IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

SUNOCO PARTNERS MARKETING & TERMINALS L.P.; SUNOCO, INC. (R&M),

Applicants,

v.

PERRY CLINE, on behalf of himself and all other similarly situated,

Respondent.

APPLICATION TO THE HON. NEIL M. GORSUCH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Sunoco Partners Marketing & Terminals L.P. and Sunoco, Inc. (R&M), hereby move for an extension of time of 30 days, to and including March 30, 2022, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be February 28, 2022.

In support of this request, Applicants state as follows:

1. The United States Court of Appeals for the Tenth Circuit rendered its decision on November 1, 2021 (Exhibit 1), and denied a timely petition for rehearing on November 29, 2021 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the requirements for a final and appealable judgment and whether a party can be denied its right to appeal a nine-figure "judgment"

because the district court and court of appeals have differing standards of finality. In 2017, Respondent Perry Cline filed a class action lawsuit against Applicants for statutory interest on certain royalty payments under Oklahoma's Production Revenue Standards Act (PRSA). The district court certified a 53,000-member class despite serious questions about whether some class members could even be identified. In August of 2020, the district court issued a "Judgment Order" that awarded the class actual damages in the aggregate amount of approximately $80 million, as well as punitive damages in the aggregate amount of $75 million. Although the "Judgment Order" purported to be a final judgment under Rule 58 of the Federal Rules of Civil Procedure, it did not allocate aggregate damages among class members or provide for the damages that could not be distributed to class members, which are both prerequisites for an order to qualify as a final judgment under Tenth Circuit precedent. *See Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87, 88 (10th Cir. 1982); *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1137-38 (10th Cir. 2010).

3. Applicants filed a protective notice of appeal in the Tenth Circuit, along with a jurisdictional statement explaining why Applicants believed the "Judgment Order" was not final and appealable under Rule 58. In November 2020, the Tenth Circuit agreed and dismissed the appeal.

4. Class counsel then filed a "Proposed Plan of Allocation" in the district court. Although the plan allocated some of the aggregate damages to class members, it failed to allocate all of them, and it still failed to provide for the damages that could

not be distributed to class members. Over Applicants' objection, the district court issued a "Plan of Allocation Order" adopting the proposed plan in full.

5. Applicants filed a second protective notice of appeal to the Tenth Circuit, explaining that the "Plan of Allocation Order" still did not satisfy the requirements for a final judgment under Tenth Circuit law. Meanwhile, the district court denied Applicants' motions for a new trial and to amend the judgment, and Applicants filed a third protective notice of appeal.

6. This time around, however, the Tenth Circuit refused to decide whether the district court had issued a final judgment and sowed confusion instead. Rather than dismiss these appeals because the underlying orders were non-final, as it had done with the first appeal, the Tenth Circuit dismissed them by faulting Applicants for failing to meet their "burden" to establish appellate jurisdiction because they brought this potential jurisdictional defect to the court's attention (just as they successfully had in the first appeal). As a result, the Tenth Circuit dismissed Applicants' protective appeals without definitively addressing whether the district court's new orders are final under Tenth Circuit law. The Tenth Circuit indicated, however, that a mandamus petition might provide Applicants with an alternative route to an appellate determination whether the district court had issued a final judgment under Tenth Circuit law. On November 29, 2021, the Tenth Circuit denied rehearing and rehearing en banc.

7. On December 1, 2021, Applicants took the Tenth Circuit up on its suggestion to file a petition for a writ of mandamus, asking the Tenth Circuit to order

the district court to enter a final, appealable judgment consistent with the requirements of Rule 58 and Tenth Circuit precedent. However, a different panel of the Tenth Circuit denied the petition, perpetuating the disconnect between a district court that believes it has issued a final order that is both appealable and executable, and a court of appeals that will neither allow an appeal to proceed nor definitively rule that the orders are non-final under Tenth Circuit law.

8. Applicants are now in a wholly untenable position. They face a $150 million "judgment" that the plaintiffs and district court view as final and ready for execution. In Applicants' view, however, the orders are not final under Tenth Circuit law, and the damages award is based on legal errors that will not survive appeal. But rather than step in and either hear Applicants' appeal or clarify that the district court has not entered a final appealable judgment, the Tenth Circuit faulted Applicants for candidly expressing their good-faith belief that the orders addressed in their protective notices of appeal are not final under Tenth Circuit law.

9. The predictable consequence of the Tenth Circuit's refusal to either hear Applicants' appeals or dismiss them because the orders are not yet final is that the plaintiffs believe that they have a green light to begin execution on a judgment that has never been subject to appellate review. This untenable and patently unfair dynamic would not occur in any other circuit, where courts have sensible rules for protective notices of appeal that do not leave would-be appellants between a rock and a hard place when a district court enters an order that it views as final but that is not

final under binding circuit law. Unless the lower courts take action to redress this dynamic, Applicants will seek this Court's intervention.

10. Applicants' counsel, Paul D. Clement, who has been recently retained, has substantial briefing obligations between now and the current due date of the petition, including a brief for petitioner in *Kennedy v. Bremerton Sch. Dist.*, No. 21-418 (U.S.), an opening brief in *Estes v. 3M Co.*, Nos. 21-13131, 13133, 13135 (11th Cir.), and an opening brief in *Baker v. 3M Co.*, No. 21-12517 (11th Cir.).

11. In addition, Applicants are diligently pursuing alternative means to redress the situation and have filed a motion with the district court to generate an order that the district court and the Tenth Circuit would both recognize as final. Applicants have also moved to enjoin efforts to execute on a nine-figure award that has not been subject to appellate review and is not yet final under Tenth Circuit law. If those efforts are wholly successful, they could obviate the need for this Court's intervention. If those efforts are wholly unsuccessful, Applicants may need to seek immediate relief from this Court. But either way, an extension will allow an interval for those efforts to proceed.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including March 30, 2022, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

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