No. 19-

IN THE

Supreme Court of the United States

APACHE CORPORATION,

Petitioner,

v.

BIGIE LEE RHEA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Three circuits have held that Rule 23(b)(3) requires proponents of class certification to show an administratively feasible method for identifying class members. Four held it does not. Among other things, the administrative-feasibility requirement ensures that i) putative class members can be identified without individualized mini-trials that defeat the efficiencies of class actions, ii) persons without a claim are not included in the class, iii) class members can receive appropriate notice of their rights, and iv) defendants can enforce class judgments and settlement releases.

In the case below, respondent did not propose an administratively feasible method to ascertain class membership. The undisputed record evidence established that no such method was possible. Yet the district court certified the class anyway because it assumed that the class would "likely" turn out to be ascertainable and petitioner could always move to decertify or redefine the class later if the class proceedings proved unworkable.

Contrary to the ruling below, do Rule 23 and due process require district courts to undertake a rigorous analysis to determine whether the plaintiff has established that class membership is ascertainable through an administratively feasible method before certifying a class?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is Apache Corporation. The respondent is Bigie Lee Rhea.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that petitioner Apache Corporation is a corporation duly incorporated under the laws of the state of Delaware. It has no parent company. petitioner's common stock is listed on the NYSE, the Chicago Stock Exchange, and the NASDAQ National Market, and trades under the symbol "APA." No publicly-held corporation owns ten percent or more of Apache's stock.

PROCEEDINGS

- *Apache Corporation v. Bigie Rhea*, No. CJ-2016-00018, District Court in and for Dewey County State of Oklahoma. Judgment entered June 1, 2018.

- *Bigie Lee Rhea v. Apache Corporation*, No. 14-CV-433, U.S. District Court for the Eastern District of Oklahoma. Class-certification granted Feb. 15, 2019; motion for reconsideration denied May 3, 2019.

- *Apache Corporation v. Bigie Lee Rhea*, No. 19-602, U.S. Court of Appeals for the Tenth Circuit. Order denying petition for permission to appeal class certification order entered July 16, 2019.

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STATUTES AND OTHER AUTHORITIES

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Petitioner Apache Corporation respectfully asks the Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Apache Corp.* v. *Bigie Lee Rhea*, No. 19-602.

OPINIONS BELOW

The Tenth Circuit's order denying Apache's petition for permission to appeal under Rule 23(f) is unreported but is reprinted in the Appendix at App. 1a-2a. The district court's order granting class certification is reprinted at App. 9a-33a. The district court's order denying Apache's motion for reconsideration is reprinted at App. 3a-8a.[1]

STATEMENT OF JURISDICTION

The Tenth Circuit denied Apache's petition for permission to appeal on July 16, 2019. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1). See *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554-58 (2014) (Supreme Court may grant certiorari after Court of Appeals denies petition for permission to appeal); *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345 (2013) (same); *Hohn* v. *United States*, 524 U.S. 236, 242 (1998) (same).

STATUTORY PROVISION INVOLVED

This case involves Federal Rule of Civil Procedure 23, which is reproduced at App. 34a-44a.

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1. Citations in the form "App. __" are to the petition appendix.

STATEMENT

Respondent, an Oklahoma mineral owner, receives royalty payments from gas produced by six Apache-operated wells in Western Oklahoma. Ex. N to Apache Corporation's Response in Opposition to Plaintiff's Motion for Class Certification, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Oct. 31, 2016), ECF No. 164 (Original Petition ¶5, filed under seal). Apache entered into two midstream services contracts in 1998 (the "1998 Contracts") with Transok Inc. *Id.* ¶ 7. Enogex LLC subsequently purchased Transok, Inc., which later became Enable Midstream Partners, LP (collectively referred to as "Enable"). *Id.* ¶ 8. The 1998 Contracts were "keep-whole" agreements common in the industry at the time whereby Enable gathered gas produced from Apache wells and redelivered a thermally equivalent volume of gas to Apache at downstream locations. *Id.* ¶ 9. The 1998 Contracts gave Enable the right to process the gas to remove and retain natural gas liquids ("NGLs"). *Ibid.*

For many reasons, not all gas produced from the Apache wells in question was processed. Ex. C to Apache Corporation's Response in Opposition to Plaintiff's Motion for Class Certification, *Bigie Lee Rhea v. Apache Corp.*, No. 14-CV-433 (E.D. Okla. Oct. 31, 2016), ECF No. 164 (Declaration of Mark Huffer ¶ 3, filed under seal). From 1998 forward, the Enable facilities changed and evolved. *Id.* ¶¶ 3-8. Gathering pipelines were constructed, replaced, rerouted, and abandoned. *Id.* ¶¶ 4, 6-9. Processing plants used to extract NGLs were also constructed, modified, and abandoned. *Ibid.* As a result, the potential for gas produced from any given well to be processed changed month-to-month. Because the processing plants in the

Enable system had varying processing capacities over the course of the class period, the fact that gas *could* be processed did not mean it *was* in fact processed. *Id.* ¶ 7.

Market realities also caused gas from the relevant wells to go unprocessed at different times during the class period. *Id.* ¶ 9. NGLs are a commodity, and like any other commodity, NGL prices fluctuated significantly over the class period. As a result, there were periods when it was not economically beneficial for Enable to process gas from the Apache wells in question. During those periods, Enable processed little or none of Apache's gas.

Determining which gas from which wells was actually processed during any given month is difficult, if not impossible. Under the 1998 Contracts, Apache delivered gas to Enable at or near Apache wells and received a thermally equivalent volume of gas downstream. Ex. N to Apache Corporation's Response in Opposition to Plaintiff's Motion for Class Certification, *Bigie Lee Rhea v. Apache Corp.*, No. 14-CV-433 (E.D. Okla. Oct. 31, 2016), ECF No. 164 (Original Petition ¶ 9, filed under seal). Under that arrangement, there was no business reason for Apache or Enable to know whether gas from any particular well was being processed in any particular month. Nor did respondent or the district court identify any records that might provide the answers.

Respondent brought a putative class action against Apache in Oklahoma state court, seeking to represent a class of royalty owners with interests in an unidentified set of Apache-operated wells in Western Oklahoma. *Id.* at 1. Respondent's original petition alleged Apache breached its leases by failing to pay royalties on the value of NGLs

in the gas stream produced from wells dedicated under the 1998 Contracts. *Id.* ¶¶ 20-24. Respondent's liability theory applied only to royalties paid on gas that was actually processed. App. 20a-21a. During months when Enable did not, for whatever reason, actually process the gas produced from the relevant Apache wells, Enable did not remove and retain the relevant NGLs, and the corresponding royalty payments were not subject to the alleged shortfall. *Id.* at 21a.

Respondent initially sought to represent a class of royalty owners with interests in Apache wells which produced gas that "was or could have been" processed during the period the 1998 Contracts were in effect. Ex. N to Apache Corporation's Response in Opposition to Plaintiff's Motion for Class Certification 12-14, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Oct. 31, 2016), ECF No. 164 (Original Petition ¶ 14, filed under seal). In his motion for class certification, however, respondent sought to represent a different class—one not limited to wells producing gas that "was or could have been processed." App. 30a. But because respondent's liability theory remained limited to gas that was, in fact, processed, Apache argued that the putative class could not be certified because, among other reasons, it was not ascertainable. Apache Corporation's Response to Motion for Class Certification 12-14, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Oct. 31, 2014), ECF No. 161, filed under seal. In particular, Apache argued that respondent had failed to identify any objectively reliable, administratively feasible method for determining class members' gas was actually processed during the class period. *Id.* at 13.

In support of its ascertainability argument, Apache relied on cases from the Third Circuit requiring would-be class plaintiffs to demonstrate a reliable and administratively feasible means of identifying class members *before* a class may be certified. *Id.* at 12 & n.5 (discussing Third Circuit cases and noting that "[t]he Tenth Circuit has not yet adopted a specific test for ascertainability and there is a circuit split regarding the applicable test.").

Respondent argued that Rule 23 does not require putative class plaintiffs to demonstrate ascertainability at the class-certification stage. Bigie Lee Rhea's Notice of Supplemental Authority 4-5 & nn.1-2, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Feb. 18, 2017), ECF No. 231. Although he acknowledged that Apache had cited cases to the contrary, respondent emphasized that other circuits disagreed, and the Tenth Circuit had declined to address the issue. *Id.* He urged the district court to reject the Third Circuit standard in favor of the approach of other circuits that rejected any independent ascertainability requirement applicable at the class-certification stage. *Id.*

The district court agreed with Apache that respondent's claims depended on the gas actually being processed. App. 20a-21a. In its view, however, respondent could fix the problem by redefining the class to include only wells whose gas was, in fact, processed. *Id.* at 21a. On that basis, the district court granted class certification subject to respondent redefining the class definition to reflect that supposedly curative limitation that the gas must actually be processed. *Ibid.* Instead of proposing the new class definition ordered by the district court,

respondent proposed a class covering all wells "upstream of a processing plant." Bigie Lee Rhea's Modified Class Definition 1, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Mar. 1, 2019), ECF No. 296.

Apache sought reconsideration, arguing that without any administratively feasible means of identifying class members, the certified class was not ascertainable as Rule 23 requires. Apache Corporation's Motion for Reconsideration 3, No. 14-CV-433 (E.D. Okla. Mar. 1, 2019), ECF No. 295. Although the district acknowledged Apache's ascertainability concerns, it concluded that they need not impede class certification for two reasons: (1) in the district court's view, gas from so-called "upstream" wells "likely" "would be processed," and (2) if that assumption proved unfounded or if determining which wells were "upstream" turned out to be unworkable as Apache had warned, it could always move to decertify or redefine the class later. App. 4a-5a.

Apache filed a petition under Rule 23(f) for permission to appeal the district court's class-certification order. Apache Corporation's Petition for Permission to Appeal, *Apache Corporation* v. *Bigie Lee Rhea*, No. 19-602 (10th Cir. May 17, 2019). Focusing on the same ascertainability concerns and emphasizing the entrenched circuit split and the Tenth Circuit's silence on the issue, Apache argued that its petition raised an unresolved legal issue central to Rule 23 jurisprudence. *Id. at* 6-7. In particular, it explained that "there is currently a split in the federal appellate circuits concerning the precise evidentiary burden for demonstrating ascertainability." *Id.* at 6. After describing the Third Circuit's demanding standard, Apache noted that "[t]he Seventh Circuit has adopted a

lower standard for ascertainability, differing from the heightened analysis of the Third Circuit." *Id.* at 7 (citing *Mullins* v. *Direct Dig., LLC,* 795 F.3d 654, 659-61 (7th Cir. 2015)).

Apache also emphasized the absence of guidance from the Tenth Circuit regarding ascertainability and the requisite "burden of proof" plaintiff's should bear with respect to the issue at the class-certification stage. *Id.* at 7. "As a result of this split in the federal circuits and the lack of direct authority in the 10th Circuit," Apache explained, the court should grant the petition "to provide guidance as to the ascertainability analysis and the necessary burden of proof borne by the party seeking certification." *Ibid.* It proceeded to argue that because respondent failed even to propose a feasible "method for ascertaining which wells are upstream of a processing plant or even if they are, how one would determine if and when gas from a particular well was actually processed," *id.* at 14, he could not possibly have carried any burden of proof applicable at the class-certification stage, no matter how light, *id.* at 7.

Finally, Apache noted that due to the in terrorem effects associated with class-certification, the ascertainability issue would very likely evade review if the court refused its requested appeal. *Id.* at 8 (citing *Vallario*, at 1262); see also *Coopers & Lybrand*, 437 U.S. 463, 476 (1978) (defendant facing the specter of classwide liability may "abandon a meritorious defense").

Emphasizing that the Tenth Circuit "*strongly disfavor[s]*" interlocutory review of class-certification orders, respondent called Apache's petition "a waste of

time." Bigie Lee Rhea's Answer in Opposition to Rule 23(f) Petition 1, *Apache Corporation* v. *Bigie Lee Rhea*, No. 19-602 (10th Cir. May 30, 2019) (citing *Downs* v. *Rivera*, 2015 WL 9022001, at *1 (10th Cir. 2015) (unpublished) (emphasis in original)). He admitted that his claims hinged on the "allegation that Apache failed to pay royalty on processed gas." Bigie Lee Rhea's Answer in Opposition to Rule 23(f) Petition 12, *Apache Corporation* v. *Bigie Lee Rhea*, No. 19-602 (10th Cir. May 30, 2019). He also acknowledged that the record evidence proved that Apache was, in fact, correct that Enable processed its gas in some but not all months across the class period. *Id.* at 14.

Nor did respondent deny the entrenched circuit split on the issue or the lack of guidance from the Tenth Circuit regarding the proper standard. To the contrary, he openly acknowledged both. *Id.* at 11. Nevertheless, despite offering no reliable, administratively feasible method of his own for identifying class members, respondent insisted that "this simply [wa]s not the right case" for the Tenth Circuit to address the ascertainability puzzle. *Id.* at 7. After all, he explained, *Apache* had not proven that the class would *necessarily* be unworkable, *id.* at 16, and even if it did prove unworkable later, "Apache ha[d] a remedy: seek to redefine or recertify the class," *id.* at 8.

Apache's reply brief emphasized respondent's failure even to propose a solution to the ascertainability problem at the heart of the case. Apache Corporation's Reply In Support of Petition for Permission to Appeal 4, *Apache Corporation* v. *Bigie Lee Rhea*, No. 19-602 (10th Cir. June 6, 2019). Given that he also acknowledged the deep disagreement among the circuit courts on the issue as well as the lack of guidance from the Tenth Circuit on the applicable standard, Apache urged the appellate court

to "grant [the] Petition to facilitate development of class action law." *Id.* at 3.

The Tenth Circuit denied Apache's petition, effectively blessing the district court's approach of certifying classes while deferring ascertainability issues for potential, post-certification consideration under a yet-unannounced standard. See *Dart*, 135 S. Ct. at 556 (reversing another Tenth Circuit order denying petition for permission to appeal, and emphasizing that by denying the petition, the Tenth Circuit effectively froze "the law applied by the district court … in place for all venues within" its jurisdiction). The panel explained that it had "carefully considered the … parties' submissions," including Apache's description of the entrenched circuit split on the ascertainability issue at the heart of the petition. App. 2a. Inexplicably, however, it concluded that "this matter [wa] s not appropriate for immediate review" because it did *not* present "an unresolved issue of law relating to class actions." *Ibid.* Apache timely filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided.

Would-be class plaintiffs in the Third, Fourth, and Eleventh Circuits must provide an efficient method for identifying absent class members; would-be class plaintiffs in the Sixth, Seventh, Ninth, and Second Circuits need not. Class certification—"often the most significant decision rendered in … class-action proceedings," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980)—should not turn on venue. This Court should resolve this important circuit split.

A. Several circuits require plaintiffs to provide, pre-certification, a reliable, efficient method for identifying class members.

In the Third Circuit, "ascertainability is 'an essential prerequisite of a class action.'" *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) (quoting *Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012)). Plaintiffs must therefore show that the proposed class is "defined with reference to objective criteria," and that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes* v. *Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (same).

Because of the "key roles" these related questions "play[] as part of a Rule 23(b)(3) class action," district courts must "rigorous[ly]" examine them "at the outset." *Carrera*, 727 F.3d at 307. Each "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Id.* They also facilitate notice, guard absent class members against fraud, and protect the defendant's right to challenge every claimant's class membership. *Id.* at 307, 310; see *Marcus*, 687 F.3d at 593.

Under this approach, any proposed method of identification must provide more than just "the sayso of putative class members." *Hayes*, 725 F.3d at 356; see also *Marcus*, 687 F.3d at 594. And any proposed method that would require "extensive and individualized fact-finding" will be rejected. *Hayes*, 725 F.3d at 356.

The Third Circuit has applied its ascertainability requirement to stop several putative class actions at the certification stage. In *Carrera*, it set aside certification of a class of retail purchasers of One-A-Day WeightSmart nutritional supplements. 727 F.3d at 300. Plaintiffs had "no evidence" that retailers had records covering the relevant period, nor had they proposed a method for screening affidavits that was "reliable" and "specific to th[e] case." *Id.* at 309, 311.

In *Hayes*, the Third Circuit vacated a class of those who had purchased warranties on certain items at Sam's Club because none of the company's records would allow the court to identify the relevant purchases, and the plaintiffs offered only other class members' "say-so" as an alternative method. 725 F.3d at 355-56. And in *Marcus*, it vacated a class of those who purchased or leased cars with run-flat tires and then had those tires replaced after they went flat. 687 F.3d at 588. Dealership records did not identify which cars came to the lot with runflat tires, which cars left the lot with those tires, or which tires were replaced at third-party repair shops. See *id.* at 593-94.

The Fourth Circuit has also "repeatedly recognized" ascertainability as an "implicit threshold requirement" that plaintiffs must meet prior to certification. *EQT Prod. Co.* v. *Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Plaintiffs must therefore demonstrate that "the members of [the] proposed class [are] readily identifiable." *Id.* In *EQT*, the district court certified classes of those who owned interests in coalbed methane gas and had allegedly not received the royalties they were owed. *Id.* at 352. Identifying the owners of those interests, however, was easier said than done. Records prepared years before offered a starting

point, but "numerous heirship, intestacy, and title-defect issues" still "plague[d]" the process of locating them. *Id.* at 359.

The Fourth Circuit vacated class certification. If class members cannot be "identif[ied] without extensive and individualized fact-finding," it explained, "then a class action is inappropriate.'" *Id.* (quoting *Marcus*, 687 F.3d at 593). Because the district court had considered neither the "number" of difficult-to-identify owners nor any "trial management tools … available to ease th[e] process" of identifying them, the Fourth Circuit remanded for the district court to assess ascertainability properly before certification. *Id.* at 360.

Finally, in the Eleventh Circuit, plaintiffs "must establish that the proposed class is adequately defined and clearly ascertainable" "[b]efore a district court may grant a motion for class certification." *Little* v. *T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). In *Karhu* v. *Vital Pharmaceuticals, Inc.*, 621 F. App'x 945 (11th Cir. 2015), the Eleventh Circuit rejected a proposed class of those who had purchased the defendant's VPX Meltdown Fat Incinerator. VPX's sales data "identified mostly third-party retailers, not class members," and the plaintiff did not show that third-party subpoenas to those retailers could bridge the gap. Nor did he explain how affidavits could be used without generating myriad mini-trials. See *id.* at 949-50; see also *Ward* v. *EZCorp, Inc.*, 2017 WL 908194 (11th Cir. Mar. 8, 2017) (per curiam) (rejecting putative class because the plaintiff proposed no method that could identify pawn shop customers wrongly charged a particular fee); *Bussey* v. *Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 788 (11th Cir. 2014) (per curiam)

(vacating because plaintiffs "provided [no] indication" they could identify class members using records or another reliable method).

B. Other circuits do not require plaintiffs to provide, pre-certification, a reliable, efficient method for identifying class members.

Other circuits do not require plaintiffs to show that a reliable means of identifying class members exists before they may proceed as a class. These circuits all recognize their disagreement with (at least) the Third Circuit.

In *Mullins* v. *Direct Dig., LLC*, 795 F.3d 654 (7th Cir. 2015), the district court certified classes of those who had purchased Instaflex Joint Support. Relying on Third Circuit precedent, Direct Digital asked the Seventh Circuit to decertify, explaining that it "ha[d] no records for a large number of retail customers," most consumers likely had not "kept their receipts," and there was no effective means of screening self-serving affidavits. *Id.* at 661.

The Seventh Circuit "decline[d]" to follow the Third Circuit's approach. *Id.* at 662. It accepted as "well-settled" the requirement that a class be "defined clearly and based on objective criteria." *Id.* at 659. It refused, however, to require plaintiffs to provide "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 662 (quoting *Byrd*, 784 F.3d at 163). The court recognized the "substantial and legitimate" concerns underlying the Third Circuit's approach, *id.* at 663, but concluded that they were "better addressed" through other class-certification requirements, which

"balance [the] interests that Rule 23 is designed to protect." *Id.* at 658, 672. The Third Circuit's approach, according to *Mullins*, "upsets this balance" and might prevent low-value consumer class actions from ever being certified. See *id.* at 658, 664-68.

In *Rikos* v. *Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), the district court certified classes of those who had purchased Align, a probiotic nutritional supplement that plaintiffs alleged did not aid digestion as advertised. But because most consumers bought Align from retailers, Procter & Gamble argued that there was "no plausible way to verify that any one single individual actually purchased Align." *Id.* at 524-25.

The Sixth Circuit, however, "s[aw] no reason to follow *Carrera*" and its demand that plaintiffs propose a reliable, efficient means of identifying class members. *Id.* at 525. Like the Seventh Circuit, it worried that an ascertainability requirement would eliminate class actions for many low-value consumer goods. See *id.* Thus, even though identifying Align purchasers might "require substantial review," the court upheld class certification because the class was "defined by objective criteria." *Id.* at 526.

In *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the Ninth Circuit followed suit. It acknowledged that the district court had not required plaintiffs to "proffer a reliable way to identify members of the certified classes." *ConAgra*, 844 F.3d at 1123. It also did not dispute ConAgra's basic claim that, given the absence of records and the perils of memory, "consumers would not be able to reliably identify themselves as class members." *Id.* at 1124. Nonetheless, the Ninth Circuit "decline[d]" to

require a mechanism for identifying absent class members and upheld class certification. *Id.* at 1126.

Most recently, the Second Circuit expressly rejected the Third Circuit's approach. In *Universities Superannuation Scheme Ltd.* v. *Petroleo Brasileiro S.A. (In re Petrobras Sec.)*, 862 F.3d 250 (2d Cir. 2017), the plaintiffs sought to certify a class of those who purchased certain debt securities in "domestic transactions." But because the securities did not trade on any domestic exchange, the district court would need to "assess each class member's over-the-counter transactions for markers of domesticity." *Id.* at 256. Defendants argued that "the need for such assessments" rendered the class unascertainable and "preclude[d] class certification." *Id.* at 257.

The Second Circuit "t[ook] the opportunity to clarify the scope of the contested ascertainability doctrine" and held that "a class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries." *Id.* at 264. It expressly rejected any "'heightened' ascertainability requirement under which any proposed class must be 'administratively feasible,' over and above the evident requirements that a class be 'definite' and 'defined by objective criteria,' and separate from Rule 23(b)(3)'s requirements of predominance and superiority." *Id.* at 265.

The Tenth Circuit's order denying permission to appeal in this case effectively approved the approach to ascertainability adopted by the Sixth, Seventh, Ninth, and Second Circuits and permitted district court's to certify classes while deferring known ascertainability problems for potential, post-certification consideration under a yet-unannounced standard.

II. The Circuit Split Is Important Because Critical Certification Decisions Currently Turn On Venue.

A. Class certification matters.

Class certification is a game changer. Often, it "so increase[s] the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Worse, defendants are often left with little choice but to abandon cases that are clear winners. "[W]hen damages allegedly owed to thousands of potential claimants are aggregated and decided at once, the risk of error will often become unacceptable." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

The effects of these coercive forces are not lost on the plaintiffs' bar. After certification, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975). That is so because the post-certification value of plaintiffs' claims "reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (Easterbrook, J.). "Judge Friendly, who was not given to hyperbole," aptly called them "blackmail settlements." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1970)).

B. The entrenched disagreement among the circuit courts regarding ascertainability leads to different results in indistinguishable cases.

Circuit courts recognize that their divergence on the ascertainability issue affects many certification decisions. *Mullins* explained, for example, that the "heightened" ascertainability requirement applied in other circuits "has defeated certification," 795 F.3d at 657. Commentators have also noted the often-dispositive disagreement. See, *e.g.*, 1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (13th ed. 2016 update) (noting that the Sixth and Seventh Circuits "have rejected" the Third Circuit's approach); 7A FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed. Jan. 2017) (noting that the Seventh Circuit has "specifically rejected" the Third Circuit's approach).

Recent litigation independently confirms that certification often turns on geography. Courts that require plaintiffs to propose a reliable, feasible method of identification routinely deny class certification. In *Fenwick* v. *Ranbaxy Pharmaceuticals, Inc.*, 353 F. Supp. 3d 315, 318 (D. N.J. 2018), for instance, the court refused to certify a class of those who purchased the drug Atorvastatin—the generic version of the drug Lipitor—explaining that plaintiff's failure to show that its proposed method of identifying class members "w[ould] be successful" thwarted class certification, *id.* at 327 (quoting *Byrd*, 784 F.3d at 16). In *Silwa* v. *Bright House Networks, LLC*, 2019 WL 4744938, at *12-13 (Md. Fla. Sept. 27, 2019), the court noted the circuit split on ascertainability before declining to certify a class under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.* Because identifying class members would require significant individualized inquiries. *Id.* A

putative class of those who purchased or leased a vehicle equipped with "Terex Hi-Ranger XT" devices met the same fate. See *Ace Tree Surgery, Inc.* v. *Terex S. Dakota, Inc.*, 2019 WL 4655945, at *2-3 (N.D. Ga. Sept. 23, 2019). Ditto for a putative class of those who purchased certain allegedly defective Domestic Corporation refrigerators. See *Papason* v. *Domestic Corp.*, 2019 WL 3317750, at *5-6 (S.D. Fla. June 28, 2019).

Virtually identical classes sail through in jurisdictions where courts ask only for an objectively defined class. See, *e.g.*, *Audet* v. *Fraser*, 2019 WL 2562628, at *12 (D. Conn. June 21, 2019) (rejecting ascertainability objection and certifying class of those who invested in products that ostensibly allowed them to share in the profits generated by mining cryptocurrency); *Compressor Engineering Corp.* v. *Thomas*, 2016 WL 438963 (E.D. Mich. Feb. 3, 2016) (rejecting ascertainability objection and holding that issues of ascertainability could be addressed *after* class-certification). Indeed, since *ConAgra*, courts in the Ninth Circuit routinely refuse to consider ascertainability-based objections to class certification altogether. See *Moser* v. *Health Ins. Innovations, Inc.*, 2019 WL 3719889, at *12 (S.D. Cal. Aug. 2, 2019) (rejecting ascertainability challenge to class certification in a TCPA case because *ConAgra* "rejected this type of ascertainability argument as a stand-alone rationale for denying class certification"); *Walker* v. *B&G Foods, Inc.*, 2019 WL 3934941, at *4 (N.D. Cal. Aug. 20, 2019) (refusing to address ascertainability challenge to putative class of those who purchased defendants' taco shells, explaining that *ConAgra* "forecloses Defendants' argument that Walker's class claims should be dismissed on grounds that 'Plaintiff has not alleged any plausible way to identify who would be in the class'").

III. This Case Is An Excellent Vehicle.

A. Respondent did not and could not propose a reliable, administratively feasible method for identifying class members.

The class here could not have been certified if the district court had required respondent to put forward an objective, efficient, and reliable method for identifying those who, over an eleven-year period, held royalty interests in wells producing gas that was, in fact, processed. The district court recognized as much. App. 4a. But because Apache could always move to decertify or to redefine the class if the case eventually proved unworkable, the district court concluded that Apache's ascertainability concerns should not preclude certification. *Id.* at 3a.

The lower courts had no choice but to resolve this case on the law: respondent did not propose a reliable and efficient means of identifying royalty owners with interests in Apache wells producing gas that was, in fact, processed, and no such method exists. Apache itself has no records regarding whether any particular well's gas was eventually processed in any particular month during the pre-2011 class period. Respondent never identified any such records obtained from any other source. And the district court did not explain how it proposed to identify wells "upstream of a processing plant" or any evidence supporting its assumption that gas from such unidentified (and perhaps unidentifiable) upstream wells would necessarily have been processed.

Nor did respondent propose a cure for these defects. *Carrera*, 727 F.3d at 304. He argued that would-be class representatives need not proffer any feasible method of identification, and even if there were such a requirement, it would pose no obstacle here because, according to respondent's unsupported sayso at least, gas from the wells in question was very likely processed. Respondent recognized, however, that this argument conflicted with the Third Circuit's more demanding approach. Bigie Lee Rhea's Notice of Supplemental Authority 4-5 & nn.1-2, *Bigie Lee Rhea* v. *Apache Corp.*, No. 14-CV-433 (E.D. Okla. Feb. 18, 2017), ECF No. 231 (arguing that Apache's more-demanding ascertainability standard mirrors the Third Circuit's and therefore conflicts with test adopted by other circuit courts).

In sum, class certification would have been out of the question under the more demanding standard applied in the Third, Fourth, and Eleventh Circuits. There could not be a cleaner vehicle for resolving that split.

B. This case differs from previously denied petitions.

This Court has declined to review the circuit split on ascertainability in three previous cases. See *ConAgra Brands, Inc.* v. *Briseno*, 138 S. Ct. 313 (Oct. 10, 2017) (mem.); *Procter & Gamble Co.* v. *Rikos*, 136 S. Ct. 1493 (Mar. 28, 2016) (mem.); *Direct Digital, LLC* v. *Mullins*, 136 S. Ct. 1161 (Feb. 29, 2016) (mem.). Those petitions, unlike this one, were flawed vehicles because each involved a consumer class where there was at least some basis for believing that most class members could easily be identified anyway.

In *Rikos*, for example, Procter & Gamble raised ascertainability as its third question presented. See Petition, 2015 WL 9591989, at i. After rejecting *Carrera*, the Sixth Circuit held that "[e]ven if [it] were to apply *Carrera*, there [we]re significant factual differences that ma[d]e [*Rikos*'s] class more ascertainable" than the one in that case. 799 F.3d at 526. Procter & Gamble's "own documents indicate[d] that more than half of its sales" took place "online" and that, "[a]t a minimum, online sales would provide the names and shipping addresses of those who purchased Align." *Id.* "In addition," studies conducted by Procter & Gamble "reveal[ed] that an overwhelming number of customers learned about Align through their physicians." *Id.* Thus, unlike the *Carrera* defendants, Procter & Gamble "could verify that a customer purchased Align by, for instance, requesting a signed statement from that customer's physician," with "[s]tore receipts and affidavits ... supplement[ing]" these other methods. *Id.* at 527.

The respondent in *Rikos* flagged these problems. See BIO, 2016 WL 4176854, at *32. Procter & Gamble disputed the accuracy of the Sixth Circuit's factual findings, but it could not dispute that the Sixth Circuit had made them and had relied on them in reaching its alternative holding. See Reply, 2016 WL 1056624, at *11-12.

Mullins also presented a problematic vehicle. Direct Digital was primarily a direct online retailer. It sought customers through television and online advertising and, once armed with the credit card and shipping information that customers themselves provided, sent a free bottle with 14 days' worth of its product. BIO, 2015 WL 9488470, at *1-2. Unless customers canceled, however, Direct Digital

then shipped additional product to those customers each month and charged their already-provided credit cards. *Id.* at *2. Direct Digital sold some of its product through retailers, but the bulk of its revenue came through direct sales. *Id.*

Direct Digital quibbled with some of these facts. It claimed, for instance, that sales percentages told only half the story because some of its customers bought more than others. See Reply, 2016 WL 159561, at *5. But it could not deny the respondent's fundamental points. The most it would say—in a footnote—was that it made "around half" of its sales at retail. *Id.* at *5 n.1. In other words, most class members could be identified after all.

ConAgra involved a consumer class action where the class definition covered purchasers of a particular cooking oil. 844 F.3d at 1123. The boundaries of the relevant class at issue there were apparent, and the plaintiffs had offered evidence that arguably would facilitate the process of identifying class members (namely affidavit testimony). *Id.* at 1132. Here, by contrast, respondent offered no method for determining which wells were "upstream" of a processing plant, much less any way to determine—short of innumerable mini-trials—whether gas produced from such wells was actually processed any given month.

Even assuming some doubts remained about the scope or importance of the circuit split when this Court denied the petitions in *Rikos*, *Mullins*, and *ConAgra*, they are long gone now. In case after case decided since, district courts that apply a more stringent approach to ascertainability have denied class certification because the plaintiffs had not proposed a reliable, feasible method for

identifying absent class members. See *supra* Part II.B. But in case after case where courts do not impose such a requirement, virtually identical class actions have been certified. *Id.*

This has to stop. There is no question that class certification matters, that courts disagree about whether a class of impossible-to-identify plaintiffs can be certified, and that this disagreement leads to conflicting outcomes in indistinguishable cases. This case typifies the disagreement and offers this Court an ideal vehicle through which to end the confusion.

IV. The Decision Below Is Wrong.

A. Rule 23 requires pre-certification proof that a reliable, feasible method for identifying class members exists.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). For certain kinds of classes, that exception is justified. See *id.* at 362 (discussing Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2)). Damages classes under Rule 23(b)(3), however, represent the "most adventuresome" departure from the usual rule. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997). Like all class actions, they bind absent members to litigation in which they played no part. But unlike classes under Rules 23(b)(1) and 23(b)(2), they do so largely for "convenien[ce]" rather than necessity, *id.* at 615, all while greatly magnifying the defendant's potential liability.

To keep this "adventurous" departure within acceptable bounds, damages plaintiffs must propose an efficient, reliable means of identifying class members. Otherwise, courts cannot meaningfully evaluate whether the proposed class satisfies Rule 23's other requirements. See *Byrd*, 784 F.3d at 162. Nor can they meaningfully protect absent plaintiffs, class defendants, or their own dockets against the risks inherent in such cases. For plaintiffs, the difficulty of identifying absent class members makes it nearly impossible to provide notice, leaving them bound by litigation they might want to escape. See *Marcus*, 687 F.3d at 593.

For defendants, that difficulty subjects their victories to potential collateral attack by unknown class members, see *Carrera*, 727 F.3d at 310, makes it hard to identify potentially applicable defenses against unknown class members, and jeopardizes their right to raise every available defense against every claim, see *id.* at 307. For courts, it threatens the very harm Rule 23 was designed to avoid: Cases predictably devolving into myriad mini-trials when defendants challenge individual claims by raising legitimate doubts about who really belongs in a class that should never have been certified in the first place. See *Marcus*, 687 F.3d at 593.

The Tenth Circuit blessed the district court's order brushing this all aside because petitioner can always move to decertify or redefine the class later if the class proves unworkable. The Tenth Circuit's "we'll deal with it later" approach ignores acertainability's interconnectedness with Rule 23's prescribed demands. Among other things, those seeking to pursue damages claims as a class must prove that the representative parties' claims are "typical"

of the class's as a whole, that the representative parties will "fairly and adequately protect" the class's interests, that there are "questions of law or fact common to the class," that those common questions will "predominate over" individualized ones, and that classwide adjudication "is superior to" other methods of resolving the dispute, considering "the likely difficulties in managing a class action." App. 34a-35a. Additionally, any class certification order "must define the class," *id.* at 36a, and upon certification the court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts," *ibid.*

Any "rigorous analysis" of these requirements before certification must ensure that some administratively feasible method of identifying class members exists. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013). Otherwise, it is impossible to tell whether the common claims are typical or whether the named representative is truly representative when the members themselves cannot be identified. Nor can the court be sure that hard-to-identify class members will receive reasonable notice. Most importantly, any conclusion regarding whether classwide issues predominate or that classwide adjudication will be superior will, of necessity, be speculative at best when every single claimant may have to be cross-examined about to determine whether he or she belongs in the class. Judicial scrutiny of ascertainability at the class-certification addresses each of these problems.

B. The Tenth Circuit abused its discretion in denying permission to appeal.

This Court has jurisdiction to grant a writ of certiorari in "any civil or criminal case … in the court of appeals." 28 U.S.C. § 1254. This statutory grant of jurisdiction extends to decisions by courts of appeal denying permission to appeal an interlocutory or non-final order. See *Dart*, 135 S. Ct. at 81; *Hohn v*, 524 U.S. at 241.

As the Court made clear in *Dart*, certiorari review can encompass the underlying district court order where, as here, the decision of the court of appeals reveals that the denial of permission to appeal was based on a "legally erroneous premise." 135 S. Ct. at 555. As the basis for its refusal to permit Apache's appeal, the Tenth Circuit cited the petition's failure to present any unsettled question of law important to class actions generally. But because Apache's petition expressly raised one of the most important issues dividing the circuits in the Rule 23 context, the Tenth Circuit's refusal to grant review was an abuse of discretion. See *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 864 (2008) (stating that "a court 'by definition abuses its discretion when it makes an error of law'" and reversing where the court of appeals' opinion was legally erroneous (quoting *Koon* v. *United States*, 518 U.S. 81, 99-100 (1996))). While circuit courts enjoy broad discretion when deciding whether to permit an interlocutory appeal from a certification decision, their exercise of that discretion must "turn[ ] on more than what [the judges] had for breakfast." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 250 ("Discretionary does not mean arbitrary".)

The Tenth Circuit's own case law "weighed heavily in favor of accepting [Apache's] appeal." *Dart*, 135 S. Ct. at 556. That the Tenth Circuit rejected Apache's petition strongly suggests it either thought the district court got it right, or thought that the question presented was not important or novel. *Ibid.* Either way, refusal to grant permission to appeal was an abuse of discretion. See *id.* at 555 ("A court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'") (quoting *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384,405 (1990)).

The practical effect of the Tenth Circuit's denial of permission to appeal is to permit district courts to certify classes while deferring the issue of ascertainability for potential, future consideration under a yet-unannounced standard. *Dart*, 135 S. Ct. at 556-57 (Tenth Circuit's order denying permission to appeal "establish[es] the law not simply for this case, but for future [ones]" as well). After all, in the wake of its refusal to consider Apache's appeal in this case, no defendant is likely to expend resources arguing that a would-be class plaintiff's failure to identify a reliable and administratively feasible method for ascertaining class members thwarts class-certification. *Ibid.*

The Tenth Circuit's denial of permission to appeal based on the supposed lack of any question presenting an unsettled issue of importance to class actions turns Rule 23(f) on its head. This Court created Rule 23(f) to facilitate the resolution of unsettled questions of law under Rule 23. If the Tenth Circuit's order in this case is allowed to stand, however, that Rule will become a tool for courts of appeals to insulate their own substantive decisions on even the most important and controversial questions of

law under Rule 23 from review simply by embedding them in an unpublished order denying permission to appeal.

The need for this Court's immediate, supervisory review is further underscored by the fact that the court of appeals took a procedural short-cut: Rather than providing the full airing that *granting* the Rule 23(f) petition would have afforded the parties and the court of appeals, the court chose to use the vehicle of a Rule 23(f) *denial* order to issue what is effectively a substantive ruling blessing the district court's decision to certify a class without requiring respondent to establish a reliable and administratively feasible method for identifying class members.

Petitioner was deprived of the opportunity to fully brief the fundamental, still-unresolved class-certification issues presented by the district court's class-certification order. Instead, it had only the 14 days provided by Rule 23(f) to cram its arguments into the 20-page petition for permission to appeal allowed by Federal Rule of Appellate Procedure 5(a). Petitioner was not even permitted to present oral argument on the petition. Those highly abridged appellate proceedings make this Court's review exceptionally important in this case. See Sup. Ct. R. 10(a), (c).

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Apache Corp.* v. *Bigie Lee Rhea*, No. 19-602.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JULY 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-602
(D.C. No. 6:14-CV-00433-JH)
(E.D. Okla.)

APACHE CORPORATION,

Petitioner,

v.

BIGIE LEE RHEA,

Respondent.

ORDER

Before **LUCERO**, **PHILLIPS**, and **CARSON**, Circuit Judges.

This matter comes on for consideration of the *Petitioner Apache Corporation's Petition for Permission to Appeal Class Certification Order*, the *Respondent's Answer in Opposition*, *Apache's Motion for Leave to File Reply Brief in Support of Petition for Permission to Appeal*, and the *Respondent's Response in Opposition*. *See* Fed. R. App. P. 5; Fed. R. Civ. P. 23(f).

Appendix A

The decision whether to grant the petition is purely discretionary. *See* Fed. R. Civ. P. 23(f); *Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009) (this discretion is "'unfettered and akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.'") (quoting Fed. R. Civ. P. 23(f) advisory committee's note).

We have carefully considered the district court's written order granting class certification, the parties' submissions, and the applicable legal authority. We conclude that the order does not sound the "death knell" of the claims, that the district court order does not constitute manifest error, and it does not present "an unresolved issue of law relating to class actions that is likely to evade end-of-case-review which is significant to the case at hand as well as to class action generally." *Id.* at 1263. Accordingly, this matter is not appropriate for immediate review.

The petition for permission to appeal is denied. The motion for file a reply brief is granted.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk
/s/_____
by: Ellen Rich Reiter
Counsel to the Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, FILED MAY 3, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-14-433-JH

BIGIE LEE RHEA,

Plaintiff,

v.

APACHE CORPORATION,

Defendant.

ORDER

On February 15, 2019, the court granted plaintiff's motion for class certification subject to modification of the class definition. Plaintiff has now filed a modified class definition to which defendant has objected. Defendant has also filed a motion for reconsideration of the court's order granting certification. Both matters are fully briefed and ready for resolution.

a. The class definition issue

The court's prior order stated that plaintiff's proposed definition was overbroad because it would include some wells where "there was no opportunity for processing

sufficient to be a basis for the lost royalty nature of plaintiff's claim." Doc. # 294, p. 11. The court concluded that the class definition should be limited to "only those wells whose gas was actually processed." *Id.*

Plaintiff has filed the following modified class definition:

> All non-excluded persons or entities with royalty interests in wells upstream of a processing plant with a Btu content of 1050 or higher and where Apache Corporation marketed gas from the well pursuant to the terms of the January 1, 1998 contracts between Transok, Inc. and Apache Corporation and/or the July 1, 2011 contract between Enogex Gathering & Processing LLC and Apache Corporation on or after January 1, 2000.

Plaintiff contends that the phrase "in wells upstream of a processing plant" addresses the court's concern about the overbroad definition.

Defendant has objected to the modified definition, arguing that plaintiff has not addressed the court's order to restrict the definition to "only those wells whose gas was actually processed." It contends that the proposed definition still leads to an unascertainable, overbroad class because the manner in which natural gas collection and processing systems operate precludes a definitive finding that, based on any given well's location relative to the processing plant, the well's gas was actually processed.

According to defendant, issues such as plant capacity, blending, and bypass of gas must be considered when evaluating whether any given well's gas was processed.

The court acknowledges the tension between the phrases "no opportunity for processing" and "wells whose gas was actually processed" used in the prior order, as they do not necessarily describe the same thing. However, based on the present submissions, the court concludes that the potential circumstance of an upstream well, otherwise within the class, not having its gas processed is sufficiently remote and speculative that it should not bar the certification of the proposed class. The nature of gas collection systems makes it difficult to impossible to distinguish one well's gas from another once both wells are connected to a central connection line. However, as to wells of the type involved here which are above the processing plant, it appears entirely likely that their gas would be processed.

If, after further discovery, there is evidence suggesting that a significant portion of gas produced from wells upstream of processing plants was not processed, then a motion to decertify or redefine the class may be appropriate. On the present submissions, however, the court concludes that possibility is sufficiently speculative that it does not render the proposed class definition problematic. It appears from defendant's current pay practices that the concern is more theoretical than real. Plaintiff's modified class definition adequately addresses the court's concerns raised in the prior order — that the class be restricted to wells whose gas was processed for the extraction of NGLs.

Accordingly, the court adopts the following definition for the proposed class:

> All non-excluded persons or entities with royalty interests in wells upstream of a processing plant with a Btu content of 1050 or higher and where Apache Corporation marketed gas from the well pursuant to the terms of the January 1, 1998 contracts between Transok, Inc. and Apache Corporation and/or the July 1, 2011 contract between Enogex Gathering & Processing LLC and Apache Corporation on or after January 1, 2000.
>
> Fuel Gas Subclass: All non-excluded persons or entities included in the class who are also entitled to share in royalty proceeds payable under any lease that contains an express provision stating that royalty will be paid on gas used off lease premises (a Fuel Gas Clause) as set forth in Column G of Exhibit 1.
>
> The persons excluded from the Class and Fuel Gas Subclass are: (1) agencies, departments, or instruments of the United States of America and the State of Oklahoma; (2) publicly traded oil and gas exploration companies and their affiliated; (3) persons or entities that Plaintiff's counsel is, or may be, prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the Court involved in this action.

b. The motion to reconsider

Defendant has also filed a motion to reconsider the prior class certification order. Defendant argues, again, that *Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998), precludes the certification of the class in this action because "post-production costs must be examined on an individual basis." In defendant's words: "The Court's determination that *Mittelstaedt* applies is fatal to class certification." Doc. # 295, p. 6. The court concludes otherwise. The prior order addressed *Mittelstaedt* and the potential certification of such royalty class actions in Oklahoma. This and other arguments of defendant are essentially restatements of the same matters previously considered by the court, and the court is unpersuaded that its initial determination was in error.

CONCLUSION

For the reasons stated, the class definition set out above is adopted. Defendant's Motion for Reconsideration [Doc. # 295] is **DENIED.**

The parties are directed to confer and submit, within 14 days, a proposed scheduling order for further proceedings in this case.

IT IS SO ORDERED.

Dated this 3rd day of May, 2019.

Appendix B

/s/_____
JOE HEATON
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA FILED FEBRUARY 15, 2019

NO. CIV-14-0433-JH

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

BIGIE LEE RHEA,

Plaintiff,

v.

APACHE CORPORATION,

Defendant.

ORDER

Plaintiff Bigie Lee Rhea filed this putative class action on behalf of himself and other royalty owners with interests in Oklahoma wells operated by, or the production from which was sold by, defendant Apache Corporation ("Apache"). He seeks to recover for the alleged underpayment of royalties by defendant, contending that Apache underpaid royalties due to its failure to obtain the best price available for the gas it sold. More specifically, he contends that defendant breached its implied duty to market the gas and obtain the best price available by (1) marketing the gas under a "keep whole" contract which did not capture the value of the natural gas liquids ("NGLs")

included in the production, and (2) paying excessive fees to the midstream processor even after the keep whole contract was modified to capture the value of the NGL's. He also asserts that defendant failed to pay royalty on fuel gas used by the midstream processor in performing midstream services, contrary to explicit lease provisions included in most, but not all, of the affected leases. These contentions are the underlying basis for claims for breach of contract, tortious breach of contract, fraud (actual and constructive) and deceit, and for an accounting.

The plaintiff has moved for class certification, for appointment of himself as class representative, and for appointment of class counsel. The court held a hearing on the motion on August 9, 2018. After consideration of the parties' submissions at the hearing and otherwise, the court concludes the motions should be granted as stated here.

BACKGROUND

Plaintiff's claims are based on defendant's alleged practices stretching over many years. The parties' submissions indicate that, on January 1, 1998, defendant entered into two related contracts (the "1998 Contracts") involving gas sales from Oklahoma wells. The Gathering and Compression Agreement covered gas wells connected to the NAGS, WAGGS, East Caddo, West Caddo, Mistletoe, Hydro, and Limestone pipeline systems[1]

1. At the time the agreement was executed, no wells were connected to the Mistletoe, Hydro, or Limestone systems.

owned or operated by Transok, Inc.[2] Doc. #137-4.[3] The Dedicated Interruptible Service Agreement covered gas wells connected to the Traditional and Anadarko pipeline systems owned by Transok. Doc. # 161-17. The 1998 Contracts (1) were due to expire on December 31, 2012; (2) dedicated all future wells drilled or recompleted within five miles of one of the pipeline systems to the relevant agreement; (3) required Transok to deliver "thermally equivalent" volumes of gas for the account of defendant after NGLs and other substances were removed during processing; (4) defined all relevant terms and conditions in substantially the same language; and (5) reserved the right to defendant to "process all of its gas and retain all of the oil and liquid hydrocarbons." Doc. Nos. 137-4, p. 10; 161-17, p. 9. Defendant also paid Transok gathering and compression fees under the agreements.[4]

The 1998 Contracts are considered "keep-whole" agreements whereby the well-operator permits the midstream services provider to process the gas to remove NGLs and retain those liquids for its own use or sale.

2. Transok was purchased by Enogex LLC in 1999 which assumed all Transok rights under the agreements. Enogex later became Enable Midstream Partners LP ("Enable").

3. References to filings with this court are to the CM/ECF document and page number.

4. Defendant argues the petition addresses only the Gathering and Compression Agreement. However, the contract reference in the petition is to language appearing in both contracts. The court concludes plaintiff has sufficiently raised issues as to both contracts, and there is no apparent prejudice to defendant from proceeding on that assumption.

This processing decreases the energy content of the gas relative to the raw gas. The operator is kept "whole" as to the energy content of the gas produced when a thermally equivalent amount of residue gas — less the amount of gas used as fuel to power operations during the gathering, compressing, and processing stages of the operations — is returned to the operator after processing. Apache's royalty payments were based on the value of the returned residue gas. Doc. 137-5, p. 21.

Plaintiff contends that the keep-whole arrangement denies royalty owners the best price available for the gas that is sold, because the value of the NGLs removed exceeds the value of the thermally equivalent residue gas that is returned. The alleged difference between the value of the NGL's removed and the value of the replacement residue gas is referred to as the "NGL uplift." According to plaintiff, the loss is particularly significant for royalty owners in the proposed class of "NGL-rich" gas wells because a significant amount of NGLs could be removed during processing. Plaintiff also contends royalty owners are disadvantaged because of the 15-year term of the 1998 Contracts, the dedication of future wells to the Contracts, and the volatility of pricing for NGLs. Doc. # 136, pp. 9-14. Defendant argues that the value of NGLs was transferred to the midstream services provider "for processing and other services," and that the contracts were reasonable based on the circumstances existing at the time. Doc. # 161, p. 13.

Plaintiff's fraud claims are based on allegations that proposed class members received uniform royalty

check stubs with false and/or misleading statements. Plaintiff specifically alleges that the check stub failed to comply with Oklahoma law and did not provide required information that would have permitted proposed class members to identify that the gas produced was NGL-rich gas. Doc. # 136, p. 15.

On July 1, 2011, Apache and Enogex Gathering and Processing entered into a Gas Gathering & Processing Agreement (the "2011 Contract") which replaced the 1998 agreements. Under the 2011 Contract, defendant received value for the NGLs and paid royalties on that value. Plaintiff alleges, however, that the initial six months of fees agreed to in the 2011 Contract were unreasonably high and improperly diminished the amount of royalties paid to the class. *Id.* at 14-15.

Plaintiff's submissions indicate over 500 wells meet the proposed class definition and that at least 5,679 leases relate to those wells. *Id.* at 18-19. Plaintiff has presented a lease chart for the leases involved in this case, Doc. # 135-1, and argues that none of the leases negate the duty to pay the best price available for the gas. Doc. # 136, p. 21. He also contends that 4,159 leases contain express language stating royalty will be paid on all constituents of gas produced and only 538 of the leases contain language expressly allowing for the deductions of gathering, compression, dehydration, treating, and/or processing fees. Doc. # 138-10, pp. 5-6. Finally, plaintiff alleges that 4,824 of the 5,679 leases contain a "Fuel Gas Clause" which expressly mandates that defendant pay royalty on the value of gas used to power gathering, compressing,

and processing equipment off the lease premises ("fuel gas"). Doc. 136, p. 19. Plaintiff claims that Apache has never paid royalties based on the fuel gas used. *Id.* at 23.

THE PROPOSED CLASS

Plaintiff seeks to represent the following class and subclass in this action:

> All non-excluded persons or entities with royalty interests in wells with a Btu content of 1050 or higher where Apache Corporation marketed gas from the well pursuant to the terms of the January 1, 1998 contracts between Transok, Inc. and Apache Corporation and/or the July 1, 2011 contract between Enogex Gathering & Processing LLC and Apache Corporation on or after January 1, 2000.
>
> Fuel Gas Subclass: All non-excluded persons or entities entitled to share in royalty proceeds payable under any lease that contains an express provision stating that royalty will be paid on gas used off the lease premises (a Fuel Gas Clause) as set forth in Column G of Exhibit 1.[5]

5. Apache objects to the proposed classes on the basis they are different from those proposed in the petition. The court concludes the Fuel Gas claims are within the scope of the original petition and, in any event, consideration of the modified definitions does not prejudice the defendant.

Appendix C

> The persons excluded from the Class and Fuel Gas Subclass are: (1) agencies, departments or instruments of the United States of America and the State of Oklahoma; (2) publicly traded oil and gas exploration companies and their affiliates; (3) persons or entities that Plaintiff's counsel is, or may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the Court involved in this action.

Doc. # 135, p 4. Plaintiff asserts defendant is liable to the class for failing to obtain the best price available from January 1, 2000 to June 30, 2011, based on the impact of the NGL Uplift. He contends it failed to obtain the best price available from July 1, 2011 to January 1, 2012 due to paying excessive processing fees. He alleges that defendant failed to pay royalties attributable to the use of fuel gas from January 1, 2000 to the present.

ANALYSIS

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (quotations and citation omitted).

> Rule 23 sets out the requirements for class certification. Rule 23(a) requires the party seeking certification to demonstrate that: (1) the class is so numerous that joinder of all

> members is impracticable (numerosity); (2) there is a question of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213, 1217 (10th Cir. 2013). The class must also satisfy one of the three requirements listed in Rule 23(b). *Id.* In this case, plaintiff relies on Rule 23(b)(3), which requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

RULE 23(A) REQUIREMENTS

Rule 23 sets forth more than a pleading standard. *Wal-Mart*, 564 U.S. at 350. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* The court "has an independent obligation to conduct a 'rigorous analysis' before concluding that Rule 23's requirements have been satisfied." *Roderick*, 725 F.3d at 1217 (quoting *Wal-Mart* 564 U.S. at 351). "Granting or denying class certification

is a highly fact-intensive matter of practicality." *Monreal v. Potter*, 367 F.3d 1224, 1238 (10th Cir. 2004) (citations omitted). These requirements are addressed below.

a. Numerosity

Numerosity requires the plaintiff to show that the "class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). The number of royalty owners who are potential class members is not precisely stated in the parties' submissions but, given the number of wells within the class definition and the number of leases involved, it is clear that several thousand persons — likely in excess of 5000 — qualify. Plaintiff's showing amply satisfies the numerosity requirement and plaintiff does not seriously challenge that conclusion.

b. Commonality

Plaintiff must establish that there are "questions of law or fact common to the class." Rule 23(a)(2). To satisfy the element of commonality, the plaintiff need only demonstrate there is a single question of law or fact common to the entire class. *Wal-Mart*, 564 U.S. at 359. But "the mere raising of a common question does not automatically satisfy Rule 23(a)'s commonality requirement." *Roderick*, 752 F.3d at 1218. "Rather, the common contention 'must be of such a nature that it is capable of *classwide resolution* — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* (quoting *Wal-Mart*, 564 U.S. at 350).

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Plaintiff contends that common questions to be resolved include at least the following: (1) whether defendant owed a uniform duty to pay royalties on the best price available for the gas; (2) whether defendant used a uniform royalty payment methodology; (3) whether defendant's royalty payment methodology breached the duty to pay royalties on the best price available; (4) whether subclass leases contained an express lease clause that required the payment of royalty on fuel gas; (5) whether defendant breached the fuel gas clause; and (6) whether an elevated fee initially charged under the 2011 contract breached duties to the class.

Defendant argues that the commonality question as to this case, or this type of case, has already been answered by the undersigned judge in *Foster v. Apache Corp.*, 285 F.R.D. 632 (W.D. Okla. 2012), and the parties have devoted considerable attention to whether this case is, or is not, like *Foster*. In *Foster*, the plaintiff sought to represent a class of over 10,000 royalty owners in over 1200 wells. The case involved gas sales under thirty different marketing arrangements and to over two dozen purchasers. *Id.* at 636. The court concluded that plaintiff had failed to establish the commonality element because the potential variations in lease languages negated plaintiff's argument that common royalty payment practices, points of marketability, and fuel gas clauses were all common questions of fact or law. *Id.* at 640-44.

While there is no doubt some overlap between the claims and circumstances in *Foster* and those involved here, the court concludes there are differences which

suggest a different result. Unlike the circumstances in *Foster*, where the operative lease language varied from lease to lease, 285 F.R.D. at 642, plaintiff's evidence here is that *none* of the leases involved include language which would negate the implied obligation to obtain the best price available. That circumstance lends itself to a collective resolution of the question plaintiff seeks to focus on: whether defendant systematically underpaid royalties due to its failure to obtain full value for the NGL's which were part of these well's gas production. And, unlike in *Foster*, that evidence is based on a systematic evaluation of the individual leases. Thus, whether defendant had a uniform duty to pay royalties on the best price available, used a uniform royalty payment method to pay those royalties, and, in doing so, breached the duty to pay royalties on the best price available are all questions common to the proposed class.

Plaintiff also alleges that whether subclass leases contained an express lease clause that required the payment of royalty on fuel gas is a question common to the subclass. The lease chart provided indicates that over 4800 of the leases examined obligate defendant to pay the lessors for gas used off premises or in the manufacture of products permitting the court to uniformly interpret the clauses. Such a common analysis cannot be performed, according to defendant, because each clause in each lease must be construed individually and take into consideration the custom and practice in the industry. A review of applicable fuel gas language in the lease chart indicates that there is extensive uniformity between leases. As such, whether the subclass leases require payment of

royalty on fuel gas is a question capable of answer across the subclass.

Finally, the 2011 Contract contains an express provision that varies the processing fee to be charged over the first two years of the agreement. Doc. # 162-1, p. 11. For the first six months of the contract the fee was set at eighty cents ($0.80) per MMBtu. For the next year the fee was thirty cents ($0.30) per MMBtu. After that a discount of nineteen cents ($0.19) would apply to the thirty-cent fee for the first 175 TBtu of gas processed. Therefore, whether the eighty-cent processing fee charged to all proposed class members for the first six months of the 2011 Contract is excessive is a question common to the class. Evidence common to all class members would demonstrate if the elevated fee was required to offset some required expenditure by the midstream processor or whether the fee served some other purpose that did not transfer benefits to the class.

There is one aspect of the circumstances which gives the court pause in determining whether the common questions are appropriate for class-wide resolution. That is defendant's evidence that not all gas produced from the proposed class wells was processed to extract NGLs. Some of the wells were upstream of a processing plant, and their production was processed to remove the NGLs. Others were located downstream of the processing plant, with the result that the gas was either not processed or was somehow rerouted in some other way. As a result, plaintiff's proposed class of "persons or entities with royalty interests in wells with a Btu content of 1050

or higher" is overly broad because, as to at least some of those "rich gas" wells, there was no opportunity for processing sufficient to be a basis for the lost royalty nature of plaintiff's claim. However, the court concludes the issue does not bar certification altogether, but rather warrants a modification of the proposed class definition. Specifically, the court concludes the class description should be modified to include only those wells whose gas was actually processed.

With modification of the definition as indicated, the court concludes plaintiff has made the necessary showing as to the existence of common questions appropriate for classwide resolution that class members have "suffered the same injury." *Wal-Mart*, 564 U.S. at 350.

c. Typicality and Adequacy

A class action may only be certified when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). Commonality and typicality "tend to merge" and "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Walmart*, 564 U.S. at 349 n.5. Both requirements "also tend to merge with the adequacy-of-representation requirement." *Id.*

Defendant argues that plaintiff's claims are not typical of those of the class for a variety of reasons. It contends

plaintiff is not typical because his lease is a "'market value' 'at the wellhead' lease [which have] been repeatedly held to require royalties to be paid on the condition of the gas at the wellhead before processing." Doc. # 161, p. 40. But this argument does not negate plaintiff's primary argument that the value of the gas at the wellhead would include the value of the NGLs contained therein.

Defendant also argues that plaintiff was a class member in a prior class action against Apache, and that the settlement in that case released all claims that were or could have been raised related to the 1998 Contracts. But by its terms, the settlement of that action resolved claims "for the period of May 25, 1989 to December 31, 1999." Doc. # 161-5, p. 3. Here, plaintiff has proposed a class period beginning January 1, 2000. Given the explicit time limitation on the scope of the prior settlement, there appears to be no plausible basis for suggesting that plaintiff would be precluded from asserting claims which arose later.

Defendant further contends that plaintiff was paid differently from other class members because changes in his lease granted him royalty free from post-production costs and fees. But defendant's representative acknowledged that prior to 2012, no system was in place to identify royalty owners whose leases granted them royalties free from such costs. Doc. # 138-10, pp. 5-7. Thus, such fees were deducted from all proposed class members. Defendant has failed to establish that defendant was not typical of other class members with respect to defendant's royalty payment methodologies.

Defendant also argues that plaintiff lacks standing to bring this action on behalf of forced pooled royalty owners because the implied duty to market with respect to the deduction of post-production costs does not apply to forced pooled royalty owners. *See Panola Ind. Sch. Dist. No. 4 v. Unit Petroleum Co.*, 2012 OK CIV APP 94, 287 P.3d 1033, 1035-36 (Okla. Civ. App. 2012). If the court makes this legal determination, however, the forced pool royalty owners can simply be excluded from the class. This argument does not dictate the plaintiff is atypical or an inadequate representative for the class as proposed.

Defendant asserts that plaintiff is also not an adequate class representative because a potential conflict exists between the class and named plaintiff. Representative parties must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Defendant argues that the requested accounting may result in some class members owing defendant money, while defendant owes money to plaintiff and others. While that theoretical possibility always exists with an accounting, defendant's concern here is essentially speculation. Given the nature of plaintiff's claim, coupled with the evidence of the uniform process being employed by defendant in how it paid royalties, the court concludes the theoretical potential for conflict, without more, is insufficient to disqualify plaintiff as an adequate class representative. "The representative does not need to be in perfect alignment and agreement with all class members." Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary*, Rule 23 Commentary (2018). Certification is only inappropriate "if there are substantial or fundamental conflicts." *Id.*

Finally, defendant also argues that some class members may want to tailor their own liability and damages arguments creating conflict in the class. That may well be true and, if so, individual class members may separately pursue their own claims by opting out of the class. Such arguments, however, fail to demonstrate that plaintiff would be an inadequate class representative.

The court concludes that Mr. Rhea's claims and defenses are typical of the proposed class and that he would be an adequate class representative.[6]

Accordingly, the court concludes that the elements of Rule 23(a) have been met.

RULE 23(B): PREDOMINANCE AND SUPERIORITY

The next question is whether plaintiff has met his burden under Rule 23(b) — specifically whether he can "show that common questions subject to generalized, classwide proof *predominate* over individual questions. 'The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) (quoting

6. Defendant has not challenged the adequacy of proposed class counsel. The court concludes that proposed class counsel have demonstrated adequate investigation of the claims presented, have extensive experience handling similar class claims, and will fairly and adequately represent the interests of the class. *See* Fed.R.Civ.P. 23(g).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622-23, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). The court must determine "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. *Id.* (quotations and citation omitted). Further, "Rule 23(b)(3)'s predominance criterion is 'far more demanding' than Rule 23(a)'s commonality requirement." *Roderick*, 725 F.3d at 1220 (quoting *Amchem*, 521 U.S. at 623-24).

Defendant contends that individual questions predominate because of its "varying obligations[,] varying contracts[, and] other issues typically involved in royalty underpayment cases." Doc. # 161, p. 44. But plaintiff argues that his claims here are not the claims of a "typical" royalty underpayment case. Plaintiff contends that he is not contesting when the gas becomes marketable or whether the fees charged after the gas becomes marketable enhanced the value of the gas, were reasonable, or increased the royalty payments proportionally. *See Mittelstaedt v. Santa Fe Minerals, Inc.*, 1998 OK 7, 954 P.2d 1203, 1208 (Okla. 1998). Rather, the central thrust of plaintiff's claim is that *Mittelstaedt* is inapplicable in this case because he simply seeks royalties to be paid on the value of the residue gas plus the value of the NGLs removed during the processing — his proposed "best price available."

Plaintiff's argument, however, appears to misconstrue the keep whole nature of the 1998 Contracts entered into between defendant and the midstream processor.

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> A keep-whole processing contract is one in which the processor agrees to process the gas, keep the liquids for itself, and redeliver the same Btu equivalent after processing. . . . From the processor's perspective, it enjoys all the profit potential from extracting liquids, but bears the entire pricing risk, since it must make up, out of its own pocket, the volume of gas necessary to keep the producer whole.

Robert L. Theriot, *Midstream Update—Challenges in Getting Production to Market*, 59 Rocky Mt. Min. L. Inst. 6-15 (2013); *see also Duke Energy Nat. Gas Corp. v. C.I.R.*, 172 F.3d 1255 (10th Cir. 1999) (Under a keep whole contract, "the producer receives the [thermally equivalent] volume of residue gas, while [the processor] receives the proceeds from the NGLs that are separated in processing, and sometimes a processing fee.").

Therefore, on the face of the agreements at least, the value of the NGLs appears to have been transferred to the midstream processor as at least a partial fee for processing. Accordingly, *Mittelstaedt* would apply in this case. Such a determination, however, is not fatal to class certification, despite defendant's insistence. Under *Mittelstaedt*, operators may charge post-production costs to the lessor if (1) once the gas is in a marketable condition; (2) the post-production costs enhanced the value of the gas; (3) the costs are reasonable; and (4) the costs increased royalties proportionally. 954 P.2d at 1208. Because plaintiff does not contest that the gas is marketable at the wellhead, a significant *Mittelstaedt* factor barring certification in other cases is not present

here. *See, e.g.*, *Foster*, 285 F.R.D. at 643 ("Thus, in light of the various marketing arrangements and other factors involved here, the point at which gas becomes marketable is not a question which can be answered on a class-wide basis, at least for a class a broad as this one.").

Plaintiff's case is intentionally centered on the NGL uplift that he says royalties must be paid on. Plaintiff does not challenge the other fees charged by the midstream processor. Thus, only a single fee — the "NGL fee" — is at issue in this case. This single fee, as alleged, is uniformly charged against all putative class members. The question then becomes whether evaluation of the value of the NGLs as fees enhanced the value of the residue gas, whether that was a reasonable fee, and whether royalties increased in proportion to that value would still present common questions subject to class-wide proof that predominate over the individual questions that may arise. The court concludes that the common questions do predominate for the specific, limited class proposed by plaintiff in this action.

Defining the putative class to include only wells with a Btu content of 1050 or higher appears to limit the class to wells with extractable levels of NGLs that have value and which require processing prior to entry into the high pressure intra and interstate pipelines. Therefore, all class members arguably have been charged the fee represented by the value of those NGLs, with higher NGL content wells paying a higher fee and lower NGL content wells paying a lower fee. Whether that fee was reasonable, whether the extraction of those NGLs enhanced the value of the gas, and whether that cost increased royalties proportionally would

likewise be applicable to and proportional across the class and subject to class-wide proof. Despite the fact that "[p]ost-production costs must be examined on an individual basis to determine if they are within the class of costs shared by a royalty interest," *Mittelstaedt*, 954 P.2d at 1208, the court concludes that plaintiff's proposed class definition, as modified by this order, is narrow enough and creates enough uniformity among class members to establish that common questions predominate over the individual issues that typically arise in a *Mittelstaedt* analysis.

Finally, plaintiff's lease chart addresses defendant's concerns about variations in lease language, indicating that the leases do not negate Oklahoma's implied duty to market and pay royalty on the best price available. Defendant's own representative confirms this conclusion. Doc. # 138-9, p. 8. As in *Naylor Farms, Inc. v. Chaparral Energy, LLC*, No. CIV-11-0634, 2017 U.S. Dist. LEXIS 6073, 2017 WL 187542 (W.D. Okla. 2017), the court concludes that plaintiff's analysis of most or all the leases addresses the common concern in oil and gas royalty class actions regarding the "remarkable variety of royalty provisions." *Foster v. Merit Energy Co.*, 282 F.R.D. 541, 557 (W.D. Okla. 2012). Here, like *Naylor Farms*, the court has confirmed that plaintiff's lease chart demonstrates that the leases in this case contain clauses creating the implied duty to market as established in *Mittelstaedt, TXO Prod. Corp. v. State ex rel. Comm'rs of Land Office*, 1994 OK 131, 903 P.2d 259 (Okla. 1994), and *Wood v. TXO Prod. Corp.*, 1992 OK 100, 854 P.2d 880 (Okla. 1992).[7]

7. Defendant does not challenge that plaintiff accurately represents the language of the leases in the lease chart.

Defendant also contends that many of the wells at issue in this case are subject to prior litigation and that its communications with various class members varied raising individual questions that must be addressed. To the extent that potential class members have released claims in litigation with other processors, prior to Defendant acquiring the interests in the wells, these individuals can be excluded from the class by modifying the exclusion clause of the class definition. And defendant has failed to present any evidence of how varying communications to class members would impact plaintiff's basic claims for failure to properly pay royalties, to pay royalties on fuel gas, and that the elevated fee for the first six months of the 2011 Contract improperly reduced royalties. In fact, defendant has testified that all royalty owners receive the same check-stub form and that it does not indicate whether the gas produced included NGLs that were or could have been extracted. Doc. # 137-5, p. 31.

Defendant also argues, however, that reliance cannot be presumed for the fraud claim and that this is necessarily an individual inquiry. However, "claims of fraud, deceit, constructive fraud, and punitive damages are appropriate for class certification" "where standardized written misrepresentations have been made to class members," and "plaintiff's reliance . . . is confined to a single state." *Weber v. Mobil Oil Corp.*, 2010 OK 33, 243 P.3d 1, 5-7 (Okla. 2010). In this case, there is no evidence that suggests any law other than Oklahoma law would govern plaintiff's fraud claims. Further, the claims are based on the information presented to royalty owners on their check stubs, a "standardized written" representation. In this

instance, the court concludes that plaintiff has adequately countered defendant's individual reliance arguments sufficient for the fraud claim to be certified.

The final significant argument against predominance presented by defendant is that individual damage questions would consume the proceedings. This argument focuses on plaintiff's original proposed class definition in his state court petition which included in the class royalty owners whose gas "was or could have been processed for removal and sale of valuable natural gas liquids." Doc. 3-1, p. 7. By modifying the class definition to include only royalty owners whose gas was processed for the removal of NGLs, defendant's concerns are significantly addressed. While there are still damage calculation variables that must be addressed, plaintiff has presented evidence that his expert will be able to determine damages on a classwide basis. *See* Doc. # 137-7. The court concludes that plaintiff's showing is sufficient to support a finding of predominance despite the questions surrounding individual damage calculations.

Finally, the court must also consider whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b). The following factors, among others, are considered in making that determination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Id.

A class action is especially well suited to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 617 (quotations and citation omitted). This action is representative of the instance when the amount of potential recovery is dwarfed by the costs of bringing the suit.[8] For this reason it is highly suited to proceed as a class action and there is little likelihood that class members would be interested in controlling the litigation through separate, individual actions.

Defendant also argues that superiority is defeated because plaintiff has failed to submit a trial plan to establish priority, nor has plaintiff explained the exact

8. For example, in the prior class action in which plaintiff was a class member and received an award for the underpayment of royalties over a ten-year period, he received a settlement distribution check of less than $20.00. Doc. # 161-9, p. 2.

methodology that will be used to calculate damages. The court concludes that plaintiff is not required to submit a trial plan at this juncture to establish superiority. Further, while the damage calculations may be challenging, given plaintiff's theory of recovery and expert report and testimony, damages will not defeat a finding of superiority at this time.[9]

Here, plaintiff has demonstrated that a class action "would achieve [greater] economies of time, effort and expense, and promote [enhanced] uniformity of decision as to persons similarly situated" than would individual actions. Fed.R.Civ.P. 23, Advisory Comm. Note (1966). The court concludes the superiority element of Rule 23(b)(3) is satisfied.

CONCLUSION

Plaintiff's motion for class certification and to appoint a class representative and class counsel [Doc. # 135], with the modifications to the class definition stated in this Order, is **GRANTED**. Plaintiff is instructed to file a modified definition reflecting these modifications within fourteen (14) days. Defendant may file any objection to the modified definition within seven (7) days thereafter.[10] Plaintiff Bigie

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9. Defendant also indirectly argued the second factor — the extent and nature of other litigation — in its overlapping class action arguments. As noted, the court concluded this concern can be resolved excluding from the class individuals whose claims are barred by prior litigation. Defendant, who removed the action to this court, does not challenge the desirability of this forum.

10. Any objection should be limited to the question of whether the modified definition is consistent with this order, rather than some broader challenge.

Appendix C

Lee Rhea is appointed as Class Representative, the law firm of Nix, Patterson, & Roach, LLP is appointed as Class Counsel, and the law firm of Whitten Burrage is appointed as Liaison Counsel.

IT IS SO ORDERED.

Dated this 15th day of February, 2019.

/s/ Joe Heaton
JOE HEATON
UNITED STATES DISTRICT JUDGE

APPENDIX D — FEDERAL RULES OF CIVIL PROCEDURE RULE 23

FEDERAL RULES
OF CIVIL PROCEDURE RULE 23

RULE 23. CLASS ACTIONS

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can

be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the

Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).