

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

| | | |
|---------------------------------|-------------|-----------------------|
| (1) LADENE RAMSEY BEER, et al., |) | |
| |) | |
| | Plaintiffs, | |
| |) | |
| vs. |) | Case No. CIV-07-798-L |
| |) | |
| (1) XTO ENERGY, |) | |
| | Defendant. | |
| |) | |

**PLAINTIFFS' COMBINED MOTION FOR
CLASS CERTIFICATION AND BRIEF IN SUPPORT**

Edward L. White, OBA #16549
Martin S. High, OBA #20725
13924-B Quail Pointe Drive
Oklahoma City, OK 73134
Telephone: (405) 810-8188
Facsimile: (405) 608-0971

ATTORNEYS FOR PLAINTIFFS

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TABLE OF CONTENTS

INDEX ii

TABLE OF AUTHORITIES iii

STATUTES AND OTHER AUTHORITIES CITED vii

EXHIBITS viii

MOTION FOR CLASS CERTIFICATION 1

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION 1

BACKGROUND 1

LEGAL FRAMEWORK 2

COMMON FACTS 4

CLASS DEFINITION 11

PROPOSITION I

MORE THAN 200 MEMBERS IN THE GENERAL CLASS
MAKE JOINDER PER SE IMPRACTICABLE, SATISFYING
FRCP 23(A)(1) 12

PROPOSITION II

PLAINTIFFS’ CLAIMS ARE TYPICAL OF THE CLASS
CLAIMS AND ARE BASED ON COMMON FACTS
REGARDING THE PAYMENT OF ROYALTIES BASED ON
AN INTRA-COMPANY SALE AND, SATISFYING BOTH
FRCP 23(A)(2) AND (3) 14

PROPOSITION III

PLAINTIFFS AND THEIR COUNSEL ARE READY,
WILLING AND ABLE TO ZEALOUSLY REPRESENT THE
CLASSES, SATISFYING FRCP 23(A)(4) 16

PROPOSITION IV

CERTIFICATION OF THE TIMBERLAND CLASS UNDER
FRCP 23(B)(1) OR (B)(2) IS PROPER BECAUSE
DEFENDANT HAS FAILED OR REFUSED TO PROVIDE
ADEQUATE COMPENSATION TO THE ENTIRE CLASS
AND INJUNCTIVE RELIEF IS NEEDED 18

PROPOSITION V

A. ALTERNATIVELY, CERTIFICATION OF THE
TIMBERLAND CLASS UNDER FRCP 23(B)(3) IS PROPER
BECAUSE COMMON ISSUES PREDOMINATE OVER
INDIVIDUAL ISSUES AND LITIGATION OF THIS
MATTER AS A CLASS ACTION IS VASTLY SUPERIOR
TO OTHER METHODS FOR ADJUDICATING THE
CONTROVERSY 20

B. CLASS TREATMENT IS THE SUPERIOR METHOD FOR
THE FAIR AND EFFICIENT ADJUDICATION OF THE
PLAINTIFFS’ CLAIMS 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases Cited

Page

Afro American Patrolmen’s League v. Duck,
503 F.2d 294 (6th Cir. 1974) 13, 14

A.J. Bertulli v. Ind. Assn. Of Cont’l. Pilots,
242 F.3d 290, 299 (5th Cir. 2001) 22, 23, 24

| | |
|---|---------------|
| <i>Albertston’s, Inc. v. Amalgamated Sugar Co.</i> , 503 F.2d 459 (10 th Cir. 1974) | 17 |
| <i>Alvarado Partners, LP v. Mehta</i> , 130 FRD 673, 676 (D. Colo. 1990) | 17 |
| <i>American Pipe & Construction Co. v. Utah</i> , 414 U.S. 538, 553 (1974) | 23 |
| <i>American Timber & Trading Co. v. First Nat’l. Bank</i> , 690 F.2d 780, 786, n.5 (9 th Cir. 1982) | 13 |
| <i>Anderson v. Boeing Co.</i> , 222 F.R.D. 521, 541 (N.D. Okla. 2004) | 19 |
| <i>Arkansas Educational Ass’n. v. Board of Education</i> , 446 F.2d 763 (8 th Cir. 1971) | 13, 14 |
| <i>Association of Data Processing Serv. Orgs. Ins. v. Camp</i> , 397 U.S. 150, 172 | 17 |
| <i>Black Hawk Oil Co. v. Exxon Corp.</i> , 1998 OK 70, 969 P.2d 337, 343 | 13 |
| <i>Blackie v. Barrack</i> , 524 F.2d 891, 905 (9 th Cir. 1975) | 22 |
| <i>Booth, et al. v. XTO</i> , District Court, Dewey County, State of Oklahoma, Case No. CJ-98-16 | 6, 11, 12, 19 |
| <i>Bratcher v. Nat’l. Std. Life Inc. Co.</i> , 365 F.3d 408, 415, 416 (5 th Cir. 2004), <i>cert. denied</i> 543 U.S. 870 | 20 |
| <i>Califano v. Yamasaki</i> , 442 U.S. 682, 705 (1979) | 19 |
| <i>Daniels v. Blount Parrish & Co.</i> , 211 F.R.D. 352, 353 (N.D. Ill. 2002) | 13 |

| | |
|--|-----------|
| <i>Davoll v. Webb</i> , 160 FRD 142, 143 (D. Colo. 1995), <i>aff'd</i> , 194 F.3d 1116 (10 th Cir. 1999) | 4 |
| <i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156, 177-78 (1974) | 1 |
| <i>Esplin v. Hirschi</i> , 402 F.2d 94, 99 (10 th Cir. 1968), <i>cert. denied</i> 394 U.S. 928 (1969) | 3, 20, 21 |
| <i>Eubanks v. Billington</i> , 110 F.3d 87, 96 (D.C. Cir. 1997) | 4, 18 |
| <i>Fielder v. Credit Acceptance Corp.</i> , 175 F.R.D. 313, 320, 321 (W.D. Mo. 1997) | 19 |
| <i>Gold Strike Stamp Co. v. Christensen</i> , 436 F.2d 791, 796, 798 (10 th Cir. 1970) | 22 |
| <i>Goodman v. Lukens Steel Co.</i> , 777 F.2d 113 (3 rd Cir. 1985) | 18 |
| <i>Greghol Ltd. Partnership v. Oryx Energy Co.</i> , 1998 OK CIV APP 111, 959 P.2d 596, 599 | 22 |
| <i>Griffin v. Burns</i> , 431 F. Supp. 1361, 1365 (DRI 1977), <i>aff'd</i> , 570 F.2d 1065 (1 st Cir. 1978) | 15 |
| <i>Hallaba v. Worldcom Network Services, Inc.</i> , 196 FRD 630 (N.D. Okla. 2000) | 17 |
| <i>Howell v. Texaco, Inc.</i> , 2004 OK 92, ¶34112 P.3d 1154 | 1, 15 |
| <i>Joseph v. General Motors Corp.</i> , 109 FRD 635 (D. Colo. 1986) | 14 |

| | |
|--|--------|
| <i>Kathan v. Rosenstiel</i> , 424 F.2d 161, 169 (3d Cir 1970), <i>cert. denied</i> , 398 U.S. 950 (1970) | 3 |
| <i>Kornhaas Constr., Inc. v. Okla., Dep't. Of Cent. Serv.</i> , 140 F. Supp. 2d 1232 (W.D. Okla. 2001) | 4, 19 |
| <i>Lobo Exploration Co.</i> , 991 P.2d at 1052 | 20, 21 |
| <i>Matzen v. Cities Service Oil Co.</i> , 667 P.2d 337, 343,344 (Kan. 1983) | 1, 15 |
| <i>Milonas v. Williams</i> , 691 F.2d 931, 938 (10 th Cir 1982) | 14 |
| <i>Molski v. Gleich</i> , 307 F.3d 1155 (9 th Cir. 2002) | 20 |
| <i>Paxton v. Union Nat'l. Bank</i> , 688 F.2d 552, 559, 560 (8 th Cir. 1982) | 13 |
| <i>Penn v. San Juan Hosp., Inc.</i> , 528 F.2d 1181, 1189 (10 th Cir. 1975) | 15 |
| <i>Philadelphia Elec. Co. v. Anaconda American Brass Co.</i> , 43 FRD 452, 463 (E.D. Pa. 1968) | 23 |
| <i>Pruitt v. Allied Chem. Corp.</i> , 85 FRD 100, 104, 105 (E.D. Va. 1980) | 13 |
| <i>Rex v. Owens ex rel. State of Oklahoma</i> , 585 F.2d 432, 435 (10 th Cir. 1978) | 2 |
| <i>Ridgeway v. Intern. Broth. Of Elec. Wkrs, Loc. No. 134</i> , 74 FRD 597, 604 (N.D. Ill. 1977) | 3 |
| <i>Rutstein v. Avis Rent-a-Car Sys., Inc.</i> , 211 F.3d 1228, 1233 (11 th Cir. 2000) | 21 |

| | |
|--|----|
| <i>Shores v. First City Bank Corp.</i> , 1984 OK 67, 689 P.2d 299, 305 | 23 |
| <i>Sias v. Edge Communications, Inc.</i> , 2000 OK CIV APP 72, 8 P.3d 182 | 11 |
| <i>Wetzel v. Liberty Mut. Ins. Co.</i> , 508 F.2d 239, 248, 249 (3 rd Cir. 1975) | 18 |

Statutes and Other Authorities Cited

| | <u>Page</u> |
|---|---------------------------|
| Federal Rule Civil Procedure § 23 | 1, 13, 21 |
| § 23(a) | 3 |
| § 23(a)(1) | 12, 24, 25 |
| § 23(a)(2) | 3, 14, 16, 25 |
| § 23(a)(3) | 3, 14, 15, 16 |
| § 23(a)(4) | 16, 18, 25 |
| § 23(b) | 3 |
| § 23(b)(1) | 3, 18, 19, 20, 25 |
| § 23(b)(2) | 4, 18, 19, 20, 25 |
| § 23(b)(3) | 4, 18, 19, 20, 21, 22, 25 |
| K.S.A. § 60-511 | 12 |
| Okla. Stat., tit. 12, § 93(A)(1) | 12 |
| NEWBERG ON CLASS ACTIONS, 3d Ed., (1992), | |
| § 3.10 | 14 |
| § 3.42 | 17 |
| § 4.01 | 3 |

EXHIBITS

| | | |
|---------|--|----------------|
| Exh. 1 | Hand Sketch Showing “Sales” | 2, 9 |
| Exh. 2 | Spaulding Deposition | 6, 7, 11 |
| Exh. 3 | Kniffen Deposition | 6, 7, 9, 10 |
| Exh. 4 | Schultz Deposition | 6, 7, 8, 9, 10 |
| Exh. 5 | Acklie Deposition | 6, 7, 9, 10 |
| Exh. 6 | 1996 Gas Purchase Contract (“1996 GPC”) | 6, 9 |
| Exh. 7 | Map of Kansas Portion of Timberland Gathering System | 6 |
| Exh. 8 | 2006 Ratification and Amendment of 1996 GPC | 6, 7 |
| Exh. 9 | Selected Leases from XTO Discovery Responses | 7 |
| Exh. 10 | Atypical Free Gas Clause | 7 |
| Exh. 11 | 1997 Natural Gas Sales Agreement Timberland/CTES | 9, 10 |
| Exh. 12 | 2002 Gas Purchase Contract CTES/Duke | 9, 10 |
| Exh. 13 | 2005 Amendment to CTES/Duke Gas Purchase Contract | 10 |
| Exh. 14 | XTO Supplemental Discovery Responses to Plaintiffs | 10 |
| Exh. 15 | <i>Booth v. XTO</i> Settlement Agreement | 11 |
| Exh. 16 | <i>Booth v. XTO</i> Order Certifying Class & Settlement Agreement | 11 |
| Exh. 17 | <i>Kornhaas v. St. of Okla.</i> Order Granting Class Certification | 19 |

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs are members of a proposed class of royalty owners that executed leases with Defendant XTO Energy Inc. or its predecessors in interest (“XTO”). Members of the class currently proposed to be certified number at least in the hundreds.¹ XTO failed to properly pay Plaintiffs by unlawfully basing Plaintiffs’ royalty payments on an intra-company “sale,” by failing to pay for gas used as fuel off of the leased properties, and by failing to pay for natural gas liquids recovered in a gas processing plant. Plaintiffs have been underpaid by at least 20%. Plaintiffs ask the Court to certify the Timberland Class as defined herein and to set a discovery schedule leading up to an expeditious trial of the claims of the Timberland Class. Plaintiffs also ask the Court for both a temporary and permanent injunction requiring XTO to begin properly paying royalties and accounting to Plaintiffs and the Timberland Class. Plaintiffs ask the Court to set forth detailed findings of fact and conclusions of law underlying its ruling on this Motion. Plaintiffs also ask for a hearing to be set promptly after this matter is fully briefed.

¹ More than 200 wells are affected by the proposed Timberland Class, and for each of those wells there will be at least several royalty owners affected. Plaintiffs anticipate seeking certification of additional classes once proper responses to outstanding discovery requests are received. Plaintiffs have a pending Motion to Compel (Doc. No. 19) and anticipate that another may be necessary if XTO refuses to provide discovery responses it has promised for quite some time but failed to deliver.

BRIEF IN SUPPORT OF CLASS CERTIFICATION

BACKGROUND²

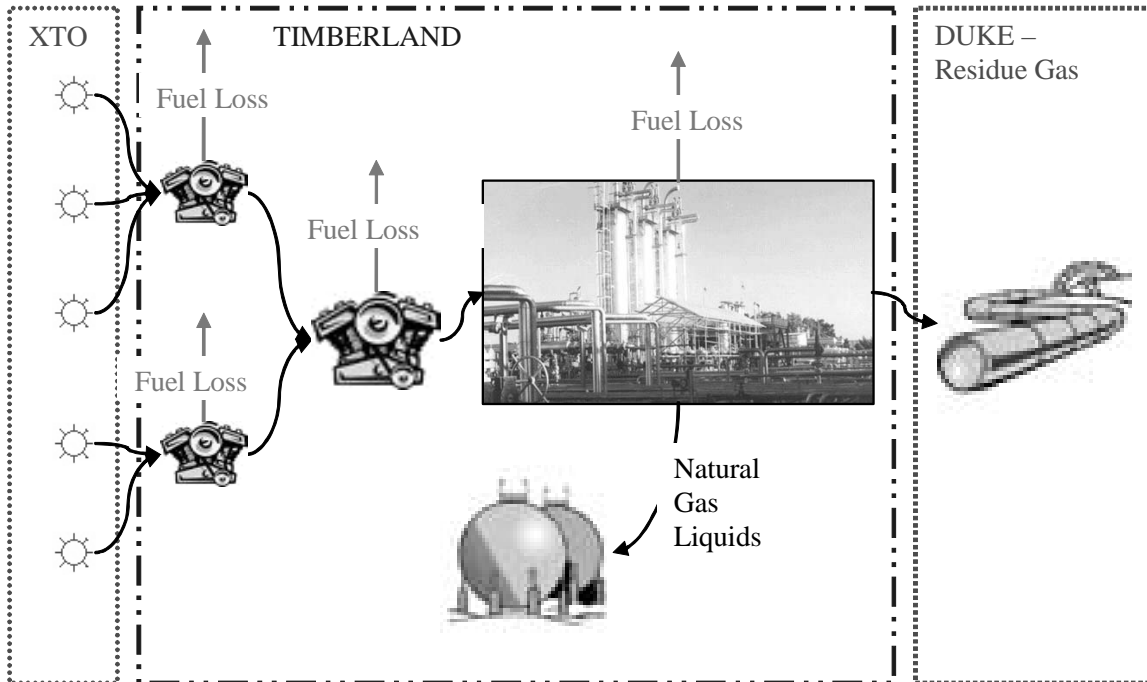
Plaintiffs, on behalf of themselves and a proposed class, seek an accounting from XTO regarding its underpayment of their royalties and damages associated with underpayments found. XTO pays Plaintiffs based on an intra-company “sale” from XTO itself to one of its wholly-owned subsidiaries, Timberland Gathering and Processing Co., Inc. (“Timberland”).

Basing royalties on such an intra-company sale is clearly improper in Oklahoma and Kansas. *Howell v. Texaco, Inc.*, 2004 OK 92, ¶34, 112 P.3d 1154; *Matzen v. Cities Service Oil Co.*, 667 P.2d 337, 343, 344 (Kan. 1983) (holding that the minimum required in Kansas is an arms-length transaction, but more may be required in that jurisdiction).

Several hundred XTO-operated wells feed into the Timberland gathering and processing system, which services Plaintiffs’ wells. Timberland’s gathering system is shown in an illustrative fashion in the figure below. The wells in the diagram are illustrated by round “starburst” symbols. Those wells feed into low-pressure field compressors designed to pull gas out of the wells and to maintain a constant intake pressure. From there, another set of larger compressors pushes the gas through several miles of pipeline to Timberland’s Tyrone natural gas liquids (“NGL”) processing plant. Both sets of compressors use natural gas as fuel to accomplish the compression, but contrary to the leases, XTO fails to pay for gas used as fuel off of the leased premises. At the Tyrone NGL plant, more fuel is used to power a plant to recover NGLs.

The NGLs recovered at the Tyrone plant are sold by Timberland, but no payment to Plaintiffs is made based on the NGLs sold. The gas remaining after the liquids are recovered

² The background is provided for the Court’s edification. The merits of a case are generally not considered in ruling on class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (holding that the “question is not whether the plaintiff...has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met”).



is typically called “residue gas.” A compressor at the outlet of the Tyrone plant pushes the residue gas into an interstate pipeline, where it is purchased by Duke Energy Field Services, LP (“Duke”). This sale to Duke is the first arms-length transaction where XTO sells gas.³

LEGAL FRAMEWORK

The party seeking class certification bears the burden of proving that each of the requirements for a class action are met. *Rex v. Owens ex rel. State of Oklahoma*, 585 F.2d 432, 435 (10th Cir. 1978). However, a close question should be resolved in favor of sustaining certification because the order is always subject to modification prior to judgment

³ Not pictured on the Timberland system diagram, but shown on Ex. 1 (Depo. Ex. 25) is a third transaction where Timberland “sells” the gas to CTES at the tailpipe of the Tyrone plant, at which point CTES, without doing any further processing sells it to Duke at the same point. XTO pays no royalties on CTES’ profits.

on the merits. “But if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.” *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). An action filed as a putative class action is presumed to be such until a final determination to the contrary is made. *Kathan v. Rosenstiel*, 424 F.2d 161, 196 (3rd Cir. 1970), *cert. denied*, 398 U.S. 950 (1970).

Under FRCP 23(a) a proponent of a class action must first establish: (1) impracticality of joinder; (2) questions of law or fact common to the class; (3) claims or defenses of the representative are typical of the claims or defenses of the class; and (4) the representative will fairly and adequately protect the interest of the whole class. The shorthand names for these elements are numerosity, commonality, typicality and adequate representation. The first two elements (numerosity and commonality) focus on the propriety of the case for class treatment. The second two elements focus on whether the named plaintiff is appropriate to represent the class. There is, however, much overlap between the typicality and commonality elements. *See, e.g., Ridgeway v. Intern. Broth. of Elec. Wkrs, Loc. No. 134*, 74 FRD 597, 604 (N.D. Ill. 1977) (holding that where the rights of the representative and the class depend on substantially the same legal theory, “then 23(a)(3) [typicality] is conceptually, if not semantically, subsumed within 23(a)(2) [commonality]”).

Once the elements of FRCP 23(a) are satisfied, the proponent must next establish that certification is maintainable under one of the categories of FRCP 23(b): (1) prosecution of individual actions is undesirable because it might establish inconsistent standards or individual adjudications would as a practical matter be dispositive of potential class claims; (2) the defendant has acted or failed to act on grounds generally applicable to the class making injunctive relief proper; or (3) questions of law or fact predominate and class treatment is superior to other methods of adjudicating the claims. There is considerable overlap among the FRCP 23(b) categories. *Newberg on Class Actions*, 3d ed. (1992) §4.01.

Certification of a class under more than one category may be proper. *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) (in claim for monetary and injunctive relief, the “court may adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief”). *See also Kornhass Constr., Inc. v. Okla., Dep’t. of Cent. Serv.*, 140 F. Supp. 2d 1232 (W.D. Okla. 2001) (Judge Russell certifying under both (b)(2) and (3) (counsel for the present plaintiffs was also lead counsel).

Inquiry into the merits of the action is inappropriate when the court is deciding whether a class should be certified. *Davoll v. Webb*, 160 FRD 142, 143 (D. Colo. 1995), *aff’d*. 194 F.3d 1116 (10th Cir. 1999) (the merits of an action are not judged in ruling on a motion for class certification). Whether the Plaintiffs will ultimately succeed on a claim should be of no consequence where the requirements for class certification are otherwise met.

COMMON FACTS

Plaintiffs set forth herein a set of common facts that apply to the entire Timberland Class. Each fact is a simple declarative sentence followed by supporting evidence. To make it easier to see the allegations divorced from the supporting evidence, the common facts are first written as paragraphs, uninterrupted by the supporting evidence, then numbered and reproduced with supporting evidence.

[1] Timberland Gathering and Processing Company (“Timberland”) and Cross Timbers Energy Services (“CTES”) are both wholly owned subsidiaries of Defendant XTO Energy. [2] Plaintiffs’ gas, and the gas royalty owners with rights based on production from about 228 similarly situated wells (collectively, Plaintiffs and these similarly situated royalty owners will be referred to as “Timberland Class,” see definition, below) is produced by XTO and gathered through Timberland’s gathering system. [a] About 67 of the wells are within the proposed Kansas Subclass as indicated by a map of Timberland’s gathering

system. [3] XTO “sells” the gas of the Timberland Class to Timberland under a single contract. [a] The price per MCF paid to the Timberland Class is based on the intra-company sale from XTO to Timberland. [b] Timberland pays XTO 80% of the price per MCF received by Timberland, and XTO uses this intra-company sales price as a basis for paying royalties to the Timberland Class.

[4] Plaintiffs’ leases, which are typical for the Panhandle and Kansas, include a clause providing that the operator can use gas as fuel for its operations only on the leased premises (the “Free Gas Clause”). [a] At least one lease in the proposed class has an atypical Free Gas Clause.

[5] XTO operates some on-lease compressors and Timberland operates off-lease compressors. [a] To get produced gas from the wellhead to Timberland’s Tyrone processing plant, natural gas is used as fuel in multiple off-lease compressors on the Timberland gathering system. [b] Off-lease compressors and other operations consume about 10% of the produced gas as fuel, but no separate payment is made for that fuel.

[6] All of the gas gathered by Timberland is processed in its Tyrone plant. [a] Timberland’s Tyrone Plant produces natural gas liquids, but XTO does not pay the Timberland Class based on the proceeds from the liquids produced. [b] Timberland uses gas as fuel in the Tyrone plant without paying the Tyrone Class therefor in contravention of the Free Gas Clause. [c] Royalty owners whose gas is gathered by Timberland are treated identically whether their production originates in Kansas or Oklahoma. [d] Timberland “sells” all of the residue gas to CTES, at the tailpipe of the Tyrone Plant.

[7] CTES sells all of the residue gas to Duke, the first non-XTO subsidiary in the series of sales, at the exact same point where CTES bought the gas from Timberland. [a] CTES makes a handsome profit, though it does not really do anything meaningful to process or market the gas.

[8] XTO does not incur any deductible costs in marketing the gas of the Timberland Class.

[9] The settlement in *Booth v. XTO* (“Booth Settlement”) only awarded damages for XTO’s past practices regarding Oklahoma wells. [a] *Booth* did not approve XTO’s royalty payment provisions in a prospective fashion or award any injunctive relief.

Having stated the Common Facts in summary fashion, Plaintiffs now reproduce them with supporting evidenced incorporated by reference.

1. Timberland and CTES are both wholly owned subsidiaries of Defendant XTO Energy. Ex. 2, Spaulding dep. at 31:15-18; Ex. 3, Kniffen dep. at 115:13-17; Ex. 4, Schultz dep. at 16:8-23; Ex. 5, Acklie dep. at 26:11-16.

2. Plaintiffs’ gas, and the gas royalty owners with rights based on production from about 228 similarly situated wells (collectively, Plaintiffs and these similarly situated royalty owners will be referred to as “Timberland Class,” see definition, below) is produced by XTO and gathered through Timberland’s gathering system. See Ex. 6, 1996 Gas Purchase Contract at XTO prod. p. 1044-1051 (Dep. Ex. 20) (listing the wells governed by the contract); and Ex. 5, Acklie dep. at 70:12-71:14.

a. About 67 of the wells are within the proposed Kansas Subclass as indicated by a map of Timberland’s gathering system. Ex. 7, map of Kansas portion of Timberland gathering system.

3. XTO “sells” the gas of the Timberland Class to Timberland under a single contract. Ex. 6, 1996 Gas Purchase Contract (Dep. Ex. 20); Ex. 8, 2006 Ratification and Amendment of 1996 Gas Purchase Contract (Dep. Ex. 21); and Ex. 5, Acklie dep. at 72:20-73:23.

a. The price per MCF paid to the Timberland Class is based on the intra-company sale from XTO to Timberland. Ex. 5, Acklie dep. at 32:16-33:21 (“[W]hat questions would you want to ask Jennifer to find out where the 5.22 [the MCF price paid to

plaintiff] came from? A: Is she using the same price that Timberland paid XTO. Q: Do you think she's using the same price? A: Yes, I do. Q: And why do you think that? A: Because...I would assume that's what the contract calls for.”); 43:5-6 (“the price that XTO pays is based off of what Timberland pays XTO”); 72:20-73:23; 78:24-79:2 (“this price between...between Timberland...and XTO is based on MMBtus at the wellhead? A: Correct.”); 80:9-19 (“Unprocessed gas comes out of the wellhead, it is at that point sold from XTO to Timberland based on MMBtu content? A: Correct.”); and 124:14-125:10; Ex. 4, Schultz dep. at 137:13-138:9; and Ex. 2, Spaulding dep. at 34:5-10.

b. Timberland pays XTO 80% of the price per MCF received by Timberland, and XTO uses this intra-company sales price as a basis for paying royalties to the Timberland Class. Ex. 2, Spaulding dep. at 37:3-18 (“So XTO receives 80% of the price that Timberland ultimately gets for the gas, is that what happens? A: 80% of the residue price that Timberland receives, yes.”); Ex. 5, Acklie dep. at 73:3-23; Ex.4, Schultz dep. at 107:1-8, 139:16-140:4; Ex. 3, Kniffen dep. at 29:1-8.

4. Plaintiffs’ leases, which are typical for the Panhandle and Kansas, include a clause providing that the operator can use gas as fuel for its operations only on the leased premises (the “Free Gas Clause”). Ex. 9, selected leases taken from XTO’s discovery responses with the relevant clauses highlighted on the Acrobat (.pdf) files.

a. At least one lease in the proposed class has an atypical Free Gas Clause. Ex. 10, atypical Free Gas Clause providing for right to use gas for operations off of the leased premises and for pro rata apportionment regarding uses that serve several wells.

b. The table, below, reproduces the typical Free Gas Clauses exemplified by the six leases reproduced in Ex. 8 and the atypical free gas clause reproduced in the single lease in Ex. 9. A class is requested for both Oklahoma and Kansas royalty owners, that the typical lease form is indicated on the face thereof to be for both Kansas and Oklahoma.

| TYPICAL FREE GAS CLAUSE | ATYPICAL FREE GAS CLAUSE ⁴ |
|---|--|
| <p>8. The lessee shall have the right to use free of cost, gas, oil and water found on said land for its <i>operations thereon</i>, except water from the wells of the lessor. When required by lessor, the lessee shall bury pipe lines below plow depth and shall pay for damage caused by its operations to growing crops on said land. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without written consent of the lessor. Lessee shall have the right at any time during or after the expiration of this lease to remove all machinery, fixtures, houses, buildings and other structures placed on said premises, including the right to daw and remove all casing.</p> | <p>6. Lessee shall have the free use of oil, gas...and water from said land, except water from lessor's wells, for all <i>operations hereunder</i>, and the royalty on oil and gas shall be on the net quantity after deducting any so used for operations. If lessee shall operate the leased premises jointly with other premises by a central plant or plants using oil or gas as fuel, and there be available such fuel...from the leased premises, then lessee shall have the right to allocate to the leased premises, for deduction as free fuel, their pro rata share of the total oil or gas consumed in such plant or plants as fuel. If in its judgment advantageous, lessee may use in separate operation of the leased premises or in any such central plant fuel not available from the leased premises, or power, and charge its cost (or the proper pro rata portion thereof) against the production from the leased premises, but in no event may it charge more than the value (or the proper pro rata portion thereof) of that equivalent amount of fuel from the leased premises which would have been used in the same operations, had fuel from the leased premises been employed therefor....</p> |

5. XTO operates some on-lease compressors and Timberland operates off-lease compressors. Ex. 4, Schultz dep. at 177:13-181:11 (partly including witness testimony and partly including statements of outside counsel, Jim Peters, and in-house counsel, Taylor Pope).

⁴ The atypical language strengthens Plaintiffs' argument that the typical Free Gas Clause only allows for free gas for operations on the leased premises. The industry knew, as evidenced by the atypical language, how to write a free gas clause to allow for free gas at remote locations and in relation to shared facilities (such as compressors serving more than one lease). The failure to include this atypical language in the leases affecting the vast majority of the class has a clear meaning: free gas can only be used on the leased premises under the typical Free Gas Clause.

a. To get produced gas from the wellhead to Timberland's Tyrone processing plant, natural gas is used as fuel in multiple off-lease compressors on the Timberland gathering system. Ex. 3, Kniffen dep. at 37:5-20, 83:5-11; Ex. 4, Schultz dep. at 114:14-115:1, 120:14-122:15, 125:9-24.

b. Off-lease compressors and other operations consume about 10% of the produced gas as fuel, but no separate payment is made for that fuel. Ex. 3, Kniffen dep. at 37:5-20, 124:12-15; Ex. 4, Schultz dep. at 126:5-14, 127:15-128:4, 143:2-10 (Q: [B]etween 10 and 12% of the gas is used in processing? A: The operations of those facilities, yes; processing, compression, just line loss, unaccounted for gas. Q: And so the amount sold by CTES to Duke is 88 to 90 percent of the volume produced? A: Yes.”).

6. All of the gas gathered by Timberland is processed in its Tyrone plant. Ex. 4, Schultz dep. at 117:8-118:22; Ex. 5, Acklie dep. at 35:2-10, 101:8-11.

a. Timberland's Tyrone Plant produces natural gas liquids, but XTO does not pay the Timberland Class based on the proceeds from the liquids produced. Ex. 3, Kniffen dep. at 22:14-23:5; Ex. 4, Schultz dep. at 143:16-144:1; Ex. 5, Acklie dep. at 81:7-82:1 (Oneok buys the NGLs produced in the Tyrone plant).

b. Timberland uses gas as fuel in the Tyrone plant without paying the Tyrone Class which is in contravention of the Free Gas Clause. Ex. 4, Schultz dep. at 121:1-22.

c. Royalty owners whose gas is gathered by Timberland are treated identically whether their production originates in Kansas or Oklahoma. Ex. 1, hand sketch showing “sales” transactions and referencing the underlying contracts; Ex. 6, 1996 Gas Purchase Contract (Dep. Ex. 20); Ex. 11, 1997 Natural Gas Sales Agreement between Timberland and CTES (Dep. Ex. 22); Ex. 12, 2002 Gas Purchase Contract between CTES

and Duke Energy Field Services, LP (Dep. Ex. 18); and Ex. 13, 2005 “Amendment” to Gas Purchase Contract (Dep. Ex. 23).⁵

d. Timberland “sells” all of the residue gas to CTES, at the tailpipe of the Tyrone Plant. Ex. 11, 1997 Natural Gas Sales Agreement between Timberland and CTES (Dep. Ex. 22).

7. CTES sells all of the residue gas to Duke, the first non-XTO subsidiary in the series of sales, at the exact same point where CTES bought the gas from Timberland. Ex. 12, 2002 Gas Purchase Contract between CTES and Duke Energy Field Services, LP (Dep. Ex. 18); and Ex. 13, 2005 “Amendment” to Gas Purchase Contract (Dep. Ex. 23); Ex. 5, Acklie dep. at 74:24-76:13 (CTES takes possession of the gas at the outlet of the plant and sells it at exactly the same point, and it does not do anything to the gas); and Ex. 3, Kniffen dep. at 31:18-32:25;

a. CTES makes a handsome profit, though it does not really do anything meaningful to process or market the gas. Ex. 5, Acklie dep. at 48:10 (CTES does not have any employees), 55:14-58:9, 75:2-4 (CTES “buys” gas from Timberland at the outlet of the Tyrone plant and sells it at the exact same point without doing anything to it).

8. XTO does not incur any deductible costs in marketing the gas of the Timberland Class. Ex. 14, XTO’s supplemental responses to Plaintiff’s discovery requests at Resp. to Int. No. 23 (“defenses, XTO responds that it does not deduct any costs from plaintiffs’ royalties related to production from the Fern Parkes and Leona Woods wells”) and

⁵ From 2002 to 2005, there was no written agreement under which Duke purchased gas from CTES. Ex. 12, the 2002 contract between CTES and Duke was never executed. Ex. 4, Schultz dep. at 93:4-12 When XTO discovered that it had an ongoing multimillion “handshake” deal, it executed the 2005 “Amendment.” Ex. 4, Schultz dep. at 93:22-94:4 (“handshake” deal until 2006), 92:23-93:2 (executed “Amendment” in 2006). Nevertheless, when this huge oversight was discovered, according to XTO not one email, letter, or other document was generated or received other than the executed amendment. 94:19-96:25.

Resp. to Req. for Prod. No. 29 (“XTO refers the named Plaintiffs to their royalty check stubs where it shows that no deductions are taken”); Ex. 2, Spaulding dep. at 38:24-39:12.

9. The settlement in *Booth v. XTO* (“Booth Settlement”) only awarded damages for XTO’s past practices regarding Oklahoma wells. Ex. 15, Booth Settlement at p.4 (defining the relevant period to be Jan. 1, 1993 through June 30, 2002).

a. *Booth* did not approve XTO’s royalty payment provisions in a prospective fashion or award any injunctive relief. Ex. 16, Order approving Booth Settlement.

CLASS DEFINITIONS

Plaintiffs presently propose the following objective definitions of the proposed class.⁶ Plaintiffs anticipate seeking certification of additional classes once proper responses to outstanding discovery requests are received. Plaintiffs have a pending Motion to Compel (Doc. No. 19) and anticipate that another may be necessary if XTO refuses to provide discovery responses it has promised for quite some time but failed to deliver.

Timberland Class. Nongovernmental royalty owners who, during Relevant Times, received payments based on production from an XTO-operated well for which the production is processed in Timberland’s Tyrone natural gas processing plant.

a. ***Kansas Subclass.*** Members of the Timberland Class who receive royalties from at least one well located in Kansas.

b. ***Oklahoma Subclass.*** Members of the Timberland Class who receive royalties from at least one well located in Oklahoma.

⁶ While there are no express rules regarding the “appropriateness” of a class definition or rules requiring particularity in defining the proposed class, Oklahoma case law has generally required only that the class be “reasonably identifiable,” or otherwise stating that the class need be “adequately defined and clearly ascertainable.” *Sias v. Edge Communications, Inc.*, 2000 OK CIV APP 72, 8 P.3d 182.

As used in the class definitions, “Relevant Times” means the following:⁷ (1) for members of the Kansas Subclass, for a period at least as early as March 25, 1997 to present;⁸ (2) for members of the Oklahoma Subclass, (a) for a period from July 1, 2002 to present for those bound by the *Booth* settlement, and (b) for a period from March 25, 1997 to present for those who opted out of the *Booth* settlement.⁹

PROPOSITION I

MORE THAN 200 MEMBERS IN THE GENERAL CLASS MAKE JOINDER PER SE IMPRACTICABLE, SATISFYING FRCP 23(A)(1).

At greater than 200 affected wells, the classes per se satisfy the numerosity element. *See* Common Fact 2 (228 wells affected). The leases at issue were generally signed in the 1920s - 1950s. The current owners are the descendants or successors in interest to the original lessors. Most wells will have at least a couple of separate royalty owners, and some may have dozens of different owners dispersed around the country. That is, the 200+ wells represent a much larger number of royalty owners. For wells signed in the 1920s, there would likely be at least two, and possibly three generations of successors at issue, meaning potentially dozens of grandchildren or great-grandchildren of the original lessor. Upon

⁷ The definition of “Relevant Time” includes the formulation “at least as early as” a specified date. The reason for this formulation is that, should proof warrant, Plaintiffs may ask for damages prior to the per se statutory bar date based on applicable discovery rules. That is, in some instances, the statute of limitation does not begin to run until a plaintiff knew or should have known of the wrongdoing. If proof available at trial or in dispositive motion(s) supports application of an applicable discovery rule, an earlier date may be determined to apply.

⁸ Under KSA § 60-511, a five-year statute of limitation applies to any agreement in writing. The Amended Petition in a predecessor action (Texas County, Oklahoma Dist. Ct Case No. CJ-2002-11) from which the present action was severed, was filed on March 25, 2002 at ¶43 gave XTO notice that Plaintiffs intended to assert claims on behalf of a potentially multi-state class expressly including Kansas. Plaintiffs calculated a date five years before that filing.

⁹ Under Okla. Stat., tit. 12, §93(A)(1), a five-year statute of limitation applies to any agreement in writing. The Amended Petition referenced in the preceding footnote was the first time that royalty claims were asserted against XTO for Oklahoma royalty owners, so that date also governs claims for the Oklahoma Subclass.

information and belief, the number of royalty owners having an interest in the affected wells likely exceeds 1,000 persons or entities.

Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class. *Arkansas Educational Ass'n v. Board of Education*, 446 F.2d 763 (8th Cir. 1971); and *Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (only 35 class members identified); *Daniels v. Blount Parrish & Co.*, 211 F.R.D. 352, 353 (N.D. Ill. 2002) (class of 300 satisfied numerosity). *See also, Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, 969 P.2d 337, 343 (under Oklahoma's class action statute, similar to FRCP 23, holding that the numerosity test is met by numbers alone when the class size is in the hundreds).

While the wells at issue in the Timberland Class are not that geographically dispersed, all located within a circa 60-mile radius, the royalty owners affected reside in many states. The multiple generations of inheritance and the general flight of children from the Panhandle region implicate a vast geographic distribution of people or entities affected by the Timberland Class.

Where subclasses are requested, each subclass need not independently satisfy the numerosity requirement if each is a member of a larger, overall class. *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 780, 786, n.5 (9th Cir. 1982). Similarly, when the size of a subclass is substantial, but still less than normally found for certification, subclass certification has been upheld for reasons of judicial convenience and economy. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559, 560 (8th Cir. 1982) (approving subclass with circa 98 members and citing with approval certification of a subclass of 41-46 members); *Pruitt v. Allied Chem. Corp.*, 85 FRD 100, 104, 105 (E.D. Va. 1980) (approving certification of subclasses as small as 37). Here, there are circa 67 wells represented with the Kansas Subclass. As noted previously, many more persons or entities will have a right to receive payment from those 67 wells. It is likely that the number of persons or entities will be two

to three times as large as the number of wells. Nevertheless, only looking at the number of wells for this subclass indicates that numerosity is satisfied. *Arkansas Educational Ass'n v. Board of Education*, 446 F.2d 763 (8th Cir. 1971) (circa 20 class members); and *Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (only 35 class members identified).

PROPOSITION II

PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLASS CLAIMS AND ARE BASED ON COMMON FACTS REGARDING THE PAYMENT OF ROYALTIES BASED ON AN INTRA-COMPANY SALE AND, SATISFYING BOTH FRCP 23(A)(2) AND (3).

To satisfy the typicality requirement of FRCP 23(a)(2), only a single issue of fact **OR** law need be common to all class members, so this element is easily met in most cases. *Newberg on Class Actions*, 3d ed. (1992) §3.10, page 3-50 (citing *Joseph v. General Motors Corp.*, 109 FRD 635 (D. Colo. 1986) (in a design defect case, holding that differences in the amount of damages was irrelevant to class certification when the central issue was whether the automobile engines, V6s and V8s, were defectively designed)). *See also, Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (common issue of law concerning legality of defendant's practices overrode factual differences).

Plaintiffs have asserted class claims for breach of contract in Defendant's conduct in its performance of its royalty agreements with the Timberland Class, and these claims are dependent on a large core of Common Facts. For example, all of the Timberland Plaintiffs' wells are operated by XTO and gathered by Timberland. Common Fact No. 2. A single "sales" contract governs the intra-company "sale" from XTO to Timberland. Common Fact No. 3. All Timberland Class' gas is gathered to and processed in the Tyrone Plant. Common Fact No. 6. All of the Timberland Class' gas is "sold" by Timberland to CTES under a single contract. Common Fact 6(d). CTES sells all of the Timberland Class' gas to Duke under a single contract. Common Fact 7. XTO does not incur any deductible costs

in marketing the Timberland Class' gas. Common Fact 8. All of these and other Common Facts will govern and determine the validity of the claims of the named Plaintiffs and the class they seek to represent.

The claims of the Timberland Class are common because all of the members' royalties are governed by the same set of gas contracts among XTO and its subsidiaries. The Timberland Class was also damaged in substantially the same way – Defendant failed to adequately compensate the royalty owners, instead, for example, it improperly based royalty payments on an intra-company transaction. Common Fact 3(a).

The Timberland Class has not been and will not be properly paid unless and until an injunction issues. This fact is made clear by reviewing the history of the present case. XTO was previously sued for similar issues regarding Oklahoma royalty owners. However, instead of beginning to properly pay royalties, it continued to base royalties on an intra-company sale, a clearly improper practice in both Oklahoma and Kansas. *Howell v. Texaco, Inc.*, 2004 OK 92, ¶34, 112 P.3d 1154; *Matzen v. Cities Service Oil Co.*, 667 P.2d 337, 343, 344 (Kan. 1983) (holding that the minimum required in Kansas is an arms-length transaction, but more may be required in that jurisdiction)

Since named plaintiffs' claims and those of the Timberland Class are based on the same legal or remedial theory, the requirement of typicality under FRCP 23(a)(3) is satisfied. *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975). Where the same unlawful conduct was directed at or affected both the named plaintiffs and the class, typicality is satisfied regardless of fact patterns underlying each individual claim. *Griffin v. Burns*, 431 F. Supp. 1361, 1365 (DRI 1977), *aff'd*, 570 F.2d 1065 (1st Cir. 1978).

The Timberland Class's claims are based on the following common basic issues: (1) that XTO improperly based royalties on an intra-company transaction, (2) that XTO wrongfully failed to compensate the Timberland Class for fuel gas used off of the leased premises; and (3) that XTO wrongfully failed to pay royalties on NGLs it recovered in the

Tyrone plant. With respect to all of these claims, the remedial theories are the same for the named plaintiffs and for the proposed classes.

There are intertwined common issues of fact and law related to the foregoing, including, but not limited to the following: (1) whether the natural gas produced on the royalty owners properties is marketable at the well or whether additional processing of the gas is required to make the natural gas marketable; (2) whether the natural gas is marketable at the wellhead or whether additional transportation of the natural gas is required to take the natural gas to market; (3) what is meant by the term “marketable” and whether it is synonymous with the term “salable”; (4) whether the Defendant is selling the gas at the best price available and at what price the Defendant is able to sell the gas. These and other mixed issues of fact and law are common to the proposed classes; likewise, the named plaintiffs’ claims regarding these issues are typical of the claims of the proposed class.

There are clearly common issues between the claims of the named plaintiffs and the proposed class. Likewise, the named plaintiffs’ claims are typical of those that will be asserted by the proposed classes. Because the claims of the named plaintiffs and the proposed class are based on the same operative set of facts and involve the same remedial theories, Plaintiffs’ claims are common with and typical of those of the class generally. 2023(a)(2) and (3) are therefore satisfied by the proposed classes.

PROPOSITION III

PLAINTIFFS AND THEIR COUNSEL ARE READY, WILLING AND ABLE TO ZEALOUSLY REPRESENT THE CLASSES, SATISFYING FRCP 23(A)(4).

The “adequacy of representation” prerequisite to class certification has two elements: adequacy of counsel, and an absence of antagonistic interests between the named parties and the class. *Hallaba v. Worldcom Network Services, Inc.*, 196 FRD 630 (N.D. Okla. 2000). Adequate representation is generally present if the named plaintiffs have no material

conflicts with the proposed class and exhibit a willingness and ability to vigorously prosecute the action on behalf of the class. Moreover, “courts have generally declined to consider conflicts, particularly as they regard damages, generally sufficient to defeat class action status at the outset unless the conflict is *apparent, imminent and on an issue at the very heart of the suit.*” *Alvarado Partners, LP v. Mehta*, 130 FRD 673, 676 (D. Colo. 1990) (emphasis added). Even where the plaintiff class members are normally competitors, the plaintiffs will be adequate representatives if the antagonism of competition does not carry over into the litigation. *Albertson’s, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459 (10th Cir. 1974).

Further, courts generally presume, in the absence of proof to the contrary, that prosecution of the action will be vigorous. NEWBERG ON CLASS ACTIONS, 3d ed., § 3.42 (1992). “We may reasonably expect that a person so harmed will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously.” *Association of Data Processing Serv. Orgs. Ins. v. Camp*, 397 U.S. 150, 172 (1970) (Brennan, concurring in result, dissenting in part).

In the case at bar, there are no apparent antagonistic interests between the named plaintiffs and the putative class members. Each and every class member, including the named plaintiffs, have the same interests of receiving the benefit for which they bargained, to wit, the payment of any monies owed to the royalty owners due to excessive deductions by the Defendant or by understating of the payment received by the Defendant for the natural gas, so that Plaintiffs and the putative class can hereafter obtain appropriate accurate and lawful royalty payments. The Plaintiffs and the proposed class also seek equitable relief to compel Defendant to properly compensate named plaintiffs and other class members appropriately. Therefore, the named plaintiffs, as class representatives, will fairly and adequately protect the interests of the class.

The adequacy of representation also considers the adequacy of the class counsel. Counsel for the plaintiffs have successfully prosecuted numerous class actions and other complicated litigation in both the state and federal courts in Oklahoma. Counsel for plaintiffs have the knowledge, experience and financial ability to successfully prosecute this litigation. Counsel are prepared to zealously represent the class through the trial of this matter and any necessary appeals. Based on the willingness and ability of both the named plaintiffs and their chosen counsel to zealously represent the interests of the proposed classes, the adequate representation requirement of FRCP 23(a)(4) is satisfied.

PROPOSITION IV

CERTIFICATION OF THE TIMBERLAND CLASS UNDER FRCP 23(B)(1) OR (B)(2) IS PROPER BECAUSE DEFENDANT HAS FAILED OR REFUSED TO PROVIDE ADEQUATE COMPENSATION TO THE ENTIRE CLASS AND INJUNCTIVE RELIEF IS NEEDED.¹⁰

Certification of the Timberland Class is proper and is sought under FRCP 23(b)(1) and/or (b)(2). In addition, or in the alternative, certification is sought under FRC 23(b)(3). The Court may appropriately certify a class where, as here, the Plaintiffs seek both equitable and monetary relief. *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) (in claim for monetary and injunctive relief, the “court may adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief”); *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 320, 321 (W.D. Mo. 1997) (certifying a class under 23(b)(1) and (b)(2) because the plaintiffs otherwise

¹⁰ The Court may certify under FRCP 23(b)(1) or (b)(2) related to Plaintiffs’ injunctive claims with the monetary relief as an adjunct and/or certify under FRCP 23(b)(3) regarding claims for monetary relief. Either or both of these provisions make certification proper. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 248, 249 (3rd Cir. 1975), *questioned on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3rd Cir. 1985). *Wetzel* teaches that a Court may find that certification is proper under either (b)(2) or (b)(3), but in such cases, certification under (b)(2) is preferable because of the mandatory nature of that provision – i.e., you cannot opt-out of a (b)(1) or (2) class, but you can opt-out of a (b)(3) class.

would have likely been unable to sue individually and the results of multiple litigations would have been inconsistent). *See also* Ex. 17, unpublished order in *Kornhaas Construction v. State of Oklahoma*, CIV-99-1106 (W.D. Okla. 2001) at p.15 (Judge Russell certifying the class seeking both damages and injunctive relief under both (b)(2) and (3) in a case where counsel for the named plaintiffs was also lead counsel).

Injunctive relief is especially appropriate in the present case. Defendant has underpaid and continues to underpay royalties to the class members. The need for injunctive relief is clear because XTO was previously sued for similar improper conduct and, even after a multimillion dollar settlement for those claims, refused to properly pay royalties. *See* Common Fact 9 (addressing the *Booth* Settlement). Because Defendant has acted on grounds generally applicable to class, injunctive relief is necessary to compel the Defendant to perform in accordance with their leases. An injunction is proper to protect the interests of absent class members and to prevent repetitive litigation. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

Whether Plaintiffs ultimately prevail on the foregoing prayers for injunctive relief should be of no consequence at this stage of the litigation. Rather, the Court should only consider whether the requested relief could be imposed if Plaintiffs are ultimately able to prove Defendant's wrongful conduct. *See Anderson v. Boeing Co.*, 222 F.R.D. 521, 541 (N.D. Okla. 2004) ("whether or not injunctive and declaratory relief should be granted is simply a merits argument, irrelevant to whether such relief *could be imposed* if plaintiffs can prove [the asserted wrongful conduct] – the decision to be made at the certification stage.") (emphasis added). Because XTO's acts and omissions affect the entire Timberland Class, the injunctive relief is a material aspect of Plaintiffs' claims and relief sought therefor, and justify the creation of a 2023(b)(1) or (b)(2) class.

The fact that damages are also sought does not preclude certification under (b)(1) or (b)(2). The question is whether the monetary damages flow directly from liability to the

whole class on claims forming basis of injunctive or declaratory relief. *Molski v Gleich*, 307 F.3d 1155 (9th Cir. 2002); *Bratcher v Nat'l Std. Life. Ins. Co.*, 365 F.3d 408, 415, 416 (5th Cir. 2004), *cert. denied* 543 U.S. 870. Here, Plaintiffs seek injunctive relief ordering XTO to cease paying royalties on an intra-company sale. Common Fact No. 3(a). Plaintiffs also seek an injunction requiring XTO to begin paying for fuel it uses off of the leased premises and for NGLs it sells. Common Facts No. 5(a) and 6(a). If established, the bona fides justifying such injunctive relief will also inexorably lead to a finding that damages are owed. However, those damages will flow from liability to the Timberland Class on claims forming the basis for the injunctive relief sought.

PROPOSITION V

A. ALTERNATIVELY, CERTIFICATION OF THE TIMBERLAND CLASS UNDER FRCP 23(B)(3) IS PROPER BECAUSE COMMON ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES AND LITIGATION OF THIS MATTER AS A CLASS ACTION IS VASTLY SUPERIOR TO OTHER METHODS FOR ADJUDICATING THE CONTROVERSY.

Predominance relates to whether there is a common nucleus of operative facts. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). *Lobo Exploration Co.*, 991 P.2d at 1052 held that “the predominance question under FRCP 23(b)(3) requires the court to consider whether the group seeking class certification seeks to remedy a common legal grievance.” *Lobo* upheld the trial court’s certification of a class:

Amoco treated all the non-operating working interest owners the same with respect to the issues involved in this case, despite differing forms of agreements. *The acts or omissions of Amoco which constitute the alleged breaches of contract and/or fraud, as well as the other causes of action pleaded by Lobo, are the same or similar acts or omissions for each class member.* The court concludes, therefore, that common questions predominate where the acts or omissions are the same, even though damage amounts may

vary....[The defendant] treated the class members uniformly with respect to the disputed charges.¹¹ (Emphasis added).

The test in determining predominance of common over individual questions rests on the presence of *rel non* “material variance” in “elements...upon which liability is based...[such as] representations made by the defendants to different members of a plaintiff class.” *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied* 394 U.S. 928 (1969). In order to meet the predominance requirement of FRCP 23(b)(3), a plaintiff must establish that “the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole...predominate over those issues that are subject only to individualized proof.” *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000).

In the present case, each and every member of the Timberland Class are paid royalties under identical contractual arrangements among XTO and its subsidiaries. Common Facts 3 (“sale” from XTO to Timberland), 6(c) (no differentiation between Kansas and Oklahoma royalty owners), 6(d) (“sale” from Timberland to CTES), and 7 (the first arms-length sale from CTES to Duke at the exact same point as CTES “bought” it from Timberland). Although some royalty owners may have different royalty ratios (1/8th or 3/16th of the proceeds of the sale of the natural gas), that issue does not predominate over the central issue regarding Defendant’s unlawfully basing royalties on an intra-company sale, failing to pay royalties for gas used as fuel off of the leased premises, and failing to pay royalties for NGLs sold by Timberland. These common issues predominate over any minor individual issues that may exist. In particular, issues created by language in specific lease agreements do not outweigh common class particularly when the issue of proper deductions for post-production

¹¹ Oklahoma’s class action statute is, in material respects, identical to FRCP 23 regarding this issue, so the Oklahoma Supreme Court’s rulings in this regard in a similar royalty suit are persuasive. Findings of the *Lobo* trial court quoted at 1053.

costs are involved. *Greghol Ltd. Partnership v. Oryx Energy Co.*, 1998 OK CIV APP 111, 959 P.2d 596, 599

The properties involved in this action produce natural gas in a variety of amounts, so there will be variation in the amount of damages. Variance in damages, however, does not defeat class certification. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796, 798 (10th Cir. 1970) (affirming district court's determination that common issues predominated in an antitrust suit "where the question of basic liability can be established readily by common issues" and stating that "[t]he fact that there may have to be individual examinations on the issue of damages has never been held, however, a bar to class actions"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment"). The central factual and legal issues presented clearly predominate over the exact dollar amount to be awarded to each Plaintiff.

B. CLASS TREATMENT IS THE SUPERIOR METHOD FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE PLAINTIFFS' CLAIMS.

Considerations pertinent to a finding of superiority of the class action include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (d) the difficulties likely to be encountered in the management of a class action. FRCP 23(b)(3). *See also, A.J. Bertulli v. Ind Assn. of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001).

Here, many class members have little or no interest in or incentive to maintain individual actions because of the great difficulty litigating a royalty cause of action. In fact, the small individual damages relative to the great cost and difficulty litigating this type of action would be prohibitive of individual remedies. In this regard, the 5th Circuit held that

“defendants must not merely show that individual actions are feasible; they must show that individual class members have an interest sufficient to make individual actions desirable.” *A.J. Bertulli v. Ind Assn. of Cont’l Pilots*, 242 F.3d 290, 299 (5th Cir. 2001). This is because class actions are designed, in part, to ensure that defendants cannot get away with taking small amounts of money from a multitude of people, thus depriving any one of them, or even a group, of the ability to challenge the conduct in an economically feasible manner. *Bertulli* also held that individualized calculations needed for determination of damages are consistent with a finding of predominance and superiority.

The principal purpose of the class action is to advance the efficiency and economy of litigation. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974). Litigation of hundreds of individual claims would be practically impossible, and would clearly be less efficient than resolution of all claims in a single action. Undoubtedly, many of those royalty owners with larger claims will file individual actions if a class is not certified. *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 FRD 452, 463 (E.D. Pa. 1968):

While 25 [class members] is a small number compared to the size of the other classes being considered, it is a large number when compared to a single unit. I see no necessity for encumbering the judicial process with 25 lawsuits if one will do.

Finally, examination of the difficulties to be encountered in managing the class requires the Court to examine the benefits which the class action procedure has over other alternative methods of adjudicating the dispute, balanced against the management problems which may arise from class treatment. *Shores v. First City Bank Corp.*, 1984 OK 67, 689 P.2d 299, 305. Individual litigation of hundreds or more claims would require an unwieldy multitude of hearings; individual litigation would require innumerable depositions and would result in litigation costs on the party and the judicial system vastly exceeding those that would be incurred in a single action. Class action treatment, on the other hand, will achieve

the economies of time, effort, and expense which the class model promotes, and it will further promote uniformity of decision as to persons similarly situated. As in this case, “[a] large group of plaintiffs, each with small damages, seeking injunctive relief that benefits the group as a whole, is the prototypical class.” *A.J. Bertulli v. Ind Assn. of Cont’l Pilots*, 242 F.3d 290, 299 (5th Cir. 2001).

The presence of some class members with relatively larger claims practically ensures the filing of multiple actions if a class is not certified. In that case, management of the multiple actions would be substantially more difficult than management of a single class action. The litigation is therefore more manageable as a class action than if undertaken individually, an unlikely possibility for perhaps hundreds of class members given their relatively small damages. Rather than requiring that all or a substantial number of class members bring separate lawsuits, putative class members should have the opportunity to have their rights determined in this single action.

The proposed classes will be relatively easy to manage. All royalty owners and their addresses are known as the Defendant regularly mails statements to the royalty owners. Identification of and notice to class members is easily achieved by resort to Defendant’s own databases. Further, administration of this case as a class action will be vastly simpler than administration of an action involving dozens, if not hundreds of parties and their counsel.

CONCLUSION

There are more than 200 wells affected by the Timberland Class. Each of those wells will have, on average, at least several individuals or entities receiving royalties therefrom. Thus, hundreds, and perhaps thousands of class members exist, and they are distributed across the country even though the wells are geographically concentrated. Therefore, the numerosity requirement of 23(a)(1) is satisfied.

A central core of Common Facts governs the claims of the Timberland Class. XTO measures its obligations to pay the Timberland Class based on common contracts applied to

all class members regardless of where the well is located or what their lease says. The claims of the Timberland Class are based on the same remedial theory applied to the Common Facts, to wit: (1) XTO improperly paid royalties based on an intra-company sale, (2) XTO improperly failed to pay for fuel used off of the leased premises; and (3) XTO improperly failed to pay royalties based on NGLs it recovers from the gas. Thus, the commonality and typicality requirements of 23(a)(1) and (2) are satisfied.

Class counsel and the named plaintiffs will zealously and adequately represent the proposed class. Class counsel is experienced and capable, and the class representatives are ready, willing and able to advance the interests of the class they seek to represent. Therefore, the adequate representation requirement of 23(a)(4) is satisfied.

Finally, the Timberland Class may properly be certified under 23(b)(1) or (2) in view of the injunctive relief requested and the damages flowing directly therefrom or, alternatively, under 23(b)(3). Under 23(b)(3), the classwide issues clearly predominate over the individualized issues such as calculation of individual damage amounts. The judicial efficiency associated with classwide litigation of these claims makes it superior to individual litigation of these claims. Therefore, certification is proper under several of the 23(b) classes.

WHEREFORE, Plaintiffs ask the Court to certify the Timberland Class as defined above, and to enter an appropriate scheduling order requiring notice (if certification granted under 23(b)(3)) to the plaintiff class on such schedule as the Court may deem appropriate and setting appropriate times for remaining discovery and a prompt trial. Plaintiffs will separately move the Court for injunctive relief consistent with their claims as described herein.

Respectfully submitted,

/s/ Edward L. White /s/

Edward L. White, OBA #16549
Martin S. High, OBA #20725
EDWARD L. WHITE, P.C.
13924-B Quail Pointe Drive
Oklahoma City, Oklahoma 73134
Telephone: (405) 810-8188
Facsimile: (405) 608-0971
Email: ed@edwhitelaw.com

ATTORNEY FOR PLAINTIFF

Certificate of Service

I hereby certify that on May 7, 2008, I electronically transmitted this document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

James M Peters – jpeters@MonnetHayes.com
Christopher J Perry – cperry@monnethayes.com
Michael S Peters – mpeters@monnethayes.com, mspajp@aol.com
Monnet, Hayes, Bullis
1719 First National Center West
120 North Robinson Avenue
Oklahoma City, Oklahoma 73102
Attorneys for the Defendant

/s/ Edward L. White /s/

Edward L. White