No. 26-____

IN THE

Supreme Court of the United States

MERIT ENERGY COMPANY, LLC, MERIT HUGOTON, L.P., AND OXY USA, INC.,

Petitioners,

v.

CHERRY RIDER, TRUSTEE OF THE CHERRY RIDER FAMILY TRUST, AND R.W. AND CATHY LUCAS, CO-TRUSTEES OF THE R.W. LUCAS AND CATHY LUCAS LIVING TRUST,

individually and on behalf of all others similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2008, defendant-petitioner OXY USA, Inc. ("Oxy") settled a dispute with a class of mineral interest owners in a Kansas natural gas field. In 2014, defendant-petitioner Merit Hugoton, L.P. acquired Oxy's assets in the area. Plaintiffs-Respondents alleged that petitioners breached the 2008 settlement agreement and sought class certification. They initially proposed a class defined by membership in the settlement, but later sought to certify a broader class. The district court denied certification because it found, *inter alia*, that class membership could not be ascertained in any administratively feasible way and that the putative class included innumerable members without standing to sue under the settlement. The Tenth Circuit reversed on both issues and ordered the class to be certified.

The questions presented are:

1. Whether Federal Rule of Civil Procedure 23 permits certification of a damages class even though the district court finds that there is no administratively feasible way to ascertain members of the proposed class.

2. Whether Article III and Rule 23 permit certification of a damages class where the class is defined to include members who lack standing and undisputed evidence tends to show that the number of members who lack standing is not de minimis.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Merit Energy Company, LLC and Merit Hugoton, L.P. (collectively, "Merit"), and OXY USA, Inc. ("Oxy"). Petitioners were defendants-appellees below.

Respondents ("Plaintiffs") are Cherry Rider, trustee of the Cherry Rider Family Trust, and R.W. and Cathy Lucas, co-trustees of the R.W. Lucas and Cathy Lucas Living Trust. Respondents were plaintiffs-appellants below.

Merit Energy Company, LLC is a limited liability company. Merit Hugoton, L.P. is a limited partnership.

OXY USA, Inc. is wholly owned by Occidental Petroleum Corporation (NYSE: OXY). Berkshire Hathaway Inc. (NYSE: BRK.B) owns more than 10% of Occidental Petroleum Corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Cherry Rider, Trustee of the Cherry Rider Family Trust et al.,* v. *Oxy USA, Inc. et al.*, No. 25-3142 (10th Cir. May 5, 2026).
- *Cherry Rider, Trustee of the Cherry Rider Family Trust et al.,* v. *Oxy USA, Inc. et al.*, No. 23-1274-KHV (D. Kan. June 18, 2025).

Petitioners are unaware of any other proceedings that are directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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In this case, the district court held that a putative class could not be certified because, among other reasons, respondents ("Plaintiffs") provided no means by which class members could be feasibly identified and the class definition included members without standing who also could not be easily identified. The Tenth Circuit, however, reversed and ordered class certification. In its view, a class need only be objectively defined to be ascertainable, even if identifying thousands of class members would require laborious scrutiny of member-specific ownership documents running back more than a decade. Moreover, the Tenth Circuit held that a damages class can be defined so as to sweep in innumerable class members who lack standing, with the identification of those who do have standing postponed until after a liability verdict is entered in favor of the class.

That erroneous decision amplifies two different circuit splits on important class certification issues that each merit the Court's review. First, the Tenth Circuit deepened a longstanding conflict by holding that the requirement that class membership be ascertainable is satisfied even if there is no administratively feasible mechanism for identifying class members. Second, the Tenth Circuit joined the wrong side of a circuit split as to whether, and if so when, a class can be certified where the class definition includes members without standing. This Court has twice granted certiorari on that issue without being able to resolve it, and this case presents an ideal opportunity to do so. The Court should reject the Tenth Circuit's extreme position that not only can a class be certified when it is defined to include countless members without standing, but the

identification of those members can be deferred indefinitely even after a liability verdict.

Particularly given the difficulty of obtaining appellate review of class certification decisions, the Court should resolve these persistent circuit conflicts now. The Tenth Circuit has lowered the burden to justify class claims for damages by postponing otherwise-disabling individualized questions on the identification of the class itself and its members who lack standing until defendants are faced with the potentially crippling liabilities of a certified class and a classwide liability verdict. The likely result will be unfairly forced settlements with classes inflated by unknown or uninjured members (or, as here, both), because plaintiffs were not required at the outset to offer any means to identify class members or weed out those without standing. The Court should therefore grant the petition to restore clarity and uniformity in the circuits on these crucial questions.

OPINIONS BELOW

The Tenth Circuit's opinion reversing the district court's judgment is reported at 175 F.4th 1214 and reproduced at App. 1a-31a. The district court's opinion is reported at 2025 WL 1707377 and reproduced at App. 32a-57a.

JURISDICTION

The Tenth Circuit issued its judgment on May 5, 2026 and denied Petitioners' timely petition for rehearing en banc on July 10, 2026. *See* App. 58a. On September 8, Justice Gorsuch extended the time to file this petition until November 6, 2026. This Court has jurisdiction pursuant to 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. 60a-70a.

STATEMENT OF THE CASE

A. Factual Background.

The Hugoton Field in Kansas is North America's largest gas field and the world's second largest. *See* Kansas Geological Survey, *Hugoton Natural Gas Area of Kansas* (https://kgs.ku.edu/hugoton-natural-gas-area-kansas). More than 25 years ago, plaintiffs owning mineral interests in that field brought class claims against petitioner Oxy in Kansas state court. App. 4a. They alleged Oxy took improper deductions before paying royalties. *Id.*; CA10 Appx. 7:231-32.[1] That case resulted in a 2008 class settlement (the "*Littell*" settlement) in which Oxy agreed to limit future deductions on royalties paid to class members and their successors in interest. App.4a-5a.

Over the next six years, Oxy drilled hundreds of additional wells in and around the Hugoton field. App. 17a; CA10 Appx. 2:229. Oxy, however, applied the *Littell*-settlement payment methodology to some payees in that region even when they were not part of the *Littell* settlement. *See* App. 6a-7a n.3; CA10 Appx. 1:243; CA10 Appx. 2:196-97. In 2014, petitioner Merit acquired Oxy's assets and leases in the area and began paying royalties to interest owners that Oxy previously paid. App. 6a. These payees included both *Littell* settlement class members and

[1] The Tenth Circuit appendix is cited by Volume number and page number.

the other mineral rights owners whose interests arose later. CA10 Appx. 2:196-97.

B. The Undisputed Evidence On Lack Of Ascertainability And Standing.

In late 2023, Plaintiffs filed this putative class action in the Kansas District Court. 28 U.S.C. § 1332(d) (granting federal jurisdiction). They alleged that Merit and Oxy breached the *Littell* settlement agreement by taking excessive deductions. App. 7a.

Plaintiffs initially proposed a class comprising only the original *Littell* settlement class and their successors in interest. App. 8a. In discovery, however, Merit maintained that identifying the members and successors of the *Littell* settlement class—by then over fifteen years old—would require individualized tracing of title to mineral interests whenever an original settlement class member had transferred its mineral interests. CA10 Appx. 1:169.

In an attempt to sidestep those issues, Plaintiffs changed their class definition. Rather than measure class membership by the *Littell* settlement class—the only parties with standing to sue under the settlement agreement—Plaintiffs sought to certify a class comprising (with an exception not pertinent here) everyone Merit had paid since December 2017 "under oil and gas leases in the Kansas Hugoton Field that were assigned to Merit by OXY." App. 8a-9a; CA10 Appx. 1:169.

Merit opposed on multiple grounds, including two relevant here.[2] First, Merit explained that Plaintiffs'

[2] One of Merit's substantive defenses to Plaintiffs' claims is that it is not bound by the *Littell* settlement. *See* App. 7a n.4. But the opposition to class certification was not based on that defense.

class was not ascertainable. Similar to most operators of mature producing oil and gas assets, Merit's royalty payments are well-based, not lease-based. In most cases wells are "unitized," which means royalties from those wells are apportioned to different royalty interests in the surrounding 640 acres, corresponding to multiple leases, based on the totality of each payee's royalty interests. CA10 Appx. 2:202. Payments therefore do not identify which lease or leases each payment implicates. *See* App. 46a (Merit's evidence showed that "Merit's royalty payment records alone do not establish class members because the payment records do not tie payees to specific oil and gas leases"). As the district court held below, to determine which leases a payee's interests derive from—let alone exactly how Merit acquired those lease rights—"[t]he [c]ourt would have to individually inquire into Merit's payment records, lease records and acquisition records, along with public land records and relevant transfer documents for each payee." App. 49a. That task is both difficult and time-consuming at best, and in many cases impossible from Merit's internal files alone. CA10 Appx. 2:202-04.

Second, Merit showed that Plaintiffs' new class definition included members who were not part of the *Littell* settlement class and therefore could not have standing to assert claims for breach of that settlement agreement. As noted, from 2008 to 2014, Oxy drilled hundreds of new wells in the Hugoton field and, accordingly, had likely paid many new interest holders who were not entitled to enforce the *Littell* settlement. *See supra* at 4. Thus, Plaintiffs' new class definition—everyone Merit paid under a Hugoton lease acquired from Oxy—necessarily included payees who were not *Littell* settlement class members or

their direct successors in interest and therefore lacked standing. As the district court found, Merit presented evidence that its "payments on former Oxy properties also include some royalty payees and payments where Merit's interests are not derived from the Oxy acquisition, but from some other acquisition, direct leasing by Merit or unleased and/or unknown mineral owners." App. 45a. *See also* CA10 Appx. 2:202.

Moreover, undisputed evidence showed that "even if Merit could identify individuals who received royalties on leases acquired from Oxy, the payees may not be the current record and legal title owners under the oil and gas leases and may not be entitled to royalty payments." App. 46a. Identifying those successor interest holders entitled to sue for breach "would require a manual individualized investigation of any actual transfer documents," "title searches in public records," and retaining "title attorneys to provide title opinions." App. 46a-47a.

Merit also presented undisputed evidence showing that the class's overbreadth was likely substantial. Of the thousands of recipients of payments on wells acquired from Oxy in 2014, ***more than 60%*** were not included on the list of *Littell*-class members Plaintiffs provided (a list itself subject to doubt). App. 20a; CA10 Appx. 2:242-46. While some of those thousands might have standing as successors to original *Littell* class members, Plaintiffs offered no evidence or methodology to establish how many do.

C. The District Court Denies Certification.

The district court denied certification. App. 32a-57a. The court first exhaustively examined defendants' unrefuted affidavits, documents and expert opinions showing that "class members are not ascertainable

because to ascertain class members, [defendants] would need to conduct an individualized land-ownership analysis * * *." App. 45a-49a. The court then found that determining class membership "is not administratively feasible" because of the need to individually examine title and ownership records. App. 49a-50a. Given that "Plaintiffs suggest[ed] no alternative methodology to ascertain class members without such individualized inquiries," the court found that "class members are not reasonably ascertainable, and class certification is inappropriate in this case." App. 50a.

Regarding standing, the court noted that plaintiffs had identified at least one class member with standing. App. 42a. But the court did not stop there. It held that "plaintiffs' proposed class may include individuals without standing to enforce the [*Littell*] Settlement, meaning that they have no claim for breach of contract." App. 52a. These individualized issues going to standing defeated typicality, predominance and commonality under Rule 23(a)(2), (a)(3), and (b)(3). App. 52a-53a, 55a; *see also* App. 17a (Tenth Circuit's recognition that "[t]his concern—that Plaintiffs have not shown that the class members have a claim and standing—affected the district court's certification analysis as well.").

The district court therefore denied certification based on these and other defects.

D. Proceedings In The Court Of Appeals.

After allowing appellate review under Rule 23(f), the Tenth Circuit reversed on both issues, reversed the denial of class certification, and ordered certification of Plaintiffs' proposed class. The court first noted the divergence of views in the circuits as to whether

administrative feasibility can be considered in determining ascertainability. App. 11a-12a. But the court followed its decision in *Cline* v. *Sunoco, Inc. (R&M)*, 159 F.4th 1171 (10th Cir. 2025), which "rejected the 'administrative feasibility' requirement" and held that for class membership to be ascertainable, the class definition need only be clear and objective, with members identifiable using "reasonable" accuracy. App. 13a (quoting *Cline*, 159 F.4th at 1194-96).[3]

The panel also rejected Petitioners' standing arguments. The court acknowledged defendants' unrebutted evidence that the certified class likely included thousands of members who were not *Littell* class members and who would therefore not have standing to assert the claims in this case, and that "individualized title searches" would be needed "to connect class members to the *Littell* settlement." App. 20a. But the court held that plaintiffs need only show that at least some class members had standing. App. 21a-22a. As the court held later in its opinion, it was immaterial that many other members likely suffered no injury at all, because that inquiry could be deferred until after a classwide liability verdict. Even though "Defendants are correct that eventually each class member will need an ownership interest that connects to the *Littell* settlement," and despite evidence of a "fraught situation of indeterminable ownership," the court held that "the mechanics of this determination are best left for the damages stage." App. 29a.

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[3] As discussed below, *see infra* at 33-34, the Court recently denied a petition for certiorari in *Cline*, but that denial does not affect this petition.

Because the panel weighed each Rule 23 factor differently than had the district court, it concluded that "[t]he proper inquiries under each Rule 23 requirement support certification of the class." App. 22a. It therefore reversed the certification denial "with instructions to certify a class." App. 31a.

REASONS FOR GRANTING THE PETITION

This case raises two questions that have deeply divided the courts of appeals: first, whether a plaintiff seeking class certification under Rule 23 must demonstrate that there exists a reliable and administratively feasible mechanism for identifying who falls within that definition; and second, whether, and if so, to what extent, a plaintiff can define a putative class to include members without standing.

The circuits have staked out different positions on both questions, and the Tenth Circuit's decision adds to the disarray. By expressly "reject[ing] the 'administrative feasibility' requirement," App. 13a, and aligning itself with the "majority" of circuits, *see Cline*, 159 F.4th at 1195-96, the Tenth Circuit has allowed named plaintiffs to put off—possibly forever—any requirement that they be able to feasibly identify exactly who they represent. And by not only allowing but requiring a district court to certify a class despite undisputed evidence that possibly thousands of class members lack any conceivable standing, the Tenth Circuit has allowed named plaintiffs to secure a liability verdict on behalf of a class that could be chock full of uninjured plaintiffs.

On both counts, the Tenth Circuit significantly lowered the bar for certifying a damages class and offered class plaintiffs—and their counsel—two additional tools to avoid class-disabling individual

inquiries: they can define a class even if they have no hope of feasibly identifying who is in it, and they can define it broadly without regard for whether the resulting class members would even have standing to assert the class's claims. Nor is this problem academic: because certification is often effectively dispositive and highly coercive, the standards governing what plaintiffs must demonstrate at the certification stage are vital.

This Court should grant certiorari to resolve both conflicts.

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON WHETHER ASCERTAINING CLASS MEMBERSHIP MUST BE ADMINISTRATIVELY FEASIBLE.

A. There Is a Deep And Intractable Split Among the Circuits.

Rule 23 is a procedural rule that cannot "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). A plaintiff cannot aggregate claims when doing so would prevent a defendant from asserting defenses that vary from one class member to the next. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011). Damages classes are particularly troublesome. The Rule 23 amendments allowing for such claims marked an "adventuresome innovation" for situations "in which class-action treatment is not as clearly called for." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614-15 (1997) (quotations omitted).

Rule 23 therefore requires named plaintiffs to make a heightened showing that courts must rigorously analyze. *See id.* They must show, among other things, that the case will not be burdened by

individual inquiries that predominate over common ones. Fed. R. Civ. P. 23(b)(3). Damages class actions also have notice and opt-out requirements to prevent absent members' claims from being involuntarily extinguished. *Wal-Mart*, 564 U.S. at 362-63.

For these requirements to be meaningful, however, a court must first be able to determine who is actually in the class. Accordingly, "most circuits require the class to be ascertainable before granting class certification." App. 11a. And courts uniformly recognize that plaintiffs "must satisfy this requirement before the district court can consider whether the class satisfies" other Rule 23 factors. *Cherry* v. *Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). Yet the circuits sharply disagree over what ascertainability requires. All agree that a named plaintiff must define the putative class objectively. But they part ways over whether a plaintiff must also demonstrate an "administratively feasible" means to identify who actually meets the class definition.[4]

As Judge Tymkovich recently noted in disagreeing with the Tenth Circuit's approach in this case, "[t]he disparity among the circuits regarding the proper role of administrative feasibility in the class-certification analysis creates confusion and will likely encourage forum-shopping by plaintiffs for certification-friendly courts." *Dunn* v. *Santa Fe Nat. Tobacco Co.*, 185 F.4th

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[4] *See*, *e.g.*, Zachary L. Sanders, *Administrative Feasibility Redux: A Reexamination of the Heightened Ascertainability Requirement for Class Certification*, 98 N.Y.U. L. Rev. 2273, 2273 (2023) (noting that "the Supreme Court has yet to weigh in on this glaring rift in class action jurisprudence"); Cong. Research Serv., *Congressional Court Watcher: Circuit Splits from May 2026* at 1-2 (noting that Tenth Circuit's decision in this case entrenches the circuit split on ascertainability) (https://tinyurl.com/37vjuf7c).

999, 1049-50 (10th Cir. 2026) (Tymkovich, J., dissenting). Accordingly, "[r]esolution of that split by the Supreme Court * * * would mitigate these issues" and likely "would improve [the Tenth Circuit's] compliance with the Rules Enabling Act and its mandate that class actions may not facilitate shortcuts around substantive issues." *Id.* at 1050.

1. The Third, Fourth, And First Circuits Require Plaintiffs To Demonstrate An Administratively Feasible Mechanism For Identifying Class Members.

On one side of the divide are circuits that treat feasible identification as an essential prerequisite to ascertainability and therefore certification. The Third Circuit has held that at certification, a plaintiff must prove both "(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." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 183 F.4th 178, 192 (3d Cir. 2026) (quoting *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 130 (3d Cir. 2023)); *see also Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("The method of determining whether someone is in the class must be 'administratively feasible.'"). That approach was first laid out in *Marcus* v. *BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), where the Third Circuit required named plaintiffs to demonstrate that the process of identifying class members could be done without requiring mini-trials. *Id.* at 593-94. After all, if substantial individualized inquiries are required to determine who is in a damages class at all, then the primary justification for allowing such a procedure—

efficiency—is illusory. *Id.* at 593; *see also Amchem Prods.*, 521 U.S. at 614-15.

The Fourth Circuit has similarly held that class action plaintiffs must "define a class in such a way as to ensure that there will be some administratively feasible [way] for the court to determine whether a particular individual is a member at some point," without requiring "extensive and individualized fact-finding or mini-trials." *Krakauer* v. *Dish Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (quoting *EQT Prod. Co.* v. *Adair*, 764 F.3d 347, 358 (4th Cir. 2014)) (internal quotation marks omitted). That standard was met in *Krakauer* when phone records readily identified class members. *Id.* But it was not met in *EQT* when ownership in mineral estates could not be established from available documents due to potential changes in ownership over time. 764 F.3d at 359. The First Circuit recognized a similar standard in *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015). There, the court held that certification requires a determination whether, "prior to judgment," an "administratively feasible" method exists to identify class members with viable claims, and cited the Third Circuit's *Carrera* decision to support that conclusion. *Id.* at 19.

2. Other Circuits Reject Administrative Feasibility As A Requirement For Ascertainability And Require Only Objective Class Criteria.

On the other side of the divide, a collection of circuits hold that a class is ascertainable so long as it is defined by objective criteria, even if identifying individual members may be burdensome or uncertain. The Second Circuit has acknowledged that Rule 23 "demands that a class be sufficiently definite so that

it is administratively feasible for the court to determine whether a particular individual is a member." *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017) (citation omitted). But in that circuit, administrative feasibility "does not directly concern itself with the plaintiffs' ability to offer ***proof of membership*** under a given class definition." *Id.* at 269 (emphasis in original). It requires only that a class be "defined using objective criteria that establish a membership with definite boundaries" to establish a "clear sense of who is suing about what." *Id.*

In *Rikos* v. *Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), the Sixth Circuit expressly disagreed with the Third Circuit in rejecting any feasibility requirement. *Id.* at 525 ("[W]e see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts."). The court held instead that a class need only be defined by "objective criteria," and that an eventual identification with "reasonable" accuracy, potentially based on a "substantial review" of files, was no impediment to certification. *Id.* at 526.

The Seventh Circuit has also held that "imposing [a] stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements." *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015). Instead, it applies the "'weak' version of ascertainability" that requires only objective criteria. *Id.* at 659. The Eighth, Ninth, and Eleventh Circuits hold the same. *See Cherry* v. *Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021) ("Proof of administrative feasibility cannot be a precondition for certification."); *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121, 1128-29 (9th Cir. 2017) (rejecting the "Third Circuit['s]

expressed concern" over identifying class members for providing notice), *abrogation on other grounds recognized by Healy* v. *Milliman, Inc.*, 164 F.4th 701, 709 (9th Cir. 2026); *Sandusky Wellness Ctr., LLC* v. *Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) ("[T]his court has not addressed ascertainability as a separate, preliminary requirement" and instead "adheres to a rigorous analysis of the Rule 23 requirements"). And the Federal Circuit, in a recent comprehensive survey, agreed with these circuits that "there is no basis for finding a lack of ascertainability because it is difficult to identify the class members." *Freund* v. *McDonough*, 114 F.4th 1371, 1378 (Fed. Cir. 2024).

B. The Tenth Circuit Joined The Wrong Side Of The Circuit Split.

In siding with circuits that do not require district courts to consider—and even prevent them from considering—"administrative feasibility" as a component of ascertainability, the Tenth Circuit joined the wrong side of the circuit split. The district court in this case explicitly recognized that split and elected to follow the Third and Fourth Circuits' position. *See* App. 44a, 49a-50a. In reversing, the Tenth Circuit relied on its recent decision in *Cline* which held, with little discussion, that administrative feasibility should be considered, if at all, only as an element of a different Rule 23 requirement (superiority). 159 F.4th at 1195-96. In this case, the court confirmed that *Cline* "rejected the 'administrative feasibility' requirement" followed by the Third Circuit in favor of the different view adopted by the "majority" of circuits. App. 12a-13a.

That approach does not comport with Rule 23's overriding goal of protecting the parties' legal

interests from being compromised by the procedural vehicle of certification. Superiority asks only a comparative question—whether a class action is preferable to alternatives. Ascertainability considers the antecedent question whether any coherent class exists in the first place and, if so, who is in it. As Judge Tymkovich recently noted in disagreeing with the Tenth Circuit's holdings in *Cline* and in this case, "an approach that more-or-less precludes district courts from denying certification solely on administrative feasibility grounds can morph Rule 23's procedural rules into a substantive shortcut for plaintiffs to prove elements of their legal claims." *Dunn*, 185 F.4th at 1045.

As the Third Circuit explained in *Marcus*, given that a defendant in an individual action would have an indisputable right to cross-examine the actual plaintiff regarding elements of his or her claims, granting named plaintiffs the power to define a class without any feasible or fair method to identify absent members raises "serious due process implications." 687 F.3d at 593-94. Moreover, requiring feasible ascertainability "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Id.* at 593. If nobody can viably determine who is in a class, then defendants have no way to know who is even suing them or what their potential liability could be.

Nor are defendants the only ones who suffer. For absent class members, administrative feasibility helps protect their notice and opt-out rights, since they cannot be apprised of these rights if they cannot be identified in the first place. *See* Fed. R. Civ. P. 23(b)(3), (c)(2)(B); *Marcus*, 687 F.3d at 593 (citing *Manual for Complex Litig.*, § 21.222 (4th ed. 2004)).

And for courts, administrative feasibility protects scarce judicial resources by preventing class plaintiffs from hiding individualized evidentiary issues at class certification. That concern is especially serious in class cases for damages, since efficiency and convenience are the primary—possibly the only—justifications for them. *See Amchem*, 521 U.S. at 615.

Allowing class plaintiffs to avoid offering any means to identify proper class members until some indeterminate future time lessens these protections. Class claims can proceed based solely on named plaintiffs' estimates of the total number of class members and vague assurances that they can someday be identified. But once a class is certified, defendants face potentially immense settlement pressure. The primary beneficiaries of this arrangement are class counsel, who stand to reap a portion of an inflated settlement without ever identifying the members on whose behalf they purport to sue.

That is the situation presented here. The class is defined as anyone Merit paid on a lease received from Oxy. But as the district court found on an undisputed record, identifying these class members cannot be done through a simple review of Merit's payments in part because Merit's payments are well-based, not lease-based. Accordingly, to determine which leases a payee's interests derive from and how Merit acquired those rights "the [c]ourt would have to individually inquire into Merit's payment records, lease records and acquisition records, along with public land records and relevant transfer documents for each

payee." App. 49a. As the court found, that task is not administratively feasible. App. 49a-50a.[5]

By holding that a damages class is ascertainable even if there is no administratively feasible method for identifying its members, the Tenth Circuit has improperly allowed Rule 23 to abridge substantive rights. Allowing certification of such classes overrides both defendants' basic due process rights to know at the outset of a case who is suing them, and absent class members' rights to opt out. Here, for example, class notice will be issued without the class even being identified, and petitioners' potential liability will be improperly inflated by those spurious potential claims. Nor, as this case shows, is that problem rectified by considering this issue under the rubric of superiority. The Tenth Circuit concluded that a class action was a superior method for adjudicating common issues as to breach of the settlement, and therefore directed certification, even though the district court found based on undisputed evidence that no feasible mechanism exists to even determine who is suing in the first place. The Court should therefore grant certiorari to resolve this persistent circuit split and restore the safeguards of Rule 23.

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[5] The Tenth Circuit downplayed these problems by concluding that if Merit's files are good enough to process payments each month, they should be good enough to establish class membership. App. 14a-16a. That approach does not comport with the undisputed facts establishing that payments alone do not establish class membership for the reasons explained above. That Merit pays a given person or entity does not establish that the payment is due to a specific lease acquired from Oxy in 2014, which is what determines class membership. And in any event, the Tenth Circuit held as a matter of law that administrative feasibility is irrelevant to the ascertainability inquiry.

II. THE TENTH CIRCUIT'S DECISION DEEPENS A CIRCUIT SPLIT OVER WHETHER A CLASS MAY INCLUDE UNINJURED MEMBERS.

The Tenth Circuit also took the wrong side in a deep divide over the role standing plays in class certification. This Court has held that class members must establish standing before obtaining relief. *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 442 (2021). But the circuits disagree on whether, and to what extent, courts can certify classes containing members who lack Article III injury. Several hold that a class cannot be certified if defined to include any members without standing; others hold that such overbreadth will not preclude certification if only a de minimis number lack standing; and the remainder treat standing of unnamed members as largely irrelevant to certification. The Tenth Circuit has now joined the latter group and has taken the extreme position that not only can a plaintiff obtain certification without even positing a method for weeding out uninjured members, but that this inquiry can be deferred indefinitely, even past a verdict on class liability. This Court has repeatedly granted certiorari to resolve this persistent conflict, but the question remains open. The Court should grant certiorari to resolve it in this case.

A. The Split Is Deep And Persistent But Has Previously Evaded This Court's Review.

1. The Second And Eighth Circuits Hold That A Class Cannot Be Certified If Defined To Include Members Without Standing.

On one end of the spectrum are circuits that treat standing as a threshold constraint on the class definition itself. If the proposed class definition would sweep in members who cannot have standing to assert the claims asserted, those circuits hold that the class cannot be certified; it must instead be trimmed to its proper size or the case must proceed on behalf of the named plaintiffs alone.

The Second Circuit has held categorically that "no class may be certified that contains members lacking Article III standing," and that any "class must therefore be defined in such a way that anyone within it would have standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). The Eighth Circuit has likewise held that "[a] class cannot be certified where it is defined in such a way to include individuals who lack standing," *Johannessohn* v. *Polaris Indus., Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021), and that "[i]n order for a class to be certified, each member must have standing," *Halvorson* v. *Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). Both courts thus treat the existence of class members without standing as a fundamental defect in the class definition that precludes certification.

2. The D.C., First, And Fourth Circuits Hold That A Class Cannot Be Certified If It Contains A Significant Number of Uninjured Members.

Three circuits occupy a middle ground. They do not categorically prohibit certification if some class members lack standing, but hold that Rule 23(b)(3)'s predominance requirement is not satisfied if the class contains more than a de minimis number of uninjured members. Otherwise, individualized questions of injury would predominate over common ones.

The D.C. Circuit has recognized that because "[u]ninjured class members cannot prevail on the merits, * * * their claims must be winnowed away as part of the liability determination." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2019). To avoid these individualized issues from predominating over common ones, that court holds that no class can be certified when it contains more than a "de minimis" number of uninjured members. *Id.* at 625.

The First Circuit has similarly held that "class certification is permissible even if the class includes a de minimis number of uninjured parties." *Nexium*, 777 F.3d at 14. While it has not set an upper threshold, the First Circuit has made clear even "a very small absolute number" would likely undercut predominance and render certification improper. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018).

The Fourth Circuit recently joined this camp in holding that "attempting to define a class with * * * a high share of uninjured members also raises Article III standing concerns." *Mr. Dee's Inc.* v.

Inmar, Inc., 127 F.4th 925, 934 (4th Cir. 2025). And while it also declined to set an upper limit, the Fourth Circuit affirmed a district court's discretion to deny certification partly because "the presence of 32% of uninjured members in a proposed class" was "much too high." *Id.*

3. The Seventh, Ninth, Tenth, And Eleventh Circuits Hold That Class-Member Standing Is Largely Irrelevant At The Certification Stage.

At the other end of the spectrum, four circuits (now including the Tenth Circuit) have held that the presence of uninjured class members is largely—or entirely—irrelevant for class certification. These courts treat the matter as one to be addressed later as part of a liability determination or, in the case of the Tenth Circuit here, even beyond.

The Seventh Circuit has held that "a class will often include persons who have not been injured by the defendant's conduct," a fact that "is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). But "[s]uch a possibility or indeed inevitability does not preclude class certification." *Id.* Standing is only a problem if a "great many" class members are uninjured. *Kohen*, 571 F.3d at 677; *see also Lacy* v. *Cook Cnty., Ill.*, 897 F.3d 847, 864 (7th Cir. 2018) (holding that the defendants' failure to show "a great many" members without standing failed to show error in certification). But "[t]here is no precise measure for 'a great many.'" *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

The Eleventh Circuit has similarly held that a properly defined class "'will often' include uninjured class members," and that fact "is not a problem that precludes class certification." *Cordoba* v. *DIRECTV, LLC*, 942 F.3d 1259, 1275 (11th Cir. 2019) (quoting *Kohen*, 571 F.3d at 677). Like the Seventh Circuit, the Eleventh Circuit held that class certification was improper when a "large portion" of members appeared to lack any injury. *Id*. at 1277.

The Ninth Circuit has gone still further by rejecting any threshold for the number of uninjured members. In *Olean Wholesale Grocery Coop., Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc), that court "reject[ed] the * * * argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." In the Ninth Circuit, Rule 23 thus imposes no ceiling on the proportion of uninjured members a class definition might sweep in.

4. The Court Has Previously Granted Certiorari To Address This Issue, But So Far It Has Evaded Review.

In *Tyson Foods, Inc.* v. *Bouaphakeo*, the Court granted certiorari to decide "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.'" 577 U.S. 442, 460 (2016). But the petitioner later recast the issue, and the Court therefore never reached it. *Id.* Chief Justice Roberts wrote separately to flag what the Court was leaving unanswered: Article III confers no "power to order relief to any uninjured plaintiff, class action or not," and the Court's failure to decide the question left open the conditions under which a class may be certified over a standing objection. *Id.* at 466 (Roberts, C.J., concurring).

In *TransUnion*, *supra*, the Court touched on that question but again did not resolve it. The Court held that every class member "must have Article III standing in order to recover individual damages," but expressly declined to address "whether every class member must demonstrate standing ***before*** a court certifies a class." 594 U.S. at 431 & n.4 (emphasis original). *TransUnion* thus confirmed that the ultimate recovery must be limited to injured plaintiffs while leaving unanswered whether courts may certify first and then decide which class members have standing later.

Most recently, the Court granted certiorari in *Laboratory Corp. of America Holdings* v. *Davis* ("*LabCorp.*"), 605 U.S. 327, 327 (2025), on that exact question, only to dismiss the writ as improvidently granted for procedural reasons. Justice Kavanaugh, dissenting from the dismissal, expressed the view that a court "may not certify a damages class that includes both injured and uninjured members." *Id.* at 328 (Kavanaugh, J., dissenting).

B. The Tenth Circuit Erroneously Held That Courts Can Certify Classes Even When Defined To Include Uninjured Members.

In holding that class-member standing is irrelevant for certification, the Tenth Circuit again chose the wrong side of a circuit split. Standing is a constitutional limitation on federal courts' jurisdiction, e.g., *TransUnion*, 594 U.S. at 431, while the class action device is a procedural one that cannot change parties' substantive rights, *e.g.*, *Wal-Mart Stores*, 564 U.S. at 367. As Justice Kavanaugh explained in *LabCorp.*, when a damages class includes both injured and uninjured members, "common questions do not predominate" because uninjured members "can't

share the same injury with the other class members." 605 U.S. at 328, 332 (Kavanaugh, J., dissenting).

That is this case here. No individual Merit payees could sue for breach of the *Littell* settlement without alleging, and eventually proving, that they were parties to that settlement or successors in interest to someone who was. Yet when defendants showed that a class defined in this manner (as Plaintiffs had originally proposed) would require myriad individualized inquiries to trace title, Plaintiffs reformulated their class so that it is broader than only those with standing. The undisputed evidence showed that the class Plaintiffs sought to certify—everyone Merit paid on a lease acquired from Oxy—was broader than the class of plaintiffs who could sue for breach of the *Littell* settlement. As detailed above, and as found by the district court based on uncontested evidence, the defined class—even if it were ascertainable—necessarily includes payees who were not settlement class members. *See supra* at 4-6. Such overbreadth would have defeated certification in the Second and Eighth Circuits, yet the Tenth Circuit not only reversed the district court's denial of certification but ordered certification on remand.

Moreover, the undisputed evidence also shows—and Plaintiffs never seriously contested—that the potential number of class members without standing is far from de minimis. ***More than 60%*** of the roughly 6,200 interest owners Merit paid on wells (as distinct from leases) it acquired from Oxy were not on the list of *Littell* class members that the named plaintiffs provided in discovery. CA10 Appx. 2:245-46. Thus, even the Tenth Circuit recognized that a majority of those payees during the class period were not members of the original *Littell* settlement class and

could therefore have standing only if each qualified as a successor in interest to a *Littell* class member. App. 21a-22a. But even if Merit could somehow perform the laborious, individualized title-tracing to ascertain the specific leases implicated in each payment for each Oxy well, *see supra* at 4-5, no evidence established that the substantial mismatch between known *Littell* settlement beneficiaries and the members of the putative class would dwindle from over 60% to a de minimis amount, let alone yield a class in which all members would have standing.

Yet none of this mattered to the court. As with the Ninth Circuit, it was enough for the Tenth Circuit that at least some member of the class had standing. App. 19a-21a. Even though it recognized that "eventually each class member will need an ownership interest that connects to the *Littell* settlement," and that defendants had posited a "fraught situation of indeterminable ownership," the court directed class certification while holding that "the mechanics of this determination are best left for the damages stage." App. 29a. Thus, far from holding that only a de minimis number of class member lacked standing, the court ordered certification of a class with possibly thousands of uninjured members and indefinitely postponed any determination on standing until ***after*** a liability verdict is rendered in favor the entire class.

This extreme view transforms the purely procedural device of class certification into a potent weapon for plaintiffs seeking to coerce unjustified settlements. By allowing Plaintiffs to defer any determination on individual class members' standing until the ***damages*** phase of the case—if it ever arises—the Tenth Circuit has subjected petitioners to millions of

dollars in potential liability to an overbroad certified class with no ability to contest that issue until after that liability becomes a reality. This effectively allows the class device to supply standing that class members lack. Article III standing is a "threshold" requirement that must be met before a court can "proceed at all." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation omitted). The damages phase is unquestionably not at the "threshold" of any case, as it follows a liability finding. The Tenth Circuit's holding that uninjured class members may be awarded liability verdicts is plainly improper given that Article III requires a showing of standing before a federal court may "declare the rights of individuals." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

In addition to the strictures of Article III, Rule 23(b)(3) also independently precludes class certification, at least where (as here) the number of uninjured class members is not de minimis and determining their injury requires individualized evidence. As Justice Kavanaugh has stated, "if there are members of a class that aren't even injured, they can't share the same injury with the other class members." *LabCorp.*, 605 U.S. at 332 (Kavanaugh, J., dissenting) (internal quotation marks omitted). *See also Rail Freight*, 934 F.3d at 624 (to establish predominance, plaintiffs must "show that they can prove, through common evidence, that all class members were in fact injured" by the defendant's conduct) (quotation omitted).

In this case, the standing issue left unresolved by the Tenth Circuit would render the putative class defective on its face in other circuits. The only people

with a claim for violation of the 2008 settlement agreement are the *Littell* settlement class and their successors. But Plaintiffs deliberately proposed a different, and broader, class in an effort to sidestep individualized title-tracing questions. To treat this standing issue as merely a question for possible damages calculations conflates the fundamental distinction between (1) a properly defined class comprising members with standing whose claims might ultimately succeed or fail on the merits and (2) a class defined to include members who ***could not*** state any claim if required to do so in an individual capacity. *See Denney*, 443 F.3d at 263-64.

As Justice Kavanaugh has also recognized, a class "overinflated with uninjured members" can "raise the stakes for businesses that are the targets of class actions" and "can coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial." *LabCorp.*, 605 U.S. at 333 (emphasis removed). Under the Tenth Circuit's rule, the problem is even worse. Postponing the standing inquiry until the damages phase bestows a coercive windfall on uninjured absent class members that no individual plaintiff without standing could ever achieve: a liability verdict in their favor.

The Court should therefore grant certiorari to resolve this longstanding conflict, restore uniformity to the law, and correct the Tenth Circuit's extreme departure from precedent.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THEM.

Both questions presented are important and recurring. By relaxing or eliminating plaintiffs' need to limit their putative classes to identifiable parties that actually have claims, the Tenth Circuit has joined other circuits that allow class plaintiffs to avoid Rule 23(b)(3)'s rigorous certification requirements by deferring individualized inquiries regarding class membership and standing until a later stage of the case that may never come.

Under the Tenth Circuit's approach to ascertainability, plaintiffs can achieve certification of broad classes without ever proposing any feasible methodology for identifying the members of those classes. As the Third Circuit has explained, requiring a showing of feasibility to demonstrate ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action," and protects both absent class members and defendants. *Marcus*, 687 F.3d at 593. The Tenth Circuit's contrary approach fosters all these harms. The inexorable result will be undue pressure on defendants to enter into unjustified settlements in favor of unknown and unknowable claimants.

The Tenth Circuit's separate holding that certified classes may include countless uninjured members further underscores the need for this Court's review. The Court's repeated attempts to resolve the circuit split on this question itself shows its importance. And the Tenth Circuit's resolution will only further encourage plaintiffs to seek certification of overbroad classes. Allowing damages classes to be certified even

when innumerable members have no standing "invite[s] plaintiffs to concoct oversized classes stuffed with uninjured class members," which lets them "inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement * * *." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). *Accord*, *LabCorp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting). That is what happened here: rather than face the fatal predominance problems inherent in a class limited to only those with standing to sue, Plaintiffs concocted an oversized class containing untold numbers of uninjured members. The Tenth Circuit's blessing of that tactic will only encourage future plaintiffs to do the same.

The *in terrorem* value of a class certification is so well established that the Federal Rules confer a rare opportunity for an immediate appeal in Rule 23(f). As Judge Tymkovich has noted in disagreeing with the Tenth Circuit's holdings below, "courts must be vigilant in ensuring that Rule 23 is not weaponized with classes that are overinflated or only theoretically exist" because, *inter alia*, "[b]usinesses cannot afford to roll the dice if they face potential damages in the hundreds of millions—even if the merits of the underlying claims are doubtful or the rightful class is small." *Dunn*, 185 F.4th at 1049 (Tymkovich, J., dissenting). In an effort to downplay the effect of its ruling, the Tenth Circuit surmised that when a class is overbroad "the parties may agree to modify the class via a court-approved settlement agreement." App. 20a. But settlement pressures obviously increase with the size of the class certified, so a defendant facing a class that is facially overbroad is in a far worse negotiating position than it should be.

Given the coercive effect of a grant or denial of certification, class certification issues often evade review. Rule 23(f) allowed for appellate review in this case, but such review may be elusive in future cases involving the same issues. Most circuits have now weighed in on one or both questions. Thus, because Rule 23(f) provides virtually unfettered discretion to the courts of appeal to deny review on issues already resolved by circuit precedent, it is unclear at best whether future cases presenting those questions will make their way to this Court. The Court should therefore take this opportunity to decide them now.

This case also presents an ideal vehicle to answer both questions presented. First, the Tenth Circuit clearly addressed both. On ascertainability, it recognized a circuit split and took a side. App. 12a-13a. And in response to petitioners' standing objection, the Tenth Circuit made clear that as long as some class members have standing, it is immaterial to certification whether the class includes uninjured members. App. 19a-21a. Nor did the court reject petitioners' contention that potentially large numbers of absent class members are uninjured. The court recognized that all class members must individually prove that they are either *Littell* settlement beneficiaries or successors, but expressly deferred any consideration of that issue until the damages phase, if at all. App. 29a.

Second, the district court ruled in petitioners' favor on both issues and based its decision on an undisputed factual record. Defendants submitted extensive evidence, in the form of declarations, documents, and expert testimony, showing that there is no feasible mechanism to identify class members or the subset of them that are uninjured. *See* App. 46a-49a. Plaintiffs

submitted no contrary evidence. *See* App. 45a. After thoroughly evaluating that unrefuted showing, the district court expressly found that determining class membership "is not administratively feasible" and therefore that "class members are not reasonably ascertainable." App. 49a-50a. Likewise, the court recognized that "plaintiffs' proposed class may include individuals without standing" and that individualized inquiries required to weed out the uninjured precluded certification. App. 52a-53a, 55a-56a. The Tenth Circuit did not expressly reject those findings but instead held that administrative feasibility is irrelevant to the ascertainability determination as a matter of law and that any resolution of the standing issue can be postponed until the damages phase.

IV. THE COURT SHOULD EITHER GRANT THIS PETITION OR HOLD IT PENDING MERITS DECISIONS IN OTHER CASES RAISING SIMILAR ISSUES.

Petitioners are aware of other pending cases in this Court raising similar issues relating to the standing of uninjured class members.[6] Those cases, however, do not involve the analytically separate ascertainability issue that is presented in this case and that has also divided the circuits. Nor do those cases involve the Tenth Circuit's starkly erroneous position that standing questions can be postponed even after a liability verdict has been rendered for the class. Accordingly, even if the Court were to grant another petition raising similar issues, it should also grant this petition and hear the cases together. But at a

[6] *See Nestlé USA, Inc.* v. *Falcone*, No. 26-400 (U.S. filed Sept. 18, 2026); *Bayer Healthcare LLC* v. *Drake*, No. 26-376 (U.S. filed Sept. 15, 2026); *Kroger Co.* v. *Solano*, No. 26-244 (U.S. filed Aug. 17, 2026).

minimum, if the Court grants another such petition, it should hold this petition pending a merits decision in that case and then vacate the Tenth Circuit's judgment and remand this case.

Nor is it relevant that the Court recently denied certiorari in *Cline v. Sunoco*, with one Justice recused *See Sunoco, Inc.* v. *Cline* ("*Sunoco*"), No. 26-1, 2026 WL 2976408 (U.S. Oct. 5, 2026). Even when rendered by the full Court, such decisions have no precedential value. Moreover, *Sunoco* involved alleged impediments to review that are not present in this case. First, in opposing certiorari in *Sunoco*, the plaintiffs in that case principally argued that the Court lacks jurisdiction because the petition was not filed after the Tenth Circuit's initial decision. *See* Br. in Opp. at 11-15, *Sunoco*, No. 26-1 (U.S. filed Aug. 24, 2026). Regardless of that argument's merit, it is not present in this case. Second, the *Sunoco* plaintiffs contended that the administrative feasibility question was not squarely presented there because the district court (which oversaw a trial on disputed facts) purportedly found the class identifiable. *Id*. at 19-23. The opposite is true here: the district court squarely held that the class is unascertainable because identification of members is not administratively feasible, yet the Tenth Circuit reversed as a matter of law. Third, the *Sunoco* plaintiffs argued that the standing issue was not presented there because all class members allegedly had standing. *Id*. at 32-33. In this case, the Tenth Circuit recognized the likelihood of uninjured class members and held that "Defendants are correct that eventually each class member will need an ownership interest that connects to the *Littell* settlement." App. 29a. But the court held that this acknowledged standing issue did not prevent

certification because "the mechanics of this determination are best left for the damages stage." *Id*. Accordingly, the principal impediments to this Court's review asserted by the *Sunoco* plaintiffs are not present in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, reverse the Tenth Circuit, and reinstate the district court's order denying class certification.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHERRY RIDER, trustee of the Cherry Rider Family Trust; R. W. LUCAS, co-trustee of the R.W. Lucas and Cathy Lucas Living Trust, individually and as representative plaintiff on behalf of persons or concerns similarly situated; CATHY LUCAS, co-trustee of the R.W. Lucas and Cathy Lucas Living Trust, individually and as representative plaintiffs on behalf of persons or concerns similarly situated,

Plaintiffs - Appellants,

v.

OXY USA, INC.; MERIT ENERGY COMPANY, LLC; MERIT HUGOTON, L.P.,

Defendants - Appellees.

FILED
United States Court of Appeals
Tenth Circuit

May 5, 2026

Christopher M. Wolpert
Clerk of Court

No 25-3142

EASTERN KANSAS ROYALTY OWNERS ASSOCIATION,

Amicus Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 6:23-CV-01274-KHV-TJJ)

Mr. David G. Seely (Ryan K. Meyer, and Emily K. Arida, of Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas, and Erick E. Nordling of Kramer, Nordling & Nordling, LLC, Hugoton, Kansas, with him on the briefs), for Plaintiffs-Appellants

Mr. Daniel M. McClure, Norton Rose Fulbright US LLP, Houston, Texas (James M. Shultz of Norton Rose Fulbright US LLP, Houston, Texas, James V. Leito IV of Norton Rose Fulbright US LLP, Dallas, Texas, Peter B. Siegal of Norton Rose Fulbright US LLP, Washington, D.C., Robert W. Coykendall and Will B. Wohlford of Morris, Laing, Evans, Brock & Kennedy, CHTD., Wichita, Kansas, James M. Armstrong of Foulston Siefkin LLP, Wichita, Kansas, and Mark Rodriguez and Maryam Ghaffar of Beck Redden LLP, Houston, Texas, with him on the brief), for Defendants-Appellees

Rex A. Sharp and Scott B. Goodger, Sharp Law, LLP, Prairie Village, Kansas, filed an Amicus Curiae brief in support of Appellants.

Before **BACHARACH**, **KELLY**, and **FEDERICO**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiffs-Appellants Cherry Rider, as trustee of the Cherry Rider Family Trust, and R.W. Lucas and Cathy Lucas, as co-trustees of the R.W. Lucas and Cathy Lucas Living Trust, filed a putative class action in 2023 against Merit Energy Company, LLC and Merit Hugoton, L.P. (collectively, "Merit") and OXY USA, Inc. ("Oxy"), the Defendants-Appellees. Plaintiffs own royalty interests in the Kansas Hugoton Gas Field. Their claims arise from the alleged breach of a 2008 class action settlement agreement with Oxy that resolved a dispute over the underpayment of royalties. Merit and Oxy filed motions to dismiss as a matter of law which the district court denied. Thereafter, the district court denied class certification because it found that the class was not ascertainable and then determined that Plaintiffs could not satisfy any other Rule 23 requirements. Plaintiffs timely filed a petition for an interlocutory appeal which we granted. Fed. R. App. P. 5; Fed. R. Civ. P. 23(f).

On appeal, Plaintiffs argue that the district court erred in concluding that (1) proof of record title ownership would be required for every potential claimant, notwithstanding that Merit can identify all royalty payees; (2) identification of the class was not administratively feasible, thereby failing to adequately consider the proposed class definition and the fact that the class includes over 1,900 members who were parties to the settlement, particularly given that numerosity was not contested; and (3) the other class certification requirements were not met, where the district court's conclusions regarding administrative feasibility affected the remainder of its analysis. For the reasons that follow, we reverse the

district court's denial of class certification and remand with instructions to certify the putative class.

Background

A. The 2008 Settlement.

On November 13, 1998, a group of plaintiffs filed a putative class action, Littell v. OXY USA, Inc., Case No. 98-CV-51 (the "Littell case"), in the District Court of Stevens County, Kansas against Oxy, alleging Oxy was underpaying royalties on lease agreements in the Kansas Hugoton Gas Field. I Aplt. App. 40. The court certified the class under Kansas law. Id. at 41. The Littell class was defined as:

> All persons or concerns owning mineral interests in lands located in the areal confines of the Kansas Hugoton Gas Field, burdened by oil and gas leases owned in whole or in part by defendant with respect to gas production from the above base of the Panoma-Council Grove Field, whose royalty payments have been reduced by a "gathering/compression" deduction or "marketing deduct" identified on the monthly gas revenue detail sent by defendant to each such member.

Id. In January of 2008, the Littell plaintiffs entered into a settlement with Oxy. Id. at 40–64. The court approved the settlement on March 4, 2008, and entered a Journal Entry of Judgment. Id. at 28–38. Nineteen class members opted out of the settlement.[1] Id. at 46, 169.

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[1] Cherry Rider, as Trustee of the Cherry Rider Family Trust, was a participating class member in the settlement and a class representative. R.W. Lucas was also a participating class

As part of the settlement, the plaintiffs agreed to release past claims and Oxy agreed to provide $16.7 million to a settlement fund and to cease fuel charges and limit gathering charges [2] on future royalty payments (the "royalty provisions"). Id. at 40–64. The royalty provisions provided in part:

> It is the intent of the parties hereto that the royalty payments received by members of the Plaintiff Class or their successors in interest with respect to gas produced on or after July 1, 2008, shall not be diminished or reduced by any charge other than fifteen cents per mmbtu ($0.15/mmbtu) for Gathering Charges, taxes owed by them or the actual cost of transporting such gas on a transmission pipeline.

Id. at 52 (emphasis added). The settlement also stated:

> This [settlement] shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors, assigns, executors, administrators, heirs and legal representatives, and upon any corporation or other entity into or with which any party hereto may hereafter merge, combine or consolidate, as the case may be; provided however, that no assignment by any

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member, and the R.W. Lucas and Cathy Lucas Living Trust is the successor in interest to R.W. Lucas. VII Aplt. App. 232–33.

[2] The settlement agreement defines "fuel charges" as "gas used to operate compressors located on a Gathering Facility[]." I Aplt. App. 45. It defines "gathering charges" as "charges, expenses or assessments . . . associated with any and all activities occurring between the wellhead of any well producing gas that is subject to a royalty interest owned by a member of the Plaintiff Class and the inlet to any mainline transmission facility[.]" Id.

> party shall operate to relieve such party of any obligations hereunder.

Id. at 61.

B. The Present Suit.

Merit acquired Oxy's assets in the Kansas Hugoton Gas Field in May 2014. At the time of the acquisition, Oxy informed Merit about the identity of royalty owners to whom Oxy had been making payments under the Littell settlement and the owners who opted out of the settlement. Id. at 243. Oxy also provided Merit with information on how it calculated royalty payments for participating class members. Id. at 247–48. According to a Merit representative, Merit "attempts to confirm . . . information about ownership interests" before it issues royalty payments, although it is not always successful. II Aplt. App. 190. If there are doubts as to whether the ownership records are correct, payments are placed in suspense until the ownership issue is resolved. Id. at 191–92. Before and after purchasing Oxy's assets, Merit held other interests in Kansas that it acquired from sources other than Oxy. Id. at 188–90; Aplee. Br. at 9–10. Merit contends that it is not bound by the settlement's royalty provisions.[3] Aplee. Br. at 10; Aplee. App. 19–

[3] Mary Drennan, Merit's division order manager, stated that when Oxy sold to Merit, Oxy informed Merit of the 2008 settlement, although Merit was not provided the names and ownership numbers of the settlement members or their successors in interest. II Aplt. App. 196. According to Ms. Drennan,

> Merit understood from Oxy that Oxy was paying all royalty owners in Kansas wells in the same manner regarding deductions using the methodology set out in the Littell settlement, regardless of whether the owners were Littell class members or not. Merit determined that Merit was not subject

35. Oxy contends that it has no obligation regarding royalty payments by other parties. See Cherry Rider Family Tr. v. OXY USA, No. 6:23-cv-01274-KHV-TJJ, Defendant Oxy USA Inc.'s Motion to Dismiss at 6–9, ECF No. 27 (D. Kan. Feb. 23, 2024).

Plaintiffs claim that since May 2014 Merit has taken improper deductions from royalty payments in violation of the settlement's royalty provisions. I Aplt. App. 23. They filed a motion to enforce the Judgment against Merit in the District Court of Stevens County. Id. The state district court denied the motion on the grounds that the judgment had become dormant and unenforceable under Kansas law. Id. at 24. Plaintiffs appealed from that decision on February 8, 2024, and their appeal is still pending before the Kansas Court of Appeals. Id.; Aplt. Br. at 7.

Plaintiffs filed the present class action complaint on December 29, 2023 in federal court alleging breach of contract claims against Merit and Oxy based on the Littell settlement. I Aplt. App. 17–26. According to Plaintiffs, the settlement is binding on Merit, and assignment did not relieve Oxy of its obligations.[4]

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to the future royalty provisions regarding deductions in the Littell settlement agreement.

Id. at 196–97.

[4] Oxy and Merit filed separate motions to dismiss, both of which the district court denied. Rider v. OXY USA, Inc., No. CV 23-1274-KHV, 2024 WL 1856315 (D. Kan. Apr. 29, 2024). Merit argued that it is not bound by the settlement because it is not a successor or assign of Oxy, and Oxy argued that the royalty provisions only apply to its own payments to class members. Id. at *3. The court found that Plaintiffs' interpretation of the settlement was a "reasonable one" and that Defendants had failed to show "as a matter of law" that the settlement did not apply to them. Id. at *4–5.

Aplt. Br. at 10–11. They defined the putative class in their complaint as follows:

> The class of persons or entities who were Participating Class Members in the class action settlement approved by the District Court of Stevens County, Kansas, on March 4, 2008, in the case of Opal Littell, et. al v. OXY USA, Inc., Case No. 98-CV-51, together with their successors, and who have received, or are entitled to receive, royalty payments from Merit Energy Company, LLC, Merit Hugoton LP, and/or any related or affiliated entity, at any time during the period of May 2014 to the present.

I Aplt. App. 19.

The parties disputed the feasibility of identifying "successors" in interest to the Littell class members. Id. at 169. According to Plaintiffs, Defendants were concerned that they would need to conduct individualized title examinations for each potential class member to identify the persons and entities entitled to the benefits of the Littell settlement. Id. Plaintiffs then proposed a modified class definition in their Motion for Class Certification that focused on payees under the leases Merit acquired from Oxy:

> All persons or entities to whom Merit Energy Company, LLC, Merit Hugoton LP, and/or any related or affiliated entity (collectively "Merit") has paid royalties at any time since December 2, 2017, under oil and gas leases in the Kansas Hugoton Field that were assigned to Merit by OXY USA, Inc. in or about 2014, except for those persons or entities who have received royalty payments from Merit exclusively for interests now or previously held by any of the 19 persons

> or entities who opted out of the class action settlement approved by the District Court of Stevens County, Kansas, on March 4, 2008, in the case of Opal Littell, et. al v. OXY USA, Inc., Case No. 98-CV-51[.]

Id. at 168–69. Defendants opposed the motion for class certification and the parties engaged in seven months of discovery on class certification issues. Aplee. App. 258. Plaintiffs did not provide any expert testimony in support of certification. Id. at 259. They maintained that the class could be readily ascertained from Merit's business records. VII Aplt. App. 239. Defendants disagreed, arguing that ascertaining class members would require individualized land ownership analysis to determine which persons and entities have standing to assert a claim for breach of the settlement. Id.

Defendants relied upon the declaration of Mary Drennan, Merit's division order manager, who maintains records used to pay mineral interest owners. Id. at 240; see also II Aplt. App. 187–214 (entire declaration). According to Ms. Drennan, Merit's royalty payment records do not establish who the class members are because the records do not tie payees to specific oil and gas leases. VII Aplt. App. 240. To gather such information, Merit would need to look at division order and contract files to determine whether the payee is an owner under a lease acquired from Oxy. Id. Merit also makes payments on interests that it acquired from sources other than Oxy. Id. Further, even if Merit could identify the individuals who receive royalties under the Oxy leases, those payees may not be the current title owners. Id. Ms. Drennan believes Merit is paying royalties to payees that no longer have an interest but that failed to

inform Merit of the ownership change. Id. at 241. Defendants also presented declarations from three expert witnesses, all of whom agreed that the class was not ascertainable from Merit's business records. II Aplt. App. 224–61, 263–87; III Aplt. App. 2–24; VII Aplt. App. 241–43.

On June 18, 2025, the district court denied Plaintiffs' motion for class certification. VII Aplt. App. 229–49. It held that the class members were not readily ascertainable; therefore, the class did not satisfy numerosity. Id. at 237–44. Specifically, it would not be "administratively feasible" to determine which members own mineral interests in land burdened by leases that Merit acquired from Oxy. Id. at 243. The court also held that Plaintiffs had not satisfied the commonality, typicality, adequacy, predominance, or superiority requirements. Id. at 244–49. As noted, we granted permission to appeal the court's denial of class certification. Id. at 250–51.

Discussion

We "review de novo questions of whether the district court applied the correct legal standard in its class certification analysis." Sherman v. Trinity Teen Sols., Inc., 84 F.4th 1182, 1192 (10th Cir. 2023). If the court applied the correct legal standard, our review is for an abuse of discretion. Id. "The district court abuses its discretion when it misapplies the Rule 23 factors—either through a clearly erroneous finding of fact or an erroneous conclusion of law—in deciding whether class certification is appropriate." Id. (quoting CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1085–86 (10th Cir. 2014)).

Under Federal Rule of Civil Procedure 23, the party seeking to certify a class must show that "(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." Fed. R. Civ. P. 23(a); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011). The class must also be ascertainable. See Rex v. Owens ex rel. Oklahoma, 585 F.2d 432, 436 (10th Cir. 1978). To certify a class for damages under Rule 23(b)(3), the party must also show 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." Fed. R. Civ. P. 23(b)(3); Wal-Mart Stores, Inc., 564 U.S. at 362.

A. The Proposed Class is Ascertainable.

1. The Ascertainability Standard Has Been Clarified and Differs from That Used by the District Court.

Rule 23 does not explicitly include an ascertainability requirement, but most circuits require the class to be ascertainable before granting class certification. Cline v. Sunoco, Inc. (R&M), 159 F.4th 1171, 1194 (10th Cir. 2025). Meaning, the moving party must present "a sufficiently definite" class definition that will allow the court to identify class members at some stage of the proceeding. Id. (quoting 1 Newberg and Rubenstein on Class Actions § 3:3 (6th ed. 2025)).

At the time the district court denied class certification here, it correctly indicated that we had

yet to adopt a test for ascertainability. VII Aplt. App. 238. District courts in the Tenth Circuit, it noted, applied either the Third Circuit or Seventh Circuit approach to ascertainability. Id.; see also Cline, 159 F.4th at 1194–95 (describing the Third Circuit approach as the minority view and the Seventh Circuit approach as the majority view). The Third Circuit requires plaintiffs to present an objectively defined class and show that a reliable and administratively feasible mechanism exists to determine the class members. VII Aplt. App. 238–39. The Seventh Circuit applies a more relaxed standard, requiring only that plaintiffs present a clearly defined class based on objective criteria. Id. at 239.

The district court treated ascertainability as a sub-requirement of numerosity, see Rex, 585 F.2d at 436, and found that Plaintiffs had not shown that the class is ascertainable based on the class definition, VII Aplt. App. 243. It stated that "[c]lass membership is wholly premised on whether class members own mineral interests in land burdened by oil and gas leases which Merit acquired from Oxy[.]" Id. And "[t]o determine that . . . is not administratively feasible." Id. The court would have to individually consider Merit's payment records, lease records, acquisition records, and other documents to assess the land ownership chain for each payee. Id. Such "individualized inquiries" are a "significant hurdle[.]"[5] Id. at 243–44.

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[5] Plaintiffs argue that the court should not have reached the ascertainability issue because Defendants did not contest numerosity. Aplt. Br. at 15–16. But "[w]hen addressing class certification, the district court must undertake a rigorous analysis to satisfy itself that the prerequisites of Rule 23 are met." CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1086 (10th Cir. 2014) (citation modified). The district court was

We since have clarified our approach to ascertainability. In Cline v. Sunoco, we rejected the "administrative feasibility" requirement and held that "[f]or class members to be ascertainable, the class definition must (1) be defined clearly and cannot be defined too vaguely, and (2) be defined objectively and cannot be based on subjective criteria[.]" 159 F.4th at 1194–96. Plaintiffs must show that class members can be identified, although not necessarily already identified at the time of certification, "using reasonable — but not perfect — accuracy." Id. (citation modified).

We agree with Plaintiffs that Cline applies to the present appeal. [6] Aplt. Reply Br. at 1–6. At a minimum, we would remand to the district court to reconsider ascertainability without considering administrative feasibility. However, under the factors identified in Cline and based on the record, the class here is plainly ascertainable and any finding to the contrary would be an abuse of discretion.[7]

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correct to consider all class certification requirements, including ascertainability.

[6] Defendants filed a Motion for Leave to File Supplemental Brief Addressing Cline v. Sunoco and attached their supplemental brief to the motion. See App. Dkt. No. 51. Although we now grant their motion, none of their arguments dissuade us from applying Cline.

[7] Although we understand that the district court did not have the benefit of Cline as guidance, we pause to note another error in its analysis. After modifying the class definition from their complaint, Plaintiffs sought to certify a class of "[a]ll persons or entities to whom [Merit] has paid royalties at any time since December 2, 2017 under oil and gas leases in the Kansas Hugoton Field that were assigned to Merit by [Oxy] in or about 2014," except for the persons or entities that opted out of the settlement. I Aplt. App. 168–69. The district court stated that

First, the proposed class definition is clearly defined and not vague. As Plaintiffs state, Merit can identify each person or entity it has paid from its own records. Id. at 3; see, e.g., I Aplt. App. 208–29 (check stubs identifying payees). And when Merit acquired Oxy's assets, Oxy provided Merit with the identities of those to whom it was paying royalties under the settlement. I Aplt. App. 243. Second, the class is defined by objective criteria. The court need not resort to any subjective inquiries. See Evans v. Brigham Young Univ., No. 22-4050, 2023 WL 3262012, at *9 (10th Cir. May 5, 2023) (affirming denial of class certification where the court would have to determine the intent of the putative class members).

Insofar as determining ownership, "Merit does not send out its own division orders for existing, producing wells as a prerequisite for making payments to mineral owners" except for new wells it drills or upon owner request. II Aplt. App. 191. Rather, "Merit applies the paydecks it receives from the producer who sold the properties to Merit and continues making payments in accordance with those paydecks[,]" making changes only when it is informed of ownership changes or errors. Id. "If Merit has doubts about whether it has correct ownership

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"[c]lass membership is wholly premised on whether class members own mineral interests in land burdened by oil and gas leases which Merit acquired from Oxy in 2014" and stressed the "significant hurdles of determining ownership interests[.]" VII Aplt. App. 243. Plaintiffs argue on appeal that the district court focused on the wrong class definition and "created an 'ownership' problem where none exists." Aplt. Br. at 24. As discussed below, we understand the core of Defendants' argument against class certification to involve ownership tracing issues, but we stress the importance of considering the precise class definition when denying class certification on that basis.

information for a property and payee, the proceeds are placed in suspense for that specific payee and property." Id. Thus, the exhaustive measures Merit claims will be necessary to ascertain the identity of the payee whom Merit believes is the correct owner of the royalty interest in a given property is belied by Merit's existing practice. Merit knows who its payees are.

Regardless, Cline clarified that neither gaps in a defendant's record-keeping nor the large number of records to be reviewed can defeat class certification. Cline involved a class action challenging the defendant's late distribution of royalty payments without interest from oil extraction profits. 159 F.4th at 1179. We rejected the defendant's argument against ascertainability that not all class members were identified, finding unpersuasive defendant's claim that "locating class members will be time-consuming and overly difficult." Id. at 1194. We clarified that "there is no basis for finding a lack of ascertainability because it is difficult to identify the class members." Id. at 1196 (citation modified). Especially where the law required the defendant to gather and produce records, "gaps in the records kept and produced by a defendant cannot be used to hinder class certification." Id. at 1194. Moreover, "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." Id. at 1195 (citation modified). We noted that administrative feasibility may still be relevant to whether class resolution is superior to individual resolution, but it cannot

"operate as a trump card that outweighs all other factors under Rule 23." Id. at 1196.

Defendants contest whether they have a record-keeping duty like the defendant in Cline. Aplee. Br. at 52–53. But as noted, Merit already makes monthly royalty payments to Littell class members and their successors in interest. Amicus Br. at 10. If the district court later reaches the merits and finds Merit is underpaying royalties, Merit need not separately ascertain the class because it already sends monthly payments to royalty interest owners in the Kansas Hugoton Gas Field. Id. Amicus Eastern Kansas Royalty Owners Association asserts that Merit's records are digitized and easily searchable and Merit employs software to track ownership information. Id. at 11–14. Merit admits that it maintains division order files on almost every property from which it produces gas and other hydrocarbons, but claims that its automated search capability is limited. II Aplt. App. 189. Be that as it may, we agree with Plaintiffs and amicus that under Cline, Defendants cannot point to deficiencies[8] or inaccuracies in their records to defeat ascertainability.

2. The Proposed Class Is Not Overbroad.

Before moving to the other certification requirements, we address Defendants' argument that the class is overbroad. Defendants contend that Plaintiffs did not show that the proposed class contains an insignificant number of members who were not parties to the Littell settlement or successors

[8] Moreover, given Merit's awareness of the Littell settlement and Oxy's method of calculating royalty payments in accordance therewith, it was hardly unforeseeable that Merit's determination that it was not bound might be challenged.

in interest to those parties. Aplee. Br. at 24. This, Defendants argue, is more than just an ascertainability issue. Id. The class definition "divorce[s]" class membership from membership in the Littell settlement. Id. at 26–27 (emphasis omitted). Unless the putative class members are also members of the Littell settlement or successors in interest to the members, which Plaintiffs have not met their burden to show that they are, the class members have no claim and no standing. Id. This concern — that Plaintiffs have not shown that the class members have a claim and standing — affected the district court's certification analysis as well.

As an example, Defendants explain that Oxy drilled hundreds of new wells in Kansas after the Littell settlement but before transferring interests to Merit. Id. at 24–25. If those wells are in the Hugoton field, its payees would be members of the putative class; however, some of those wells may fall outside the Littell class definition if exclusively below the Panoma-Council Grove Field, the Littell settlement boundary. Id. Those payees, therefore, may not have a claim. Id.

Plaintiffs respond that royalty interests do not change just because new wells are drilled. Aplt. Reply Br. at 8–9. At oral argument, the parties disagreed whether the drilling of new wells — particularly below the Panoma-Council Grove Field described in the Littell class definition — created new ownership issues. Oral Arg. at 05:30–09:49, 23:15–23:33, 30:29–32:00. Further, Plaintiffs claim that the class can still be certified even if some class members have no damages. Aplt. Reply Br. at 11.

Both Plaintiffs and Defendants cite Black v. Occidental Petroleum Corp., 69 F.4th 1161 (10th Cir.

2023), to support their view of how precise the class definition must be. Black involved a class action antitrust dispute between private landowners and the defendant operator. Id. at 1168–69. In considering whether the plaintiffs had to prove antitrust impact for every class member to satisfy predominance, we stated that "[t]he presence of class members who experienced varying degrees of injury, including some who were altogether uninjured, does not bar class certification[.]" Id. at 1185. The district court need not identify uninjured class members at the certification stage. Id. But we also said, "[a] class including a significant portion of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, is defined too broadly to permit certification." Id. (citation modified).

We do not find Black to be precisely on point for either party's position. For one, in Black, we addressed uninjured class members in the context of whether proving antitrust impact is a common issue for the predominance inquiry. Id. Moreover, we explained that a class can be certified even if it consists largely or even entirely of members who are ultimately found to have suffered no harm because the defendant was not the proximate cause of their injury. Id. We looked to Messner v. Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012), which stated the point succinctly: a court cannot deny class certification because some class members' claims may eventually fail on the merits. Id. at 823. But here, unlike in Black, we understand Defendants' argument to be that some putative members cannot have a claim, not just that they may not have a successful claim.

However, Black supports the common-sense principle that the class definition need not be perfect. Case law from our sister circuits supports this. See, e.g., Mullins v. Direct Digital, LLC, 795 F.3d 654, 657–58 (7th Cir. 2015) (declining to adopt a heightened ascertainability requirement); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525–26 (6th Cir. 2015) (finding ascertainability met where the class can be determined with reasonable, but not perfect accuracy based on a substantial review of the defendant's data); In re Nexium Antitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015) (noting that it may be impossible to certify a class excluding all uninjured class members given courts' reluctance to certify a "fail-safe class"). And Cline too, in declining to adopt a more stringent ascertainability standard, supports the principle that imprecision in the class definition is acceptable at the certification stage. When we have denied certification on the basis of the class definition, we have done so where the class is defined by subjective parameters. See Evans, 2023 WL 3262012, at * 9.

We also recognize that Defendants' concern that the class definition incorporates owners of wells outside the Littell settlement boundary could be alleviated by modifying the class definition slightly. Plaintiffs originally proposed as the class definition "persons or entities who were Participating Class Members in the [Littell settlement] together with their successors, and who have received, or are entitled to receive, royalty payments[.]" I Aplt. App. 19. This definition would avoid any potential issues with new wells, since that class is defined by the settlement and excludes the payments on wells drilled below the Panoma-Council Grove Field. District courts have authority to

modify the class definition, or the parties may agree to modify the class via a court-approved settlement agreement. In re Motorola Secs. Litig., 644 F.3d 511, 518 (7th Cir. 2011); Powers v. Hamilton Cnty. Pub. Def. Comm'n., 501 F.3d 592, 619 (6th Cir. 2007). Given the factual issue on new wells, this modification may need to be considered.

However, that modification still would not resolve the crux of Defendants' objection to the class definition, which as we understand it is that this class action would require them to conduct individualized title searches to connect class members to the Littell settlement. Defendants contend that in Kansas there are 5,416 Merit royalty payees on wells acquired from Oxy, and of those payees 3,480[9] were not original Littell class members, and of the remaining 1,932 class members who were original Littell settlement members, some may have transferred their interest. Aplee. Br. at 26; II Aplt. App. 227–28. Those payees — who either cannot trace their interest to the Littell settlement or can trace their interest but have sold that interest — do not have standing to bring a claim, according to Defendants. Aplee. Br. at 26–27. The district court found this argument persuasive and, without the benefit of Cline, found the class not ascertainable because Defendants would need to conduct individualized land ownership analysis to determine which payees have standing to sue for breach of the Littell settlement. VII Aplt. App. 239.

We are not persuaded by Defendants' arguments, particularly after Cline. For one, we do not require plaintiffs to prove standing as to all class members at the certification stage. See Colo. Cross-Disability

[9] That number should be 3,484. Aplt. Reply Br. at 10 n.3.

Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1214 (10th Cir. 2014). And at the certification stage, the class need only be ascertainable (not already ascertained) with reasonable accuracy. Cline, 159 F.4th at 1196.

At a minimum there are 1,932 putative class members who were also members in the Littell settlement. [10] The Defendants' concern that some payees may have sold their legal interest in royalty payments is not dispositive. Surely if the records are adequate for Merit to rely on to make regular payments, they are adequate for Merit to rely on to make additional payments, should Plaintiffs have a meritorious claim. As for Defendants' concern that the other 3,480 payees were not members of the Littell settlement, we are not persuaded that it would be too onerous for Merit to determine which of those payees can trace their interest to a Littell settlement member. As Cline clarifies, a defendant cannot defeat class certification by arguing that it must individually review a large number of records. Cline, 159 F.4th at 1195. We conclude that the class is ascertainable and that nothing in the class definition dissuades us from certifying the class.

B. The Proposed Class Satisfies the Other Certification Requirements.

After denying class certification on ascertainability grounds, the court also found that the class did not meet the other Rule 23 requirements. VII Aplt. App. 244–49. Plaintiffs argue that the district court's ascertainability analysis "tainted its analysis" of the other certification requirements. Aplt. Br. at 35

[10] That number easily satisfies numerosity. See Cline, 159 F.4th at 1185 n.3.

(citation modified). We agree. The court's brief discussion of the other requirements focused primarily on challenges with identifying legal interest owners and how the putative class members do not have standing to enforce the settlement without proof of legal ownership. VII Aplt. App. 244–49. As discussed, the parties need not conduct individual title analysis at the certification stage, and the class definition here does not hinder the parties from eventually identifying those entitled to damages with reasonable accuracy. See Cline, 159 F.4th at 1196. Further, plaintiffs need not prove standing as to every class member for certification purposes. Colo. Cross-Disability Coal., 765 F.3d at 1214.

The proper inquiries under each Rule 23 requirement support certification of the class. See Garcia-Rubiera v. Calderon, 570 F.3d 443, 460–61 (1st Cir. 2009) (reversing denial of class certification and directing the district court to certify the class where the district court did not directly address the Rule 23(a) prerequisites, but on appeal finding the prerequisites "easily satisfied").

1. Commonality.

Plaintiffs must show that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Wal-Mart Stores, Inc., 564 U.S. at 349–50 (citation modified). The class claims "must depend upon a common contention" and that common contention "must be of such a nature that it is capable of classwide resolution" — meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 350.

Plaintiffs asserted that the following questions are common to all members of the proposed class:

> 1. Has Merit . . . taken improper deductions for gathering charges in excess of the limit of $0.15/mmbtu and the prohibitions on fuel deductions set forth in the Settlement?
>
> 2. Is Merit . . . bound by the terms of the Settlement?
>
> 3. Is Oxy bound by the terms of the Settlement?
>
> 4. Has Merit . . . breached the terms of the Settlement?
>
> 5. Has Oxy breached the terms of the Settlement?

VII Aplt. App. 244. The district court found that the second and third questions are common legal questions but that the first, fourth, and fifth questions are not common questions because they involve individualized inquiries into property ownership and deductions. Id. at 245. Some members of the proposed class may have transferred their interest and lack standing to sue, and alleged deductions will vary from one well to another and from one gathering system to another. Id. "Without a claim for breach of contract, whether the Settlement binds Merit or Oxy" — the common legal questions — "is irrelevant and will not determine the truth or falsity of an issue central to breach of contract" and "to each proposed class members' claims." Id. The court held that Plaintiffs failed to satisfy commonality. Id.

Courts may certify a class action involving some individualized inquiries so long as there is "at least one common question of law or fact, the resolution of which would drive the litigation." Sherman, 84 F.4th at 1193 (emphasis omitted); see also Wal-Mart Stores,

Inc., 564 U.S. at 359 ("We quite agree that for purposes of Rule 23(a)(2) even a single common question will do." (citation modified)).

We agree with Plaintiffs that the "central issue" here is whether Merit breached the settlement by deducting more than the limit under the settlement. Aplt. Br. at 37. The same limit applies to all leases and all wells under the settlement. Id. The first question alone satisfies the commonality requirement, as do the second and third questions. The need for individualized damages determinations later does not defeat class certification. Menocal v. GEO Grp., Inc., 882 F.3d 905, 922 (10th Cir. 2018). The district court abused its discretion in finding no common questions of law or fact.

2. Typicality.

Plaintiffs must show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). The claims of the named plaintiffs and class members "need not be identical[.]" DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010). So long as the claims are "based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." Id. at 1198–99.

The district court found that the Plaintiffs' "legal and remedial theories may not be identical to those of the proposed class because . . . the proposed class includes members who may not have legal title to the mineral interests . . . or own the class claim for underpayment of royalties." VII Aplt. App. 246. For example, the Lucas Living Trust is not even a class member since it did not receive royalty payments from

Merit during the at-issue time period, even though it now owns the mineral interests. Id.

We find that Plaintiffs satisfy typicality. Named plaintiffs need not have identical claims to the class members. Devaughn, 594 F.3d at 1198. Plaintiffs here claim that Defendants underpaid royalties on their interests and the class members' interests in breach of the Littell settlement. Their only claims apply to all class members. As for the argument that the Lucas Living Trust is not a class member, the parties dispute whether under Kansas law the legal title must change when the settlor and trustee is the same person. Aplt. Br. at 43–44; Aplee. Br. at 44–45. But this issue is beside the point. Transferring the ownership interest to a revocable inter vivos trust does nothing to change the breach of settlement claim that R.W. and Cathy Lucas bring on behalf of their trust. Their claims are based on the same legal theory as the rest of the class. The district court's finding that the named Plaintiffs' claims are not typical of the rest of the class was incorrect.

3. Adequacy.

Named plaintiffs must also show that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). We consider two questions to assess adequacy of representation: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187–88 (10th Cir. 2002) (citation modified).

The district court found that because individualized ownership issues precluded Plaintiffs from satisfying

commonality and typicality, and "[g]iven the variance in claims, plaintiffs do not necessarily possess the same interests as other class members, and they would not . . . adequately protect" class interests. VII Aplt. App. 247. But having found that Plaintiffs satisfy commonality and typicality, we disagree that they fail on adequacy of representation. There is nothing to suggest that Plaintiffs have any conflicts of interest with the other class members or that they will not prosecute the action vigorously on behalf of the class. Rutter, 314 F.3d at 1187–88. As Plaintiffs indicate, Ms. Rider even has previous experience as a class representative in Littell.[11] The district court's finding that Plaintiffs are not adequate class representatives was in error.

4. Predominance.

To certify a class for damages under Rule 23(b)(3) plaintiffs must also satisfy predominance and superiority. Fed. R. Civ. P. 23(b)(3). The predominance inquiry asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Cline, 159 F.4th at 1186 (citation modified). The district court must assess "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." Id. (citation

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[11] Defendants argue that Plaintiffs and their counsel have already failed the class because they allowed claims prior to December 2017 to expire. Aplee. Br. at 46. Plaintiffs explain that they did not discover Merit's improper deductions for several years because Merit reported its monthly payments using a different unit of measurement from the unit listed in the settlement, so the breach was not readily apparent. Aplt. Br. at 7. Plaintiffs are not inadequate because of this delay in filing suit.

modified). "Common, aggregation-enabling issues are those that are susceptible to generalized, class-wide proof" and "individual, aggregation-defeating issues are those for which members of the proposed class will need to present evidence that varies from member to member." Sherman, 84 F.4th at 1194 (citation modified).

The predominance inquiry "begins with the elements of the underlying cause of action." Cline, 159 F.4th at 1186 (citation modified); Sherman, 84 F.4th at 1194–95. Common questions must predominate over individual questions, but "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." Cline, 159 F.4th at 1187 (citation modified). "Rule 23(b)(3) requires predominance, not perfection[.]" Id. And "[a]s a matter of law, individualized damages in class actions typically do not defeat predominance[.]" Id. at 1191; see also 2 Newberg and Rubenstein on Class Actions § 4:54 (6th ed.) ("[C]ourts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations.").

Further, as we recently stated in Cline, "predominance is often satisfied when a defendant has implemented a class-wide scheme, policy, or practice." Cline, 159 F.4th at 1187–88 (collecting cases). When the suit challenges a 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." Id. at 1188. In such cases the defendant's

alleged class-wide breach is the predominant issue. Id.; see, e.g., Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779, 798 (10th Cir. 2019) (affirming certification of a class action to challenge the underpayment of royalty interests on oil and gas wells where the class-wide breach of lease question predominated over individualized questions on variations in gas quality and lease language, which went to damages).

In a short paragraph, the district court held that common questions do not predominate because there are no common questions. VII Aplt. App. 248. And even if there were common questions, the individual ownership issues would predominate. Id. On this record common questions abound, so we need not remand the predominance inquiry to the district court.

Plaintiffs bring one claim against each Defendant: breach of settlement. There is no dispute as to the existence of the settlement agreement, leaving only questions as to (1) whether there is a breach, (2) whether Merit can be held to the settlement agreement, and (3) whether Oxy can be held to the settlement agreement. These questions can be decided based on generalized, class-wide proof. Cline, 159 F.4th at 1187–88. And they are the questions that go to the heart of Plaintiffs' claims.[12]

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[12] Plaintiffs described their claims as breach of contract claims. See I Aplt. App. 24–25; Aplt. Reply Br. at 13. "The elements of a breach of contract claim are: (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." Stechschulte v. Jennings, 298

Unsurprisingly, Defendants argue that individual issues predominate. Aplee. Br. at 28–43. Their argument is now familiar: that determining the ownership rights of current payees and tracing their interests back to the Littell class "would be a painstaking, individualized, class-member-by-class-member process that would make it impossible to resolve the claims in this case 'in one stroke.'" Id. at 29 (quoting Wal-Mart Stores, Inc., 564 U.S. at 350). They maintain that "hundreds or thousands of mini-trials . . . would be necessary[.]" Id. at 31.

For reasons previously stated, we disagree that individual issues predominate. Defendants are correct that eventually each class member will need an ownership interest that connects to the Littell settlement. But Defendants have conjured a fraught situation of indeterminable ownership, notwithstanding their current business operations and payees. Regardless, the mechanics of this determination are best left for the damages stage. The district court would first resolve whether Defendants breached the settlement and whether both or either Defendant can be held liable. Only then would the court address damages issues, including who can recover and precisely how much. Crucially, any issues as to individual ownership interests do not affect the core question of Defendants' liability. Defendants' alleged systematic breach of the settlement is the predominant issue. See Cline, 159 F.4th at 1187–88; Naylor Farms, Inc., 923 F.3d at 782–83.

P.3d 1083, 1098 (Kan. 2013). Considering the elements of a breach of contract claim, Cline, 159 F.4th at 1186, the only elements at issue are breach (a common issue) and damages (an individualized issue). And individualized damages issues do not defeat predominance. Id. at 1187.

Returning to our discussion of Black, we do not read that decision to require certainty that every class member could have suffered an injury to satisfy predominance. See Black, 69 F.4th at 1185; see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (rejecting "argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members"); In re Nexium Antitrust Litig., 777 F.3d at 21–22 (explaining how it may be impossible to exclude all uninjured class members at the preliminary certification stage and how ultimately defendant will not pay those uninjured class members). Finally, we are not persuaded by Defendants' concern over mini-trials because individual damages issues do not typically defeat predominance, Cline, 159 F.4th at 1187, and we have already rejected Defendants' concern over the difficulty of sorting through their own records. The class satisfies predominance.[13]

5. Superiority.

Rule 23(b)(3) provides a series of factors courts can consider in the superiority analysis. They 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;

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[13] We have considered the remaining arguments against predominance in Defendants' brief and are not persuaded by them. Aplee. Br. at 32–43.

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

Menocal, 882 F.3d at 915; Fed. R. Civ. P. 23(b)(3).

The district court held that because Plaintiffs failed on predominance, typicality, adequacy of representation, and ascertainability, they could not show that a class action is the superior method to resolve whether Defendants breached the settlement. VII Aplt. App. 248–49. Having found that this putative class action meets all other certification requirements, we have little trouble concluding that superiority is also satisfied. We accept Plaintiffs' arguments that the above factors weigh in favor of class treatment of their claims. See Aplt. Br. at 47–48. Finally, we note that Cline said that administrative feasibility may bear on whether class resolution is superior to individual resolution. 159 F.4th at 1196. But for all the reasons already discussed, the purported difficulties in determining who can recover do not convince us that this dispute is ill-suited for a class action. The class satisfies superiority.

Conclusion

Ultimately, we are not convinced by Defendants' arguments against certifying this class. We fail to see how a class action is not the ideal method to litigate the breach of a class action settlement. Accordingly, we **REVERSE** the district court and **REMAND** with instructions to certify a class consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHERRY RIDER, trustee of the Cherry Rider Family Trust and R.W. and CATHY LUCAS, co-trustees of the R.W. Lucas and Cathy Lucas Living Trust, individually and as representative plaintiffs on behalf of persons or concerns similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**No. 23-1274-KHV**
OXY USA, INC.; MERIT ENERGY COMPANY, LLC; and MERIT HUGOTON L.P.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

On December 29, 2023, Cherry Rider, as Trustee of the Cherry Rider Family Trust, and R.W. Lucas and

Cathy Lucas, as Co-Trustees of the R.W. Lucas and Cathy Lucas Living Trust, filed this putative class action against OXY USA, Inc. ("Oxy"), Merit Energy Company, LLC and Merit Hugoton L.P. (collectively, "Merit"). Plaintiffs allege that by taking improper deductions from royalty payments that Merit made to plaintiffs, defendants breached a stipulation of settlement which the District Court of Stevens County, Kansas entered in Littell v. OXY USA, Inc., No. 98-CV-51. See Class Action Complaint (Doc. #1) filed December 29, 2023.

This matter is before the Court on Plaintiffs' Motion For Class Certification (Doc. #89), Defendants' Motion To Strike The Expert Opinions Of Paul Saas As An Improper Rebuttal Witness (Doc. #90) and Defendants' Daubert Motion To Exclude The Opinions Of Paul Saas (Doc. #91), all filed January 9, 2025. For reasons stated below, the Court overrules plaintiffs' motion for class certification. It overrules as moot defendants' motions to strike and exclude.

Legal Standard

The class action is an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011). The Court has considerable discretion in making class certification decisions. See Tabor v. Hilti, Inc., 703 F.3d 1206, 1227–28 (10th Cir. 2013). It must, however, conduct a "rigorous analysis" to determine whether the putative class satisfies the requirements of Rule 23, Fed. R. Civ. P. Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013); Dukes, 564 U.S. at 350–51. Rule 23 "does not set forth a mere pleading standard." Dukes, 564 U.S. at 350. Rather, the Court's analysis will frequently overlap with the merits of plaintiffs' claims. See

Comcast, 569 U.S. at 33–34; Dukes, 564 U.S. at 351. This is so because determining whether to certify a class typically involves considerations that are enmeshed in the factual and legal issues which comprise plaintiffs' cause of action. Comcast, 569 U.S. at 34.

As the party seeking class certification, plaintiffs have the strict burden to affirmatively prove that the proposed class satisfies the requirements of Rule 23. Dukes, 564 U.S. at 351. In doing so, plaintiffs must first satisfy the prerequisites of Rule 23(a): they must demonstrate that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact are common to the class, (3) the claims of representative parties are typical of class claims and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, plaintiffs must demonstrate that the proposed class action fits within one of the categories described in Rule 23(b).

Here, plaintiffs seek to proceed under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." In determining predominance and superiority under Rule 23(b)(3), the Court considers the following factors:

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

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

Id.

Factual Background

Plaintiff Cherry Rider is trustee of the Cherry Rider Family Trust. Plaintiffs R.W. Lucas and Cathy Lucas are co-trustees of the R.W. Lucas and Cathy Lucas Living Trust. The trusts own mineral and royalty interests in lands in the areal confines of the Kansas Hugoton Gas Field.

I. The Littell Settlement

On November 13, 1998, Bonnie Beelman, Opal Littell and Cherry Rider, as co-trustees of the Opal Littell Family Trust, filed suit against Oxy in the District Court of Stevens County, Kansas in a case captioned Littell v. OXY USA, Inc., No. 98-CV-51. In that case, plaintiffs alleged that Oxy had failed to properly calculate and pay required royalty payments under oil and gas leases within the Kansas Hugoton Gas Field. On March 13, 2001, the Stevens County court certified the case as a class action. In January of 2007, the class action plaintiffs and Oxy entered into a stipulation of settlement (the "Settlement").

The Settlement defined class members as follows:

> All persons or concerns owning mineral interests in lands located in the areal confines of the Kansas Hugoton Gas Field, burdened by oil and

> gas leases owned in whole or in party by defendant with respect to gas production from above the base of the Panoma-Council Grove Field, whose royalty payments have been reduced by a "gathering/compression" deduction or "marketing deduct" identified on the monthly gas revenue detail sent by defendant to each such member.

Stipulation Of Settlement (Doc. #1-1) filed December 29, 2023 at 14.

On March 4, 2008, the Stevens County court approved the Settlement between the participating class members and Oxy, and it entered a journal entry of judgment.[14] Under the terms of the Settlement, Oxy would pay $16,700,000, plus accrued interest, into the settlement fund. The final payment schedule contained 4,307 owner numbers, corresponding to approximately 2,600 participating class members.

The Settlement set forth specific limitations on Oxy's future royalty payments to participating class members and their successors. Section 2.6 of the Settlement states that Oxy shall not "diminish[] or

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[14] The Settlement defines "Participating Class Members" as "all Class Members who do not exclude themselves as provided for in the Notice Order." Stipulation Of Settlement (Doc. #1-1) at 7. The Settlement contains two definitions of "Oxy." Generally, when used in the Settlement, "Oxy" means Oxy and "its parents, subsidiaries, and all affiliated companies." Id. at 5. When used in connection with the "Settled Claims," "Oxy" also includes all present and former successors and assigns. Id. The "Settled Claims" are "any and all claims . . . based on any facts, circumstances, transactions, events. . . which occurred at any time prior to July 1, 2007, that were or could have been properly alleged in the Action and that in any way related to the Leases, OXY's operation of the Leases, or OXY's failure to operate the Leases." Id. at 8–9.

reduce[] by any charge other than fifteen cents per mmbtu ($0.15/mmbtu) for Gathering Charges, taxed owed by them or the actual cost of transporting such gas on a transmission pipeline." Id. at 13. Section 7.3 of the Settlement provides that the agreement "shall be binding upon" participating class members and their successors and assigns. Id. at 22. Further, it states that an assignment does not relieve any party of its obligations under the Settlement. Id.

Cherry Rider, as Trustee of the Cherry Rider Family Trust, is a participating class member in the Settlement and remains a named plaintiff and class representative in that case. R.W. Lucas is also a participating class member under the Settlement. The R.W. Lucas and Cathy Lucas Living Trust is the successor in interest to R.W. Lucas.

II. Merit Acquires Oxy's Leases

In May of 2014, Merit acquired Oxy's assets in the Kansas Hugoton Gas Field and took over operation of Oxy's oil and gas leases which are subject to the Settlement. At that time, Oxy (1) informed Merit about the Settlement; (2) identified royalty owners who were participating class members, as well as those that were not; and (3) provided Merit information regarding how it calculated royalty payments to participating class members, including information on limitations in the deductions. Plaintiffs allege that since May of 2014, participating class members and their successors have received royalty payments from Merit or a related entity which contain improper deductions under Section 2.6 of the Settlement.

III. Procedural History

On April 27, 2023 in the District Court of Stevens County, plaintiffs filed a motion to enforce the Settlement against Merit as successor in interest to Oxy. On May 26, 2023, Merit filed a notice of removal to this district. See Littell v. OXY USA, Inc., No. 23-1103 (D. Kan.). The Honorable Holly L. Teeter sustained plaintiffs' motion to remand, finding that the federal court lacked jurisdiction because the Littell case, which was filed in 1998, commenced before the Class Action Fairness Act, 28 U.S.C. § 1332(d), went into effect.[15] Order, Littell, No. 23-1103 (Doc. #21 filed Aug. 22, 2023).

On remand to Stevens County, plaintiffs filed a renewed motion to enforce. On December 5, 2023, the Stevens County court overruled plaintiffs' motion because the judgment which approved the Settlement had become dormant under Kansas law. On February 8, 2024, plaintiffs appealed. The Kansas Court of

[15] The Class Action Fairness Act, which "expanded the subject matter jurisdiction of federal courts over class actions in which at least one plaintiff class member was diverse in citizenship from the defendant and where the amount in controversy exceeded $5 million," applies to any case commenced on or after February 18, 2005. Pritchett v. Off. Depot, Inc., 420 F.3d 1090, 1092 (10th Cir. 2005). A case commenced in state court before February 18, 2005 (when Congress enacted the Class Action Fairness Act) is not "recommenced" post-Class Action Fairness Act by the act of removal after February 18, 2005. See id. at 1094–97. Here, the class action commenced in state court in 1998, and defendants removed it to this district in 2023. Judge Teeter held that because the class action commenced before the Class Action Fairness Act went into effect, the Class Action Fairness Act could not be the basis for federal jurisdiction. For that reason, the court lacked subject matter jurisdiction over the case, and Judge Teeter remanded it. Order, Littell, No.23-1103 (Doc. #21).

Appeals has not yet issued an opinion in the matter. See Littell v. Merit Energy Co., No. 127221 (Kan. Ct. App. appeal docketed Feb. 8, 2024).

On December 29, 2023, plaintiffs filed this suit. Plaintiffs claim that both Merit and Oxy breached the Settlement by taking improper deductions from royalty payments in excess of what the Settlement allowed. Plaintiffs claim that Merit is a successor or assign of Oxy and is bound by the Settlement, including the limitations on deductions. Plaintiffs assert that Oxy also breached the Settlement because Section 7.3 provides that no assignment relieves Oxy of its obligations under the agreement.

On January 9, 2025, plaintiffs filed their motion for class certification. See Plaintiffs' Motion For Class Certification (Doc. #89). That same day, defendants filed motions to strike or exclude the testimony of Paul Saas. See Defendants' Motion To Strike (Doc. #90); Defendants' Daubert Motion To Exclude (Doc. #91).

Analysis

Before the Court addresses the requirements for class certification, it addresses defendants' motions to strike or exclude the testimony of Paul Saas.

I. Defendants' Motions To Strike Or Exclude

Defendants argue that the Court should strike the expert testimony of Paul Saas because (1) during discovery, plaintiffs stipulated that they would not designate any expert in support of their motion for class certification and (2) after defendants designated three experts, plaintiffs improperly designated Saas as a "rebuttal" expert in support of class certification. In the alternative, defendants argue that the Court should exclude Saas's expert testimony because (1) he does not have the requisite knowledge or experience

to provide expert opinions on issues related to class certification and (2) his methodology to determine class members is not reliable.

In their motion to strike, defendants acknowledged that plaintiffs did not attach Saas's report to their motion for class certification or reference his opinions in the motion. Nevertheless, defendants asserted that "it is obvious that [plaintiffs] *will* rely on the Saas opinions" in their reply. Defendants' Motion To Strike (Doc. #90) at 7 (emphasis added). In their reply, plaintiffs state that "there is no present need for Plaintiffs to present testimony from their rebuttal expert." Reply To Defendants' Response In Opposition To Plaintiffs' Motion For Class Certification (Doc. #104) filed May 9, 2025 at 3. Plaintiffs did not present Saas's report or reference his opinions in their reply. Because plaintiffs did not—and do not—rely on Saas to support their motion for class certification, defendants' motions to strike and/or exclude his testimony are moot. The Court therefore overrules the motions.

II. Plaintiffs' Motion For Class Certification

Plaintiffs seek class certification under Rule 23(b)(3) for the purpose of asserting common claims for breach of contract against Oxy and Merit regarding royalty payment obligations. Defendants raise two initial issues related to plaintiffs' proposed class definition: ascertainability and standing. Specifically, defendants argue that to ascertain class members under the proposed definition, they would need to conduct an individualized land-ownership analysis to determine who has standing to assert a claim for breach of the Settlement. Because the Tenth Circuit treats ascertainability as a sub-requirement of numerosity, the Court considers defendants'

ascertainability arguments in that section.[16] Evans v. Brigham Young Univ., No. 22-4050, 2023 WL 3262012, at *5 (10th Cir. May 5, 2023) (citing Rex v. Owens ex rel. Oklahoma, 585 F.2d 432, 436 (10th Cir. 1978)).

A. Standing

Plaintiffs ask the Court to certify the following class:

> All persons or entities to whom Merit Energy Company, LLC, Merit Hugoton LP, and/or any related or affiliated entity (collectively "Merit") has paid royalties at any time since December 2, 2017, under oil and gas leases in the Kansas Hugoton Field that were assigned to Merit by OXY USA, Inc. in or about 2014, except for those persons or entities who have received royalty payments from Merit exclusively for interests now or previously held by any of the 19 persons or entities who opted out of the class action settlement approved by the District Court of Stevens County, Kansas, on March 4, 2008, in the case of Opal Littell, et. al v. OXY USA, Inc., Case No. 98-CV-51, and excluding the United States of America insofar as its mineral interests are managed by the Office of Natural Resources Revenue.

Plaintiffs' Motion For Class Certification (Doc. #89).

Article III standing is a threshold matter central to the Court's subject matter jurisdiction. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (Rule

[16] By contrast, some circuits have found that ascertainability is better addressed under the predominance and superiority requirements of Rule 23(b)(3). See Mullins v. Direct Digital, LLC, 795 F.3d 654, 658 (7th Cir. 2015).

23 "must be interpreted in keeping with Article III constraints"); Vallario v. Vandehey, 554 F.3d 1259, 1269 n.7 (10th Cir. 2009) (class certification analysis must begin with Article III standing). Plaintiffs bear the burden of showing that Article III standing exists. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992). To have standing, plaintiffs must show that (1) they suffered an injury in fact, i.e. an injury that is sufficiently concrete and particularized, actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to defendants' conduct and (3) the injury is likely to be redressed by a favorable decision. Id. at 560–61. At the class certification stage, standing exists if at least one named plaintiff meets the requirements. DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010). Here, defendants do not challenge that at least one named plaintiff has standing to bring suit. At this stage, plaintiffs have standing to proceed.

B. Rule 23(a) Requirements

As noted, Rule 23 governs class certification, and plaintiffs have the strict burden to affirmatively prove that the proposed class satisfies the requirements of Rule 23. Dukes, 564 U.S. at 351. Under Rule 23(a), plaintiffs must first demonstrate that (1) the class is so numerous that joinder of all members is impracticable; (2) questions of law or fact are 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. Fed. R. Civ. P. 23(a). Defendants argue that plaintiffs' proposed class does not meet the commonality, typicality and adequate representation requirements of Rule 23(a).

The commonality and typicality requirements "tend to merge;" "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Dukes, 564 U.S. at 349 n.5. Commonality and typicality also "tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." Id. Even so, the Court addresses each requirement under Rule 23(a) separately.

1. Numerosity

Rule 23(a)(1) requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations. Gen. Tel. Co. of Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980). Plaintiffs must produce some evidence or otherwise establish by reasonable estimate the number of class members who may be involved. Tripp v. Berman & Rabin, P.A., 310 F.R.D. 499, 504 (D. Kan. 2015).

As noted, the Tenth Circuit treats ascertainability as a sub-requirement of numerosity. Rex, 585 F.2d at 436. To show numerosity, "there must be presented some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement." Id. Numerosity is essential because the "district court cannot determine whether a proposed class satisfies the Rule 23 requirements without a way to identify

absent class members." Evans, 2023 WL 3262012, at *5 (quoting 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (19th ed. 2019)). The Court may "properly look below the surface of a class definition to determine whether the actual process of ascertaining class membership will necessitate delving into individualized or subjective determinations." Id.; see also id. at *6 (from tuition records alone, court could not ascertain class members without individualized inquiries).

The Tenth Circuit has not adopted a standard for ascertainability. Id. at *8. Even so, it "allow[s] district courts to consider [out-of-circuit standards] as part of their discretion to grant or deny class certification." Id. Generally, courts apply the standards adopted by the Third Circuit or the Seventh Circuit. See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-MD-2785-DDC, 2020 WL 1873989, at *9–12 (D. Kan. Feb. 27, 2020) (discussing both standards). The Third Circuit requires that (1) the class be objectively defined and (2) a reliable and administratively feasible mechanism exists for determining whether putative class members fall within the class definition. Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 353 (3d Cir. 2013). By contrast, the Seventh Circuit has adopted a more relaxed standard which requires that plaintiffs show ascertainability by "defining classes clearly and with objective criteria." Mullins v. Direct Digit., LLC, 795 F.3d 654, 672 (7th Cir. 2015). Courts in this district typically rely on the Seventh Circuit's articulation. See In re EpiPen, 2020 WL 1873989, at *11; In re: Syngenta AG MIR 162 Corn Litig., No. 14-MD-2591-JWL, 2016 WL 5371856, at *3 (D. Kan. Sept. 26, 2016).

Here, the final payment schedule in the Settlement contained 4,307 owner numbers, corresponding to approximately 2,600 participating class members. Plaintiffs claim that class members are easily ascertainable because when Merit acquired Oxy's assets in the Kansas Hugoton Field, Oxy provided Merit with royalty payment records and current royalty payment information, as well as its oil and gas leases and records regarding property ownership. Plaintiffs therefore argue that class members are readily ascertainable from Merit's business records. They suggest no alternative methodology. As noted, defendants argue that under the proposed definition, class members are not ascertainable because to ascertain class members, they would need to conduct an individualized land-ownership analysis to determine who has standing to assert a claim for breach of the Settlement.

Specifically, defendants argue that (1) Merit's payment records do not tie payees to specific oil and gas leases; (2) payees may not be the current record and legal title owners to the mineral interests under the oil and gas leases, and therefore entitled to royalty payments; (3) a successor in interest to a participating class member in the Settlement may not have also acquired the alleged class claim for underpayment of royalties; (4) the class definition is unclear whether plaintiffs are making a claim related to the wells that have been drilled on Oxy lease properties after 2008; and (5) Merit's payments on former Oxy properties also include some royalty payees and payments where Merit's interests are not derived from the Oxy acquisition, but from some other acquisition, direct leasing by Merit or unleased and/or unknown mineral owners. Defendants assert that given these issues,

ascertaining class members would require the parties to conduct a manual individualized investigation of title and transfer documents for each payee.

Defendants present the Declaration of Mary Drennan, Merit's Division Order Manager. See Declaration Of Mary Drennan (Doc. #103-1) filed March 21, 2024. The Division Order department maintains records, including the names, addresses and decimal ownership interests of owners in wells, which it uses to distribute payments to all mineral interest owners. Drennan attests that Merit's royalty payment records alone do not establish class members because the payment records do not tie payees to specific oil and gas leases. Accordingly, Merit cannot identify payees who have received royalty payments since 2017 under oil and gas leases that Merit acquired from Oxy in 2014. To gather such information, Merit would need to pull information from individual Division Order and contract files to determine whether a payee is an owner under an oil and gas lease acquired from Oxy. To further complicate the inquiry, Merit's payments on former Oxy properties also include some royalty payees and payments where Merit's interests are not derived from the Oxy acquisition, but from some other acquisition, direct leasing by Merit or unleased and/or unknown mineral owners.

Drennan states that even if Merit could identify individuals who received royalties on leases acquired from Oxy, the payees may not be the current record and legal title owners under the oil and gas leases and may not be entitled to royalty payments. Because Merit relies on mineral interest owners to inform it of ownership transfers, Merit's files often do not reflect the legal chain of title. Even if Merit's own files could

identify these interests, it would require a manual individualized investigation of any actual transfer documents—and during discovery, Merit produced a total of 14,392 transfer documents, comprising 69,594 pages. The parties would also need to conduct title searches in public records and locate and examine files containing records of transfers by court orders (such as probate decrees) and representations by payees about title transfers. Moreover, Drennan contends that the parties would need to retain title attorneys to provide title opinions.

Drennan also states that annually, Merit pays unclaimed gas proceeds in 50 states based on the last known state of residence of the interest owners whose funds have been held in suspense and met the conditions for abandonment. Drennan asserts that if an owner has proceeds which are sent to state unclaimed property funds, serious doubt exists whether that person is still a title owner and entitled to the funds.

Drennan believes that for all the above reasons, Merit is paying royalties to a significant number of persons and entities who are not the title owners of interests, but the payees never disclosed that they are not the title owners or that they transferred their interests. Plaintiff R.W. Lucas demonstrates this exact problem. In his deposition, Lucas testified that Merit sends all royalty checks to him personally, not the Lucas Living Trust, even though the Lucas Living Trust is the legal owner of the mineral interests. See Deposition Of Ronald Wayne Lucas (Doc. #103-18) filed March 21, 2025 at 59:1–60:5. Lucas testified that he never informed Oxy or Merit of his transfer to the Trust.

Defendants also present the declarations and reports of their three retained experts, Angela Paslay, David Bengston and Joe Leon.[17] See Declaration Of Angela Paslay (Doc. #103-3), Declaration Of David E. Bengston (Doc. #103-4) and Declaration Of Joe Leon (Doc. #103-5), all filed March 21, 2025. Paslay is a Director at Applied Economics Consulting Group, Inc., which conducts economic, accounting and financial analyses in the oil and gas industry. In her opinion, plaintiffs cannot identify class members by looking at Merit payment records but would need to conduct an individualized examination of ownership and pooling records. Paslay also notes that since 2008, hundreds of new wells have been drilled on Oxy's lease properties and (1) it is unclear whether plaintiffs are making a claim related to the new wells and (2) if they are, the parties would need to complete an individualized examination of production records to determine whether the wells were drilled above or below the Panoma-Council Grove Field horizon and within the areal confines of the Hugoton Gas Field such that they fall within the scope of the Settlement.

Bengston is an attorney at Stinson LLP, with substantial experience in oil and gas title work. In his opinion, plaintiffs cannot identify class members by looking at Merit payment records because the payment records do not (1) account for intervening ownership changes; (2) reflect ownership changes not reported to Merit; or (3) account for informal title transfers reported to Merit which may not satisfy legal transfer requirements. Moreover, Bengston opines that because a successor in interest may not have also acquired the alleged class claim for

[17] Plaintiffs have not challenged the expert opinions of Paslay, Bengston or Leon.

underpayment of royalties, an individualized examination of transfer documents is necessary to determine ownership of those claims.

Leon is a Project Manager at Western Land Services, LLC, with substantial experience in the oil and gas industry performing detailed title searches, acquiring oil and gas leases and conducting title curative work related to ownership claims for mineral royalty interests. In his opinion, the proposed class definition raises the following issues: (1) determining the successors of the 19 individuals who opted out of the Settlement; (2) identifying royalty owners and tying them back to specific leases acquired from Oxy; and (3) determining whether royalty owners are subject to other leases acquired from producers other than Oxy.

On this record, plaintiffs have not met their burden of showing that class members are presently ascertainable based on the proposed class definition. Plaintiffs present no rebuttal expert evidence that class members are ascertainable and contend that they do not need an expert because they can simply use Merit's royalty payment records. Plaintiffs claim that tying specific royalty owners to specific leases is irrelevant to determining class membership.

The Court disagrees. Class membership is wholly premised on whether class members own mineral interests in land burdened by oil and gas leases which Merit acquired from Oxy in 2014. To determine that, however, is not administratively feasible. The Court would have to individually inquire into Merit's payment records, lease records and acquisition records, along with public land records and relevant transfer documents for each payee. Given the significant hurdles of determining ownership

interests and tying the interests back to specific leases, plaintiffs have not clearly defined their class, and the Court cannot presently apply the class definition to determine who is and who is not a member of the class. See Evans, 2023 WL 3262012, at *6 (from tuition records alone, court could not ascertain class members without individualized inquiries); see also EQT Prod. Co. v. Adair, 764 F.3d 347, 359 (4th Cir. 2014) (class members not ascertainable from gas estate ownership schedules because numerous heirship, intestacy and title-defect issues plague many potential class members' claims to gas estate); Johnson v. Kan. City S., 224 F.R.D. 382, 389 (S.D. Miss. 2004) (ascertaining class members would require individualized review of thousands of title documents containing differing and diverse conveyance language that would have to be analyzed according to specific language used and applicable case law to ascertain intention of parties to conveyances and legal effect of instruments), aff'd sub nom. Johnson v. Kan. City S. Ry. Co., 208 F. App'x 292 (5th Cir. 2006). Plaintiffs suggest no alternative methodology to ascertain class members without such individualized inquiries.

For these reasons, the Court finds that under the present definition, class members are not reasonably ascertainable, and class certification is inappropriate in this case.

2. Commonality

Rule 23(a)(2) requires plaintiffs to show that "questions of law or fact are common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Dukes, 564 U.S. at 349–50 (quotations omitted). The requirement that class

members have suffered the same injury "does not mean merely that they have all suffered a violation of the same provision of law." Id. at 350. Rather, plaintiffs must show that the class's claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id.

Plaintiffs bring one claim for breach of contract against Oxy and one claim for breach of contract against Merit. Plaintiffs assert that the following questions of fact or law are common to all members of the proposed class:

> 1. Has Merit Energy or Merit Hugoton taken improper deductions for gathering charges in excess of the limit of $0.15/mmbtu and the prohibitions on fuel deductions set forth in the Settlement?
>
> 2. Is Merit Energy and/or Merit Hugoton bound by the terms of the Settlement?
>
> 3. Is Oxy bound by the terms of the Settlement?
>
> 4. Has Merit Energy or Merit Hugoton breached the terms of the Settlement?
>
> 5. Has Oxy breached the terms of the Settlement?

Motion For Class Certification (Doc. #89) at 8. Plaintiffs' first, fourth and fifth questions are essentially the same breach of contract claims against three different parties.

Defendants argue that plaintiffs' common questions cannot be answered the same for all proposed class members. Specifically, defendants argue that plaintiffs' questions necessarily turn on

individualized inquiries: (1) whether the class members are legal owners of mineral interests burdened by oil and gas leases which Merit acquired from Oxy; (2) if the owners transferred their interests, whether they also assigned their class claim for underpayment of royalties; and (3) whether the terms of each individual lease address defendants' waiver and estoppel defenses. Moreover, defendants assert that Merit's alleged deductions will vary from one well to another and from one gathering system to another, such that questions on deductions cannot be answered the same for all class members.

Plaintiffs' second and third questions are purely legal questions which the Court could answer based on the terms of the Settlement and Merit and Oxy's acquisition documents; it would not need to consider the proposed members' individual circumstances. The Court agrees with defendants, however, that due to individual inquiries related to property ownership and deductions, plaintiffs' first, fourth and fifth "common" questions will not yield the same answer for each proposed class member. Despite the second and third questions being purely legal questions, the answer to the questions would not resolve each class members' claims in one stroke. As discussed, plaintiffs' proposed class may include individuals without standing to enforce the Settlement, meaning that they have no claim for breach of contract. Without a claim for breach of contract, whether the Settlement binds Merit or Oxy is irrelevant and will not determine the truth or falsity of an issue central to breach of contract. Accordingly, plaintiffs' proposed common questions would not resolve an issue that is central to each proposed class members' claims.

Plaintiffs have not satisfied the commonality requirement.

3. Typicality

Rule 23(a)(3) requires plaintiffs to show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The test of typicality is whether all class members were at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances. Stricklin, 594 F.3d at 1198–99. The interests and claims of named plaintiffs and class members need not be identical; so long as the claims of named plaintiffs and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality. Id.

Here, plaintiffs' legal and remedial theories may not be identical to those of the proposed class because, for reasons stated above, the proposed class includes members who may not have legal title to the mineral interests burdened by oil and gas leases which Merit acquired from Oxy or own the class claim for underpayment of royalties. Therefore, plaintiffs' proposed class of royalty owners includes individuals who may not have standing to enforce the Settlement and have no legal or remedial theory on which to bring suit. For example, The Lucas Living Trust would not even be a class member, given that it has not received royalty payments from Merit during the requisite time period, even though it is the legal owner of the mineral interests. Moreover, plaintiffs' claims are not typical of the claims of royalty owners whose names are attached to unclaimed royalties sent to the states. For these reasons, plaintiffs' claims are not typical of the proposed class.

4. Adequacy

To satisfy the final requirement of Rule 23(a), plaintiffs must demonstrate that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court considers two questions when determining adequacy of representation: (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187–88 (10th Cir. 2002). Here, plaintiffs have not satisfied the commonality or typicality requirements due to individualized issues related to mineral interest ownership and class claim ownership. See Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc., 725 F.3d 1213, 1219 (10th Cir. 2013) (commonality, typicality and adequacy requirements of Rule 23(a) "tend to merge"). Given the variance in claims, plaintiffs do not necessarily possess the same interests as other class members, and they would not fairly and adequately protect the interests of the entire class. The named plaintiffs are not adequate representatives of the proposed class.

C. Rule 23(b)(3) Requirements

Under Rule 23(b), the Court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance

Rule 23(b)(3) requires plaintiffs to "show that common questions subject to generalized, classwide proof predominate over individual questions." CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014). The predominance inquiry looks to "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the noncommon, aggregation-defeating, individual issues." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016). The Court should "characterize the issues in the case as common or not, and then weigh which issues predominate." CGC Holding, 773 F.3d at 1087. 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." Tyson Foods, 577 U.S. at 453.

Here, plaintiffs have presented no questions common to all proposed class members. Accordingly, common questions do not predominate. Even if plaintiffs could point to a single common question, individual issues related to ownership of the mineral interests would significantly outweigh any common issue. See XTO Energy, Inc., 725 F.3d at 1218–19 (individualized issues predominate when duty of marketability requires reviewing every class members' lease); Foster v. Merit Energy Co., 282 F.R.D. 541, 560 (W.D. Okla. 2012) (plaintiffs fail to establish predominance when method for calculating royalty payments depended on varying terms of lease agreements). Plaintiffs have not satisfied the predominance requirement.

2. Superiority

To establish superiority under Rule 23(b)(3), plaintiffs must 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). In making this determination, the Court considers (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). Here, plaintiffs cannot show that common issues predominate, that their claims are typical of the proposed class or that they could adequately represent the proposed class. Furthermore, even ascertaining the members of the class could present challenges which swallow any perceived benefits of classwide adjudication. For all the reasons discussed above, plaintiffs cannot show that a class action is the superior method to efficiently resolve whether Merit and Oxy breached the terms of the Settlement agreement by taking improper deductions from plaintiffs' royalty payments.

On the facts before the Court, plaintiffs have not established that the proposed class satisfies all requirements of Rule 23. The Court overrules plaintiffs' motion for class certification.

IT IS THEREFORE ORDERED that Plaintiffs' Motion For Class Certification (Doc. #89) filed January 9, 2025 is **OVERRULED**.

IT IS FURTHER ORDERED that Defendants' Motion To Strike The Expert Opinions Of Paul Saas As An Improper Rebuttal Witness (Doc. #90) and Defendants' Daubert Motion To Exclude The Opinions Of Paul Saas (Doc. #91), both filed January 9, 2025, are **OVERRULED as moot**.

Dated this 18th day of June, 2025 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHERRY RIDER, trustee of the Cherry Rider Family Trust, et al.,

Plaintiffs - Appellants,

v.

OXY USA, INC.; MERIT ENERGY COMPANY, LLC; MERIT HUGOTON, L.P.,

Defendants - Appellees.

EASTERN KANSAS ROYALTY OWNERS ASSOCIATION,

Amicus Curiae.

FILED
United States Court of Appeals
Tenth Circuit

July 10, 2026

Christopher M. Wolpert
Clerk of Court

No 25-3142
(D.C. No. 6:23-CV-01274-KHV-TJJ)
(D. Kan.)

ORDER

Before **BACHARACH**, **KELLY**, and **FEDERICO**, Circuit Judges.

Appellees' motion for leave to file a reply in support of petition for panel and en banc rehearing is denied.

Appellees' petition for panel 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

Per Curiam

APPENDIX D

U.S. Constitution, 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. Class Actions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Certification Order.

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

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

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

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the

court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

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

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

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

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

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be 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).