IN THE
SUPREME COURT OF THE UNITED STATES

No. 21A440

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

Applicants,

v.

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

Respondent.

APPLICATION TO THE HON. NEIL M. GORSUCH FOR A FURTHER 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 April 29, 2022, for the filing of a petition for a writ of certiorari. Unless a further extension is granted, the deadline for filing the petition for certiorari will be March 30, 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. Indeed, the plaintiffs have already begun taking steps to execute the "judgment," and the district court has ordered Applicants to appear concerning their property and assets and has referred further enforcement-related proceedings to a magistrate judge. 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. On February 23, 2022, this Court granted an initial 30-day extension of time to and including March 30, 2022, for the filing of a petition for a writ of certiorari.

11. Applicants' counsel, Paul D. Clement, who was not involved in the proceedings below, has substantial briefing and oral argument obligations between now and the current due date of the petition, including a reply brief and oral argument in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (U.S.), and oral argument in *Morgan v. Sundance, Inc.*, No. 21-328 (U.S.).

12. In addition, Applicants are diligently pursuing alternative means to redress the situation. As explained in Applicants' initial extension request, Applicants 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, and Applicants have also moved to enjoin the plaintiffs' efforts to execute the nine-figure "judgment" that has not been subject to appellate review and is not yet final under Tenth Circuit law. Since the initial extension request, Applicants have continued to diligently litigate both of those motions, filing over 50 pages of related briefing. The motions are now fully briefed and remain pending before the district court. If those motions are successful, they could obviate the need for this Court's intervention. If they are

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 April 29, 2022, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com
Counsel for Applicant

March 16, 2022

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiff - Appellee,

v.

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

Defendants - Appellants.

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PETROLEUM ALLIANCE OF OKLAHOMA; OKLAHOMA CHAPTER OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS,

Amici Curiae.

Nos. 20-7064 & 20-7072
(D.C. No. 6:17-CV-00313-JAG)
(E.D. Okla.)

ORDER[*]

---

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.[**]

Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively "Sunoco"), appeal the district court's judgment and orders in favor of a plaintiff class that sued Sunoco for failure to pay interest on late oil proceeds payments under the Oklahoma Production Revenue Standards Act, Okla. Stat. tit. 52, § 570.1 *et seq*. The district court awarded the plaintiff class over $155 million in actual and punitive damages. It also issued a plan of allocation order to divide and distribute the damages. Sunoco appealed. We dismiss these consolidated appeals because Sunoco did not meet its burden to establish appellate jurisdiction.

I. BACKGROUND

A. *Legal Background*

"[T]he appellant . . . has the duty to establish the existence of this court's appellate jurisdiction." *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1161 (10th Cir. 2021). "It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear [its] appeal." *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1275 (10th Cir. 2011).

Further, under the Federal Rules of Appellate Procedure,

> [t]he appellant's brief must contain . . . a jurisdictional statement, including . . . the basis for the court of appeals'

[**] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of these consolidated appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

> jurisdiction . . . and . . . an assertion that the appeal is from a final order or judgment . . . or information establishing the court of appeals' jurisdiction on some other basis.

Fed. R. App. P. 28(a). "It is indisputably within our power as a court to dismiss an appeal when the appellant has failed to abide by the rules of appellate procedure . . . ." *MacArthur v. San Juan Cty.*, 495 F.3d 1157, 1161 (10th Cir. 2007).

B. ***Sunoco's Briefing***

Sunoco filed four briefs arguing or implying we *lack* jurisdiction.[1]

First, in November 2020, Sunoco argued "[t]he District Court's Plan of Allocation does not result in a final, appealable judgment." Aplt. Mem. Br. at 1.

Second, in December 2020, Sunoco argued "there is yet no final judgment." Aplt. First Suppl. Mem. Br. at 3.[2]

---

[1] In a related earlier appeal (No. 20-7055) filed before the district court issued its plan of allocation order, Sunoco filed two briefs in response to this court's order to address the finality of the district court's judgment. Neither said we had jurisdiction.

First, in September 2020, Sunoco asserted "the District Court's Judgment Order is likely not a final judgment under 28 U.S.C. §[]1291, absent this Court revisiting *Strey* [*v. Hunt International Resources Corporation*, 696 F.2d 87 (10th Cir. 1982)] and *Cook* [*v. Rockwell International Corporation*, 618 F.3d 1127 (10th Cir. 2010)] in light of the Supreme Court's decision in *Tyson Foods*[*, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016)]." Aplt. Mem. Br. at 9, *Cline v. Sunoco Partners Mktg. & Terminals L.P.*, 2020 WL 8632631 (10th Cir. 2020) (No. 20-7055), ECF No. 10771954.

Second, in November 2020, shortly after the district court issued its plan of allocation order, Sunoco asserted that the plan of allocation order "may not result in a final, appealable judgment." Aplt. Suppl. Mem. Br. at 4, *Cline*, 2020 WL 8632631 (No. 20-7055), ECF No. 10782938.

[2] Sunoco also stated that language from the district court's opinion denying its post-judgment motions "creates uncertainty on the finality-of-judgment question." Aplt. First Suppl. Mem. Br. at 3.

Third, in March 2021, Sunoco filed its merits brief with the following jurisdictional statement:

> There was jurisdiction for this class action. 28 U.S.C. §1332(d). This Court ordered the parties to file memoranda on whether there is a final, appealable judgment. After those memoranda were filed, this Court ordered that the finality-of-judgment issue will be carried with the appeal.

Aplt. Br. at 15.

Fourth, in October 2021, after reviewing the parties' filings, this court ordered the parties to address: (1) "[w]hether the Sunoco appellants have met their burden to show why the court has appellate jurisdiction?" and (2) "[i]f Sunoco has failed to meet this burden, what action should the court take?" Doc. 10865486 at 2. In response, Sunoco argued "there is appellate jurisdiction if this Court takes the actions requested . . . to ensure finality of the judgment." Aplt. Second Suppl. Mem. Br. at 10.[3]

II. **DISCUSSION**

Sunoco has not met its burden to establish our jurisdiction. Indeed, it has argued the opposite. Sunoco filed four briefs arguing or implying we *lack*

That same day, Sunoco filed a status report, which asserted that "the appeal should continue to be abated until this Court rules on whether there is a final, appealable judgment in this case." Doc. 10792010 at 1.

[3] Sunoco also said that, "[u]pon further reflection," the district court had clarified the plan of allocation order's principles for distributing unclaimed funds, and this was "adequate for a final judgment." Aplt. Second Suppl. Mem. Br. at 5-6. But, Sunoco said, this clarification does not extend to the division of damages for unidentifiable class members, which, it contends, is a finality requirement that has not been met. *See id.* at 6-9.

jurisdiction because the district court's plan of allocation order does not result in a final, appealable judgment. *See* Aplt. Mem. Br. at 1; Aplt. First Suppl. Mem. Br. at 3; Aplt. Second Suppl. Mem. Br. at 10. Nor does the jurisdictional statement in Sunoco's opening merits brief invoke a basis for our appellate jurisdiction. *See* Aplt. Br. at 15.

Sunoco's latest brief, rather than argue we have appellate jurisdiction, suggests we resolve the remaining finality issue regarding unidentifiable class members by (1) determining first, before addressing finality, that unidentifiable class members lack standing; or (2) directing the district court to modify its orders. *See* Aplt. Second Suppl. Mem. Br. at 9-10. Neither suggestion states we have appellate jurisdiction and neither has merit.

First, as to the standing of unidentifiable class members, "[o]n every . . . appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotations omitted). "Thus, the question of this Court's jurisdiction (i.e., our appellate jurisdiction) is *antecedent* to all other questions, including the question of the subject matter [jurisdiction] of the District Court." *In re Lang*, 414 F.3d 1191, 1195 (10th Cir. 2005) (quotations omitted); *see also United States v. Springer*, 875 F.3d 968, 973 (10th Cir. 2017).[4] We cannot address questions of standing if we lack appellate jurisdiction.

[4] Although "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits," *Sinochem Int'l Co., Ltd. v. Malaysia Int'l*

Second, Sunoco attempts to shift the burden of establishing appellate jurisdiction to this court by asking us to "give directions to the District Court." Aplt. Second Suppl. Mem. Br. at 10. It cites no authority to support this approach.[5] Instead, Sunoco asserts "there is appellate jurisdiction *if* this Court takes the actions requested . . . to ensure finality of the judgment." *Id.* at 10 (emphasis added). But that conditional assertion does not show we have jurisdiction. Sunoco, not us or Appellee Cline, must "conjure up possible theories to invoke our legal authority to hear [its] appeal." *Raley*, 642 F.3d at 1275. Sunoco did not pursue the options available to it to establish appellate jurisdiction.[6] "Where an appellant fails to lead, we have no duty to follow." *Id.*

Shipping Corp., 549 U.S. 422, 431 (2007) (quotations omitted), as *Steel Co.*, 523 U.S. at 94, *Lang*, 414 F.3d at 1195, and *Springer*, 875 F.3d at 973, explain, an appellate court must first consider appellate jurisdiction.

[5] Earlier in its brief, Sunoco quotes *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005), for the rule that "federal courts always have jurisdiction to consider their own jurisdiction." Aplt. Second Suppl. Mem. Br. at 6. But that rule does not explain how we have authority to direct the district court to address finality concerns about our appellate jurisdiction.

[6] If, as Sunoco repeatedly argues, the district court has not issued a final, appealable judgment, Sunoco had at least four ways to attempt to invoke our jurisdiction. It pursued none and fails to explain why not. Sunoco could have:

(1) Asked the district court to certify an interlocutory appeal under 28 U.S.C. § 1292(b);
(2) Attempted to invoke the collateral order doctrine exception to 28 U.S.C. § 1291's final judgment rule, *see, e.g.*, *Henderson v. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015);
(3) Filed a petition for a writ of mandamus for the district court to enter final judgment, *see, e.g.*, *United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974) ("Appellant . . . filed a notice of appeal, and, on the theory that the court's orders were not final and

III. **CONCLUSION**

Sunoco has repeatedly argued that we lack jurisdiction. It has not therefore met its burden to establish appellate jurisdiction. We thus dismiss these consolidated appeals. *See Stephens v. Jones*, 494 F. App'x 906, 908 (10th Cir. 2012) (unpublished) (cited for persuasive value under 10th Cir. R. 32.1 and Fed. R. App. P. 32.1) (dismissing appeal of two orders for failure to prosecute where appellant "presented no argument, in either his jurisdictional brief or his merits briefs, regarding our jurisdiction over" two of the three orders he appealed); *see also E.E.O.C. v. PJ Utah, LLC*, 822 F.3d 536, 542-43 & n.7 (10th Cir. 2016) (dismissing

---

therefore non-appealable, also filed an application for a writ of mandamus . . . to require entry of final judgment."); or

(4) Asked us to "constru[e] the appeal as a petition for a writ of mandamus," *Boughton v. Cotter Corp.*, 10 F.3d 746, 748, 750-51 (10th Cir. 1993); *see also, e.g.*, Opening Br. of Aplts. & Cross Aplees. at 4, *Cook*, 618 F.3d 1127 (Nos. 08-1224, 08-1226, 08-1239), ECF No. 9640935 ("[I]f this Court were to conclude that it lacks appellate jurisdiction here, [appellants] respectfully urge this Court to treat these fully briefed appeals as petitions for mandamus . . . .").

We do not address whether any of these options would have established our jurisdiction. Nor do we address whether we have sua sponte authority to construe this appeal as a petition for a writ of mandamus. Moreover, we have "discretion to decline to consider waived arguments that might have *supported* . . . jurisdiction." *Tompkins v. United States Dep't of Veterans Affs.*, — F. 4th —, 2021 WL 4944641 at *1 n.1 (10th Cir. 2021) (quotations omitted); *see also Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) (same).

part of appeal for lack of jurisdiction and declining to address collateral order doctrine because appellant had burden to, and did not, invoke the doctrine).[7]

Entered for the Court
Per Curiam

[7] We do not address whether the district court's plan of allocation order resulted in a final, appealable judgment.

EXHIBIT B

FILED
United States Court of Appeals
Tenth Circuit

November 29, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiff - Appellee,

v.

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

Defendants - Appellants.

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PETROLEUM ALLIANCE OF OKLAHOMA; OKLAHOMA CHAPTER OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS,

Amici Curiae.

Nos. 20-7064 & 20-7072
(D.C. No. 6:17-CV-00313-JAG)
(E.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk