UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HENRY SEELIGSON, JOHN M. SEELIGSON, SUZANNE SEELIGSON NASH, and SHERRI PILCHER, Individually And On Behalf Of All Others Similarly Situated, *Plaintiffs*, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., *Defendant*.	Case No. 3:16-cv-00082-K

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Henry Seeligson, John M. Seeligson, Suzanne Seeligson Nash, and Sherri Pilcher (collectively, the "Named Plaintiffs" or "Plaintiffs"), on behalf of themselves and the Court-certified Class, hereby respectfully move this Court for final approval of the proposed settlement of the above-captioned class action (the "Action") for $28,000,000 in cash (the "Settlement"), and for approval of the proposed plan for allocating the net proceeds of the Settlement to Class Members (the "Plan of Allocation" or "Plan").[1]

PRELIMINARY STATEMENT

Subject to the Court's final approval, Plaintiffs have agreed to settle all claims in the Action in exchange for a cash payment of $28 million for the benefit of the Certified Class.[2] Plaintiffs respectfully submit that the proposed Settlement represents a substantial and favorable recovery for the Certified Class and readily satisfies the standards for final approval under Rule 23(e)(2).

The proposed Settlement is the culmination of six years of hard-fought litigation between the Parties. As detailed in the accompanying Meltzer Declaration, the litigation efforts in this case were extensive and included, among other things: (i) a thorough investigation of the claims against

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[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated December 30, 2020, (the "Settlement Agreement"), attached as Ex. A [App. 1-40] to the Appendix to (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Named Plaintiffs (the "Appendix"), or in the Declaration of Joseph H. Meltzer in Support of: (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Named Plaintiffs (the "Meltzer Declaration" or "Meltzer Decl."), filed herewith. Citations to "¶ __" refer to paragraphs in the Meltzer Declaration and citations to "Ex. __" refer to exhibits to the Appendix. Unless otherwise noted, all internal citations and quotations have been omitted and emphases have been added.

[2] The Settlement Amount has been deposited into the Escrow Account and is earning interest.

Defendant; (ii) briefing on a motion to dismiss and motions for class certification; (iii) several rounds of briefing before the Fifth Circuit Court of Appeals ("Fifth Circuit"); (iv) an evidentiary hearing on the motion for class certification; (v) extensive fact and expert discovery, including depositions of DEPCO employees and two of the Named Plaintiffs, analysis of over 125,010 pages of documents produced by Defendant and third-party affiliates, and consultation with various experts; and (vi) arm's-length negotiations between the Parties under the supervision of former United States District Chief Judge David Folsom, a highly experienced mediator. ¶¶ 3-4, 9-14, 28-29. This substantial work gave Plaintiffs and Class Counsel a thorough understanding of the strengths and weaknesses of the claims and defenses asserted in the Action.

Given this understanding, Plaintiffs and Class Counsel believe that the $28 million Settlement is an excellent result for the Class in light of the risks of continued litigation and the potential for obtaining a smaller recovery for the Class—*or no recovery at all*—after continued litigation. While Plaintiffs believe that they would have ultimately succeeded at trial, there were still several hurdles to clear before reaching trial. Had the Parties not settled, Defendant would have filed a motion for summary judgment or other dispositive motion. Defendant also would have likely filed *Daubert* motions challenging Plaintiffs' experts and the admission of their testimony at trial. An adverse ruling for Plaintiffs at summary judgment or the preclusion of one or more of their experts would have changed the landscape of this Action altogether. ¶¶ 15, 61-63. DEPCO would have continued to vigorously deny liability and resist paying damages to Plaintiffs and the Class through trial and post-trial appeals. In addition, due to the length of the litigation, Plaintiffs also recognize that establishing DEPCO's liability at trial could have been undermined by the unavailability or fading memories of witnesses. ¶¶ 60-61.

The Settlement avoids these risks, and others, and achieves a substantial recovery for the Class—notably, close to 50% of the Class's alleged damages and likely verdict amount (i.e., approximately $58.6 million) based on estimates provided to Plaintiffs by their damages experts. ¶ 5. Moreover, the Settlement has the full support of Plaintiffs, and the reaction of the Class to date has been positive. *See* Exs. H-K ("Pls.' Decs.") [App. 296-319]; ¶ 71. While the May 11, 2021 deadline to object has not yet passed, to date, not a single objection to the Settlement has been received. ¶ 71.

In addition to requesting final approval of the Settlement, Plaintiffs request that the Court approve the Plan of Allocation, which was filed with Plaintiffs' preliminary approval papers (ECF No. 249) and is posted on the Settlement Website, www.SeeligsonSettlement.com, for Class Members to view. ¶ 70. The Plan, which was developed by Class Counsel in consultation with Plaintiffs' damages experts, provides a reasonable method for allocating the Net Settlement Fund among Class Members based on the damages they incurred from the reduction in royalty payments made by DEPCO in violation of Plaintiffs' and Class Members' leases and the implied duty of market under Texas law. ¶ 74; *see also* Fed. R. Civ. P. 23(e)(2)(D).

As detailed further below and in the Meltzer Declaration, Plaintiffs and Class Counsel respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate and warrant final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR FINAL APPROVAL UNDER RULE 23(e)

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Fifth

Circuit has recognized a strong public policy in favor of pretrial settlements of class action lawsuits. *See In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (noting a public interest favoring class action settlements).

Rule 23(e)(2) provides that, in determining whether a class action settlement is fair, reasonable, and adequate, the Court should consider 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.

Fed. R. Civ. P. 23(e)(2).

Consistent with Rule 23(e)(2)'s guidance, the Fifth Circuit has identified similar factors for courts to consider in deciding whether to approve a class action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); *see also Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (applying *Reed* factors to proposed settlement of class action); *Izzio v. Century Golf Partners Mgmt., L.P.*, 2019 WL 10589568, at *6 (N.D. Tex. Feb. 13, 2019).[3]

[3] The factors set forth in Rule 23(e)(2), which were added by amendment effective December 1, 2018, are not intended to "displace any factor" traditionally used by the Courts of Appeal to assess final settlement approval, but rather to focus on core concerns to guide the approval decision. *See* Fed. R. Civ. P. 23, advisory committee's notes to 2018 amendment. The factors in amended Rule 23(e)(2) are entirely consistent with the factors used by the Fifth Circuit to assess final settlement approval and each are addressed in the sections below.

At the preliminary approval stage, this Court considered the Rule 23(e)(2) factors in assessing the Settlement, and found it to be fair, reasonable, and adequate, subject to further evaluation at the Fairness Hearing. Order Prelim. Approving Settlement and Providing for Notice ¶ 1, ECF No. 251. Nothing has changed to alter the Court's previous analysis, and the factors supporting the Court's determination to preliminarily approve the Settlement apply equally now. Accordingly, the Settlement is fair, reasonable, and adequate and warrants final approval under the Rule 23(e)(2) factors and Fifth Circuit law.

A. Plaintiffs and Class Counsel Have Adequately Represented the Certified Class

In determining whether to approve a class action settlement, the Court should consider whether Plaintiffs and Class Counsel "have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). By certifying the Class in February 2020, the Court found Plaintiffs and Class Counsel to be adequate representatives for the Class. *See* Mem. Op. and Order, ECF No. 220. Plaintiffs vigorously litigated this Action on behalf of the Certified Class for six years. Before the Class was certified, Plaintiffs had investigated the facts and claims at issue. Plaintiffs produced documents in response to Defendant's document requests, responded to written discovery, consulted with Class Counsel on litigation strategy, case developments, mediation, and the Settlement, and two of the Plaintiffs appeared for depositions. Pls.' Decs., Exs. H-K [App. 296-319]. In addition, Plaintiffs have claims that are typical of other Class Members and have no conflict of interests with other members of the Class. Accordingly, Plaintiffs have adequately represented the Class in litigating the claims in this Action and in reaching the Settlement.

Class Counsel likewise have adequately represented the Class throughout the litigation. As detailed in the Meltzer Declaration, Class Counsel have actively litigated this Action through motion to dismiss briefing, a highly-contested and protracted class certification process, and

extensive fact and expert discovery, resulting in a comprehensive understanding of the strengths and weaknesses of the case, the risks, costs, and delays of trial, and the obstacles to obtaining a greater recovery from Defendant. With insights gleaned from these efforts as well as mediation with Judge Folsom, Class Counsel recommended that Plaintiffs resolve the Action through the Settlement. This factor clearly supports approval of the Settlement.

B. The Settlement Was Negotiated at Arm's-Length and There Was No Fraud or Collusion

Rule 23(e)(2)(B) and the first *Reed* factor also support final approval because the Settlement was negotiated after substantial discovery and there is no evidence of fraud or collusion. To the contrary, the Settlement was reached only after extensive arm's-length negotiations by experienced counsel with the assistance of Judge Folsom, an experienced and well-respected mediator. ¶¶ 3, 81. The Parties engaged in a formal videoconference mediation session with Judge Folsom in October 2020, which included the exchange of detailed mediation statements. ¶ 55. Following the mediation, the Parties reached an agreement in principle to resolve this matter in its entirety and on a class-wide basis for a Settlement Amount of $28 million.

The Parties' hard-fought, arm's-length negotiations and the involvement of an experienced mediator demonstrate that the Settlement is procedurally fair and is not the product of fraud or collusion. *See, e.g.*, *Klein v. O'Neal*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010) (finding "that the proposed settlement is not the product of fraud or collusion" and granting final approval of the settlement); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063-65 (S.D. Tex. 2012) (approving settlement where parties engaged in arm's-length negotiations with the benefit of discovery to gauge the strengths and weaknesses of the case); *Billitteri v. Sec. Am., Inc.*, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) (finding no fraud

or collusion in settlement reached through counsel's diligent arm's-length negotiations before a neutral mediator). Thus, this factor powerfully supports final approval.

C. The Settlement Is Fair and Adequate in Light of the Costs and Delay of Further Litigation

Rule 23(e)(2)(C)(i) and the second *Reed* factor further support final approval of the Settlement. Continued litigation of the Action would involve complex and costly pre-trial, trial, and post-trial proceedings that would delay the ultimate resolution of the claims without any guarantee of recovery for the Class. "When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Klein*, 705 F. Supp. 2d at 651; *see also Heartland*, 851 F. Supp. 2d at 1064 (approving settlement and noting that litigating case to trial would be "time consuming, and '[i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years.'") (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009)).

Continuing to litigate this Action would have required substantial time and expense, in the face of serious risks and with no guarantee of success. In the absence of the Settlement, this would have included the completion of discovery, surviving Defendant's anticipated motion for summary judgment and *Daubert* challenges, and then achieving a litigated verdict at trial, which would have required substantial fact and expert testimony. Even if Plaintiffs and Class Counsel overcame Defendant's arguments contesting liability, Defendant still had significant arguments on damages. ¶¶ 61-63. While Class Counsel were prepared to rebut those arguments, it is clear that achieving a litigated verdict would have required a substantial investment of time and resources (in addition to the considerable time and resources already expended over this Action's six-year pendency), and carried significant risk of a materially lower recovery—or none at all.

Moreover, if Plaintiffs did succeed at trial, it is virtually certain that Defendant would appeal, further delaying the receipt of any recovery by the Class. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 291 (W.D. Tex. 2007) (granting final approval of the settlement and considering possible risks, including "the likelihood of appeals and subsequent proceedings if this case proceeds on the litigation track."); *In re OCA, Inc. Sec. & Derivative Litig.*, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) ("After trial, the parties could still expect years of appeals."); *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *19 (N.D. Tex. Nov. 8, 2008) (noting that even "if Plaintiffs were to succeed at trial, they still could expect a vigorous appeal by Defendants and an accompanying delay in the receipt of any relief"). Further, there is always a risk that a verdict could be reversed by the trial court or on appeal. *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict in favor of plaintiffs and granting judgment for defendants as a matter of law), *aff'd*, 688 F. 3d 713 (11th Cir. 2012). All of the foregoing would pose substantial expense for the Class and delay the ability to recover damages—assuming, of course, that Plaintiffs were ultimately successful on their claims.

In contrast, the Settlement provides an immediate, substantial, and certain cash recovery of $28 million, without exposing Plaintiffs and the Class to the risk, expense, and delay of continued litigation. Further, the Settlement Amount represents approximately 50% of the damages Plaintiffs would have requested had the Action continued to trial. ¶ 5. Accordingly, this factor supports final approval of the Settlement.

D. The Stage of the Proceedings Warrants Final Approval of the Settlement

The third *Reed* factor also weighs in favor of final approval of the Settlement. The Settlement was reached after the Parties engaged in extensive and comprehensive litigation efforts over the course of six years. This included a detailed investigation by Class Counsel, thorough briefing on Defendant's motion to dismiss, full briefing on Plaintiffs' motions for class

certification, extensive fact and expert discovery into the claims and defenses at issue in the Action, and multiple rounds of briefing before the Fifth Circuit. ¶¶ 3, 81. As noted above, Plaintiffs' discovery efforts included, among other things: (i) the review and analysis of more than 125,010 pages of documents produced by Defendant and third parties; (ii) participation in 13 depositions of key fact witnesses, including two of the Named Plaintiffs; and (iii) consultation with experts in the oil and natural gas industry and damages. ¶¶ 3, 10-11, 28-29.

As previously noted, the Parties also engaged in hard-fought, arm's-length settlement negotiations conducted under the supervision of Judge Folsom. ¶¶ 3, 81. Accordingly, Plaintiffs and Class Counsel had "a full understanding of the legal and factual issues surrounding this case," including the strengths and weaknesses, when negotiating and evaluating the proposed Settlement. *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996); *see also Heartland*, 851 F. Supp. 2d at 1064 ("Under [this] factor, the key issue is whether 'the parties and the district court possess ample information with which to evaluate the merits of the competing positions'") (quoting *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004)). Based on the information developed, Plaintiffs and Class Counsel were able to make an informed appraisal of the case, and they believe that the Settlement represents a resolution that is highly favorable to the Class without the substantial risk, uncertainty, and delay of continued litigation. Thus, this factor further supports approval of the Settlement.

E. The Settlement Is Fair and Reasonable in Light of the Risks of Further Litigation

Rule 23(e)(2)(C)(i) and the fourth *Reed* factor further support final approval of the Settlement. Plaintiffs recognize that, although they believed that substantial evidence supported their claims, there were also substantial risks in establishing Defendant's liability and damages at summary judgment, trial and any appellate proceedings. Weighing these risks against the certain

and substantial recovery for the Class demonstrates that the Settlement is fair, reasonable, and adequate. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 849 (E.D. La. 2007) (finding "settlement was preferable to litigation" where "legal and factual obstacles presented a considerable threat to the Plaintiffs' success on the merits"); *Schwartz*, 2005 WL 3148350, at *18 (plaintiffs' "uncertain prospects of success through continued litigation" supported approval of settlement).

Had the Action continued, Plaintiffs would have faced a number of risks in proving Defendant's liability and establishing damages. *See* ¶¶ 59-63. Plaintiffs also faced additional risk due to Defendant's pending counterclaim. ¶¶ 64-65. While Plaintiffs had largely prevailed at the initial motion to dismiss stage and obtained certification of the Class, they still faced substantial risks that the Court would grant Defendant's forthcoming motion for summary judgment, or that Defendant might prevail at trial or on appeal.

Having considered the risks of continued litigation, and based on all proceedings and discovery performed in the Action, it is the informed judgment of Plaintiffs and Class Counsel that the proposed Settlement is fair, reasonable, and adequate, and in the best interest of the Class. This factor supports the Settlement.

F. The Settlement Is Well Within the Range of Reasonableness

Rule 23(e)(2)(C) requires the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal" and the fifth *Reed* factor considers "whether the terms of the settlement 'fall within *a reasonable range of recovery*, given the likelihood of the plaintiffs' success on the merits.'" *Billitteri*, 2011 WL 3586217, at *12 (quoting *Klein*, 705 F.Supp.2d at 656) (emphasis in original). In assessing the reasonableness of a proposed settlement under both these analyses, the inquiry "should contrast settlement rewards with likely rewards if [the] case goes to trial." *In re Chicken Antitrust Litig.*

Am. Poultry, 669 F.2d 228, 239 (5th Cir. 1982); *see also Erica P. John Fund v. Halliburton Co.*, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2108) ("In ascertaining whether a settlement falls 'within the range of possible approval,' courts will compare the settlement amount to the relief the class could expect to recover at trial, i.e., the strength of the plaintiff's case.").

Here, the Settlement is well within the range of reasonableness. Under any measure, $28 million in cash is a substantial recovery, and is especially so here when considering the percentage of alleged damages the Settlement represents when weighed against the risks of continued litigation and the possibility that the Class might have recovered substantially less or nothing at all after continued litigation. Indeed, Plaintiffs' damages expert has estimated the Class's alleged damages and likely verdict amount to be approximately $58.6 million. ¶ 5. Using this theoretical number, the Settlement represents approximately 50% of the Class's conceivable maximum damages. *Id*. This is a significant recovery.[4] Therefore, this factor supports final approval.

G. Class Counsel, Plaintiffs, and Class Members Support Final Approval of the Settlement

Class Counsel, Plaintiffs, and Class Members all support final approval of the Settlement, thereby satisfying the sixth *Reed* factor. *See Marcus v. J.C. Penney Co.*, 2017 WL 6590976, at *3 (E.D. Tex. Dec. 18, 2017) ("Significant weight is given to the opinion of class counsel concerning whether the settlement is in the best interest of the class and the court is not to substitute its own judgment for that of counsel."), *R. & R. adopted*, 2018 WL 307024 (E.D. Tex. Jan. 4, 2018); *Schwartz*, 2005 WL 3148350, at *21 ("[W]here the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action

[4] *See, e.g.*, *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 103 (D.D.C. 2013) (settlement approximating "4-8% of the 'best case scenario' potential recovery" deemed reasonable).

litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of [the] case.'").

Class Counsel have conducted a thorough fact-finding investigation into the claims against Defendant and, after six years of intense litigation and hard-fought settlement negotiations, have a firm understanding of the strengths and risks attendant to these claims. Based on this understanding, as well as Class Counsel's substantial experience litigating these types of complex class actions, Class Counsel have concluded that the Settlement is fair, reasonable, and adequate. Likewise, Plaintiffs have been actively involved in the Action since its inception, reviewed important pleadings and filings, and were kept apprised of the mediation and settlement negotiations with Defendant. All of the Plaintiffs endorse the Settlement. Pls.' Decs., Exs. H-K [App. 296-319].

Additionally, the positive response of Class Members to date further supports final approval of the Settlement. The Court-authorized Settlement Administrator, Heffler Claims Group, now Kroll Settlement Administration ("Kroll"), mailed 7,836 copies of the Summary Notice to potential Class Members on February 10, 2021, and has published the same in the *Denton Record*, the *Fort Worth Star*, the *Dallas Morning News*, and the *Wise County Messenger*. *See* Declaration of James Prutsman ("Kroll Decl."), attached to the Appendix as Exhibit B, at ¶¶ 10-11 [App. 191-192]. The Summary Notice, along with the long form Notice posted on the Settlement Website, describe the essential terms of the Settlement, and inform Class Members of their right to opt-out of the Class or object to any aspect of the Settlement. As set forth in the notices, the deadline for Class Members to opt-out of the Class was March 29, 2021, and the deadline to submit an objections is May 11, 2021. There have been no requests to opt out of the Class and, while the deadline for objecting has not yet passed, to date, there have been no

objections to the Settlement. ¶ 71; Kroll Decl. ¶ 14 [App. 192].[5] This factor, along with all of the other *Reed* factors addressed above, supports a finding that the Settlement is fair, reasonable, and adequate.

H. The Other Rule 23(e)(2) Factors Support Final Approval of the Settlement

Rule 23(e)(2) also considers (i) the effectiveness of the proposed method of distributing relief to the class; (ii) the terms of any proposed award of attorneys' fees; (iii) any agreements made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (iii), and (iv); Fed. R. Civ. P. 23(e)(2)(D).

1. The Proposed Method of Distributing Settlement Proceeds Is Effective

The proposed method of distribution here ensures equitable treatment of Class Members. *See* Rule 23(e)(2)(C)(ii), (e)(2)(D). The proceeds of the Settlement will be distributed to Class Members based on their losses incurred from the reduction in royalty payments made by DEPCO in violation of Plaintiffs' and Class Members' leases and the implied duty of market under Texas law. ¶ 74. To this end, the allocation method set forth in the Plan relies on owner-side check stub data provided by DEPCO, including owner gross values paid and/or suspended for production months January 2008 through February 2014. *Id.* Apportioning the Net Settlement Fund among Class Members based on the historical royalty payments is consistent with the effect among Plaintiffs and Class Members of the artificial price reduction of royalties over the course of the Class Period that was allegedly caused by Defendant's misconduct.

[5] Under the schedule set by the Court, Plaintiffs will file reply papers in further support of final approval on June 8, 2021, addressing any objections that may be received after this submission.

2. The Requested Fees and Expenses Are Fair and Reasonable

The relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees and expenses, including the timing of any such Court-approved payments. *See* Rule 23(e)(2)(C)(iii). As shown in the accompanying Fee Memorandum, the requested attorneys' fees in the amount of one-third of the Settlement Fund ($9,333,332) is consistent with attorneys' fees awarded in comparable complex class actions and is reasonable in light of the extensive efforts of Plaintiffs' Counsel and the substantial risks in the Action. *See Erica P. John Fund, Inc.*, 2018 WL 1942227, at *9 ("[O]ne-third of the fund . . . is within the range of percentage fees awarded in the Fifth Circuit in other complex cases."). Class Counsel also request reimbursement or payment of Litigation Expenses that were necessarily incurred by Plaintiffs' Counsel over the course of the Action in the amount of $614,210.75, as well as Services Awards to Plaintiffs in the aggregate amount of $80,000. Both the one-third fee and expense request are authorized by and made pursuant to agreements between Class Counsel and Plaintiffs entered into at the outset of the Action. ¶ 79.

Pursuant to the terms of the Stipulation, and as is standard in complex class actions, attorneys' fees and expenses will be paid within thirty (30) calendar days upon the Court's granting of final approval of the Settlement, and shall be reimbursed to the Settlement Fund if the award is reduced or reversed in any subsequent legal proceedings. *See* Stip., ¶ 13. Most importantly with respect to the Court's consideration of the fairness of the Settlement, is the fact that approval of attorneys' fees and expenses is entirely separate from approval of the Settlement, and neither Plaintiffs nor Plaintiffs' Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to the ultimate award of fees or expenses. *See id.*

3. The Supplemental Agreement Does Not Affect the Fairness of the Settlement

Rule 23(e)(2)(C)(iv) asks the Court to consider any additional agreements made by the Parties in connection with the Settlement. Here, the only such agreement, besides the initial Term Sheet that was superseded by the Stipulation, is the Parties' confidential Supplemental Agreement that sets forth the conditions under which DEPCO is able to terminate the Settlement if the number of Class Members who request exclusion from the Class reaches a certain threshold (the "Termination Threshold"). That type of agreement is a standard provision in complex class actions and is routinely maintained as confidential to avoid allowing potential opt-outs to use this provision as leverage. The agreement has no negative impact on the fairness of the Settlement. *See, e.g.*, *Erica P. John Fund, Inc.*, 2018 WL 1942227, at *5 (granting final approval of settlement that included a similar agreement). As noted above, no Class Member has requested exclusion from the Class.

4. The Settlement Treats Class Members Equitably

Finally, the proposed Settlement treats members of the Class equitably relative to one another. There is no preferential treatment for any members of the Class. Plaintiffs will receive recoveries based on the same formula under the Plan of Allocation (other than the Service Awards that may be awarded by the Court for Plaintiffs' efforts in representing the Class in the Action). As discussed immediately below, the Net Settlement Fund will be distributed among Class Members in accordance with the Plan of Allocation, which provides a fair and equitable method of allocation.

II. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

The standard for approval of a plan of allocation of the settlement funds is the same as that for approving a settlement: whether it is "fair, adequate and reasonable and is not the product of

collusion between the parties." *Chicken Antitrust Litig.*, 669 F.2d at 238. A plan of allocation need not be perfect—to be fair, reasonable, and adequate, "[t]he allocation formula 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'" *In re Dell, Inc.*, 2010 WL 2371834, at *10 (W.D. Tex. June 11, 2010).

Here, the proposed Plan of Allocation was developed by Class Counsel in consultation with Plaintiffs' damages experts. ¶¶ 56, 74. *See Schwartz*, 2005 WL 3148350, at *8 (approving plan of allocation "formulated by Lead Counsel with assistance from its materiality and damages experts"). The Plan takes into account the economic losses Class Members suffered as a result of Defendant's alleged violations of Plaintiffs' and Class Members' leases and the implied duty of market under Texas law. ¶ 76.

Under the Plan of Allocation, the Net Settlement will be allocated to Class Members using a four-step process. *First*, there will be an allocation to the wells—i.e., the Net Settlement Fund will be proportionately allocated to each well by the ratio of (1) the sum of the Class Members' gross value for each well for production months from January 2008 through February 2014, divided by (2) the sum of the total Class Members' gross value for all wells for production months from January 2008 through February 2014. *Second*, there will be an allocation to the Class Members in each well—i.e., each well's allocated amount will be allocated among the Class Members that held an interest in the respective well's last production month within the Class Period. *Third*, Class Members' allocated amounts will be aggregated and those Class Members with an allocation less than a pre-tax amount of $5.00 will not receive a check. Those amounts will be ratably re-allocated across the remaining Class Members. *Finally*, any amounts allocated to Class Members who have requested exclusion from the Class will be returned to Defendants. ¶ 75.

Thus, the Plan of Allocation fairly accounts for each Class Members' artificial price reduction of royalties over the course of the Class Period that was allegedly caused by DEPCO's misconduct. *See Slipchenko v. Brunel Energy, Inc.*, 2015 WL 338358, at *12 (N.D. Tex. Jan. 23, 2015) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable.") (quoting *Schwartz*, 2005 WL 3148350, at *23); *In re Waste Mgmt., Inc. Sec. Litig.*, 2002 WL 35644013, at *20 (S.D. Tex. May 10, 2002) (approving plan of allocation in which "Class Members will receive relief based on the size and strength of their claims"), *amended*, 2003 WL 27380802 (S.D. Tex. July 31, 2003).

Accordingly, Class Counsel believe that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as result of the alleged misconduct. ¶ 76. Moreover, to date, no objections to the proposed Plan of Allocation have been received. ¶ 77.

III. NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

Notice to the Class satisfied the requirements of Rule 23, which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable"—i.e., it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Maher v. Zapata Corp.*, 714 F. 2d 436, 451 (5th Cir. 1983).

Both the substance of the notice and the method of its dissemination to members of the Class satisfied these standards. Together, the Court-approved notices include all of the information required by Federal Rule of Civil Procedure 23(c)(2)(B) as well as other relevant information including: (i) the nature of the Action and the claims asserted; (ii) the Class definition; (iii) the amount of the Settlement; (iv) the reasons why the Parties are proposing the Settlement; (v) that a

Class Member may enter an appearance through an attorney if the Class Member so desires; (vi) a description of Class Members' right to request exclusion from the Class or to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; (vii) the maximum amount of attorneys' fees requested; and (viii) notice of the binding effect of a judgment on Class Members under Rule 23(c)(3).

In accordance with the Court's Preliminary Approval Order, Kroll began mailing copies of the Summary Notice to Class Members on February 10, 2021. *See* Kroll Decl. ¶¶ 10, 12 [App. 191-192]. As of April 23, 2021, Kroll has disseminated 7,836 copies of the Summary Notice to potential Class Members. *See id*. ¶ 10 [App. 191]. In addition, Kroll caused the Summary Notice to be published in Dallas, Fort Worth, Denton, and Wise County local newspapers. *See id*. ¶ 11 [App. 192]. Kroll also maintains, and updates as required, a website, e-mail address, and toll-free telephone number dedicated to the Settlement. *See id*. ¶¶ 7-9 [App. 191]. This combination of individual mailed notice to all Class Members who could be identified with reasonable effort, supplemented by notice in appropriate publications was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Schwartz*, 2005 WL 3148350, at *10.

CONCLUSION

Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate.

Dated: April 27, 2021

Respectfully submitted,

/s/ Joshua L. Hedrick

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CERTIFICATE OF SERVICE

On April 27, 2021, I caused to be electronically submitted the foregoing document with the clerk of court for the U.S. District court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Joshua L. Hedrick
Joshua L. Hedrick