NO. 15-2879

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RUDY F. WEBB, et al. APPELLANTS

V.

EXXON MOBIL CORPORATION, et al. APPELLEES

On Appeal from the United States District Court
for the Eastern District of Arkansas

Brian S. Miller, Presiding Judge

JOINT BRIEF OF APPELLEES

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SUMMARY OF THE CASE

Appellants asserted a breach of contract claim demanding repair, replacement, or removal of the Pegasus Pipeline, an interstate crude oil pipeline running from Illinois to Texas, because appellants believe that the pipeline is unsafe. The contract is an easement to which appellants' property is subject. But the easement does not actually impose any of the obligations that the defendants are alleged to have breached. Appellants sought certification of a class consisting of thousands of landowners whose property is subject to an easement.

After initially certifying a class, the district court decertified the class because the pipeline's characteristics vary widely from place to place, making each class member's claim highly individualized. The district court also determined that appellants' claims are preempted by federal law because they attempt to impose a state law safety standard on the operation of the pipeline. Finally, the district court granted summary judgment on appellants' claims because the easements did not expressly or impliedly impose the duties that appellants asserted.

Oral argument is unnecessary in this case because the issues can and should be resolved without argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, appellees disclose the following:

1. Exxon Mobil Corporation is a publicly traded company, organized under the laws of New Jersey and headquartered at 5959 Las Colinas Boulevard, Irving, Texas 75039-2298.

2. Exxon Mobil Corporation has no parent company, and no publicly traded corporation owns 10% or more of its stock.

3. ExxonMobil Pipeline Company is a Delaware corporation operating as an indirectly wholly owned subsidiary of Exxon Mobil Corporation.

4. ExxonMobil Pipeline Company is 100% owned by Exxon Pipeline Holdings, Inc., which in turn is 100% owned by Exxon Mobil Corporation.

5. Mobil Pipe Line Company is a Delaware corporation operating as an indirectly wholly owned subsidiary of Exxon Mobil Corporation.

6. Mobil Pipe Line Company is 100% owned by Mobil International Petroleum Corporation, which is 100% owned by Mobil Corporation.

7. Mobil Corporation is 100% owned by Exxon Mobil Corporation.

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STATEMENT OF THE CASE

I. The Pegasus Pipeline.

This case involves the northern portion of the Pegasus Pipeline, which runs approximately 650 miles from Patoka, Illinois, to Corsicana, Texas. (App. 40, ¶ 40; App. 347, ¶ 7).[1] Appellants alleged that the pipeline consists of pre-1970 low-frequency electric resistance welded ("LF-ERW") seamed pipe. (App. 35, ¶ 28). Appellants take issue with the appropriateness of using LF-ERW pipe in the Pegasus (or any pipeline), alleging that its use for the Pegasus subjects all persons who own property subject to an easement for the Pegasus along its entire 650-mile run to the identical "imminent" risk that the pipeline's seams will fail and cause a release of oil. (App. 35, ¶ 28; 194–95).

However, appellants' cornerstone allegation is demonstrably untrue. The federal Pipeline Hazardous Materials Safety Administration ("PHMSA")—the agency charged with the regulation of interstate pipelines—has found that the pipeline contains both seamed and seamless pipe. (App. 72). The amount of seamless pipe is substantial. As defendants' expert Robert D. Caligiuri explained, 215

[1] References to "App." in this brief are to appellants' appendix. References to appellees' separate appendix appear as "Appellees' App."

miles—approximately one-third—of the Patoka to Corsicana section consists of seamless pipe, which has no risk of seam failure because it has no seam. (App. 347–48, ¶ 7). The pipeline also contains high-frequency electric resistance welded ("HF-ERW") pipe and double submerged arc welding ("DSAW") pipe, which are different from LF-ERW pipe. (*Id.*) Sections of the pipeline have been replaced in twelve separate years since 1948, including eight different years since 1970. (*Id.* at 349, ¶ 12). Thus, the pipeline's constituent materials differ greatly from place to place along the 650-mile stretch from Patoka to Corsicana.

The risk of failure on any pipeline, including the Pegasus Pipeline, varies from section-to-section. Determining a pipeline's susceptibility to failure requires consideration of a number of factors that Caligiuri characterizes generally as "pipeline material related, mechanical/pipeline operations related, and external hazards related," with each general category containing several individual factors:

- The pipeline material-related factors include the method used to manufacture the pipe, the coating used on the pipe, the manufacturer of the pipe, the pipe material strength, the pipe wall thickness, the pipe installation dates, and the pipe steel fracture toughness. (App. 347–50, ¶¶ 7–13).

- The mechanical/pipeline operations-related factors include surface topography, proximity to pumping stations, and product pressure cycling. (App. 350–52, ¶¶ 14–16).

- The external hazard variables include local soil/environmental conditions and the potential for third-party damage. (App. 352–53, ¶¶ 17–18).

These factors differ at various locations along the pipeline, meaning that the risk of failure along the pipeline is anything but uniform.

II. Appellants' claims against appellees.

Appellants filed suit against appellees Exxon Mobil Corporation, ExxonMobil Pipeline Company, and Mobil Pope Line Company[2] on April 17, 2013.[3] (App. 10). The amended complaint alleges that the Pegasus Pipeline ruptured on March 29, 2013, in Mayflower, Arkansas, resulting in the spill of crude oil "into the nearby community adjacent to and within the environmental footprint of the Pipeline." (App. 38, ¶ 33). But appellants' complaint has nothing to do with that release of oil—they do not allege that the oil was spilled on or otherwise came into

[2] For the purposes of this brief, the term "Exxon" will be used to refer collectively to the appellees.

[3] Appellants also named "ExxonMobil Pipeline Company, L.P.," a company that does not exist.

contact with their property. None of the appellants even live in the area where the spill occurred. The Webbs live in Conway, Arkansas, and own property outside the spill area in Mayflower, while the Harpers live several miles away from Mayflower. (App. 30, ¶¶ 13–14). Even though no oil reached their lands, appellants alleged that they have "directly experienced real property injury and damages" as a result of the spill. (*Id.*) They later abandoned any claim for damages, limiting the relief they sought to a forced removal or replacement of the entire pipeline. (Add. 2; App. 370–71, 373–74, 564).

The basis for appellants' claims is that their properties have easements on them for the pipeline, that the easements are contracts, and that defendants have breached those contracts by not maintaining the pipeline. (App. 43–45, ¶¶ 48–58). They sought "specific performance"—of a promise that is not in the easement—in the form of an order to remove or replace the pipeline. (App. 45, ¶ 58). In addition to their individual claims, appellants proposed a class action on behalf of a multistate class consisting of "all persons and entities who owned real property as of March 29, 2013, with an easement for the Pegasus

Pipeline on their real property from Patoka, Illinois, to Corsicana, Texas." (App. 40, ¶ 40).

The easement at issue is a "RIGHT OF WAY GRANT" executed on May 6, 1947, by Nannie Fuller Saxton, appellants' predecessor in interest. (App. 463). That instrument conveyed an interest in land and certain related privileges to Magnolia Pipe Line Company, the predecessor in interest to appellee Mobil Pipe Line Company. (App. 463). The only obligations that the "RIGHT OF WAY GRANT" imposes on Magnolia Pipe Line Company are the following:

> Magnolia Pipe Line Company, its successors and assigns, . . . hereby agrees to pay any damages that may arise to crops, timber or fences from the use of said premises for such purposes. . . . Should more than one pipe line be laid under this grant at any time, fifty cents per rod shall be paid for each additional line so laid, besides the damage above provided for. It is further agreed that said pipes shall be buried to a sufficient depth so as not to interfere with cultivation of soil.

(App. 463). No provision of the instrument endows the grantors with the right to demand repair, replacement, or removal of the pipeline or to impose any sort of safety standards on its operation.

Nevertheless, appellants sought replacement or removal of the pipeline. (App. 43–45, 355–56, 368, 370–71, 373–74). These claims are

intricately tied to the perceived "safety" of the pipeline. (*See* App. 368 (stating "I think they should put a new one in or something. It is going to probably burst again."); App. 370 (responding "just a safer pipe" to a question regarding what is sought in this lawsuit); App. 377 (stating that "the pipeline is there up under the ground, and it is just not safe")). Appellants admitted that the pipeline never caused any damage to any crops, timber, or fences on their property. (Appellees' App. 4, 6). Exxon has not installed additional pipelines on appellants' property since the installation of the Pegasus Pipeline. (Appellees' App. 3). The Pegasus pipeline, likewise, is not interfering "with cultivation of soil." (App. 463).

III. Proceedings in the district court.

Appellees moved for class certification on February 3, 2014. (App. 137). Exxon responded to that motion on April 15, 2014, arguing that class certification was improper for several reasons—(1) the class did not have a viable claim because federal law preempts state law from regulating the safety of interstate pipelines, precluding class certification; (2) the class was overbroad because it included members who lacked standing to assert claims relating to the pipeline, either because they no longer owned land subject to an easement or because

the pipeline did not actually cross their property, as is the case with the Webbs; (3) the class was not ascertainable because identifying its members would require individualized inquiries into the chain of title of thousands of pieces of property to determine the current owner; (4) appellants failed to demonstrate the Rule 23(a) requirements of commonality, typicality, and adequacy because determining whether an individual easement had been breached required an individualized assessment; (5) the class could not be certified under Rule 23(b)(2) because appellants did not seek injunctive or declaratory relief and their class was not cohesive; and (6) the class could not be certified under 23(b)(3) because appellants failed to demonstrate predominance and superiority. (App. 301–02).

After the parties briefed the issue of class certification, the district court granted appellants' motion on August 12, 2014. (App. 563). The district court ruled that the claims were not preempted, that the class was ascertainable, and that the class met the Rule 23(a) and Rule 23(b)(3) requirements. (App. 565–72). The district court found that the Webbs lacked standing because the pipeline did not actually cross their property and thus refused to let them join with the Harpers as class

representatives. (App. 568). The district court also *sua sponte* narrowed the class to landowners who currently own real property subject to an easement for the Pegasus Pipeline and who have that pipeline physically crossing their property from Patoka, Illinois, to Corsicana, Texas. (App. 568–69). Exxon filed a motion for reconsideration of this order on August 26, 2014, asserting that the district court had erred in finding the class ascertainable and in ruling that appellants' claims were not preempted.[4] (App. 575–76). Appellants responded to that motion on September 11, 2014. (App. 587).

On September 8, 2014, Exxon filed a motion for summary judgment on appellants' individual claims,[5] arguing that appellants' breach of contract claims failed because the easements did not impose any of the obligations that appellants claimed that Exxon breached. (App. 579–80). In that motion, Exxon also renewed its preemption argument and requested judgment as to the Webbs based upon the

[4] Exxon also petitioned this Court for an immediate appeal from the class certification ruling, which was denied. (App. 16–17).

[5] That date was the motions deadline set by the district court. (App. 13).

district court's ruling that they lacked standing to pursue any claims. (App. 580). Appellants responded to that motion on October 27, 2014. (App. 18).

On December 5, 2014, appellants filed a motion to compel. (App. 1048). At that time, Exxon had produced more than 200,000 documents, consisting of over 800,000 pages, and its document production was substantially complete. (App. 1235–56). Nevertheless, appellants sought to compel Exxon to re-start its document-production efforts using computer-assisted "predictive coding" in place of the statistically validated search terms and other methods Exxon had used to identify responsive, non-privileged documents. (App. 1049). Exxon responded to that motion on December 29, 2014. (App. 1211). The district court denied it on February 9, 2015. (Add. 18; App. 1508).

On March 17, 2015, the district court issued an order granting Exxon's motion for reconsideration, decertifying the class, and granting the motion for summary judgment. (Add. 19; App. 1509). With regard to class certification, the district court determined that its earlier ruling on the Rule 23 requirements was mistaken because the record demonstrated that "the situation is far more nuanced" than the district

court initially concluded. (Add. 24; App. 1514). Rather than being "a single entity," the district court determined, the pipeline is actually "a series of individual segments, with each segment corresponding to each individual landowner." (Add. 25; App. 1515). Accordingly, "Exxon's actions, or inactions, on one individual's land would not necessarily implicate the interests of other landowners," and the fact that "Exxon may not be fulfilling its duties on one person's land does not necessarily mean it is not fulfilling its duties on all landowners' property." (Add. 25; App. 1515). A "trial would necessarily devolve into a parcel-by-parcel analysis of whether Exxon breached each individual easement." (Add. 25; App. 1515). The district court also reconsidered its preemption ruling, finding that appellants were attempting to use state common law claims to impose safety standards on the operation of the pipeline and that their claims were therefore preempted, precluding certification of a class. (Add. 29–33; App. 1519–23).

The district court also granted summary judgment, concluding based on an Arkansas Supreme Court case involving a nearly identical right of way grant that the contracts in this case impose neither an affirmative duty to maintain or repair the pipeline nor an implied duty

to do so. (Add. 33–40; App. 1523–30). The district court entered judgment on appellants' claims on March 17, 2015. (App. 1531).

On April 13, 2015, appellants filed a motion to alter or amend the judgment in which they urged the district court to change its rulings on class certification and summary judgment, as well as its earlier ruling denying their motion to compel discovery. (App. 1532). The district court denied that motion on July 24, 2015. (Add. 42; App. 1684). Appellants filed their notice of appeal to this Court on August 20, 2015. (App. 1691).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in decertifying the class. Appellants failed to meet their burden to demonstrate the commonality, typicality, and adequacy requirements of Fed. R. Civ. P. 23(a) because the class claims could not be resolved without extensive individual inquiries into the state of the pipeline on each individual landowner's property. More specifically, the record demonstrates that the pipeline has been repaired in some sections and completely replaced in others, meaning that the district court correctly concluded that the question of breach was individualized for each parcel of property. For the same reason, appellants failed to demonstrate predominance and superiority under Rule 23(b)(3).

The district court also correctly decertified the class because the only claim asserted on behalf of the class is preempted by the federal Pipeline Safety Act, which precludes the use of state law to impose safety standards upon the operation of an interstate pipeline like the Pegasus Pipeline. Appellants' amended complaint demonstrated beyond question that they sought to do just that, demanding repair, replacement, or removal of the pipeline based upon their belief that the

pipeline is unsafe. This ruling doomed both plaintiffs' class certification motion , as well as their individual claims.

The district court also correctly granted summary judgment on appellants' individual claims after decertifying the class. The district court granted summary judgment because the easements do not impose a contractual duty to repair and maintain the pipeline, and the undisputed material facts demonstrated that Exxon did not breach any contractual duties created under the easement. That conclusion was compelled by controlling Arkansas law, which establishes plainly that easements do not impose affirmative duties of maintenance on the easement holder unless the language of the easement does so expressly. The express language of the easement at issue in this case did not impose the duties that appellants claimed, and appellants failed to demonstrate that Exxon breached any obligation actually imposed by the easement in question.

Nor did the district court err in determining that Exxon did not unreasonably interfere with appellants' property rights. The undisputed proof in this case established that no oil leaked on appellants' property, and they did not establish any actual injury to

their property or interference with their use of their property. In fact, appellants expressly waived any claim for compensatory damages in this case.

Finally, the district court did not abuse its discretion in denying appellants' post-judgment request for relief under Fed. R. Civ. P. 59(e) and 60(b). Appellants did not follow the procedure for seeking additional time for discovery before responding to the motion for summary judgment, never once requesting additional time for discovery before responding and never suggesting that they needed additional discovery until after the district court had granted the motion. In fact, the record demonstrates that appellants had received more than 800,000 pages of documents in discovery prior to filing their response to the motion for summary judgment. Seeking relief after the district court granted summary judgment was improper, and appellants cannot complain on appeal that they were denied discovery after ignoring the proper procedure for raising the issue in the district court. Moreover, the evidence that appellants submitted with their post-judgment motion would not have produced a different result, so the district court correctly denied appellants' motion.

Because the district court's ruling decertifying the class and granting summary judgment were correct, this Court should affirm those rulings.

ARGUMENT

I. Because appellants failed to satisfy the requirements of Fed. R. Civ. P. 23, the district court correctly decertified the class.

Appellants misstate the standard of review applicable to their appeal of the district court's class certification ruling. The issue here is not a motion for reconsideration but rather the district court's decision to decertify a class.[6] Fed. R. Civ. P. 23(c)(1)(C) specifically permits a district court to alter or amend an order granting class certification at any time before final judgment in a case. In fact, the district court has a duty to assure compliance with Rule 23's requirements "even after certification" and should decertify a class if it appears that it does not meet the Rule 23 requirements. *Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986). When a district court fulfills that duty and

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[6] In fact, the district court's order decertifying the class did so largely on grounds that Exxon did not reassert in the motion for reconsideration. Exxon raised ascertainability and claim preemption in the motion for reconsideration and did not reargue the Rule 23 factors that it had raised in its class certification briefing. (App. 575–76). The district court reconsidered the issues of commonality, typicality, adequacy, and predominance *sua sponte* in decertifying the class. (Add. 22–29; App. 1512–19). The district court was simply fulfilling its duty to assure compliance with Rule 23 even after certification. *See White v. Nat'l Football League*, 756 F.3d 585, 594 (8th Cir. 2014) (stating that "indeed, so important are the Rule 23 class prerequisites that courts often decertify classes *sua sponte*, even at the appellate level, after finding that class litigation is no longer appropriate or that the class has become obsolete") (citations omitted).

decertifies a class, this Court on appeal applies the same abuse of discretion standard of review ordinarily applicable to certification orders, and the district court's decertification "must be upheld absent an abuse of discretion." *Id.*; *see also Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 961 (8th Cir. 1985) (stating that the "district court's decertification must be upheld unless it was an abuse of discretion").

In the class certification context, the Court has described that discretion as "broad." *Prof. Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). Generally, this "deferential standard recognizes that the district court has a range of choices, and its decision will not be disturbed as long as it stays within that range, is not influenced by any mistake of law or fact, and does not reflect a clear error of judgment in balancing relevant factors." *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 818 (8th Cir. 2010) (citations omitted).

Appellants have not demonstrated an abuse of discretion in the district court's decision to decertify the class for the simple reason that the district court correctly concluded that the class did not demonstrate commonality, typicality, and adequacy under Rule 23(a) and did not demonstrate predominance under Rule 23(b)(3).

A. Appellants failed to satisfy Rule 23(a) because commonality, typicality, and adequacy were lacking in light of the district court's conclusion that the pipeline is not uniform along its length.

Class actions under Fed. R. Civ. P. 23 are "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). A plaintiff seeking the benefit of that exception "must affirmatively demonstrate his compliance" with Rule 23's requirements, which are more than "a mere pleading standard." *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). Those requirements are each of the "four threshold requirements" of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and one of the three subsections of Rule 23(b). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613–15 (1997).

Showing compliance with Rule 23 requires evidence "to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast*, 133 S. Ct. at 1432 (emphasis in the original) (citing *Dukes*). The district court's analysis of whether a

plaintiff has met this burden must be "rigorous." *Dukes*, 131 S. Ct. at 2551. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff 's cause of action." *Id.* (internal citations omitted). A failure to meet even one of the Rule 23 requirements precludes class certification.

Here, the district court performed that rigorous analysis, concluding that appellants had failed to satisfy the commonality, typicality, and adequacy requirements of Rule 23(a). (Add. 22–26; App. 1512–16). The district court further concluded that appellants had failed to show predominance under Rule 23(b)(3). (Add. 26–29; App. 1516–19). As shown below, the district court was correct in each of those conclusions.

1. The proposed class lacked commonality because the varied state of the pipeline along its 650-mile length required individualized inquiries into whether Exxon breached its obligations under the easements to each individual landowner.

Underlying appellants' arguments before the district court and this Court has been the incorrect notion that the pipeline is a single,

indivisible entity that is the same along its entire 650-mile length. (*See* Appellants' Br. 19). The district court disagreed, concluding that "the situation is far more nuanced." (Add. 24; App. 1514). Instead, the district court concluded that the pipeline is in reality a series of greatly varying individual segments:

> While often discussed as a single entity, a more appropriate way to view the pipeline is as a series of individual segments, with each segment corresponding to each individual landowner. This is so because Exxon's actions, or inactions, on one individual's land would not necessarily implicate the interests of other landowners. For example, a pipeline leak in Illinois would have no practical effect on a landowner in Texas. The same principle can be applied to any purported duty to maintain or repair; simply because Exxon may not be fulfilling its duties on one person's land does not necessarily mean it is not fulfilling its duties on all landowners' property. Defendants are therefore correct that a trial would necessarily devolve into a parcel-by-parcel analysis of whether Exxon breached each individual easement.

(Add. 25; App. 1515). Based upon that conclusion, the district court ruled that appellants cannot satisfy the commonality, typicality, or adequacy requirements of Rule 23(a) or the predominance requirement of Rule 23(b)(3). (Add. 24–27; App. 1514–17).

Appellants have not demonstrated that the district court abused its discretion in finding a lack of commonality. As the district court

concluded, the record demonstrates that the pipeline consists of a series of segments that differ from place to place along its span. Exxon's expert, Dr. Robert D. Caligiuri, established that numerous sections along the pipeline have been replaced at various times since the pipeline was originally built. (App. 349–50, ¶ 12). More than 200 miles of the pipeline—approximately one-third of the stretch from Patoka to Corsicana—consists of pipe different from the original LF-ERW pipe about which appellants complained before the district court. (*Id.* at 347, ¶ 7). The replacement pipe differs in several aspects from the original pipe, presenting differing traits and differing maintenance needs. (*Id.*) Thus, one class member's proof that the pipeline has not been maintained, repaired, and replaced on her property will not necessarily prove a lack of maintenance, repair, or replacement on the property of another class member. The pipeline might have already been repaired or replaced on the second class member's property. Thus, just as the district court found, the question of maintenance, repair, and replacement can only be resolved on a parcel-by-parcel basis.

Appellants' own expert, Don Deaver, does not disagree with this conclusion that maintenance and repair needs differ from parcel to

parcel. He testified in his deposition that "if you want to start fixing the problems with [the pipeline], you've got to start looking at [it] piece by piece and identify specific areas of it." (App. 525). As Caligiuri puts it, given the various factors affecting the pipe in any given location, "the hazard profile presented by the presence of the Pegasus Pipeline in a Property Owner's easement will vary considerably from Property Owner to Property Owner along the 650-mile extent of the pipeline." (App. 353, ¶ 19). The need for maintenance and repair on the pipeline thus varies from location to location, meaning that answering the question of whether Exxon complied with any maintenance requirements cannot be answered on a classwide basis. The district court's finding that appellants' claims require a parcel-by-parcel analysis is therefore correct.

The fact that the easements were similar in their terms does not demonstrate an abuse of discretion. Proving commonality "requires a plaintiff to show that there are questions of law or fact common to the class," but the Supreme Court observed in *Dukes* that this "language is easy to misread" because "any competently crafted class complaint literally raises common 'questions.'" 131 S. Ct. at 2551 (quoting

Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009)). Merely "reciting these questions is not sufficient to obtain class certification;" rather, commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Id.* Ultimately, what "'matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 571 (8th Cir. 2015) (quoting *Dukes*, 131 S.Ct. at 2551 (emphasis in original)).

The existence of common contractual duties does not "drive the resolution of the litigation"—the key question is whether there was a breach of any duties. As the Supreme Court explained in *Dukes*, "dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 131 S.Ct. at 2551 (quoting Nagareda). Thus, in *Dukes* the plaintiffs failed to demonstrate commonality because their Title VII discrimination claims required an examination of the defendant's "particular employment decisions," and those decisions were discretionary decisions made by

thousands of supervisors at thousands of locations across the country pursuant to varying regional policies, with no proof of an overarching corporate policy of discrimination that affected all the class members. *Id.* at 2554–57. Those dissimilarities compelled a conclusion that there was no common issue in the case. *Id.*

This Court applied the same concept recently in a class action arising from a pipeline leak, holding that a Missouri district court abused its discretion in certifying a class of nearby landowners because they did not have a uniform injury. In *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015), the district court certified a class of landowners whose property lay within 0.25 miles of the leak site, an area containing 61 properties. *Id.* at 924–25. The evidence of contamination within this limited zone was not uniform, however, because properties in the immediate area around the leak were contaminated but properties at the periphery of the zone were not. *Id.* at 926. This Court held that the district court abused its discretion in finding commonality because of "the absence of evidence showing class members were commonly affected by contamination on their property."

Id. at 927. In other words, commonality was absent because not all class members were affected by the claimed violation.

Appellants ignore this recent authority in favor of pre-*Dukes* cases and state cases that are largely irrelevant to the question before this Court. *See United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) (stating that district courts "do[] not continue to be bound by prior interpretations of the law that are contrary to the Supreme Court's most recent announcement"). The correct standard for commonality is that delineated in *Dukes* and applied in *Smith*.

In finding commonality lacking, the district court applied the correct standard and reached the correct result, the same result that this Court reached in *Smith*. In fact, the variance amongst class members is far greater here than in *Smith* because the 0.25-mile radius zone with 61 class members in that case was much more limited than this class, which consisted of owners of property subject to an easement and touched by a pipeline that stretches 650 miles across four states. As the district court concluded, the state of the pipeline varies considerably along that length with regard to its maintenance, repair, and replacement needs. Those dissimilarities within the proposed class

on the central question of whether Exxon breached any obligations to maintain, repair, and replace the pipeline defeat commonality, and the district court therefore correctly concluded that commonality was lacking.

Appellants have not shown that the district court abused its discretion in finding no commonality. This Court should affirm.

2. The same conclusion regarding variations in the pipeline supports the district court's conclusion that typicality and adequacy are absent.

Appellants have also failed to demonstrate that the district court erred in concluding that the nature of the pipeline precluded a finding of typicality. The mere presence of a common legal theory does not establish typicality under Rule 23(a)(3) when proof of a violation requires individualized inquiry. *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) (citing *Parke v. First Reliance Stnd. Life Ins. Co.*, 368 F.3d 999, 1004–05 (8th Cir. 2004)). The district court correctly found that proving a violation would require individualized inquiry into the state of the pipeline on each class member's property, and that finding supports the conclusion that appellants failed to prove typicality.

The district court's ruling regarding the pipeline also provided the basis for its conclusion that appellants failed to demonstrate adequacy. As the district court noted in its order, any adequacy here was outweighed by the inconvenience of maintaining a class action that would require thousands of individualized inquiries into the state of the pipeline over its 650-mile course. (Add. 26; App. 1516 (quoting *Rattray v. Woodbury Cty., Iowa*, 614 F.3d 831, 835 (8th Cir. 2010)). Again, the district court's conclusion regarding the nature of the pipeline was not an abuse of discretion, and its accompanying conclusion that the individualized nature of the claims precluded a finding of adequacy was no abuse, either.

The district court correctly ruled that typicality and adequacy were lacking in this case because the record demonstrated that the pipeline varies considerably from place to place along its 650 miles, requiring inquiry on a parcel-by-parcel basis to determine if Exxon violated the terms of any easements. This Court should affirm the district court's ruling that appellants failed to show typicality and adequacy.

B. The individualized nature of the claims also precluded a finding of predominance under Rule 23(b).

Appellants' failure to demonstrate commonality also dooms their attempt to show predominance, for "the predominance criterion is far more demanding" than commonality, requiring more than simply identifying common questions. *Amchem*, 521 U.S. at 624; *see also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013) (holding that "individual questions in the claims under North Dakota contract law predominate," even though "there are indeed common questions of law and fact for the putative class"). The predominance requirement is not met unless the "proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623–24, and appellants "show that [their claims] can be proven on a systematic, classwide basis" such that common questions predominate over individual ones. *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005). Individual issues require "evidence that varies from member to member" to make a prima facie showing. *Id.* at 566.

The district court correctly determined that common issues do not predominate in this case because of the highly individualized nature of each class member's claims. (Add. 27; App. 1517). As discussed above,

the record demonstrates that the pipeline is simply not the same at each point along its 650-mile length, with significant portions replaced at different points in time, different materials used in various places, and different factors affecting its risk profile from place to place. Appellants are therefore incorrect in claiming that "class-wide breach can be proven with one set of common proof" (Appellants' Br. 26)—if a pipeline section has been completely replaced on one landowner's property, the proof of breach for that landowner will be markedly different than it would be for a landowner whose land is traversed by a section of the pipeline that has not been replaced since initial installation. Considering that more than 200 miles of the pipeline have been replaced and that several different types of pipe are present in the pipeline, determining the state of the pipeline on any particular piece of property would be necessarily individualized. The district court did not abuse its discretion in determining that such heavily individualized inquiries precluded a finding of predominance.

The Montana case that appellants cite in their brief is irrelevant to this analysis. In *Mattson v. Montana Power Co.*, 291 P.3d 1209 (Mt. 2012) (*Mattson II*), the Montana court was not considering a 650-mile

long pipeline spanning four states. Instead, *Mattson II* involved easements for a single dam on the lower Flathead River that was operated to keep the level on Flathead Lake artificially high and caused damage to properties around the lake. *Id.* at 1211–12. The dam could only be operated in one manner, either reasonable or unreasonable, that did not vary for each property owner. The undisputed proof in the present case shows that the pipeline has been maintained, repaired, and replaced differently in different places and is therefore not uniform to all the class members like the *Mattson II* dam was. *Mattson II* offers nothing to the Court's analysis in this case.

The district court also ruled that predominance was lacking for an entirely different reason, one that appellants have not contested on appeal. The district court concluded that Arkansas law governing easements differed significantly from that in other states and that "Arkansas law is unique in its interpretation of the issue." (Add. 28; App. 1518). Appellants do not address this issue in their brief, thus waiving the issue. *Land O' Lakes, Inc. v. Employers Ins. Co. of Wausau*, 728 F.3d 822, 827 (8th Cir. 2013) (quoting *Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040 (8th Cir. 2013)). The district court was

correct. As the district court concluded, the laws of Illinois, Missouri, and Texas differ from Arkansas law on the issue of the duties imposed by an easement, so "an application of Arkansas law in this instance would run the risk of imposing a unique Arkansas state law remedy across four states" and would impose difficult case management issues. (Add. 28; App. 1518 (citing cases)). Differences in state law defeat predominance. *See Amchem*, 521 U.S. at 624 (noting that "differences in state law" affecting a multi-state class action defeat predominance); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing class certification because the district court had not conducted a choice-of-law analysis to determine if applying the law of another state rather than individual class members' home state laws would violate due process). These key differences in state law affecting the various class members supported the district court's finding that there was no predominance in this case.

Again, appellants have failed to demonstrate any abuse of discretion on the part of the district court. The district court correctly found that appellants did not establish the requirements of Rule 23(b)(3), and this Court should affirm that ruling.

II. Appellants' claims are expressly preempted by the Pipeline Safety Act, precluding class certification and entitling Exxon to judgment as a matter of law.

Even in the context of the abuse of discretion standard applied to class certification issues, the district court's rulings on issues of law are reviewed *de novo*. *In re St. Jude*, 425 F.3d at 1119. Preemption is a legal issue that the Court reviews *de novo*. *Keller v. City of Fremont*, 719 F.3d 931, 937 (8th Cir. 2013).

Here, the district court ruled that "even if the requirements of Rule 23 were satisfied, plaintiffs' case could not proceed because their claims are preempted by the Pipeline Safety Act." (Add. 29; App. 1519). The district court concluded that appellants were using their common law claim to impose state safety standards upon the operation of an interstate pipeline, a result that the Pipeline Safety Act (the "Act") expressly preempts. (Add. 29–33; App. 1519–23). The district court also concluded that its ruling on preemption also disposed of appellants' individual claims. (Add. 47; App. 1689). Appellants argue that the district court's ruling was erroneous, but that argument cannot survive any scrutiny under the language of the Act, this Court's interpretation of it, and the allegations of appellants' complaint.

Under the Act, 49 U.S.C. § 60101 *et seq*., the Secretary of Transportation has exclusive authority over every aspect of the construction and operation of interstate pipelines. 49 U.S.C. § 60102. Intending the Act "to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities," Congress required the Secretary to identify "areas that are unusually sensitive to environmental damage if there is a hazardous liquid pipeline accident" and adopt regulations to reduce the risk of such accidents. 49 U.S.C. §§ 60102(a)(1), 60109(b), & 60109(c). This authority over pipeline safety thus encompasses "adequate protection" against the harms that individuals would suffer if accidents caused leaks of oil from pipelines. The Secretary has exercised this authority by adopting numerous regulations governing pipeline safety. *See generally* 49 C.F.R. part 195 and Appendix A.

To protect the Secretary's authority to establish uniform national requirements governing interstate pipelines, the Act contains an express preemption provision prohibiting states from regulating interstate pipeline safety. Particularly, the Act declares that states "may not adopt or continue in force safety standards for interstate

pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). In other words, state law may not impose safety requirements on the operation of interstate pipelines.

Though appellants omit any discussion of the case in their brief, in *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir. 1993), this Court held that by enacting the preemption provision of the Act, "Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines. For this reason, the state cannot regulate in this area." *Id.* at 358; *see also Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 878 (9th Cir. 2006) (stating that "federal preemption of the regulation of interstate pipeline safety is manifest in the language of the PSA [Pipeline Safety Act]"); *People ex rel. Sneddon v. Torch Energy Services, Inc.*, 102 Cal. App. 4th 181, 187 (2002) (stating that the "language of the PSA clearly expresses the intent of Congress to fully occupy the field of oil and gas operations and pipeline safety so that any state law that touches upon the area, even consistent state law, is preempted"). Department of Transportation regulations take the same approach. 49 C.F.R. part. 195, app. A (concluding that the Act "leaves

to exclusive Federal regulation and enforcement the 'interstate pipeline facilities,' those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce").

The question before the district court was whether appellants' claims in this case constituted an attempt to impose a state law safety requirement on the operation of the Pegasus Pipeline, which is an interstate pipeline covered by the Act. Analysis of this question must examine the "substance of the allegations" to determine what the appellants seek and whether that remedy is preempted by federal law. *Kutten v. Bank of Am., N.A.*, 530 F.3d 669, 670–71 (8th Cir. 2008). In other words, labels like "breach of contract" and "common law property claims" are irrelevant—what appellants actually sought is all that matters.

Appellants' brief omits any analysis of the substance of their allegations in this case in favor of such labels. The reason for that omission becomes obvious upon a review of those allegations, which establish that appellants sought to impose a safety regime different from the one that PHMSA has imposed on the Pegasus Pipeline. Indeed, appellants asked the district court to make a fundamental

decision reserved to PHMSA—whether the pipeline is sufficiently safe to be permitted to operate at all. Their amended complaint seeks "specific performance" mandating "removal of the pipeline or in the alternative replacement of the ***unsafe pipeline***." (App. 45, ¶ 58 (emphasis added)). Supporting that request for relief are numerous paragraphs in which appellants claimed that the pipeline is "unsafe and defective and not fit for transporting" oil. (*See, e.g.*, App. 29, ¶ 12; 31, ¶ 15; 33, ¶ 22; 34–35, ¶ 25; 35, ¶¶ 26–28; 36, ¶ 30; 37–39, ¶¶ 31–38; 40, ¶ 41). Indeed, nearly every one of the "common" questions that appellants identified in their complaint had to do with the safety of the pipeline. (App. 41, ¶ 41(a)–(g)).

Each of the appellants made clear in depositions that they wanted the district court to order either the removal or the replacement of the Pegasus Pipeline and that they seek no damages. (App. 355–56, 365, 368, 370–71, and 373–74). Appellants claim their demand is motivated by a concern over the safety of the pipeline—as appellant Arnez Harper put it, this case is about "just a safer pipe." (App. 370). His wife, appellant Charletha Harper, similarly claimed she wanted the pipeline

replaced because "the pipeline is there up under the ground, and it is just not safe." (App. 377).

Both appellants' allegations and their testimony establish beyond any doubt that they sought to impose safety standards on the pipeline to determine whether it should be permitted to continue in operation and, if so, how it would be permitted to operate. That effort infringes directly on PHMSA's authority. Indeed, PHMSA has initiated its own process to determine if the pipeline may be restarted. (App. 71–76). In its corrective action order, PHMSA specifically stated what EMPCo would have to do before it would be permitted to restart the pipeline. (App. 74–76). Granting the relief requested by appellants in this case would interfere with that procedure by stripping authority over the safe operation of the pipeline from PHMSA and delegating that role to a court applying state law. The district court recognized that appellants' claims would interfere with the regulatory process and therefore concluded that the claims are preempted. That ruling was correct.

Against the district court's persuasively reasoned opinion, appellants offer *American Airlines v. Wolens*, 513 U.S. 219 (1995), a case that they read far too broadly to argue that federal law never

preempts state common law actions for breach of contract.[7] *Wolens* does not broadly reject preemption of state common law contract claims. Rather, in *Wolens*, the Supreme Court narrowly "held that the Airline Deregulation Act of 1978 (ADA) . . . did not preempt regular breach of contract claims against airlines." *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 386 (7th Cir. 2007). But even when airlines are involved, the focus must be on the substance of the claims, not their designation as lying in contract. In *Treiber & Straub*, the Seventh Circuit found that a contract claim was preempted by the ADA, even though it was "nominally about a shipper seeking to enforce a contract that it contend[ed] UPS breached," because the plaintiff sought relief that would "in effect" impose a state rule contrary to federal law. *Id.* at 386–87. *Wolens* thus does not apply as broadly as plaintiffs argue; it essentially holds only that the Airline Deregulation Act of 1978 does not preempt state common law contract claims that are outside the scope of

[7] As the district court concluded in its opinion, the United States Supreme Court has long held that "state law" subject to preemption "encompasses common law claims, as well as statutes and regulations." (Add. 31–33 (citing *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); and *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504 (1992)).

its preemption provisions. Like the Seventh Circuit in *Treiber & Straub*, the district court here found that appellants' breach of contract claim would in effect impose a state rule contrary to federal pipeline regulations and enforcement. That claim is preempted.

Moreover, the district court concluded that no provision in the easements at issue in this case endows landowners with the authority to demand the repair, removal, or replacement of the pipeline. (*See* Add. 35; App. 1525 (reviewing the easement and concluding that "while plaintiffs' easements grant Exxon the privilege to enter their land to maintain and repair the pipeline, nothing in the easements supports plaintiffs' arguments that the easements impose an obligation on Exxon to do so"). Thus, appellants did not seek, as they quote from *Wolens*, "a remedy confined to a contract's terms" for the simple reason that the remedy they sought cannot be found in the terms of the easement. *Wolens* simply is not on point.

Nor does preemption leave landowners along a pipeline without a remedy if safety concerns arise. 49 U.S.C. § 60121 permits citizen suits seeking injunctive relief for violations of the Pipeline Safety Act or its implementing regulations—i.e., federal safety requirements imposed by

the Act itself—in limited circumstances. Because PHMSA already instituted an administrative action regarding the operation of the Pegasus Pipeline through its issuance of a corrective action order after the Mayflower incident (App. 71), appellants could not proceed under this provision. *See* 49 U.S.C. § 60121(a)(1)(B) (providing that citizen suits are unavailable if the government "has begun and diligently is pursuing an administrative proceeding for the violation"). But that does not change the fact that the PSA provides a remedy to landowners if PHMSA does not address a safety concern relating to a pipeline.

The analysis of the substance of appellants' allegations leads to the conclusion that they plainly sought to use common law to impose a safety standard upon the operation of the pipeline. The Act preempts such claims. This Court should affirm the district court's ruling that appellants' claims are preempted, dooming both their class certification effort and their individual claims.

III. The district court properly granted Exxon's motion for summary judgment because the easements impose no relevant contractual duties, and Exxon did not breach any of the duties the easement actually creates.

Appellants sued Exxon for breach of contract based on an allegation that it had failed to properly repair and maintain the

Pegasus pipeline. (App. 43–45). The district court granted summary judgment to Exxon because the easements do not impose a contractual duty to repair and maintain the pipeline, and the undisputed material facts demonstrate that Exxon did not breach any contractual duties created under the easement. *See City of Crossett v. Riles*, 261 Ark. 522, 523, 549 S.W.2d 800, 801 (1977). This Court reviews the entry of summary judgment *de novo*, applying the same legal standards as the district court. *Am. Rivers, Inc. v. U.S. Army Corps of Eng' rs*, 421 F.3d 618, 628 (8th Cir. 2005).

A. The easements do not create a contractual duty to repair and maintain the pipeline.

Appellants' lone claim against Exxon is for breach of contract. (App. 43–45). As such, any duty at issue in this case must be created by a valid contract. *Zufari v. Architecture Plus*, 323 Ark. 411, 420, 914 S.W.2d 756, 761 (1996) ("When performance of a duty under a contract is contemplated, any non-performance of that duty is a breach."). The contracts at issue here (the easements) are in writing, and Exxon's only alleged breach of contract—including as to the provision reserving to appellants the right "fully to use and enjoy their property"—is Exxon's alleged failure to repair and maintain the Pegasus pipeline. (App. 43–

45 ¶¶ 50, 51, 53, and 57). Accordingly, appellants bore the burden of proving that the express terms of the easements created a contractual duty for Exxon to repair and maintain the pipeline. *See Seidenstricker Farms v. Doss*, 372 Ark. 72, 78, 270 S.W.3d 842, 846–847 (2008) (citing *Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 147 S.W.3d 681 (2004)) ("To hold otherwise would require this court to read into the contract words that are not there, which we will not do."); *Foundation Telcoms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 241–42, 16 S.W.3d 531, 538 (2000) ("A court cannot make a contract for the parties but can only construe and enforce the contract that they have made."). Finally, the named plaintiffs are Arkansas land owners, and the district court granted Exxon's motion for summary judgment only after decertifying the class. (*See* Add. 33; App. 30 ¶¶ 13, 14; App. 1523). Accordingly, whether the easements imposed any contractual duty to repair and maintain the pipeline is governed solely by Arkansas law. *See Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 856 (8th Cir. 2010) (holding that when, as here, Arkansas is the forum state, a federal court is "obligated to apply governing precedent from the Arkansas Supreme Court.").

In *City of Crossett*, the Arkansas Supreme Court rejected precisely the same claims that appellants raised here in a case involving a nearly identical easement. There, the plaintiffs granted the city of Crossett, Arkansas, an easement to install a drainage ditch across the plaintiffs' land. *Id.* at 523, 549 S.W.2d at 801. The Court summarized the terms of the easement as follows:

> It grants to the city "a right of way and easement for the purpose of constructing, maintaining and repairing a drainage ditch over, across, and through" a 30-foot strip across the plaintiffs' land. The grantee is given rights of ingress and egress "for the purposes herein contained." The grantee agrees that in the construction and maintenance of the ditch no stumps, brush, trees, limbs, or debris shall be placed, piled or moved so as to create a fire hazard, damage any property of property owners in the vicinity, or otherwise damage nearby standing trees. The grantee agrees to indemnify, defend, and hold harmless the grantors against claims for damages to persons or property arising from acts or omissions of the grantee relating to the construction and maintenance of the drainage ditch.

Id. Over the years, Crossett "passively failed to keep the ditch in good repair." *Id.* When a heavy rain caused the ditch to overflow and flood the plaintiffs' house, the plaintiffs sued Crossett for breach of contract, arguing that the easement imposed a duty upon Crossett to maintain the ditch. *Id.*

The Arkansas Supreme Court rejected this claim and held that the easement unambiguously imposed no such duty. The Court explained:

> We can find no language in the instrument, and counsel for the appellees point to none, expressly or impliedly binding the city to construct or maintain or repair the ditch. The instrument is just what its title says, "Grant of Easement." It is essentially a conveyance *by* the grantors *to* the grantee, of certain privileges, with limited protective language in favor of the grantors. Absent any language imposing an affirmative duty of maintenance upon the city, no such duty existed.

Id. at 523–24, 549 S.W.2d at 801–02 (emphasis in original). The Court further held that even if the contract were treated as ambiguous, the plaintiffs' erroneously admitted parol evidence did not establish a contractual duty to repair and maintain the easement or a valid modification of the parties' contract. *Id.* at 524, 549 S.W.2d at 802 ("We find no competent testimony creating an issue of fact with respect to the city's asserted obligation to maintain the ditch."). Accordingly, because Crossett did not owe the duty it was alleged to have breached, the Court reversed the jury verdict in the plaintiffs' favor and dismissed the plaintiffs' complaint. *Id.*

Here, just as in *City of Crossett*, appellants allege that the easement imposes requirements for repair, maintenance, and operation of the pipeline. (App. 43-45 ¶¶ 50–54). However, the easement is, as its title suggests, merely a "RIGHT OF WAY GRANT." (App. 463). The easement grants Magnolia Pipe Line Company, the predecessor in interest to Mobil Pipe Line Company, the following privileges:

> [Grantors] hereby grant and convey to MAGNOLIA PIPE LINE COMPANY . . . the rights of way, easements and privileges to lay, repair, maintain, operate and remove pipe lines and replace existing lines with other lines, for the transportation of oil and gas, and the products thereof, water, or any other fluid or substance, and to erect, repair, maintain, remove and operate electric lines, telegraph lines and telephone lines over, across and through Grantors' lands . . . .

(*Id.*). This language is indistinguishable from the easement at issue in *City of Crossett*. Just as in *City of Crossett*, no corresponding provision expressly requires Magnolia Pipe Line Company to do any of the things this easement grants it the right to do, including repairing and maintaining the pipeline. Thus, just as in *City of Crossett*, this easement cannot be read to bind Exxon to "construct or repair or maintain" the pipeline. *See* 261 Ark. at 523, 549 S.W.2d at 801. The easement at issue is simply a grant of certain privileges *by* appellants'

predecessor in interest *to* Exxon's predecessor in interest. Because there is no language imposing an affirmative duty of maintenance upon the defendants, no such duty exists.

On appeal, appellants attempt to distinguish *City of Crossett* based on the fact that the easements here expressly reserve to appellants "the right fully to use and enjoy the said premises except for the purposes hereinbefore granted to Magnolia Pipe Line Company." (App. 463; Appellants' Br. 37–38, 40–42). As a preliminary matter, it is unclear whether the easement at issue in *City of Crossett* contained similar boilerplate, as the case is simply silent on the issue, and no court has previously distinguished it on this basis. It could be that the *City of Crossett* court simply found such language to be too unimportant to mention.

Nevertheless, appellants have offered no authority to show that similar "fully to use and enjoy" language would have changed the result in *City of Crossett*. To that end, the only case appellants cite that actually discusses the effect of such language is *Dwiggins v. Propst Helicopters, Inc.*, 310 Ark. 62, 832 S.W.2d 840 (1992). *Dwiggins* is a tort case in which the servient estate holder argued that the power-company

easement holder had damaged its pasture through the negligent application of herbicides. *Id.* at 63, 832 S.W.2d at 841. The easement gave the power company the right to install power lines and "the right to clear and keep clear a right-of-way." *Id.* at 66, 832 S.W.2d at 843. The power company argued that based on this provision, it was immune from tort liability for damage to the right of way. *Id.* The easement, however, also reserved to the servient estate holder the "especially understood" right to "full and free use of said right-of-way except for the purposes herein stated; and the right to farm and cultivate and otherwise use said right-of-way." *Id.* Based on the servient estate holder's "'especially understood' right to farm and cultivate the same right-of-way," the Arkansas Supreme Court held that the easement did not immunize the power company from damages for negligently damaging the pasture land in the right of way. *Id.*

This is a breach-of-contract case, not a tort claim for negligence, so *Dwiggins* is inapposite. Exxon does not rely on the easement terms as an affirmative defense to a tort claim; Exxon's argument is that any contractual duty must come from the express terms of the easement itself. *City of Crossett* is clear, binding precedent that the district court

applied correctly: if the easement grant does not impose an express duty to maintain and repair the easement, under Arkansas law, no such contractual duty exists. *City of Crossett*, 261 Ark. at 524, 549 S.W.2d at 802. None of the terms of the easement—including the provision granting appellants' predecessors in interest the right "fully to use and enjoy the said premises"—impose an express duty on the defendants to repair or maintain the pipeline, so no such contractual duty exists. *See id.*

As with their reliance on *Dwiggins*, appellants' other arguments likewise ignore the limited nature of the claims they have asserted in this case. Thus, to counter the directly on-point, binding Arkansas precedent of *City of Crossett*, appellants offer only an inadmissible declaration from a law professor (Prof. Susan Fletcher French), a number of cases involving property and tort disputes, and one out-of-state breach of contract case. None of these overcome *City of Crossett*.

On Prof. French's declaration, "expert testimony on legal matters is not admissible. Matters of law are for the trial judge." *See So. Pine Helicopters, Inc. v. Phoenix Aviation Mgrs., Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (internal citation omitted). The question of what duty is

owed is always a matter of law. *See Wagner v. Gen. Motors Corp.*, 370 Ark. 268, 272–73, 258 S.W.3d 749 (2007). So, too, is the construction of an unambiguous contract, *see Sec. Ins. Co. v. Owen*, 252 Ark. 720, 725, 480 S.W.2d 558, 561 (1972), and appellants have not preserved a challenge to the district court's finding that the easements are unambiguous.[8] (*See* Add. 40; App. 1530). Thus, Prof. French's opinions on these issues are inadmissible. In addition, Prof. French's opinions are contrary to *City of Crossett* and, therefore, contrary to Arkansas law. Moreover, as discussed more fully in the next section, below, the undisputed material facts demonstrate that Exxon did not breach the duties that Prof. French would read into the parties' easement. Thus, Prof. French's declaration provides no basis to overturn the district court's grant of summary judgment.

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[8] Appellants do argue on appeal that the easements are ambiguous. (*See* Appellants Br. 47-49). Appellants never raised this argument below; indeed, in their response to Exxon's motion for summary judgment, appellants conceded that the easements are unambiguous. (Appellees' App. 21). Appellants should not be permitted to raise this issue for the first time on appeal. *Aaron v. Target Corp.*, 357 F.3d 768, 779 (8th Cir. 2004) ("Arguments and issues raised for the first time on appeal are generally not considered."). Moreover, the argument is without merit. *See City of Crossett*, 261 Ark. at 523, 549 S.W.2d at 801 ("[W]e find no real ambiguity in the written agreement.").

Appellants' various property and tort cases fare no better. It is true that property law imposes a number of obligations on both parties to an easement, and these obligations can be used to resolve disputes between the dominant and servient estates as to what the parties can and cannot do on the easement.[9] Likewise, as the district court

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[9] *See, e.g.*, *Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 842 (8th Cir. 1975) (holding that easement authorized easement holder to install additional pipelines); *Fruth Farms v. Village of Holgate*, 442 F. Supp. 2d 470, 481 (N.D. Ohio 2006) (denying summary judgment for both parties on issue of whether easement allowed holder to convert right of way to a public road); *Wilson v. Brown*, 320 Ark. 240, 248, 897 S.W.2d 546, 550 (1995) (holding that neither easement holder nor servient estate owner could block the other's right to use a shared driveway); *Bean v. Johnson*, 279 Ark. 111, 114, 649 S.W.2d 171, 173 (1983) (holding that easement did not require easement holder's presence or written permission to allow social guests to use the easement); *St. Louis, I.M. & S. Ry. Co. v. Brooksher*, 86 Ark. 91, 109 S.W. 1169, 1170 (1908) (holding that easement did not authorize easement holder to divert stream onto servient estate when other options were available); *Barnett v. Sanders*, 2014 Ark. App. 702, at 5, 451 S.W.3d 211, 214-15 (reversing bench verdict for easement holder because court made no factual findings as to whether servient estate holder's erection of gates and fences unreasonably interfered with easement); *Hatfield v. Ark. W. Gas. Co.*, 5 Ark. App. 26, 29-30, 632 S.W.2d 238, 241 (1982) (holding that servient estate holder could not construct a building on top of the easement holder's gas pipeline); *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 102, 807 N.E.2d 1054, 1063 (2004) (holding that easement authorized trimming, but not removal, of trees); *Maasen v. Shaw*, 133 S.W.3d 514, 520 (Mo. Ct. App. 2004) (holding that easement holder was not authorized to park vehicles on the right of way or to cut or remove trees and vegetation on the non-roadway portion of the easement); *VanCleve v.*

recognized, "[c]ases certainly exist that impose a general duty to repair on negligent easement holders when their failure to do so gives rise to liability in tort." (Add. 28; App. 1518 (citing cases)). If Exxon had negligently caused physical injury to the appellants' land, appellants could bring property or tort claims based on those actions. But this is a breach-of-contract case alleging no damage to appellants' property. (App. 43–45). Contrary to appellants' novel assertion (Appellants' Br. 52), they have asserted no property claims alleging that Exxon used the easements for some purpose other than those authorized in the grant or seeking to terminate the easements for alleged willful and substantial misuse.[10] (*See* App. 43–45). *City of Crossett* governs this breach-of-

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Sparks, 132 S.W.3d 902, 906 (Mo. Ct. App. 2004) (holding that servient estate holder could install speed bumps on right of way); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) (holding that mineral lease authorized easement holder to drill water wells and use water from those wells to the extent reasonably necessary for oil production); *Stout v. Christian*, 593 S.W.2d 146, 151 (Tex. Civ. App. 1980) (holding that easement authorized servient estate holder to place locked gates on right of way).

[10] Indeed, appellants could not seek termination of the easements for willful and substantial misuse on behalf of the class because misuse is not a ground for termination of an easement under Illinois, Missouri, or Texas law. *McCann v. R.W. Dunteman Co.*, 242 Ill. App. 3d 246, 258, 609 N.E.2d 1076, 1084 (1993) (holding that forfeiture of an easement for misuse "would be thoroughly inappropriate"); *Phelps v. Crites*, 187 S.W. 3, 5 (Mo. 1916) (rejecting claim that breach of easement contract could

contract case brought under Arkansas law, and these property and tort cases have no bearing on the issues raised here.

In fact, appellants cite only one case actually involving a claim for breach of an easement contract. *See Mattson v. Montana Power Co.*, 215 P.3d 675, 689 (Mont. 2009) (*Mattson I*). As an initial matter, *Mattson I* is potentially contrary to Arkansas law because the Montana court expressly rejected application of *Carvin v. Ark. Power & Light Co.*, 14 F.3d 399 (8th Cir. 1993), a case dealing with a dam operator's liability for flooding that applied Arkansas law. *Mattson I*, 215 P.3d at 692. More importantly, *Mattson I* did not establish a duty to maintain and repair an easement. *Mattson I* involved a dispute between the operator of a dam and the landowners around a reservoir. 215 P.3d at 679. Operation of the dam would inevitably cause erosion to the land, and the dam operator had a right under the easement to cause that damage. *Id.* at 687–88. The question was how much erosion damage was allowed under the easements. *Id.* at 689. The court concluded that the dam operator had a duty "not to cause unreasonable damage to the

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result in forfeiture of easement); *Perry v. City of Gainesville*, 267 S.W.2d 270, 273 (Tex. Civ. App. 1954), writ refused NRE ("[M]isuser alone never constitutes a premise for the termination of an easement.").

properties or interfere unreasonably with their enjoyment." *Id.* at 692. Thus, *Mattson I* did not involve maintenance or repair of an easement—it attempted to balance the interests of the parties when it was undisputed that use of the easement damaged the servient estate. *Id.* *Mattson I* has no application here, where the undisputed material facts demonstrate that use of the easement has not damaged the appellants' property. (*See* App. 612; Appellees' App. 1–16).

Indeed, to the extent that any of appellants' out-of-state authority supports a contractual duty to repair and maintain the pipeline at issue in this case—and none of it does—that authority would be contrary to Arkansas law. This case is a breach-of-contract lawsuit governed by Arkansas law. Arkansas law simply does not presume that an easement imposes a contractual duty of maintenance and repair. *See City of Crossett*, 261 Ark. at 523, 549 S.W.2d at 801 (holding that there was nothing in the easement "impliedly binding the city to construct or maintain or repair the ditch"). The easements at issue here imposed no express contractual duty to maintain and repair the pipeline, so no such duty exists. *See id.* at 524, 549 S.W.2d at 802. Because Exxon owed no

relevant contractual duties to appellants, the district court properly granted summary judgment on their breach-of-contract complaint.

B. Exxon did not breach any contractual duties owed to the appellants.

The easements at issue do impose certain express contractual duties on Exxon, including an obligation to pay for any damages to crops, timber, or fences from use of the easement; to pay additional money should additional pipelines be installed; and to bury the pipe at "sufficient depth so as not to interfere with cultivation of soil." (App. 463). The appellants have never contended that Exxon breached any of the express contractual duties actually imposed by the easement. (App. 612).

Instead, appellants rely solely on the allegedly implied duty to avoid unreasonable interference with the appellants' right to use and enjoy the servient estate as the source of Exxon's alleged breach. (Appellants' Br. 50–55). The district court addressed this alleged duty at length in its summary judgment order:

> Here, nothing indicates that there has been an unreasonable interference with the plaintiffs' land. Nothing in the record indicates that any landowners have any oil leakage on their property, suffered any ground discoloration, or smelled any fumes. Indeed, plaintiffs are suing in an attempt to avoid an uncertain injury. Moreover, the cases upon which plaintiffs

> rely are tort cases in which actual injuries were suffered by the plaintiffs. These cases do not address instances such as this one, in which plaintiffs were allowed to hold defendants liable for injuries that may occur in the future.

(Add. 20–21; App. 1528–29).

The expert declarations on which appellants rely to show a genuine issue of material fact on this issue (*see* Appellants' Br. 53 (citing App. 1542–45, 1570, 1574)) were all first submitted with appellants' motion for reconsideration of the summary judgment order and are therefore inadmissible. *See United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir. 2006) ("Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment."); *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010) (holding that Rule 60(b) cannot be used to "introduce new evidence that could have been adduced during pendency" of the motion at issue). Nevertheless, none of these declarations, nor any other evidence in the record, contradict the quoted paragraph of the district court's order. Nor could they—appellants admitted that Exxon has not interfered with their use and enjoyment of their property. (App. 612; Appellees' App. 1–6). Thus, the undisputed material facts

demonstrate that Exxon has not breached even the duties appellants would read into the easement contract. The district court properly granted Exxon's motion for summary judgment.

IV. Appellants have failed to create a genuine issue of material fact on the issue of Exxon's alleged unreasonable interference with appellants' property rights.

For their fourth point on appeal, appellants argue that the district court's summary judgment order improperly limited the "unreasonable interference" that could give rise to a breach of contract claim "to only odor, discoloration, and physical oil damages." (Appellants' Br. 56). Appellants specifically describe the district court's order as limiting the available remedies for Exxon's alleged breach by disallowing certain elements of compensatory damages otherwise available under Arkansas law. As a preliminary matter, appellants waived any interest in compensatory damages in their motion for class certification. (Add. 2; App. 370–71, 373–74, 564). Further, while Exxon later filed a second motion for summary judgment on the availability of appellants' chosen remedies, that motion was never ruled on and is not at issue on appeal. In the motion for summary judgment at issue on appeal, Exxon relied solely on the duty and breach elements of appellants' breach-of-contract claim. (App. 579).

Appellants are conflating the elements of damages potentially available for a breach with the question of whether Exxon breached any contractual duty imposed by the easements. In *Felton Oil Co. v. Gee*, the Arkansas Supreme Court did recognize that "loss of use and enjoyment" is an element of damages that may be recovered for tortious injuries to real property. *See Felton Oil Co. v. Gee*, 357 Ark. 421, 427, 182 S.W.3d 72, 76 (2004) (citing *Restatement (Second) of Torts* § 929, cmt. e (1979)). However, under the express terms of *Felton* and the cited *Restatement* provision, damages for "loss of use and enjoyment" are only available to one "entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value." *Id.*

Nothing appellants have cited suggests that an easement holder can be liable for unreasonable interference without causing any actual injuries to the servient estate. Thus, in each of the cases cited by appellants, there was some direct injury to the plaintiff's land or direct interference with the plaintiff's activities on the land. *See, e.g.*, *Jackson v. Unocal Corp.*, 262 P.3d 874, 890 (Colo. 2011) (certifying class against pipeline operator when during excavation and removal process, parts of

the asbestos wrap on the pipe were dislodged and left on the plaintiffs' property); *Stout v. Christian*, 593 S.W.2d 146, 151 (Tex. Civ. App. 1980) (holding that easement holder's failure to lock gates on the right of way interfered with servient estate's right to use the land for cattle grazing). For example, in *Felton*, the plaintiff recovered damages for loss of use and enjoyment arising out of the fact that "diesel fuel had leaked onto her property." *Id.* at 428, 182 S.W.3d at 77. Oil has not leaked on the appellants' property, nor have appellants shown any actual injuries to their property or interference with their activities on the property. (App. 612). Accordingly, the district court correctly determined that Exxon had not unreasonably interfered with appellants' property rights.

V. The district court did not commit a clear abuse of discretion in denying appellants' request for relief under Rules 59(e) and 60(b).

Appellants finally appeal the district court's denial of their motion for reconsideration of the summary judgment order under Rules 59(e) and 60(b). (Add. 6–7; App. 1689–90.) Appellants misstate the standard of review applicable to this order. "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e), and this court will not reverse absent a clear abuse of discretion." *U.S. v. Metro. St. Louis Sewer Dist.*, 440

F.3d 930, 933 (8th Cir. 2006). Likewise, "[t]he district court has wide discretion in ruling on a Rule 60(b) motion," so such a motion is also subject to a "clear abuse of discretion" standard of review. *Sellers v. Mineta*, 350 F.3d 706, 716 (8th Cir. 2003). The district court did not commit a clear abuse of discretion in denying the appellants' motion for reconsideration. That motion—and its claimed need for additional discovery—came far too late, and nothing appellants offered in support of it would have changed the result on Exxon's motion for summary judgment.

A. If appellants needed additional discovery, they had ample time to comply with Rule 56(d).

Although appellants raised a number of arguments in their motion for reconsideration, they only appeal the portion of the district court's order addressing Exxon's alleged discovery deficiencies. (Add. 47–48; App. 1689–90). The district court did not commit a clear abuse of discretion in denying this motion because appellants' asserted need for additional discovery came far too late. Fed. R. Civ. P. 56(d)[11]

[11] Subdivision (d) of Rule 56 was formerly subdivision (f) before being moved (without modification to its substance) as part of the 2010 amendment to Rule 56. Fed. R. Civ. 56 Advisory Committee Note. Accordingly, some cases cited in this response refer to subdivision (f)

"provides a simple procedure for requesting relief: move for a continuance and submit an affidavit explaining why the additional discovery is necessary." *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706 (7th Cir. 2006). Following this procedure is mandatory: "If a party opposing a summary judgment motion does not seek shelter under Rule 56(f) or otherwise ask for a continuance, a court generally does not abuse its discretion in granting summary judgment based on the record before it." *Nooner v. Norris*, 594 F.3d 592, 600 (8th Cir. 2010) (citation omitted).

A party responding to a motion for summary judgment may not ignore the "simple procedure" only to seek relief after the motion has been granted. *See Osborne v. Grussing*, 477 F.3d 1002, 1007 n.3 (8th Cir. 2007) (refusing to consider the issue of whether the plaintiffs had adequate time for discovery when they failed to seek relief under Rule 56(d) prior to the district court's ruling on the motion). A "party cannot have two bites at the cherry: he ordinarily cannot oppose a summary judgment motion on the merits and, after his opposition is rejected, try to save the day by belatedly invoking Rule 56(d) ." *Nieves-Romero v.*

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rather than (d), but they refer to the same provision regardless of designation.

United States, 715 F.3d 375, 381 (1st Cir. 2013). Fed. R. Civ. P. 60(b)(2)'s "newly discovered evidence" provision, which appellants invoke here, does not absolve a party of its failure to follow Rule 56(d) . *See Arnold*, 627 F.3d at 721 (stating rule that Rule 60(b) motions cannot be used to "introduce new evidence that could have been adduced during pendency" of the motion at issue) (citations omitted); *Medical Mut. of Ohio v. k. Amalia Enterprises Inc.*, 548 F.3d 383, 394 n.8 (6th Cir. 2008) (rejecting relief under Rule 60(b)(2) where party failed to submit Rule 56(f) affidavit to seek the alleged "newly-discovered evidence" in time to include in its summary judgment response).

In the present case, appellants had ample opportunity to follow the Rule 56(d) procedure but never raised the asserted need for discovery until after the district court granted the motion. As appellants note, discovery in this matter was bifurcated—without objection from appellants—between class certification and merits issues. (Appellants' Br. 59). The Court ruled on class certification on August 12, 2014. (Add. 6; App. 563). Little more than a month later, on September 18, 2014, Exxon produced the vast majority of its documents in this case. (App. 1243.)

Exxon filed its motion for summary judgment on September 8, 2014. (App. 579). Appellants sought and received a 30-day extension to respond to the motion, stating in the motion that they needed time to analyze documents that defendants had already provided in discovery. (Appellees' App. 7–8; App. 17). When that extended deadline came, on October 27, 2014, appellants filed a response without requesting any further extension for additional discovery or for additional time to analyze already-provided documents. (Appellees' App. 12–29).

Appellants did not seek additional discovery at that time for a simple reason—they had conducted substantial discovery already. In a motion filed the same day as the summary judgment response, appellants stated that Exxon had already produced 872,000 pages of documents to them in discovery; appellants also suggested that they had reviewed "*every single page*" of those documents and determined (incorrectly, it turns out) every one to be marked confidential under the parties' agreed protective order. (App. 616, ¶ 6 (emphasis in the original)). Indeed, appellants submitted hundreds of pages of exhibits to the Court with their summary judgment response, indicating that

they had adequate discovery to support their response. (App. 651–986, 1333–1480).

On December 5, 2014, appellants filed a motion to compel. (App. 1048.) Contrary to appellants' assertions on appeal, this motion had absolutely nothing to do with "Exxon's refusal to agree upon relevant search terms." (Appellants' Br. 61.) Instead, appellants sought to compel Exxon to re-start its document production efforts from scratch, replacing its methods of document production, including the use of statistically validated search terms, with "predictive coding." (App. 1049). To the extent appellants appeal from the denial of this motion (Add. 18; App. 1508), the district court should be affirmed. Appellants' motion to compel sought literally unprecedented relief, as no prior court had ever compelled the use of predictive coding, and appellants offered no evidentiary or legal support for their extraordinary demand. (App. 1219). In denying appellants' motion to compel, the district court did not commit a "gross abuse of discretion" affecting "the fundamental fairness" of the proceedings. *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000).

The district court's order granting Exxon's motion for summary judgment was entered on March 17, 2015. (Add. 19; App. 1509). Thus, if appellants believed that any alleged issues with Exxon's discovery practices in any way affected their ability to craft an adequate record on the summary judgment motion, appellants had more than adequate time to seek relief under Rule 56(d). Because appellants failed to seek additional discovery in a timely and procedurally appropriate manner, they cannot raise the issue now.

B. Nothing appellants offered in support of their motion for reconsideration would change the result on Exxon's motion for summary judgment.

"To obtain a Rule 56(f) continuance, the party opposing summary judgment must file an affidavit 'affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) (citations omitted). Likewise, "[t]o prevail on a Rule 60(b)(2) motion, the moving party must show," among other elements "that a new trial considering the evidence would probably produce a different result." *McCormack v. Citibank, N.A.*, 100 F.3d 532, 542 (8th Cir. 1996); *see also Alpern v. UtiliCorp Utd., Inc.*, 84 F.3d 1525, 1537 (8th

Cir. 1996) (affirming refusal to reconsider summary judgment order because "even if the district court had reconsidered its ruling in light of appellants' new evidence, it would have probably not produced a different result"). Appellants have not and could not demonstrate that the documents attached to their motion or any additional discovery would change the result of Exxon's motion for summary judgment.

To that end, appellants claim that the expert declarations and evidence attached to appellants' motion for reconsideration demonstrate that Exxon unreasonably interfered with the appellants' use and enjoyment of their property. Whether Exxon interfered with appellants' use and enjoyment of their property is irrelevant to the resolution of the summary judgment motion. As fully argued above, Exxon is alleged to have caused unreasonable interference only through its alleged failure to maintain and repair the pipeline. However, under *City of Crossett*, Exxon owed no contractual duty to repair and maintain the pipeline. In the absence of any relevant duty, Exxon cannot be held liable for any breach.

Moreover, appellants' evidence does not demonstrate that the defendants unreasonably interfered with appellants' use and enjoyment

of their property. Nothing in the record—and none of the documents appellants cited in their motion for reconsideration—contradicts the district court's finding that appellants suffered no actual injuries. (Add. 38–39; App. 1528–29). Thus, appellants' requested discovery would not change the result of Exxon's motion for summary judgment.

CONCLUSION

Appellants have failed to demonstrate that the district court erred in decertifying the class, in granting summary judgment, or in denying appellants' post-judgment motion. This Court therefore should affirm the district court in all respects.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), the undersigned certifies that this brief complies with the applicable type-volume limitations and that, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,651 words. This certificate was prepared in reliance on the word count of the word processing system (Microsoft Word 2010) used to prepare this brief. The undersigned further certifies that the electronic version of this brief has been scanned for viruses and is virus-free.

/s/ Gary D. Marts, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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