

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
- CHARLESTON DIVISION-

GARY P. JONES and SHIRLEY J. JONES,
individually, and H. DOTSON CATHER,
Trustee of Diana Goff Cather Trusts, and
MCDOWELL POCAHONTAS COAL
COMPANY, INC., a Virginia corporation,

Plaintiffs,

v.

Civil Action No. 2:06-cv-00671
(Judge Joseph R. Goodwin)

DOMINION TRANSMISSION, INC.,
a Delaware corporation, DOMINION
EXPLORATION & PRODUCTION, INC.,
a Delaware corporation, and DOMINION
APPALACHIAN DEVELOPMENT, LLC,
a Virginia corporation,

Defendants.

**MEMORANDUM IN SUPPORT OF JOINT MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

I. INTRODUCTION

Plaintiffs Gary P. Jones, Shirley J. Jones, H. Dotson Cather and McDowell Pocahontas Coal Company, Inc., by counsel, and Defendants Dominion Transmission, Inc. (“DTI”), Dominion Exploration & Production, Inc. (“DEPI”) and Dominion Appalachian Development, LLC (“DADI”) (collectively, “Dominion”), by counsel, submit this memorandum in support of their joint motion for a Final Order and Judgment exercising personal jurisdiction over the Class Members, certifying a settlement Class consisting of One-Eighth and Flat Rate Subclasses, overruling the objections to the settlement, finding that the settlement is fair, reasonable, adequate and not the produce of collusion and granting final approval of the settlement pursuant to Federal Rule of Civil Procedure 23(e). The Parties further request that the order grant

exclusion from the settlement to the Class Members that have requested exclusion listed in “Exhibit A” to the motion, establish a Bar Date forty-five days following mailing of the Benefit Notices and Claim Forms and otherwise conform to the terms and conditions of the Amended Settlement Agreement (the “Agreement”).

Pursuant to the terms of the Agreement, in the Final Judgment and Order the Court should dismiss the Action with prejudice and with costs to be awarded solely as provided in the Agreement, except that (a) the claims of the Opt-Out Class Members listed in “Exhibit A” to the motion should be dismissed without prejudice; and (b) the Court should retain jurisdiction to the extent necessary to administer and enforce the Agreement; the Court should bar and enjoin all Subclass Members from asserting Royalty Claims against any Released Party, with the exception that Opt-Out Class Members’ claims should not be barred and enjoined; the Court should hold that the Subclass Members’ Royalty Claims are released through the date of the Final Order and Judgment, with the exception that Opt-Out Class Members’ Royalty Claims should not be released; the Court should declare, adjudge, and decree that the Agreement provides the exclusive remedy for Subclass Members (and any successors-in-interest) with respect to any and all Royalty Claims against the Released Parties, including but not limited to the Dominion Defendants, that were or could have been brought in this action; the Court should further declare, adjudge, and decree that any Opt-Out Class Member may bring a separate suit; the Court should certify under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay and therefore expressly direct the entry of a final judgment as to the claims of Subclass Members, except with respect to the Royalty Claims of Opt-Out Class Members; and the Court should reserve its continuing and exclusive jurisdiction over the Parties and Class Members to

administer, supervise, construe, and enforce the Agreement in accordance with its terms for the mutual benefit of the Parties and Subclass Members.

In support of their motion, the parties submit that in accordance with the preliminary approval order entered on July 16, 2008, they have satisfied due process and provided reasonable notice and the best notice practicable under the circumstances of this case to Class Members. Class Members have been afforded an opportunity to request exclusion or to file written objections and to appear at the final fairness hearing in person or through counsel. In addition, Dominion has provided adequate notice of the settlement to appropriate State and Federal Officials under the Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1715.

As evidence that the class action settlement is fair, reasonable, adequate and not the product of collusion, requests for exclusion and objections are minimal. There are only thirty-two requests for exclusion, and only three Class Members filed objections to the settlement. The parties filed timely responses to those objections.

Upon due consideration of the Joint Motion for Final Approval of Class Action Settlement and the entire record, the Court should grant the motion and enter a Final Order and Judgment that exercises jurisdiction over the Class Members, certifies a settlement Class, overrules the objections and finds that the settlement is fair, reasonable, adequate and not the product of collusion under Rule 23(e). The Final Order and Judgment should conform to the terms of the Agreement and bind Class Members who have not requested exclusion. In addition, the Final Order and Judgment should grant exclusion to all those Class Members who have filed requests for exclusion that have not been withdrawn. Finally, the Final Order and Judgment should set a Bar Date forty-five days following mailing of the Benefit Notices and Claim Forms.

II. STATEMENT OF THE CASE

Plaintiffs commenced this civil action by filing their Complaint in the Circuit Court of Roane County, West Virginia, on or about June 22, 2006. Thereafter, on or about August 22, 2006, an Amended Complaint was filed, which added McDowell Pocahontas Coal Company, Inc. as a Plaintiff. The action was filed as a putative class action involving the payment of royalties on oil and gas leases. The Amended Complaint contains claims alleging breach of contract (Count I), breach of fiduciary duty (Count II), fraud (Count III) and violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-101, *et seq.* (Count IV). The Amended Complaint also states a claim for compensatory and punitive damages (Count V), as well as attorneys' fees and interest. In essence, Plaintiffs claim that the Dominion Defendants breached lease agreements by improperly paying flat rate royalties, or deducting post-production expenses from royalty payments.

The Dominion Defendants timely removed this action to federal court on August 29, 2006, on several bases, including, but not limited to, diversity jurisdiction under CAFA, 28 U.S.C. § 1332(d), and federal question jurisdiction, 28 U.S.C. § 1331. The Dominion Defendants filed an answer to the Amended Complaint on August 30, 2006.

III. SUMMARY OF THE SETTLEMENT

The parties engaged in settlement negotiations, including numerous formal mediation sessions with mediator David Hendrickson, beginning in June 2007. In discovery and as a part of these settlement negotiations, the Dominion Defendants produced over 118,000 pages of documents, and numerous pages of spreadsheet data relating to leases and royalties. Additionally, Plaintiffs' counsel took several depositions pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs also retained experts to assist them in reviewing information, analyzing data and making damages calculations.

After extensive settlement negotiations, the parties entered into a Settlement Agreement dated April 30, 2008, followed by an Amended Settlement Agreement dated July 14, 2008, and a clarifying Stipulation and Order entered into on September 17, 2008, to settle the Royalty Claims of Plaintiffs and the Class Members. Those Royalty Claims include the claims asserted in this Action, specifically claims for improper royalty payments, improper deductions, improper measurement, improper accounting for natural gas liquids, improper sales prices, and damages for breach of lease agreements, breach of fiduciary duty, fraud, violation of the West Virginia Consumer Credit and Protection Act (W. Va. Code § 46A-6-101, *et seq.*), violation of the West Virginia Flat Rate Royalty Statute (W. Va. Code § 22-6-8) and punitive damages, for failure to pay proper royalty. The Agreement establishes the calculation of Settlement Payments based upon the type of Lease the Class Members have with Dominion (Flat Rate or One-Eighth). Class Members with One-Eighth Leases are entitled to additional consideration if they enter into a Lease Modification.

After analyzing the facts and law applicable to the Royalty Claims herein, and taking into account the burdens, risks, uncertainties and expense of litigation, as well as the fair cost-effective and assured method of resolving the Royalty Claims of the Plaintiffs and the Class Members under the Agreement, the Class Counsel and Class Representatives have concluded that the Agreement is fair, reasonable, adequate and in the best interests of the Class. The Dominion Defendants have similarly concluded that the Agreement is desirable in order to reduce the time, risk, expense and uncertainties of litigation and to resolve finally and completely the Royalty Claims of the Class.

A. Settlement Payments; Settlement Fund

Flat Rate Subclass Members are eligible to receive a Settlement Payment based upon their share of an amount equal to 50% of the difference between a royalty based upon one-eighth

of the DTI Monthly Index Price for monthly volumes and the actual monthly royalty payment during the period of June 1999 through May 2006, plus 9% simple annual interest, and less Court-approved Fee Awards. The Settlement Payment due each Flat Rate Subclass Member is calculated first by determining the Aggregate Monthly Difference for each Flat Rate Well on his or her lease and then determining the Net Owner's Total.¹

One-Eighth Subclass Members who currently own a One-Eighth Lease who elect Settlement Option A, which requires them to agree to a Lease Modification, are eligible to receive a Settlement Payment based upon their share of an amount equal to 155% of the difference between a royalty based upon one-eighth of the DTI Monthly Index Price and the rate on which royalties were paid for monthly volumes during the period of June 1996 through May 2006, plus 9% simple annual interest, and less Court-approved Fee Awards. One-Eighth Subclass Members who owned a One-Eighth Lease and those who currently own a One-Eighth Lease but who do not elect the Lease Modification are eligible under Settlement Option B to receive a Settlement Payment based upon their share of an amount equal to 120% of the difference between a royalty based upon one-eighth of the DTI Monthly Index Price and the rate on which royalties were paid for monthly volumes during the period of June 1996 through May 2006, plus 9% simple annual interest, and less Court-approved Fee Awards. The Settlement Payment due One-Eighth Subclass Members is calculated first by determining the Aggregate Monthly Difference for a well and then determining the Net Owner's Total.

Dominion represents in the Agreement that the estimate of the contribution to the Settlement Fund for the total One-Eighth Subclass is equal to \$38,713,093.00, in the event all

¹Calculation examples for the Settlement Payments for Flat Rate Subclass Members and One-Eighth Subclass Members are set forth in the Agreement.

One-Eighth Subclass Members were the owners for the entire Compensation Period and they each elect Settlement Option A. Dominion represents that the estimate of the contribution to the Settlement Fund for the total One-Eighth Subclass is equal to \$29,971,426.00, in the event all One-Eighth Subclass Members elect Settlement Option B. Dominion represents that the estimate of the contribution to the Settlement Fund for the total Flat Rate Subclass is equal to \$11,768,506.00, in the event all Flat Rate Subclass Members elect settlement. These estimates include amounts due to Dominion. As Dominion is excluded from the class definitions, the contributions will be lowered by these amounts. In addition, the contributions will be lowered by the amounts due to Class Members who have excluded themselves from this settlement. Plaintiff Class Representatives have verified the accuracy of these amounts and accept them for purposes of this settlement. Dominion's contribution to the Settlement Fund may be less than these amounts in the event not all Subclass Members elect settlement, but in no event shall the Dominion's obligations to make contributions to the Settlement Fund exceed these amounts, provided that interest accruing in the Settlement Fund may be used as necessary for payment of Settlement Payments.

B. Claims Administrator and Claims Process

By order entered on August 15, 2008, the Court appointed Arnett & Foster, P.L.L.C. ("A&F") as Claims Administrator and directed A&F to carry out the duties set forth in the Agreement. Pursuant to the Court's order, A&F is making monthly reports to the Court concerning matters involving the status of the Claims Administration.

Specifically with regard to the claims process, the Agreement provides that a Benefit Notice will be sent to each Participating Subclass Member within sixty days of the entry of the Final Order and Judgment. The Claims Administrator will also mail appropriate Claim Forms to each Subclass Member at the same time as the Benefit Notice, which will require the Subclass

Member to confirm or dispute information regarding the period during which the Subclass Member was the owner of a Covered Lease and other information relating to the proper amount of the Settlement Payment. Disputed Claims shall be determined by the Claims Administrator in accordance with the Claims Resolution Process set forth in the Agreement.

All Claim Forms provide a release of claims against Dominion. The Claim Forms further provide in the event of new legislation or a final, non-appealable order of the West Virginia Supreme Court of Appeals or the United States Supreme Court requiring payment of one-eighth royalties for Flat Rate Leases or voiding such Flat Rate Leases, the Flat Rate Subclass Members will not seek forfeiture of any Flat Rate Leases converted by Dominion to One-Eighth Leases prospectively from the date of such final decision.

In addition, the Claim Form for Current Lessors who are One-Eighth Subclass Members will permit an election of either Settlement Option A or Settlement Option B. Those Current Lessors of Covered Leases in the One-Eighth Subclass who elect Settlement Option A must sign a Lease Modification adding a royalty clause specified in the Agreement to their Covered Leases and pooling or unitization agreements.

Pursuant to the Agreement, Class Members will have forty-five days after the Claim Forms are mailed to return a completed Claim Form to the Claims Administrator, either confirming or disputing the content of the Claim Form. Accordingly, the parties request that the Court set a Bar Date in the Final Order and Judgment that is forty-five days following mailing of the Benefit Notices and Claim Forms. That date will be the final date by which a Class Member must have mailed a completed Claim Form to be eligible to receive Settlement Payments.

The costs of notice and Administration Expenses up to \$2.0 million will be paid by Dominion in accordance with the terms of the Agreement. Dominion shall be responsible for

additional costs incurred by the Claims Administrator for recording Lease Modifications which shall not be included as Administration Expenses counted toward the \$2.0 million threshold. If the Administration Expenses exceed \$2.0 million, then excess Administration Expenses shall be assessed as Costs of Litigation.

C. Fee Award and Incentive Payments

Class Counsel are in the process of filing an application for a Fee Award pursuant to Federal Rule of Civil Procedure 23(h) in an amount not to exceed 25% of the Gross Owner's Totals for Participating Subclass Members, plus Costs of Litigation. Dominion does not object to Class Counsel's application for this Fee Award. The Fee Award approved by the Court will be the only legal fees of Class Counsel payable in this Action. The Fee Award will be paid by the Claims Administrator from the Settlement Fund when approved by the Court. Class Counsel may apply for a phased payment of attorneys' fees with an initial payment after the Formal Fairness Hearing.

Class Counsel are also in the process of filing an application for reasonable incentive payments up to \$25,000.00 per Plaintiff Class Representative subject to Court Approval and taxed as Costs of Litigation. Dominion does not object to Class Counsel's application for these incentive payments.

The size of the Fee Award and any incentive awards shall not increase the Settlement Fund, as defined in the Agreement.

D. Escrow Agent and Establishment of Escrow Fund

In accordance with the terms of the Agreement, a bank account has been established for the Settlement Fund at a federally chartered financial institution. By order entered on December 17, 2008, the Court has appointed Branch Banking and Trust Company as the Escrow Agent for the Escrow Fund, which shall meet the requirements of a Qualified Settlement fund in this

Action. The Court further has approved the Escrow Agreement, and ordered that at all times the Escrow Fund shall be fully collateralized with securities of the United States Government or Agencies of the United States Government that have the implicit backing of the United States of America.

Dominion has made its initial deposit of Fifteen Million Dollars (\$15.0 million) into the Settlement Fund. Dominion will deposit a sum equal to the Gross Owner's Totals for Participating One-Eighth Subclass Members and Participating Flat Rate Subclass Members, as defined in the Agreement, into the Settlement Fund within seven (7) days prior to the Claims Administrator's distribution of Settlement Payments. The principal and interest in the Settlement Fund account will be used to make Settlement Payments and to pay Fee Awards.

E. Final Approval Order

The Agreement is subject to and conditioned upon the issuance by the Court, following the "Formal Fairness Hearing," which is defined in the Agreement, as the Final Order and Judgment granting final approval of the Agreement in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, and providing the below-specified relief, which relief shall be subject to the terms and conditions of the Agreement and the Parties' performance of their continuing obligations thereunder. The Agreement provides that the Final Order and Judgment shall:

1. Conditionally certify the Class and Subclasses as defined in this Agreement for purposes of this settlement only;
2. Declare that this Agreement is fair, reasonable, adequate, in the best interests of the Class, and non-collusive;
3. Dismiss the Action with prejudice and with costs to be awarded solely as provided in the Agreement, except that (a) the claims of the Opt-Out Class Members shall be dismissed without prejudice; and (b) the Court shall retain jurisdiction to the extent necessary to administer and enforce the Agreement;

4. Bar and enjoin all Subclass Members from asserting Royalty Claims against any Released Party, with the exception that Opt-Out Class Members' claims shall not be barred and enjoined;
5. Order that the Subclass Members' claims are released through the Date of [the Final Order and Judgment], with the exception that Opt-Out Class Members' claims shall not be released;
6. Declare, adjudge, and decree that this Agreement provides the exclusive remedy for Subclass Members (and any successors-in-interest) with respect to any and all Royalty Claims against Dominion that were or could have been brought in this Action;
7. Declare, adjudge, and decree that any Opt-Out Class Member may bring a separate suit;
8. Expressly determine under Fed. R. Civ. P. 54(b) that there is no just reason for delay and therefore expressly direct the entry of a final judgment as to the claims of Subclass Members, except with respect to the claims of Opt-Out Class Members; and
9. Reserve the Court's continuing and exclusive jurisdiction over the Parties and Class Members to administer, supervise, construe, and enforce the Agreement in accordance with its terms for the mutual benefit of the Parties and Subclass Members.

IV. PRELIMINARY APPROVAL ORDER

This Court entered its preliminary settlement approval order on July 16, 2008. The Court made findings of fact consistent with the summary of the settlement set forth above and entered an order that, among other things, found that all of the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3) have been satisfied and conditionally and temporarily certified as a class action for settlement purposes a Flat Rate Subclass and a One-Eighth Subclass as defined in the order. In addition, the preliminary approval order granted preliminary approval of the Agreement and held that notice should be provided to Class Members in accordance with the notice plan established by the Parties' notice experts containing information concerning deadlines established by the Court. Finally, the Court set a Formal Fairness Hearing for January

19, 2009. By order entered on July 22, 2008, the Court rescheduled the Formal Fairness Hearing for 9:00 a.m. on January 21, 2009.

V. DISCUSSION

A. The Court Should Exercise Personal Jurisdiction over Class Members.

This Court has personal jurisdiction over the Class Members because notice was reasonable and afforded an opportunity to be heard and to opt out. In *In re Serzone Products Liability Litigation*, 231 F.R.D. 221, 231 (S.D.W. Va. 2005), this Court held as follows:

Reasonable notice combined with an opportunity to be heard and withdraw from the class satisfies the due process requirements of the Fifth Amendment. Thus, “silence on the part of those receiving notice is construed as tacit consent to the court’s jurisdiction.” In addition, in a settlement class maintained under Rule 23(b)(3), class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e). Rule 23(e) specifies that “[n]o class action may be ‘dismissed or compromised without [court] approval,’ preceded by notice to class members.” Rule 23(c)(2) requires that notice to the class must be “the best practicable under the circumstances, including individual notice to all member [sic] who can be identified through reasonable effort.” The Rule also requires that the notice inform potential class members (1) that they have an opportunity to opt out; (2) that the judgment will bind all class members who do not opt out; (3) and that any member who does not opt out may appear through counsel. Thus, [the Court] must consider the mode of dissemination and the content of the notice to assess whether such notice was sufficient.

Id. at 231 (citations omitted).

On July 16, 2008, the Court entered an order finding that the proposed notice forms and plan of dissemination meet the requirements of Federal Rule of Civil Procedure 23 and are the best notice practicable under the circumstances. The Court further ordered that notice must be provided to Class Members in accordance with the notice plan established by the parties’ notice experts as set forth in the Joint Motion for Approval of Notice Forms and Plan of Dissemination and supporting memorandum of law and that notice to Class Members must include the information set forth therein concerning deadlines.

In accordance with the Court's order, on September 17, 2008, a "Notice Packet" consisting of a cover letter and Detailed Notice was mailed to 13,908 Current Lessor Class Members and 3,940 Former Lessor Class Members. On that same day, an "Heir Notice Packet" consisting of an heir cover letter and Detailed Notice was mailed to 7,185 people who were identified as potential heirs of deceased Former Lessors and Suspended Lessors (those who have had their royalty payments returned as non-deliverable). A&F has re-mailed 157 Notice Packets that were corrected through the United States Postal Service. Additionally, an extra search for different addresses using Accurint data resulted in re-mailings to 2,239 potential Class Members. Only 1,152 or 4.6% of the total mailing remain undelivered. Therefore, overall, mailed Notice reached approximately 95.4% of the potential Class Members.²

In addition, on September 18, 2008, a party-neutral, Court-approved informational release was issued to approximately 4,490 press outlets throughout the United States. Also on that date, the case website, www.DominionClass.com, went live. By logging onto this website, Class Members may obtain additional information about the settlement. As of January 2, 2009, there have been 14,489 hits to the website and 815 visits or sessions.³ These efforts further enhanced the reach percentage of the mailed Notice.

² Due to a printer error, the envelopes that were mailed to Current Lessors and Former Lessors did not provide information on the Class Member's Lease type. Following Court approval, a supplemental cover letter informing Class Members of their Lease type was mailed to every Current and Former Lessor on September 23, 2008.

³ A "hit" is simply a successful request to your web server from a visitor's browser for any type of file, including an image, pdf or an HTML page. A "session" is defined as a series of clicks on your site by an individual visitor during a specific period of time. A Session is initiated when the visitor arrives at your site, and it ends when the browser is closed or there is a period of inactivity.

The toll free number set-up and hosted by the Claims Administrator became operational on the same day the initial Notice Packets were mailed. By calling this number, Class Members may speak to a live operator. As of January 2, 2009, the toll free number has received 2,624 calls.

The Settlement Notice effectively reached the greatest practicable number of Class Members and provided them with every reasonable opportunity to understand that their legal rights were affected, to be heard and to object or exclude themselves if they so chose. With forty-five days from the mailings until the exclusion and objection deadlines, the timing of the mailings allowed plenty of time for Class Members to see the Notice and respond.

In addition, the Dominion Defendants have provided adequate notice of the settlement to appropriate State and Federal Officials under CAFA. 28 U.S.C. § 1715.

There are only thirty-two exclusion requests,⁴ and three Class Members have filed objections. The parties filed timely responses to the objections on December 1, 2008.

B. The Court Should Certify a Settlement Class.

The requirements for final certification of a settlement class have been met. In *In re Serzone Products Liability Litigation*, 231 F.R.D. 221, 231 (S.D.W. Va. 2005), this Court held as follows:

Regarding requirements for certification, a settlement class must meet the requirements for certification under Federal Rule of Civil Procedure 23. Thus, the named plaintiffs must meet the prerequisites of Rule 23(a) and at least one of the subsections of Rule 23(b). The practice in this Circuit is “to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in

⁴ Thirty-three exclusion requests were filed, but one was withdrawn. *See* Docket No. 165.

application [that] will in the particular case best serve the ends of justice for affected parties and promote judicial efficiencies.”

Id. at 236-37 (citations omitted).

In its preliminary approval order entered on July 16, 2008, the Court analyzed the proposed settlement class pursuant to Rule 23(a) and 23(b)(3) and made the following findings:

- a. Numerosity. The settlement class, consisting of an estimated 25,000 persons, satisfies the numerosity requirement of Federal Rule of Civil Procedure 23(a) as joinder of such a large group would be impractical.
- b. Commonality. There are common issues of law and fact relating to whether the Dominion Defendants improperly paid royalties by deducting post-production expenses or using flat rates. While this is dependent upon language in individual leases, the class members have been subclassified by the type of leases they had, one-eighth or flat rate, which makes their claims common as to both liability and damages by subclass.
- c. Typicality. The claims of the proposed class also satisfy the element of typicality. Rule 23(a) does not require that the claims be identical, just that they arise out of the same legal or remedial theory. *See United Bhd. of Carpenters & Joiners of Am. v. Phoenix Assoc.*, 152 F.R.D. 518, 522 (S.D.W. Va. 1994). The named Plaintiffs’ claims are typical of the claims of the putative class members, as they are based upon the propriety of the same type of post-production expense deductions or flat rates.
- d. Adequate Representation. There is no evidence that the named Plaintiffs’ interests conflict in any way with the other members of the putative class. Instead, the parties’ interests appear to be aligned, as they are all seeking to recover for improperly paid royalties arising from deductions of post-production expenses or payment of flat rate royalties. Additionally, Class Counsel is experienced in class action and other complex litigation and have worked to prosecute the claims of the class in this matter. Thus, the requirement of adequate representation of the settlement class has been fully met.
- e. Predominance of Common Issues. As addressed above, there are common issues that exist between the named Plaintiffs and the putative class members. The Rule 23(b)(3) requirement is similar to the commonality requirement of Rule 23(a)(2). However, Rule 23(a)(2) only requires that common questions exist; Rule 23(b)(3) requires that they predominate. *See 2 Alba Conte & Herbert Newberg, Newberg on Class Actions* § 3.24 (4th ed. 2002). The predominance test is met in this case because all of the class members have common liability claims regarding whether royalties were properly paid where post-production expenses were

deducted or flat rates used. The claims are also subject to common types of proof, including the types and amounts of deductions taken, the flat rates paid, and the period during which they were taken. These issues predominate over any individual questions, and the proposed settlement has mooted any problem of manageability that would attend this case if it were to be tried or litigated on a class action basis.

- f. Superiority of the Class Action Mechanism. This case is also appropriate for class action status because it would promote both efficiency and uniformity of judgment, as the numerous class members, many of whom would lack the necessary resources, will not be forced to separately pursue claims or execute settlements in various courts.

Therefore, this Court preliminarily **FINDS** that all of the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3) have been satisfied, and this action is hereby conditionally and temporarily certified as a class action for settlement purposes on behalf of the following two subclasses of plaintiffs:

Flat Rate Subclass: All persons who have entered into, or who are or were lessors of, oil and gas leases on lands lying within the boundary of the State of West Virginia, and who have or had oil, gas or other hydrocarbon production under said lease and have received or are due royalty payments from June 22, 1996 through the Date of Settlement, from DTI, DEPI, DADI, or their predecessors or successors for Flat Rate Wells. The Flat Rate Subclass excludes lessors due royalties for One-Eighth Wells, Fixed Rate Wells, and Non-Affiliate Farmout Wells, as well as persons entitled to receive Overriding Royalty Interests. Dominion Resources, Inc. and its subsidiaries, affiliates, and related corporations are excluded as lessors from this Subclass. The Flat Rate Subclass does not include lessors due royalties for wells drilled or acquired by DTI, DEPI or DADI after May 31, 2006.

One-Eighth Subclass: All persons who have entered into, or who are or were lessors of, oil and gas leases on lands lying within the boundary of the State of West Virginia, and who have or had oil, gas or other hydrocarbon production under said lease and have received or are due royalty payments from June 22, 1996 through the Date of Settlement, from DTI, DEPI, DADI, or their predecessors or successors for One-Eighth Wells. The One-Eighth Subclass excludes lessors due royalties for Flat Rate Wells, Fixed Rate Wells, Non-Affiliate Farmout Wells, and wells under leases where the deduction of Post-Production Expenses is expressly permitted, as well as persons entitled to receive Overriding Royalty Interests. Dominion Resources, Inc. and its subsidiaries, affiliates, and related corporations are excluded as lessors from this Subclass.

The One-Eighth Subclass does not include lessors due royalties for wells drilled or acquired by DTI, DEPI or DADI after May 31, 2006.

No Class Members have filed an objection relating to certification of a settlement Class. The parties request the Court to make these findings final and to certify the Flat Rate and One-Eighth Subclasses for settlement purposes.

C. The Court Should Overrule the Objections to the Settlement.

The Court should overrule the objections because the settlement is fair, reasonable, adequate and not the product of collusion. As indicated above, only three Class Members have filed objections. Those Class Members are Hunter M. Bennett, Jr., Doris Weaver Griffith and Ann Shreve Norris. The parties have timely responded to those objections. Following the filing of those responses, on December 3, 2008, this Court entered an order directing that the objections be held in abeyance pending the Formal Fairness Hearing.

For the reasons set forth in the responses to the objections, this Court should overrule the objections filed by Hunter M. Bennett, Jr., Doris Weaver Griffith and Ann Shreve Norris because as discussed more fully below the settlement is fair, reasonable, adequate and not the product of collusion.

D. The Court Should Finally Approve the Settlement as Fair, Reasonable, Adequate and Not the Product of Collusion.

Federal Rule of Civil Procedure 23(e)(2) provides that the Court may only approve the settlement of a certified class action after determining that it is fair, reasonable, adequate and not the product of collusion. This Court recently recognized that such approval is required to ensure that any settlement is consistent with the plaintiff's fiduciary obligations to the class. *Muhammad v. National City Mortgage, Inc.*, Civil Action No. 2:07-0423, 2008 WL 5377783 (S.D.W. Va. Dec. 19, 2008). In *Muhammad*, the Court cited *In re Jiffy Lube Secs. Litig.*, 927

F.2d 155, 158-59 (4th Cir. 1991), and applied the Fourth Circuit's bifurcated analysis for class action settlements, which separates the inquiry into the fairness of the settlement from the inquiry into its adequacy. *Muhammad*, 2008 WL 5377783 at *3. The Court held that in assessing the fairness of a proposed settlement, the following four factors must be considered: (1) the posture of the case at the time the settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations;⁵ and (4) the experience of counsel in the area of class action litigation. *Id.* In assessing the adequacy of a proposed settlement, the Court must consider the following five factors: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *Id.* at *4.

The Agreement in this Action meets the fairness test because it has been negotiated over a period of months at arm's length between counsel through the use of an experienced mediator. This action has been pending for approximately two and one-half years. In that time, Plaintiff Class Representatives have actively pursued necessary discovery. In fact, the Dominion Defendants have produced over 118,000 pages of documents to the Plaintiff Class Representatives, in addition to numerous pages of database information produced on CDs. Class Counsel have taken depositions pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Class Representatives have retained several expert witnesses in the field of

⁵Absent evidence to the contrary, the Court may presume that the Parties conducted settlement negotiations in good faith and that they reached the resulting Agreement without collusion. *See id.* at *4.

gas royalty accounting. During the pendency of this Action, including over ten months of intensive settlement negotiations, Class Counsel, with the aid of their experts, have been able to determine the nature and strength of the Royalty Claims and to make reasonable damages calculations.

The Agreement also meets the adequacy test. Although Plaintiff Class Representatives believe they have strong claims against the Dominion Defendants, there is obviously no certainty that they will prevail if the settlement is not approved and the litigation continues. Moreover, the Dominion Defendants have denied liability and will continue to challenge Plaintiff Class Representatives' claims if the case should move forward. The issues in this Action involving gas lease language and the permissibility of deductions from royalties are complex and may be difficult for a jury to understand at trial. Complex litigation such as this would be very costly to maintain, as the parties expect to take many additional lengthy depositions as well as continued production and review of documents. Further, maintenance of this Action would require extensive review by experts who would be costly to both sides.

There is no issue of the solvency of the Dominion Defendants and the Agreement establishes a Settlement Fund to which the Dominion Defendants have already contributed an initial deposit as outlined in the Agreement.

Finally, as discussed above, only three Class Members have filed objections to the settlement. For the reasons discussed above and more particularly in the Parties' responses to those objections, the Court should overrule the objections and find that the settlement is fair, reasonable, adequate and not the product of collusion.

E. The Court Should Set a Bar Date Forty-Five Days Following Mailing of the Benefit Notices and Claim Forms.

The Court should set a Bar Date forty-five days following the mailing of the Benefit Notices and Claim Forms. Section VI.B of the Agreement provides that the Court will be asked to set a Bar Date in the Final Order and Judgment. To be eligible to receive Settlement Payments, a Class Member must have mailed a completed Claim Form prior to the Bar Date. *See id.* Section VI.A.2 of the Agreement further provides that Class Members will have forty-five days after the Claim Form is mailed to return a completed Claim Form to the Claims Administrator, either confirming or disputing the content of the Claim Form.

In light of the effectiveness of the Claims Administrator in distributing the Notice to date as demonstrated by the reach percentage over 95.4%, the parties request that the Court set a Bar Date forty-five days following mailing of the Benefit Notices and Claim Forms pursuant to Section VI.B of the Agreement. The recommended Bar Date will give Class Members ample time to submit Claim Forms, while providing finality to the this process for all, including those Class Members who may choose to forgo their rights in this action.

VI. CONCLUSION

For all of the foregoing reasons, the Court should grant the joint motion for final approval of the class action settlement and enter a Final Order and Judgment exercising personal jurisdiction over the Class Members, certifying a settlement Class consisting of One-Eighth and Flat Rate Subclasses, overruling objections to the settlement, finding that the settlement is fair, reasonable, adequate and not the product of collusion and granting final approval of the settlement pursuant to Federal Rule of Civil Procedure 23(e). The order should further grant exclusion from the settlement to the Class Members that have requested exclusion listed in “Exhibit A” to the motion, establish a Bar Date forty-five days following mailing of the Benefit

Notices and Claim Forms, granting a release from the Subclass Members' Royalty Claims against the Released Parties as defined in the Agreement, including but not limited to the Dominion Defendants, through the date of the Final Order and Judgment, and otherwise conform to the terms and conditions of the Agreement.

Dated this 9th day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2009, I electronically filed the foregoing “Memorandum in Support of Joint Motion for Final Approval of Class Action Settlement” with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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I hereby certify that I have mailed the document by United States Postal Service to the following non-CM/ECF participant:

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