlement Fund and the Released Persons shall have no responsibility for, interest in, or liability whatsoever with respect to investment decisions or the actions of the Escrow Agent, or any transactions executed by the Escrow Agent.

3.2 The Escrow Agent shall not disburse the Settlement Fund except as provided in the Settlement Agreement, by an order of the Court, or with the written agreement of counsel for Defendant.

3.3 Subject to further order(s) and/or directions as may be made by the Court, or as provided in the Settlement Agreement, the Escrow Agent is authorized to execute such transactions as are consistent with the terms of the Settlement Agreement. The Released Persons shall have no responsibility for, interest in, or liability whatsoever with respect to the actions of the Escrow Agent, or any transaction executed by the Escrow Agent.

3.4 All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and/or further order(s) of the Court.

3.5 Prior to the Effective Date and without further order of the Court, up to $250,000 of the Settlement Fund may be used by Class Counsel to pay Notice and Administration Costs. After the Effective Date, Class Counsel may pay all further reasonable Notice and Administration Costs, regardless of amount, without further order of the Court.

3.6 It shall be Class Counsel's sole responsibility to disseminate the Notice to the Class in accordance with this Settlement Agreement and as ordered by the Court, and to respond to all inquiries from Class Members related thereto. Class Members shall have no recourse as to the Released Persons with respect to any claims they may have that arise from any failure of the notice process.

D. Taxes

The Settling Parties and the Escrow Agent agree to treat the Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. §1.468B-1. In addition, the Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this ¶4.1, including the "relation-back election" (as defined in Treas. Reg. §1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary Parties, and thereafter to cause the appropriate filing to occur.

4.2 For the purpose of §1.468B of the Internal Revenue Code of 1986, as amended, and the

regulations promulgated thereunder, the "administrator" shall be the Escrow Agent. The Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including, without limitation, the returns described in Treas. Reg. §1.468B-2(k)). Such returns (as well as the election described in ¶4.1 hereof) shall be consistent with this ¶4.2 and in all events shall reflect that all Taxes (including any estimated Taxes, interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in ¶4.3 hereof.

4.3 All (a) Taxes (including any estimated Taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including any Taxes or tax detriments that may be imposed upon the Released Persons or their counsel with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for federal or state income tax purposes, and (b) expenses and costs incurred in connection with the operation and implementation of this ¶4.3 (including, without limitation, Tax Expenses), shall be paid out of the Settlement Fund; in all events the Released Persons and their counsel shall have no liability or responsibility for the Taxes or the Tax Expenses. The Escrow Agent, through the Settlement Fund, shall indemnify and hold each of the Released Persons and their counsel harmless for Taxes and Tax Expenses (including, without limitation, Taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be treated as, and considered

to be, a cost of administration of the Settlement Fund and shall be timely paid by the Escrow Agent out of the Settlement Fund without prior order from the Court and the Escrow Agent shall be authorized (notwithstanding anything herein to the contrary) to withhold from distribution to Class Members any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. §1.468B-2(1)(2)); neither the Released Persons nor their counsel are responsible nor shall they have any liability for any Taxes or Tax Expenses. The Parties hereto agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this ¶4.3.

E. Releases

5.1 Upon the Effective Date, Lead Plaintiffs and each member of the Class shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged all Settled Claims against the Released Persons. Claims to enforce this Settlement Agreement are not released.

5.2 Upon the Effective Date, all Class Members and anyone claiming through or on behalf of any of them, will be forever barred and enjoined from commencing, instituting, prosecuting or continuing to prosecute any action or other proceeding in any court of law or equity, arbitration tribunal, or administrative forum, asserting the Settled Claims against any of the Released Persons.

5.3 The Parties acknowledge and agree that the relief afforded under this Settlement Agreement fully and completely compromises the Class Members' claims for relief in the Action against the Released Persons.

5.4 Upon the Effective Date, the Released Persons hereby release, relinquish and discharge Lead Plaintiffs and each and all of the Class Members and Class Counsel from any and all claims and causes of action of every nature and description (including unknown claims) related to: (i) Statoil's use of an Index Pricing Methodology for purposes of calculating Royalty payments, including any affirmative defense Statoil could assert related to such claims; and (ii) the institution, prosecution or settlement of the claims against Defendant. Claims to enforce this Settlement Agreement are not released.

F. Best Efforts to Garner Settlement's Approval

6.1 The Parties and Class Counsel agree to recommend that the Court approve the Settlement and further agree to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement and any other reasonable steps and efforts that may be necessary or appropriate to implement the terms of this Settlement Agreement and to garner final approval.

6.2 The Parties agree that they will not take any steps to suggest or recommend that members of the Class should opt out of or elect to be excluded from this Settlement Agreement. However, nothing shall prevent Statoil from engaging in discussions related to previously asserted claims.

6.3 Lead Plaintiffs agree that they will not elect or seek to opt out of or exclude themselves from the Class.

G. Motion for Preliminary Approval

Lead Plaintiffs shall submit to the Court a motion for preliminary approval of the Settlement, which shall include a request for entry of the Preliminary Approval Order in the form attached hereto as Exhibit A and a request to stay all proceedings in the Action until the Court has approved this Settlement Agreement and entered the Judgment. It is expressly understood that by entering into this Settlement Agreement and by filing a paper supporting Lead Plaintiffs' motion for preliminary approval of the Settlement, Defendant does so for settlement purposes only. Defendant expressly reserves the right to oppose certification of a litigation class in the event the Court denies Lead Plaintiffs' motion for preliminary approval. The motion for preliminary approval also shall include the proposed Notice in the form attached hereto as Exhibit A-1.

H. Notice of Settlement

8.1 By the date set forth in the Court's Preliminary Approval Order, or a date otherwise established by the Court, the Settlement Administrator shall provide the Notice to the Class by mailing the Notice by first-class mail, postage pre-paid, to individuals and entities who are in the Class and for whom Defendant has addresses available from its business records, or such other manner as the Court shall order. To the extent that any Notice is returned because an individual or entity who is a Class Member does not reside at the address provided, the Settlement

Administrator shall take reasonable steps to obtain a valid address and re-mail the Notice.

8.2 Class Counsel, or any person acting on behalf of Class Counsel, shall not publish any form of written notice except for posting the Notice and other Settlement-related documents on the Settlement website (www.statoilsettlement.com) or as otherwise provided for herein without prior written approval of the content of such notice by Defendant, other than any information provided to any court in furtherance of this Settlement Agreement.

8.3 Defendant shall send a timely and proper notice(s) of this Settlement to all appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), including under 28 U. S.C. §1715, if necessary.

I. Administration and Calculation of Final Awards and Supervision and Distribution of the Settlement Fund

9.1 The Settlement Administrator, subject to such supervision and direction of the Court as may be necessary or as circumstances may require, shall administer and calculate the Final Awards to Class Members and shall oversee distribution of the Net Settlement Fund to Class Members.

9.2 The Settlement Fund shall be applied as follows:

(a) to pay all Notice and Administration Costs;

(b) to pay the Taxes and Tax Expenses;

(c) to pay attorneys' fees and expenses of Class Counsel and to pay any incentive

awards granted for Lead Plaintiffs, if and to the extent allowed by the Court; and

(d) after the Effective Date, to distribute the Net Settlement Fund in the form of Final Awards to Class Members as allowed by the Settlement Agreement, the Plan of Allocation, or the Court.

9.3 Any returned or uncashed Final Award payments shall be paid to the following non-profit organization: Environmental Defense Fund.

J. Class Counsel's Attorneys' Fees and Expenses

10.1 Class Counsel may submit an application or applications (the "Fee and Expense Application") for: (a) an award of attorneys' fees; plus (b) expenses or charges in connection with prosecuting the Action; plus (c) any interest on such attorneys' fees and expenses at the same rate and for the same periods as earned by the Settlement Fund (until paid) as may be awarded by the Court.

10.2 The attorneys' fees and expenses, as awarded by the Court (the "Fee and Expense Award"), shall be paid to Class Counsel, as ordered, immediately after the Court executes the Judgment and an order awarding such attorneys' fees and expenses.

10.3 In the event that the Effective Date does not occur, or the Judgment or the order making the Fee and Expense Award is reversed or modified, or the Settlement Agreement is canceled or terminated for any other reason, and such reversal, modification, cancellation or termination becomes final and not subject to review, and in the event that the Fee and Expense Award has been paid to any

extent, then Class Counsel shall within five (5) business days from receiving notice from the Defendant's Counsel or from a court of appropriate jurisdiction, refund to the Settlement Fund such fees and expenses previously paid to them from the Settlement Fund plus interest thereon at the same rate as earned on the Settlement Fund in an amount consistent with such reversal or modification. Each Class Counsel law firm receiving fees and expenses, as a condition of receiving such fees and expenses, on behalf of itself and each partner and/or shareholder of it, agrees that the law firm and its partners and/or shareholders are subject to the jurisdiction of the Court for the purpose of enforcing the provisions of this paragraph.

10.4 Lead Plaintiffs may submit an application for incentive awards for representing the Class in the prosecution of the Action.

10.5 The procedure for and the allowance or disallowance by the Court of any applications by Class Counsel for an award of attorneys' fees and expenses, or incentive awards for Lead Plaintiffs, to be paid out of the Settlement Fund, are not part of the Settlement set forth in the Settlement Agreement, and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement set forth in the Settlement Agreement, and any order or proceeding relating to the Fee and Expense Application, or Lead Plaintiffs' incentive awards application, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Settlement Agreement, or affect or delay the finality of the Judgment approving the Settlement

Agreement and the Settlement of the Action set forth therein.

10.6 Any fees and/or expenses awarded by the Court shall be paid solely from the Settlement Fund. Defendant and its Related Parties shall have no responsibility for any payment of attorneys' fees and/or expenses to Class Counsel, and in no event shall Statoil be required to pay more than the Settlement Amount.

K. Walk Away Rights

Statoil shall have the option to terminate the Settlement in the event that persons who would otherwise be Class Members, representing more than a certain percentage of Total Royalty Volume (on an McF basis), exclude themselves from the Class, as set forth in a separate agreement (the "Supplemental Agreement") executed between Class Counsel and Statoil, by and through their counsel. If the Court requires that the Supplemental Agreement be filed, the parties shall request that it be filed under seal.

L. Termination

12.1 Unless otherwise ordered by the Court, in the event the Stipulation shall terminate, or be canceled, or shall not become effective for any reason, within five (5) business days after written notification of such event is sent by Defendant's Counsel or Class Counsel to the Escrow Agent, the Settlement Fund (including accrued interest), less expenses which have either been disbursed pursuant to ¶¶3.5 and 4.3 hereof, or are chargeable to the Settlement Fund pursuant to ¶¶3.5 and 4.3 hereof, shall be refunded by the Escrow Agent pursuant to written instructions from Defendant's Counsel. The Escrow Agent or its designee shall apply for any tax

refund owed on the Settlement Amount and pay the proceeds, after deduction of any fees or expenses incurred in connection with such application(s) for refund, pursuant to written instructions from Defendant's Counsel.

12.2 In the event that the Stipulation is not approved by the Court or the Settlement set forth in the Stipulation is terminated or fails to become effective in accordance with its terms, the Settling Parties shall be restored to their respective positions in the Action as of October 23, 2017. In such event, the terms and provisions of the Stipulation, with the exception of ¶¶3.5, 4.3, 12.1-12.3, 14, and 15 hereof, shall have no further force and effect with respect to the Settling Parties and shall not be used in this Action or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of the Stipulation shall be treated as vacated, nunc pro tunc. No order of the Court or modification or reversal on appeal of any order of the Court concerning the Plan of Allocation or the amount of any attorneys' fees, expenses, and interest awarded by the Court to any of Class Counsel or incentive awards to Lead Plaintiffs shall operate to terminate or cancel this Stipulation or constitute grounds for cancellation or termination of the Stipulation.

12.3 If the Effective Date does not occur, or if the Stipulation is terminated pursuant to its terms, neither Lead Plaintiffs nor any of Class Counsel shall have any obligation to repay any amounts disbursed pursuant to ¶¶3.5 or 4.3. In addition, any expenses already incurred pursuant to ¶¶3.5 or 4.3 hereof at the time of such termination or

cancellation but which have not been paid, shall be paid by the Escrow Agent in accordance with the terms of the Stipulation prior to the balance being refunded in accordance with ¶12.1 hereof.

M. Order, Judgment, and Dismissal

If the Court finally approves this Settlement Agreement, then the Parties jointly and promptly shall seek entry of the Judgment in the form attached hereto as Exhibit C.

N. No Admission

Nothing in this Settlement Agreement, whether or not consummated, and no information provided by Statoil in the course of the settlement process will constitute or be asserted to be an admission of any kind by Statoil. The Settlement Agreement, all negotiations and discussions regarding the Settlement Agreement, and all information provided in the settlement process will be treated in all respects as confidential settlement material pursuant to Federal Rule of Evidence 408 and all state law analogues. Without limiting the foregoing, this Settlement Agreement, whether or not consummated, will not be offered against Statoil as evidence of, or construed as or deemed to be evidence of, any presumption, concession, or admission by Statoil regarding any issue whatsoever, including: (i) whether the proposed class was appropriate for class certification; (ii) the validity of any allegation or claim that was, could have been, or will be asserted against Statoil; (iii) liability, negligence, fault, or wrongdoing of any kind; (iv) the appropriate methodology for calculating Royalty payments; (v) the appropriate approach to deductions; or (vi) the existence or scope of any damages.

O. Confidentiality

The Parties agree to keep confidential the fact and contents of their settlement negotiations, their agreement to enter into a settlement, and the existence of this Settlement Agreement, unless and until: (a) all the Parties jointly determine and agree in writing to disclose such information for an agreed-upon purpose; or (b) any Party is required by law or regulation to disclose any such information, in which case the disclosing Party will provide the non-disclosing Party with three (3) business days advance written notice before making such disclosure. The Parties agree not to disclose the substance of the negotiations that led to the Settlement, including the merits of any position taken by any Party except as necessary, in their mutual agreement, to provide the Court with information necessary to consider approval of the Settlement and to provide the Class information needed for purposes of the Settlement or approval thereof

P. Conditions Precedent to Agreement's Effect

This Settlement Agreement shall become final, binding and effective upon the Effective Date, and not before then.

Q. Modifications

Any modification to this Settlement Agreement or its exhibits, whether
modified by the Parties or any court, must be approved in writing signed by the Parties or their authorized representatives to be binding.

R. Authority and Capacity to Execute

Each person signing this Settlement Agreement on behalf of a Party represents that such signatory has the full and complete power, authority and capacity to execute and deliver this Settlement

Agreement and any documents to be executed pursuant hereto, that all formalities necessary to authorize execution of this Settlement Agreement so as to bind the principal, limited liability company, trust, partnership or corporation have been undertaken, and that upon the occurrence of the Effective Date, this Settlement Agreement will constitute the valid and legally binding obligation of each such Party hereto, enforceable by and against that Party in accordance with its terms.

S. Successors and Assigns

This Settlement Agreement is binding upon and will inure to the benefit of each of the Parties hereto and their respective agents, officers, directors, shareholders, employees, consultants, heirs, devisees, legal representatives, attorneys, successors and assigns.

T. Construction

The language of all parts of this Settlement Agreement and its exhibits will in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. All Parties have participated in the preparation of this Settlement Agreement and its exhibits and no presumptions or rules of interpretation based upon the identity of the Party preparing or drafting this Settlement Agreement or its exhibits, or any part thereof, shall be applied or invoked.

U. Survival of Covenants and Representations

All covenants and representations contained in this Settlement Agreement are contractual in nature, are not mere recitals, and will survive the execution of this Settlement Agreement.

V. Miscellaneous

22.1 Governing Law. This Settlement Agreement is and will be governed by the laws of the Commonwealth of Pennsylvania.

22.2 Severability. In the event that a court of competent jurisdiction enters a final judgment or decision holding invalid any nonmaterial provision of this Settlement Agreement, the remainder of this Settlement Agreement will be fully enforceable. If a court of competent jurisdiction holds invalid or materially modifies any material provision of this Settlement Agreement, including, but not limited to, the provisions set forth in ¶2, either Party shall be entitled to dissolve this Settlement Agreement and withdraw from the Settlement.

22.3 Counterparts. This Settlement Agreement may be executed by facsimile or electronic signatures and in counterparts, all of which will have full force and effect between the Parties, subject to all conditions precedent and subsequent set forth herein.

22.4 Integration. This Settlement Agreement and its exhibits constitute the entire agreement of the Parties and a complete merger of all prior negotiations and agreements.

22.5 Headings. The headings of the paragraphs and subparagraphs herein are intended solely for convenience or reference and will not control or influence the meaning or interpretation of any of the provisions of this Settlement Agreement.

22.6 Extensions of Time. The Parties reserve the right, subject to the Court's approval, to mutually agree to any reasonable extension of time that might be necessary to carry out any of the provisions of this Settlement Agreement.

AGREED TO AND DATED AS OF THE 6th DAY OF MARCH, 2020.

THE CLARK LAW FIRM
DOUGLAS A. CLARK
Attorney I.D. PA 76041
Main Street
Peckville, PA 18452
Telephone: 570/307-0702
clarkesquire@comcast.net

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
FRANCIS P. KARAM
Attorney I.D. PA 77910

FRANCIS P. KARAM
South Service Road,
Suite 200
Melville, NY 11747
Telephone: 631/367-7100
srudman@rgrdlaw.com
flcaram@rgrdlaw.com

LAW OFFICE OF JOHN F. HARNES
PLLC LLP
JOHN F. HARNES
Attorney I.D. NY 1809581, admitted *pro hac vice*
Lexington Avenue,
9th Floor
New York, NY 10022
Telephone: 917/810-8460
jfharnes@harneslaw.com

Class Counsel for Lead Plaintiffs
SHEARMAN & STERLING LLP
DAVID A. HIGBEE
Attorney I.D. D.C. 500605, admitted *pro hac vice*
9th Street NW,
Suite 800
Washington, DC 20004
Telephone: 202/508-8000
david.hi2beeashearman.com

LISKOW & LEWIS
ROBERT L. THERIOT
Attorney I.D. TX 24044508, admitted *pro hac vice*
Fannin Street, Suite 1800
Houston, TX 77002
Telephone: 713/651-2900
rltheriot@liskow.com

ELLIOTT GREENLEAF & DEAN
JOHN G. DEAN
Attorney I.D. PA 76168
Penn Avenue, Suite 202
Scranton, PA 18503
Telephone: 570/346-7569
igd@elliottgreenleaf.com
Counsel for Defendant
Statoil USA Onshore Properties Inc.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., AS EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD, Plaintiff, VS. STATOIL USA ONSHORE PROPERTIES INC., STATOIL NATURAL GAS LLC and STATOIL ASA, Defendants.	Case No. 3:16-cv-00085-MEM **PLAN OF ADMINISTRATION AND DISTRIBUTION** **EXHIBIT B**

1. Plan of Allocation

(a) Each Class Member's claim will be calculated (prior to adjustments for fees, costs, expenses, interest, and other approved deductions under the Stipulation and Agreement of Settlement ("Settlement Agreement"), and without consideration of any offsets asserted by Statoil) based on the Resale Price that Statoil achieved, and the Index Methodology price on which Statoil actually calculated Royalties paid to Class Members under the Northern Pennsylvania leases from inception of production and payments by Statoil through the month in which the Effective Date occurs.

(b) Each Class Member in each allocation group shall be paid the percentage of the Net Settlement Fund that each Class Member's claim, as calculated in accordance to the provisions herein,

bears to the total of the claims of all Class Members in that same allocation group, i.e., their pro rata share of the Net Settlement Fund. Payment in this manner shall be deemed conclusive against all Class Members.

(c) To implement the Plan of Allocation, Statoil shall use its reasonable efforts to prepare and provide a schedule (the "Distribution Schedule") of (a) all Class Members, (b) the allocation group in which their interest belongs, and (c) a calculation of their total claim based on the sum of (i) the monthly spread between the Resale Price and the Index Methodology price for their gathering system multiplied by (ii) their monthly Royalty volume. For purposes of allocation only, the
schedule used for allocation shall be calculated from inception of payment through the production date of July 2017.

(d) Two allocation groups shall be identified by Statoil from its land records: (i) those Royalty Owners with interests under Lease Form 29 ("Lease Form 29 Group"); and (ii) those Royalty Owners with interests under all other lease forms ("Other Lease Group").

(e) The Net Settlement Fund shall be allocated as follows, in the following manner:

(i) Class Members in the Lease Form 29 Group, which comprise 7% of the Class, will be allocated 18% of the Net Settlement Fund proportionately, based on the ratio by which their calculated claim (not less than zero) bears to the total calculated claims of the other Class Members in the Lease Form 29 Group (but not less than a minimum payment of $10).

(ii) Class Members in the Other Lease Group, which comprise 93% of the Class, will be allocated the balance, or 82%, of the Net Settlement Fund proportionately, based on the ratio by which their calculated claim (not less than zero) bears to the total calculated claims of other Class Members in the Other Lease Group (but not less than a minimum payment of $10).

(f) Statoil will apply the above allocation formula to each Class Member's claim calculations in the Distribution Schedule, and provide same to the Settlement Administrator for purposes of implementing this Plan of Administration and Distribution. The Distribution Schedule shall remain confidential (to protect the financial privacy of the Class Members), and if required to be submitted to the Court, shall be submitted only under seal.

(g) The Settlement affects only Statoil and/or its affiliates and does not affect how any other entity calculates and/or pays Royalties.

2. Heirship Notification Form. Certain Class Members may now be deceased ("Deceased Class Members"). In order to assist the Settlement Administrator in the allocation and distribution of funds attributable to the interests of Deceased Class Members, the Notice will include an Heirship/Beneficiary Information Form ("Heirship Form"), which will be substantially in the form of the document attached hereto as Exhibit 1. If a Class Member believes that he or she is entitled to receive all, or some portion, of the Net Settlement Fund allocable to a Deceased Class Member under the Plan of Allocation, then the Class Member will be requested, but not required, to mail to the Settlement

Administrator a completed Heirship Form containing the information and documents requested therein.

The provision of an Heirship Form will be requested as an aid to the Settlement Administrator in the distribution of the Net Settlement Fund, but shall not constitute a required proof of claim form, nor be a condition precedent to the allocation and distribution of Settlement monies attributable to a Deceased Class Member. In the absence of an Heirship Form, the Settlement Administrator may, but will not be required to, review records in Defendant's possession, including division orders, transfer orders, probate records, payment records, and like documents, and reasonably attempt to allocate and distribute the Deceased Class Member's portion of the Net Settlement Fund to that Deceased Class Member's successor-in-interest. The Settlement Administrator may also allocate and distribute that portion of the Net Settlement Fund to the estate of the Deceased Class Member, with any such payment to be sent to such mailing address as may be readily ascertainable by the Settlement Administrator.

3. Distribution of Settlement Proceeds

(a) Following the Effective Date, the Settlement Administrator shall utilize the allocated share of the Net Settlement Fund as calculated in accordance with the Plan of Allocation and Distribution Schedule as provided above, and issue checks to those Class Members to whom a payment is owed.

(b) The amount of money to be disbursed to each Class Member will be the Class Member's allocated share of the Net Settlement Fund.

(c) Not less than one year after the Effective Date, the Settlement Administrator shall determine the total dollar amount of all Settlement distribution checks payable to Class Members, who, for whatever reason, failed or refused to negotiate his, her or its distribution check. All such unclaimed monies shall be donated to a non-profit organization agreed to by Lead Plaintiffs and Defendant.

4. **Disputed Claims.** Any dispute between persons who are, or who purport to be, Class Members concerning their allocated share of the Net Settlement Fund, as determined herein, will be submitted to the Court for resolution. The person(s) involved in such dispute must submit their dispute to the Court within thirty (30) days after being notified of the Class Member's allocated share of the Net Settlement Fund, if any. Such dispute shall in no way affect, delay, or interfere with, the approval of the Settlement or any distribution to any persons not involved in the dispute, including any distribution to other Class Members. Notwithstanding the above, should the amount in dispute be $1,000.00 or less, Class Counsel and Defendant's Counsel may agree as to the resolution or compromise of the dispute, in their sole discretion, and direct the Settlement Administrator to pay accordingly.

5. No Class Member shall have any claim against the Lead Plaintiffs, Class Counsel, the Settlement Administrator, or Defendant based on distributions made substantially in accordance with the Settlement Agreement, this Plan of Administration and Distribution, or orders of the Court, or in good faith reliance on any public records or records provided by Defendant or any other person or entity.

6. Definitions. All terms defined in the Settlement Agreement shall have the same meaning when used in this Plan of Administration and Distribution except as otherwise specified herein.