UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-1327

ROGER A. SALVATORA; SANDRA E. SALVATORA; D&M MARBURGER FAMILY ENTERPRISES, L.P.; HEASLEY'S NURSERIES, INC.; RODNEY L. LANG; BONITA A. LANG, individually and on behalf of all those similarly situated

v.

XTO ENERGY, INC.,
Appellant

On Appeal from the U.S. District Court, W.D. Pa.
Judge William S. Stickman, IV, No. 2:19-cv-01097

Before: KRAUSE, PHIPPS, and FISHER, *Circuit Judges*
Argued: Dec. 10, 2025; Decided: August 24, 2026

OPINION OF THE COURT

PHIPPS, *Circuit Judge*.

In this Rule 23(b)(3) class action dispute over royalties due under oil and gas leases, none of the named plaintiffs had arbitration clauses in their leases, but the proposed classes were defined broadly enough to include leaseholders with arbitration clauses in their leases. The defendant moved to compel arbitration against the leaseholders with arbitration clauses in their leases but only after class certification and the expiration of the opt-out period for putative class members. Because that motion was preceded by years of litigation, the District Court concluded that the defendant impliedly waived its right to compel arbitration against the unnamed class members with arbitration clauses in their leases by demonstrating a preference for litigation over arbitration. Through this interlocutory appeal, the defendant challenges that ruling. In reviewing the District Court's legal conclusion of waiver *de novo* and its attendant factual findings for clear error, *see White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 338 (3d Cir. 2023), we will VACATE the order denying the defendant's motion to compel arbitration and REMAND the case for further proceedings consistent with this Opinion.

BACKGROUND

Six landowners in Western Pennsylvania had oil and gas leases under which XTO Energy, Inc., a wholly owned subsidiary of Exxon Mobil Corporation, owed them royalties on natural gas extracted from their properties. They believed that XTO, a citizen of Delaware by incorporation and of Texas through its principal place of business, was underpaying those royalties. None of those six landowners, who were all citizens of Pennsylvania with one, a limited partnership, also being a citizen of North Carolina, had arbitration clauses in their leases. On August 29, 2019, they sued XTO in the Western District of Pennsylvania on behalf of themselves and three putative classes seeking over $5 million in damages for the underpayment of royalties. As proposed, the putative classes together included over 100 landowners in Western Pennsylvania whose oil and gas leases provided similar methods for calculating royalties due from XTO. The definition of the putative classes did not exclude landowners whose leases had arbitration clauses. With minimal diversity among the parties, the number of putative class members above the numerosity threshold, and a qualifying amount in controversy, the case was within the District Court's subject-matter jurisdiction under the Class Action Fairness Act, and the parties consented to have a Magistrate Judge preside over it.[1]

Before XTO answered the original complaint, the named plaintiffs amended it. XTO answered that amended complaint as well as the second and third amended complaints that followed. XTO identified many affirmative defenses in each of those answers, but it never included arbitration among them.

Beyond the pleadings, the initial focus of the case was class discovery. That involved multiple case management conferences, several depositions, the production of documents, and the exchange of expert reports. The parties also engaged in court-sponsored mediation during the class-discovery period consistent with local rule. *See* W.D. Pa. LCvR 16.2 (Nov. 1, 2016) (presumptively requiring that parties to civil cases engage in some form of alternative dispute resolution).

In March 2022, the six named plaintiffs moved to certify two classes – one for each count in the operative pleading, the third amended complaint. Their proposed classes together included about 500 leaseholders, a fraction of whom had arbitration clauses in their leases.

XTO opposed class certification on several grounds. Among those was its contention that if the classes were defined to include leaseholders with arbitration clauses in their leases, then the typicality and adequacy requirements for class certification could not be satisfied. *See* Fed. R. Civ.

[1] *See* 28 U.S.C. § 1332(d)(2) (requiring an amount in controversy of over $5 million), (d)(2)(A) (providing that minimal diversity is satisfied when "any member of a class of plaintiffs is a citizen of a State different from any defendant"), (d)(5)(B) (conditioning the grant of jurisdiction on "the number of members of all proposed plaintiff classes in the aggregate" being 100 or more); *id.* § 636(c)(1); Fed. R. Civ. P. 73(a).

P. 23(a)(3)–(4). In support of that position, XTO made clear that it was unwilling to "waive its arbitration rights under any leases containing [arbitration clauses]." Def.'s Resp. to Pls.' Am. Mot. for Class Certification 19 (JA321).

Over XTO's opposition, the Magistrate Judge, who was no longer presiding, but deciding the motion on a referral, *see* Fed. R. Civ. P. 72(a), issued a report recommending certification of a Rule 23(b)(3) class inclusive of leaseholders with arbitration clauses in their leases. *Salvatora v. XTO Energy, Inc.*, 2023 WL 4137306, at *1, *11–24 (W.D. Pa. June 2, 2023). *See generally* Fed. R. Civ. P. 23(b)(3). In doing so, the Magistrate Judge did not address the plaintiffs' argument that XTO had implicitly waived its right to arbitration. But, in recognition of the potential for class members with arbitration clauses in their leases to opt out of the class, *see* Fed. R. Civ. P. 23(c)(2)(B)(v), the Magistrate Judge left open the possibility that XTO could "raise the arbitration defense post-certification" by filing a motion to "amend the class definition to exclude such members after the expiration of the opt-out period," which would "enable the Court to determine the class composition and analyze 'the specific arbitration agreements that [XTO] wishes to enforce[.]'" *Salvatora*, 2023 WL 4137306, at *17 (second alteration in original) (quoting *In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litig.*, 2016 WL 5508843, at *2 (D.N.J. Sept. 28, 2016)).

The District Court adopted that report and recommendation over XTO's objections. *Salvatora v. XTO Energy, Inc.*, 2023 WL 4135570, at *1–2 (W.D. Pa. June 22, 2023). On July 6, 2023, XTO petitioned this Court under Rule 23(f) for interlocutory appellate review of that decision and filed a motion in the District Court to stay the case pending this Court's review. In its brief in support of a stay, XTO repeated its intention to enforce its arbitration rights with respect to putative class members with arbitration clauses in their leases.

The District Court denied the stay request in late July, and this Court denied the Rule 23(f) petition on August 20, 2023.

Without a stay during the pendency of the Rule 23(f) petition, the proceedings in the District Court focused on notice to members of the (b)(3) classes. In a proposed case management order on that topic submitted on July 25, 2023, XTO reaffirmed its intention to compel arbitration with the members of the classes whose leases contained arbitration clauses. The Magistrate Judge approved the class notice in October and set an exclusion date of January 8, 2024, for class members to opt out. In a filing on February 23, 2024, the plaintiffs indicated that one class member had opted out. At that point, 15 or 16 of the unnamed class members' leases contained arbitration clauses.[2]

Other than the single opt-out and a joint motion to amend the case management order filed on March 27, 2024, there was no docket activity from the beginning of the opt-out period until March 29, 2024, when XTO moved to compel arbitration with the unnamed class members whose leases had arbitration clauses. In its motion, XTO quoted the Magistrate Judge's pre-certification statement allowing for the possibility that XTO would move to "amend the class definition to exclude such members after the expiration of the opt-out period." Def.'s Mot. to Compel Arbitration (JA691–93) (quoting *Salvatora*, 2023 WL 4137306, at *17).

In opposing that motion, the plaintiffs argued that XTO had implicitly waived its right to arbitrate. They pointed out that XTO chose to litigate the case for 55 months before moving to compel arbitration. The plaintiffs further emphasized that during that time, XTO filed three answers in which it did not

[2] The parties disagree on the precise number of leases with arbitration clauses. XTO identifies 16 leases with arbitration clauses, and the plaintiffs argue that one of those leases does not belong in either class.

mention an arbitration defense; engaged in discovery for class certification, which included case management orders, depositions, document production, and expert reports; opposed class certification; and moved to compel arbitration only after the opt-out period expired.

On referral, a different Magistrate Judge denied XTO's motion to compel arbitration. *See* Fed. R. Civ. P. 72(a). In doing so, that Magistrate Judge relied on a decision from a District Court in New Jersey – *Valli v. Avis Budget Rental Car Group, LLC*, 2024 WL 4349747 (D.N.J. Sept. 30, 2024) – to conclude that XTO had abandoned its right to arbitrate by "illustrat[ing] a preference for litigation." *Salvatora v. XTO Energy, Inc.*, 759 F. Supp. 3d 615, 621–22 (W.D. Pa. 2024). XTO filed objections to that ruling, *see* Fed. R. Civ. P. 72(a), which the District Court rejected.

Through a notice of appeal, XTO invoked this Court's appellate jurisdiction to challenge the denial of its motion to compel arbitration. *See* 9 U.S.C. § 16(a)(1)(B).[3] The parties completed their briefing and participated in oral argument. Six days after oral argument, however, this Court issued a precedential decision vacating and remanding the *Valli* decision on which the Magistrate Judge had relied in denying XTO's motion to compel arbitration. *See Valli v. Avis Budget Grp., Inc.*, 162 F.4th 396, 416 (3d Cir. 2025). The parties were

[3] The plaintiffs contest the exercise of appellate jurisdiction on the grounds that XTO's motion sought to *dismiss* the claims brought by leaseholders whose leases had arbitration clauses instead of moving to *compel* arbitration with those leaseholders. But the order denying XTO's motion precluded arbitration, and because it had "the effect of declining to compel arbitration," a challenge to that order is within this Court's appellate jurisdiction. *Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 72 F.4th 499, 505 (3d Cir. 2023) (quoting *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 592 (3d Cir. 2004)).

then permitted an opportunity to provide supplemental briefing about the impact of that *Valli* decision on this case. In their supplemental briefing, the plaintiffs added the argument that XTO's participation in mediation was evidence of its waiver of its arbitration rights.

DISCUSSION

To determine whether a party to an arbitration agreement waives its right to pursue enforcement of that agreement in federal district court under the Federal Arbitration Act, *see* 9 U.S.C. § 4, courts apply the standard of waiver applicable to federal rights. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 416–17 (2022). Under that standard, a waiver, which may be explicit or implied, requires (i) an intentional relinquishment or abandonment (ii) of a known right. *See id.* at 417; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); *Valli*, 162 F.4th at 409 (explaining that a waiver of arbitration rights can be "explicit" or "implied").

XTO's principal argument is that the Magistrate Judge erred by concluding that XTO, through its conduct, satisfied the first element of waiver. In the context of the waiver of arbitration rights, an intentional relinquishment or abandonment may be established by conduct inconsistent with an intention to compel arbitration, such as by demonstrating "a preference for litigation over arbitration." *White*, 61 F.4th at 339–40.

The intervening *Valli* decision articulated a caveat to the application of that standard in the context of class-action litigation before class certification. It held that when no named class member has claims subject to arbitration, but the proposed class includes putative members with claims potentially subject to arbitration, the lack of a motion to compel arbitration by a defendant before class certification does not indicate a preference for litigation over arbitration. *Valli*, 162 F.4th at 408, 410. That caveat applies here because none of the named class members had arbitration clauses in their leases, and, as proposed, the classes could include leaseholders with arbitration clauses in their leases. Therefore, under *Valli*, the absence of a motion to compel arbitration by XTO before class certification is not suggestive of a preference by XTO for litigation over arbitration.

The *Valli* caveat, however, is not all-encompassing. Other actions taken by a defendant before class certification may be evidence of its intention to waive arbitration, especially when the defendant does not expressly communicate its interest in asserting its right to compel arbitration. *See id.* at 410 (recognizing that the lack of a formal motion to compel arbitration "does not remove all pre-[certification] conduct from the waiver inquiry"). A defendant's conduct after class certification is likewise outside of the scope of the *Valli* caveat and may be considered in evaluating whether a defendant exhibited a preference for litigation over arbitration. *See id.*

Applied here, the plaintiffs identify several actions or inactions by XTO – beyond the lack of a motion to compel arbitration – that they contend are inconsistent with an intention to exercise the right to compel arbitration. Those are (i) XTO's omission of the arbitration affirmative defense in each of its three answers; (ii) XTO's engagement in class discovery; (iii) XTO's participation in mediation; (iv) XTO's opposition to class certification; and (v) XTO's delay in moving to compel arbitration until the opt-out period had expired. Those facts, however, do not demonstrate a preference for litigation over arbitration sufficient for an implied waiver.

XTO's failure to plead arbitration as an affirmative defense in each of its three answers does not constitute an intentional relinquishment or abandonment of the right to compel arbitration with putative class members whose leases have arbitration clauses. As a matter of law, putative members of a Rule 23(b)(3) class are not parties to a case until after class certification. *See N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492–93 (3d Cir. 2019) ("It is axiomatic that an unnamed class member is not 'a party to the class-action litigation before the class is certified.'" (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011))); *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 63 (3d Cir. 2023) (same); *see also Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) (describing the argument that an unnamed class member is a party to the litigation before certification as "novel and surely erroneous"). Thus, when XTO answered the three amended complaints before class certification, it was not litigating against any putative class members, much less putative class members with arbitration clauses in their leases – they were not parties to the case at those times. Consequently, the filing of those answers without the inclusion of the arbitration affirmative defense cannot be viewed as exhibiting a preference for litigation over arbitration with respect to any putative class members.[4]

XTO's involvement in class discovery also does not demonstrate an intention to relinquish or abandon its right to compel arbitration. As with XTO's answers to the amended complaints, when class discovery was taking place, the putative class members were not, as a matter of law, parties to the case. *See N. Sound Cap.*, 938 F.3d at 492–93. So by

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[4] Even if the putative class members were viewed as parties to the case at the pleading stage, XTO's failure to raise arbitration as an affirmative defense in its answer would not be a waiver of that defense under the Federal Rules of Civil Procedure because those rules apply waiver to only four defenses if omitted from a responsive pleading or an initial motion, and the affirmative defense of arbitration is not one of those. *See* Fed. R. Civ. P. 12(h)(1) (identifying, through cross reference to Rule 12(b)(2)–(5), the defenses of lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process as waived if not raised in a Rule 12 motion or a responsive pleading).

engaging in class discovery, XTO was not actively litigating against putative class members. Moreover, by participating in class discovery, XTO was availing itself of an opportunity to limit the litigation to the named plaintiffs – or at least to classes defined in a manner that would not include leaseholders with arbitration clauses in their leases. *See* Emily Villano, *Arbitration Asymmetries in Class Actions*, 131 Yale L.J. F. 742, 745 (2022) (reporting that "[b]y and large . . . [when] a putative class representative . . . is not bound to arbitrate her claims[, courts do] not certify a class where a defendant has asserted that putative class members are bound by arbitration agreements"). And as set forth in *Valli*, the "speculative" nature of a "yet-to-be-defined" class "weakens any reasonable inference" of waiver. *Valli*, 162 F.4th at 411. Put simply, by trying to prevent putative class members with arbitration clauses in their leases from becoming parties to the case, XTO was not exhibiting a preference for litigation over arbitration with respect to them.[5]

XTO's participation in mediation during the class-discovery period likewise does not reflect an intent to relinquish or abandon its right to enforce its arbitration rights with respect to putative class members with arbitration clauses

[5] The plaintiffs also contend that XTO impermissibly engaged in merits-discovery during the class-discovery period by serving four contention interrogatories. That may well be true, but those contention interrogatories were served upon the named plaintiffs, and sought information common to both arbitrable and non-arbitrable claims. That alone is not a firm enough basis for inferring a preference for litigation over arbitration with respect to the putative unnamed class members with arbitration clauses in their leases. *See Valli*, 162 F.4th at 412 ("Where both arbitrable and non-arbitrable claims are present, courts 'might hesitate to infer' waiver from discovery efforts that might also 'be relevant to the non-arbitrable claims.'" (quoting *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 775 (D.C. Cir. 1987))).

in their leases. Mediation, unlike litigation or arbitration, is non-binding. Participation in mediation does not ordinarily affect a person's ability to litigate or to engage in arbitration. And when mediation is presumptively required by local rule, as it is in the Western District of Pennsylvania, *see* W.D. Pa. LCvR 16.2, a party's participation in mediation is minimally indicative of an intention to abandon arbitration rights. Accordingly, under these circumstances, XTO's participation in mediation with named class members before either class was certified did not reveal an intention to relinquish or abandon its right to compel arbitration with putative class members. *But cf. Valli*, 162 F.4th at 412 (recognizing that participation in mediation "can support a finding of waiver in appropriate circumstances").

The plaintiffs also rely on XTO's vigorous opposition to class certification as a basis for implying its intentional relinquishment or abandonment of its arbitration rights. But there is a very high bar for such an inference because XTO expressly indicated its unwillingness to waive its arbitration rights in opposing class certification. *See id.* at 410 (recognizing that after consistent, express reservations, "there is no uncertainty to resolve by inference and the predicate for implied waiver largely collapses"). To clear the high bar set by an express reservation of arbitration rights, the conduct must unambiguously show a preference for litigation over arbitration. *See id.* at 410 n.15. And XTO's opposition does not demonstrate an unambiguous preference for litigation over arbitration because its opposition attempted to exclude putative class members from the litigation, as opposed to resolve their dispute through litigation.[6]

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[6] For the same reason, even in the absence of an express reservation of arbitration rights, a defendant's opposition to class certification of a putative class with arbitration asymmetries on the grounds that the plaintiff class should not include members subject to arbitration is not evidence of a

As a final basis for implying XTO's intentional relinquishment or abandonment, the plaintiffs rely on the timing of XTO's motion to compel arbitration. Specifically, they argue that XTO preferred litigation over arbitration for the class members with arbitration clauses in their leases because XTO did not move to compel arbitration promptly after class certification but rather waited until after membership in the classes was finalized. But XTO, in opposing class certification, had already stated its intention to preserve its arbitration rights against the then-putative class members with arbitration clauses in their leases. Thus, for the timing of XTO's motion to be evidence of an intention to relinquish or abandon arbitration rights, it must demonstrate an unambiguous preference for litigation over arbitration.

It does not. Waiting to see whether members of the certified classes chose to opt out here suggests a preference to avoid litigation with members of the class subject to arbitration. The Magistrate Judge's opinion granting class certification forecasted that any arbitration issues would be addressed once membership in the class was finalized. *See Salvatora*, 2023 WL 4137306, at *17. And adhering to the Magistrate Judge's timeline for resolving arbitration disputes is far removed from unambiguous evidence of a preference for litigation over arbitration. Nor was XTO using the opt-out period and the subsequent time needed to finalize class membership to advance its case against the class members with arbitration clauses in their leases. The only docket activity other than the plaintiffs' submission of the list of excluded class members was a joint motion to amend the case management order filed two days before XTO's motion to compel arbitration. In addition, the timing of XTO's motion was reasonably prompt; XTO filed it within five weeks of finalization of class membership. *Cf. Valli*, 162 F.4th at 412–13 (concluding that a four-month gap between class

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preference for litigation over arbitration as to class members subject to arbitration.

certification and a motion to compel arbitration was reasonably prompt). Thus, these circumstances do not clear the high bar needed to infer that XTO, after stating an intention to preserve its arbitration rights, intended to relinquish or abandon its ability to compel arbitration.

From this analysis, no specific action or inaction by XTO comes close to permitting the inference that XTO intended to relinquish or abandon its right to compel arbitration. Even so, the waiver analysis is holistic, *cf. White*, 61 F.4th at 339–40 (explaining that the waiver analysis is "informed by the 'circumstances and context of each case'" (quoting *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011))), and in theory, the cumulative effect of XTO's conduct could still permit the inference of waiver. But when considered in aggregate, XTO's conduct produces a negative synergy for purposes of proving intent. Many of the plaintiffs' arguments for an implied waiver have the same shortcoming – they treat XTO as being in active litigation against the unnamed class members. That was not the case, however, because those unnamed class members did not become parties until the certification order. Moreover, class membership was not finalized until the expiration of the opt-out period. So, by continuing to litigate, even for 55 months, XTO did not exhibit a preference for that mode of dispute resolution over arbitration with respect to unnamed class members with arbitration clauses in their leases.

CONCLUSION

For the foregoing reasons, the District Court's order will be VACATED and the case will be REMANDED. This Court will not retain jurisdiction during the remand.

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