No. _____

In the
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

R. PAUL YETTER
ROBERT D. WOODS
YETTER COLEMAN LLP
600 Travis Street
Suite 5400
Houston, TX 77002
(713) 632-8000

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
KYLE R. EISWALD*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

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QUESTION PRESENTED

The decision below affirmed an award of $100 million in damages to a class full of members who have never been identified and likely never will be, with upwards of three-quarters of that judgment bound for unclaimed-property funds and class counsel's coffers. This case involves a class of 53,000 "oil-well interest owners" to whom petitioners failed to pay statutorily required interest on late proceeds payments. But the class was not confined to people who actually received a late proceeds payment. It instead included thousands of well interests for which *no one* had been paid proceeds, and proceeds were instead sitting in unclaimed-property funds—because petitioners could not identify or locate their owners. Respondent does not claim to know who is entitled to most of those proceeds or have any administratively feasible means of identifying them. Yet he nonetheless sought to recover interest on behalf of those unknown owners—even though entitlement to interest turns on whether and when someone secured "marketable title," which cannot be determined without knowing who claims to have it. The district court certified the class and awarded it $100 million—nearly two-thirds of which is attributable to these unknown "owners"—and the Tenth Circuit affirmed. In doing so, it took the wrong side of a circuit split over whether a class must provide a feasible means of ascertaining its members, and it sanctioned nearly $70 million in damages that no one has been proven to have standing to recover.

The question presented is:

Whether Rule 23 or Article III permits a court to certify a class and award all members damages when

the class never identifies any feasible way to ascertain who is part of the class or has standing to recover them.

PARTIES TO THE PROCEEDING

Petitioners are Sunoco, Inc. (R&M) (now Energy Transfer (R&M), LLC) and Sunoco Partners Marketing & Terminals, L.P. (now Energy Transfer Marketing & Terminals L.P.). They were Defendants-Appellants below. Petitioners are both wholly owned subsidiaries of Energy Transfer LP (NYSE: ET).

Respondent is Perry Cline, on behalf of himself and all others similarly situated. He was Plaintiff-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Sunoco, Inc. (R&M) (now Energy Transfer (R&M), LLC) is a limited liability company that has no corporate parents but is a wholly owned subsidiary of Energy Transfer LP. Energy Transfer LP is publicly traded on the NYSE, but no publicly held company owns 10% or more of its stock.

Petitioner Sunoco Partners Marketing & Terminals, L.P. (now Energy Transfer Marketing & Terminals L.P.) is a limited partnership and has no corporate parents but is a wholly owned subsidiary of Energy Transfer LP. Energy Transfer LP is publicly traded on the NYSE, but no publicly held company owns 10% or more of its stock.

Energy Transfer LP's stock ticker symbol is ET.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 26-7014 (10th Cir.), judgment entered March 30, 2026; mandate entered March 30, 2026.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 23-7090 (10th Cir.), judgment entered November 17, 2025; mandate entered December 9, 2025.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 22-7030 (10th Cir.), judgment entered August 4, 2022.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 22-7018 (10th Cir.), judgment entered August 3, 2023; mandate entered August 25, 2023.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 22-7017 (10th Cir.), judgment entered August 4, 2022.
- *In re: Sunoco, Inc. (R&M) et al.*, No. 21-7063 (10th Cir.), judgment entered February 2, 2022.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 20-7072 (10th Cir.), judgment entered November 1, 2021; rehearing denied November 29, 2021; certiorari denied October 3, 2022.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 20-7064 (10th Cir.), judgment entered November 1, 2021; rehearing denied November 29, 2021; certiorari denied October 3, 2022.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 20-7055 (10th Cir.), judgment entered November 3, 2020.

- *Sunoco, Inc. (R&M) et al. v. Cline et al.*, No. 19-608 (10th Cir.), judgment entered November 13, 2019.
- *Cline et al. v. Sunoco, Inc. (R&M) et al.*, No. 6:17-cv-00313 (E.D. Okla.), amended judgment order entered February 23, 2026.

Petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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The decision below affirmed a $100 million class-action judgment even though the class representative cannot begin to identify thousands of his 53,000 putative class members. And he is not alone; *no one* has ever offered any feasible way of determining who those class members are. All instead recognize that upwards of half of that massive damages award is likely bound for state unclaimed-property funds, because no one will ever be able to identify or locate someone entitled to all the damages petitioners have been ordered to pay. That may not be a concern for class counsel, which gets its $30 million cut either way—and indeed benefitted from packing the class with unidentified and unidentifiable members. But it is a serious problem for Rule 23 and Article III, as neither permits federal courts to order defendants to pay damages to no one. Yet the Tenth Circuit sanctioned that extraordinary result nonetheless—on the theory that classes simply do not have any obligation to identify any feasible means to ascertain who is part of them. That cannot be reconciled with Rule 23, Article III, or this Court's precedent.

This case arises out of the efforts of petitioners (hereinafter, "Sunoco") as a "first purchaser" of oil in Oklahoma—i.e., a party who buys all the oil from a well. As part of those efforts, Sunoco agreed to handle paying proceeds from its sales to parties with an ownership interest in the well. That is more difficult than it sounds because oil-well ownership interests become highly fractionalized over decades of subdivided inheritance and assignments, leaving it virtually impossible in some instances to identify or

locate someone with the requisite "marketable title" to each interest. Nevertheless, Sunoco managed to identify, locate, and timely pay owners almost 99% of the time. When Sunoco could not identify someone with marketable title, it segregated the funds until it could, or until enough time passed that the funds could be designated unclaimed property. And if Sunoco paid an owner proceeds but failed to do so on time, Oklahoma's Production Revenue Standards Act ("PRSA"), 52 Okla. Stat. §570.1 *et seq.*, entitled the owner to interest, with the applicable rate depending on when the owner secured marketable title.

Respondent Perry Cline is a well-interest royalty owner who received a late payment from Sunoco but was not paid interest alongside it, because Sunoco followed the industry practice of determining interest owed only after an owner requested it. Not content to simply collect his interest, Cline sought to bring a class action on behalf of all well-interest owners in Oklahoma who "received" a late proceeds payment from Sunoco but had not yet been paid interest. That alone would have been an exceedingly unwieldy class action since the PRSA interest rate turns on the highly individualized question of when someone secured marketable title. But Cline did not stop there. He also insisted on representing any well interest for which someone was not timely paid proceeds—even if *no one* ever "received" a proceeds payment for that interest, and the proceeds associated with it were instead sitting in unclaimed-property funds with (at best) only an "apparent owner" identified.

Cline offered no way—common or otherwise—to ascertain who the rightful owners of those unclaimed

proceeds may be. So there was no way of determining whether anyone was legally entitled to them, let alone whether and at what rate they might be entitled to PRSA interest, as one cannot determine whether or when someone acquired marketable title without knowing who claims to have it. That glaring ascertainability problem in turn spawned not only a predominance problem, but an Article III problem, as it created a very real risk of awarding damages that no plaintiff has standing to recover.

These unidentified (and likely unidentifiable) "well-interest" class members were no rounding error; they numbered in the thousands and accounted for nearly two-thirds of the damages Cline sought. But the district court certified the class nevertheless and ultimately awarded it $100 million in damages, and the Tenth Circuit affirmed. In doing so, the court expressly joined the long (and wrong) side of a circuit split over whether Rule 23 requires a class to supply some administratively feasible means of ascertaining who is part of it. And the court sanctioned an award of tens of millions of dollars in damages that no one may have standing to recover, in violation of this Court's repeated holdings that Article III standing must be proven for each damages class member.

While many petitions arrive at this Court warning of the problems that may arise if courts do not strictly adhere to the requirements of Rule 23 and Article III at the certification stage, this case vividly illustrates what far too often happens when courts take a certify-now-ask-questions-later approach: The critical questions are never answered, and defendants' rights suffer for it. If this Court does not step in and

at the very least insist that a class must *at some point* prove that actual parties are entitled to the damages it seeks, then the already-hydrologic pressure to settle post-certification will become more powerful still. The Court should grant the petition, resolve the circuit splits that the decision below exacerbates, and ensure that class actions do not devolve into a license to mete out rough justice, unshackled from the strictures of Rule 23 and Article III.

OPINIONS BELOW

The relevant Tenth Circuit opinion and order are reported at 2026 WL 861620 (No. 26-7014) and 159 F.4th 1171 (No. 23-7090) and reproduced at App.1-2 and 3-71. The relevant district court decisions are reported at 479 F.Supp.3d 1148 and 333 F.R.D. 676 and reproduced at App.93-153 and 165-85.

JURISDICTION

The Tenth Circuit issued its order and judgment on March 30, 2026. That court had jurisdiction to review the district court's amended judgment order under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause 1 of the United States Constitution and Federal Rule of Civil Procedure 23 are reproduced at App.237-47.

STATEMENT OF THE CASE

A. Legal Background

Class actions are "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). Anyone seeking "a departure from that rule" must affirmatively "justify" the use of the class mechanism by satisfying all the requirements of Federal Rule of Civil Procedure 23, and courts may certify a class only "after a rigorous analysis" of whether it satisfies those requirements. *Id.* at 348, 350-51.

Although the concept is not explicitly discussed in Rule 23, almost every circuit has recognized that a damages class cannot be certified unless the members of the proposed class are "ascertainabl[e]"—i.e., "readily identifiable." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). To that end, most courts require class representatives to "propose a definite class … with reference to objective criteria." 1 Newberg & Rubenstein on Class Actions §3:1 (6th ed. June 2026 update); *see also id.* §3:3 & n.9 (collecting cases). And some courts require class representatives to also demonstrate that "there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). Whichever test courts may use, they generally agree that ascertainability is a "threshold requirement." *In re Petrobras Secs.*, 862 F.3d 250, 264 (2d Cir. 2017); *see* Newberg, *supra*, §3:3 & n.2. In other words, class representatives "must satisfy this requirement before the district court can consider whether the class satisfies" the Rule 23 factors. *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). After all, courts "cannot determine whether a proposed class satisfies the Rule 23[(a) and (b)] requirements without a way to identify absent

class members." McLaughlin on Class Actions §4:2 (22nd ed. Nov. 2025 update).

That threshold inquiry also helps ensure that a proposed class action will be consistent with the jurisdictional limits on federal courts. "Federal courts do not exercise general legal oversight … of private entities." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021). "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id.* at 423. "For there to be a case or controversy under Article III, [a] plaintiff must have a 'personal stake' in [a] case"—i.e., standing. *Id.* "[P]laintiffs bear the burden of demonstrating that they have standing," *id.* at 430-31, which they must meet at each successive stage of litigation. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). And courts have an ongoing "'obligation to assure [them]selves' of litigants' standing under Article III," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006), as strict adherence to these principles is critical to confine federal courts to resolving only "real controvers[ies] with real impact[s] on real persons," *TransUnion*, 594 U.S. at 424.

Class actions, like all other federal court actions, must satisfy Article III's standing requirements. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). That is particularly important when it comes to damages class actions. Because such actions are, at bottom, just "individualized claim[s] for money," *Wal-Mart*, 564 U.S. at 363, "litigated in an economical fashion," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982), this Court has reiterated time and again that "[e]very class member must have Article III standing

in order to recover individual damages," *TransUnion*, 594 U.S. at 431. Yet there is no way to determine whether every class member does if there is no feasible way to determine who each class member is. Ascertainability thus can be essential to ensuring that a class action does not exceed the bounds of the federal courts' Article III jurisdiction by awarding damages that no one has standing to recover.

B. Factual Background

1. "Oil production has a cast of varied characters," covering those who own, explore, produce, extract, and market oil, and more. App.102 n.6. Among those many players are entities known as "first purchasers," who agree to buy the oil produced from a well and then pay proceeds to those entitled to them. That is more challenging than it sounds. Oil and gas ownership interests are varied, fractured, and frequently changing hands—so much so that hundreds (if not thousands) of people can own shares of the proceeds generated by the sale of oil from a single well.

First, there are the owners of the mineral rights (typically royalty owners), who enter leases with well operators and get a percentage of the proceeds derived from oil produced from the land. D.Ct.Dkt.266 at 172-73. That share is often spread among multiple people. Since mineral rights were first granted in Oklahoma in the late 19th century, they have been subdivided among multiple heirs across multiple generations, *id.* at 172, and various entities across the country have bought (and sold) these interests from fourth- and fifth-generation owners, *id.* at 177-78. Next, there are the exploration and production companies—well operators who lease mineral rights from owners and

do the drilling—along with non-operating "working interest" owners who invest capital and pay expenses in return for a share of the proceeds. *Id.* at 173-74. Finally, there are assignees, to whom working-interest owners may have assigned all or part of their interests. *Id.* at 215-16; *see* D.Ct.Dkt.269 at 698-701. In all, "it is not unusual for [a first purchaser] to pay anywhere from tens to thousands of interest owners for oil produced" from one well. App.103 n.6.

While a first purchaser's payment obligations are contractually grounded, the Oklahoma legislature eventually codified them in the PRSA, providing that "[p]roceeds from the sale of oil or gas production from an oil or gas well shall be paid to persons legally entitled thereto" within certain deadlines that vary by sale type. 52 Okla. Stat. §570.10(B). The PRSA also provides for interest as a form of damages when payors breach the obligation to remit proceeds in full and on time. *Id.* §570.10(E)(1); *Purcell v. Santa Fe Mins., Inc.*, 961 P.2d 188, 191-93 (Okla. 1998). Unsurprisingly, it is not always clear who the rightful interest owner is. To account for the risk of uncertainty on that score, Oklahoma courts have long held that someone is not entitled to proceeds under the PRSA unless she can prove that she has "marketable title." *In re Tulsa Energy, Inc.*, 111 F.3d 88, 90 (10th Cir. 1997). That is a demanding standard, defined by the courts as "perfect title or clear title of record … free from apparent defects, grave doubts and litigious uncertainty." *Hull v. Sun Refining & Mktg. Co.*, 789 P.2d 1272, 1277 (Okla. 1989).

The PRSA not only confirms the need for "marketable title," but also accounts for the reality

that a payor may not be able to pay proceeds on time because no one has such title. To that end, while the statute provides a default rate of 12% interest for untimely payments, it reduces the rate to 6% "[w]here such proceeds are not paid because the title thereto is not marketable." 52 Okla. Stat. §570.10(D)(1)-(2). If title was not marketable when proceeds came due, then whoever is legally entitled to proceeds may claim them once she has cured whatever defect or cloud on her title existed, but she will be entitled to only 6% interest for the period during which she was not paid because she lacked marketable title. The PRSA thus strongly incentivizes payors to promptly determine who has marketable title (lest they be saddled with 12% interest for untimely payments), but does not penalize them with 12% interest during periods when an owner lacked marketable title.

2. Sunoco used to operate as a first purchaser in Oklahoma.[1] When it did so, it contracted with thousands of oil producers in the state, paying more than 100,000 interest owners proceeds from more than 20,000 properties. App.167. To facilitate timely payments, Sunoco worked hard to ascertain who held marketable title to each interest. But because Sunoco is not an exploration-and-production company with personal relationships with royalty owners, its title experts generally had to rely on information provided by operators regarding the plethora of interests down the chain. App.103. Operators typically provided Sunoco with title opinions prepared by their own title experts demarcating the various payees on each well

[1] Sunoco decided to exit the proceeds-paying business in Oklahoma because of this litigation. App.107.

and identifying what percentage of a well interest each payee owned. D.Ct.Dkt.266 at 171-72. These opinions often exceeded 100 pages, D.Ct.Dkt.269 at 700-01, as title over fractional interests often became muddied by decades' worth of poorly recorded transactions, stray deeds, deaths without a probated estate, unrecorded lease terminations, and more. D.Ct.Dkt.266 at 195-202. And the information Sunoco received from operators was not always complete or correct. App.103.

Despite these challenges, Sunoco made timely payments almost 99% of the time, making it the industry leader in the state. App.104. In the rare instances when Sunoco did not timely pay, that was typically for one of three reasons. First, sometimes a title examination revealed who likely owned a well interest, but more information was needed to confirm that they held marketable title, and thereby avoid any risk of paying proceeds to the wrong person. In that case, a title attorney would issue an opinion noting what additional documents were needed, and payment would not be remitted until they were obtained. D.Ct.Dkt.266 at 216. Second, sometimes Sunoco thought it knew who the owner was but got no response to requests for confirmation, or sent proceeds checks only to have them repeatedly go uncashed. *E.g.*, *id.* at 135-37, 200-02, 215-16, 221-22, 236-37, 241-42. Finally, sometimes a title examination was so inconclusive that even title experts could not identify any potential owner at all. *Id.* at 297.

When Sunoco ran into these complications, it did not simply keep the proceeds; it segregated them for payment if and when someone with marketable title

was identified and/or located. And if difficulties identifying and/or locating someone with marketable title persisted long enough for the proceeds to be presumed abandoned under the law of the state where someone thought to own the interest was last known to live, Sunoco sent the proceeds to that state's unclaimed-property fund, listing the name of the apparent owner if it had been able to identify one. App.110.[2] When Sunoco had no idea who the rightful owner was, it sent the proceeds to two "undivided" accounts (i.e., accounts with no associated name(s) or address(es)) in the Texas unclaimed-property fund, where Sunoco is headquartered. App.110.

The situation was even more complicated when it came to the interest that the PRSA mandates on late payments. As noted, the PRSA prescribes different interest rates for untimely payments depending on whether the delay was owing to lack of marketable title. 52 Okla. Stat. §570.10(D)(1)-(2). Sunoco thus could not accurately determine the applicable interest for a late payment without determining both the actual owner and the periods when her title was marketable—i.e., without the very information that often precluded Sunoco from making a timely payment. Accordingly, Sunoco followed the industry practice of waiting to pay interest until someone who could establish that she had marketable title affirmatively asked for it, rather than setting aside (and in all likelihood sending to unclaimed-property

[2] To be clear, while these payments sometimes listed the name and/or address of a last-known owner, Sunoco sent these proceeds to unclaimed-property funds because it had doubts about that person's title, identity, and/or location. *See* D.Ct.Dkt.268 at 547.

funds) interest that may be owing to no one. App.105-06.

C. Procedural Background

1. Cline is among the roughly 1% of interest owners who received untimely proceeds payments from Sunoco. Though he was ultimately paid all proceeds owed, he maintained that Sunoco violated the PRSA by not paying him interest alongside those proceeds and instead waiting until he asked for it. App.94-95, 103-04. And he filed a putative class action against Sunoco seeking to represent and collect compensatory and punitive damages on behalf of all similarly situated interest owners. App.94-96.

Cline initially sought to represent anyone who had "received" a late proceeds payment from Sunoco and not been paid interest. D.Ct.Dkt.2-2 at 5. As Sunoco explained in resisting certification on (among other things) predominance grounds, that was problematic enough, as there would be no way to answer the critical question of whether (and for what period(s)) each class member was entitled to 6% or 12% interest without conducting individualized inquiries into when each member secured marketable title. D.Ct.Dkt.105 at 23-24.[3] But things took a turn for the much worse when Cline insisted that his class also include well interests for which no one had ever "received" the relevant proceeds payments, and those

[3] Some members also may not have been entitled to interest at all owing to contractual agreements. For instance, a representative from one class member testified at trial that the company opted out because it did not have any right to interest under an indemnity agreement. D.Ct.Dkt.269 at 772-79.

proceeds were instead sitting in state unclaimed-property funds.

Sunoco resisted that effort too, arguing that the class could not possibly include thousands of abstract "interest owners" whose identities Cline offered no "reliable and administratively feasible mechanism for" identifying. *See* D.Ct.Dkt.105 at 17-22; App.183-85. But the district court dismissed Sunoco's ascertainability concerns, accepting Cline's dubious claim that his expert could determine their identities from *Sunoco*'s records—even though Sunoco had sent proceeds for those well interests to unclaimed-property funds because it could not identify or locate their owners. App.184. The court therefore certified a class of approximately 53,000 members, including thousands of well interests whose ownership no one had ascertained. App.162-64; App.113-16. And the court later clarified that the class included not just well interests with proceeds sitting in unclaimed-property funds in the name of an "apparent owner," but even funds sitting in the undivided accounts associated with no one. App.154-61. In effect, then, the court certified a class chock-full of "well interests," with no feasible means of determining who (if anyone) held marketable title to them.

2. After certifying Cline's inchoate class, the court granted it partial summary judgment, holding that the PRSA required Sunoco to "pay the statutory interest without a demand [from an interest owner] and at the same time it makes the late payment." D.Ct.Dkt.231 at 1. At that point, the only remaining

issue (which was really the only issue[4]) was what interest rate(s), and for how long, each class member was entitled to. Yet, as Sunoco had predicted, Cline could not identify all the people or entities that he claimed were entitled to the PRSA interest he sought—because the Sunoco records that he had promised would supply that information did not have it for many of the well interests in his class.

Cline instead insisted that it did not matter who (if anyone) held marketable title to those interests because Sunoco owed 12% to *everyone* unless it could prove that a class member did *not* have marketable title—a highly individualized issue Sunoco could not begin to try to prove for most members since Cline never identified who he claims had marketable title. And the district court spent a grand total of four days for its bench trial, thus ensuring that Sunoco could not present the complex evidence needed to make such a showing as to all 53,000 well interests anyway.

Nearly a year later, the court issued an opinion holding Sunoco liable to all class members, awarding the class 12% interest for all periods during which any payment on any covered well interest was not timely made (totaling roughly $80 million), and awarding $75 million in punitive damages. App.123-53; App.88. In doing so, the court rejected Sunoco's certification and standing arguments, positing that "each class member has suffered an injury because Sunoco has withheld

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[4] The timing-of-payment issue was relevant at most only to Cline's demand for punitive damages, as Sunoco never disputed that it owed PRSA interest for late payments even if the PRSA did not require that interest to be paid until the owner requested it. *See* D.Ct.Dkt.160 at 8-9.

interest it owes to the owner," and blaming Sunoco for failing to have kept a single, comprehensive record of which payments were late owing to marketable-title problems. App.128-34. It also ignored the reality that approximately two-thirds of the ordered damages are likely destined to sit indefinitely in state unclaimed-property funds. *See* D.Ct.Dkt.268 at 573-75.

3. Sunoco proceeded to spend "almost three years … unsuccessfully attempt[ing] to appeal" that massive damages award, owing to deficiencies in the district court's judgment and related orders arising out of uncertainty about how to deal with the reality that most damages would never be distributed to an actual class member. App.186-87. While Sunoco offered easy ways to cure those deficiencies, the class steadfastly resisted any efforts to do so, and the district court inexplicably refused to make the modest tweaks necessary to conform its judgment to the Tenth Circuit's finality rules.

After the Tenth Circuit ultimately agreed with Sunoco that the district court's "judgment" was deficient, *see* App.204-05, the district court finally entered a conforming amended judgment and allocation plan indicating what should be done with the tens of millions of dollars in damages awarded to well interests whose owners could not be identified or located. App.83-85. In particular, the court ordered that damages "remaining as a result of uncashed distribution checks, inability to locate Class Members, and/or other such reasons after the Judgment Administrator" "us[es] commercially reasonable efforts" to try to distribute the award to class members "will be sent to the appropriate state accounts for

unclaimed property." App.81, 86. The court also entered a new Rule 58 Judgment, awarding the class an additional $23,181,516.50 in interest at the PRSA's punitive 12% rate for the three years during which the class and the district court frustrated Sunoco's ability to appeal, bringing the total to $103,873.002.50 in actual damages and $75,000,000 in punitives. App.76-77.

4. Once Sunoco finally had an appealable judgment in hand, it promptly appealed, arguing (among other things) that Cline failed to prove that the class satisfied all the requirements of Rule 23 or that all members have standing to recover the damages the district court awarded. While the Tenth Circuit vacated the $75 million punitive damages award, it otherwise affirmed. App.61.

Starting with Rule 23, the Tenth Circuit did not deny that neither Cline nor the district court had ever been able to ascertain who all is part of the class, or that in all likelihood no one will ever be able to do so. Instead, the court first chastised Sunoco for failing to supply the information Cline needed to ascertain who is part of his class, App.37-40, and then joined some circuits in "reject[ing]" the rule that a class cannot be certified unless it identifies an "administrative[ly] feasib[le]" way of ascertaining who is part of it. App.41. To be ascertainable, the court instead held, a class need only "(1) be defined clearly" and not "too vaguely, and (2) be defined objectively and [not] based on subjective criteria." App.41-42. The court then summarily declared that "[t]he Class satisfied this ascertainability standard," App.42—even though the class is not confined to the only objective criteria Cline

provided (i.e., parties who "received" an untimely payment, App.162).

As for standing, the Tenth Circuit essentially adopted the district court's reasoning. *See* App.44-48. Though the court acknowledged that "plaintiff[s] must demonstrate that they" meet Article III's requirements, App.44, it held that all class members had standing to recover damages because, by sending *proceeds* to state unclaimed-property funds, Sunoco purportedly recognized that *someone* must be entitled to them. App.44-47. The court recognized that no one knows who that is—which makes it impossible to know whether or at what rate they may be entitled to PRSA interest, the only damages the class sought. But it once again faulted Sunoco's purportedly "deficient recordkeeping" for Cline's inability to prove whether any real person or entity has standing to recover all the damages he secured. App.47-48.

5. After the Tenth Circuit vacated and remanded, the district court issued an amended final judgment ordering Sunoco to pay $103,873,002.50. App.72-73. Sunoco appealed that order and all "intertwined … or related" "orders, adjudications, findings, and conclusions," D.Ct.Dkt.689 at 1, seeking summary affirmance to facilitate this Court's review "now that all aspects of the case have been determined through final judgment." CA10 No. 26-7014, Dkt.28 at 5. The Tenth Circuit summarily affirmed on March 30, 2026. App.1-2. When the mandate returned, the district court ordered Sunoco to pay for the full judgment plus post-judgment interest, which (with an additional $5 million in agreed-upon statutory fees and costs) came out to $123,876,871.65. D.Ct.Dkt.710.

REASONS FOR GRANTING THE PETITION

The decision below sanctioned a $100 million judgment to a 53,000-member damages class knowing full well that the vast majority of that damages award will never make it into the hands of any actual class member. Indeed, that is all but certain, as thousands of "members"—accounting for almost two-thirds of the damages award—not only were never identified, but likely never will be. That startling result flouts Rule 23, which cannot confine class actions to workable classes or protect the rights of plaintiffs or defendants if there is no feasible means to ascertain who is part of the class. It flouts Article III, which does not permit federal courts to award money damages without assuring themselves that actual plaintiffs have standing to seek them. And it deepens two acknowledged circuit splits to boot. This case provides a relatively rare opportunity for this Court to resolve entrenched disagreements over these critical Rule 23 and Article III issues in the context of a class action that was litigated all the way to final judgment, with a complete record of how these kinds of Rule 23 and Article III issues actually cash out. And that record confirms that a certify-now-ask-questions-later approach has little to recommend it. The Court should grant certiorari and confirm that federal courts may not utilize the class-action device to right perceived "wrongs" on behalf of parties who have not even been proven to exist, let alone to have Article III standing.

I. The Decision Below Flouts Rule 23, Article III, And This Court's Precedent.

1. The first and most essential prerequisite to certifying a class action is ensuring that the court can

determine who is part of it. After all, a court cannot meaningfully assess whether "there are questions of law or fact common to the class," "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(2)-(4), if it cannot readily determine who is part of the class. Nor can it assess whether "questions of law or fact common to class members predominate over any questions affecting only individual members," *id.* 23(b)(3), if it does not know who those members are. Indeed, if determining who is part of the class would itself require complex individualized inquires, that alone may defeat predominance.

Having a feasible way of determining who is part of the class is essential for more fundamental reasons, too. For one thing, it is critical to ensuring that each class member has standing. As this Court has repeatedly reiterated, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431; *see also, e.g.*, *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439-40 (2017). To be sure, lower courts have not always agreed about the stage at which a class must make that showing. *See infra* Part II.B. But they have at least agreed that courts cannot award damages without at *some* point assuring themselves that each class member has standing to recover them. And, to state what should be obvious, courts cannot undertake that essential inquiry if they do not know on whose behalf damages are sought.

The identity of class members is also critical to due process on both sides of the v. It is not at all clear how courts can ensure that class members have fair notice of their opt-out and other rights if they do not have a feasible means of determining who they are.[5] *See* Fed. R. Civ. P. 23(c)(2). Conversely, a defendant may not be able to meaningfully defend itself against "class members consisting of persons not identified." *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980). Indeed, a defendant may not even know what individualized defenses it has if it cannot figure out who each plaintiff is.

For precisely those reasons, several (but not all, *see* Part II.A *infra*) courts have concluded that class representatives must show that membership in their proposed class will be easy to ascertain using objective criteria, and will not turn on complex individualized issues. *See, e.g.*, *Smith v. LifeVantage Corp.*, 341 F.R.D. 82, 91-93 (D. Utah 2022). As the Third Circuit has described this threshold "ascertainability" requirement, the proponent of certification must "show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd*, 784 F.3d at 162; *see also, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT*, 764 F.3d at 358.

2. Applying those principles, this class action never should have been permitted to proceed, let alone

[5] This concern is starkly posed here for owners of funds bound for the "undivided" accounts, as they undoubtedly did not receive notice since no one has been able to identify them.

made it all the way to a $100 million judgment. Cline initially proposed a class of those who had "received" a late proceeds payment from Sunoco and had not been paid PRSA interest for the delay. Even that was an unworkable proposal, as those parties could not be awarded damages without determining whether they were entitled to 12% or 6% interest under the PRSA—which requires an individualized inquiry into whether and when each party obtained marketable title. *See supra* p.11. But while that proposed class should have failed on (among other things) predominance grounds, at least it would have consisted of actual, known parties.

Things truly jumped the tracks, however, when the district court accepted Cline's invitation to expand the class to include any well interest for which Sunoco had set aside proceeds without also setting aside interest—even if those proceeds had never been paid to anyone, and instead remained sitting in unclaimed-property funds, with at best just a guess as to who may be entitled to them. Indeed, for the undivided accounts, the proceeds were not even associated with an apparent owner; they were just designated by well interest. App.15; *see supra* p.11. And Cline never purported to have any independent information as to who (if anyone) may have marketable title to those well interests. *See supra* p.13.

In effect, then, the district court certified a class of "well interests," without determining who (if anyone) was entitled to the proceeds associated with them, let alone what (if any) interest rate(s) they are entitled to for what period(s). And these unknown—and likely unknowable—"well interest" class members

were no rounding error; they number in the thousands, and they accounted for roughly two-thirds of the $100 million damages award. D.Ct.Dkt.268 at 573-575. Indeed, well interests with proceeds sitting in unclaimed-property funds actually drove the damages up disproportionately, as Sunoco had to hold onto those proceeds (with, in Cline's view, interest running at 12% the whole time) for as many years as each state required before they could be designated unclaimed property.

By certifying a class of "interest owners" without requiring Cline to identify who claimed to own them, the court deprived Sunoco of any meaningful ability to litigate an issue that was "central to the validity of each one of the claims," *Wal-Mart*, 564 U.S. at 350: whether and when each class member secured marketable title. After all, it is impossible to answer those questions without knowing who claims to have that marketable title. It is difficult to imagine a more fundamental ascertainability problem than forcing a defendant to defend itself against highly individualized damages claims brought on behalf of claimants *who are never identified*.

That is not just a problem for Sunoco: As things stand, third parties could find themselves embroiled in highly individualized post-judgment disputes over which of them is actually the class member. Worse still, because Cline failed to prove that anyone *ever* had marketable title to all of these thousands of well interests, the district court may well have ordered Sunoco to pay tens of millions of dollars in damages that no one has Article III standing to recover, and that will just end up languishing in state unclaimed-

property funds years to come. That is what is bound to happen when courts award damages without first determining who (if anyone) is entitled to seek them.

3. Instead of holding Cline to his burdens under Rule 23 and Article III, the Tenth Circuit blamed Sunoco for his failure to satisfy them. *See* App.37-48.

The court first faulted Sunoco for "fail[ing] to gather and produce the owner information" Cline needed to determine who is part of his class. App.38. But the problem here is not a matter of declining to keep ownership records. Sunoco kept records of all the interest owners it could ascertain and pay (which it was able to do nearly 99% of the time), including all the *known* members of the class. Sunoco did not have accurate "owner information" for the thousands of unknown members *because it was unable to identify or find them*. Any perceived deficiencies in Sunoco's ownership records thus had nothing to do with its recordkeeping practices; Sunoco simply could not keep records of information it did not have.

The Tenth Circuit's effort to paper over the Article III problem is equally unavailing. Parroting the district court, it insisted that "each class member has suffered an injury because Sunoco has withheld interest it owes to the owner." App.45. But there is no way to know if that is actually true for "each class member"—let alone know what interest was owed, or for how long—without knowing who claims to own the relevant well interest. After all, putative well-interest owners are not even entitled to proceeds under the PRSA, let alone to PRSA interest for late payment, unless they have "perfect title or clear title of record … free from apparent defects, grave doubts and

litigious uncertainty." *Hull*, 789 P.2d at 1277. It is thus entirely possible under Oklahoma law that *no one* is presently entitled to proceeds, as steps necessary to secure marketable title (e.g., record a deed or lease, probate an estate) simply may not have been taken. It is also entirely possible that Cline would have gotten it wrong several times over had he been forced to identify someone he actually thought was entitled to proceeds and interest for each of the tens of thousands of well interests in his sprawling class.

The Tenth Circuit once again tried to shift the blame to Sunoco, insisting that it did not do a good enough job keeping records that would make it easy to determine without holding 53,000 mini-trials why it had not made timely payment the 1% of the time when it failed to do so. App.47-48. But even if Sunoco had been able to provide one comprehensive record of the many complex issues underlying each of those well interests, that would not have made the marketable-title issue any less individualized. After all, Cline would have had an obligation to review each and every one of Sunoco's record entries and challenge what they said any time a class member had a reasonable basis to dispute a claim that it lacked marketable title. Adequate class representation requires nothing less. So there was no avoiding those individualized disputes no matter who bore the burden on marketable title.

Moreover, the Tenth Circuit's reasoning ignores the jurisdictional problem that Cline's inchoate class created. Federal courts are not "'roving commissions' … licensed to 'sally forth each day looking for wrongs to right.'" *Margolin v. Nat'l Ass'n of Immigr. Judges*, 146 S.Ct. 1285, 1288 (2026) (per curiam). "Article III

grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, 594 U.S. at 427. That is why it is "plaintiffs," not defendants, that "bear the burden of demonstrating that they have standing." *Id.* at 430-31. And neither state recordkeeping laws nor any shortcomings in Sunoco's efforts to document all the marketable-title complications it encountered could relieve the class of that burden—or the courts of their independent obligation to ensure that damages are awarded only to parties with Article III standing to recover them.

In short, this class action should never have gotten off the ground. But it certainly should not have produced a $100 million judgment—the vast majority of which will be distributed to Cline's lawyers (who stand to recover a cool $30 million) or languish in state unclaimed-property funds for years to come. No one would seriously think that a lawyer could file a lawsuit in federal court seeking PRSA interest while refusing to say who she thinks is entitled to recover it. By allowing Cline to do exactly that for thousands of class members, the Tenth Circuit let standing "be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring in part). That result flouts both Rule 23 and Article III (not to mention the Rules Enabling Act and the Due Process Clause), as well as the settled precedent of this Court.

II. The Tenth Circuit's Decision Exacerbates Two Circuit Splits.

A. The Tenth Circuit Joined the Wrong Side of a Deep Ascertainability Split.

1. By refusing to require some feasible means of identifying who is part of the class that has been awarded $100 million in damages, the Tenth Circuit not only flouted Rule 23, Article III, and this Court's precedent; it also took the wrong side of a circuit split. Though almost all courts to consider the issue have recognized the need for *some* ascertainability requirement, the First, Third, and Fourth Circuits apply what has been characterized by some courts as a "heightened 'ascertainability' requirement." *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 657 (7th Cir. 2015). Under that standard, class representatives must "show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd*, 784 F.3d at 163; *see also, e.g.*, *Nexium*, 777 F.3d at 19; *EQT*, 764 F.3d at 358. Class representatives in those circuits thus must prove "that identifying class members [will be] a manageable process that does not require much, if any, individual fact inquiry." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013).

The Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and Federal Circuits, by contrast, have rejected any administrative-feasibility requirement. *See, e.g.*, *Petrobras*, 862 F.3d at 264-69; *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524-25 (6th Cir. 2015); *Sandusky Wellness Ctr., LLC v. Medtox Sci.,*

Inc., 821 F.3d 992, 995-98 (8th Cir. 2016); *Cherry*, 986 F.3d at 1302-05; *Freund v. McDonough*, 114 F.4th 1371, 1377-78 (Fed. Cir. 2024); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124-33 (9th Cir. 2017), *abrogated on other grounds by TransUnion*, 594 U.S. 413 (2021).[6] They instead employ a self-described "'weak' version of ascertainability," under which a class representative need show only that the class is defined by "objective criteria." *Mullins*, 795 F.3d at 659.

With scant discussion of the issue, the Tenth Circuit "join[ed] the majority view" and rejected any meaningful "administrative feasibility" requirement. App.41-42. All the court offered in defense of that decision was to note that some circuits have rejected such a requirement and criticized the courts that employ one. *Id.* Almost all the circuits have thus now taken a clear stance on the administrative-feasibility issue, rendering it ripe (and then some) for this Court's resolution.

2. This case is the poster child for why Rule 23 demands an administratively feasible mechanism for identifying class members. The district court not only never made Cline offer any administratively feasible way to identify all members of his purported class; the court never even tried to conduct that inquiry before

[6] Though the Ninth Circuit has rejected ascertainability as an independent requirement for certification, it has also separately rejected any requirement that class representatives must supply an administratively feasible means of identifying class members. *See Briseno*, 844 F.3d at 1123-24 n.4. Cline did not dispute below that ascertainability is an independent certification requirement. Cline.Br.30, CA10 No.23-7090.

awarding the class $100 million. It is thus not a matter here of "defer[ring] until later in the litigation" resolution of that critical question. *Mullins*, 795 F.3d at 662. No one has *ever* determined who thousands of the class members are, and Cline has all but admitted that he will likely never be able to do so. *See* D.Ct.Dkt.317 at 3-4. Any attempt to conduct that herculean task would inevitably devolve into a litany of post-judgment mini-trials fraught with individualized, fact-intensive inquiries. That is why upwards of half the damages award will in all likelihood end up languishing in unclaimed-property funds. Requiring Cline to supply an administratively feasible mechanism of identifying class members would have avoided that massive class-action abuse.

It also would have avoided precisely the concerns that have led courts to require class representatives to identify such a mechanism. As the Third Circuit has explained, that requirement "eliminates 'serious administrative burdens that are incongruous with the efficiencies expected in a class action.'" *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 132 (3d Cir. 2023); *see also Carrera*, 727 F.3d at 307. It protects absent plaintiffs' opt-out rights, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012), and their interest in ensuring that their recovery is not "diluted by fraudulent or inaccurate claims," *Carrera*, 727 F.3d at 310. And "it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable," *Marcus*, 687 F.3d at 593, and by preserving defendants' due-process rights to raise all challenges and defenses, *Carrera*, 727 F.3d at 307.

Here, by contrast, the trial was efficient only because the district court refused to engage with the marketable-title issue; no one knows the full universe of "who will be bound by the final judgment," *Marcus*, 687 F.3d at 593, or is entitled to recovery under it; Sunoco never had a chance to determine what individualized defenses it may have for each class member, let alone litigate them all (because it did not know all the parties it was litigating against); and the vast majority of the damages awarded will not go to class members. That ran roughshod over not only Rule 23, but the Rules Enabling Act, which commands that the class-action device cannot be used to "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Class actions are "an exception to the usual rule" of individual litigation. *Wal-Mart*, 564 U.S. at 348. Requiring an administratively feasible mechanism to determine who is part of them is the best way to ensure that they remain confined to that important, but limited, role.

The principal justification courts have offered for rejecting that approach is that it is not one of Rule 23's "explicit requirements." *Mullins*, 795 F.3d at 662-63; *see also, e.g.*, *Briseno*, 844 F.3d at 1123, 1127-28.[7] But that misses the point: Courts cannot begin to conduct a rigorous assessment of the "explicit requirements" that Rule 23 *does* contain (or provide the notice it

[7] Some courts have also expressed concern that such a requirement may effectively bar class actions "in cases involving relatively low-cost goods or services." *Mullins*, 795 F.3d at 658. It is not clear why that would be so. But to the extent the concern is valid, there is no exception to Rule 23 for "cases involving relatively low-cost goods or services."

requires) if they cannot even figure out who is part of the class. That is particularly true when it comes to predominance, as "the very [efficiency] purpose of the rule is thwarted," *Niaspan*, 67 F.4th at 132, if it will take "extensive and individualized fact-finding or 'mini-trials'" just to figure out who is part of the class, *Marcus*, 687 F.3d at 593. And while defining a class via "objective criteria" may suffice some (or even most) of the time, this case vividly illustrates why ensuring that there is an administratively feasible means of identifying class members provides a critical backstop when the criteria alone do not supply any means of doing so (or, to the extent they could, are not actually followed).

In short, the decision below joined the wrong side of a circuit split, and in doing so blessed a $100 million award that will most likely end up going principally to class counsel and unclaimed-property funds. That is what is bound to happen when courts not only certify, but award final judgment to, class actions chock-full of members who are never identified and in all likelihood never will be. This Court should grant certiorari to resolve that split and reverse.

B. The Decision Below Exacerbates the Circuit Split Over Whether a Class May Include Members Who Lack Article III Standing.

The Tenth Circuit's decision also exacerbates an already-deep split regarding whether a class may be maintained when it includes members who lack Article III standing. Broadly speaking, the Second and Eighth Circuits will not certify damages classes unless they are defined in a way that ensures that all

members have standing. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Johannessohn v. Polaris Indus., Inc.*, 9 F.4th 981, 987-88 (8th Cir. 2021). Under that rule, this class could not have been certified—let alone have proceeded to final judgment—because Cline failed to confine his class to parties with Article III standing, i.e., well-interest owners who actually "received" a late proceeds payment but no interest. *See supra* p.12-13.

Other circuits, by contrast, allow certification of damages classes even if the definition sweeps in members lacking Article III standing (albeit with some variation as to how many such members they will permit). *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53, 58 (1st Cir. 2018); *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925, 933-34 (4th Cir. 2025); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019); *In re Rail Freight Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019).[8] This Court has twice granted certiorari to resolve this acknowledged split. *See Lab'y Corp. of Am. Holdings v. Davis*, 145 S.Ct. 1133, *dismissed as improvidently granted*, 605 U.S. 327 (2025); *Tyson Foods, Inc. v. Bouphakeo*, 577 U.S. 442, 460 (2016).

By affirming a damages judgment to a class chock-full of unknown and unknowable members, the

[8] Circuits also disagree about whether this presents an Article III jurisdictional concern, *see, e.g.*, *Denney*, 443 F.3d at 263-66, a Rule 23 predominance concern, *see, e.g.*, *Asacol*, 907 F.3d at 51-58, or both, *Mr. Dee's*, 127 F.4th at 933-34.

Tenth Circuit effectively joined the wrong side of that split. In fact, it took it a step further in the wrong direction. The only thing worse than certifying a damages class with members *known* to lack standing is certifying a damages class and entering judgment when a significant number of "members" *are neither known nor knowable*. Even courts on the wrong side of the split have recognized that a class must prove *at some point* that all members have standing to recover damages. *See, e.g.*, *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 950 F.3d 959, 970 (7th Cir. 2020); *Healy v. Milliman, Inc.*, 164 F.4th 701, 706 (9th Cir. 2026). Yet that never happened here. This Court should grant certiorari and confirm that classes cannot be certified, let alone awarded $100 million, when they make no effort to prove whether thousands of members have standing to recover them.

III. The Question Presented Is Important And Cries Out For This Court's Resolution.

"[I]n an era of … class actions," this Court has instructed lower federal courts to "be more careful to insist on the formal rules of standing, not less so," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011), and to conduct a "rigorous analysis" of the Rule 23 certification criteria, *Wal-Mart*, 564 U.S. at 350-51. Despite these admonitions, the Tenth Circuit not only ignored glaring Rule 23 problems, but allowed standing to "be acquired through the back door of a class action" for thousands of class members, *contra Allee*, 416 U.S. at 829 (Burger, C.J., concurring in part). In doing so, moreover, the court exacerbated two circuit splits. And all in service of ordering Sunoco to pay a $100 million damages judgment that is bound

mostly for lawyers' coffers and unclaimed-property funds. All of that cries out for this Court's review.

This case provides a particularly suitable vehicle to resolve these critical Rule 23 and Article III issues because it is the relatively rare class action that proceeded to trial and final judgment. A certification ruling "is often the most significant decision rendered in … class-action proceedings." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). It can spell the end of the case for either plaintiffs or defendants. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 476 (1978), *superseded by rule as stated in Microsoft Corp. v. Baker*, 582 U.S. 23 (2017). Yet this Court has often declined to weigh in at the certification stage, when the record is less developed. That unfortunately has proven an impediment to review, as the Court often does not have another opportunity given the hydraulic settlement pressures that certification can create. And it has often deprived the Court of the ability to see what actually happens when class actions are permitted to proceed to trial on the theory that serious doubts about their compliance with Rule 23 and Article III can be sorted out later.

The Court should thus be particularly reluctant to pass on the chance to weigh in with a fully developed record and final judgment on Rule 23 and Article III standing issues that are critical to so many certification decisions (as evidenced by the frequency of petitions imploring the Court to resolve them). Indeed, little would be gained by holding off even if several more such opportunities may be waiting in the wings, as the circuits are fully aware of the competing views on ascertainability and class-member standing,

and none gives any indication of budging. And unless this Court is willing to step in and ensure that the boundaries of Rule 23 and Article III are policed at *some* point, even fewer cases are likely to make it to final judgment. The Court should grant the petition, resolve the circuit splits this case exacerbates, and ensure that class actions are not converted into rough-justice mechanisms for simply punishing defendants, divorced from disputes between actual parties.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

R. PAUL YETTER
ROBERT D. WOODS
YETTER COLEMAN LLP
600 Travis Street
Suite 5400
Houston, TX 77002
(713) 632-8000

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
KYLE R. EISWALD*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

June 26, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 26-7014

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Mar. 30, 2026

Before MATHESON, BACHARACH, and PHILLIPS, Circuit Judges.

ORDER*

This matter is before the court on *Defendants-Appellants' Unopposed Motion for Summary Affirmance*. The motion is GRANTED. The judgment of the U.S. District Court of the Eastern District of

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

Oklahoma is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court,

Per Curiam

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-7090

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Nov. 17, 2025

Before MATHESON, MORITZ, and FEDERICO, Circuit Judges.

OPINION

FEDERICO, Circuit Judge.

This appeal arises from a dispute over oil proceeds and a class action bench trial in Oklahoma. It centered on class-wide violations of Oklahoma's Production Revenue Standards Act (PRSA), Okla. Stat. Ann. tit. 52, §§ 70.1-570.15. The PRSA imposes strict timeframes on when a "first purchaser or holder of proceeds" of crude oil from an Oklahoma well must

distribute proceeds to royalty interest or working interest owners entitled to payments. *Cline v. Sunoco, Inc. (R&M)*, 479 F. Supp. 3d 1148, 1157 (E.D. Okla. 2020) (*Cline II*). If the proceeds payments arrive late, the PRSA mandates that these payments must include statutory interest, at a default rate of 12 percent. *Id.*

The named plaintiff and class representative, Perry Cline, is an Oklahoma farmer and landowner who owns royalty interests in three Oklahoma oil wells. *Id.* at 1159. In 2017, Cline filed a class action lawsuit against Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively, Sunoco). *Id.* at 1155. He sought to represent all owners who received late payments from Sunoco without the PRSA-required interest. *Id.* Under the PRSA, an "[o]wner" is "a person or governmental entity with a legal interest in the mineral acreage under a well which entitles that person or entity to oil or gas production or the proceeds or revenues therefrom[.]" Okla. Stat. Ann. tit. 52, § 570.2. The class definition setting forth the members of the class included all "owners" of mineral interests who received late payments from Sunoco. *See Cline v. Sunoco, Inc. (R&M)*, 333 F.R.D. 676, 681-82 (E.D. Okla. 2019) (*Cline I*) (defining the certified class); *see id.* at 681 n.1 (discussing class definition).

In 2019, the district court certified this class. Relevant to this appeal, Cline's lawsuit asserted two state law claims for relief: violation of the PRSA and common law fraud. *Id.* at 681.

In 2020, after a four-day bench trial, the district court ruled for the Class on the PRSA claim and for

Sunoco on the fraud claim. The Class of over 53,000 owners was awarded damages for over $1.5 million late proceeds payments that failed to include the 12 percent rate of interest. *Cline II*, 479 F. Supp. 3d at 1164, 1176-77. The judgment totaled over $103 million in actual damages (which included additional prejudgment interest that accrued post-trial) and $75 million in punitive damages.

Before this appeal, Sunoco filed a string of appeals that we dismissed. We accepted Sunoco's last appeal preceding this one, however, because the district court's initial allocation of damages failed to provide adequate instructions regarding two undivided accounts for owners whom Sunoco could not locate. *Cline v. Sunoco, Inc. (R&M)*, No. 22-7018, 2023 WL 4946312, at *6-8 (10th Cir. Aug. 3, 2023) (*Cline III*). On remand, the district court corrected those issues in an amended plan of allocation order and an updated damages order. Together, these orders instructed the settlement administrator regarding the amount of damages to pay each class member, including class members who could not be identified and whose payments were sent to state unclaimed property funds.

After finalizing the total damages awarded to the Class, the district court entered final judgment. We therefore have jurisdiction under 28 U.S.C. § 1291. We affirm much of the district court's findings and rulings, however, we reverse on one issue, punitive damages.

I

We begin by discussing the PRSA, including its text, legislative history, and application to Sunoco. We

then discuss this case's procedural history as it informs the issues raised on appeal.

A

The Oklahoma Legislature enacted the PRSA in 1980 to "regulate[] the marketing, sale, and production of hydrocarbons from Oklahoma wells." *H.B. Krug v. Helmerich & Payne, Inc.*, 362 P.3d 205, 211 (Okla. 2015). The PRSA "generally applies to all owners and all producing wells in Oklahoma with certain exceptions[,]" defining the duties and requirements for "proceed sharing" and "royalty disbursement" to those who own interests in such wells. *Id.*

The PRSA was passed to stop the industry practice of delaying proceeds payments from the sale of oil and gas to royalty owners. *See id.* at 214. Originally, the PRSA's 12 percent statutory interest rate for late payments was punitive. But in 1985, the Oklahoma Legislature "removed the phrase 'as a penalty' from the statute[.]" *Purcell v. Santa Fe Mins., Inc.*, 961 P.2d 188, 193 (Okla. 1998). That means the PRSA is no longer a punitive statute, and the 12 percent interest rate is held to be "incorporate[d] . . . into the contractual arrangements" among the parties. *Id.* at 194. "The obvious overriding purpose of the [PRSA] is to ensure that royalty owners are timely paid their share of the proceeds." *H.B. Krug*, 362 P.3d at 214. And when interpreting the PRSA, the Oklahoma "Legislature has followed a path of strengthening mineral owners['] rights since the Act's inception." *Id.*

The PRSA sets forth a specific timetable of when proceeds payments to owners must occur: within six

months from the date of the first sale and within two months of any subsequent sales. Okla. Stat. Ann. tit. 52, § 570.10(B)(1). Subject to a marketable title exception—an exception that allows a delay or suspension in proceeds payments if there is a legitimate question over an owner's marketable title, *see Base v. Devon Energy Prod. Co.*, 563 P.3d 934, 954 (Okla. 2024)—statutory interest must be added to any late proceeds payment. § 570.10(D)(1). Relevant here, the statutory interest rate is 12 percent or, if marketable title is legitimately in question, 6 percent for payments before 2018 (and a lower rate after 2018). § 570.10(D)(2). This statutory interest "shall" be "compounded annually . . . until the day paid." § 570.10(D)(1). In other words, the PRSA sets a default 12 percent interest rate subject to the marketable title exception:

> D.1. *Except as otherwise provided in paragraph 2*[,] . . . that portion not timely paid *shall* earn interest at the rate of twelve percent (12%) per annum *to be compounded annually*, calculated from the end of the month in which such production is sold *until the day paid*.
>
> 2.a. Where such proceeds are not paid because the title thereto is *not marketable*, such proceeds shall earn interest at the rate of (i) six percent (6%) per annum[.]

§ 570.10(D)(1), (2)(a) (emphases added).

Although the PRSA applies to both crude oil and natural gas wells in Oklahoma, this case involves only the purchase of oil. Sunoco buys oil extracted from Oklahoma wells, making it a "first purchaser" under

the PRSA, but "Sunoco is not itself an oil and gas producer and does not have leases with individual landowners." *Cline II*, 479 F. Supp. 3d at 1157-58. Instead, the "'operators' typically extract the oil from the ground and, pursuant to contracts, convey it to Sunoco. Sunoco then pays owners their proceeds directly."[1] *Id.* at 1158-59 (footnote omitted). In

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[1] Numerous players are involved, including royalty owners (like Cline), working interest owners, operators, and first purchasers (like Sunoco), among others:

> Oil production has a cast of varied characters. When someone (such as Cline) owns land that may have oil on it, an exploration and production ("E&P") company leases the land to drill for and extract the oil. The E&P company agrees to split the proceeds from the sale of that oil with the landowner if the company can extract it. Usually, the landowner gets at least a one-eighth royalty and bears no costs or risk associated with drilling the well or cleaning and closing a dry hole. The E&P company partners with other industry players, known as working interest owners, to drill the well, and they split the remaining interest. One of the working interest owners is deemed the "operator." The operator "frequently ha[s] either a majority interest, or [it is] elected because [it is] knowledgeable and the other working interest owners respect [it]." The working interest owner with the largest share of the interest performs and coordinates the work, with the remaining companies sharing in the cost and risk. After the working interest owners extract the oil, companies such as Sunoco will enter into contracts with the operators to transport and market the oil. The landowner's interest may fracture over time, such as when a landowner dies or sells the interest to another individual or entity. Thus, it is not unusual for Sunoco to pay anywhere from tens to thousands of interest owners for oil produced from a well.

addition, Sunoco signs contracts with thousands of oil producers in Oklahoma to purchase their oil, and it "has paid over 100,000 well owners royalty proceeds for oil and gas production from over 20,000 properties since 2006." *Cline I*, 333 F.R.D. at 681.

B

Cline filed this lawsuit against Sunoco in Oklahoma state court in 2017. *Cline II*, 479 F. Supp. 3d at 1155. Sunoco removed the lawsuit to the United States District Court for the Eastern District of Oklahoma. *Id.* "The case moved along slowly" until June 2019, when Cline moved for class certification. *Id.* Cline argued that because Sunoco uniformly failed to pay the statutory interest it owed under the PRSA on late proceeds payments for all wells in Oklahoma, the Class should be certified based on Sunoco's uniform duty and breach under the PRSA to all 53,000 class members. *See id.* at 1155-56. The district court granted class certification in October 2019, citing four common questions in support:

> (1) whether, under Oklahoma law, Sunoco owed interest to Plaintiff and the Class on any and all Untimely Payments;
>
> (2) whether owners must make a demand prior to being entitled to receive statutory interest;
>
> (3) whether Sunoco's failure to pay interest to Plaintiff and the putative class on any

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Cline v. Sunoco, Inc. (R&M), 479 F. Supp. 3d 1148, 1158 n.6 (E.D. Okla. 2020) (*Cline II*) (alterations in original) (internal citations omitted).

> Untimely Payments constitutes a violation of the PRSA; and
>
> (4) whether Sunoco defrauded Plaintiff and the putative class by knowingly withholding statutory interest [as applied to Count II (fraud) of the original petition].

Cline I, 333 F.R.D. at 683 (alteration in original).

On October 3, 2019, the district court certified both the PRSA claim and the fraud claim. *Id.* at 681, 688. In the class certification decision, the district court rigorously analyzed each of the factors in Federal Rule of Civil Procedure 23. *Id.* at 682-88. The testimony and damages model of Cline's expert, Barbara Ley, "establish[ed] that Cline [could] identify the putative class members and calculate damages class-wide with common proof." *Id.* at 681 n.3. Citing our decision in *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 798 (10th Cir. 2019), the district court advised that it could "later divide the class into subclasses to determine damages, or amend or alter its class certification order, if necessary." *Cline I*, 333 F.R.D. at 686 n.9.

Regarding class certification of the fraud claim, Sunoco argued that individualized questions on each owner's reliance on Sunoco's statements precluded class certification. *Id.* at 686. But as the district court explained, "[c]ourts will certify fraud claims . . . when the law of one state applies to the majority of the claims and the check stubs sent to royalty owners 'presented . . . a standardized, written representation.'" *Id.* at 687 (quoting *Rhea v. Apache Corp.*, No. CIV-14-0433-JH, 2019 WL 1548909, at *9 (E.D. Okla. Feb. 15, 2019)). And it held that Cline

could "establish fraud through the check stubs Sunoco issued uniformly to the putative class members." *Id.*

Sunoco also claimed that not all members of the Class could be identified, and thus were not ascertainable. But the Class's damages "model provides a reliable and administratively feasible mechanism for determining class membership." *Id.* at 688. Ultimately, using the revised class definition set forth in Cline's reply brief, the district court granted class certification,[2] defining the Class as:

> All non-excluded persons or entities who: (1) received Untimely Payments from Defendants (or Defendants' designees) for oil proceeds from Oklahoma wells and (2) who have not already been paid statutory interest on the Untimely Payments. An "Untimely Payment" for purposes of this class definition means payment of proceeds from the sale of oil production from an oil and gas well after the statutory periods identified in O[kla]. S[tat]. tit 52, § 570.10(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold). Untimely Payments do not include: (a) payments of proceeds to an owner under O[kla]. S[tat]. tit 52, § 570.10(B)(3) (minimum pay); (b) prior

[2] Cline's "revisions provide[d] a more narrow and manageable definition[.]" *Cline I*, 333 F.R.D. at 681 n.4. Because of a statute of limitations argument, the class definition was limited to a five-year period of late payments. *Id.* at 687.

> period adjustments; or (c) pass-through payments.

Id. at 681-82 (alterations in original).

Pointing to the two years the case had languished, the district court set the discovery cutoff as October 18, 2019, and the trial date as December 16, 2019. *Cline II*, 479 F. Supp. 3d at 1156.

On December 10, 2019, the district court granted the Class's partial motion for summary judgment on class-wide liability for the PRSA claim. It held that the PRSA requires Sunoco to include statutory interest automatically every time it makes a late proceeds payment. Sunoco had admitted that it did not add interest to late payments unless specifically requested, which seldom happened. Class-wide partial summary judgment established Sunoco's liability under the PRSA to every class member.

On December 16, 2019, the Class proceeded to a class action bench trial on both claims for relief. The trial established that Sunoco was already making proceeds payments to the members of the Class. Sunoco's corporate representative, Eric Koelling, agreed that Sunoco had "already sent" "principal proceeds owed to every class member directly, or to an unclaimed property fund[,]" and that "there is no issue" that each class member had "a right to be paid their principal proceeds[.]" Aple. App. IV at 18.

The Class also offered a class-wide damages expert and damages model to prove that the actual damages owed can be—and, in fact, already have been—allocated to each class member:

> To prove the precise amount due, Cline relied on the expert testimony of Barbara Ley, a certified public accountant who has extensive experience with accounting in the oil and gas industry. Ley testified credibly, and described a thorough and defensible method of calculating the amount due from Sunoco. Ley received information from Sunoco to create a database of individual owner information and to determine whether each payment was late based on that data. Sunoco's data identifies the date proceeds were sold, the date Sunoco paid proceeds to an owner, and the amount of the proceeds. To the extent she could, Ley checked the sale date against public records. She also reviewed depositions and other documents produced in the case, and was present in the courtroom during the majority of the trial. Sunoco agrees that Ley's data reliably reflects the sale date, payment date, and amount of proceeds.

Cline II, 479 F. Supp. 3d at 1161 (citations omitted).

In August 2020, the district court struck Sunoco's damages expert, Eric Krause. His report was untimely and, according to the district court, not helpful because it rested upon faulty assumptions. *Id.* at 1165-68. Sunoco does not appeal these rulings. During the bench trial, Sunoco relied exclusively upon the testimony of Krause to challenge Ley and to attack the Class's damages. So, with Krause struck as an expert, Sunoco ultimately defended the class action trial with liability already entered class-wide on the PRSA claim, no damages expert, no damages model, no

challenge to Ley's expert damages testimony, and no challenge to Ley's damages model.

On appeal, Sunoco criticizes at length the district court's change of the trial date and the discovery cutoff date. Sunoco, however, does not actually appeal any of the discovery deadlines, the case scheduling order, or the trial date. And the district court made unchallenged, specific factual findings in its trial opinion when it struck Sunoco's damages expert, *id.* at 1167-68, and dismantled Sunoco's critique of the scheduling order, *id.* at 1164. Despite Sunoco blaming the outcome of this case on a "rogue" district court, Sunoco did not file a motion to amend the scheduling order, discovery cutoff date, or trial date. Op. Br. at 57.

Also left unchallenged are the district court's findings that Sunoco and its counsel engaged in litigation obstruction. The district court found that "[w]hen it became clear that the case would move forward, Sunoco adopted a number of tactics to derail the litigation." *Cline II*, 479 F. Supp. 3d at 1156. Sunoco's tactics included (1) "sending Cline an unrequested check for the amount of interest it owed him, and then, nearly two years later, claim[ing] that the tendered check deprived him of standing[,]" (2) filing a baseless motion to clarify the class definition that "merely amounted to an argument to cut down the size of the class[,]" and (3) "after the [c]ourt certified the class (and long after the [c]ourt set a trial date and discovery cutoff)," waiting "to look through thousands of files for evidence of what it might owe." *Id.* at 1156-57.

According to the district court, Sunoco's delays in producing relevant documents resulted in an untimely

and prejudicial "production of millions of lines of data to the plaintiff—after the plaintiff's expert report was due, and after the discovery cutoff." *Id.* at 1156. The district court found that "Sunoco characterizes its search for data as heroic; in reality, Sunoco ignored its files for years because it never intended to pay much interest, and let this case sit around for three years without getting its evidence together." *Id.*

Before this appeal, Sunoco filed a string of appeals that we dismissed for lack of jurisdiction. In 2023, however, we agreed with Sunoco's latest appeal preceding this one and reversed the district court's damages allocation order. *Cline III*, 2023 WL 4946312, at *6-7. We held that "although the allocation plan provides a formula that will produce individual damage awards for most class members, it will not produce such awards for the group of class members associated with the two undivided accounts." *Id.* at *6. These undivided accounts held the damages awards for class members who could not be identified and located. On remand, the district court issued an amended plan of allocation order that addressed our concerns. Notably, in this appeal, Sunoco does not challenge the amended allocation award.

After resolving post-trial motions, in October 2023, the district court entered an amended award of damages that updated the actual damages awarded to $103,873,002.50. These increased actual damages included the compounded, prejudgment interest that had continued to accrue post-trial.

Final judgment was entered on October 19, 2023, and Sunoco timely appealed.

II

In this appeal, Sunoco's challenges: (1) class certification, (2) Article III standing of certain class members whose payments went to unclaimed state property funds because Sunoco's records were insufficient to locate them, (3) the prejudgment interest awarded as actual damages to the class, and (4) the punitive damages awarded to the Class. We affirm the district court on the first three issues, but we vacate the punitive damages award.

A

We start with Sunoco's challenge to the class certification order. We review de novo whether a district court applied the proper legal standard to decide a motion for class certification. *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1173 (10th Cir. 2023). In this case, because the district court rigorously applied each of the Rule 23(a) and (b)(3) factors, our review of the decision granting class certification "is highly deferential." *Naylor Farms*, 923 F.3d at 790-91. We may reverse only for an abuse of discretion, which means that we "must defer to the district court's ruling unless" the class certification "decision falls outside the bounds of rationally available choices given the facts and law involved in the matter at hand." *Id.* at 791 (internal quotation marks omitted).

Class actions in federal court are controlled by Federal Rule of Civil Procedure 23. There are four Rule 23(a) factors that all class actions must satisfy, and, in a case seeking damages under Rule 23(b)(3), two additional factors must be met: predominance and

superiority. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).

The four Rule 23(a) factors are:

1. [Numerosity:] the class is so numerous that joinder of all members is impracticable;[3]

2. [Commonality:] there are questions of law or fact common to the class;[4]

3. [Typicality:] the claims or defenses of the representative parties are typical of the claims or defenses of the class;[5] and

4. [Adequacy:] the representative parties will fairly and adequately protect the interests of the class.[6]

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[3] No set threshold exists for the number of class members needed to meet the numerosity factor. Usually, a total of 40 or more class members "raises a presumption of impracticability of joinder based on numbers alone." 1 Newberg and Rubenstein on Class Actions § 3:12 (6th ed. 2025).

[4] "A finding of commonality requires only a single question of law or fact common to the entire class." *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) (quoting *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010)); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("We quite agree that for purposes of Rule 23(a)(2) even a single common question will do.") (brackets and internal quotation marks omitted)).

[5] Typicality looks only to confirm that the legal claims for relief are similar; factual variations among the class members do not defeat typicality. *Menocal*, 882 F.3d at 914.

[6] Under Rule 23(a)(4), "[o]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Tennille v. W. Union Co.*, 785 F.3d 422, 430 (10th Cir. 2015) (internal quotation marks omitted). Likewise, Sunoco alleges without support the possibility of intra-

Fed. R. Civ. P. 23(a).

A class action seeking damages must also satisfy Rule 23(b)(3),[7] which requires a plaintiff to show predominance and superiority. Rule 23(b)(3) states that predominance is satisfied if "the court finds that the *questions* of law or fact common to class members predominate over any *questions* affecting only individual members," and superiority is met if a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphases added).[8]

In challenging class certification, Sunoco contends that (1) individualized issues on each owner's marketable title overwhelm the common issues so predominance is not met, (2) the class

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class conflicts based on some class members having indemnity agreements, but a "merely speculative or hypothetical" conflict will not defeat the adequacy requirement. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (internal quotation marks omitted).

[7] In contrast to a Rule 23(b)(3) class action for damages, a class action for injunctive relief is pursued under Rule 23(b)(2), and it does not require predominance or superiority. A plaintiff is allowed to pursue in the same case both injunctive relief under Rule 23(b)(2) and damages under Rule 23(b)(3). *See, e.g.*, *Chicago Tchrs Union, Loc. No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 443 (7th Cir. 2015).

[8] The factors to assess superiority include, but are not limited to: "(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." Fed. R. Civ. P. 23(b)(3)(A)-(D).

members are not ascertainable because not all of them can be identified from Sunoco's records, and (3) several unidentified class members lack standing so the class should not have been certified. We address these challenges in turn.

1

Challenging whether the Class met predominance, Sunoco argues that the class is not cohesive and there are too many individualized issues to warrant class certification. *See* Op. Br. at 34 ("There is simply no way to adjudicate on a classwide basis claims dependent on the individualized land-ownership details of each plaintiff.").

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). To apply the predominance factor at class certification, "the district 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.'" *Sherman v. Trinity Teen Sols., Inc.*, 84 F.4th 1182, 1194 (10th Cir. 2023) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). This means a district court first "should '*characterize* the issues in the case as common or not, and then *weigh* which issues predominate.'" *Black*, 69 F.4th at 1175 (quoting *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014)). As we have emphasized, "[i]t is not necessary that all" the "elements of the claim entail questions of fact and law that are common

to the class." *Id.* (quoting *CGC Holding Co.*, 773 F.3d at 1087).

The predominance inquiry "begins 'with the elements of the underlying cause of action.'" *Id.* (quoting *CGC Holding Co.*, 773 F.3d at 1088). In this case, the district court certified claims for violation of the PRSA and common law fraud. The elements of a PRSA violation claim have not been affirmatively stated in a published opinion by an Oklahoma appellate court, but we must construe the PRSA claim here as a breach of contract claim. *See Purcell*, 961 P.2d at 193. A breach of contract claim under Oklahoma law requires "(1) formation of a contract; (2) breach of the contract; and (3) damages as a result of that breach." *Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 748 (Okla. 2021); *accord Cline I*, 333 F.R.D. at 684 ("To succeed on his PRSA claims, Cline must show that Sunoco (1) owed Cline payments; (2) made the payments to Cline late; and (3) did not pay the interest on the late payments." (citing *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS, 2018 WL 2745906, at *2 (E.D. Okla. June 7, 2018))).

Regarding the fraud claim, "fraud is a generic term embracing the multifarious means which human ingenuity can devise so one can get advantage over another by false suggestion or suppression of the truth." *Croslin v. Enerlex, Inc.*, 308 P.3d 1041, 1045 (Okla. 2013). The district court did not identify which type or form of fraud it interpreted Cline's fraud claim to be alleging. Oklahoma recognizes two forms of fraud—actual and constructive—along with similar claims for relief that could apply, such as deceit by

nondisclosure. "Actual fraud is the intentional misrepresentation or concealment of a material fact, with an intent to deceive, which substantially affects another person[.]" *Id.* (footnote omitted). And "constructive fraud," which "has the same legal consequence as actual fraud[,]" "is a breach of a legal or equitable duty to the detriment of another, which does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose." *Id.* at 1045-46.

In line with Oklahoma law on both the PRSA claim and the fraud claim, the district court identified four common and predominant questions that would determine class-wide liability against Sunoco as a matter of law. *Cline I*, 333 F.R.D. at 683. As Cline argued in seeking class certification, "Sunoco's business records and employee testimony will confirm its 'uniform policy of not paying statutory interest unless requested by an owner.'" *Id.* Cline pointed out "that the proposed class will use common evidence of Sunoco's unlawful actions, and that if the Court finds Sunoco had a duty to pay that interest without a request and Sunoco breached that duty, every class member will prevail." *Id.*

Predominance hinges on the distinction between common issues and individual issues. "Common issues are those for which 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Black*, 69 F.4th at 1175 (quoting *Tyson Foods, Inc.*, 577 U.S. at 453) (alteration in original). In contrast, "[i]ndividual issues are those for which 'members of [the] proposed class will need to present evidence that

varies from member to member.'" *Id.* (quoting *Tyson Foods*, *Inc.*, 577 U.S. at 453).

Because of the distinction between common and individualized evidence, we agree that the Class met the Rule 23(b)(3) predominance factor. To show predominance, "[i]t is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *CGC Holding Co.*, 773 F.3d at 1087. What Rule 23(b)(3) "does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen Inc.*, 568 U.S. at 469 (quoting Fed. R. Civ. P. 23(b)(3)). And "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 459.

Thus, Rule 23(b)(3) requires predominance, not perfection, such that "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Menocal*, 882 F.3d at 914-15 (quoting *CGC Holding Co.*, 773 F.3d at 1087). "Critically, so long as at least one common issue predominates, a plaintiff can satisfy Rule 23(b)(3)—even if there remain individual issues, such as damages, that must be tried separately." *Naylor Farms,* 923 F.3d at 789; *accord* 7AA C. Wright, A. Miller, M. Kane & R. Klonoff, Federal Practice & Procedure § 1778 (3d ed. 2025) ("The common questions need not be dispositive of the entire action. In other words, 'predominate' should not be

automatically equated with 'determinative.'" (footnote omitted)).

Key aspects of this class action align with several controlling Tenth Circuit class certification decisions: *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014); *CGC Holding Co.*, 773 F.3d 1076; *Menocal*, 882 F.3d 905; and *Naylor Farms*, 923 F.3d 779. Across these decisions, we emphasized three traits that the Class proved were present here: (1) the defendant used a common or uniform scheme, policy, or practice to target most of the class (or each sub-class); (2) the empirical proof of a class action trial confirmed whether predominance actually existed or whether the class imploded at trial under the force of too many individualized issues; and (3) the predominating issue of a defendant's breach outweighed any individualized issues on damages or other matters.

a

First, we start with the principle that predominance is often satisfied when a defendant has implemented a class-wide scheme, policy, or practice.[9] In most of our recent decisions concluding that the predominance factor was satisfied, we have

[9] A "scheme" and a "policy" are the same thing; a "scheme" is a "policy" that harms the plaintiffs, often by deception or foul play. A "practice" is included to illustrate that even if a defendant denies having a business policy or avoids reducing its business policy to writing, a "practice" functions as a *de facto* "scheme" or "policy." *See, e.g.*, Aplt. App. II at 55 (negating Sunoco's assertion that it did not have a "policy" and merely engaged in a "practice" to not pay interest it owed without receiving a demand). These three terms function the same way, and we use them interchangeably.

emphasized the legal significance of this showing under Rule 23(b)(3):

- *In re Urethane*, 768 F.3d at 1258-59 (affirming class-wide jury verdict in an antitrust conspiracy case because the defendants' price-fixing scheme created a singular, common issue that predominated over any individualized issues).
- *CGC Holding Co.*, 773 F.3d at 1082, 1091 (affirming class certification of a civil RICO claim based on the defendants' "common scheme to defraud" all investors in a real estate investment offering and a generalized inference of reliance).
- *Menocal*, 882 F.3d at 920 (affirming class certification based on the defendant's uniform policy to coerce all prisoners in its private prison to perform forced labor).
- *Naylor Farms*, 923 F.3d at 782-83 (affirming class certification because the defendant's uniform policy of deducting midstream services from royalty payments created a singular, class-wide issue).

When a class action targets a defendant's class-wide policy or practice, the focus at trial necessarily is on the defendant and the common evidence in its documents and business records—not on individual issues that require the individualized testimony of each class member. And as this case confirms, the "predominant question" of a defendant's class-wide liability will, in many cases, "definitively end the litigation." *CGC Holding Co.*, 773 F.3d at 1093 n.11.

The Class successfully demonstrated that Sunoco "engaged in an ongoing scheme to avoid making the required interest payments" by not disclosing its duty to pay interest and only paying interest when specifically requested. *Cline I*, 333 F.R.D. at 681. Sunoco's class-wide scheme made "class-wide proof possible." *Menocal*, 882 F.3d at 920. Sunoco's scheme allowed the district court to grant partial summary judgment on liability to the Class—a class-wide, dispositive ruling for all 53,000 class members that Sunoco does not appeal. To be clear, Sunoco does not appeal the ruling of class-wide liability, only the amount of interest (which, in this case, constitutes the actual damages) it owes to each of the 53,000 members of the Class. Thus, Sunoco's class-wide scheme supplies "the 'glue' that holds together" the Class's claim that Sunoco violated the PRSA and owes statutory interest to every class member. *See Menocal*, 882 F.3d at 920 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)). We thus affirm the unchallenged factual findings that "[t]he trial testimony established that Sunoco followed a practice of not paying interest until it received a request from an owner[;]" that "Ley created a methodology through which she could calculate class-wide damages based on that conduct[;]" and that Ley's "computer calculations identify the precise damages for each late payment for each owner of each well." *Cline II*, 479 F. Supp. 3d at 1164.

Sunoco primarily relies on *Wal-Mart Stores, Inc. v. Dukes* to argue that class certification was improper. But *Wal-Mart* is less valuable in a Rule 23(b)(3) damages case than Sunoco contends. *See Menocal*, 882 F.3d at 920 n.10 (explaining the limited

utility of *Wal-Mart* in a damages class action involving a corporate policy that unifies the class). The *Wal-Mart* plaintiffs alleged "that the discretion exercised by their local supervisors over pay and promotion matters" violated Title VII by discriminating against women. *Wal-Mart*, 564 U.S. at 342. The Ninth Circuit in *Wal-Mart* had approved class certification of "one of the most expansive class actions ever[,]" with a decade-long class period and 1.5 million current and former female employees in all of Wal-Mart's 3,400 stores across America. *Id.*[10] The Supreme Court reversed the order granting class certification, ruling that the plaintiffs had not established commonality because the employment decisions complained of resulted from millions of individual decisions made by low-level decision-makers who had total, subjective discretion over such matters. *Id.* at 359-60. As a result of these outlier facts, the class members "wish[ed] to sue about literally millions of employment decisions at once[,]" but the class could not be certified "[w]ithout some glue holding the alleged *reasons* for all those decisions together[.]" *Id.* at 352; *see also id.* at 359 (finding no commonality absent "convincing proof of a companywide discriminatory pay and promotion policy").

But *Wal-Mart* involved outlier facts, and the class sought nationwide injunctive relief under Rule

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[10] These plaintiffs "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed[.]" *Wal-Mart,* 564 U.S. at 359-60 (internal quotation marks omitted).

23(b)(2). Given the fact pattern, even the dissenting Justices agreed that class certification for injunctive relief was improper under Rule 23(b)(2).[11] The plaintiffs did not target a corporate policy or a series of corporate policies,[12] but rather sought to challenge "literally millions of employment decisions at once." *Id.* at 352.

Those concerns, however, are wholly absent here. Sunoco's uniform, objective policy not to pay interest was devised at the corporate level by its executives and legal counsel as a corporate policy or practice (not by thousands of low-level individual employees). Sunoco's policy did not involve thousands of decision-makers scattered across the 50 states. Equally important, Cline and the Class did not seek injunctive relief under Rule 23(b)(2). As the *Wal-Mart* majority clarified, "[t]he applicability" of the language in Rule 23(b)(3) on predominance was "not before [the Court]." *Id.* at 346 n.2.

The class certification in this case involved a uniform corporate policy and a damages class action pursued under Rule 23(b)(3). Both wide-scale exercise of independent discretion and the Rule 23(b)(2) concerns in *Wal-Mart* are absent. And Rule 23(b)(3) "allows class certification in a much wider set of

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[11] *See Wal-Mart*, 564 U.S. at 367 (Ginsburg, J., dissenting in part and concurring in part) ("The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2).").

[12] *See id.* at 355 ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters.").

circumstances but with greater procedural protections." *Id.* at 362.

b

Next, we recognize the significance that this class action proceeded to a bench trial and that the allocation of individual damages awards to each of the 53,000 class members is unchallenged. That damages could be—in fact, already were—individually allocated to each of the 53,000 class members proves the Class satisfied the predominance factor. The amended allocation order, which states precisely how much is awarded individually to each class member, is not at issue on appeal.

Typically, our review of class certification is at the Rule 23(f) stage, before summary judgment and long before trial. But here, we do not have to predict whether the common issues of Sunoco's liability will predominate—"we know from the actual trial" that they in fact did. *In re Urethane*, 768 F.3d at 1258-59 (affirming class action trial aggregate damages award totaling nearly $1 billion for antitrust violations). Indeed, "the district court had the benefit of seeing what ultimately took place at trial. The court had no need to make a prediction based on the expert report. Instead, the district court could see that common issues of liability had predominated over individualized issues." *Id.* at 1259.

With the proof generated by the class action trial transcript, the district court's findings disproved Sunoco's challenges to predominance: "The trial testimony established that Sunoco followed a practice of not paying interest until it received a request from an owner. Ley created a methodology through which

she could calculate class-wide damages based on that conduct." *Cline II*, 479 F. Supp. 3d at 1164 (citations omitted). "Further, her computer calculations identify the precise damages for each late payment for each owner of each well." *Id.* We see no reason to disturb the district court's findings.

c

Additionally, we conclude that the predominating issue of Sunoco's liability outweighed any individualized issues on damages or other matters. This case aligns with our decision in *Naylor Farms,* a royalty underpayment class action pursued under Oklahoma law. As to our federal class action standards, we explained that, "[c]ritically, so long as at least one common issue predominates, a plaintiff can satisfy Rule 23(b)(3)—even if there remain individual issues, such as damages, that must be tried separately." *Naylor Farms*, 923 F.3d at 789.

Our review of class certification in *Naylor Farms* was at the Rule 23(f) stage, so we had to predict what issues would predominate at trial.[13] That case involved a class of royalty owners who alleged they were charged excess deductions for midstream services applied to natural gas produced from Oklahoma wells in which they had royalty interests. *Id.* The defendant insisted that the variations among gas quality and different lease language made it

[13] *Naylor Farms*, 923 F.3d at 798 (stating at the Rule 23(f) stage, before trial, that "[w]e see no indication" that individualized issues overwhelming the common issue "will occur here" later at trial). But in this case, with the trial concluded and damages allocated to the Class members, we know with certainty that no individualized issues predominated.

impossible to certify a cohesive class. *Id.* at 795-96. Similarly, Sunoco here insists there are individualized variations regarding the timing of the interest payments and each owner's marketable title among the Class.

We rejected the defendant's argument in *Naylor Farms*, explaining that a single common issue (the defendant's class-wide breach of lease to each class member) predominated, and that all the defendant's alleged individualized issues were "relevant only to the post-breach question of damages." *Id.* at 790. We reject Sunoco's argument on the same grounds. And because the class plaintiffs in *Naylor Farms* "provided evidence that [their] expert [could] determine damages on a class[-]wide basis through use of a model," we affirmed the district court's ruling that "these distinctions don't defeat predominance." *Id.* (internal quotation marks omitted). We highlighted that the defendant failed to identify any "specific" evidence that showed any actual lease language variations that would create genuine individualized issues and make a class action trial unworkable. *Id.* at 797. All this analysis applies with full force here, and even more so, given that Sunoco's only identified expert on class certification and damages—Krause—was struck (and independently deemed unreliable as an expert).

Sunoco relies on our decision reversing class certification in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013). That case, like *Naylor Farms*, involved alleged royalty underpayments that depended on the language in hundreds of individual leases, but our

ruling there was largely driven by the class plaintiffs' basic failure to even review all the leases. *See id.* at 1219 ("[T]here are roughly 430 leases which have yet to be examined[.]"). We did not suggest that the class could never be certified as a matter of law; rather, we said that "[o]n remand" the class plaintiffs "could, for example, create a chart classifying lease types" so that the district court could determine whether the lease language variations were too individualized. *Id.*; *see also Naylor Farms*, 923 F.3d at 795-96 (distinguishing *Roderick* because the royalty owner class plaintiffs created a "generally accurate" lease chart, doing exactly as we suggested in *Roderick* (internal quotation marks omitted)).

As Sunoco argues, we also suggested in *Roderick* that on remand the district court needed to assess "the extent to which material differences in damages determinations will require individualized inquiries." *Roderick*, 725 F.3d at 1220. But we continued: "That said, there are ways to preserve the class action model in the face of individualized damages." *Id.*

As a matter of law, individualized damages in class actions typically do not defeat predominance under Rule 23(b)(3). "[T]he black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations." *Brayman v. KeyPoint Gov't Sols., Inc.*, 83 F.4th 823, 839 (10th Cir. 2023) (quoting 2 Newberg and Rubenstein on Class Actions § 4:55); *see also Menocal*, 882 F.3d at 922 (same).

Sunoco primarily challenges predominance by claiming that individualized questions on marketable title (which went only to the amount of damages owed) overwhelmed the common questions on liability. But Sunoco fails to confront the district court's analysis on marketable title or show any legal error.

Because this case is in federal court based on federal diversity jurisdiction under the Class Action Fairness Act (CAFA),[14] "we apply the substantive law of the forum state—Oklahoma." *Shotts v. GEICO Gen. Ins. Co.*, 943 F.3d 1304, 1308 n.4 (10th Cir. 2019). To do so, we "must ascertain and apply Oklahoma law with the objective that the result obtained in the federal court should be the result that would be reached in an Oklahoma court." *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926, 930 (10th Cir. 2018) (quoting *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512 (10th Cir. 1994)). Thus, when considering the arguments on marketable title, we look to Oklahoma law.

We start by analyzing the factual underpinnings of Sunoco's arguments. Sunoco does not address the district court's findings of fact regarding Sunoco's failure to substantiate its marketable title defense. The district court found that:

- "Sunoco did not identify a single case in which an owner did not have marketable title." *Cline II*, 479 F. Supp. 3d at 1171.

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[14] Sunoco removed this case to federal court under the Class Action Fairness Act of 2005 (CAFA), a sub-section of the diversity jurisdiction statute, 28 U.S.C. § 1332. *See* § 1332(d)(2).

- "Sunoco has never even bothered to figure out how much interest it owes to owners. It keeps scant records of why it made late payments." *Id.* at 1155.
- It was only "after the [c]ourt certified the class (and long after the [c]ourt set a trial date and discovery cutoff)" that "Sunoco finally began to look through thousands of files for evidence of what it might owe." *Id.* at 1156.
- "For its millions of late payments, it says it cannot determine the amount of interest due. This inability, however, does not arise from a lack of information. Rather, it arises from Sunoco's unwillingness to make the effort, at the time of the late payment, to determine the cause of the lateness and the amount of interest due." *Id.* at 1160.

These factual findings undercut Sunoco's marketable title challenge on appeal. Under Oklahoma law, doubts regarding marketable title can be used to suspend or deny proceeds payments to owners "only when a legitimate question as to marketability of title exist[s.]" *Hull v. Sun Refin. & Mktg. Co.*, 789 P.2d 1272, 1277 (Okla. 1989). We explored this issue in *Quinlan v. Koch Oil Co.*, 25 F.3d 936 (10th Cir. 1994), applying Oklahoma law and rejecting an oil producer's defense that a royalty owner seeking relief under the PRSA had to make "a showing of marketable title every time a royalty payment was due." *Id.* at 940. We declined "to read *Hull* as broadly as [the defendant] would have us." *Id.*

The parties in this case frame this inquiry as a question of who has the burden of proof on marketable

title. We assume, without deciding, that generally each royalty owner has the initial burden to establish marketable title to receive royalty payments under the PRSA, if there are "legitimate questions" on marketable title. But in this case, Sunoco itself had already determined that every member of the Class had marketable title, and it is "implausible that Sunoco paid people money that it did not owe them, especially considering the company's policy of withholding interest payments from their rightful owners in contravention of clear Oklahoma law." *See* Aplt. App. II at 204. Additionally, the definition of the class also ensured that Sunoco would pay damages only to those owners it had already determined were entitled to proceeds payments. *See id.* ("These limitations—narrowing the class to those who have already received untimely payments for oil proceeds but have not received the statutory interest payments—ensure the legal entitlement of each member of the class to interest payments under the PRSA.").

As a result, we "conclude that the marketability of [the Class members'] title was not legitimately in question[,]" and thus we affirm the holding that each member of the Class is not obligated "to make an affirmative showing of marketable title" to prevail against Sunoco, *Quinlan*, 25 F.3d at 940; *accord Base*, 563 P.3d at 954 (advising that "it does not appear that the parties even dispute whether [plaintiffs] have marketable title, as [the defendant] has been making royalty payments to [them]").

In the absence of legitimate questions on marketable title in the first instance, marketable title

became an affirmative defense, which Sunoco bore the burden to establish. *See, e.g.*, *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1335 (10th Cir. 2017); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits[.]"). Sunoco pleaded a lack of marketable title as an affirmative defense, and "the burden of proving all affirmative defenses rests on the defendant." *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007). Placing the impossible burden on each Class member to determine how Sunoco conducted its internal corporate decision-making on the lack of marketable title would be both unworkable and unreasonable.

Sunoco failed to meet its burden to establish a lack of marketable title. At trial, Sunoco presented Kraettli Epperson "as an expert on marketable title." *Cline II*, 479 F. Supp. 3d at 1163. But Epperson "did not examine any titles" and "could not testify that any of the owners did not have marketable title." *Id.* Beyond this, "Epperson did not conduct a title search on property of any of the 53,000 owners to whom Sunoco made late payments. He offered no opinion on the state of any titles at issue in this case." *Id.* Thus, Sunoco's expert was unable to locate a single instance out of over 1.5 million late payments where legitimate questions on marketable title justified the late proceeds payment to an owner.

Finally, Sunoco argues that affirmative defenses are individualized and defeat class certification. *See* Reply Br. at 19. But affirmative defenses rarely defeat

class certification, especially where, as here, they target only the amount of damages owed by a defendant:

> In many circumstances, however, a class that otherwise satisfies predominance can be certified even if affirmative defenses raise individual questions of law or fact. Courts are generally reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members, such that the presence of individual defenses does not by its terms preclude class certification. Courts in most circuits have adopted some version of this approach. This is particularly true given the range of procedural mechanisms available to courts to deal with potentially individualized affirmative defenses.

2 Newberg and Rubenstein on Class Actions § 4:55 (6th ed. 2025) (footnotes and internal quotation marks omitted); *see also Tyson Foods*, *Inc.*, 577 U.S. at 453-54 (predominance is met "under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members" (quoting 7AA C. Wright, A. Miller, M. Kane & R. Klonoff, Federal Practice & Procedure § 1778 (3d ed. 2005))); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668 (9th Cir. 2022) (same); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012) (same); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 301 (3d Cir. 2011) (same); *Smilow*

v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) (same) (collecting cases).

In sum, we reject Sunoco's challenges to predominance under Rule 23(b)(3) and affirm the district court's decision to certify the Class and thereafter to decline to decertify the Class following the successful class action trial.

2

We next address Sunoco's argument that the members of the class were not ascertainable. Sunoco says that the Class should not have been certified because all members of the Class were not identified by name. Op. Br. at 35-37.

Rule 23 does not expressly include an ascertainability requirement. But "most circuits have implemented some version of an ascertainability test as an implied prerequisite to class certification." *Freund v. McDonough*, 114 F.4th 1371, 1378 (Fed. Cir. 2024); *see also Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (same) (collecting cases). At class certification, the movant must provide "a sufficiently definite" class definition, and "[a]ll courts essentially focus on the question of whether the class can be ascertained by objective criteria." 1 Newberg and Rubenstein on Class Actions § 3:3 (6th ed. 2025). "[A]scertainability requires only that the court be able to identify class members at some stage of the proceeding." *Freund*, 114 F.4th at 1378 (internal quotation marks omitted).

In challenging ascertainability, Sunoco argues that we should adopt the minority view that "administrative feasibility" is a required element of the test for ascertainability. In support, Sunoco cites

Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980), a Seventh Circuit decision from several decades ago.[15] Reply Br. at 14. Sunoco contends that class certification violates the "administrative feasibility" factor because locating class members will be time-consuming and overly difficult. However, Sunoco cannot defeat class certification either by failing to keep proper records or failing to produce them. *See Cline II*, 479 F. Supp. 3d at 1171 n.21 (declining to "allow Sunoco to hide behind a mess of its own making" by failing to keep proper records).

The record demonstrates that Sunoco failed to gather and produce the owner information it was statutorily required to maintain under the PRSA. And gaps in the records kept and produced by a defendant cannot be used to hinder class certification. *See Kelly v. RealPage Inc.*, 47 F.4th 202, 223 (3d Cir. 2022). It is settled that "where [a defendant's] lack of records makes it more difficult to ascertain members of an otherwise objectively verifiable class, the [individuals] who make up that class should not bear the cost of the [defendant's] faulty record keeping." *Id.* (alterations in original) (quoting *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470 (3d Cir. 2020));[16] *see also Rikos v. Procter &*

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[15] Not only does this 1980 decision precede the amendments to modern Rule 23, but it also advises that a court facing an overbroad class definition should narrow it—not outright deny class certification, and thereby deny relief to the entire class. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009) (citing *Adashunas*, 626 F.2d at 603-04).

[16] These bracketed alterations in *Kelly v. RealPage Inc.* expanded the ruling in *Hargrove v. Sleepy's LLC*, 974 F.3d 467 (3d Cir. 2020), which involved an employer-employee dynamic. In *RealPage*, the Third Circuit stated that it is appropriate to "rel[y]

Gamble Co., 799 F.3d 497, 525-26 (6th Cir. 2015) (advising that ascertaining the class members requires only "reasonable accuracy" and that class certification is proper even if that "process may require additional, *even substantial*, review of files") (quoting *Young*, 693 F.3d at 539).

Nor can "defendants . . . defeat ascertainability with a strategic decision to house records across multiple sources or databases." *Kelly*, 47 F.4th at 223; *Lewis v. Gov't Emps. Ins. Co.*, 98 F.4th 452, 462 & n.13 (3d Cir. 2024) (explaining that "a straightforward 'yes-or-no' review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources") (quoting *Kelly*, 47 F.4th at 224); *see also Kelly*, 47 F.4th at 223 (A "matching of records is precisely the sort of exercise we have found sufficiently administrable to satisfy ascertainability in other cases.").

Likewise, a defendant cannot avoid class certification by objecting "to the number of records that must be individually reviewed," because that "is essentially an objection to the size of the class, which . . . explicitly . . . is not a reason to deny class certification." *Kelly*, 47 F.4th at 224; *see also Young*, 693 F.3d at 539-40 (same and collecting cases). "To

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on *Hargrove* outside of the employment context for the proposition that a defendant's faulty recordkeeping will not preclude certification of an otherwise ascertainable class." *Lewis v. Gov't Emps. Ins. Co.*, 98 F.4th 452, 462 n.13 (3d Cir. 2024) (citing *Kelly v. RealPage Inc.*, 47 F.4th 202, 223 (3d Cir. 2022)). Thus, these ascertainability rulings apply to all class actions.

hold otherwise would be to categorically preclude class actions where defendants purportedly harmed too many people, which would seriously undermine the purpose of a class action to vindicate meritorious individual claims in an efficient manner." *Id. at 225* (internal quotation marks omitted). Indeed, "[i]t is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people." *Rikos*, 799 F.3d at 525 (quoting *Young*, 693 F.3d at 540). And, thus, "[t]o allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies." *Id.* at 525-26 (quoting *Young*, 693 F.3d at 540).

At the same time, our circuit has not yet published a decision on whether ascertainability is a separate class certification factor.[17] It appears that there is now some uncertainty, which has left some district courts in this circuit forced to guess about what ascertainability standard to apply. At least two lower courts in our circuit have predicted that we would

[17] We did state in the 1970s that "[i]n class action suits there must be presented some evidence of established, ascertainable numbers constituting the class" to satisfy the numerosity requirement in Rule 23(a)(1). *Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978). But we did not expand on what that meant, and in the nearly half century since then, Rule 23 and the corresponding case law on class actions and ascertainability have evolved significantly (along with the ability to gather and analyze records electronically, allowing litigants to ascertain in seconds what might have taken months or years in previous decades).

adopt the Seventh Circuit's test for ascertainability, which is the majority rule among our sister circuits.[18]

We join the majority view by adopting the Seventh Circuit's test for ascertainability of a class action's members. We also reject "administrative feasibility" as an additional *required* factor. *Freund*, 114 F.4th at 1378 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir. 2013)). Instead, we "agree with the majority of circuits that there is no basis for finding a lack of ascertainability because it is difficult to identify the class members." *Id.*; *see also id.* at 1378 n.6 (collecting cases from the Second, Seventh, Eighth, and Ninth Circuits). Rather, as our sister circuits have explained, "administrative feasibility may bear on whether class resolution is superior to individual resolution," but it should not operate as a trump card that outweighs all other factors under Rule 23. *Id.*; *see also Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (upholding district court's exercise of discretion that determining class membership would be administratively infeasible).

For class members to be ascertainable, the class definition must (1) be defined clearly and cannot be

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[18] In two multi-district litigations involving complex class actions in the District of Kansas, both district courts predicted our adoption of the Seventh Circuit's test for ascertainability, "under which the class definition must not be too vague, the class must not be defined by subjective criteria, and the class must not be defined in terms of success on the merits." *In re: Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 5371856, at *2 (D. Kan. Sept. 26, 2016); *see also In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1180550, at *11 (D. Kan. Mar. 10, 2020) (same).

defined too vaguely, and (2) be defined objectively and cannot be based on subjective criteria, such as by a person's state of mind.[19] *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 659-60 (7th Cir. 2015). Again, we "see no reason" to make administrative feasibility a required element of this test, "particularly given the strong criticism it has attracted from other courts." *Rikos*, 799 F.3d at 525; *see also Mullins*, 795 F.3d at 662 (same). In contrast, we require the movant seeking class certification to show that class members can ultimately be identified (i.e., they are ascertain-*able* but not necessarily ascertained at the time of class certification) using "reasonable—but not perfect—accuracy." *Rikos*, 799 F.3d at 526.

The Class satisfied this ascertainability standard. The district court made specific fact-findings that the class was objectively defined with a reliable and administratively feasible mechanism for determining class membership. *Cline I*, 333 F.R.D. at 688. Sunoco does not challenge these findings of fact, again failing to point us to an error in the trial proceedings or district court rulings. Having paid every class member principal proceeds and deemed its own records sufficient to satisfy its obligations under the PRSA, Sunoco is not permitted to cast doubt on its own record-keeping to avoid liability. *See Soutter v.*

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[19] We again decline to decide whether a "fail-safe" class definition is an independent bar to class certification because this argument was not adequately briefed. *Sherman v. Trinity Teen Solutions, Inc.*, 84 F.4th 1181, 1191 n.6 (10th Cir. 2023). A "fail-safe" class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

Equifax Info. Servs., LLC, 307 F.R.D. 183, 197-98 (E.D. Va. 2015) ("In general, courts do not look favorably upon the argument that records a defendant treats as accurate for business purposes are not accurate enough to define a class.").

This is especially true in this case because, as a "first purchaser" of oil, Sunoco is obligated under the PRSA to keep proper records on the payments owed and made to owners. *Cline II*, 479 F. Supp. 3d at 1172. And Sunoco does not contest on appeal the district court's factual findings on ascertainability or its ability to locate members of the Class. The district court found:

> Unsurprisingly, Sunoco conflates doing what is impossible with doing what is hard. No doubt, figuring out what Sunoco owes to interest owners is difficult when it has failed to comply with the PRSA for years. Had Sunoco done its homework in the years before this suit, it would have known how much interest it owes, and could have presented a compilation or summary. *See* Fed. R. Evid. 1006. Sunoco's own evidence shows that it has the ability to determine what Sunoco owes interest owners; it just does not do so until asked. Thus, Sunoco's arguments fall far short.

Id. at 1164-65. For all these reasons, we affirm the district court's ruling that the Class satisfied ascertainability.[20]

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[20] Beyond its challenges to class certification based on predominance and ascertainability, Sunoco also lists several

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Sunoco next challenges standing. It contends that a portion of the Class was not identified by name because Sunoco had only the account information, not the names for each "flesh and blood" class member.[21] As a result, Sunoco argues that the entire class action failed for lack of standing. We disagree.

To establish standing, a plaintiff must demonstrate that they (1) "ha[ve] suffered or likely will suffer an injury in fact," (2) "the injury likely was caused or will be caused by the defendant," and (3) "the injury likely would be redressed by the requested judicial relief." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). The

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other class action factors, left undeveloped as legal arguments, that we decline to review under "the doctrine of appellate-briefing waiver." *In re Syngenta AG MIR 162 Corn Litig.*, 111 F.4th 1095, 1112 (10th Cir. 2024). The mere "[r]ecitation of a tale of apparent injustice . . . cannot substitute for legal argument." *Id.* (internal quotation marks omitted). Sunoco asserts, for instance, that the district court violated the Rules Enabling Act and that some class members had intra-class conflicts based on indemnity agreements. Sunoco also mentions that determining the date of first-sale as a factual matter defeated the typicality and adequacy requirements under Rule 23(a)(3) and (4). Before the district court, it made a similar argument to challenge predominance. *See* Aplt. App. I at 202. But even if this argument was not waived as under-developed on appeal, the district court's fact-finding, made in reliance upon the Class's expert, was not an abuse of discretion.

[21] Sunoco inserted a "flesh and blood" phrase or argument for the first time in its reply brief, no less than six times. Reply Br. at 6, 7, 12, 16, 22, 23. But it does not adequately explain the meaning of that phrase nor provide a citation for any authority that would give this phrase legal significance to this case.

Class met all three factors. Sunoco underpaid every class member by failing to automatically pay interest (monetary injury), and every time it did so, the cause of this underpayment is directly traceable to (and, thus, directly redressable by the damages paid by) Sunoco.

Sunoco's standing challenge focuses primarily on the Article III standing of the Class members whose damages awards were allocated to unclaimed state property funds. Sunoco argues that class members who have not been located have not been injured, but it fails to offer any legal support addressing its unclaimed property fund argument.

The district court's reasoning on standing is sound. "Each state has created by statute a government agency that collects money held by businesses for people who cannot be found. The agency holds the money on behalf of the true owners." *Cline II*, 479 F. Supp. 3d at 1162. In turn, "[o]nce the state receives the money on behalf of the individual, the owner can claim the money." *Id.* at 1172 (citing Okla. Stat. Ann. tit. 60, §§ 661, 663-64, 674-75; Tex. Prop. Code Ann. §§ 74.304, 74.501 (state unclaimed property funds for Oklahoma and Texas)). Therefore, "[p]aying the state amounts to paying the owner or an agent or trustee on behalf of the owner. Thus, each class member has suffered an injury because Sunoco has withheld interest it owes to the owner." *Id.*

Sunoco has not presented persuasive arguments to the contrary. Oklahoma has adopted the Uniform Unclaimed Property Act, and "this statutory scheme governs the distribution of unclaimed or abandoned property in Oklahoma." *Unit Petroleum Co. v. Veitch*,

79 F. Supp. 3d 1234, 1241 (N.D. Okla. 2015); *see* Okla. Stat. Ann. tit. 60, § 651-88 (the Uniform Unclaimed Property Act (UUPA)). Sunoco says the district court's award to the unclaimed property funds is an invalid order of "escheat," which "is a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." *Dani v. Miller*, 374 P.3d 779, 786 n.4 (Okla. 2016). But Sunoco's effort to defeat standing by its escheat argument is off the mark because the UUPA is "not" an "escheat" statute. *See TXO Prod. Corp. v. Oklahoma Corp. Comm'n*, 829 P.2d 964, 971-72 (Okla. 1992) (explaining that the UUPA is not a true escheat statute but rather a custodial taking law). Oklahoma's unclaimed property fund "protects the owners of unclaimed property by providing an orderly system of recovery for presumably abandoned property[.]" *Dani*, 374 P.3d at 788 (rejecting numerous constitutional challenges to Oklahoma's UUPA statute); *see also Croslin v. Enerlex, Inc.*, 308 P.3d 1041, 1049 (Okla. 2013) (advising that the UUPA properly ensures "mineral proceeds of unknown and unlocated property owners will be safeguarded[.]"). Which is to say, the payments to the unclaimed property fund do not defeat the injury in fact requirement of standing.

Both Oklahoma, where the oil wells at issue in this case are located, and Texas, where Sunoco is headquartered and sends unclaimed funds for which it has no owner information, *Cline II*, 479 F. Supp. 3d at 1160, have adopted the UUPA. *Dani*, 374 P.3d at 786; *Clark v. Strayhorn*, 184 S.W.3d 906, 910 (Tex. App. 2006). In contrast, Sunoco's novel view on standing would motivate oil and gas companies to

make every effort to *avoid* locating owners entitled to proceeds and interest under the PRSA. That would undermine the statutory purpose of both the PRSA and the UUPA, which is "designed so that unclaimed property is held by and for the benefit of the state until the rightful owner can be found, and . . . is intended to prevent a windfall to a private holder seeking to claim property for [itself]." *Unit Petroleum*, 79 F. Supp. 3d at 1241 (citing *Combs v. B.A.R.D. Indus. Inc.*, 299 S.W.3d 463, 471-72 (Tex. App. 2009)).

In addition, Sunoco's standing argument fails because it admits, as it must, that it owes a statutory duty to keep adequate records regarding its royalty payments. *See* Okla. Stat. Ann. tit. 52, § 570.12(A). And Sunoco's deficient recordkeeping is the reason these royalty owners are not identified by name. In this case, "Cline offered evidence" showing that "Sunoco did not make a bona fide effort to find people before sending their proceeds to unclaimed property funds" and even "threatened to send one of Cline's interest checks to unclaimed property, even though it was in litigation with Cline, knew his address, and had frequent contact with his lawyers[.]" *Cline II*, 479 F. Supp. 3d at 1162 n.15.

Thus, although "Sunoco has vigorously argued that its own records are too unreliable to explain why it made a late payment," we agree that "interpret[ing] the PRSA to impose on the owners the burden to prove why Sunoco withheld payment" in turn "would effectively allow Sunoco to hide behind a mess of its own making, claiming innocence." *Id.* at 1171 n.21; *see also Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 607 (D. Kan. 2014) (pointing out in a

consumer class action the danger that a defendant "could immunize itself from class certification by merely choosing not to keep records[.]").

Simply put, every class member was underpaid by Sunoco and therefore has standing based on a monetary injury that is traceable and redressable by Sunoco. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) ("If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."). For all these reasons, we reject Sunoco's standing argument.[22]

C

We next turn to the outcome of the bench trial—damages. This case proceeded as a class action to trial, and then to post-trial proceedings to allocate the damages to the Class. The district court issued its trial opinion with its findings of fact and conclusions of law, as Federal Rule of Civil Procedure 52(a) requires.

On appeal, we review the district court's legal rulings de novo and the district court's findings of fact "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6). Thus, "deference to the trier of fact" is "the rule, not the exception." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Our role is limited "[i]n reviewing the district court's findings after a bench trial for clear error," and "we do not retry

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[22] In a footnote to its opening brief, Sunoco also argues that "any claim to interest on proceeds sitting in unclaimed-property funds is not prudentially ripe." Because this argument is underdeveloped and inadequately briefed, we deem it to be waived. *Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023).

the facts." *MVT Servs., LLC v. Great W. Cas. Co.*, 118 F.4th 1274, 1281 (10th Cir. 2024).

Sunoco challenges the award of prejudgment interest owed at a 12 percent rate, compounded annually, until the date the trial order was published.[23] "When royalty proceeds are not paid within the time constraints outlined in the [PRSA], interest begins to accrue and is compounded annually." *Krug*, 362 P.3d at 212. Sunoco primarily argues that a significant amount of interest was added after the date of trial, which is unfair and unlawful.

Both parties frame this issue on appeal as a question of prejudgment interest. This circuit has also described the damages owed for unpaid PRSA statutory interest as "prejudgment interest," *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1320 (10th Cir. 1998). Prejudgment interest in a diversity action is "a substantive matter governed by state law." *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1134 (10th Cir. 2002).

To the district court, Sunoco argued that "once it makes the late payment to the interest owner, statutory interest stops accruing." *Cline II*,

479 F. Supp. 3d at 1175. In response, the Class argued that "Sunoco owes compound interest until Sunoco pays the statutory interest." *Id.* At trial and on

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[23] As a cutoff date for when prejudgment interest stopped accruing, the district court stated that it used the date that it issued its trial decision, which was published on August 17, 2020. *See Cline II*, 479 F. Supp. at 1161 n.13 (explaining that "the interest owed in this case is $74,763,113.00 plus any additional interest due from December 17, 2019, to the date of this Opinion.").

appeal, "Sunoco interprets 'until the day paid' to mean 'until the day Sunoco paid the proceeds.' Thus, Sunoco argues that it does not owe compound interest." *Id.*; *see* Op. Br. at 51-52.

The district court sided with the Class, determining that "compound interest is a common feature in investments and means simply that interest becomes part of the principal and therefore earns interest." *Cline II*, 479 F. Supp. 3d at 1175. It further cited and adopted the reasoning of *Cockerell Oil Props., Ltd v. Unit Petroleum Co.*, No. CIV-16-135-KEW, 2020 WL 2110904, at *2 (E.D. Okla. May 4, 2020), which held that compound interest, as used in the PRSA, is "unambiguous" and "provid[es] for the annual accrual of interest on the accumulated interest on any unpaid proceeds not paid timely under the provisions of that statute."

We start with the PRSA's plain language. *See Am. Airlines, Inc. v. State, ex rel. Oklahoma Tax Comm'n*, 341 P.3d 56, 64 (Okla. 2014) ("The cardinal rule of statutory construction is to ascertain and give effect to the legislative intent and purpose as expressed by the statutory language."). The PRSA states, in relevant part:

> [T]hat portion [of the proceeds] not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

Okla. Stat. Ann. tit. 52, § 570.10(D)(1).

As the Class argues, under Oklahoma law and universally across jurisdictions, "amounts of unpaid

interest become part of the principal; that is the technical definition of 'compound interest.'" Resp. Br. at 55. Oklahoma's statute defining compound interest says this expressly. *See* Okla. Stat. Ann. tit. 25, § 27 ("The words 'compound interest' mean interest *added to the principal* as the former becomes due, and *thereafter made to bear interest*." (emphasis added)).

As unpaid compound interest accrues, it is *added* to the principal, effectively converting it from unpaid interest to become a portion of the underlying unpaid principal proceeds that are owed to the plaintiff. *See id.*; *see also* 47 C.J.S. Interest & Usury § 2 ("Compound interest is interest on interest. It is paid both on the principal and the previously accumulated interest. Accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed. (footnotes omitted)"); 44B Am. Jur. 2d Interest and Usury § 41 (same). Nor does Sunoco refute that, generally, debt payments are applied to any unpaid interest before they ever are applied to reduce the unpaid principal. *See* Resp. Br. at 56 (citing *Landess v. State ex rel. Comm'rs of Land Off.*, 335 P.2d 1077, 1079 (Okla. 1958) ("[T]he rule is to apply the payments in the first place to the discharge of the interest then due and the remainder on the principal.") (internal quotation marks omitted)).

We agree with the dissent that the accrual date for payment stops the day *something* is paid. Dissent at 3 (emphasis in original). However, the dissent concludes the "something" is "that portion [of proceeds] not timely paid." *Id.* But this reading of the PRSA does not give adequate weight to the language that commands those unpaid proceeds "shall

earn interest . . . to be compounded annually." § 570.10(D)(1). Thus, under Oklahoma law, the better reading of the PRSA is "take all of its provisions and read them as a whole so that each provision will be in harmony with every other, ..." *Melton v. Quality Homes, Inc.*, 312 P.2d 476, 479 (Okla. 1957). The PRSA mandates the payment of unpaid proceeds and compounded interest, so we agree with the district court that the accrual date stops when "that portion [of proceeds and compounded interest are] paid." § 570.10(D)(1) (citation modified).

Even if the PRSA's language on compound interest were ambiguous (which it is not), we would affirm and reach the same result by applying Oklahoma's rules of statutory construction. *See Am. Airlines*, 341 P.3d at 64 ("If the legislative intent cannot be ascertained from the language of a statute, as in the cases of ambiguity, we must apply rules of statutory construction."). In interpreting the PRSA specifically, the Oklahoma Supreme Court has directed that "[l]egislative intent controls statutory interpretation." *Krug*, 362 P.3d at 210. So we must "give effect to the legislative intent and the public policy underlying the intent." *Am. Airlines*, 341 P.3d at 65.

Furthermore, the Oklahoma "Legislature has expressed its intent that it shall be the public policy in Oklahoma for royalty owners to receive prompt payment from the sale of oil and gas products." *Hull*, 789 P.2d at 1279; *see also In re Tulsa Energy, Inc.*, 111 F.3d 88, 90 (10th Cir. 1997) (same). To this end, "[f]rom 1980 to 1989," the PRSA "provided for interest of twelve percent per annum, without compounding."

Hebble v. Shell W. E & P, Inc., 238 P.3d 939, 945 (Okla. Civ. App. 2009).[24] Not only does the statute now mandate that unpaid proceeds "shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually . . . until the day paid," but "[t]he prejudgment interest authorized by § 570.10 constitutes a part of the judgment and is considered a part of the total liability recovered." *Id.* (quoting § 570.10); *see also id.* at 946 (advising that "prejudgment interest under the PRSA is part of [the] compensatory damages" to be awarded). We decline to reach a conclusion that "conflicts with the spirit and letter of [the PRSA] and [violates] the public policy intended to be promoted through its enactment—prompt payment to royalty owners of proceeds from the sale of oil or gas." *Hull*, 789 P.2d at 1280.

Under Oklahoma law, and the law of most states generally,[25] "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until

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[24] *Hebble* involved a challenge to the trial court's instruction to the jury about the awarding of prejudgment interest under the PRSA. 238 P.3d at 946. It did not interpret the PRSA's "until the day paid" language that is at issue here.

[25] "Prejudgment interest . . . is part of the actual damages sought to be recovered." *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1134 (10th Cir. 2002) (quoting *Johnson v. Continental Airlines Corp.,* 964 F.2d 1059, 1062-63 (10th Cir. 1992)). Thus, "[p]rejudgment interest is an element of complete compensation," and without awarding prejudgment interest, a plaintiff is not made whole because it loses out on the time value of money. *Morrison Knudsen Corp. v. Ground Improvement Techs., Inc.*, 532 F.3d 1063, 1073 (10th Cir. 2008) (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)).

judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *Krug*, 362 P.3d at 214. Indeed, "[i]t is an element of the total liability adjudicated." *Id.*

On top of this, we are bound to recognize that the Oklahoma "Legislature has followed a path of strengthening mineral owners['] rights since the [PRSA's] inception." *Id.*; *see also Hull*, 789 P.2d at 1279 (same). The Oklahoma legislature "removed" language in the PRSA that led courts to interpret the statute as punitive. *Krug*, 362 P.3d at 213 n.24. When a legislature amends a statute, we presume that "it intends its amendment to have real and substantial effect." *Bufkin v. Collins*, 145 S. Ct. 728, 741 (2025) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004)); *see also Estrada v. Smart*, 107 F.4th 1254, 1268 (10th Cir. 2024) (same). Taken together, we discern from the statutory text and a clear legislative intent to make royalty owners whole by compensating them for the lost time value of their money.

Sunoco claims it is unfair to compound the prejudgment interest owed because the delays caused by the district court's initial order allocating damages—which we reversed—caused an increase in the amount of prejudgment interest. But "courts should not read into a statute exceptions not made by the Legislature." *Antini v. Antini*, 440 P.3d 57, 60 (Okla. 2019) (quoting *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 422 P.2d 840, 843 (Okla. 1966)). Similarly, the PRSA states that prejudgment interest "shall" accrue at 12 percent, and "the word 'shall' is a mandatory command" we are obligated to follow. *State*

ex rel. W. State Hosp. v. Stoner, 614 P.2d 59, 63 (Okla. 1980); *see also Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) (same). As a federal court sitting in diversity jurisdiction, we are "not free to engraft" any "exceptions or modifications" to Oklahoma law. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). Our "proper function" in a diversity case "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

Moreover, we have also already considered and rejected the notion of an equitable exception argument to prejudgment interest. Applying Colorado law, which is substantially similar to Oklahoma law on prejudgment interest, we held that it was reversible error to insert an equitable exception into a state statute awarding prejudgment interest. *See Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1092 (10th Cir. 2001) ("Regardless of the factors that contributed to the length of time during which prejudgment interest was accruing[,]" there is "no discretion" to add an equitable exception.). A state prejudgment interest statute—whether Colorado's or Oklahoma's—"merely recognizes the time value of money" and restores the plaintiff to the position the plaintiff would have been in but for the defendant's harm. *Id.* (internal quotation marks omitted).

Finally, Sunoco argues that the Energy Litigation Reform Act (ELRA), Okla. Stat. Ann. tit. 52, §§ 901-03, expressly limits the scope of damages and "confirms that extra-statutory prejudgment interest is off the table." Op. Br. at 54. Sunoco contends the ELRA, which was enacted in 2012, requires that "no

interest beyond what the PRSA awards as damages—which stops accruing once proceeds are paid—may be awarded." *Id.* It is questionable whether this ELRA argument was properly raised before the district court to not be forfeited on appeal, *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011), however, the Class does not raise forfeiture in its Response Brief because it does not mention Sunoco's ELRA argument regarding prejudgment interest at all. Nevertheless, Sunoco cites no authority to support its reading that the ELRA mandates that interest stops accruing once proceeds are paid, and we are aware of none. Based upon the thin argument presented and the depth of authority that supports our holding, we are not persuaded that Sunoco's ELRA argument alters our reading of the PRSA's compound interest or merits Sunoco any relief.

We affirm the district court's final actual damages award, which included the additional prejudgment interest added until the entry of the district court's trial opinion.

D

The last argument we reach is Sunoco's challenge to the punitive damages award. The district court awarded $75 million in punitive damages, ruling that Sunoco willfully violated the PRSA by failing to pay interest that it knew was owed to every class member without receiving an individual demand from each royalty owner. *Cline II*, 479 F. Supp. 3d at 1178-81.

On appeal, Sunoco argues that punitive damages are available only for tort claims, not claims for breach of contract, and the PRSA claim must be interpreted as a breach of contract claim under Oklahoma law. In

response, the Class argues that the PRSA creates a statutory tort, and that the ELRA expressly allows punitive damages in a case also involving a claim and liability under the PRSA. *See* Okla. Stat. Ann. tit. 52, § 903 (allowing punitive damages under the ELRA if a factfinder determines "upon clear and convincing evidence" that the defendant failed to pay required proceeds "with the actual, knowing and willful intent: (a) to deceive the person to whom the proceeds were due, or (b) to deprive proceeds from the person the holder knows, or is aware, is legally entitled thereto"). We agree with Sunoco and vacate the punitive damages award.

The district court found that the Class had to clear two hurdles to be awarded punitive damages, the ELRA and the Oklahoma punitive damages statute, Okla. Stat. Ann. tit. 23, § 9.1. By awarding punitive damages, the district court found that the Class was successful in its clearance of both. However, the punitive damages award runs afoul of Oklahoma law, which precludes punitive damages for a breach of contract claim. *See* Okla. Stat. Ann. tit. 23, § 9.1(A) ("In an action for the breach of an obligation *not arising from contract*, the jury, in addition to actual damages, may, . . . award punitive damages . . .) (emphasis added).

Taking a step back, we acknowledge again that the only claim before us on appeal is the PRSA claim because the Class did not prevail on the fraud claim at trial. Under Oklahoma law, a claim under the PRSA is construed as a claim for breach of contract. *Purcell*, 961 P.2d at 193; *see also Krug*, 362 P.3d at 213 (explaining that the 12 percent interest owed under

the PRSA "should not be characterized as a penalty but, rather, an integral part of a contractual claim"). Which is to also say, under Oklahoma law, a party cannot recover punitive damages unless it also prevails on an *independent* tort claim for fraud, deceit by nondisclosure, or a similar tort claim that permits punitive damages. We made this point in our decision in *Zenith Drilling Corp. v. Internorth, Inc.*, 869 F.2d 560 (10th Cir. 1989), where we explained that punitive damages are available under Oklahoma law in a case involving a breach of contract only when a plaintiff prevails on an "independent, willful tort[.]" *Id.* at 565 (quoting *Z.D. Howard Co. v. Cartwright*, 537 P.2d 345, 347 (Okla. 1975)).

To sidestep the general rule that a party cannot receive punitive damages based on a breach of contract claim, the Class argues that the PRSA created a statutory tort. This argument has been rejected by Oklahoma courts. *See, e.g.*, *Purcell*, 961 P.2d at 191-94 (rejecting the argument that the PRSA creates "statutory liability" that arises "separately" and instead stating that the "12 [percent] interest" awarded as PRSA damages is "part of the contractual claim"); *Krug*, 362 P.3d at 213 (explaining that the 12 percent interest owed under the PRSA "should not be characterized as a penalty but, rather, an integral part of a contractual claim"); *Hebble*, 238 P.3d at 945 ("[t]he PRSA does not create a statutory claim.").

In *Purcell*, the Oklahoma Supreme Court held that a PRSA violation "is based upon a breach of the obligation to pay the royalty arising *ex contractu* in the manner prescribed by [the PRSA]." 961 P.2d at 193 (citation omitted); *see also Ex Contractu*, Black's Law

Dictionary (12th ed. 2024) (defining "*ex contractu*" as "[a]rising from a contract"); *see also Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 684-85 (Okla. 1983) (holding that a claim for relief that is *ex contractu* "is clearly a contract action"). Just last year, the Oklahoma Supreme Court reaffirmed this language from *Purcell*, holding that "claims under the PRSA are really an action *ex contractu*—i.e., they arise out of *a* contract[.]" *Base*, 563 P.3d at 953 (emphases in original). The continued expression of this legal principle by Oklahoma courts leaves no reason for us to doubt that a PRSA claim is a breach of contract and thus excluded from potential punitive damages awards by statute.

The Class also argues that the ELRA is another route to the punitive damages award. The district court assumed the ELRA was applicable and focused on whether "Sunoco's conduct overcomes the ELRA's bar to punitive damages." *Cline II*, 479 F. Supp. 3d at 1178.

As the Class did here, a plaintiff can pursue a PRSA breach of contract claim for underpayment of royalties alongside a claim for common law fraud or deceit in the same case. *See Okland Oil Co.*, 144 F.3d at 1314. The Oklahoma Supreme Court has also held that "the claims of fraud, deceit, constructive fraud, and punitive damages are appropriate for class certification." *Weber v. Mobil Oil Corp.*, 243 P.3d 1, 7 (Okla. 2010). As a result, there is no barrier to a single plaintiff or a class pursuing and recovering damages for both a PRSA breach of contract and a fraud claim in the same case.

Oklahoma law, however, draws a distinction between the claims for breach of contract and fraud.

See Finnell v. Seismic, 67 P.3d 339, 345 (Okla. 2003) (explaining that the "words negligent and willful are legal terms of art that refer to tortious conduct" rather than a "breach of contract"). A PRSA claim, which is construed as a breach of contract, does not require any showing of "actual, knowing and willful intent" to deceive or deprive the victim of proceeds, which is required to obtain punitive damages under the ELRA. Okla. Stat. Ann. tit. 52, § 903.

In this context, owners suing for an intentional tort like fraud or deceit are alleging fraud in the *performance* of existing contracts (or leases), not that they detrimentally relied on the promises of the defendant to enter a contract or a lease in the first place (i.e., fraudulent inducement). The owners "already ha[ve] a protectable interest" to be paid royalties (and interest for late payments under the PRSA) based on their existing "contracts" or leases. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 (2d Cir. 2013).[26]

The dissent voices strong opposition to this reasoning and concludes that our reading of "§ 9.1, a general statute governing punitive damages in breach-of-contract cases, as somehow overriding § 903's exclusive remedy." Dissent at 7. We agree with

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[26] Both fraudulent inducement and fraud in the performance of an existing contract are cognizable forms of fraud. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 (2d Cir. 2013). This court approvingly discussed the Second Circuit's decision in *In re U.S. Foodservice* and other similar cases (including state common law fraud decisions) in *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1089-91 (10th Cir. 2014), explaining that class certification of a fraud claim can be based on "circumstantial proof of classwide reliance."

the dissent that, under Oklahoma law, "when there is a conflict between two statutes, one specific . . . and one general, the statute enacted for the purpose of dealing with the subject matter controls over the general statute." *Stitt v. Treat*, 546 P.3d 882, 893 (Okla. 2024). But we discern no conflict in the statutes here and instead determine that Oklahoma's punitive damages statute § 9.1 "must be read harmoniously" with the ELRA § 903. *Id.* at 892. Which is to say, we agree the ELRA allows for punitive damages to be awarded in a PRSA case so long as the plaintiff alleges and proves an independent, intentional tort to the statutory standard set out in the ELRA § 903.

The trial found that Sunoco's liability arose from a PRSA violation (breach of contract), not an intentional tort (fraud). Because the Class did not prevail on its independent, intentional tort claim, the ELRA does not provide a backdoor to an award of punitive damages in this case. As a result, with only a PRSA claim proved at trial, which we must interpret as a breach of contract under Oklahoma law, the punitive damages award cannot stand. For these reasons, we vacate the punitive damages award.

III

We **AFFIRM** the district court's orders granting class certification and denying post-trial class decertification, along with the orders determining the actual damages awarded to the Class, including prejudgment interest. We **VACATE** the punitive damages award and **REMAND** for the district court to amend the judgment consistent with this opinion.

MORITZ, Circuit Judge, concurring in part, dissenting in part.

I join sections II.A and II.B of the majority opinion analyzing class certification and standing. I write separately to address the interest and punitive damages Cline can recover under Oklahoma law.

As I see it, Oklahoma's Production Revenue Standards Act (PRSA), Okla. Stat. tit. 52, §§ 570.1-570.15, dictates that interest on unpaid oil proceeds stops accruing once the proceeds are paid, even if some amount of statutory interest remains outstanding. So unlike the majority, I would vacate the district court's nearly $104 million interest award (which reflects accrual through the date of judgment) and remand for recalculation.

As for punitive damages, I would give effect to the Energy Litigation Reform Act (ELRA), Okla. Stat. tit. 52, §§ 901-903, which specifically authorizes punitive awards against defendants that willfully withhold proceeds. Because the ELRA and PRSA provide the exclusive remedies for these oil and gas claims, Oklahoma's general prohibition on punitive damages in contract cases—which the majority sees as a barrier to Cline's recovery—simply does not apply here. Punitive damages would thus be available if the district court made an appropriate finding. But the district court found that Sunoco intended to withhold the *interest*, not the *proceeds*. So I join the majority in vacating the $75 million punitive award but would remand for the district court to reconsider punitive damages under the correct ELRA standard.

Fundamentally, both issues turn on the special statutes applicable to the oil and gas industry. I start

by explaining the relevant statutes and then discuss their application to the interest and punitive-damages questions raised here.

Oklahoma has carved out a distinct set of rules for oil and gas disputes, of which the PRSA and the ELRA are part. *See generally* Okla. Stat. tit. 52 ("Oil and Gas"). Per the ELRA, the PRSA provides the "exclusive remedy" for late payment of oil and gas proceeds (subject to certain listed exceptions not relevant here). Okla. Stat. tit. 52, § 903. When a company like Sunoco fails to pay well owners on time, well owners can recoup "actual damages," which are "limited to the proceeds due and the interest as provided in [the PRSA]." *Id.* Actual damages "are deemed to be adequate remedies for failure to pay proceeds," unless a court finds that the defendant withheld proceeds with the requisite intent, in which case punitive damages are available, too. *Id.*

Because Oklahoma has specifically enumerated the sole remedies for late payment of proceeds—and clarified that such remedies fully compensate plaintiffs—we don't need to look to the state's general remedies statutes to determine what remedies are available here. *See* Okla. Stat. tit. 23, §§ 6, 9.1 (part of Chapter 1, "Damages in General," of Title 23, "Damages"). Instead, we go straight to the oil and gas statutes, which answer both damages questions on appeal.

Let's begin with the PRSA's statutory interest provision. It says:

> [W]here proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable

> time periods provided in this section, that portion not timely paid shall earn interest at the rate of . . . 12%[] per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

Okla. Stat. tit. 52, § 570.10(D)(1). Like most statutes, it isn't the easiest thing to read. But it is clear about *how long* interest accrues: "until the day paid." *Id.*

Right off the bat, this means the district court erred in awarding interest up to the date it entered judgment, and the majority errs in affirming this faulty analysis. The district court's award might have been appropriate if Oklahoma's statute assessed interest until "the date of payment or . . . the date judgment is entered, whichever first occurs," like a Colorado statute governing prejudgment interest in contract suits. *Echo Acceptance Corp. v. Household Retail Srvs., Inc.*, 267 F.3d 1068, 1092 (10th Cir. 2001) (quoting Colo. Rev. Stat. § 5-12-102(1)(b)). But the PRSA doesn't say that, so the date of judgment can't be the correct stop date.

What is the correct accrual stop date? Well, "the day [something is] paid." § 570.10(D)(1). And that *something*, if one looks back at the statute, is "that portion [of proceeds] not timely paid."[1] *Id.* Putting this all together, PRSA interest accrues "from the end of

---

[1] The relevant clause reads, "where *proceeds* from the sale of oil or gas production . . . are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest . . . , calculated from the end of the month in which such production is sold until the day paid." § 570.10(D)(1) (emphasis added).

the month in which [the oil] is sold until the day [the proceeds from the sale are belatedly] paid." *Id.* This makes intuitive as well as textual sense: once late proceeds are paid, interest stops accruing.

Yes, this means PRSA statutory interest functions differently than typical prejudgment interest. But that's the point of creating special rules, as Oklahoma's done for oil and gas disputes. Indeed, the state's choice to jettison traditional prejudgment-interest rules in favor of distinct rules designed for oil and gas royalties is also apparent in the accrual start dates. Generally, Oklahoma law provides that prejudgment interest begins accruing from a payment's due date. *See* Okla. Stat. tit. 23, § 6 (providing for interest from the day on which "the right to recover [a debt] is vested in . . . the creditor"). And under the PRSA, proceeds are due "not later than the last day of the second succeeding month after the end of the month within which such production is sold"—in other words, roughly two months after the oil sells. § 570.10(B)(1)(b). But PRSA statutory interest starts accruing *before that*, at "the end of the month in which such production is sold." § 570.10(D)(1). This gives well owners two more months of interest than they would receive under traditional prejudgment-interest principles, thereby increasing the penalty for payments that are even slightly late. I see this as further proof that Oklahoma intended to displace traditional prejudgment interest in favor of a distinct statutory remedy for late payment of oil and gas proceeds.

Yet the majority avoids this straightforward understanding by way of the PRSA's requirement that

interest "be compounded annually." *Id.* "'[C]ompound interest' mean[s] interest added to the principal . . . and thereafter made to bear interest." Okla. Stat. tit. 25, § 27. From that uncontroversial premise, the majority leaps to the conclusion that adding interest to the principal when calculating interest on proceeds "effectively convert[s] . . . unpaid interest to . . . unpaid . . . proceeds." Maj. Op. 55.

But nowhere does Oklahoma law say that the process of compounding—a simple mathematical step—somehow changes what the law considers "[p]roceeds from the sale of oil or gas production from an oil or gas well." § 570.10(B)(1). And reading all the PRSA's provisions "in harmony," as the majority urges, doesn't change my assessment. Maj. Op. 57 (quoting *Metlon v. Quality Homes, Inc.*, 312 P.2d 476, 479 (Okla. 1957)). To the contrary, the statute's use of "proceeds" and "accrued interest" confirms that the two are separate. § 570.10(D)(2)(b). Addressing the treatment of "proceeds which have not been paid because of unmarketable title," the PRSA provides for interest to be "compounded annually" and authorizes parties "to interplead the proceeds *and* all accrued [compound] interest into court." § 570.10(D)(2)(a), (b) (emphasis added). If proceeds and accrued compound interest were one and the same, as the majority asserts, the statute wouldn't need to reference both.

Perhaps anticipating these textual weaknesses, the majority suggests that Oklahoma legislative intent favors its interpretation. Yet the legislative goal it cites—that "royalty owners . . . receive prompt payment from the sale of oil and gas products"—is equally served by awarding interest until proceeds are

paid. Maj. Op. 57 (quoting *Hull v. Sun Refin. & Mktg. Co.*, 789 P.2d 1272, 1279 (Okla. 1989)). If interest accrues until *proceeds* are paid, as it does under these unique statutes, companies like Sunoco have an incentive to pay well owners on time. Awarding additional interest after that just incentivizes companies to pay the interest, not to pay on time in the first place. So in my book, the legislative intent doesn't tip the scales.

Accordingly, I would hold that Oklahoma law does not authorize statutory interest to accrue after late proceeds are paid, even if interest is outstanding. The district court awarded Cline interest through entry of judgment, long after Sunoco paid the overdue proceeds. The interest award has since ballooned to nearly $104 million, over twice the roughly $49 million Sunoco concedes it could be liable for. In upholding that award, the majority significantly misinterprets Oklahoma's statutory scheme and turns legislative intent on its head. I would thus vacate and remand for the district court to recalculate interest through the date of payment, consistent with § 570.10(D)(1).

Now to punitive damages. As with the interest issue, I confine my analysis to the relevant oil and gas statute, § 903. That provision generally forecloses punitive damages for late payment of proceeds, except if:

> there [is] a determination by the finder of fact upon clear and convincing evidence that the holder who failed to pay such proceeds did so with the actual, knowing[,] and willful intent: (a) to deceive the person to whom the proceeds were due, or (b) to deprive proceeds

> from the person the holder knows, or is aware, is legally entitled thereto.

§ 903. The clear aim of the statute is to permit punitive damages in late-payment actions if the district court makes a sufficient intent finding.

Nevertheless, the majority concludes that the punitive damage award must be vacated not because the district court's findings were insufficient, but because the award doesn't pass muster under Okla. Stat. tit. 23, § 9.1. That provision, entitled "[p]unitive damages awards by jury," sets out criteria for awarding punitive damages in "action[s] for the breach of . . . obligation[s] not arising from contract." § 9.1. Because late-payment claims are based on an underlying contract, the majority reasons that punitive damages are unavailable for such claims.

Once again, the majority's holding is seriously flawed in that it directly contravenes the Oklahoma legislature's express directive in the ELRA that the PRSA provides the "*exclusive remedy*" for late payment of oil and gas proceeds. § 903 (emphasis added). In fact, it's hard to imagine a more blatant deviation from this directive than the path taken by the majority here. Instead of adhering to the "exclusive remedy" for late payment of oil and gas proceeds, *id.*, the majority elects to interpret § 9.1, a general statute governing punitive damages in breach-of-contract cases, as somehow overriding § 903's exclusive remedy.

Even more perplexingly, the majority does so based on language from *Purcell v. Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998)—a case that *preceded* the enactment of the ELRA and its exclusive remedy

provision. There, the Oklahoma Supreme Court unsurprisingly observed that PRSA interest is "part of [a] contractual claim." *Id.* at 193. Extrapolating from this observation, the majority concludes that plaintiffs can never recover punitive damages on PRSA statutory claims, like Cline's, because those claims are based on royalty agreements—that is, underlying contracts—and § 9.1 prohibits such damages.

In addition to ignoring that the general punitive-damages statute, § 9.1, is irrelevant here, the majority ignores that *Purcell* didn't consider whether a general statute governing punitive damages can somehow negate the ELRA's exclusive-remedy provision governing late-payment remedies, including punitive damages. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) ("It is an elementary tenet of statutory construction that 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" (cleaned up) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). Nor could it have, because Oklahoma didn't enact the ELRA—the statute clarifying that the PRSA and the ELRA's punitive-damages provision provide the exclusive remedy for withheld proceeds—until 2012, well after the Oklahoma Supreme Court decided *Purcell*. Rather, *Purcell* addressed the applicable statute of limitations for a claim to statutory damages under the PRSA. *See* 961 P.2d at 194. And although the Oklahoma Supreme Court later relied on *Purcell*'s characterization of late-payment claims in *Base v. Devon Energy Production Co.*, it again said nothing about the available damages. 563 P.3d 934, 953-54 (Okla. 2024).

The majority's underlying premise seems to be that we can't give effect to an Oklahoma statute expressly permitting punitive damages in one setting if a preexisting statute more generally prohibits punitive damages. Of course, that is not the case. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 614 (1996) (Ginsburg, J., dissenting) ("At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute."). "A fundamental premise of statutory construction is that a specific statute dealing with a subject controls over the general statute on the subject, unless it appears the legislature intended the general act to control." *Wetherill v. Bank IV Kan., N.A.*, 145 F.3d 1187, 1193 (10th Cir. 1998). The majority suggests we needn't apply this principal because it "discern[s] no conflict in the statutes here." Maj. Op. 67. But under "a common-sense reading of the various provisions," the typical PRSA action would, in the majority's view, fail § 9.1 even if it satisfied § 903. *Cherokee Nation v. U.S. Dep't of Interior*, 564 P.3d 58, 70 (Okla. 2025) (analyzing potential conflict). That's an effective conflict warranting application of § 903, "[a] statute . . . enacted for the primary purpose of dealing with a particular subject, and which prescribes the terms and conditions of that particular subject matter," over § 9.1, "a general statute which does not refer to the particular subject matter, but does contain language which might be broad enough to cover the subject matter if the special statute was not in existence." *Multiple Inj. Tr. Fund v. Coburn*, 386 P.3d 628, 635-36 (Okla. 2016).

All this to say, I depart from the majority and read Oklahoma's dedicated punitive-damages statute

regarding late payment of oil and gas proceeds exactly as the Oklahoma legislature intended it to be read. That is, § 903 authorizes punitive damages if the district court finds that the defendant intended to deceive or deprive the well owner of the withheld proceeds. Full stop.

Nevertheless, I agree with the majority that the district court's punitive damages award cannot survive in its current state. To justify punitive damages, the defendant must have "inten[ded] . . . to deceive . . . or . . . deprive [the well owner of] *proceeds*"—not interest. § 903 (emphasis added). But the district court focused its punitive-damages analysis on interest. It concluded that "Sunoco knew that it owed interest on late payments, but it made no effort to identify those payments to determine the interest it owed—much less pay that interest." App. vol. 2, 451. But that rationale cannot sustain a punitive-damages award under § 903 because Sunoco's intent in withholding proceeds may have differed from its intent in withholding interest. As such, I would vacate and remand the punitive damages award against Sunoco so the district court could analyze the evidence of intent under this standard.

Accordingly, I join the majority opinion except as to its discussions of interest and punitive damages. Hewing closely to the text of Oklahoma's oil and gas statutes, I respectfully dissent from the majority's affirmance of the interest award. I concur in the vacatur of punitive damages, but I would remand for the district court to consider awarding punitive damages under the appropriate standard.

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Feb. 23, 2026

AMENDED RULE 58 JUDGMENT ORDER

Under Rule 58, and pursuant to the Circuit Court's mandate, the Court hereby amends its Rule 58 Judgment Order of October 19, 2023 (ECF No. 646) and ENTERS JUDGMENT against the Defendants in accordance with the reasoning stated in the Court's August 17, 2020 opinion (ECF No. 298), its prior Order (ECF No. 299), and the Circuit Court's November 17, 2025 opinion reversing this Court's award of punitive damages. In addition to the actual damages of $80,691,486.00 calculated as of the Judgment Order entered on August 27, 2020 (ECF No. 308), the Court awards an additional $23,181,516.50 in actual

damages in accordance with its October 17, 2023 Order (ECF No. 642) and its October 19, 2023 Amended Award of Actual Damages (ECF No. 645).

The total amount awarded to Plaintiffs from Defendants, therefore, is $103,873,002.50 in actual damages.

The Court attaches hereto as Exhibit A the Amended Plan of Allocation Order entered on October 17, 2023 (ECF No. 646-1).

IT IS SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 23 February 2026]

[handwritten: signature]
JOHN A. GIBNEY, JR.
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Nov. 20, 2023

ORDER

This matter comes before the Court on a motion for a new trial and a motion to alter or amend the judgment filed by the defendants, Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively, "Sunoco"). (ECF Nos. 651, 652.) Sunoco raises no new arguments in its motions. Instead, it rehashes a litany of arguments that this Court carefully considered and rejected throughout the past six years of proceedings. Indeed, Sunoco reiterated many of these arguments in previous post-trial motions, which this Comi denied. (ECF No. 349.)

Accordingly, and upon due consideration, the Court DENIES the motions. (ECF Nos. 651, 652.)

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 20] November 2023
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 19, 2023

RULE 58 JUDGMENT ORDER

Under Rule 58, the Court hereby ENTERS JUDGMENT against the Defendants in accordance with the reasoning stated in the Court's August 17, 2020 opinion, (ECF No. 298), and its prior Order (ECF No. 299.) In addition to the actual damages of $80,691,486.00 calculated as of the prior Judgment Order on August 27, 2020 (ECF No. 308), the Court awards an additional $23,181,516.50 in actual damages in accordance with its October 17, 2023 order (ECF No. 642.)

The total amount awarded to Plaintiffs from Defendants, therefore, is $103,873,002.50 in actual damages and $75,000,000.00 in punitive damages.

The Court attaches hereto as Exhibit A an Amended Plan of Allocation Order.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 19 October 2023]
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix F

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 19, 2023

AMENDED AWARD OF ACTUAL DAMAGES

This matter comes before the Court following a bench trial and numerous appeals that resulted in a determination that the judgment was not yet final. The Court held a trial in this case on December 16-19, 2019, and heard closing arguments on June 17, 2020. On August 17, 2020, the Court entered its Opinion and Order in this matter. (ECF Nos. 298-299.) The Court entered a Judgment Order on August 27, 2020, to update the actual damages based on the interest statute, awarding damages in the amount of $80,691,486.00 in actual damages and $75,000,000.00 in punitive damages. (ECF No. 308.)

On August 3, 2023, the Tenth Circuit Court of Appeals ruled that the judgment in this case is not yet final and remanded the case for further proceedings. In accordance with its reasoning for the August 27, 2020 order and its October 17, 2023 order (ECF No. 642), the Court now updates the actual damages based on the interest statute and awards an additional $23,181,516.50 in actual damages for interest that accrued after the Court's August 27, 2020 order, for a total of $103,873,002.50 in actual damages.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 19 October 2023]
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix G

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 17, 2023

AMENDED PLAN OF ALLOCATION ORDER

This matter comes before the Court following the Order and Judgment by the Tenth Circuit in Case No. 22-7018, which remanded this matter for further proceedings consistent with its opinion of August 3, 2023. The Court, being fully advised on the issues before it, hereby ORDERS as follows:

A. Definitions

For purposes of this Order:

The term "Judgment Fund" means the sum of all actual and punitive damages awarded in this matter and allowed after any appeal (or after the expiration

of time allowed for filing an appeal, if no appeal is filed within that time), inclusive of any attorneys' fees, expenses, costs, and pre- and post-judgment interest as have been or may be awarded to Class Representative and the Class, and inclusive of any interest earned through such investments as the Court may direct following Defendants' payment of the judgment.

The term "Judgment Administrator" means the officer appointed by the Court pursuant to this Order to execute the Plan for Distribution and to perform such incidental and additional duties as are set forth in this Order or as the Court may subsequently direct.

The term "Net Class Award" means the Judgment Fund, less any: (i) case contribution award to Class Representative; (ii) attorneys' fees, expenses, and costs awarded from the Judgment Fund to counsel for Class Representative and the Class; (iii) compensation and expenses paid or reimbursed to the Judgment Administrator; and (iv) any additional administrative expenses that may be charged against the Judgment Fund at the Court's direction.

The term "Residual Unclaimed Funds" means the amount of the Net Class Award remaining as a result of uncashed distribution checks, inability to locate Class Members, and/or other such reasons after the Judgment Administrator distributes the Net Class Award to all Class Members using commercially reasonable efforts according to the Final Distribution Order.

B. The Formula That Will Determine the Division of Damages

The Tenth Circuit recognized that the original plan of allocation adopted a formula for dividing damages that was intended to assign each class member a ten-digit BA number taken from Sunoco's records. Order and Judgment at 11. Under this formula, the judgment administrator would calculate each class member's damages by multiplying their predetermined percentage of the total judgment by the total judgment itself. *Id.* at 11-12.

There is no dispute that this formula will produce individual damage figures for *most* class members because *most* of the BA numbers correspond to an individual class member. *Id.* at 12. But two of the BA numbers do not represent individual accounts held by a single class member, but instead, represent two undivided accounts that Sunoco deposited proceeds into whenever it did not know a mineral-interest owner's name or address. Order at 12.

Finding that these undivided accounts prevented the original plan of allocation from achieving finality, the Tenth Circuit remanded and instructed this Court to include instructions for how the judgment administrator is to divide damages among the class members associated with those two BA numbers (0009134057 & 0007005424).

This Amended Plan of Allocation cures the Tenth Circuit's concern, *see* Order at 13 n.6, by now including instructions for the two undivided accounts.

1. Division of Damages for BA Numbers that Correspond to Individual Class Members

The formula that will determine the division of damages for BA numbers that correspond to individual class members is the same formula set forth in the Oklahoma Production Revenue Standards Act ("PRSA") for calculating 12% compound interest as applied by Barbara Ley at trial to calculate the damages for Class Members. That information is contained in PX454. That formula has been applied and set forth on a percentage basis in Exhibit 1 to the Declaration of Barbara Ley (Class Representative's damages expert) [Dkt. No. 317-1].

The methodology Ms. Ley used to prepare the proposed allocation was derived from, and consistent with, the methodology that this Court previously approved in support of Plaintiffs *Motion to Certify Class* [Dkt. No. 91] and admitted into evidence at the trial in this matter in order to determine the total amount of actual damages.[1]

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[1] Ms. Ley's methodology here is also consistent with the methodology that has been approved by this Court in the following cases: *Reirdon v. XTO Energy*, Final Plan of Allocation Order, Dkt. No. 141 (E.D. Okla. June 12, 2018); *Reirdon v. Cimarex*, Final Plan of Allocation Order, Dkt. No. 114 (E.D. Okla. April 25, 2019); *Chieftain v. Marathon Oil Co.*, Final Plan of Allocation Order, Dkt. No. 127 (E.D. Okla. June 11, 2019); *Chieftain v. Newfield Exploration Mid-Continent Inc.*, Final Plan of Allocation Order, Dkt. No. 75 (June 4, 2020); *DASA Investments, Inc. v. Ener Vest Operating, et al.*, Final Plan of Allocation Order, Dkt. No. 124 (E.D. Okla. June 25, 2020); and *McClintock v. Continuum Producer Services,* LLC, Case No. 6: 17-

Ms. Ley calculated the amount of damages owed to each individual Class Member, and then summed those figures to determine the amount of damages owed to the Class. Ms. Ley then updated those amounts, at the Court's direction, to reflect the time that had elapsed and the interest that had accrued since her original calculation. Ms. Ley then divided the updated damage figure for each Class Member by the total amount of damages awarded to the Class, and thereby determined each Class Member's proportional share of the Judgment. The result of this formulaic approach is a list containing Class Members' fractional share of the total amount of damages.

For Class Members other than those in the undivided accounts, the Judgment Administrator is directed to multiply the fractional share for each Class Member expressed in Ms. Ley's Declaration by the Net Class Award in order to arrive at the exact dollar amount that each Class Member shall be paid.

2. Division of Damages for The Two Undivided Accounts with BA Numbers 0009134057 & 0007005424

For the undivided accounts, PX454 contains the information related to each separate late principal payment made to a Class Member and labeled as "undivided," along with the formula and amount to calculate the damages owed for each payment. The Judgment Administrator is directed to calculate the fractional share for each such payment based on Ms.

CV-259-JAG, Initial Plan of Allocation Order, Dkt. No. 64 (E.D. Okla. June 4, 2020).

Ley's calculations and formula using the information in PX454, then apply the resulting percentage to the Net Class Award to arrive at the exact dollar amount owed for each payment and assign that amount to the Class Member, if possible. If the Judgment Administrator is unable to obtain further ownership information related to any particular payment, then the Judgment Administrator shall pay the same amount to the appropriate unclaimed property fund with a schedule identifying all information related to the original payment from PX454 so that the unclaimed property fund can correlate the damages to the original late principal payment. That schedule is attached hereto as Exhibit 1.

C. Procedures for Distribution

The Court already appointed JND Legal Administration to serve as Judgment Administrator in this matter. At such time as the Court directs, the Judgment Administrator, in consultation with Class Counsel, shall be responsible for applying the mathematical principles established in the Plan for Distribution to ascertain the precise amounts of the Net Class Award allocable to each Class Member and each separate late payment included in the undivided accounts. The result of the Judgment Administrator's calculations shall be submitted to the Court for approval as the Final Plan for Distribution.

Upon approval, the Court will enter a Final Distribution Order establishing the allocation for purposes of disbursements to Class Members.

The Judgment Administrator will also be responsible for distributing the Net Class Award

pursuant to such further orders as the Court shall issue.

The Judgment Administrator shall report to the Court from time to time to advise the Court of its progress in discharging its responsibilities under this Order, on such occasions and at such intervals as the Judgment Administrator may deem appropriate or as the Court may direct. The Judgment Administrator is authorized to make reasonable expenditures to secure the resources and assistance reasonably necessary to the performance of its duties, including obtaining support from experts such as Barbara Ley and landmen. Such expenses, and the compensation of the Judgment Administrator at its usual and customary hourly rates, will be paid and reimbursed from the Judgment Fund periodically, as incurred.

The Judgment Administrator shall not commence the performance of its duties under this Order until such time as the case is remanded to this Court from any appeal (or until after the expiration of the time allowed for filing such appeal, if no appeal is filed within that time).

D. Procedures and Principles for the Distribution of any Unclaimed Funds

Any Residual Unclaimed funds will be sent to the appropriate state accounts for unclaimed property. After the Judgment Administrator has used commercially reasonable efforts to complete the distribution process outlined in the Final Distribution Order, Class Counsel shall file a motion stating the amount of any Residual Unclaimed Funds. The Court will then order the Residual Unclaimed Funds to be remitted to the unclaimed property funds as indicated.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 19 October 2023]
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix H

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Aug. 27, 2020

JUDGMENT ORDER

This matter comes before the Court following a bench trial. The Court held a trial in this case on December 16-19, 2019, and heard closing arguments on June 17, 2020. For the reasons stated in the Court's August 17, 2020 Opinion, pursuant to Federal Rule of Civil Procedure 58, the Court ENTERS JUDGMENT against the defendants as to Count One. The Court AWARDS damages in the amount of $80,691,486.00 in actual damages and $75,000,000.00 in punitive damages.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 27] August 2020

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix I

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Aug. 17, 2020

ORDER

This matter comes before the Court following a bench trial. The Court held a trial in this case on December 16-19, 2019, and heard closing arguments on June 17, 2020. For the reasons stated in the accompanying Opinion, the Court ORDERS as follows:

1. The Court GRANTS the plaintiff's motion to strike Eric Krause (Dk. No. 207) and SUSTAINS the plaintiff's objections to Krause's testimony at trial.

2. The Court ENTERS JUDGMENT against the defendants as to Count One in the amount of $74,763,113.00 as of December 16, 2019, plus any

additional interest that has accrued on each payment at a rate of 12 percent, compounding annually, from December 17, 2019, to the date of this Order, subject to the modifications as set forth below. The Court, however, withholds entering a final judgment order pursuant to Federal Rule of Civil Procedure 58 until counsel has provided the Court with an updated damages calculation.

3. The Court AW ARDS punitive damages in the amount of $75,000,000, pursuant to Okla. Stat. tit. 23, § 9.l(B).

4. The Court CONCLUDES that the defendants have not committed fraud as alleged in Count Two.

5. The Court DENIES the requests for an accounting, disgorgement, and a permanent injunction set forth in Counts Three and Four.

6. Except as otherwise indicated, the Court OVERRULES all outstanding objections to the exhibits, witnesses, deposition designations, and other evidence.

7. Within seven (7) days of this Order, counsel shall confer and file a notice that sets forth the following calculations:

a. The total amount of actual damages, to include the total additional interest that has accrued on each payment between the date of trial and the date of this Order. Counsel shall subtract the interest due for any timely exclusion requests not accounted for in the plaintiffs trial calculations, and add the interest due to the class members who timely withdrew their exclusion requests. *(See* Dk. No. 271.)

b. The combined total of the updated damages calculation plus $75,000,000.00 in punitive damages.

8. Within fourteen (14) days of filing the updated calculations, class counsel shall file a brief setting forth its proposed plan for distribution of the damages award. The defendants shall respond within fourteen (14) days after class counsel files the proposed plan. Class counsel may file a reply six (6) days thereafter.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 17 August] 2020
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
Senior United States District Judge

Appendix J

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Aug. 17, 2020

OPINION

Sunoco owes millions of dollars in interest on late payments for crude oil. Oklahoma law requires a first purchaser of crude oil—such as Sunoco—to pay promptly for the oil. If the purchaser pays late, it must pay interest to the owner of the well that produced the oil. This case involves Sunoco's failure to pay that interest.

Long ago, Sunoco decided not to pay interest on late payments. Recognizing that the law mandated interest, Sunoco has adopted a policy only to pay if the well owner requests an interest payment. Since most well owners do not know they can get the payment,

few request their interest, and Sunoco keeps the money. It amounts to millions of dollars each year.

Sunoco's indifference to its obligation extends far beyond not paying what it should. Sunoco has never even bothered to figure out how much interest it owes to owners. It keeps scant records of why it made late payments. Instead, Sunoco simply keeps the money for its own use, knowing two things: that most owners will not request interest, and that eventually the owners' potential claims will die at the hands of the statute of limitations. And when that happens, Sunoco will have irrevocably pocketed the money.

In this case, a farmer named Perry Cline calls Sunoco to task on this practice.

I. INTRODUCTION

Perry Cline, the named plaintiff, represents a class of owners of interests in oil wells in Oklahoma.[1] The defendants, Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively, "Sunoco"), purchase crude oil from those wells, sell the oil, and pay proceeds to well owners pursuant to Oklahoma's Production Revenue Standards Act ("PRSA"). *See* Okla. Stat. tit. 52, § 570, *et seq*. The PRSA says that, when Sunoco pays well owners late, it must pay interest on those late payments.

Cline has sued Sunoco under the PRSA for failing to pay the statutory interest on late payments it made on oil proceeds. He also contends that Sunoco

[1] Cline serves as the named representative of a class certified by the Court on October 3, 2019. The Court uses the terms "the class" and "Cline" interchangeably.

committed fraud by failing to disclose that it owed interest on those payments.

This case requires the Court to resolve several straightforward questions: Under the PRSA, when Sunoco pays an interest owner late, must Sunoco automatically pay statutory interest owed on the late payment? If Sunoco did not pay interest at the same time it made the late payment, does interest continue to accrue? Does Sunoco's failure to disclose that it did not pay interest on a late payment constitute fraud? And how much does Sunoco owe?

On December 10, 2019, the Court concluded that the PRSA requires Sunoco to make statutory interest payments automatically with the late payment. The Court held a bench trial on the remaining issues from December 16-19, 2019. The Court heard closing arguments on June 17, 2020.[2] The Court now issues this Opinion to set forth its findings of fact and conclusions of law resolving the remaining questions in this case. *See* Fed. R. Civ. P. 52(a)(1).

II. Procedural History

On July 7, 2017, Cline filed this case in Oklahoma state court on behalf of himself and all others similarly situated. Cline asserts claims for a violation of the PRSA (Count One) and fraud (Count Two). He seeks compensatory and punitive damages, and various forms of equitable relief.

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[2] The Court delayed ruling on the case until the parties received the trial transcript and had a chance to brief the case. Unfortunately, by the time the parties filed briefs, Coronavirus 2019 (COVID-19) had struck, and the judge could not immediately return to Oklahoma to hear oral argument.

Almost immediately after Cline filed suit, Sunoco removed the case to the U.S. District Court for the Eastern District of Oklahoma (Dk. No. 2) and filed its answer (Dk. No. 23). The case moved along slowly, and, finally, on June 14, 2019, Cline moved to certify the class, appoint a class representative, and appoint class counsel. (Dk. No. 91.)

On July 18, 2019, the Court reassigned this case to the undersigned. (Dk. No. 97.) Given the length of time the case had gone on, the Court set the case for trial on December 16, 2019, set a discovery cutoff of October 18, 2019, and set other pretrial deadlines. (Dk. No. 102.)

On October 3, 2019, the Court certified the following class:

> All non-excluded persons or entities who: (1) received Untimely Payments from Defendants (or Defendants' designees) for oil proceeds from Oklahoma wells on or after July 7, 2012, and (2) who have not already been paid statutory interest on the Untimely Payments. An "Untimely Payment" for purposes of this class definition means payment of proceeds from the sale of oil production from an oil and gas well after the statutory periods identified in Okla. Stat. tit 52, § 570.10(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold). Untimely Payments do not include: (a) payments of proceeds to an owner under

> Okla. Stat. tit 52, § 570.10(B)(3) (minimum pay); (b) prior period adjustments; or (c) pass-through payments.
>
> The persons or entitles excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America or the State of Oklahoma; (2) publicly traded oil and gas companies and their affiliates; (3) persons or entities that Plaintiff's counsel may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the court.

(Dk. No. 127, at 1.)

When it became clear that the case would move forward, Sunoco adopted a number of tactics to derail the litigation. First, after the Court set the case for trial, Sunoco moved to dismiss it as moot. Sunoco had finagled its mootness argument by sending Cline an unrequested check for the amount of interest it owed him, and then, nearly two years later, claimed that the tendered check deprived him of standing. This attempt to pick him off as a plaintiff failed. (Dk. Nos. 122-23)

Second, on October 8, 2019, Sunoco moved to stay this case pending its appeal of the Court's class certification decision to the Tenth Circuit Court of Appeals, pursuant to Federal Rule of Civil Procedure 23(f). The Court denied the stay. (Dk. Nos. 131, 149-50.) On November 13, 2019, the Tenth Circuit denied Sunoco's request to appeal the Court's class certification ruling. (Dk. No. 170.)

Third, after the Court certified the class (and long after the Court set a trial date and discovery cutoff), Sunoco finally began to look through thousands of files for evidence of what it might owe. This resulted in a massive production of millions of lines of data to the plaintiff—after the plaintiff's expert report was due, and after the discovery cutoff.[3] Sunoco characterizes its search for data as heroic; in reality, Sunoco ignored its files for years because it never intended to pay much interest, and let this case sit around for three years without getting its evidence together. Notwithstanding its untimely production of millions of pieces of evidence, Sunoco scolded Cline's expert for not including it in her calculations. And Sunoco's own expert, Eric Krause, relied upon the compilation of data to file tardy reports of his own—reports that he supplemented and that continued to evolve to fit the defense's needs. (*See* Dk. Nos. 207, 230, 234.) Indeed, he even revised his opinion the weekend before the trial in this case.

Fourth, Sunoco filed a motion to "clarify" the class definition, which merely amounted to an argument to cut down the size of the class. (Dk. No. 172.) On November 26, 2019, the Court denied this motion. (Dk. No. 186.)

In December, 2019, the case finally moved toward rulings on the merits. On December 10, 2019, the Court granted Cline's motion for partial summary judgment. (Dk. Nos. 231-32.) The Court concluded that the PRSA requires Sunoco to pay interest at the

[3] Sunoco produced the same data to its own expert, helping to fatally delay his report, as discussed below.

same time it makes a late payment, and that Sunoco cannot wait for a request from the owner before paying that interest. (*See* Dk. No. 231.) The Court held a bench trial in this case from December 16-19, 2019, and heard closing arguments on June 17, 2020.

III. THE PRSA

Before reciting the facts, the Court begins by setting forth the relevant provisions of the PRSA. In this case, Sunoco admits that it frequently makes late payments for oil. The PRSA sets forth different interest rates on late payments, depending on the cause of the lateness. A great deal of the evidence at trial dealt with the issue of the correct rate of interest. The significance of the evidence in the case, therefore, only grows clear when viewed through the prism of the PRSA's requirements.

As noted above, the PRSA imposes duties on the first purchaser who buys oil or gas from an interest owner or the person holding the proceeds from the sale of the oil and gas. Specifically, the first purchaser must pay owners their proceeds within six months from the date of first sale and within two months after the month of subsequent sales. Okla. Stat. tit. 52, § 570.10(B)(1). This requirement has several exceptions, including one that allows less frequent payments for small royalties of less than $100. *See, e.g.*, *id.* §570.10(B)(3).

The Oklahoma Legislature adopted the prompt payment rule because of abusive practices by the oil industry, which frequently withheld payments from owners for a long time. *See Krug v. Helmerich & Payne, Inc.*, 362 P.3d 205, 214 (Okla. 2015). To compensate owners for delayed payment, and to

provide an incentive to pay properly, the statute requires the oil industry to pay interest on late payments. When "proceeds from the sale of oil or gas production . . . are not paid prior to the end of the applicable time periods provided in" the PRSA, those proceeds "shall earn interest." Okla. Stat. tit. 52 §570.10(D)(1)-(2). "Except as otherwise provided in paragraph 2 of this subsection [regarding late payments due to marketable title]," a 12 percent interest rate applies to late payments "until the day paid." *Id.* § 570.10(D)(1). When a first purchaser or holder of proceeds does not pay proceeds due to an issue with marketable title,[4] a 6 percent interest rate applies to periods before November 1, 2018, and "the prime interest rate as reported in the Wall Street Journal" applies to periods on or after November 1, 2018.[5] *Id.* § 570.10(D)(2)(a). The interest compounds annually. One of the big fights in this case revolves around whether Sunoco owes 12 percent or 6 percent interest.

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[4] "Marketability of title shall be determined in accordance with the title examination standards of the Oklahoma Bar Association." § 570.10(D)(2)(a). The title examination standards define "marketable title" as "one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record." (Defs.' Ex. 26, at 12.)

[5] The lower interest rate also applies until "the holder has received an acceptable affidavit of death and heirship in conformity with Section 67 of Title 16 of the Oklahoma Statutes," or until the proceeds are interpled, as set forth in § 570.10(D)(2)(b). *See* § 570.10(D)(2)(a). The Court will refer to the lower interest rate as the 6 percent interest rate throughout this Opinion. This rate only applies until title to the interest becomes marketable. *Id.*

The PRSA also bears on Cline's argument that Sunoco committed fraud by withholding information from well owners. The statute says that, when a first purchaser or holder of proceeds makes a payment to an owner, it must provide the owner with the following information:

1. Lease or well identification;
2. Month and year of sales included in the payment;
3. Total barrels or MCF attributed to such payment;
4. Price per barrel or MCF, including British Thermal Unit adjustment of gas sold;
5. Total amount attributed to such payment of severance and other production taxes, with the exception of windfall profit tax;
6. Net value of total sales attributed to such payment after taxes are deducted;
7. Owner's interest, expressed as a decimal, in production from the property;
8. Owner's share of the total value of sales attributed to such payment prior to any deductions;
9. Owner's share of the sales value attributed to such payment less owner's share of the production and severance taxes; and
10. A specific listing of the amount and purpose of any other deductions from the

> proceeds attributed to such payment due to the owner upon request by the owner.

Okla. Stat. tit. 52, § 570.12(A).

IV. FACTS

A. The Parties

1. Sunoco

Sunoco, Inc. (R&M) (now Sunoco (R&M), LLC) is a limited liability company that is a wholly owned subsidiary of ETP Holdco Corporation ("ETP"). Sunoco Partners Marketing & Terminals, L.P., is a limited partnership with no corporate parents. Sunoco has a net value over $30 billion.

Sunoco buys crude oil from oil producers and sells the oil. (Trial Tr. vol. 1, 168:11-20.) Sunoco is a first purchaser under the PRSA. (*Id.* 77:7-10, 85:21 to 86:8.) As a first purchaser, Sunoco is a "holder" of the oil proceeds owed to owners until Sunoco pays the oil proceeds directly to owners or to states as "unclaimed" property on behalf of unlocated owners. (*Id.* 77:7-13, 86:3-8, 131:8-24.)

Sunoco is not itself an oil and gas producer and does not have leases with individual landowners. (*Id.* 112:18 to 113:1, 177:7-9.) Rather, "operators" typically extract the oil from the ground and, pursuant to contracts, convey it to Sunoco.[6] Sunoco then pays

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[6] Oil production has a cast of varied characters. When someone (such as Cline) owns land that may have oil on it, an exploration and production ("E&P") company leases the land to drill for and extract the oil. (Trial Tr. vol. 1, 174:22 to 175:8.) The E&P company agrees to split the proceeds from the sale of that oil with the landowner if the company can extract it. (*Id.* 175:10-13.) Usually, the landowner gets at least a one-eighth royalty and

owners their proceeds directly. (*Id.* 86:3-8, 191:2-14.) Sunoco has paid thousands of owners across the United States. (*Id.* 178:3-5.) In many cases, Sunoco has agreed to pay these owners pursuant to a contract with the operator.[7] (*See, e.g.*, Defs.' Ex. 29, at 3 ¶ 6.) Sunoco often relies on information provided by a well operator to pay owners their proceeds. (*See, e.g.*, Trial Tr. vol. 1, 178:6 to 181:11.) That information is not always correct. (*Id.* 171:6-14, 178:6 to 181:11.)

2. Cline and the Class

Cline lives in Oklahoma and owns royalty interests in three oil wells. (Dk. No. 175.) He works as a farmer and has no training in the oil and gas

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bears no costs or risk associated with drilling the well or cleaning and closing a dry hole. (*Id.* 175:14-20.) The E&P company partners with other industry players, known as working interest owners, to drill the well, and they split the remaining interest. (*Id.* 175:21-24.) One of the working interest owners is deemed the "operator." (*Id.* 175:25 to 176:2.) The operator "frequently ha[s] either a majority interest, or [it is] elected because [it is] knowledgeable and the other working interest owners respect [it]." (*Id.* 176:3-7.) The working interest owner with the largest share of the interest performs and coordinates the work, with the remaining companies sharing in the cost and risk. (*Id.* 176:8-13.) After the working interest owners extract the oil, companies such as Sunoco will enter into contracts with the operators to transport and market the oil. (*Id.* 176:24 to 177:6.) The landowner's interest may fracture over time, such as when a landowner dies or sells the interest to another individual or entity. (*Id.* 177:13 to 178:10.) Thus, it is not unusual for Sunoco to pay anywhere from tens to thousands of interest owners for oil produced from a well. (*Id.* 172:19-25.)

[7] The contracts sometimes include an indemnity agreement under which the producer or operator agrees to indemnify Sunoco for costs associated with late payments to owners. (*See* Trial Tr. vol. 1, 125:22 to 127:4.)

industry. (Trial Tr. vol. 2, 428:2-16.) During the class period, Sunoco paid Cline royalty proceeds on all three wells; on occasion, Sunoco paid the royalties late. (Dk. No. 175.) Cline did not ask Sunoco to pay him interest on the late payments. (Trial Tr. vol. 1, 257:1-4.) At all relevant times, Sunoco had Cline's correct contact and interest information. (*See id.* 99:8-15, 103:21 to 110:4; Pl.'s Exs. 459-60, 463.)

Cline represents a class of individuals and entities who own royalty interests in wells from which Sunoco purchased crude oil and paid proceeds late without paying interest on the proceeds. (*See* Dk. No. 127, at 1.)

B. Sunoco's Conduct

1. Late Payments

Sunoco generally pays proceeds to owners on time. (Trial Tr. vol. 1, 77:25 to 78:2, 222:8-14.) On approximately one percent of its payments, however, Sunoco pays owners the proceeds late as defined by the PRSA. (*Id.* 77:14-24, 78:3-5, 91:12-20, 222:8-14.) Because Sunoco deals with thousands of owners, making many payments to each owner, over the years this small percentage amounts to millions of late payments.

The reasons for the late payments vary. Sometimes, the payments are just not on time. Other times, Sunoco has an internal reason why they are late. For example, Sunoco may suspend payment on an account if the owner has not returned a division order.[8] (*Id.* 103:6-20.) If Sunoco does not have current

[8] Sunoco uses division orders to confirm ownership and ensure accuracy of the payments. (Trial Tr. vol. 1, 186:19 to 187:11.)

or accurate information either from the owner or from the producer to pay the owner, sometimes it cannot remit the funds, or it may receive a returned check.[9] (*Id.* 186:21 to 187:11, 221:1 to 222:1, 281:4-8.) If Sunoco does not know the identity of the interest owner, it does not remit payment to anyone and instead pays those proceeds to Texas as unclaimed funds.[10] (Trial Tr. vol. 3, 577:7-24, 578:23 to 580:8.)

When Sunoco pays owners late, it does not automatically pay statutory interest. (Trial Tr. vol. 1, 78:6-13, 116:3-11; Pl.'s Ex. 43.) As noted above, Sunoco only pays statutory interest when specifically requested by an owner. (Trial Tr. vol. 1, 78:10-13, 82:20-23; Holland Dep. 55:18 to 56:16; *see, e.g.*, Pl.'s Ex. 38.) Sunoco does not get many requests for interest each year. (*See, e.g.*, Trial Tr. vol. 1, 83:21-24; Holland. Dep. 33:5-15; Pl.'s Ex. 62.)

Sunoco takes a haphazard approach to its obligations arising from late payments. In fact, Sunoco has not even tried to identify every instance of a late payment in Oklahoma. (Trial Tr. vol. 1, 79:6-7; Holland Dep. 102:5-19.) For its millions of late payments, it says it cannot determine the amount of interest due. This inability, however, does not arise

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Oklahoma law says that an oil company cannot withhold payments because the owner has not signed a division order. Whether Sunoco's practices with regard to division orders violate the PRSA is not before the Court.

[9] When Sunoco gets bad owner information from a producer or operator, it generally does not tell the producer or operator. (*See* Pl.'s Ex. 339.)

[10] Sunoco calls payments for which it has no owner information "undivided payments."

from a lack of information. Rather, it arises from Sunoco's unwillingness to make the effort, at the time of the late payment, to determine the cause of the lateness and the amount of interest due. On the rare occasions when Sunoco receives a request for interest, it usually has the information it needs to calculate the amount of interest due on the late payment. (*See, e.g.*, Trial Tr. vol. 1, 99:8-15; Holland Dep. 34:8-24.) Sunoco employees simply look at the files for each payment to determine the reason the payment was late and whether Sunoco owes that owner 6 percent interest or 12 percent interest. (Trial. Tr. vol. 1, 94:1 to 95:3, 223:17 to 224:7.) One employee handles calculating interest after other employees research the request. (*Id.* 94:1-21.) Sunoco uses a computer program into which a Sunoco employee manually inputs information to calculate the interest. (*Id.* 94:1 to 95:3; Holland Dep. 19:8 to 21:19; *see* Defs.' Exs. 261-79.) When Sunoco finally gets around to paying interest, it pays the interest due only through the date Sunoco paid the proceeds to the owner. (Holland Dep. 123:7 to 124:18.)

Although Sunoco knows that it owes interest on late payments under the PRSA, it takes the position that the statute does not set forth a due date; in other words, the debt never becomes due. Sunoco takes this position based on industry practice and the advice of counsel. (*See, e.g.*, Trial Tr. vol. 1, 84:15-24.)

After Cline filed this lawsuit, Sunoco investigated Cline's claim for interest. (*Id.* 98:21 to 99:17; Pl.'s Ex. 4.) Sunoco had not paid Cline because Cline had not signed a division order and had not otherwise responded to Sunoco's communications with him. (*Id.*

99:21 to 100:7.) On December 19, 2017, Sunoco sent Cline a check for $1,886.54 in unpaid interest. (Dk. No. 175; Pl.'s Exs. 4, 24.) Sunoco applied a 12 percent interest rate compounded through the date it had paid Cline his late proceeds. (Trial Tr. vol. 1, 99:16-20; Pl.'s Exs. 4, 24.) When Cline did not cash the check, Sunoco sent Cline a letter asking Cline to respond and explaining that failure to respond would lead Sunoco to deem the funds as unclaimed, which could have resulted in the money going to Oklahoma's unclaimed property agency. (Trial Tr. vol. 1, 110:9 to 111:21; Pl.'s Ex. 476.) To date, Cline has not cashed Sunoco's check. (Trial Tr. vol. 2, 445:10-19.)

As a result of this litigation, Sunoco has decided to stop paying proceeds and interest in Oklahoma. (Trial Tr. vol. 1, 74:10 to 75:19.)

2. The Amount of Interest Due Because of Late Payments

Sunoco owes millions of dollars in interest on late payments. To prove the precise amount due, Cline relied on the expert testimony of Barbara Ley, a certified public accountant who has extensive experience with accounting in the oil and gas industry. (*See, e.g.*, Trial Tr. vol. 3, 493:4 to 510:15.) Ley testified credibly, and described a thorough and defensible method of calculating the amount due from Sunoco. Ley received information from Sunoco to create a database of individual owner information and to determine whether each payment was late based on that data. (*Id.* 510:17 to 588:12.) Sunoco's data identifies the date proceeds were sold, the date Sunoco paid proceeds to an owner, and the amount of the proceeds. (Trial Tr. vol. 1, 89:3-15.) To the extent she could, Ley checked

the sale date against public records. (Trial Tr. vol. 3, 519:4 to 520:17.) She also reviewed depositions and other documents produced in the case, and was present in the courtroom during the majority of the trial. (*Id.* 505:1-24). Sunoco agrees that Ley's data reliably reflects the sale date, payment date, and amount of proceeds. (Id. 90:8-20.)

Ley removed some late payments from her database because they fell outside the class certification definition. She did this based on Sunoco's accounting data, Sunoco's suspense codes,[11] and discussions with class counsel and Sunoco's experts. (*Id.* 561:9 to 570:4, 587:14 to 588:12.) Further, Ley excluded payments made to unclaimed property funds[12] when Sunoco issued a check to the interest owner on time. (*Id.* 580:21 to 582:7.) Thus, she did not include payments to unclaimed funds if Sunoco previously sent a timely check to the owner that went uncashed. (*Id.* 580:21 to 582:13.) She also excluded statutory interest payments Sunoco previously made during the class period for the types of payments at issue in this case. (*Id.* 574:15 to 575:5.) All told, Ley only considered liability for interest on late payments falling within the class definition. (*Id.* 589:5-17.)

Ley determined that Sunoco made 1,596,945 late payments to approximately 53,000 class members. (*Id.*

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[11] Suspense codes are Sunoco's administrative notes about delayed payments. In relying on Sunoco's suspense codes, Ley bent over backwards to give Sunoco the benefit of the doubt. As discussed below, even Sunoco's own experts say that the suspense codes do not give reliable information about the reasons for late payments.

[12] Unclaimed property payments are discussed below.

554:8-12, 568:21 to 569:1; Pl.'s Ex. 454.) As of December 16, 2019, Sunoco owed $74,763,113.00 in late interest payments, based on a 12 percent interest rate compounded annually.[13] (Trial Tr. vol. 3, 571:23 to 572:5.)

[13] Because the actual damages in this case include amounts that will continue to compound until the Court enters judgment, the Court must explain its reference point for damages. At trial, Cline presented a damages figure of $74,763,113.00 based on Ley's calculations. (Trial Tr. vol. 3, 571:23 to 572:5.) That figure represented the statutory interest due on the late payments through December 16, 2019, less interest Sunoco already paid and any opt-outs received during the class notification process as of the first day of trial. (*Id.* 572:9 to 576:25.) For ease, the Court will base its damages award off the $74,763,113.00 discussed during trial. Thus, the interest owed in this case is $74,763,113.00 plus any additional interest due from December 17, 2019, to the date of this Opinion. Further, for the reasons set forth below, the Court will apply a 12 percent interest rate to all the late payments.

After trial, however, the class administrator submitted information about additional optout requests and withdrawals of previously submitted opt-out requests. Although the Court will award damages based on the figure presented at trial, the Court will require counsel to submit updated calculations before it enters the final judgment order. Nevertheless, the Court believes it is appropriate to issue this Opinion and Order because the exclusion requests do not affect the merits of this case. Further, Sunoco had adequate notice of the additional exclusion requests well before closing arguments in June, 2020. Issuing this decision will stop interest from compounding and will enable counsel to provide a final damages calculation.

C. Evidence Related to Sunoco's Defenses

1. Unclaimed Property Funds[14]

Sunoco says that it should not have to pay interest on proceeds it pays to unclaimed property funds. Each state has created by statute a government agency that collects money held by businesses for people who cannot be found. The agency holds the money on behalf of the true owners.

When Sunoco cannot identify or locate an owner, it eventually sends the owner's proceeds to the unclaimed property fund of the state of the owner's last known residence. (*See, e.g.*, *id.* 131:8 to 132:21.) For example, if someone stops cashing his or her checks and does not respond to the notice Sunoco sends, Sunoco sends the proceeds to the unclaimed agency of the owner's state. It makes this payment after it holds the funds for a certain number of years set by state unclaimed property law. (*Id.* 265:10 to 270:2) If Sunoco does not know the address of the owner or the payment is an undivided payment, it pays unclaimed proceeds to Texas, Sunoco's home state. (*Id.* 262:10-20.) When Sunoco sends unclaimed proceeds to a state, it does not send any interest owed on those proceeds. (*Id.* 132:22-25.)

Sunoco does not conduct an extensive search to locate unidentified or unlocated owners. (*Id.* 137:6 to 138:8; Lanscelin Dep. 67:24 to 69:8, 70:23 to 71:02.) Rather, if Sunoco has an address for an owner who has stopped cashing checks, it will send a division order twice to the address on file, a stale check notice, a

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[14] The parties sometimes refer to these payments as "escheat" payments.

letter notifying the owner that it may send the funds to the state as unclaimed, and a due diligence notice. (Trial Tr. vol. 1, 135:16 to 137:5, 156:8-22.) Sometimes people will respond to Sunoco's notices, at which point Sunoco verifies the owner's identity or ownership. (*Id.* 271:4 to 272:3.)[15]

2. Unmarketable Title

Under the PRSA, a purchaser owes only 6 percent interest if a delay in payment occurs because the owner does not have marketable title to the oil sold. Sunoco tried to show that many of its late payments could have stemmed from the owner's unmarketable title.

To establish unmarketability, Sunoco relied on its "suspense" codes. When Sunoco puts a payment in suspense, it does not send the money to the owner. Someone at the company makes a file entry reflecting one of fifty codes. The codes are shorthand for reasons to withhold payments. As an example, Sunoco might not make a payment if the IRS had asserted a lien over the proceeds; an employee at Sunoco would then make an entry for the code relating to IRS liens. The validity

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[15] Cline offered evidence designed to show that Sunoco did not make a bona fide effort to find people before sending their proceeds to unclaimed property funds. For instance, Sunoco claimed not to know where well owner Paul Walker lived, even though he had lived at the same place for decades. Fred Buxton, an oil producer, said that his company took many steps more than Sunoco does to find correct addresses for owners. And Sunoco threatened to send one of Cline's interest checks to unclaimed property, even though it was in litigation with Cline, knew his address, and had frequent contact with his lawyers. While interesting, and indicative of a lackadaisical attitude by Sunoco, this evidence does not figure in the Court's analysis.

of suspense codes to establish marketability was a central issue at trial.

Sunoco called Kraettli Epperson as an expert on marketable title. Epperson testified about the title opinion process and opined that the title examination standards do not presume marketability, but that "you have to look at the record, you have to determine in essence whether it is clear that somebody owns it." (Trial Tr. vol. 4, 707:9-16.) Thus, a title examiner must review a variety of records to determine whether title is marketable. (*Id.* 708:20 to 710:11.)

Epperson did not examine any titles, and could not testify that any of the owners did not have marketable title. He did talk about the suspense codes, and opined that some of them might mean that the owner did not have unmarketable title. Ultimately, however, the suspense codes were, at best, "a crude surrogate" for marketability. (*Id.* 715:5.) They do not give a determination that title is marketable or unmarketable. *(Id*. 718:9-14.) As defense counsel observed at trial, Sunoco's employees prepared the codes to justify failure to make payments. The codes are simply an administrative tool, not an indication of marketability. (*Id.* 629:15-18.)

Epperson did not conduct a title search on property of any of the 53,000 owners to whom Sunoco made late payments. He offered no opinion on the state of any titles at issue in this case.

D. Fraud

Cline offered evidence to support his claim that Sunoco had committed fraud on owners to whom it owed interest. Essentially, Cline showed that Sunoco did not tell owners either that it owed them interest

on late payments, or that it would give them interest payments if they requested it.

Sunoco did, however, provide check stubs with royalty checks. Although they generally do not mention interest, Sunoco's check stubs do contain the information required by § 570.12. (See, e.g., Defs.' Ex. 8; see also Closing Arg. Tr. 195:21 to 196:6.) The check stubs, however, do not indicate: (1) that Sunoco owes the owner interest and has withheld that interest; (2) how to calculate the interest Sunoco is withholding based on the data provided; or (3) that Sunoco will pay the interest if the owner requests it. (Trial Tr. vol. 3, 589:19 to 592:2; Pl.'s Ex. 520.) On the occasions when Sunoco pays interest, it notes the payment on the check stub with an "interest payment" code. (Trial Tr. vol. 3, 514:16-20; see Pl.'s Ex. 24; Defs.' Ex. 45.)

E. Eric Krause

Sunoco called Eric Krause to rebut Ley's testimony regarding liability and damages. For the reasons set forth below, the Court will strike Krause's testimony.

V. ANALYSIS

A. Preliminary Matters

Before turning to the merits of the case, the Court must address two preliminary matters raised by the parties at trial and in their briefs.

1. Class Certification

Sunoco continues to challenge the Court's decision to certify the class. (*See, e.g.*, Dk. No. 274, at 58-60; Dk. No. 275, at 155-65.) The Court has had multiple opportunities to consider the propriety of class certification. (*See* Dk. Nos. 126, 149, 186.) For the

reasons set forth in its October 3, 2019 Opinion (Dk. No. 126), the Court continues to conclude that class certification is proper in this case. The evidence and trial testimony do not change the Court's conclusions. Nevertheless, the Court will briefly address some of Sunoco's arguments.

First, although this case requires a degree of individualized inquiry, "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Court has resolved most of the issues in this case by interpreting provisions of the PRSA and applying that interpretation to the class as a whole. (*See, e.g.*, Dk. No. 231.) The trial testimony established that Sunoco followed a practice of not paying interest until it received a request from an owner. (*See, e.g.*, Trial Tr. vol. 1, 78:6-13, 82:20-23; Holland Dep. 102:5-19.) Ley created a methodology through which she could calculate class-wide damages based on that conduct. (Trial Tr. vol. 3, 491:21 to 594:25; Trial Tr. vol. 4, 605:10 to 683:7.) Further, her computer calculations identify the precise damages for each late payment for each owner of each well.

Moreover, the trial confirmed that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). For the reasons set forth below, Cline will prevail on his breach of statutory interest claim on behalf of the class, which comprises approximately 53,000 class members and more than 1.5 million late payments. Cline has done this through a trial that lasted approximately one week. That outcome

represents a fair and efficient way of resolving the claims without requiring individual actions.

In essence, Sunoco wants to force all 53,000 victims of its scheme to file independent claims, just as it has tried to compel them to make individual requests for interests. No doubt, Sunoco hopes that the owners will abandon their claims, most of which are small, rather than incur the cost and effort to take on a behemoth. Class actions exist precisely for claims such as those presented here.

Second, to the extent that Sunoco complains that it could not possibly have presented all of its defenses at trial, Sunoco had the opportunity to at least try to do so. Instead, Sunoco did not object to finishing the trial on December 19, 2019—a day before trial was scheduled to end. (Trial Tr. vol. 4, 602:16 to 603:6.) Nor did it request any additional time to try this case. It did not even begin to analyze its own data until the eve of trial.

Sunoco continues to insist that its defenses are too individualized to present in a class action. At trial, Sunoco presented a light sampling of these defenses but failed to establish that such defenses would have overwhelmed the trial.[16] Unsurprisingly, Sunoco conflates doing what is impossible with doing what is hard. No doubt, figuring out what Sunoco owes to interest owners is difficult when it has failed to comply with the PRSA for years. Had Sunoco done its homework in the years before this suit, it would have known how much interest it owes, and could have

[16] Additionally, many of the defenses did not actually rebut Cline's claims or carry Sunoco's burden.

presented a compilation or summary. *See* Fed. R. Evid. 1006. Sunoco's own evidence shows that it has the ability to determine what Sunoco owes interest owners; it just does not do so until asked. Thus, Sunoco's arguments fall far short.

The Court declines to decertify the class.

2. Motion to Strike Krause

On December 5, 2019, Cline moved to strike the testimony and opinions of Krause, Sunoco's expert witness on damages. (Dk. No. 207.) Cline argues that Sunoco disclosed Krause's opinions late in violation of the Court's pretrial order and the Federal Rules of Civil Procedure. At trial, the Court took the motion and related objections under advisement. For the following reasons, the Court will grant the motion and sustain Cline's objections.

a. Background[17]

The parties began discovery in 2017. Sunoco disclosed Krause as an expert in March, 2019. Cline contends that Krause asked Sunoco for its suspense history data in 2018. Sunoco claims that it did not refuse to produce the historical suspense data. Rather, it asserts "that the data did not exist in [usable], accessible form in Sunoco's accounting system, and it was only through a massive effort appropriately undertaken after the Court certified the class on October 3 that Sunoco was able to come up with it at all." (Dk. No. 230, at 6.) It took Sunoco several weeks to compile the data in a usable format. This argument ignores the question of why Sunoco waited until after

[17] Because Cline filed this motion before trial, the Court summarizes the relevant facts as set forth in the parties' briefs.

class certification to begin to think about its exposure to damages in this case.

The Court reassigned the case to the undersigned district judge on July 18, 2019. On August 5, 2019, the Court set the discovery deadline as October 18, 2019. (Dk. No. 102, at 1.) For expert disclosures, the Court set the following deadlines: initial disclosures for the party with burden of proof on an issue were due October 25, 2019; the opposing party's disclosures were due on November 1, 2019; and rebuttal expert disclosures were due on November 8, 2019. (*Id.* at 2.)

Sunoco served Krause's initial expert report on November 1, 2019. In the report, Krause explained that Sunoco provided him with the data he needed to render certain opinions on October 31, 2019, and reserved the right to supplement his opinions "once [he was] able to complete a refined study" of the data. (Dk. No. 207-5 ¶ 49.) Based on his preliminary review of the data, however, he could not link millions of dollars of damages in Ley's model to any suspense codes. (*Id.* ¶ 49 n.38.) He also opined that, even with the data, he could not determine the reason for the untimely payments. (*Id.*)

On November 8, 2019, Ley served her rebuttal expert report. She objected to Krause's use of the suspense code information but nevertheless asserted that, if Sunoco met its burden of showing unmarketable title, she could incorporate those conclusions into her model. (*See* Dk. No. 230-7 ¶¶ 5-9.) She also reserved the right to supplement her report because she understood Krause's work to be ongoing. (*Id.* ¶ 11.)

Less than three weeks before trial, Krause's expert report was not done, and his opinions were not complete. Two weeks before trial, Krause served a supplemental report "[d]ue to the complex nature of the data and because [he] received the data one day prior to [his] report being due." (Dk. No. 207-3 ¶ 5.) He explained that he "did not have sufficient time by November 1 to perform a quantification of the effects to any damages resulting from a full analysis and evaluation of this data." (*Id.*) Nevertheless, "[i]t remain[ed] [his] opinion after a full review of the suspense history data" that Ley could not use that information to fully understand the reason for an untimely payment and whether a 6 percent or 12 percent interest rate would apply. (*Id.*) The report also responded to the Court's ruling on the motion to clarify. (*Id.* ¶ 29.) Krause's analysis reduced the damages amount by approximately $3.5 million. (*Id.* ¶ 15.) Krause further opined that his damages figures would change based on work performed between completing the report and trial. (*See id.* ¶ 14.)

On December 3, 2019, Sunoco sent Cline a corrected version of Krause's supplemental report. Sunoco served the materials supporting the report on December 4, 2019. Cline deposed Krause on December 5, 2019, and filed the motion to strike later that day. Sunoco contends that the "additional work [Krause] intends to do is a summary, for illustrative purposes only, of his already-disclosed opinions." (Dk. No. 230, at 14.)

At trial, Krause testified about a number of topics, including issues related to unclaimed funds and the feasibility of using the suspense codes to determine

marketable title. (Trial Tr. vol. 4, 814:13 to 912:24; Trial Tr. vol. 5, 920:21 to 947:17.) He also considered evidence from the Oklahoma Corporation Commission using information he downloaded from the Internet on December 15, 2019. (Trial Tr. vol. 4, 854:19 to 858:7.) Further, Krause testified to his own calculation of damages—a number significantly lower than Ley's calculations. (*See, e.g.*, *id.* 885:15 to 888:22, 896:17 to 901:3.) Cline objected to much of the testimony, including a continuing objection to the admissibility of Krause's testimony for the reasons set forth in the motion to strike. (*See id.* 822:21 to 823:23, 839:23 to 840:13, 855:23 to 858:7, 870:11 to 872:5, 872:15 to 873:2, 875:11 to 876:4, 890:2-3, 890:18 to 891:5.)

b. Legal Standard

When a party discloses the identity of its expert witness, the party must provide a written report prepared and signed by the expert that contains "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). Parties must make these disclosures by the dates ordered by the court. *See* Fed. R. Civ. P. 26(a)(2)(D).

A party has a duty to supplement its disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). For expert reports, the duty to supplement applies to information both included in the report and given in a deposition. *See* Fed. R. Civ. P. 26(e)(2). The

disclosures, however, "must be [made] by the time the party's pretrial disclosures under Rule 26(a)(3) are due." *Id.*

Expert reports "are necessary to allow the opposing party a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Rodgers v. Beechcraft Corp.*, 759 F. App'x 646, 656 (10th Cir. 2018) (alterations and quotations omitted). A party who fails to disclose or supplement information may not use that information or witness "to supply evidence" at a trial "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

"Substantial justification requires justification . . . that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. The proponent's position must have a reasonable basis in law and fact." *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 680 (D. Kan. 1995). A failure to disclose is harmless "when there is no prejudice to the party entitled to the disclosure." *Id.* The late-disclosing party bears the burden of establishing that the failure was substantially justified or harmless. *See id.*

A court need not make "explicit findings" about whether the failure was substantially justified or harmless. *Rodgers*, 759 F. App'x at 657. Rather, it must consider the following factors: (1) the prejudice or surprise to the party against whom the testimony is offered, (2) the ability of the party to cure the prejudice, (3) the extent to which introducing the testimony would disrupt the trial, and (4) the moving

party's bad faith or willfulness. *See id.* The late-disclosing party's conduct does not need to satisfy all factors to justify exclusion. *See, e.g.*, *SFF-TIR, LLC v. Stephenson*, No. CIV 14-0369, 2020 WL 2922190, at *14 (N.D. Okla. June 3, 2020).

c. Application

Here, Sunoco's disclosures were both late and incomplete. Sunoco assumed that Cline had the burden of proof regarding marketability of title. For the reasons set forth below, Sunoco bore that burden. Thus, Sunoco should have disclosed Krause's opinions regarding marketable title on October 25, 2019. (See Dk. No. 102.) Even if Sunoco did not have the burden of proof, the final version of his report was over a month late. In any event, Krause's disclosures gave Cline at best a high-level overview of Krause's opinions regarding marketable title and the reliability of Ley's methodology, but his opinions were essentially a moving target until trial. Thus, Cline did not have "a complete statement of all opinions [Krause] [would] express and the basis and reasons for" the opinions until trial. Fed. R. Civ. P. 26(a)(2)(B)(i).

Moreover, Sunoco had no reasonable justification to delay the production of its historical suspense data and the disclosure of Krause's opinions; it simply hoped that the case would not proceed to trial. *See* Fed. R. Civ. P. 37(c)(1). The Court cannot overstate the prejudice that Cline suffered and the incurable nature of that prejudice. *See Rodgers*, 759 F. App'x at 657. Sunoco lauds itself for transforming its suspense code data into a usable format within a few weeks of the Court's class certification decision. But discovery had been going on for nearly two years. To the extent that

the reassignment of this case to the undersigned district judge changed the trial timeline, the parties knew a month and a half before discovery closed that this case would proceed to trial in December, 2019. Instead of trying to complete discovery within the required timeline, Sunoco waited to begin these efforts until the Court certified the class and rejected Sunoco's last-ditch effort to pick off the named plaintiff and moot this case.

When Sunoco finally produced key evidence, it did so after Ley's first report was due. Then, Sunoco blamed Ley for creating an allegedly unreliable model in large part because she tried to discern marketable title from Sunoco's late-produced data. Sunoco, however, created an untenable situation for Cline—either scramble through "a big new slug of data" produced after discovery closed or risk failing to meet his burden regarding liability at trial. (Trial Tr. vol. 4, 622:4-5.) Cline, of course, chose the former option. Ultimately, Ley created a well-reasoned and thorough model that she testified about at trial.

Krause continued to work with the data well past the discovery and expert deadlines, leaving Cline to guess about Krause's opinions—the exact scenario that Rule 26 and the Court's pretrial order meant to avoid. Krause's late disclosures significantly limited the amount of time Cline's attorneys had to prepare for Krause's cross-examination and required Cline to take a deposition on the eve of trial. Any argument that Cline knew the contours of Krause's opinions ignores the fact that Sunoco's conduct still limited class counsel's ability to fully prepare for trial and required them to expend resources completing

depositions well past the discovery deadline. Much of this case now centers on the damages Sunoco owes. Any change to the damages calculations bears on central questions in this case. Regardless of whether Sunoco acted willfully or in bad faith, Sunoco's conduct justifies exclusion of Krause's testimony and opinions.

On a final note, even if the Court denied the motion, Krause's opinions would not tip this case in Sunoco's favor. Most of the evidence presented through Krause's testimony rests on faulty assumptions—that Cline bore the burden to prove marketable title and that Ley created an unreliable model. For the reasons set forth below, Sunoco, not Cline, bears the burden of proving unmarketable title, and Ley created a reliable model that satisfies Cline's burden. Moreover, Krause's testimony mostly echoes what Sunoco's other witnesses have said all along—that Sunoco's suspense codes are not reliable, and that it is too unfair to hold Sunoco liable for violating the PRSA because it would be really hard for Sunoco to straighten it all out now. These defenses do not carry the day.

For the foregoing reasons, the Court will grant the motion to strike and will sustain Cline's objections to Krause's testimony.

B. Count One: Breach of Statutory Obligation to Pay Interest

1. Liability

Cline has met his burden of proving liability by a preponderance of the evidence for the entire class.

For the reasons set forth in the Court's December 10, 2019 Opinion, "[t]he PRSA requires Sunoco to pay

interest on late payments at the same time it makes those payments, and Sunoco cannot require an interest owner to make a demand for payment before paying that interest." (Dk. No. 231, at 13.) Sunoco's representative at trial, Eric Koelling, acknowledged that Sunoco sometimes pays proceeds late and does not automatically remit interest with the late proceeds. (Trial Tr. vol. 1, 77:19 to 78:9.) Koelling also acknowledged that Sunoco generally only pays interest when owners ask for it. (*Id.* 78:10-13.) Koelling further agreed that Sunoco had already sent every class member a check for proceeds and that "there is no issue about whether those people have a right to be paid their principal proceeds." (*Id.* 159:3-12.)

Ignoring the evidence at trial, Sunoco says that the Court must consider the file of every single class member—that it must conduct thousands of mini-trials. As the Court described above, however, Ley conducted a thorough and individual assessment of more than 1.5 million late payments. (*See* Trial Tr. vol. 3, 510:17 to 588:12; Pl.'s Ex. 454.) She determined the date payment was due, and the date it was made. She calculated interest. She identified payments that fell outside of the class and excluded those payments from her calculations. (Trial Tr. vol. 3, 561:9 to 570:4, 580:21 to 582:13, 587:14 to 588:12.) This methodology proves liability by a preponderance of the evidence.

Nevertheless, Sunoco attacks Ley's method as unreliable, mainly arguing that she cannot accurately determine marketable title issues. As discussed below, Sunoco, not Cline, bears the burden of proving that it withheld payments due to title issues. Thus, Sunoco's

argument that its data is unreliable merely faults Ley for being unable to meet Sunoco's burden regarding the applicable interest rate. (*See, e.g.*, Trial Tr. vol. 4, 618:8 to 634:11, 710:12 to 744:22.)[18]

Sunoco also says that Ley cannot identify payments that fall outside the class definition. Again, Sunoco fails to sufficiently challenge Ley's methodology. Sunoco primarily relies on Krause to establish that Ley's conclusions are unreliable or incorrect. Because the Court has struck his testimony, Sunoco cannot rely on his opinions. Even so, Krause did not identify any payments Ley categorized as late because they were paid outside of the six-month and two-month time frames. (Trial Tr. vol. 5, 937:3 to 938:8, 943:3-10.) Krause did find a few small errors in Ley's methodology, and relied on them to conclude that the entire model was unreliable. (*See* Trial Tr. vol. 3, 565:20 to 566:21; Trial Tr. vol. 4, 860:13 to

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[18] Sunoco's focus on this point also underscores a separate flaw in its argument. The PRSA requires that interest accrue at 6 percent "until such time as the title to such interest becomes marketable." § 570.10(D)(2)(a). When title is not marketable, Sunoco "is not [ ] required to pay until the other party has cleared up his title." *In re Tulsa Energy, Inc.*, 111 F.3d 88, 90 (10th Cir. 1997). Interest, however, still accrues, albeit at 6 percent. At most, the defendant's argument would reduce the amount of interest it owes, a defense on which it has the burden of proof. This litigation only focuses on interest owed on payments Sunoco already made. Thus, when Sunoco paid an owner the proceeds, Sunoco essentially determined that it was liable for that payment in some capacity.

To the extent that Sunoco argues that it sometimes paid owners as a "business decision," it has provided little concrete evidence to rebut Ley's methodology and conclusions regarding class-wide liability. (Trial Tr. vol. 1, 158:3-14.)

861:24; Trial Tr. vol. 5, 945:8-20.) The Court cannot resolve this case based on a hypothetical challenge. Thus, even if the Court considered Krause's opinions, a few examples of small errors in a document spanning millions of lines of data does not undermine the credibility of Ley's testimony or methodology.

Next, relying on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), Sunoco tries to characterize this litigation as a "trial by spreadsheet." In *Dukes*, the Supreme Court determined that a class certified under Rule 23(b)(2) could not seek individualized money damages for violations of Title VII of the Civil Rights Act of 1964. The Supreme Court distinguished the class certified under Rule 23(b)(2) from one certified under Rule 23(b)(3), which "allows class certification in a much wider set of circumstances but with greater procedural protections." *Id.* at 362. The Court disagreed with the approach to determining liability, in which "[a] sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a [special] master." *Id.* at 367. Under this approach, the special master would determine "[t]he percentage of claims . . . to be valid . . . and then . . . appl[y] [that percentage] to the entire remaining class." *Id.* Each class member would receive an average back pay award.

Here, the Court certified this class under Rule 23(b)(3), thereby affording the class greater protections than enjoyed by the class in *Dukes*. Further, the class members will not receive an average damages award based on representative

claims. As explained above, Ley has examined each payment and determined liability for each class member. Essentially, Sunoco saw a spreadsheet and cried foul. But for the above reasons, Sunoco has not endured a "trial by spreadsheet."

Finally, Sunoco argues that Cline failed to prove that Sunoco alone caused the harm. Under the PRSA, "[w]here royalty proceeds are paid incorrectly as a result of an error or omission, the party whose error or omission caused the incorrect royalty payments shall be liable for the additional royalty proceeds on such production and all resulting costs or damages ***incurred by the party making the incorrect payment***."[19] § 570.10(C)(4) (emphasis added). Under that provision's plain language, the party causing the error or omission must pay Sunoco for costs associated with the incorrect payment. That provision, however, does not change Sunoco's obligations to pay owners on time when it undertakes the responsibility to do so. (*See* Trial Tr. vol. 1, 85:21 to 86:8.)[20]

Here, Sunoco was a first purchaser that paid owners late during the class period. Thus, Sunoco owes interest on those late payments. Accordingly, Cline has established liability under Count One.

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[19] The Court assumes for the purposes of this argument that the PRSA considers a late payment an "incorrect payment."

[20] For the same reasons, the Court rejects Sunoco's arguments regarding liability issues related to indemnity agreements. Whether Sunoco can later recover from another party for its liability in this lawsuit is not before the Court.

2. Default Interest Rate

Next, the parties dispute whether the 12 percent interest rate or the 6 percent interest rate applies by default, and which party bears the burden of proving that the non-default rate applies.

"Legislative intent controls statutory interpretation." *Krug*, 362 P.3d at 210. "The obvious overriding purpose of the [PRSA] is to ensure that royalty owners are timely paid their share of the proceeds. The [Oklahoma] Legislature has followed a path of strengthening mineral owners['] rights since the [PRSA's] inception." *Id.* at 214. Against that background, the Court reaches the unremarkable conclusion that the PRSA sets forth a 12 percent default interest rate.

Under the PRSA,

> ***[e]xcept as otherwise provided in paragraph 2 of this subsection***, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, ***that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum*** to be compounded annually"

§ 570.10(D)(1) (emphasis added). The "paragraph 2" referred to in that provision describes when a 6 percent interest rate applies for unmarketable title. Thus, the statute defines the 6 percent interest rate as an exception, not a rule. *See Roberts Ranch Co. v. Exxon Corp.*, 43 F. Supp. 2d 1252, 1275 (W.D. Okla. 1997) ("[T]he only exception to the twelve percent interest provision is where the proceeds are not paid

because the title to the royalties is not marketable, in which case the unpaid royalties bear interest at the annual rate of six percent (6%).") The only question that remains, therefore, is who bears the burden of proving which interest rate applies in this case?

Sunoco argues that *Tulsa Energy* should inform the Court's analysis. 111 F.3d 88. In *Tulsa Energy*, the Tenth Circuit considered whether the parties could waive the interest provision in a division order. In its analysis, the Tenth Circuit explained that "[i]t is the interest owner's responsibility to establish marketable title so that he can receive proceeds." *Id.* at 90. The court then concluded that parties may waive the 6 percent interest rate because that rate "merely compensates the party entitled to payment for the use of his money until he can establish marketable title." *Id.* at 91 (quotations omitted).

Here, the Court has limited the class definition to those whom Sunoco has paid proceeds but failed to pay interest. (*See* Dk. No. 127, at 1.) Thus, whether the class members bore the burden of proving marketable title to receive the proceeds in the first place makes no difference. Sunoco has already remitted payments to the class in some fashion. Now, it must pay the interest.

Instead, the Court considers *Quinlan v. Koch Oil Co.*, 25 F.3d 936 (10th Cir. 1994), instructive. In *Quinlan*, the Tenth Circuit rejected the argument that the plaintiff "was not entitled to twelve percent interest because he was not legally entitled to the proceeds as he failed to show either marketable title or sign a division order." *Id.* at 939 (quotations omitted). Because no question as to marketability of

title existed with regard to the plaintiff's oil interest, the Tenth Circuit explained that the PRSA "did not require [the plaintiff] to make an affirmative showing of marketable title at that time in order to be deemed 'legally entitled to the proceeds.'" *Id.* at 939-40. Further, the Tenth Circuit declined to impose a burden on the interest owner to prove marketable title for every royalty payment.

Unmarketability is, in essence, an affirmative defense. In making its argument, Sunoco agrees it owes some interest under the statute, but says that those payments falls into an exception to the general rule. The burden of proving an affirmative defense rests with the defendant. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92 (2008); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983); *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007) ("[T]he burden of proving all affirmative defenses rests on the defendant."). The burden is not only to put the defense in issue, but also to ultimately prove it. *See Roberts*, 484 F.3d at 1241.

Sunoco's entire argument rests on its suspense codes. But its own witness called them a "crude surrogate" for issues of marketability. (*See* Trial Tr. vol. 4, 715:5.) Sunoco did not identify a single case in which an owner did not have marketable title. In fact, Sunoco has already paid owners their proceeds and has not raised any legitimate questions about marketability. Thus, applying *Quinlan*'s holding more broadly, the Court concludes that the PRSA imposes the burden on Sunoco—not Cline—to prove that it

withheld the payments at issue due to unmarketable title.[21]

In sum, the PRSA requires first purchasers and holders of proceeds, such as Sunoco, to pay 12 percent interest on late payments by default. The first purchaser and holder of proceeds bears the burden of proving that it withheld payment due to unmarketable title such that it only owes 6 percent interest on the late payment. Accordingly, Sunoco bore the burden of establishing that a 6 percent interest rate applied to any of the late payments at issue in this case.

3. Unclaimed Funds

The parties dispute whether (and when) Sunoco is liable for interest on unclaimed funds. Sunoco contends that it does not owe interest on these funds when it pays the funds to the state. (*See, e.g.*, Trial Tr. vol. 1, 139:9-15.)

a. Standing

The class members entitled to unclaimed funds have standing to seek damages. To have standing, a plaintiff must prove (1) that he suffered an injury in fact that is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical;" (2) that

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[21] Sunoco has vigorously argued that its own records are too unreliable to explain why it made a late payment. If the Court interpreted the PRSA to impose on the owners the burden to prove why Sunoco withheld payment, the Court would effectively allow Sunoco to hide behind a mess of its own making, claiming innocence. Moreover, Sunoco, not the owner, is in the best position to know the reasons Sunoco made a late payment. Thus, placing the burden on the owner to prove why Sunoco made a late payment would undermine the purpose of the PRSA.

the injury is "fairly traceable to the challenged action of the defendant;" and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by the relief requested." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Cline has proven that all class members suffered an injury, including those entitled to unclaimed funds. For most payments to unclaimed property funds, Sunoco knew the identity of the owner. Even where Cline has not provided the precise identities for some class members, Ley's methodology identified late payments—payments Sunoco determined it owed to someone—on which Sunoco did not pay interest. Moreover, Sunoco admitted that it does not pay interest when it sends proceeds to a state. (Trial Tr. vol. 1, 132:22-25.) As the Court explained on November 26, 2019, "the owners' right to the funds in question . . . exists, whether the owners take possession of the funds themselves or a state holds the money for them." (Dk. No. 186, at 1.) Once the state receives the money on behalf of the individual, the owner can claim the money. *See, e.g.*, Okla. Stat. tit. 60, §§ 661, 663-64, 674-75; Tex. Prop. Code Ann. §§ 74.304, 74.501. Paying the state amounts to paying the owner or an agent or trustee on behalf of the owner. Thus, each class member has suffered an injury because Sunoco has withheld interest it owes to the owner.

Sunoco creatively argues that those entitled to unclaimed funds do not have a concrete injury because the owners have not asked for the proceeds, and therefore, are not aggrieved by a lack of interest. (*See*

Dk. No. 274, at 22.) This argument implies that an owner suffers no injury if the owner never realizes that Sunoco owes the owner proceeds. No matter how one looks at it, Sunoco has kept someone else's money, a classic example of a concrete injury. The failure to pay interest on late proceed payments—regardless of whether Sunoco has identified or located the owner—"affect[s] the [owner] in a personal and individual way," creating an injury that "actually exist[s]." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016).

Essentially, the owners of unclaimed funds suffer an injury at the moment Sunoco fails to pay interest on the late payment. Requesting the proceeds or interest, therefore, cannot be a precondition to suffering an injury for Sunoco's violation of the PRSA for failing to pay interest on late payments without a request.

Next, Sunoco argues that it has not caused the unidentified class members' injuries because those class members have not claimed their proceeds. (Dk. No. 274, at 23.) This argument is a thinly veiled effort to shift the blame to those who had a right to the money in the first place. The PRSA requires Sunoco to pay interest on proceeds, which Sunoco did not pay. Thus, Sunoco caused the class members' injuries. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) ("Article III . . . require[s] proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact.").

Finally, Sunoco argues that Cline has not established redressability because "a judgment awarding interest to the owners of unclaimed proceeds

likely would be of no practical benefit to them." (Dk. No. 274, at 23.) As with the injury analysis, Sunoco asks the Court to relieve it of its legal obligations because a royalty interest owner has not yet claimed the funds. This argument "misconstrue[s] the nature of [the] redressability inquiry." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286 (2008). The Court must consider "whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation." *Id.* at 287. The Court's judgment must "redress[ ] the plaintiff's injury . . . directly or indirectly." *Nova Health Sys.*, 416 F.3d at 1159. "[T]he requirement of redressability ensures that the injury can likely be ameliorated by a favorable decision." *S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't*, 620 F.3d 1227, 1233 (10th Cir. 2010).

Here, the class members' injuries occurred when Sunoco made a late payment without the required interest. An award of damages will compensate the unidentified or unlocated owners for the interest owed on those late payments. Once the relevant state receives the damages award on behalf of the owner, the owner may claim that interest at any time. At a minimum, this provides indirect relief for the injury. *See Nova Health Sys.*, 416 F.3d at 1159. Thus, a damages award will redress the injury that each class member suffered as a result of Sunoco's violations of the PRSA, regardless of whether the owner is identified.[22] Accordingly, owners entitled to unclaimed funds have standing.

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[22] Because the injuries to the unidentified or unlocated owners of unclaimed funds have already occurred, their claims are ripe

b. PRSA Language

The Court has already concluded that paying the state unclaimed property fund amounts to paying the owner or a trustee on behalf of the owner. (Dk. No. 186.) If Sunoco could hold proceeds without interest until it sends the proceeds to unclaimed funds, that would "contradict[ ] the purpose of the PRSA, which Oklahoma adopted to prevent exactly this kind of windfall." (*Id.* at 4.)

Indeed, the Court's analysis regarding the interest owed on unclaimed funds begins and ends with the language of the PRSA. Section 570.10 provides,

> ***Except as otherwise provided in this section***:
>
> 1. Proceeds from the sale of oil or gas production from an oil or gas well ***shall be paid to persons legally entitled thereto***:
>
> a. commencing not later than six (6) months after the date of first sale, and
>
> b. thereafter not later than the last day of the second succeeding month after the end
>
> of the month within which such production is sold.

§ 570.10(B)(1) (emphasis added). The PRSA, therefore, sets forth the precise timeframes by which Sunoco must pay proceeds. The PRSA further excepts certain payments from its timing requirements. *See,*

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for adjudication. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotations omitted)).

e.g., § 570.10(B)(3). Those exceptions do not include unclaimed funds. *See World Pub'g Co. v. Miller*, 32 P.3d 829, 833 (Okla. 2001) ("Th[e] [Oklahoma Supreme] Court does not read exceptions into a statute not made by the Legislature."). The PRSA's timing requirements, therefore, apply to unclaimed funds.

Moreover, because interest accrues "until the date paid," interest accrues until the proceeds—including interest on late payments—are paid to the relevant state.[23] *See, e.g.*, Okla. Stat. tit. 60, §§ 661, 663-64, 674-75; Tex. Prop. Code Ann. §§ 74.304, 74.501; *see also Cockerell Oil Props., Ltd v. Unit Petroleum Co.*, No. CIV-16-135, 2020 WL 2110904, at *2 (E.D. Okla. May 4, 2020) ("The term as used in the PRSA is,

[23] Sunoco lodges a bevy of challenges related to unclaimed funds, including that unclaimed funds involve numerous individual questions and that the unclaimed funds statutes of each state conflict with the PRSA and implicate constitutional concerns. The Court rejects those arguments. Sunoco has previously sent payments to unclaimed funds, so it can identify the state to which the payment is due. (*See, e.g.*, 131:8 to 139:25.) Sunoco has also summarized the period of time that must elapse before a state considers property abandoned. (Dk. No. 275, at 98-99.) Further, the PRSA requires Sunoco to pay proceeds on time and creates a consequence for not doing so; the unclaimed funds statutes set timelines for remitting the funds *only if Sunoco's efforts to locate owners do not work*. Thus, despite the deadline in the unclaimed funds statutes, Sunoco remains free to try to locate and identify the owners. Sunoco, therefore, has failed to show that (1) individual questions predominate in this regard; (2) the various states' unclaimed funds statutes conflict with the PRSA's interest payment requirements or otherwise control in this case; or (3) any purported conflicts between the PRSA timing requirements and the unclaimed funds statutes raise due process concerns.

therefore, found to be unambiguous and providing for the annual accrual of interest on the accumulated interest on any unpaid proceeds not paid timely under the provisions of that statute.").

Accordingly, Sunoco must pay interest on unclaimed funds from the date the interest payment is late under the PRSA through the date it remits those funds as unclaimed property to the relevant state.[24]

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[24] The Court rejects Sunoco's argument that it should be excused from complying with the PRSA because it relied on industry custom and could not possibly determine the applicable interest rate at the same time it makes a late payment. Moreover, Sunoco's repeated proclamations that it simply misinterpreted the law falls short. If Sunoco could escape liability because it misinterpreted the statute or because it believed its actions were legal because everyone else was doing it, that would undermine the remedy enacted by the Oklahoma Legislature to address the precise conduct that Sunoco has engaged in. *Cf. Creekmore v. Pomeroy IT Sols., Inc.*, No. 10-cv-0091, 2010 WL 3702543, at *2 (N.D. Okla. Sept. 16, 2010) ("Permitting a defendant to plead ignorance of the requirements of the Testing Act would have virtually eliminated the civil remedy created by the Testing Act, and would have reserved a civil remedy only for the most extreme violations." (quotations omitted)). Further, Sunoco presented testimony that shows that compliance may have been difficult, but it failed to establish that compliance was impossible. Indeed, Sunoco could calculate interest when someone requested interest. (*See, e.g.*, Trial Tr. vol. 1, 90:8-20, 99:8-15; Holland Dep. 34:8-24.) To the extent that Sunoco argues that the PRSA is void for vagueness, the fact that Sunoco misunderstood the PRSA's requirements does not make the PRSA "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925).

4. Compound Interest

Sunoco argues that once it makes the late payment to the interest owner, statutory interest stops accruing. Cline contends that Sunoco owes compound interest until Sunoco pays the statutory interest. Sunoco refers to this as "interest on interest," in an attempt to make it sound like something exotic or unusual. In fact, compound interest is a common feature in investments and means simply that interest becomes part of the principal and therefore earns interest. *See* Kate Ashford, *What is Compound Interest?*, Forbes (Aug. 12, 2020, 1:18 p.m.), https://www.forbes.com/advisor/investing/compound-interest/.

Under the PRSA,

> where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

§ 570.10(D)(1). Essentially, Sunoco interprets "until the day paid" to mean "until the day Sunoco paid the proceeds." Thus, Sunoco argues that it does not owe compound interest.

The Court recently resolved this question in a different case, concluding that the plain language of the PRSA "provides for compounding of interest until the full amount—the proceeds due *and the accrued interest*—are paid in accordance with the terms of the

statute," *Cockerell Oil Props.*, 2020 WL 2110904, at *1-2 (emphasis added). The Court finds *Cockerell Oil* persuasive and adopts the reasoning set forth therein. *Id.* Further, Ley's model adequately compounds interest on the payments at issue in this case. (*See, e.g.*, Trial Tr. vol. 3, 526:23 to 527:25.) Accordingly, the PRSA requires Sunoco to pay interest on interest, and Ley's model adequately calculates compound interest for the payments at issue in this case.

C. Count Two: Fraud

Cline has not proven fraud. Oklahoma recognizes two types of fraud—actual and constructive. "To be actionable, both actual fraud and constructive fraud require detrimental reliance by the person complaining." *Howell v. Texaco Inc.*, 112 P.3d 1154, 1161 (Okla. 2004). "Fraud is never presumed, but must be proven by clear and convincing evidence."[25] *Tice v. Tice*, 672 P.2d 1168, 1171 (Okla. 1983).

As explained above, the PRSA sets forth the information Sunoco must include when it remits payment. *See* § 570.12. "The PRSA . . . give[s] the royalty owners a right to be accurately informed of the facts and place[s] a legal duty on the [first purchasers and holders of proceeds] to accurately inform the plaintiffs of the facts on which the royalty payments are based." *Howell*, 112 P.3d at 1161. The plain language of the PRSA creates a legal duty for Sunoco to provide the information set forth in § 570.12. *See id.*

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[25] "[C]lear and convincing evidence is the measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *In re C.D.P.F.*, 243 P.3d 21, 23 (Okla. 2010).

Cline does not argue that Sunoco failed to comply with the PRSA's explicit requirements under § 570.12. (Closing Arg. Tr. 196:2-6); *cf. Howell*, 112 P.3d at 1161 ("The respondents failed to include any statements or evidentiary materials in their motions for partial summary judgment showing that they complied with the PRSA."). *Compare* § 570.12, *with* (Pl.'s Ex. 520). Rather, Cline contends the class relied on Sunoco's "material misrepresentations and omissions to their detriment" because "[t]hey cashed the checks they received from Sunoco believing that Sunoco paid them all the monies they were owed." (Dk. No. 272, at 43.)

The Court doubts that an additional duty exists for Sunoco to inform interest owners that it withheld interest from a late payment. *See Wylie v. Chesser*, 173 P.3d 64, 71 (Okla. 2007) ("If a statute is plain and unambiguous and its meaning clear and no occasion exists for the application of rules of construction a statute will be accorded the meaning expressed by the language used."). In any event, Cline has failed to establish class-wide detrimental reliance based on Sunoco's check stubs. For instance, owners entitled to interest on unclaimed funds did not cash—and likely, did not see—the checks. Thus, Cline has not shown that those class members have relied on the information contained on the check stubs. *See Buford White Lumber Co. Profit Sharing & Sav. Plan & Tr. v. Octagon Props., Ltd.*, 740 F. Supp. 1553, 1570 (W.D. Okla. 1989) ("The alleged misrepresentations need not be the sole inducement which causes a party to take action, but they must be that *without which the party would not have acted*." (emphasis added)). Moreover, the information on the check stubs allowed an owner to determine whether she had received interest and, if

so, in what amount. Accordingly, Cline has not proven class-wide detrimental reliance by clear and convincing evidence sufficient to prove fraud.

D. Relief[26]

1. Actual Damages[27]

a. Damages Award

For the reasons set forth above, Cline has established class-wide liability, and Sunoco must pay compound interest. Further, the Court has concluded that the PRSA applies a 12 percent interest rate to unpaid proceeds by default, and that Sunoco bears the burden of proving when a 6 percent interest rate applies. Unfortunately for Sunoco, it has failed to meet its burden of proving that 6 percent interest applies to any of the late payments.

Sunoco repeatedly emphasized that its own data cannot reliably establish why a payment was late.

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[26] Based on the post-trial briefs and closing arguments, Cline no longer seeks equitable relief if the Court awards actual and punitive damages. (*See, e.g.*, Dk. No. 272, at 53.) Because the Court will award those damages, it will not award an accounting, disgorgement, or an injunction.

[27] Sunoco argues that "Cline . . . concedes that the actual class damages claimed at trial ($74,763,113) should be reduced by $8,033,00.60 for the 'undivided' category of unclaimed funds paid to the states and by $5,790,028 based on the Krause identification of payments associated with Epperson's 'unmarketable' suspense codes." (Dk. No. 279, at 28.) Cline, however, only agrees to reduce the damages award by those amounts if the Court concludes that Sunoco met its burden of proving unmarketable title at trial. (*See* Closing Arg. Tr. 16:23 to 17:2; *see also* Dk. No. 272, at 20.) Accordingly, the Court will consider whether Sunoco has met its burden of proving marketable title as to those two figures.

(*See, e.g.*, Trial Tr. vol. 1, 222:2-7, 223:17-25.) Epperson opined that the codes were "simply a crude surrogate" for identifying payments made due to unmarketable title. (Trial Tr. vol. 4, 715:5.) He also agreed that none "of [Sunoco's] codes provide a definitively accurate determination of marketability or unmarketability without doing a more elaborate search of Sunoco's records and potentially even public records." (*Id.* 718:9-14.) Further, at trial, Koelling explained that the ability to locate an interest owner does not mean that the owner has marketable title. (Trial Tr. vol 1, 133:23-25.) Under that reasoning, the inverse is also true—being unable to locate an interest owner does not mean that that owner has unmarketable title. Indeed, Sunoco has not proffered—nor could the Court find—any authority holding that a company's inability to locate or identify an owner makes the title to that owner's interest unmarketable per se.

In sum, Sunoco has failed to establish by a preponderance of the evidence that Sunoco withheld any of the late payments at issue due to unmarketable title. Accordingly, 12 percent interest applies to all late payments in this case.[28]

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[28] The Court construes Sunoco's argument that the class did not mitigate its damages because owners failed to provide Sunoco with updated contact information as a challenge to the Court's class certification decision. To the extent that Sunoco also raises this argument as a challenge to liability and damages, that argument ignores that the PRSA requires Sunoco to pay interest regardless of the reason for the late payment. *See* § 570.10(D). For that same reason, the argument that a class member has waived interest by preventing payment also fails. Further, the Court rejects Sunoco's argument that some class members may

b. Fluid Damages

Relying primarily on *Eisen v. Carlisle & Jacquelin*,[29] Sunoco contends that the presence of unidentified class members deprives Sunoco of its due process rights, making a damages award unconstitutional. (Dk. No. 274, at 49-50.) As noted above, Cline has offered evidence that questions whether many of these individuals truly cannot be located. In any event, Sunoco has misplaced its reliance on *Eisen*.

Eisen involved a six-million-member class of individuals throughout the world who bought or sold odd lots on the New York Stock Exchange from 1962 through 1966. Millions of unidentified class members would receive notice by publication through extensive efforts. After several appeals, the district judge substituted individual claimants for "the class as a whole." *Eisen*, 479 F.2d at 1010. Under the district

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have waived interest by contract. First, Sunoco did not prove by a preponderance of the evidence that the class members were parties to contracts waiving the interest requirement. Second, as explained above, the Court concludes that a 12 percent interest rate applies to all late payments in this case. In *Tulsa Energy*, the Tenth Circuit held that parties cannot waive the 12 percent interest rate for public policy reasons. 111 F.3d at 90. Although Sunoco argues that the Oklahoma Supreme Court later concluded that PRSA claims are contractual, *see Purcell v. Santa Fe Minerals*, 961 P.2d 188, 193 (Okla. 1998)—implying that a party can now waive that interest—neither the Oklahoma Supreme Court nor the Tenth Circuit have cast doubt on the holding in *Tulsa Energy*. Thus, pursuant to *Tulsa Energy*, the parties cannot waive the 12 percent interest rate requirement.

[29] 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

court's plan, after the defendants distributed the damages award to the court, counsel would continue to publish notices soliciting claims. Importantly, the U.S. Court of Appeals for the Second Circuit suspected that few individuals would ever be identified or file claims, and the court could not discern how the district court expected to disburse the remainder of the "huge residue." *Id.* at 1010-11. The Court further noted that "the expenses of giving the notices required by . . . Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing." *Id.* at 1018.

This case does not present the same manageability problems at issue in *Eisen*. The Court has not substituted individual claimants with the class as a whole. Nor has Ley's methodology simply aggregated damages into one lump payment without considering Sunoco's liability to every class member. Rather, Ley has calculated individual damages through a standard methodology, and Sunoco has had the opportunity to rebut those calculations. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008) (explaining the right to raise individual defenses against the class members "does not mean that defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages" (quotations omitted)). Moreover, this action is far from "hopelessly unmanageable" due to the unidentified class members. *Eisen*, 479 F.2d at 1010. To the extent that Cline cannot identify the owner owed the funds,

Cline need only send that member's portion of the damages to the same place Sunoco remitted the underlying unclaimed funds.

Accordingly, recovery in this case does not "mask the prevalence of individual issues [such that] it is an impermissible affront to defendants' due process rights." *McLaughlin*, 522 F.3d at 232.

2. Punitive Damages[30]

Cline must clear two hurdles to receive punitive damages: first, Cline must show that Sunoco's conduct meets the standard set forth in the Energy Litigation Reform Act ("ELRA"), Okla. Stat. tit. 52, § 903; and second, Cline must show that Sunoco's conduct meets the requirements set forth in Oklahoma's punitive damages statute, Okla. Stat. tit. 23, § 9.1.

a. ELRA

Under the ELRA, the PRSA "provide[s] the exclusive remedy to a person entitled to proceeds from production for failure of a holder to pay the proceeds within the time periods required for payment." § 903. A plaintiff may recover punitive damages, however, if the Court determines

> upon clear and convincing evidence that the holder who failed to pay such proceeds did so with the actual, knowing[,] and willful intent: (a) to deceive the person to whom the proceeds were due, or (b) to deprive proceeds

[30] In its motion to dismiss, Sunoco argued that Cline waived his claim to punitive damages by failing to include those damages in his initial disclosures. (Dk. No. 117, at 3, 11-12.) Sunoco never moved to strike that request.

> from the person the holder knows, or is aware, is legally entitled thereto.

Id. Cline, therefore, must first show that Sunoco's conduct overcomes the ELRA's bar to punitive damages.

As an initial matter, Sunoco argues that the ELRA only applies to claims for "proceeds," not "interest." But "it is the failure to timely pay 'proceeds' that leads to the recovery of 'interest.'" *Cockerell Oil Props., Ltd v. Unit Petroleum Co.*, No. CIV-16-135, 2020 WL 974875, at *6 (E.D. Okla. Feb. 28, 2020), *modified on other grounds on reconsideration*, 2020 WL 2110904. Thus, the ELRA does not bar Cline's claim in that respect.

Next, the Court concludes that Sunoco acted with "the actual, knowing[,] and willful intent: . . . to deprive proceeds from the person the holder knows, or is aware, is legally entitled thereto." § 903. Sunoco says that it had a good faith belief that it did not have to pay interest automatically based in large part on industry practice. (*See* Dk. No. 274, at 46.)

As thousands of mothers have told their children, the fact that everyone does something does not make it right. Here, an industry (apparently supported by its lawyers) decided that it owes interest that it never has to pay. This myopic group-think does not excuse keeping millions of dollars of other people's money.

At trial, Koelling confirmed that Sunoco knew that it owed interest to royalty owners for the late payments. (Trial Tr. vol. 1, 82:20 to 85:19.) Sunoco also admitted that it generally waited for owners to ask for that interest rather than pay the interest automatically. (*Id.* 78:6-9, 82:20 to 83:23.) Further,

Cline introduced other evidence, such as emails, that established that Sunoco is aware of its legal obligation to pay interest and its intent to keep the interest absent a request, thereby depriving owners of the interest Sunoco owed them. (*See, e.g.*, Pl.'s Ex. 38.)

Thus, Cline proved by clear and convincing evidence that Sunoco knew it owed interest payments and intentionally withheld that interest until—and unless—the owner finally asked for the interest. Accordingly, the ELRA allows punitive damages in this case.

b. Oklahoma's Punitive Damages Statute[31]

Cline seeks an award of punitive damages equal to twice the class' actual damages, or in the alternative, to the amount of the class' actual damages.

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[31] Sunoco argues that Cline cannot recover for punitive damages pursuant to Oklahoma's punitive damages statute because the punitive damages statute only applies to actions "for the breach of an obligation not arising from contract." § 9.1(A). Sunoco says that PRSA claims are contractual in nature. The cases Sunoco relies on considered PRSA claims as contractual for the purposes of determining (1) the statute of limitations, *Purcell*, 961 P.2d at 193, and (2) whether a party owed owners interest on a settlement payment, *see Krug*, 362 P.3d at 210-13 (concluding that the PRSA was inapplicable to that case). Neither case considered whether punitive damages are available for the type of claim at issue here, and the ELRA specifically contemplates an award of punitive damages if the defendant's conduct meets its threshold requirements. *See* § 903. "Clearly, an exception exists under the [ELRA] for the availability of a punitive damage claim, should [the plaintiff] make the appropriate showing," *Cockerell Oil Props.*, 2020 WL 974875, at *6. Accordingly, § 9.1 does not bar recovery for punitive damages.

When the factfinder finds by clear and convincing evidence that the defendant acted with *reckless disregard* for the rights of others, the Court may award punitive damages equal to the amount of actual damages awarded. Okla. Stat. tit. 23, § 9.1(B). Reckless disregard requires the plaintiff to prove that the defendant "was either aware, or did not care, that there was a substantial and unnecessary risk that [its] conduct would cause serious injury to others." *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1273-74 (W.D. Okla. 2014) (quoting Okla. Unif. Civil Jury Instr. 5.6).

When the factfinder finds by clear and convincing evidence that the defendant acted intentionally with *malice* towards others, the Court may award twice the amount of actual damages. *Id.* § 9.1(C). Malice "requires that the action complained of be actuated by ill will or hatred and may be inferred from a willful action in reckless or wanton disregard for the rights of another." *Chavez v. Sears, Roebuck & Co.*, 525 F.2d 827, 830 (10th Cir. 1975).[32]

To determine the amount of punitive damages to award, the Court must consider:

> 1. The seriousness of the hazard to the public arising from the defendant's misconduct;

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[32] *See Hamilton v. Amwar Petroleum Co.*, 769 P.2d 146, 149 (Okla. 1989) ("Showings necessary for a punitive damage award require a higher standard of culpability, i.e., fraud[,] oppression[,] or malice which is accompanied with some evil intent or recklessly wanton conduct as is deemed its equivalent in the law.").

> 2. The profitability of the misconduct to the defendant;
>
> 3. The duration of the misconduct and any concealment of it;
>
> 4. The degree of the defendant's awareness of the hazard and of its excessiveness;
>
> 5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
>
> 6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
>
> 7. The financial condition of the defendant.

§ 9.1(A).

Seriousness and profitability of the misconduct. The public has suffered an enormous loss in this case. Sunoco urges the Court to consider that it pays almost all proceeds either early or on time. But as of December 16, 2019, Sunoco had withheld more than $74 million on more than 1.5 million late payments. (Trial Tr. vol. 3, 554:2-12, 572:5; Pl.'s Ex. 454.) Moreover, Sunoco withheld payments from over 50,000 class members. (Trial Tr. vol. 3, 568:21 to 569:1.) Despite that large number of class members and late payments, Sunoco does not get many requests for interest each year. (*See, e.g.*, Trial Tr. vol. 1, 83:21-24; Holland. Dep. 33:5-15; Pl.'s Ex. 62.) Thus, Sunoco has enjoyed an enormous benefit by paying owners late and then withholding interest on those late payments—particularly significant in light of the purpose of § 570.10(D). *See Krug*, 362 P.3d at 214.

Duration of the misconduct, concealment, and awareness. Sunoco has withheld interest until an owner asks for it for the entire class period. (*See, e.g.*, Trial Tr. vol. 1, 78:10-13, 82:20-23; Pl.'s Ex. 43.) For the reasons set forth above, the Court concludes that Sunoco did not actively conceal that it failed to pay interest to interest owners. But Sunoco knew that it owed interest on late proceeds and failed to make any effort to identify the late payments and pay the interest owed. (Trial Tr. vol. 1, 79:4-20.) Instead, Sunoco generally waited for a demand for payment before paying interest. (Trial Tr. vol. 1, 84:15 to 85:19, 116:3-6; Pl.'s Ex. 339.)

Attitude and conduct of Sunoco after discovery. Outside of litigation, Sunoco still has not tried to calculate the interest it owes on late payments or identify every late payment it has made in Oklahoma. (Trial Tr. vol. 1, 79:4-20.) Further, when this Court ruled that interest was due at the same time as the late payment, Sunoco decided to "get out of the business" of paying royalty proceeds altogether. (*Id.* 74:10-17.)

Number and level of employees involved. Sunoco did not formally train its employees on the PRSA requirements; they all received on-the-job training. (*Id.* 97:19 to 98:12; Holland Dep. 67:1-11.) Company-wide, Sunoco generally does not pay interest unless someone asks for it. (Trial Tr. vol. 1, 82:20-23.) In limited or "unusual" circumstances, Sunoco will pay interest without a request. (*Id.* 83:8-11.)

Financial Condition. Sunoco's parent company is worth approximately $30 billion.[33] (Pl.'s Ex. 440, at 169.) In Sunoco's view, the unpaid interest "was never a significant dollar amount to [Sunoco]. It was never something where [Sunoco was] going to make a fortune not paying the interest." (Trial Tr. vol. 1, 121:9-11.)

Sunoco's conduct probably reflects malice required for a punitive damages award of double the amount of compensatory damages under § 9.1(C). Malice here is demonstrated by a willful action in reckless and wanton disregard of the rights of others—specifically keeping other people's money. Nevertheless, the Court is reluctant to impose $150 million dollars in punitive damages. Generally, Sunoco does a good job of paying proceeds to owners on time, at a better rate than the petroleum industry as a whole. While it bungled its system for paying interest on late payments, an award of double the amount of compensatory damages goes a bit too far.

Sunoco's conduct, however, certainly amounts to a reckless disregard of the class members' rights. *See* § 9.1(B). Sunoco knew that it owed interest on late payments, but it made no effort to identify those payments to determine the interest it owed—much less pay that interest. (Trial Tr. vol. 1, 79:4-20.) Absent this litigation, Sunoco would have deprived the class members of millions of dollars of interest indefinitely. Thus, Sunoco acted with a reckless

[33] During discovery, Sunoco told Cline to look at the net worth of ETP to determine Sunoco's net worth. (Trial Tr. vol. 5, 948:25 to 951:6.)

disregard to a risk of serious harm to the class that supports an award of punitive damages. *See* § 9.1(B).

Furthermore, this award advances "the primary purpose of punitive damages"—punishing the wrongdoer and deterring similar conduct in the future. *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 517 (Okla. 1983). Sunoco has had these business practices in place for decades yet is only being held accountable for late payments made on or after July 7, 2012. Nevertheless, although Sunoco may have assumed that "people didn't care that much about" more than seventy million dollars in withheld interest payments (Trial Tr. vol. 1, 93:14-19), this punitive damages award will adequately punish Sunoco for failing to comply with § 570.10(D) during the class period. Further, such an award will deter Sunoco—and companies like it—from adopting "[p]erverse and absurd statutory interpretations . . . in the name of literalism" that perpetuate the abuse that the PRSA was designed to correct. *Twisdale v. Snow*, 325 F. 3d 950, 953 (7th Cir. 2003).

Thus, pursuant to § 9.1(B), the Court will award punitive damages of $75 million dollars, an amount approximately equal to the class' actual damages.[34]

VI. CONCLUSION

For the foregoing reasons, the Court will grant the motion to strike Krause as an expert and will sustain Cline's objections to Krause's testimony at trial. The

[34] At this time, the plaintiff has proved damages of just under $75 million. With interest added until the date of this Opinion, the Court expects the actual damages amount will exceed $75 million.

Court will enter judgment against Sunoco as to Count One and will award the class: (1) actual damages in the amount of the interest owed on the late payments identified by Ley, amounting to $74,763,113.00 as of December 16, 2019, plus any additional interest that has accrued on each payment at a rate of 12 percent, compounding annually, from December 17, 2019, to the date of this Opinion and Order, subject to modification based on the updated exclusion requests[35]; and (2) punitive damages in the amount of $75,000,000. The Court will not enter judgment against Sunoco as to Count Two and will not award any equitable relief. The Court will overrule the remaining objections to the exhibits, witnesses, depositions, and other evidence.

Date: [handwritten: 17 August] 2020
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
United States District Judge

[35] As explained earlier, the Court will withhold entering judgment pursuant to Federal Rule of Civil Procedure 58 until counsel provides the updated damages calculations to the Court. This Opinion and Order, however, will serve as the judgment for the purposes of calculating the final interest due.

Appendix K

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Nov. 26, 2019

MEMORANDUM ORDER

This matter comes before the Court on the defendants' motion to "clarify" the class definition.[1] (Dk. No. 172.) The Court held a telephone hearing on the motion on November 25, 2019.

Sunoco asks the Court to change the composition of the class to exclude recipients of payments made to

[1] In this Order, the Court will refer to the defendants, Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P., simply as "Sunoco".

state unclaimed property funds.[2] Sunoco inaccurately calls these payments "escheat payments," implying that the state takes title to the money. Under typical unclaimed property laws, however, a state simply holds money for owners who, for various reasons, do not themselves take possession of the funds. *See, e.g.*, Okla. Stat. tit. 60, §§ 661, 663-64.

Sunoco wants to cut those people out of the class. This argument ignores the owners' right to the funds in question. This right exists, whether the owners take possession of the funds themselves or a state holds the money for them. The Court, therefore, denies the motion to "clarify" the class definition.

In the alternative, Sunoco asks the Court to decertify the class. Sunoco has litigated this issue vigorously throughout this litigation. In previous unsuccessful efforts to derail the class action after certification, Sunoco has not only asked this Court to stay the case but even has tried to get the Tenth Circuit Court of Appeals to intervene. A month before the trial, the Court will not change the road map for the case.

For the reasons stated in this Order, the Court DENIES the motion.

I. BACKGROUND

This case arises under Oklahoma's Production Revenue Standards Act ("PRSA"). Okla. Stat. tit. 52,

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[2] Specifically, Sunoco seeks to exclude "persons [who] did not receive any payments because the proceeds potentially owed to them were instead paid to the 50 states in compliance with various unclaimed property (escheat) statutes." (Dk. No. 172, at 7.)

§ 570, et seq. The PRSA requires entities that take oil and gas to pay the owners in a timely fashion. If the purchaser pays late, interest accrues for the owner.

According to the plaintiffs, Sunoco frequently makes late payments, but does not pay interest until the owner requests it. The plaintiffs say Sunoco does not do this by accident, but rather pursuant to a business practice. The plaintiffs' expert says Sunoco has withheld over $70 million in interest owed to others.

Sometimes Sunoco cannot find the owner of the oil and gas. In these cases, it makes payment for the oil or gas to the unclaimed property agency of the state of the owner's last known residence.[3] Sunoco does not pay interest on the unclaimed funds when it sends those funds to the states. Well over half of Sunoco's late payments go to unclaimed property funds. According to the plaintiffs, the interest on these payments would amount to over $40 million—more than half the amount claimed by the plaintiffs in this case.

On October 3, 2019, the Court certified the following class:

> All non-excluded persons or entities who: (1) received Untimely Payments from Defendants (or Defendants' designees) for oil

[3] Sunoco identifies unclaimed funds by various methods, "such as checks and other correspondence being returned as undeliverable or being in certain specific categories of suspense for various reasons for several years without anyone claiming the funds or making an inquiry." (Dk. No. 172, at 8.) If Sunoco cannot identify the owner, it pays the funds to Texas, Sunoco's home state.

> proceeds from Oklahoma wells on or after July 7, 2012, and (2) who have not already been paid statutory interest on the Untimely Payments. An "Untimely Payment" for purposes of this class definition means payment of proceeds from the sale of oil production from an oil and gas well after the statutory periods identified in OKLA. ST AT. tit 52, §570.l0(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold). Untimely Payments do not include: (a) payments of proceeds to an owner under OKLA. STAT. tit 52, §570.10(8)(3) (minimum pay); (b) prior period adjustments; or (c) pass-through payments.
>
> The persons or entities excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America or the State of Oklahoma; (2) publicly traded oil and gas companies and their affiliates; (3) persons or entities that Plaintiff's counsel may be prohibited from representing under Rule 1. 7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the court.

(Dk. No. 127, at 1.) Now, less than a month before trial, Sunoco asks the Court to "clarify" the class definition. This "clarification" amounts to little more

than an attempt to lop over fifty percent off Sunoco's potential liability in this case.[4]

II. DISCUSSION

When a court certifies a class action, it "must define the class and the class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B). A court may alter or amend the order granting or denying class certification at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). Courts have broad discretion to modify class definitions, *cf Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999), and the class definition "is subject to refinement," *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 478 (D. Kan. 2001); *see also Lavigne v. First Cmty. Bancshares, Inc.*, No. 1:15-cv-00934-WJ/LF, 2018 WL 2694457, at *9 (D.N.M. June 5, 2018).

Sunoco offers three reasons for the Court to drop from the class the owners who received payments though unclaimed property statutes. First, Sunoco says that these owners have not "received" payments, and therefore do not fall under the class definition. As Sunoco explained in oral argument, it contends that the states alone have received the money and, essentially, own it. This argument ignores how unclaimed property statutes work. Whether those laws define the state as a trustee or a custodian of the money, the statutes all say that the state has received

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[4] Sunoco says the plaintiffs have overstated the amount due. Sunoco claims that the plaintiffs can recover only $48 million, of which $30 million arises from payments to unclaimed property funds. The Court, of course, cannot compute damages at this time. But under either side's view, Sunoco's proposed "clarification" would reduce its exposure by well over half.

the assets on behalf of the citizen, and that the owner can get the money at any time. *See, e.g.,* Okla. Stat. tit. 60, §§ 661 , 663-64, 674-75; Tex. Prop. Code Ann. §§ 74.304, 74.501. Sunoco admitted this during oral argument on this motion. Payment to the state differs little from payment to an agent of the owner, or to a trustee on behalf of the owner. Sunoco does not-and cannot-claim that an owner claiming through a trustee or agent does not have a right to interest on a late payment. Moreover, Sunoco's argument essentially amounts to a contention that it can perpetually keep the interest on these payments, regardless how late they are paid. This contradicts the purpose of the PRSA, which Oklahoma adopted to prevent exactly this kind of windfall.

Second, Sunoco argues that calculating the amount due on payments to unclaimed property funds is really hard to do.[5] Sunoco says that under state laws, property becomes unclaimed at various times, and that it cannot pay money into the unclaimed property funds until the statute has lain unclaimed for a period of time. This, Sunoco says, raises an insuperable calamity: on the one hand, the PRSA says Sunoco must pay for the oil within a few months of taking it, but on the other hand the unclaimed property statutes do not allow Sunoco to make the payment for years after the payment becomes due. Nevertheless, at some point the payments become late. Deciding when this occurs presents a legal issue

[5] This position echoes Sunoco's argument throughout the case-that it is not easy to calculate who should receive interest at all, and therefore that it is acceptable not to pay the interest until someone has the gumption to request it.

the Court will resolve at trial. The existence of a contested legal issue, however, does not require the Court to reframe the case on the eve of trial.

Finally, Sunoco says that the issues with unclaimed property make this case inappropriate for treatment as a class action. Although "every member of the class need not be in a situation identical to that of the named plaintiff," *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), Rule 23's requirements do have their limits. *See, e.g.*, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982); *Cole v. ASARCO, Inc.*, 256 F.R.D. 690 (N.D. Okla. 2009); *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). In this case, common questions of law and fact underlie the payments Sunoco has made directly to interest owners, such as Cline, and indirectly to owners through unclaimed fund statutes. The class encompasses all owners Sunoco paid late without including the required interest.

Including these payments will not cause individual questions to predominate or create any superiority or manageabi1ity problems. Sunoco admits that a party to whom money is owed can claim those funds at any time pursuant to the claim procedure of each state. Moreover, the party may make that claim regardless of how the state's laws define the relationship between the state and the interest owner.[6] As noted above, at trial the Court will decide when interest begins accruing for unclaimed funds. That decision will not require extensive

[6] For example, some states may hold the funds in a trust for the benefit of the interest owner, while others consider it a custodial relationship.

individual inquiries or unmanageable analyses of various state laws.

Simply put, the unclaimed property payments fall into the category of payees that Cline represents, and they do not defeat class certification. Thus, the Court will include these payments in the class definition. *Cf. Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 603 (10th Cir. 2008) (recognizing that class certification decisions may involve questions with "no single right answer . . . , but a range of possible outcomes sustainable on the law and facts").

III. CONCLUSION

For the foregoing reasons, the Court DENIES the motion and clarifies that it considers escheat payments, as defined by Sunoco, as part of the class definition. The Court declines to decertify the class.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: 26 November 2019
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
United States District Judge

Appendix L

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 3, 2019

ORDER

This matter comes before the Court on the plaintiffs motion to certify the class (Dk. No. 91) and the defendants' motion for leave to file a sur-reply (Dk. No. 119). For the reasons stated in the accompanying Opinion, the Court GRANTS the motion to certify and CERTIFIES the following class:

> All non-excluded persons or entities who: (1) received Untimely Payments from Defendants (or Defendants' designees) for oil proceeds from Oklahoma wells on or after July 7, 2012, and (2) who have not already been paid statutory interest on the Untimely

> Payments. An "Untimely Payment" for purposes of this class definition means payment of proceeds from the sale of oil production from an oil and gas well after the statutory periods identified in OKLA. STAT. tit 52, §570.10(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold). Untimely Payments do not include: (a) payments of proceeds to an owner under OKLA. STAT. tit 52, §570.10(B)(3) (minimum pay); (b) prior period adjustments; or (c) pass-through payments.
>
> The persons or entities excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America or the State of Oklahoma; (2) publicly traded oil and gas companies and their affiliates; (3) persons or entities that Plaintiffs counsel may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the court.

Further, the Court GRANTS the defendants' motion to file a sur-reply (Dk. No. 119) and DIRECTS the Clerk to docket the sur-reply (Dk. No. 119-1).

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: 3 October 2019
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
United States District Judge

Appendix M

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 3, 2019

OPINION

Perry Cline owns a royalty interest in one or more oil wells in Oklahoma. Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. ("Sunoco"), purchase and resell oil from Cline's wells. Oklahoma law requires Sunoco to pay proceeds from the oil to Cline. If Sunoco pays the proceeds late, it must pay Cline interest on the payment at a rate set forth in Oklahoma's Production Revenue Standards Act ("PRSA"). *See* Okla. Stat. tit. 52, § 570, *et seq.*

Cline has sued Sunoco for paying his production proceeds late without paying the required interest. Cline seeks to maintain a class action on behalf of

other owners[1] whom Sunoco paid late and did not pay interest.

Because Cline meets the requirements for class certification under Federal Rule of Civil Procedure 23, the Court will grant the motion and certify the class.

I. BACKGROUND

The PRSA governs the payment of proceeds for oil and gas production from Oklahoma wells. *See* Okla. Stat. tit. 52, § 570, *et seq*. The PRSA requires the first person who buys oil or gas from an interest owner ("first purchaser") or the person holding the proceeds from the sale of the oil and gas ("holder of proceeds") to pay the wells' interest owners their proceeds within specific times. The first purchaser or holder of proceeds must keep the funds "separate and distinct from all other funds." *Id.* § 570.10(A). With some exceptions, the first purchaser or holder of proceeds must pay statutory interest if it does not pay the proceeds on time. The payor must pay 6 percent or 12 percent interest, depending on the cause of the delay in payment.

Sunoco buys crude oil from oil and gas producers, collects and transports the oil, and resells the oil. It contracts with thousands of oil and gas producers in

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[1] The PRSA defines an "owner" as a "person or governmental entity with a legal interest in the mineral acreage under a well which entitles that person or entity to oil or gas production or the proceeds or revenues" from that production. Okla. Stat. tit. 52, § 570.2. Sunoco's argument distinguishes between owners who have a "royalty interest" in a well, which means an interest in a percentage of the production or the proceeds from the production, and those who have a "working interest," which "entitle[s] the owner . . . to drill for and produce oil and gas." *Id.*

Oklahoma to purchase their oil. Sunoco has paid over 100,000 well owners royalty proceeds for oil and gas production from over 20,000 properties since 2006. It maintains a division order[2] for each property. Sunoco sends division orders to owners and suspends payment until the owner returns a signed and completed division order. If an owner does not want to sign a division order, Sunoco says that it will remove the account from suspension and pay the owner, but that the owner must first tell Sunoco that he or she refuses to sign the division order. When Sunoco pays proceeds late, it often waits until an owner makes a request for interest before investigating the request and paying any necessary interest.

Cline contends that Sunoco has engaged in an ongoing scheme to avoid making the required interest payments.

The proposed class comprises owners of wells in Oklahoma who allege that Sunoco paid them oil proceeds late and without the statutory interest.[3]

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[2] A "division order" documents the division of each owner's interest in the well and the owner's name, address, and tax identification number. Okla. Stat. tit. 52, § 570.11. The division order helps the first purchaser or holder of proceeds pay the proceeds directly to the owner. *Id.*

[3] Cline relies on the expert reports of Barbara Ley, a certified public accountant, to establish that Cline can identify the putative class members and calculate damages class-wide with common proof. For the reasons stated in a separate opinion, the Court will deny Sunoco's motion to exclude Ley's expert report and testimony (Dk. No. 107) and has considered her conclusions to decide the instant motion.

Specifically, Cline seeks to represent the following class[4]:

> All non-excluded persons or entities who: (1) received Untimely Payments from Defendants (or Defendants' designees) for oil proceeds from Oklahoma wells and (2) who have not already been paid statutory interest on the Untimely Payments. An "Untimely Payment" for purposes of this class definition means payment of proceeds from the sale of oil production from an oil and gas well after the statutory periods identified in O[kla]. S[tat]. tit 52, §570.1 0(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold). Untimely Payments do not include: (a) payments of proceeds to an owner under O[kla]. S[tat]. tit 52, §570.10(B)(3) (minimum pay); (b) prior period adjustments; or (c) pass-through payments.
>
> The persons or entities excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America or the State of Oklahoma; (2) publicly traded oil and gas companies and

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[4] This includes the revised definition proposed in Cline's reply. The revisions provide a more narrow and manageable definition, and the Court analyzes whether Cline satisfies the Rule 23 requirements accordingly. The Court will, however, grant Sunoco's motion for leave to file a sur-reply (Dk. No. 119), and it will direct the Clerk to docket the sur-reply.

> their affiliates; (3) persons or entities that Plaintiffs counsel may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; and (4) officers of the court.

(Dk. No. 91, at 30; Dk. No. 114, at 13.)

II. DISCUSSION[5]

Federal Rule of Civil Procedure 23 governs class actions, including class certification. The party seeking certification must first satisfy the requirements of Rule 23(a): (1) numerosity,

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[5] The party seeking class certification bears the burden of proof. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011); *Soseeah v. Sentry Ins.,* 808 F.3d 800, 808 (10th Cir. 2015). "[A]t the class certification stage a district court must generally accept the substantive, non-conclusory allegations of the complaint as true." *Vallario v. Vandehey,* 554 F.3d 1259, 1265 (10th Cir. 2009). Additionally, "'the trial court [must be] satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' Frequently, that 'rigorous analysis' will entail some overlap with the merits of the plaintiffs underlying claim." *Wal-Mart,* 564 U.S. at 350-51 (internal citations omitted) (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 161 (1982)). "[A] district court 'may not evaluate the *strength* of a cause of action at the class certification stage,' but it must determine, 'without passing judgment on whether plaintiffs will prevail on the merits,' whether a plaintiff has satisfied the provisions of Rule 23." *Vallario v. Vandehey,* 554 F.3d 1259, 1267 (10th Cir. 2009) (quoting *Shook, et al. v. Bd. of Cty. Comm'rs, et al.,* 543 F.3d 597, 612 (10th Cir. 2008)); *see also Amgen Inc., et al. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquires at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

(2) commonality, (3) typicality, and (4) adequacy. Fed. R. Civ. P. 23(a). In addition to the requirements of Rule 23(a), the proposed class must fall within at least one of the three types of class actions listed in Rule 23(b). Rule 23(b)(3), the relevant type of class action in this case, requires (5) predominance and (6) superiority. Fed. R. Civ. P. 23(b)(3). Although the Tenth Circuit does not require a separate ascertainability analysis, the Court will consider (7) ascertainability as a separate factor. The Court addresses each requirement in turn.

A. Numerosity

The proposed class representative must demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The plaintiff must present "some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirements. There is, however, no set formula to determine if the class is so numerous that it should be so certified." *Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978). The Court must consider "the particular circumstances of the case." *Id.*; *see also Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.").

Here, the proposed class encompasses thousands of interest owners, which easily satisfies the numerosity requirement under Rule 23(a)(1). *See Rex*, 585 F.2d at 436 (citing certified classes comprising 17 to 358 members).

B. Commonality

The proposed class meets the commonality requirement because it presents "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Even a single [common] question" satisfies this requirement. *Wal-Mart,* 564 U.S. at 359. Cline must show that "the class members have suffered the same injury," and that the "common contention . . . is capable of classwide resolution . . . [and] will resolve an issue that is central to the validity of each . . . claim[] in one stroke." *Id.* at 350; *see also Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013). Furthermore, "every member of the class need not be in a situation identical to that of the named plaintiff," and "[t]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist." *Milonas v. Williams*, 691 F.2d 931,938 (10th Cir. 1982). A common question of law requires the putative class to "share a discrete legal question of some kind." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999)

Cline sets forth four questions of law and fact that he argues satisfy the commonality requirement:

> (1) whether, under Oklahoma law, Sunoco owed interest to Plaintiff and the Class on any and all Untimely Payments; (2) whether owners must make a demand prior to being entitled to receive statutory interest; (3) whether Sunoco's failure to pay interest to Plaintiff and the putative class on any Untimely Payments constitutes a violation of

> the PRSA; and (4) whether Sunoco defrauded Plaintiff and the putative class by knowingly withholding statutory interest [as applied to Count II (fraud) of the original petition].

(Dk. No. 91, at 22-23.) Cline argues that Sunoco's business records and employee testimony will confirm its "uniform policy of not paying statutory interest unless requested by an owner." (*Id.* at 23.) Cline says that the proposed class will use common evidence of Sunoco's unlawful actions, and that if the Court finds Sunoco had a duty to pay that interest without a request and Sunoco breached that duty, every class member will prevail.

The case presents common questions of law and fact "capable of classwide resolution." *Wal-Mart*, 564 U.S. at 350. Sunoco relies on "myriad individualized factors" to argue that the "'common' questions at the center of this case . . . cannot be resolved on a class-wide basis through common proof." (Dk. No. 105, at 31, 41.) Sunoco's challenge to commonality, however, reads more like a challenge to predominance. While factual differences may exist between the individual class members, these differences do not defeat the commonality prong under Rule 23(a)(2). Rather than "broadly conflat[ing] a variety of claims to establish commonality via an allegation of 'systematic failures,'" Cline alleges that Sunoco did not pay statutory interest on late payments to the proposed class members based on Sunoco's single, uniform practice. *J.B.*, 186 F.3d at 1289. Essentially, Cline presents discrete legal questions both about whether Sunoco violated the PRSA pursuant to its policy and about the injuries the proposed class members suffered as a

result. *Id.* If the Court holds Sunoco liable, all the class members prevail. Cline has satisfied the Rule 23(a)(2) commonality requirement.

C. Typicality

In this case, "the claims or defenses of [Cline] are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "limit[s] the class claims to those fairly encompassed by the named plaintiffs claims." *Gen. Tel. Co. of the Nw.*, 446 U.S. at 330. "[D]iffering fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988); *see also DG ex rel. Stricklin, et al. v. Devaughn, et al.*, 594 F.3d 1188, 1198-99 (10th Cir. 2010).

To succeed on his PRSA claims, Cline must show that Sunoco (1) owed Cline payments; (2) made the payments to Cline late; and (3) did not pay the interest on the late payments. *See Chieftain Royalty Co. v. Marathon Oil Co.*, No. Civ-17-334-SPS, 2018 WL 2745906, at *2 (E.D. Okla. June 7, 2018). To succeed on his fraud claim, Cline must show that Sunoco made "1) a material misrepresentation, 2) knowingly or recklessly . . . , 3) with intent that it be relied upon, and 4) the party relying on the false statement suffer[ed] damages." *Silver v. Slusher*, 770 P.2d 878, 881 n.8 (Okla. 1988).[6]

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[6] The accounting, disgorgement, and injunctive relief claims "necessarily flow out of the base claims." *Chieftain Royalty Co.,* 2018 WL 2745906, at *4; *see also Hitch Enters., Inc. v. Cimarex Energy Co.,* 859 F. Supp. 2d 1249, 1258 (W.D. Okla. 2012).

Cline plans to rely on facts related to Sunoco's process for paying statutory interest to prove his PRSA claim. Cline also plans to rely on facts related to Sunoco's check stubs to show that Sunoco concealed the interest it owed to him. Those same facts would also prove-or disprove-the PRSA and fraud claims of the absent class members. Sunoco admits to using the same process for remitting most payments during the class period, and Sunoco used the same check stub format across the class.

Sunoco tries to defeat the typicality prong by arguing that Cline (1) does not have standing to bring claims on behalf of either himself or the class, and (2) has interests adverse to the other putative class members. Sunoco fails on both arguments.

i. Standing

In the midst of briefing this motion, Sunoco filed a motion to dismiss for lack of subject matter jurisdiction, alleging that it paid Cline the amount he seeks in interest. Sunoco thus challenges Cline's standing to bring this action individually or on behalf of the class. The Court will issue a separate opinion and order denying the motion to dismiss and explaining its reasoning. That ruling renders Sunoco's standing argument moot.

ii. Adversity

Sunoco argues that "deep and significant adversity" exists between Cline, a royalty owner, and the working interest owners also included in the class because the class claims "could trigger an obligation on behalf of many of those same working interest owners to indemnify Sunoco." (Dk. No. 105, at 42.) Cline responds that the PRSA only contemplates

claims against the entities who paid the proceeds late, not third parties.

To support its argument on adversity, Sunoco relies on *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). *Cherokee*, however, differs in important ways from this case. In *Cherokee,* the plaintiffs, "two Indian tribes that operate various Indian Health Services programs pursuant to contracts entered into under the Indian Self-Determination Act," received project support costs from the federal government. *Id.* at 359. They performed their contracts separately, and the contracts did not have standard language or specify a particular "full funding" amount. Every year, the Indian Health Services calculated the full contract amount for each contract according to various government circulars. The plaintiffs sued because they had not received full payment and sought class certification for 329 tribes in 35 states, of which 296 had experienced contract payment shortfalls.

The court declined to certify the class partly because the named plaintiffs were not "typical" of the class. *Id.* at 364. It concluded that each tribe's contract "is individual and specific to it, . . . [and] negotiated separately from the other tribes," resulting in different definitions of "full funding." *Id.* Additionally, the court held that "the plaintiffs' interests are antagonistic to those of the members of the proposed class" because the Indian Health Services had a finite budget. *Id.* at 364-65. The damage payments would come from the Indian Health Services' budget, meaning one plaintiffs claim would decrease the funds available to pay the remaining plaintiffs.

In *Cherokee*, the central, substantive issue related to separately-negotiated contract rights that pulled from a common, finite budget. In contrast, this Court need only decide whether Sunoco violated its statutory obligations under the PRSA.[7] The PRSA clearly states that "a ***first purchaser or holder of proceeds*** who fails to remit proceeds from the sale of oil or gas production to owners legally entitled thereto within the time limitations . . . of this section shall be liable to such owners for interest . . . on that portion of the proceeds not timely paid." Okla. Stat. tit. 52, § 570.10(E)(1) (emphasis added).

Sunoco has not demonstrated that the putative class members do not have the same statutory rights as Cline, or that the putative class does not have sufficiently similar financial interests in pursuing these claims against Sunoco. The contracts between Sunoco and working interest owners, or between Cline and his lessees, do not affect Sunoco's obligations under the PRSA. (Dk. No. 105, at 42); *see* 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1768 (3d ed. 2019) ("[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.").[8]

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[7] Sunoco says that working interest owners receive 90 percent of all money paid but has not addressed Ley's observation that Sunoco owes the majority of damages in this action to royalty owners.

[8] *Cf Pueblo of Zuni v. United States,* 243 F.R.D. 436, 449 (D.N.M. 2007) ("Plaintiff challenges th[e] conclusion [that the plaintiffs' interest are antagonistic for the reasons in *Cherokee Nation*] by noting that IHS has never reimbursed the Judgment Fund. Whether or not the IHS has ever actually reimbursed the

Further, the class members do not seek to tap a designated and limited fund, but rather simply seek damages (and equitable relief) against Sunoco.

Simply put, this is not a case in which "[t]he court cannot be assured that the plaintiff[], as [the] representative class member[], will aggressively pursue the claims of all proposed class members because of [his] own possible financial interest." *Cherokee*, 199 F.R.D. at 365.

Accordingly, Cline's claims satisfy the typicality requirement under Rule 23(a)(3). Fed. R. Civ. P. 23(a)(3).

D. Adequacy

Turning to adequacy, Cline must prove that both the representative parties and class counsel will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4), (g)(4). "It is axiomatic that a plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interests of the persons he would seek to represent." *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974). The Court must "stringently appl[y]" this requirement. *Id.*

Sunoco repeats its argument regarding Cline's intra-class conflict in an effort to defeat the adequacy prong. As already explained, Cline has suffered the same injuries and has the same interests and incentives as the putative class to "fairly and adequately" protect the class' interests. Fed. R. Civ. P. 23(a)(4); *cf Rhea v. Apache Corp.*, No. CIV-14-0433-JH,

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Fund . . . does not vitiate the mandate that reimbursement is required [by statute].")

2019 WL 1548909, at *6 (E.D. Okla. Feb. 15, 2019) ("Given the nature of plaintiffs 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 Court also finds that class counsel qualifies as experienced in class actions and other complex civil litigation, and Sunoco does not argue otherwise. Thus, Cline and class counsel meets Rule 23's adequacy requirement.

E. Predominance

Next, Sunoco's challenge to the predominance requirement fails because "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). While similar to the commonality inquiry, "the predominance criterion is far more demanding." *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). It "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. "It is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *CGC Holding Co., et al. v. Broad & Cassell, et al.*, 773 F.3d 1076, 1087 (10th Cir. 2014). Instead, a court must first "*characterize* the issues in the case as common or not, and then *weigh* which issues predominate." *Naylor Farms, Inc., et al. v. Chaparral Energy, LLC*, 923 F.3d 779, 789 (10th Cir. 2019).

A court "should consider the extent to which material differences in damages determinations will

require individualized inquiries." *Roderick*, 725 F.3d at 1220. An "individualized monetary claim[]" may not defeat a finding that common questions exist, but "predominance may be destroyed if individualized issues will overwhelm those questions commons to the class." *Id.* Even so, "there are ways to preserve the class action model in the face of individualized damages." *Id.* (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 41 n.* (2013) (Ginsburg, J., and Breyer, J., dissenting) ("A class may be divided into subclasses for adjudication of damages. . . . Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.")). As long as "at least one common issue predominates, a plaintiff can satisfy Rule 23(b)(3)—even if there remain individual issues, such as damages, that must be tried separately." *Naylor Farms*, 923 F.3d at 789.

Common questions of law and fact predominate. The Court must evaluate Sunoco's practice for paying interest and determine (1) whether Sunoco owed interest to the class for making late payments, (2) whether Sunoco could wait for owners to make a demand before paying that interest, (3) whether Sunoco's failure to pay the interest or delays in paying interest pursuant to its practice violates the PRSA, and (4) whether Sunoco defrauded the class by knowingly withholding that interest. The claims will rise or fall on common evidence. *See CGC Holding*, 773 F.3d at 1088 (explaining that the predominance analysis requires a court to evaluate the elements of the underlying causes of action). If the Court finds liability, it must fashion an appropriate remedy, guided by the objective criteria set forth in the PRSA.

Sunoco points to a number of individual questions that the Court must consider to decide liability and to calculate damages, but the Court does not find them persuasive. For example, Sunoco's argument that "myriad individualized factors" predominate falls short because the Court adopts Cline's modified class definition and accepts Ley's methodology for identifying the class members and calculating damages. Sunoco may vigorously contest Ley's conclusions, but Ley's model can determine damages on a class-wide basis sufficient for this stage of the proceedings.[9] The revised definition excludes payments falling into four categories (the six month grace period, minimum suspense payments, pass-through payments, and prior period adjustments). Ley has said that she can exclude those payments from her model. Ley has also explained the method by which she intends to identify marketable title issues using Sunoco's codes, even if Sunoco contends its own coding system is unreliable for these purposes.

Sunoco also challenges Cline's fraud claim as too individualized. Fraud claims do not always warrant class treatment, particularly "if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed." Fed. R. Civ. P. 23 advisory committee notes to 1966 amendment. Courts will

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[9] The Court can later divide the class into subclasses to determine damages, or amend or alter its class certification order, if necessary. *See Naylor Farms,* 923 F.3d at 798 ("[T]he district court correctly noted that if necessary, it can later divide the class into subclasses for purposes of determining damages."); Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

certify fraud claims, though, when the law of one state applies to the majority of the claims and the check stubs sent to royalty owners "presented . . . a 'standardized, written representation.'" *Rhea*, 2019 WL 1548909, at *9. Cline intends to establish fraud through the check stubs Sunoco issued uniformly to the putative class members. Cline has adequately refuted Sunoco's challenge to the fraud claim and established that the fraud claim "is 'susceptible to general and classwide proof." *Naylor Farms, Inc., et al. v. Chaparral Energy, LLC*, No. Civ-11-0634-HE, 2017 WL 187542, at *8 (W.D. Okla. Jan. 17, 2017) (quoting CGC *Holding*, 773 F.3d at 1089).

Sunoco points to various other individual questions as well, including questions regarding contracts between Sunoco and various well owners, the marketability of title, indemnification agreements, waivers, potential third-party litigation, Sunoco's proposed defenses, and equitable remedies. Notwithstanding those individual inquiries, the class is "sufficiently cohesive to warrant adjudication by representation." *Amchen*, 521 U.S. at 623. Moreover, many of these challenges to class certification are overexaggerated and largely incredible.

Finally, Sunoco asks the Court to apply the five-year statute of limitations and limit the class period to claims arising after July, 2012.[10] *See* Okla. Stat. tit. 52, § 570.14(D). Cline has not adequately rebutted Sunoco's statute of limitations argument. "Oklahoma follows the discovery rule allowing limitations in tort

[10] Notably, Cline's class definition does not specify a time period.

cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." *Resolution Tr. Corp. v. Grant, et al.*, 901 P.2d 807, 813. To toll the statute of limitations, the Court would need to perform individual inquiries into the reasonable diligence of each class member that would defeat the predominance requirement under Rule 23(b)(3). Because Cline has not adequately rebutted that conclusion and has not defined the class period, the Court will limit the class claims to those arising on or after July 7, 2012.

Accordingly, Cline meets the predominance requirement, but the Court limits the class to claims arising on or after July 7, 2012.

F. Superiority

Cline must also show "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To evaluate this requirement, a court should consider

> (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.

Fed. R. Civ. P. 23(b)(3)(A)-(D); *see also Amchen*, 521 U.S. at 615-16 (describing the factors as "nonexhaustive"). "It is enough that class treatment is superior because it will 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *CGC Holding*, 773 F.3d at 1096 (quoting *Amchen*, 521 U.S. at 615).

A class action is superior in this case. This case involves proceeds from Oklahoma wells paid pursuant to the requirements of an Oklahoma statute, and it centers on issues that the Court can resolve class wide. The parties have engaged in extensive discovery and have been litigating the case for over two years. No other litigation is currently pending, and the Court does not foresee any difficulty in managing this case as a class action. Sunoco speculates that the attorneys' fee award will be unduly burdensome but presents no evidence to support that claim. Sunoco also argues that some interest owners "are capable of representing their own interests and resolving any claims they have directly with Sunoco." (Dk. No. 105, at 40.) Sunoco's emphasis on the class members' options to recoup money owed ignores the putative class' interest in a uniform judgment about whether Sunoco's business practice violates the PRSA. Litigating the claims together serves the interests of economy, efficiency, and uniformity of decisions, so Cline meets the superiority requirement.

E. Ascertainability

Although the Tenth Circuit does not enumerate ascertainability as a separate factor in the class

certification analysis, class actions must present "some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement." *Rex*, 585 F.2d at 436; *Shook, et al. v. El Paso County, et al.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[T]he lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification."). The plaintiff does not need to identify every potential class member at the outset of the litigation, but "the class description [must be] sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1760 (3d ed. 2019); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 306-07 (3d Cir. 2013).

To determine ascertainability, courts within the Tenth Circuit require "first, that the class be defined with reference to objective criteria; and second, a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Braver v. Northstar Alarm Servs. LLC., et al.*, 329 F.R.D. 320, 334 (W.D. Okla. 2018). Cline's class definition aligns with the exceptions outlined in the PRSA, establishing that "the class [can] be defined with reference to objective criteria." *Id.* Ley's proposed model provides a reliable and administratively feasible mechanism for determining class membership. *Id.* The Court can therefore ascertain the proposed class.

Curiously, Sunoco simultaneously touts the interest owners' sophistication and understanding of

the PRSA with regard to some factors, and argues that the class members, Sunoco, and this Court cannot reasonably determine who fits into exceptions to a class definition that tracks the language of the statute. Sunoco cannot have it both ways. Ley's model uses Sunoco's business records to specifically identify class members, assuring the Court that, even if the sophisticated interest owners cannot figure out whether they fall within the class, Ley's model can. Moreover, Sunoco's own conduct belies its argument, since, when required to do so, Sunoco itself determines whether putative owners should receive interest, and in what amount.

Accordingly, Cline has demonstrated that the proposed class definition will not present an ascertainability problem.

III. CONCLUSION

Because Cline meets the requirements for class certification, the Court will grant the motion. The Court declines to hold a hearing because it will not aid in the decisional process.

Let the Clerk send a copy of this Opinion to all counsel of record.

Date: 3 October 2019
Richmond, VA

/s/ [handwritten: signature]
John A. Gibney, Jr.
United States District Judge

Appendix N

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 22-7018

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Aug. 3, 2023

Before MATHESON, BRISCOE, and MORITZ, Circuit Judges.

ORDER AND JUDGMENT*

For almost three years, Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals, L.P. (collectively, "Sunoco") have unsuccessfully attempted to appeal several adverse rulings in a class-action

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

lawsuit that resulted in a $155 million damages award against them. We dismissed Sunoco's first attempt as premature, explaining that Sunoco had appealed before the district court entered an order satisfying the two requirements under our precedents for a final, appealable judgment in the class-action context. Specifically, the district court had not entered an order that (1) allocated damages among class members and (2) disposed of any unclaimed class funds. Once the district court adopted an allocation plan purporting to satisfy those finality requirements, Sunoco appealed a second time, reasserting its various merits arguments. But we dismissed Sunoco's second appeal, too, this time holding that Sunoco had failed to establish appellate jurisdiction because it argued that the district court's allocation plan did not, in fact, satisfy the two finality requirements and thus did not result in a final, appealable judgment.

After unsuccessfully seeking rehearing and mandamus relief, Sunoco returned to the district court and filed the Federal Rule of Civil Procedure 60(b)(6) motion at issue in this appeal. The motion asked the district court to modify the allocation plan so that it complies with the two finality requirements, thereby producing a final judgment that Sunoco might at last appeal on the merits. Believing that the plan, as written, already complied with those requirements, the district court denied the motion. Once again, Sunoco appeals. And because the district court's allocation plan satisfies neither finality requirement, we hold that the district court abused its discretion in denying Sunoco's Rule 60(b)(6) motion. We therefore reverse and remand for further proceedings.

BACKGROUND

The class-action lawsuit underlying this appeal stems from Sunoco's role as a first purchaser of crude oil. In that role, Sunoco buys oil from individual wells and pays proceeds to the mineral-interest owners for those wells. Under Oklahoma law, Sunoco must pay these proceeds within certain statutory deadlines and, if it fails to do so, must pay interest. *See* Okla. Stat. tit. 52, § 570.10(A)-(E). In 2017, Perry Cline and several other Oklahoma mineral-interest owners sued Sunoco for allegedly adopting an unlawful practice of paying interest on late proceeds payments only when owners requested such interest. The district court certified the case as a class action consisting of about 53,000 mineral-interest owners, and after a bench trial, it found Sunoco liable. The district court then issued an order in late August 2020 awarding the class about $155 million in total damages and purporting to enter final judgment against Sunoco.

That same day, Sunoco filed its first notice of appeal, challenging the district court's class-certification and bench-trial decisions, among other rulings. But about three weeks later, Sunoco moved to abate the appeal because the district court had yet to enter a final, appealable judgment. *See* Fed. R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies"); 28 U.S.C. § 1291 (permitting appeals from district court "final decisions"). Specifically, the district court had not entered an order that satisfied the two requirements for such a judgment in the class-action context under our precedents: it had not established (1) "the formula that will determine the division of damages among class members" or (2) "the

principles that will guide the disposition of any unclaimed funds." *Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87 (10th Cir. 1982); *see also Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1137-38 (10th Cir. 2010) (holding that class-action judgment was final because district court adopted allocation plan that complied with *Strey*'s two requirements). Since the absence of a final judgment affected our jurisdiction, we ordered the parties to brief whether Sunoco's first appeal should be dismissed. *See* 28 U.S.C. § 1291.

While the parties briefed that issue, the district court adopted an allocation plan addressing the two finality requirements mentioned above. As to the first, the plan adopted Cline's proposal to divide damages by assigning each class member a ten-digit Business Associate ("BA") number corresponding to their account number in Sunoco's records. A judgment administrator would then calculate each class member's damages by multiplying their predetermined percentage of the total judgment by the total judgment. And as to the second, the plan provided that the district court would decide where to send any unclaimed funds after the judgment administrator finished distributing damages to class members. Although the district court "anticipate[d]" sending unclaimed funds to "state accounts for unclaimed property," it "retain[ed] discretion to select a different method of distribution that best serves the interests of the class once all relevant information is available." App. 97. The same day the district court adopted the allocation plan, Sunoco filed a second notice of appeal challenging the plan and all prior adverse rulings.

Soon after, Sunoco filed a supplemental brief in its first appeal, noting that the district court had adopted an allocation plan but arguing that the plan did not constitute a final, appealable judgment under *Strey* and *Cook*. That is so, Sunoco argued, because the allocation plan (1) does not address how to distribute damages among a group of class members associated with two BA numbers that represent aggregate accounts that Sunoco used whenever it lacked a mineral-interest owner's name or address; and (2) makes no definitive preliminary finding about distributing unclaimed funds. The next day, we dismissed Sunoco's first appeal for lack of jurisdiction. *Cline v. Sunoco Partners Mktg. & Terminals L.P.* (*Cline I*), No. 20-7055, 2020 WL 8632631 (10th Cir. Nov. 3, 2020) (unpublished). Without mentioning the district court's recently issued allocation plan, we concluded that the appeal was premature when filed because "the district court had not yet entered a final decision" allocating damages. *Id.* at *1.

That same day, we ordered supplemental briefing in Sunoco's second appeal on whether the district court's allocation plan complied with *Strey* and *Cook*'s finality requirements. In posttrial motions filed in the district court a few weeks later, Sunoco reasserted its position that the plan did not comply with those requirements. The district court denied the motions, summarily rejecting Sunoco's argument that the plan failed to allocate damages among class members and specifically rejecting Sunoco's objection that the plan did not provide for the distribution of unclaimed damages. As to the latter point, the district court asserted that the plan requires the judgment administrator to send unclaimed damages "to state

unclaimed property funds." App. 114 n.10. Sunoco then filed a third notice of appeal challenging the district court's decision, which we consolidated with Sunoco's second appeal.

After full merits briefing and additional supplemental briefing on jurisdiction, we dismissed the consolidated appeals, holding that Sunoco "ha[d] not met its burden to establish [appellate] jurisdiction" because it had filed various briefs arguing that the district court's allocation plan "d[id] not result in a final, appealable judgment."[1] *Cline v. Sunoco Partners Mktg. & Terminals L.P.* (*Cline II*), Nos. 20-7064 & 20-7072, 2021 WL 5858399, at *2 (10th Cir. Nov. 1, 2021) (per curiam) (unpublished), *cert. denied*, 143 S. Ct. 90 (Oct. 3, 2022). Sunoco then petitioned for panel rehearing and rehearing en banc, and alternatively asked that we construe the consolidated appeals as a mandamus petition. When we denied the rehearing petition, Sunoco filed a mandamus petition asking that we order the district court to amend the allocation plan so that it complies with *Strey* and *Cook*. Sunoco's proposed amendment would have (1) instructed the judgment administrator on how to divide damages among the group of class members associated with the two BA numbers that represent aggregate accounts; and (2) incorporated the district court's clarification in the order denying posttrial motions about where unclaimed funds will be

[1] In reaching that conclusion, we expressly declined to consider whether the allocation plan is a final, appealable judgment. *See Cline II*, 2021 WL 5858399, at *3 n.7 ("We do not address whether the district court's [allocation plan] resulted in a final, appealable judgment.").

sent. We denied this petition, too, concluding that Sunoco had not shown it was entitled to mandamus relief.

Undeterred, Sunoco returned to the district court and filed the Federal Rule of Civil Procedure 60(b)(6) motion at issue in this appeal. *See* Fed. R. Civ. P. 60(b)(6) (permitting relief from "a final judgment, order, or proceeding for . . . any other reason that justifies relief"). In that motion, Sunoco asked the district court to modify the allocation plan in the two ways suggested in Sunoco's mandamus petition and to issue a new judgment. *See* Fed. R. Civ. P. 58(a) ("Every judgment and amended judgment must be set out in a separate document . . . ."). The district court denied Sunoco's motion, maintaining that the allocation plan "complies with the [finality] standard set forth in" *Strey* and *Cook* and asserting that it had already "satisfied" Rule 58(a). App. 249. Once again, Sunoco appeals.[2]

ANALYSIS

Sunoco challenges the district court's order denying Rule 60(b) relief. Before addressing Sunoco's challenge, however, we must consider the "threshold question" of whether we have jurisdiction to review that decision. *W. Energy All. v. Salazar*, 709 F.3d 1040, 1046 (10th Cir. 2013) (quoting *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002)). Only after confirming our jurisdiction may we

[2] Sunoco also appealed orders declining to enjoin or stay enforcement of the damages award, but we dismissed those appeals for lack of jurisdiction. *Cline v. Sunoco, Inc. (R&M)*, Nos. 22-7017, 22-7018, & 22-7030, 2022 WL 16578857, at *2 (10th Cir. Aug. 4, 2022) (unpublished).

proceed to address the merits of Sunoco's challenge to the district court's Rule 60(b) decision. *Id.*

I. Appellate Jurisdiction

Our jurisdiction generally extends only to appeals from "final decisions." 28 U.S.C. § 1291. As the party invoking our jurisdiction, Sunoco "bears the burden of . . . demonstrating the finality of the challenged decision." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156, 1164 (10th Cir. 2020). A decision is ordinarily final (and thus appealable) if it "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1189-90 (10th Cir. 2018) (quoting *Hayes Fam. Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1003 (10th Cir. 2017)). In other words, "a final decision is 'one by which the district court disassociates itself from a case.'" *Id.* at 1190 (quoting *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011)).

We agree with Sunoco that the district court's order denying Rule 60(b) relief is final. As Sunoco notes, we typically treat Rule 60(b) denials "as final decisions for purposes of § 1291 because they usually signal that the district court's business is done." *McClendon*, 630 F.3d at 1294; *see also id.* (noting "well[-]settled" rule "that appeal can be taken from final denial of a motion to vacate a judgment" (quoting 15B Wright & Miller, Fed. Pract. & Proc. § 3916 (2d ed.))). Here, we know that the order denying Sunoco's Rule 60(b) motion signaled that the district court's business was done because the district court denied Sunoco's motion for that very reason; it concluded that the allocation plan, as written, already met *Strey* and

Cook's requirements for a final judgment. We also know that the decision left nothing for the district court to do but execute the judgment because, as Sunoco observes, proceedings to execute the judgment are now underway. For these reasons, the district court "disassociated itself from the case" in denying Sunoco's Rule 60(b) motion, and so that denial is final. *Id.*

Cline's contrary argument does not alter our conclusion. He asserts that an order denying a Rule 60(b) motion is a final decision only if "the ruling or judgment the [motion] challenged was [itself] a final decision." Aplee. Br. viii (quoting *Stubblefield v. Windsor Cap. Grp.*, 74 F.3d 990, 993 (10th Cir. 1996)). That standard, Cline says, "creates a dilemma for Sunoco" because the Rule 60(b) motion sought to modify the district court's allocation plan precisely because Sunoco believes that the plan does *not* satisfy *Strey* and *Cook*'s finality requirements. *Id.* To be sure, we have said that our jurisdiction to review a Rule 60(b) denial generally hinges on the finality of "the ruling or judgment the Rule 60(b) motion challenged." *Stubblefield*, 74 F.3d at 993. But we have also made clear that "every post-judgment decision must be assessed on its *own terms* to determine whether it is a final decision amenable to appeal." *McClendon*, 630 F.3d at 1293. The decision appealed here denied Rule 60(b) relief because the district court believed, rightly or wrongly, that its rulings had resulted in a final judgment. And in that circumstance—when a district court "refuses to enter judgment . . . [based] on the mistaken belief that final judgment [has] already . . . been properly entered"—other circuits have concluded that the district court's decision is

final under § 1291. Wright & Miller, *supra*, § 3915 (collecting cases); *see, e.g.*, *State Nat. Bank of El Paso v. United States*, 488 F.2d 890, 892-93 (5th Cir. 1974) (treating "an order refusing to enter judgment" as final under § 1291 "because the district judge *regards* it as final" and "believes he [or she] has already entered a valid judgment"). Like those courts, we are satisfied that the district court's decision is final under § 1291.[3] *See Zinna v. Congrove*, 755 F.3d 1177, 1181 (10th Cir. 2014) (describing final order as one that "evidences the district court's intention that it is the court's final act in the matter"). We therefore have jurisdiction to review it.[4]

II. Denial of Rule 60(b)(6) Motion

Having confirmed our jurisdiction, we now consider whether the district court properly denied

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[3] As Sunoco observes, a contrary conclusion would not avoid resolution of the parties' core dispute about whether the allocation plan is final under *Strey* and *Cook*. That is, if Cline were correct that our ability to review the district court's Rule 60(b) decision really depends on whether the plan is itself final, we would still have to resolve that antecedent finality question to confirm our jurisdiction; we would simply do so "at the jurisdictional threshold" instead of on the merits of the Rule 60(b) denial. Rep. Br. 4.

[4] Because the district court's Rule 60(b) decision is appealable under § 1291, we need not address Sunoco's alternative argument that the decision is also appealable under the pragmatic-finality doctrine. *See Trial Laws. Coll. v. Gerry Spence Trial Laws. Coll. at Thunderhead Ranch*, 23 F.4th 1262, 1268 (10th Cir. 2022) (noting that this doctrine may supply jurisdiction when an "issue is so 'urgent' and 'important' that 'the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review" (quoting *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984))).

Sunoco's Rule 60(b)(6) motion. Rule 60(b)(6) "allows federal courts to relieve a party from a judgment for any reason—other than those in the five enumerated preceding categories—'that justifies relief.'" *Johnson v. Spencer*, 950 F.3d 680, 700 (10th Cir. 2020) (quoting Fed. R. Civ. P. 60(b)(6)). We review an order denying such relief for abuse of discretion, generally reversing "only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Id.* at 701 (quoting *Davis v. Kan. Dep't of Corrs.*, 507 F.3d 1246, 1248 (10th Cir. 2007)). An abuse of discretion necessarily occurs, however, if the district court bases its ruling on a legal error. *Id.*

Sunoco contends that the district court here made such an error when denying Sunoco's Rule 60(b)(6) motion. As mentioned earlier, Sunoco's motion sought to amend the allocation plan so that it complies with the finality requirements for a class-action judgment as set out in *Strey* and applied in *Cook*. Under those cases, a class-action judgment is not final "until the district court establishes both [(1)] the formula that will determine the division of damages among class members and [(2)] the principles that will guide the disposition of any unclaimed funds."[5] *Strey*, 696 F.2d

[5] We note that, contrary to Cline's view, the district court did not produce a final judgment simply by expressing its belief that the allocation plan satisfied *Strey* and *Cook*'s requirements. As Cline acknowledges, whether the district court entered such a judgment depends not only on its intent, but also on the substance of the allocation plan. *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 958 (10th Cir. 2021). So if the allocation plan does not comply with the substantive finality requirements under *Strey* and *Cook*, this failure renders the judgment nonfinal "[n]otwithstanding" the district court's entry of a purportedly

at 88; *see also Cook*, 618 F.3d at 1137-38 (applying same requirements to allocation plan). Sunoco argues that the district court abused its discretion in denying Rule 60(b)(6) relief because the allocation plan does not satisfy either of these two requirements. We address each requirement in turn.

A. Division of Damages

On the first finality requirement, Sunoco questions the allocation plan's formula for "determin[ing] the division of damages among class members." *Strey*, 696 F.2d at 88. Recall that the plan adopted a formula for dividing damages that assigns each class member a ten-digit BA number taken from Sunoco's records. Under this formula, the judgment administrator will then calculate each class member's damages by multiplying their predetermined percentage of the total judgment by the total judgment itself.

Sunoco acknowledges that this formula will produce individual damage figures for most class members because "most [of the BA] numbers correspond to an individual class member." Aplt. Br. 28. But according to Sunoco, the formula will not produce such figures for some class members because, as both parties recognize, two of the BA numbers do not represent individual accounts held by a single class member. Instead, those two BA numbers

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final judgment. *Strey*, 696 F.2d at 88. In arguing otherwise, Cline conflates the finality of the district court's Rule 60(b) ruling with the finality of the allocation plan. As Sunoco explains, "the mere fact that a district court has 'finally' determined that it has issued a final judgment does not resolve the question of whether it actually has." Rep. Br. 7.

represent two undivided accounts that Sunoco deposited proceeds into whenever it did not know a mineral-interest owner's name or address. As a result, those two accounts—which make up over $16 million of the total damages—consist of "numerous unidentified class members owning interests in over 500 distinct properties or wells." *Id.* So when the judgment administrator applies the formula to the undivided accounts, Sunoco argues, it will not produce a damages figure for each of the unidentified class members in those accounts. On the contrary, the formula "will simply yield two more large aggregate sums . . . that require further allocation" among those unidentified class members. *Id.* at 29. Because the allocation plan "is entirely silent about how to do that further allocation," *id.*, Sunoco contends that it fails to establish a "formula that will determine the division of damages among class members," *Strey*, 696 F.2d at 88. We agree that this failure presents a finality problem, and Cline's responses do not persuade us otherwise.

At the outset, Cline argues that Sunoco's records for the two undivided accounts contain enough identifying information for the judgment administrator to discover who the class members associated with those accounts are. But the finality problem Sunoco raises does not stem from the judgment administrator's potential inability to identify the class members from the undivided accounts. Instead, as Sunoco explains, the problem stems from the allocation plan's failure to articulate how the judgement administrator is to divide damages

among those class members once they are identified.[6] And without such instructions, any distribution method the judgment administrator might use to determine individual damage amounts for the cluster of unidentified class members would be of the judgment administrator's own making. This result is at odds with *Strey*, which requires "the district court"—not the judgment administrator—to establish "the formula that will determine the division of damages among class members."[7] 696 F.2d at 88.

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[6] Tellingly, Cline nowhere disputes in his briefing that the allocation plan provides no such instructions. His sole attempt to argue otherwise came at oral argument, when his attorney pointed to the plan's instruction that the judgment administrator must "ascertain the precise amounts of the Net Class Award allocable to each class member." App. 96. But the earlier part of that sentence makes clear that the judgment administrator must do so by "applying the mathematical principles established in the [p]lan." *Id.* And as discussed above, the plan includes no instructions for the two undivided accounts. Thus, the language Cline cites does not alter our conclusion that the allocation plan says nothing about how to divide damages among class members associated with the two undivided accounts.

[7] Cline contends that this requirement means the district court needed only to "set forth" or "state" *some* formula for dividing damages, regardless of whether that formula can produce "individual damage awards [for] every class member" without "further proceedings." Aplee. Br. 36-37. But *Strey* and *Cook* make clear that a formula suffices only if it will result in "the division of damages *among* class members." *Strey*, 696 F.2d at 88 (emphasis added); *Cook*, 618 F.3d at 1138 (noting that allocation plan "provide[d] a thorough framework for determining *each* individual class member's damages" (emphasis added)). And here, the allocation plan's formula will not do so because, again, it fails to instruct the judgment administrator on how to divide damages among the class members associated with the two undivided accounts.

The absence of necessary instructions in the allocation plan also makes Cline's reliance on *Cook* misplaced. There, Cline emphasizes, we concluded that an allocation plan satisfied *Strey*'s first finality requirement because it "simply require[d] the application of mathematical principles to a formula" that would generate individual damage amounts for "each individual class member." *Cook*, 618 F.3d at 1138. But the same cannot be said of the allocation plan here, which adopts a formula that will not produce damage awards for the class members linked to the undivided accounts because it provides no instructions for how to divide damages among those members. So as Sunoco asserts, the judgment administrator will "have to devise its own plan for determining what measure of damages to award to" those class members. Rep. Br. 9. This case is thus unlike *Cook*, where the district court provided "straightforward and mechanical" guidelines for allocating damages among each class member.[8] 618 F.3d at 1138.

In short, although the allocation plan provides a formula that will produce individual damage awards for most class members, it will not produce such awards for the group of class members associated with the two undivided accounts. As a result, and contrary to the district court's conclusion, the allocation plan

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[8] For the same reason, we reject Cline's view that this case resembles *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). In *Boeing*, the district court "fixed the amount that *each* [class] member . . . could recover," meaning the court-appointed special master only had "to administer the judgment and pass on the validity of individual claims." 444 U.S. at 476 (emphasis added). As explained above, the same is not true here.

does not satisfy the first finality requirement. *See Strey*, 696 F.2d at 88.

B. Disposition of Unclaimed Funds

To result in a final judgment, a class-action damages award must also establish "the principles that will guide the disposition of any unclaimed funds." *Strey*, 696 F.2d at 88. Sunoco argues that the district court's allocation plan fails to do so because it "expressly defer[s] the question of how to dispose of any unclaimed funds to a later date." Aplt. Br. 31. Here, too, we agree with Sunoco.

In the allocation plan, the district court made no definitive preliminary finding on where any unclaimed funds would go. To the contrary, the district court announced that it would rule on that issue later, "following the completion of the distribution process . . . and upon the submissions by any interested parties." App. 97. And although it "anticipate[d]" sending unclaimed funds to "state accounts for unclaimed property," it "retain[ed] discretion to select a different method of distribution that best serves the interests of the class once all relevant information is available." *Id.* Based on these statements, we can hardly say that the allocation plan "establishes" principles for disposing of unclaimed funds. *Strey*, 696 F.2d at 88; *see also* Black's Law Dictionary 688 (11th ed. 2019) (defining *establish* as "[t]o settle, make, or fix firmly").

Cline, for his part, does not dispute that the allocation plan allows the district court to resolve the unclaimed-funds issue "after the class damages have been distributed." Aplee. Br. 46. Instead, citing two district-court cases, he contends that district courts

"routine[ly]" reserve "discretion to *revisit* th[is] issue once the total amount of unclaimed funds is known" and, in so doing, do not "defeat finality." *Id.* (emphasis added). But in both cases Cline cites, the district court made an initial determination of where unclaimed funds would go before reserving discretion to choose a different location later. *See Cook v. Rockwell Int'l Corp.*, 564 F. Supp. 2d 1189, 1235 (D. Colo. 2008) (finding that unclaimed funds "shall be distributed to members . . . on a pro rata basis," "[s]ubject to further order of the [c]ourt"), *rev'd on other grounds*, 618 F.3d 1127 (10th Cir. 2010); *In re Urethane Antitrust Litig.*, No. 04-1616, 2013 WL 3879264, at *2 (D. Kan. July 26, 2013) (unpublished) (approving plan specifying that "any remaining funds *would be* distributed to participating class members" but leaving "final determination" of where such funds would go "until the expiration of the claims period" (emphasis added)). Here, on the other hand, the district court made no definitive preliminary ruling on where the unclaimed funds would go; it merely "anticipate[d]" where they might go.[9] App. 97.

And contrary to Cline's view, the district court's later order denying Sunoco's posttrial motions did not fix this finality problem. In that ruling, the district court merely asserted in a footnote that the allocation plan was "adequate [because] it provides for the

[9] Cline comments that in *In re Urethane Antitrust Litigation*, we "affirmed th[e] judgment without any concern about its finality." Aplee. Br. 46. But neither party raised finality issues in that case, and we are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

distribution of [unclaimed] funds to state unclaimed property funds."[10] *Id.* at 114 n.10. But again, the plan does no such thing—it only "anticipates" the possibility that unclaimed funds might end up going to state unclaimed property funds. *Id.* at 97. In any event, as Sunoco notes, the district court never amended the allocation plan to adopt or incorporate this later clarification. So the plan "itself still resolves nothing about the disposition of any unclaimed funds and instead leaves that question entirely to the [district] court's determination at some future date." Aplt. Br. 32-33. For this reason, the district court failed to "establish[] . . . the principles that will guide the disposition of any unclaimed funds." *Strey*, 696 F.2d at 88.

In sum, the allocation plan fails both requirements for a final and appealable class-action

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[10] Cline suggests that Sunoco "abandoned" this argument in *Cline II* by stating in a supplemental brief that it believed the district court "ha[d] adequately provided for the disposition of residual unclaimed funds" through its clarification in the order denying posttrial motions. Aplee. Br. 45 (quoting Appeal No. 20-7064, Aplt. Suppl. Br. 5-6 (Oct. 20, 2021)); *see also Cline II*, 2021 WL 5858399, at *2 n.3 (noting Sunoco's supplemental-brief statement). But Cline neither develops this argument nor cites authority explaining why the earlier statement precludes Sunoco from asserting its unclaimed-funds objection in this appeal. It is not our job "to craft arguments that the parties have not adequately developed." *New Mexico v. Trujillo*, 813 F.3d 1308, 1320 (10th Cir. 2016). Thus, we decline to address Cline's abandonment argument. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) (noting our discretion not to address arguments asserted through "[c]ursory statements, without supporting analysis and case law" (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007))).

judgment under *Strey* and *Cook*. Because the district court denied Sunoco's Rule 60(b)(6) motion based solely on its erroneous contrary conclusion, we remand for the district court to reconsider Sunoco's motion.[11] *See Johnson*, 950 F.3d at 701. In doing so, we take no position on whether Sunoco is ultimately entitled to Rule 60(b)(6) relief, as "the assessment of a motion for relief from judgment under [that provision] is committed, in the first instance, to the discretion of the district court." *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). We note, however, that the necessary consequence of our analysis is that the district court has yet to enter a final judgment.[12] So

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[11] We reject Cline's assertion that the district court denied Sunoco's motion for the additional reason that *Cline II* barred Sunoco from continuing to object to finality. Although the district court *questioned* Sunoco's counsel about that issue at the hearing on the motion, Sunoco rightly notes that such questions "are not *reasons* for denying [the] motion." Rep. Br. 20. And in any event, had the district court concluded that Sunoco could not continue to assert its finality objections, that conclusion would have rested on a misreading of *Cline II*. There, we said only that Sunoco had "waived arguments that might have *supported* . . . jurisdiction" in that appeal. *Cline II*, 2021 WL 5858399, at *3 n.6 (quoting *Tompkins v. United States Dep't of Veterans Affs.*, 16 F.4th 733, 735 n.1 (10th Cir. 2021)). We said nothing about Sunoco waiving its ability to continue pursuing its finality objections in future proceedings. So even if the district court had denied Rule 60(b)(6) relief on the ground that Sunoco waived its finality objections, that erroneous legal conclusion would likewise require reversal. *See Johnson*, 950 F.3d at 701.

[12] In recognizing as much, we do not address Sunoco's argument that the district court improperly denied Sunoco's distinct request for relief under Rule 58. As it did below, Sunoco argues that the district court should have separately issued a new judgment because the August 2020 order designated as a judgment—which we found to be nonfinal in *Cline I*, 2020 WL

although we do not decide whether Rule 60(b)(6) relief is appropriate, we urge the district court to promptly take whatever steps it deems necessary to cure the allocation plan's defects and produce a final judgment that complies with our precedents.

CONCLUSION

Because the district court legally erred in concluding that the allocation plan satisfies the two requirements for a final class-action judgment under *Strey* and *Cook*, we vacate the district court's order denying Rule 60(b)(6) relief and remand for further proceedings consistent with this opinion.

Entered for the Court

Nancy L. Moritz
Circuit Judge

8632631, at *1—was issued before the district court adopted the allocation plan. Sunoco contends that by refusing to issue a new judgment, the district court violated Rule 58(a)'s requirement that "[e]very judgment and amended judgment must be set out in a separate document." But because we have concluded that the district court's existing orders did not result in a final judgment, we need not decide whether the district court followed Rule 58(a)'s procedure for entering such a judgment.

Appendix O

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 22-7017, 22-7018, 22-7030

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Aug. 4, 2022

Before MATHESON, BACHARACH, and PHILLIPS, Circuit Judges.

ORDER

On June 30, 2022, the court directed the parties to file memorandum briefs addressing in detail whether the court has jurisdiction over Appeal Nos. 22-7017 and 22-7030. These matters are before the court on the briefs filed by the parties. Upon careful consideration of the briefs, the applicable law, and district court docket, the court dismisses Appeal

Nos. 22-7017 and 22-7030 for the reasons set forth below.

Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively "Sunoco"), has filed six appeals arising out of the same underlying district court proceeding. They are all related to Sunoco's disagreement with the district court's judgment and orders in favor of a plaintiff class that sued Sunoco for failure to pay interest on late oil proceed payments under Oklahoma law. The district court awarded the plaintiff class $155 million in actual and punitive damages. After its first three appeals were dismissed, Sunoco filed a motion to enjoin enforcement of the judgment "until the [district court] enters a judgment that the Tenth Circuit recognizes as final and appealable and affirms." Doc. No. 376. The district court held a hearing and entered an order granting the motion in part and staying all enforcement actions for 60 days. Doc. No. 405. Sunoco appealed, resulting in Appeal No. 22-7017.

The parties were instructed to engage in mediation while the stay was in place. However, mediation was ultimately unsuccessful, and Sunoco asked the district court to "extend its prior 60-day stay of enforcement actions . . . through resolution of the certiorari petition [related to the dismissal of two of its prior appeals]. . . and . . . the pending Tenth Circuit appeals." Doc. No. 419. The district court denied Sunoco's request and directed the parties to file pleadings to finalize the litigation. Sunoco appealed, resulting in Appeal No. 22-7030.

Generally, this court's jurisdiction is limited to final decisions of the district courts. 28 U.S.C. § 1291.

However, § 1292(a)(1) sets forth an exception to the general rule for interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). "[A] stay order 'by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under [28 U.S.C.] § 1292(a)(1).'" *UFCW Loc. 880-Retail Food Emps. Joint Pension Fund*, 276 F. App'x at 749 n.3 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279 (1988)).

The Supreme Court has explained:

> An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs 'the extraordinary remedy of injunction,' it directs the conduct of a party, and does so with the backing of its full coercive powers.

Nken v. Holder, 556 U.S. 418, 428 (2009) (internal citation omitted). Conversely, "a stay operates upon the judicial proceeding itself" and "[i]t does so either by halting or postponing some portion of the proceeding, *or by temporarily divesting an order of enforceability*." *Id.* (emphasis added). Although "'in a general sense, every order of a court which commands or forbids is an injunction; … in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*,' whereas '[a] stay is an intrusion into the ordinary processes of

administration and judicial review.'" *Id.* (citations omitted).

Here, Sunoco's motion to enjoin execution of the underlying monetary judgment sought only to suspend the ordinary course of proceedings before the district court, not enjoin the plaintiff's out-of-court conduct. It did not ask the court to use its coercive powers against a party; instead, it simply asked the court to pause enforcement of its own judgment until certain appellate issues are resolved. In other words, the relief actually sought by Sunoco—in both its original motion to enjoin execution of the judgment and its notice asking the district court to extend the 60-day stay—was a stay, not an injunction. *See Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007) (holding that this court looks "beyond the captions and vocabulary . . . to determine the actual, practical effect of an order before exercising appellate jurisdiction"). As a result, the district court orders challenged by Sunoco are not appealable under 28 U.S.C. § 1292(a)(1), and this court lacks jurisdiction to consider Appeal Nos. 22-7017 and 22-7030.

Sunoco's motion for an injunction or stay filed in Appeal No. 22-7017 is denied as moot. The court will decide the motion for an injunction or stay filed in Appeal No. 22-7018 by separate order.

Sunoco's motion to consolidate Appeal No. 22-7030 with Appeal Nos. 22-7017 and 22-7018 is denied as moot.

The briefing schedule in 22-7018 will be set by further order of the court.

APPEAL NOS. 22-7017 and 22-7030 DISMISSED.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

* * *

Appendix P

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 21-7063

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

Petitioners.

Filed: Feb. 2, 2022

Before MATHESON, McHUGH, and MORITZ, Circuit Judges.

ORDER

This matter comes before the court on the Petition for Writ of Mandamus ("Petition") Sunoco, Inc. (R&M), and Sunoco Partners Marketing & Terminals, L.P. (collectively "Sunoco") filed after this court dismissed Sunoco's consolidated appeals of the underlying judgment and post-judgment order for failure to establish appellate jurisdiction. *See Cline v. Sunoco Partners Mktg. & Terminals L.P.*, Nos. 20-7064 & 20-7072, 2021 WL 5858399, at *1, *3 (10th Cir. Nov. 1, 2021). The dismissal order expressly declined to decide whether the district court had entered a final, appealable judgment. *Id.* at *3 n.7. Sunoco now seeks

a writ of mandamus directing the district court to enter final judgment.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). "Three conditions must be met before a writ of mandamus may issue." *Id.* at 1187. First, the petitioner must show it has "no other adequate means to attain the relief [it] desires." *Id.* (internal quotation marks omitted). Second, the petitioner must show that its "right to the writ is clear and indisputable." *Id.* (internal quotation marks omitted). Third, the "court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (internal quotation marks omitted).

Under this test, "we will grant a writ only when the district court has acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power." *Id.* at 1186 (internal quotation marks omitted). A court "necessarily abuses its discretion" when it errs in deciding a legal issue, *id.* (internal quotation marks omitted), but "[i]t is not appropriate to issue a writ when the most that could be claimed is that the district court[] . . . erred in ruling on matters within [its] jurisdiction," *id.* at 1187 (internal quotation marks omitted).

Having considered the Petition, the underlying orders, and the record, we conclude that Sunoco has not shown either that it has no other adequate means to obtain relief or that its right to the writ is clear and indisputable. We also conclude that issuance of the writ is not appropriate under the circumstances.

Accordingly, we deny the Petition, including the request for oral argument.

We grant Sunoco's unopposed motion for leave to file bookmarked attachments to the Petition.

Entered for the Court

[handwritten: signature]

CHRISTOPHER M. WOLPERT,
Clerk

Appendix Q

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 20-7064 & 20-7072

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Nov. 1, 2021

ORDER*

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

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

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

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

I. BACKGROUND

A. Legal Background

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

Further, under the Federal Rules of Appellate Procedure,

> [t]he appellant's brief must contain . . . a jurisdictional statement, including . . . the basis for the court of appeals' jurisdiction . . . and . . . an assertion that the appeal is from a final order or judgment . . . or information establishing the court of appeals' jurisdiction on some other basis.

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

B. Sunoco's Briefing

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

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

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

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

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

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

[2] Sunoco also stated that language from the district court's opinion denying its post-judgment motions "creates uncertainty

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

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

Aplt. Br. at 15.

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

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on the finality-of-judgment question." Aplt. First Suppl. Mem. Br. at 3.

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

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

II. DISCUSSION

Sunoco has not met its burden to establish our jurisdiction. Indeed, it has argued the opposite. Sunoco filed four briefs arguing or implying we *lack* jurisdiction because the district court's plan of allocation order does not result in a final, appealable judgment. *See* Aplt. Mem. Br. at 1; Aplt. First Suppl. Mem. Br. at 3; Aplt. Second Suppl. Mem. Br. at 10. Nor does the jurisdictional statement in Sunoco's opening merits brief invoke a basis for our appellate jurisdiction. *See* Aplt. Br. at 15.

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

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

(10th Cir. 2017).[4] We cannot address questions of standing if we lack appellate jurisdiction.

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

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[4] Although "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits," *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quotations omitted), as *Steel Co.*, 523 U.S. at 94, *Lang*, 414 F.3d at 1195, and *Springer*, 875 F.3d at 973, explain, an appellate court must first consider appellate jurisdiction.

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

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

III. CONCLUSION

Sunoco has repeatedly argued that we lack jurisdiction. It has not therefore met its burden to

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(1) Asked the district court to certify an interlocutory appeal under 28 U.S.C. § 1292(b);

(2) Attempted to invoke the collateral order doctrine exception to 28 U.S.C. § 1291's final judgment rule, *see, e.g.*, *Henderson v. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015);

(3) Filed a petition for a writ of mandamus for the district court to enter final judgment, *see, e.g.*, *United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974) ("Appellant . . . filed a notice of appeal, and, on the theory that the court's orders were not final and therefore non-appealable, also filed an application for a writ of mandamus . . . to require entry of final judgment."); or

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

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

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

Entered for the Court

Per Curiam

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

Appendix R

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 20-7064 & 20-7072

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Nov. 29, 2021

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

ORDER

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

[handwritten: signature]

CHRISTOPHER M. WOLPERT,
Clerk

Appendix S

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-7055

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Filed: Nov. 3, 2020

Before TYMKOVICH, Chief Judge, BRISCOE, and EID, Circuit Judges.

ORDER

This matter is before the court on the parties' responses to the court's orders of September 18, 2020 and September 22, 2020 directing them to address the finality of the district court's judgment and whether a premature notice of appeal can ripen in these circumstances. Upon consideration of the memorandum briefs filed by the parties, the district court's docket, and applicable circuit precedent, the appeal is dismissed for lack of jurisdiction.

Generally, this court's jurisdiction is limited to review of final decisions of the district court. *See* 28 U.S.C. § 1291. A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204 (1999). In the context of an award of damages in a class action, the judgment is not final until appealable "until the district court establishes both the formula that will determine the division of damages among class members and the principles that will guide the disposition of any unclaimed funds." *Strey v. Hunt Int'l Res. Corp*., 696 F.2d 87 (10th Cir. 1982); *see also Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1137-38 (10th Cir. 2010) (holding that judgment is final under principles set forth in *Strey* because the district court attached a plan of allocation to its judgment); 15B Fed. Prac. & Proc. Juris. § 3915.2 (2d ed. 2020) ("A determination of damages that does not allocate an aggregate sum among claimants similarly is not final.") (citing *Strey*).

Here, the district court had not yet entered a final decision at the time the notice of appeal was filed. The court had entered judgment against Appellants, awarding actual and punitive damages to the certified class. However, the court had not yet issued a plan to allocate the damages it awarded when Appellants filed their notice of appeal.

Because the district court had not yet entered a final decision under § 1291 at the time the notice of appeal was filed, the court lacks jurisdiction to consider this appeal. Accordingly, the appeal is

dismissed and Appellants' motion to abate is denied as moot.

Entered for the Court

[handwritten: signature]

CHRISTOPHER M. WOLPERT,
Clerk

Appendix T

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-608

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

Petitioners,

v.

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

Respondent.

Filed: Nov. 13, 2019

Before BRISCOE, HARTZ, and PHILLIPS, Circuit Judges.

ORDER

This matter comes on for consideration of the *Petition of Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals L.P. for Permission to Appeal Class Certification*, the *Respondent's Answer in Opposition to Petitioners' Petition for Permission to Appeal Class Certification Order, Motion of Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals L.P. for Leave to File Reply in Support of Petition for Permission to Appeal Class Certification,*

Respondent's Response in Opposition to Petitioners' Motion for Leave to File Reply, and *Reply of Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals L.P. in Support of Motion for Leave to File Reply in Support of Petition for Permission to Appeal Class Certification. See* Fed. R. App. P. 5; Fed. R. Civ. P. 23(f).

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). Among the factors that inform our discretion are whether the district court order sounds the "death-knell" of the claims, whether the order constitutes manifest error, and whether the order involves "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 cases generally." *Id*. at 1263.

After careful consideration of the district court's written order granting class certification, the parties' submissions, and the applicable legal authority, we conclude this matter is not appropriate for immediate review.

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

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

Appendix U

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Apr. 6, 2022

ORDER

This matter comes before the Court on three motions: a motion to modify the Plan of Allocation Order and issue a Rule 58 judgment filed by Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals, L.P. (collectively, "Sunoco"), (ECF No. 372), and two motions to strike filed by the class representative, (ECF Nos. 379,382). The Court held a hearing on these motions on March 31, 2022.

Regarding Sunoco's motion, the Court finds that its Plan of Allocation, (ECF No. 339), complies with the standard set forth in *Strey v. Hunt International Resources Corp.,* 696 F.2d 87 (10th Cir. 1982), and

applied in *Cook v. Rockwell International Corp.*, 618 F.3d 1127 (10th Cir. 2010). *See also Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006) ("In evaluating finality, therefore, we look to the *substance* and *objective intent* of the district court's order, not just its terminology." (emphases in original)); (ECF No. 339, at 13 n.10.) Further, the Court has satisfied Federal Rule of Civil Procedure 58(a). *(See* ECF Nos. 308, 339.)

As for the class representative's motions to strike, at this time the Court will neither strike Sunoco's motions nor will it issue sanctions against Sunoco's counsel.

Thus, for the reasons stated from the bench and those set forth above, the Court DENIES Sunoco's motion to modify the Plan of Allocation Order and issue a Rule 58 judgment and the class representative's motions to strike. (ECF Nos. 372, 379, 382.)

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record and United States Magistrate Judge Kimberly West.

Date: [handwritten: 6] April 2022
Richmond, VA

/s/[handwritten: signature]
John A. Gibney, Jr.
Senior United States
District Judge

Appendix V

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 17-cv-313

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

Plaintiff,

v.

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

Defendants.

Filed: Oct. 30, 2020

PLAN OF ALLOCATION ORDER

This matter comes before the Court on class counsel's proposed plan of allocation of the damages award. (ECF No. 317.) The Court, being fully advised on the issues before it, hereby ORDERS as follows:

A. Definitions of Terms

1. For purposes of this Order:

a. The term "Judgment Fund" means the sum of all actual and punitive damages awarded following the trial in this matter and allowed after any appeal (or after the expiration of time allowed for filing such appeal, if no appeal is filed within that

time), inclusive of any attorneys' fees, expenses, costs, and pre- and post-judgment interest as have been or may be awarded to the class representative and the class, and inclusive of any interest earned through such investments as the Court may direct following the defendants' payment of the judgment.

b. The term "Judgment Administrator" means the officer appointed by the Court pursuant to this Order to execute the Plan of Allocation and to perform such incidental and additional duties as are set forth in this Order or as the Court may subsequently direct.

c. The term "Net Class Award" means the Judgment Fund, less any: (i) case contribution award to Class Representative; (ii) attorneys' fees, expenses, and costs awarded from the Judgment Fund to counsel for the class Representative and the class; (iii) compensation and expenses paid or reimbursed to the Judgment Administrator; and (iv) any additional administrative expenses that may be charged against the Judgment Fund at the Court's direction.

d. The term "Residual Unclaimed Funds" means the amount of the Net Class Award remaining as a result of uncashed distribution checks, inability to locate class members, and/or other such reasons after the Judgment Administrator distributes the Net Class Award to all class members using commercially reasonable efforts according to the Final Distribution Order.

B. The Formula That Will Determine the Division of Damages

2. The Court adopts the proposed allocation found in Exhibit 1 to the Declaration of Barbara Ley

(Class Representative's damages expert), (ECF No. 317-1), as the Court's Plan of Allocation of the Net Class Award. The methodology Ms. Ley used to prepare the proposed allocation was derived from, and consistent with, the methodology that this Court previously approved in support of the plaintiff's motion to certify the class, (ECF No. 91), and admitted into evidence at the trial in this matter in order to determine the total amount of actual damages.[1] Ms. Ley calculated the amount of damages owed to each individual class member, and then summed those figures to determine the amount of damages owed to the class. Ms. Ley then updated those amounts, at the Court's direction, to reflect the time that had elapsed and the interest that had accrued since her original calculation. Ms. Ley then divided the updated damage figure for each class member by the total amount of damages awarded to the class, and thereby determined each class member's proportional share of

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[1] Ms. Ley's methodology here is also consistent with the methodology that has been approved by this Court and used to distribute tens-of-millions of dollars to settlement class members. *See Reirdon v. XTO Energy*, No. 6:16cv87, Final Plan of Allocation Order, ECF No. 141 (E.D. Okla. June 12, 2018); *Reirdon v. Cimarex Energy Co.*, No. 6:16cv113, Final Plan of Allocation Order, ECF No. 114 (E.D. Okla. Apr. 25, 2019); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. 6:17cv334, Final Plan of Allocation Order, ECF No. 127 (E.D. Okla. June 11, 2019); *Chieftain Royalty Co. v. Newfield Expl. Mid-Continent Inc.*, No. 6:17cv336, Final Plan of Allocation Order, ECF No. 75 (June 4, 2020); *DASA Invs., Inc. v. EnerVest Operating,* No. 6:18cv83, Final Plan of Allocation Order, ECF No. 124 (E.D. Okla. June 25, 2020); *McClintock v. Continuum Producer Servs, L.L.C.*, No. 6:17cv259, Initial Plan of Allocation Order, ECF No. 64 (E.D. Okla. June 4, 2020).

the Judgment. The result of this formulaic approach is a list containing each class member's fractional share of the total amount of damages. The Judgment Administrator need only multiply the fractional share for each class member expressed in Ms. Ley's Declaration by the Net Class Award in order to arrive at the exact dollar amount that each class member shall be paid.

C. Procedures for Distribution

3. The Court appoints JND Legal Administration to serve as "Judgment Administrator" in this matter. At such time as the Court directs, the Judgment Administrator, in consultation with class counsel, shall be responsible for applying the mathematical principles established in the Plan of Allocation to ascertain the precise amounts of the Net Class Award allocable to each class member. The result of the Judgment Administrator's calculations shall be submitted to the Court for approval as the Final Plan for Distribution.

4. Prior to any disbursement to Class Members, the Court will establish appropriate procedures for approval of the Final Plan for Distribution. Upon approval, the Court will enter a Final Distribution Order establishing the allocation for purposes of disbursements to Class Members.

5. The Judgment Administrator will also be responsible for distributing the Net Class Award pursuant to such further orders as the Court shall issue.

6. The Judgment Administrator shall report to the Court from time to time to advise the Court of its progress in discharging its responsibilities under this

Order, on such occasions and at such intervals as the Judgment Administrator may deem appropriate or as the Court may direct. The Judgment Administrator is authorized to make reasonable expenditures to secure the resources and assistance reasonably necessary to the performance of its duties. Such expenses, and the compensation of the Judgment Administrator at its usual and customary hourly rates, will be paid and reimbursed from the Judgment Fund periodically, as incurred.

7. The Judgment Administrator shall not commence the performance of its duties under this Order until such time as the case is remanded to this Court from any appeal (or until after the expiration of the time allowed for filing such appeal, if no appeal is filed within that time).

D. Procedures and Principles for the Distribution of any Unclaimed Funds

8. The distribution of any residual unclaimed funds, if any, shall be determined by the Court following the completion of the distribution process outlined in the Final Distribution Order and upon the submissions by any interested parties. The Court concludes that that determination is most appropriately made at that time, as the amount of any residual unclaimed funds may bear on the Court's determination. Consistent with the Court's prior statements on the matter, *(see* ECF No. 298, at 42), the Court anticipates that any residual unclaimed funds will be sent to the same place that Sunoco remitted the underlying proceeds payments, including the appropriate state accounts for unclaimed property. But the Court retains discretion to select a different

method of distribution that best serves the interests of the class once all relevant information is available. To facilitate that determination, after the Judgment Administrator has used commercially reasonable efforts to complete the distribution process outlined in the Final Distribution Order, class counsel shall file a motion stating the amount of any residual unclaimed funds and recommending a method of distribution of those funds, with due consideration given to the Court's anticipated method described above. The Court will then set a deadline for any responses or comments from interested parties.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: [handwritten: 30] October 2020
Richmond, VA

/s/[handwritten: signature]
John A. Gibney, Jr.
Senior United States
District Judge

Appendix W

RELEVANT CONSTITUTIONAL PROVISION AND FEDERAL RULE

U.S. Const. art. III, §2, cl.1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Fed. R. Civ. P. 23

(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 brought or 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).