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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EFLO ENERGY; PACIFIC LNG OPERATIONS, LTD.,

Plaintiffs - Appellants,

v.

DEVON ENERGY CORPORATION,

Defendant - Appellee.

No. 22-6051

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CV-00544-J)

Nolan C. Knight, Munsch Hardt Kopf & Harr, P.C., Dallas, Texas, appearing for Appellants.

Timothy J. Bomhoff and Spencer F. Smith (Cole McLanahan with them on the brief), McAfee & Taft, Oklahoma City, Oklahoma, appearing for the Appellee.

Before **MATHESON**, **BRISCOE**, and **MORITZ**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs EFLO Energy (EFLO) and Pacific LNG Operations, Ltd. (Pacific) filed this diversity action alleging that defendant Devon Energy Corporation (Devon Energy) violated warranties under Oklahoma's Uniform Commercial Code,

committed fraud, and was unjustly enriched, when it drew upon a standby letter of credit that plaintiffs had obtained to secure their obligations under two written agreements with Devon Canada Corporation (Devon Canada). Devon Energy moved for, and was granted, summary judgment with respect to all three claims. Plaintiffs now appeal from the district court's grant of summary judgment. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's decision.

I

Factual history

a) The Kotaneelee Leases

In the late 1950s, "the Government of Canada issued certain permits" to two petroleum companies. Aplt. App. at 198. Those permits "were later converted to leases governed by and granted by" the Yukon. *Id.* Those leases are known as the Kotaneelee Leases. "The Kotaneelee Leases grant rights to explore for and produce oil and gas from a field located in" the Yukon. *Id.*

b) Devon Canada's operations on the Kotaneelee Leases

Between early 1977 and June 2012, Devon Canada, a Canadian corporation with its principal place of business in Calgary, Alberta, Canada, had a working interest in oil and natural gas rights, as well as oil and gas processing equipment and facilities, related to the Kotaneelee Leases. In addition, during that same time period, Devon Canada was one of several parties to a Joint Operating Agreement (JOA) that governed the development of the Kotaneelee Leases. Devon Canada had a 22.98935% working interest in the JOA and, under the terms of the JOA, served as

the managing operator of the assets and operations. The JOA provided, in relevant part, that all liabilities and indemnities arising from the joint operations on the Kotaneelee Leases including all abandonment, remediation and reclamation liabilities and indemnities would be borne by the working interest owners in the proportion of their respective interests in the JOA and the Kotaneelee Leases. The JOA further provided, in relevant part, that notwithstanding any assignment by a working interest owner of its interest in the JOA and the Kotaneelee Leases, that working interest owner would remain liable for its proportionate share of any liabilities and indemnities that arose prior to the assignment.

c) Devon Canada's sale to EFLO

On June 29, 2012, EFLO, a Nevada corporation with its principal place of business in Houston, Texas, purchased Devon Canada's assets related to the Kotaneelee Leases. More specifically, EFLO entered into an Agreement of Purchase and Sale (Sale Agreement) and a Kotaneelee Closing Agreement (Closing Agreement) (collectively the Agreements) with Devon Canada. The cash purchase price to be paid by EFLO to Devon Canada was $270,000 in Canadian dollars. As part of this transaction, EFLO also acquired Devon Canada's working interest in the JOA.

Article 6 of the Sale Agreement, titled "PURCHASER'S INDEMNITIES," provided as follows:

> 6.1 General Indemnity
>
> [EFLO] shall be liable to [Devon Canada] for and shall, in addition, indemnify [Devon Canada] from and against, all *Losses* suffered, sustained, paid or incurred by [Devon Canada] which arise out of any matter or thing occurring or arising from and after the Closing Time and which relates to the Assets, provided however that [EFLO] shall not be liable to nor be required to indemnify [Devon Canada] in respect of any *Losses* suffered, sustained, paid or incurred by [Devon Canada] which arise out of a breach of [Devon Canada's] representations and warranties contained in clause 4.1 hereunder.
>
> 6.2 Limitation
>
> Notwithstanding any other provision in this Agreement: (i) neither Party shall be responsible for indirect or punitive damages (including without limitation consequential losses or loss of profits) suffered or incurred by the other Party; and (ii) [EFLO] shall not be liable to nor be required to indemnify [Devon Canada] in respect of any *Losses* suffered, sustained, paid or incurred by [Devon Canada] in respect of which [Devon Canada] is liable to and has indemnified [EFLO] pursuant to clause 5.1 [which addressed Devon Canada's indemnities for representations and warranties] and [Devon Canada] shall not be liable to nor be required to indemnify [EFLO] in respect of any *Losses* suffered, sustained, paid or incurred by [EFLO] in respect of which [EFLO] is liable to and has indemnified [Devon Canada] pursuant to clause 5.2 [which addressed EFLO's indemnities for representations and warranties], in both cases disregarding the time limit set out in clause 5.3.

Id. at 123 (emphasis added).

In the Closing Agreement, EFLO agreed to indemnify Devon Canada against certain environmental and regulatory liabilities associated with the purchased items. Specifically, Article 3 of the Closing Agreement, titled "ENVIRONMENTAL INDEMNITIES," provided as follows:

> 3.1 Abandonment and Reclamation
>
> [EFLO] shall see to the timely performance of all Abandonment and Reclamation Obligations pertaining to the Assets, which in the absence of this Agreement would be the responsibility of [Devon Canada]. After Closing, [EFLO] shall be liable to [Devon Canada] for and shall, in addition, indemnify [Devon Canada] from and against, any and all *Losses* suffered, sustained, paid or incurred by [Devon Canada] should [EFLO] fail to timely perform such obligations.
>
> 3.2 Environmental Matters
>
> It is acknowledged that [EFLO] has been provided with the right and the opportunity to conduct due diligence investigations with respect to existing or potential Environmental Liabilities. Provided Closing occurs, [EFLO] agrees that [Devon Canada] shall have no liability whatsoever for any Environmental Liabilities and in this regard, [EFLO] shall be solely liable to and indemnify and defend [Devon Canada] from and against all *Losses* which [Devon Canada] may suffer, sustain, pay or incur as a result of any act, omission, matter or thing related to the Environmental Liabilities except to the extent that any such Losses are matters or things for which [EFLO] is entitled to indemnification pursuant to clause 5.1 of the Sale Agreement. Subject to the foregoing, this liability and indemnity shall apply without limit and without regard to cause or causes, including without limitation the negligence, whether sole, concurrent, gross, active, passive, primary or secondary, or the wilful [sic] or wanton misconduct of [Devon Canada], [EFLO] or any Third Party. [EFLO] acknowledges and agrees that it shall not be entitled to any rights or remedies as against [Devon Canada] under the common law or statute pertaining to any Environmental Liabilities including, without limitation, the right to name [Devon Canada] as a third party to any action commenced by any Third Party against Purchaser. Nothing herein contained shall prejudice any claims or remedies that [Devon Canada] may have against [EFLO] in relation to such claim or remedy outside this Agreement including rights and remedies under the common law or statute.

Id. at 94–95 (emphasis added).

Notably, both the Sale Agreement and the Closing Agreement defined the term "Losses" in the following manner:

> "Losses" means all losses, death, injuries, damage, expenses, interest, charges, assessments, damages, liabilities, fines, penalties, actions, causes of action, suits, claims and demands, including all reasonable legal and other professional fees and expenses in relation thereto on a full recovery basis, but notwithstanding the foregoing shall not include any income tax liabilities or any liability for indirect or punitive damages including without limitation any consequential losses or loss of profits.

Id. at 108–09 (Sale Agreement); 94 (Closing Agreement).

d) The letter of credit

To partially secure its indemnification obligations to Devon Canada, EFLO agreed, under the terms of the Closing Agreement, to provide a corporate guarantee and a letter of credit in favor of Devon Canada. Article 2 of the Closing Agreement, titled "CORPORATE GUARANTEE AND LETTER OF CREDIT," outlined these obligations:

> 2.1 Corporate Guarantee and Letter of Credit
>
> At Closing, [EFLO] covenants to provide [Devon Canada] with an executed Corporate Guarantee from its affiliate Holloman Corporation and in addition, [EFLO] shall provide to the credit of [Devon Canada] the Letter of Credit. [Devon Canada] agrees to discuss with [EFLO] the termination, amendment or replacement of the Corporate Guarantee or the Letter of Credit, or both, from time to time as requested by [EFLO], however, [Devon Canada's] agreement to terminate, amend or replace the same shall be at [Devon Canada's] discretion, acting reasonably, based on equivalent credit risk to [Devon Canada] having regard, inter alia, to equivalent capital size and creditworthiness.
>
> 2.2 Letter of Credit
>
> [Devon Canada] shall not be entitled to draw upon the Letter of Credit unless [Devon Canada] first provides written notice to [EFLO] claiming indemnification pursuant to this Agreement or the Sale

> Agreement, and after a period of 30 days following [EFLO's] receipt of such claim.

Id. at 94.

On June 14, 2013, EFLO, with the assistance of Pacific, a British Virgin Islands limited company, obtained Standby Letter of Credit No. SGAX211-1136693 (SLOC) from Credit Suisse AG (Credit Suisse) in the amount of $4,380,000.00 in Canadian dollars.[1] The SLOC was "secured by collateral posted by [Pacific]," and "both EFLO and [Pacific] were applicants under the [SLOC]." *Id*. at 22.

Notably, the SLOC erroneously named Devon Energy, a Delaware corporation with its principal place of business in Oklahoma City, Oklahoma, rather than Devon Canada, as the beneficiary.[2] As will be described in greater detail below, Devon Canada attempted, without success, to have EFLO correct the SLOC to reflect the proper beneficiary, and Devon Canada and Devon Energy ultimately agreed that Devon Energy would act as Devon Canada's agent in the event it was necessary to draw from the SLOC.[3]

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[1] EFLO initially obtained a letter of credit from UBS AG, an investment and financial services company based in Switzerland. That letter of credit was issued on July 17, 2012, and expired on July 13, 2013. That letter of credit is not relevant to the claims at issue in this case.

[2] The parties dispute who was responsible for this error. The evidence in the record indicates that Devon Canada's senior legal counsel instructed EFLO to name Devon Canada as the beneficiary, but also instructed EFLO to list Devon Canada's address as "C/O Devon Energy Corporation, 333 W. Sheridan Ave., Oklahoma City, OK 73102-5010." Aplt. App. at 265.

[3] The record does not include any information regarding the precise relationship between Devon Energy and Devon Canada.

The "DATE AND PLACE OF EXPIRATION" on the SLOC was listed as "14 July 2014 Zurich, Switzerland." *Id*. The SLOC stated, in pertinent part:

> A payment under this standby letter of credit shall be made upon you [Devon Energy] presenting to the issuing bank . . . Beneficiary's signed demand in writing, along with a certificate executed by an officer of the Beneficiary stating that either (a) the letter of credit is properly payable pursuant to clause 2.2 of the . . . Closing Agreement dated June 29, 2012 between [EFLO] and Devon Canada or (b) the letter of credit is properly payable pursuant to clause 2.1 of the . . . Closing Agreement dated June 29, 2012 between [EFLO] and Devon Canada.
>
> A demand along with a certificate pursuant to (a) or (b) must not be dated and/or presented more than 10 calendar days prior to the expiry of this letter of credit (e.g. if expiration date is 24 October earliest date/presentation is 15 October).
>
> * * *
>
> Upon receipt of the said documents, the bank shall pay to you the amount stated under the said demand to be payable to you without enquiring whether you have a right to such amount as between yourself and [EFLO], provided such amount does not exceed the aggregate amount of the standby letter of credit.
>
> Partial drawings are permitted.
>
> * * *
>
> This letter of credit is subject to International Standby Practices (ISP 98) International Chamber of Commerce. In this respect[,] article 3.14 of the ISP98 is hereby expressly waived.

Id. at 30–31.

Between June 2012 and June 2016, the SLOC "was annually extended for an additional year." *Id*. at 183. During that time, Devon Canada repeatedly asked EFLO, to no avail, to amend the SLOC to reflect that Devon Canada, rather than Devon Energy, was the proper beneficiary.

On June 7, 2016, Devon Canada sent EFLO a letter that stated, in pertinent part:

> This notice is sent to you pursuant to clause 2.2 of the [Closing] Agreement claiming indemnity under the [Closing] Agreement, and Sale Agreement, as defined. We will be drawing on the letter of Credit which is shortly due to expire. We are willing to exchange the cash which we will obtain from our draw for a substitute letter of credit in the same form as the expiring letter of credit and, further, in accordance with the terms of the [Closing] Agreement.

Id. at 182. In response to this letter, EFLO "extended" the SLOC "four times, each on a short-term basis." *Id*. at 183.

On September 15, 2016, Devon Canada and Devon Energy entered into a written agreement regarding the SLOC. The agreement stated that, "due to scrivener's error, the beneficiary under the [SLOC] [wa]s currently listed as" Devon Energy, but that Devon Energy "ha[d] no interest in the [SLOC] or any funds derived therefrom." *Id*. at 185. The agreement further stated, in relevant part:

> In the event that it is necessary to draw any funds from the letter of credit before the beneficiary name is corrected, [Devon Energy] will (i) execute and deliver any documents and instruments requested by [Devon Canada] to effect such draw, (ii) cause such funds to be paid to [Devon Canada], whether through providing instructions to the letter of credit issuer to make payment directly to [Devon Canada] or by effecting an immediate transfer of the funds to [Devon Canada] upon receipt, and (iii) take such further actions as may be requested by [Devon Canada] in connection with the foregoing.

Id.

On December 8, 2016, Devon Canada sent another letter to EFLO regarding the SLOC. Devon Canada stated in the letter that "[i]t is customary that a letter of credit, at a minimum, should be extended thirty (30) days prior to the then-current

expiration date," but that EFLO "ha[d] continued to fail to timely cause the issuance of an extension of" the SLOC. *Id*. at 183. Devon Canada stated that it did "not intend to re-issue a separate notice pursuant to Section 2.2 of the Closing Agreement . . . each time EFLO fail[ed] to extend the letter of credit," and it stated instead that "[t]he original notice sent by [it] on June 7, 2016, remain[ed] in effect for this on-going issue." *Id*. Devon Canada further stated that it "consider[ed] the failure to timely extend the letter of credit as warranting a draw under the letter of credit," and that "[t]he intent of the Closing Agreement [wa]s that the letter of credit remain in place as support for EFLO's obligations." *Id*. Lastly, Devon Canada noted that it "ha[d] requested multiple times that EFLO amend the name of the beneficiary to the letter of credit" to "be Devon Canada, not Devon Energy," and it stated that it "d[id] not understand why this amendment ha[d] not been made." *Id*.

The SLOC was renewed by EFLO several times thereafter to extend its expiration date, with the second-to-last of those renewals having an expiration date of June 16, 2019.

e) The spill at the Kotaneelee Wells and Facility

In August 2015, the Yukon Energy, Mines and Resources Department (YEMR) purportedly "conducted a site visit of the . . . Kotaneelee Wells and Facility" and "discovered a spill from the Facility." *Id*. at 208. The YEMR subsequently "issued various environmental protection orders" pertaining to the spill. *Id*.

f) Paramount's demand on, and suit against, Devon Canada

On April 13, 2018, Paramount Resources, Ltd. (Paramount), a company with its principal place of business in Calgary, Alberta, Canada, sent a letter to Devon Canada "concerning . . . remediation and abandonment obligations . . . and related costs" that Paramount "was and w[ould] be required to incur in relation to" the Kotaneelee Production Facilities "on behalf of . . . Devon Canada." *Id*. at 186. The letter recounted the details of Devon Canada's sale of its assets in the Kotaneelee Production Facilities to EFLO. The letter in turn stated that, following the sale, EFLO and one of its subsidiaries, EFLO Energy Yukon, became the operator under the JOA and "the holder of the largest working interest in Kotaneelee." *Id*. at 187. The letter in turn stated that "[p]ursuant to . . . letters dated May 19, 2015 and June 9, 2015 from the [YEMR], EFLO [Energy Yukon] was ordered to . . . [s]uspend or abandon the Wells" and "[c]omply with" certain sections of the Yukon's oil and gas drilling and production regulations. *Id*. The letter also stated that "EFLO [Energy Yukon] . . . ha[d] advised that [it was] insolvent" and that "[i]n or about October, 2015, EFLO [Energy Yukon] notified the YEMR that it was no longer the operator under the" JOA. *Id*. The letter stated that "[o]n or about June 15, 2016, the YEMR ordered that licenses for the Wells and the Facility be transferred [from EFLO Energy Yukon] to Paramount," and that "[i]n or about June, 2017, Paramount initiated Remediation procedures in relation to the Wells." *Id*. The letter stated that Paramount "ha[d] incurred approximately $13 million in Remediation Costs to date," "was required to provide letters of credit totaling $7.5 million," and expected to incur

"[s]ignificant additional Remediation Costs . . . on an ongoing basis as the Remediation work on the Wells and Facility continues." *Id*. at 187–88. The letter asserted that, pursuant to the Yukon Contributory Negligence Act, principles of equitable contribution, and under the terms of the JOA, Devon Canada was "obliged to contribute [EFLO Yukon Energy's] full share of the Remediation Costs, which Paramount ha[d] incurred and w[ould] incur in relation to the Wells and Facility." *Id*. at 188.

On May 15, 2018, Devon Canada sent a letter to EFLO notifying it of Paramount's demand letter. Devon Canada's letter to EFLO stated, in relevant part, that "[a]s a result" of Paramount's demands on Devon Canada, Devon Canada was "provid[ing] notice under clause 2.2 of the Closing Agreement that it claim[ed] indemnification under the Sale Agreement and the Closing Agreement . . . and demand[ed] that EFLO perform its obligations under the Sale Agreement and the Closing Agreement, including in particular the payment of EFLO's share of the Remediation Costs." *Id*. at 191. The letter further stated that, "given that the existing letter of credit is expiring on June 16, 2018 and an extension is necessary, we hereby provide you with notice that we will be drawing on the letter of credit unless we receive confirmation on or before June 1, 2018 that the letter of credit has been extended at least one year." *Id*. at 192.

On June 14, 2018, Paramount and several other companies filed a "STATEMENT OF CLAIM" in the Supreme Court of Yukon against EFLO, EFLO Energy Yukon, Devon Canada, Holloman, Pacific, and other companies. *Id*. at 193.

The statement of claim alleged, in relevant part, that "[i]n or about June, 2017, the Plaintiffs initiated abandonment, remediation, and reclamation procedures in relation to the Remaining Kotaneelee Wells and Facility" and, in doing so, "incurred significant costs" and "w[ould] continue to incur significant costs." *Id*. at 208–09. The statement of claim in turn alleged, in relevant part, that EFLO, Devon Canada, and the other defendants "ha[d] breached the [JOA] . . . by failing to pay their share of the Abandonment, Remediation, and Reclamation Costs during the time period in which they were Working Interest Owners." *Id*.

g) Devon Canada's continued demands on EFLO regarding the SLOC

On May 24, 2019, Devon Canada sent a letter to EFLO noting that the SLOC was set to expire on June 16, 2019, and asking that the SLOC "be immediately extended for one year to June 16, 2020." *Id*. at 214. The letter also again asked EFLO to "amend the name of the beneficiary to the" SLOC. *Id*. The letter stated that "[s]ince EFLO is well aware of the expiration date(s) of the [SLOC], Devon does not intend to re-issue a separate notice pursuant to Section 2.2 of the Closing Agreement, whether now or in the future, each time EFLO fails to extend the [SLOC]," and that, instead, "[t]he original notice sent by Devon on June 7, 2016, remains in effect for this on-going issue." *Id*. The letter notified EFLO that "Devon consider[ed] the failure to timely extend the [SLOC] as warranting a draw under the [SLOC]" because "[t]he intent of the Closing Agreement [wa]s that the [SLOC] remain[] in place as support for EFLO's obligations." *Id*. The letter emphasized that "[t]his matter [wa]s now even more important given the clear and express position taken by the Yukon

government to enforce payment for environmental and regulatory liabilities against all parties who have an interest or who ever had an interest in the assets affected by the [SLOC], including Devon [Canada], of which [EFLO] ha[d] also been made aware and notified." *Id.*

On May 25, 2019, an attorney representing Pacific, Steve O'Neill, sent an email to Devon Canada stating: "I am advised that [EFLO] will extend for one year and make the name change." *Id*. at 217. Notwithstanding that email, however, Devon Canada received no confirmation from EFLO that the SLOC was being extended and revised as requested.

On June 3, 2019, Devon Canada's senior legal counsel, Peter Straka, sent an email to O'Neill noting that Devon Canada "had been served with the 'Paramount Statement of Claim' in the Province of Yukon." *Id*. at 29 (amended complaint). Straka stated in the email that "[w]e will have no choice but to draw on the [SLOC] . . . the week after next unless we clearly see an amendment/extension before then." *Id*. at 216.

EFLO ultimately arranged for Credit Suisse to extend the SLOC, but, as discussed below, it failed to finalize the extension until after Devon Canada had directed Devon Energy to draw on, and after Devon Energy had actually drawn on, the SLOC. On June 13, 2019, a representative from Credit Suisse emailed Devon Energy and notified it that the SLOC had been extended through December 2019. In that same email, the Credit Suisse representative also asked Devon Energy for its "claim withdrawal since applicant [EFLO] is seeking it." *Id*. at 278.

h) The draw on the SLOC

On June 7, 2019, prior to Credit Suisse notifying Devon Energy of the SLOC renewal, Devon Canada instructed Devon Energy "to submit a draw request on the SLOC." *Id*. at 219. That same day, Devon Energy "formally presented the draw request for the total SLOC amount to Credit Suisse." *Id*. In a certificate attached to the demand letter that it sent to Credit Suisse, Devon Energy stated, in pertinent part, "that the [SLOC] is properly payable pursuant to clause 2.2 of the Kotaneelee Closing Agreement dated June 29, 2012." *Id*. at 222.

On June 12, 2019, Devon Canada's senior legal counsel, Straka, exchanged emails with O'Neill, the attorney who represented Pacific, regarding the decision to draw on the SLOC. Straka stated, in pertinent part:

> Steve, at this time, we have nothing concrete which would make us deviate from the draw process. You sent us some paper from a VP Bank in Lichtenstein which is in German and appears to be providing a guarantee for the Credit Suisse LC. VP Bank is not an approved bank under the terms of our Closing Agreement for Kotaneelee dated June 12, 2012. In addition, as we outlined to you, we are now served with a statement of claim in this matter relating to environmental liabilities. Under the Closing Agreement, we continue to be subject to a live environmental claim and have a resulting liability due to this claim. We have a right to draw on the letter of credit regardless of whether or not it is extended. Even if we were to rely on some form of an extension (which we have the right to refuse to do) we do not have that now since we have no written and binding communication from Credit Suisse whatsoever with respect to any firm extensions. Additionally as you know, we are in the process of selling our assets in Canada to Canadian Natural Resources Limited. In short, the situation is more complicated and requires further approvals and more time to take any steps on this matter one way or another. Unfortunately we must continue with the draw or risk losing the security for the pending claim for which it was put into place.

Id. at 305.

"The funds from the SLOC were transferred to Devon [Energy] by Credit Suisse on June 13, 2019, pursuant to the June 7, 2019 draw request." *Id*. at 219. "Devon [Energy] transferred the SLOC funds to [Devon Canada] on June 14, 2019." *Id*.

Procedural history

On June 14, 2019, EFLO and Pacific filed a complaint against Devon Energy in the United States District Court for the Western District of Oklahoma. The complaint alleged a single claim titled "IRREPA[RA]BLE INJURY." Complaint at 4, EFLO Energy v. Devon Energy Corp., No. 5:19-cv-00544-J (W.D. Okla. June 14, 2019). In the "RELIEF REQUESTED" section, the complaint asked for: "[a] declaratory judgment that Defendant['s] actions were fraudulent and did violate the Kotaneelee Purchase and Sale Agreement and the Kotaneelee Closing Agreement, and that the draw down upon the SLOC was non-permissible and improper"; "injunctive relief to Credit Suisse to stop the transfer of funds from the SLOC to" Devon Energy; if "the transfer . . . already occurred, issue in rem jurisdiction over the funds, and order that they remain in the United States and unmolested until further proceedings may ensue determining their status"; "[a]ctual and compensatory damages"; and "[p]unitive damages." *Id*. at 6 (emphasis omitted).

On November 7, 2019, EFLO and Pacific filed an amended complaint. The amended complaint asserted that the district court "ha[d] jurisdiction under 28 U.S.C. §[ ]1332 because" there was "complete diversity of citizenship and the amount in

controversy—$4,380,000.00 CAD—is in excess of $75,000, exclusive of costs and interest." Aplt. App. at 18 (footnote omitted). The amended complaint eliminated the "Irreparable Injury" claim that was asserted in the original complaint and added three new claims for relief. Count One alleged that Devon Energy breached statutory warranties in violation of Okla. Stat. tit. 12A, § 5-110(a)(1) and (2) by "falsely stat[ing] the draw was proper pursuant to Section 2.2 of the Closing Agreement." *Id*. at 23–24. Count Two asserted a claim for unjust enrichment. The amended complaint alleged in support that "[t]hrough its wrongful draw on the [SLOC], Devon Energy obtained funds to which it had no right to receive." *Id*. at 24. Count Three asserted a claim for fraud. In support of this claim, the amended complaint alleged that "[n]one of the contractual conditions permitting a draw of the [SLOC] . . . existed at the time Devon Energy made its draw on June 7, 2019," but "[n]evertheless, Devon Energy represented in writing to [Credit Suisse] that its Certificate was proper and that its draw was in accordance with the requirements of the Closing Agreement." *Id*. at 22.

On November 1, 2021, Devon Energy filed a motion for summary judgment.[4] Devon Energy argued in its motion that (1) its June 7, 2019 request to draw on the SLOC did not violate Oklahoma statutory warranties because it was not a party to the Agreements and, in any event, the draw request was proper under the terms of the

[4] Devon Energy unsuccessfully moved to dismiss the amended complaint shortly after it was filed. Thereafter, the parties engaged in discovery during 2020 and part of 2021.

Agreements, (2) it did not commit actionable fraud, and (3) it had not been unjustly enriched.

On March 3, 2022, the district court issued a written order granting Devon Energy's motion for summary judgment. The district court noted at the outset that "all of Plaintiffs' claims [we]re premised on the allegation that [Devon Energy's] draw on the [SLOC] was 'wrongful.'" *Id*. at 311. To determine whether Devon Energy's draw on the SLOC was wrongful, the district court began by noting that, "[u]nder Section 2.2 of the Closing Agreement," Devon Canada was "'not . . . entitled to draw upon the [SLOC] unless [Devon Canada] first provide[d] written notice to [Plaintiff] claiming indemnification pursuant to this Agreement or the Sale Agreement, and after a period of 30 days following [Plaintiff's] receipt of such claim.'" *Id*. (quoting Closing Agreement at § 2.2). Thus, the district court concluded, "for [Devon Energy's] draw on the [SLOC] to have been permissible by the terms of" Section 2.2 of "the Closing Agreement, it must have been pursuant to a written claim by Devon Canada for indemnification under an applicable provision of either the Closing Agreement or the Sale Agreement, and it must have occurred more than 30 days after Plaintiff's receipt of the indemnification request." *Id*. The district court concluded that the undisputed evidence established that these requirements were met when Devon Canada sent written correspondence to EFLO on May 15, 2018, informing it of Paramount's April 13, 2018 letter asserting claims against Devon Canada relating to incurred and future abandonment and remediation costs.

Plaintiffs argued that the May 15, 2018 letter from Devon Canada to EFLO was insufficient to trigger its duty of indemnification under the Closing Agreement or the Sale Agreement because that letter did not identify any Losses that Devon Canada actually incurred, and instead stated only that Devon Canada was reserving its rights against EFLO "in respect of the Paramount claims . . . that Devon [Canada] may incur." *Id*. at 192. The district court rejected this argument, noting, in relevant part, that "[t]he term Losses is broadly defined and includes 'claims and demands.'" *Id*. at 313. The district court also noted that "the term Environmental Liabilities is broadly defined . . . and . . . includes the abandonment and reclamation costs that are the subject of" Devon Canada's May 15, 2018 letter to EFLO. *Id*. The district court thus concluded that that letter "satisfie[d] the requirement for a written claim by Devon Canada for indemnification under the Closing Agreement." *Id*. The district court concluded that because Devon Canada's May 15, 2018 letter to EFLO was issued "more than 30 days prior to the draw on the [SLOC]," Devon Energy's "draw was proper." *Id*. at 314. And, because it concluded that the draw was proper, the district court concluded that Devon Energy was entitled to summary judgment as to each of the claims asserted against it in the amended complaint.

In addition to concluding that Devon Energy's draw on the SLOC was proper, the district court agreed with Devon Energy that there were alternative reasons why Devon Energy was entitled to summary judgment with respect to the fraud and unjust enrichment claims. In particular, the district court "f[ound] no false material representation by Devon Canada" that would support plaintiffs' fraud claim, and it

concluded that Devon Energy was not unjustly enriched because it "promptly transferred the funds from the draw to Devon Canada." *Id*. at 317.

Final judgment was entered in the case on March 3, 2022. Plaintiffs filed a timely notice of appeal.

II

In their appeal, plaintiffs challenge the district court's grant of summary judgment in favor of Devon Energy. According to plaintiffs, the district court "premised its summary judgment analysis on whether Devon Energy made a proper draw on the [SLOC]." Aplt. Br. at 24. In resolving that question, plaintiffs assert, the district court misconstrued section 3.2 of the Closing Agreement and concluded that EFLO's indemnity obligations to Devon Canada "include[d] a prospective loss." *Id*. at 25. Plaintiffs argue, however, that EFLO's "duty to indemnify arises only after a liability has attached." *Id*. Plaintiffs also argue that Devon Energy's alternative arguments in support of summary judgment should be rejected.

Standard of review

"We review the district court's rulings on summary judgment de novo, applying the same standard as the district court." *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1080 (10th Cir. 2023). "Summary judgment is appropriate if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id*. (quoting Fed. R. Civ. P. 56(a)). "On appeal, 'we examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party.'" *Id*. (brackets omitted) (quoting *Merrifield v.*

Bd. of Cnty. Comm'rs, 654 F.3d 1073, 1077 (10th Cir. 2011)). We also "have discretion to affirm on any ground adequately supported by the record." *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). "In exercising that discretion we consider whether the ground was fully briefed and argued here and below," "whether the parties have had a fair opportunity to develop the factual record," "and whether, in light of factual findings to which we defer or uncontested facts, our decision would involve only questions of law." *Id*. (internal quotation marks and brackets omitted).

Choice of law

A federal court sitting in diversity applies the substantive law of the forum state, including its choice-of-law rules. *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1201 (10th Cir. 2022); *Pepsi-Cola Bottling Co. of Pittsburg v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005). Thus, in this case, we are bound to apply Oklahoma state law.

As noted, plaintiffs have asserted three claims for relief against Devon Energy. All three claims purportedly arise out of Devon Energy's draw on the SLOC. The first claim alleges that Devon Energy breached statutory warranties under Article 5 of the Uniform Commercial Code, which governs letters of credit, by falsely stating that the draw was proper pursuant to Section 2.2 of the Closing Agreement. Notably, Article 5 of the Uniform Commercial Code, which has been adopted by Oklahoma, includes choice-of-law rules pertaining to letters of credit. The parties to a letter of credit may choose the law of the jurisdiction that will govern their respective liabilities. Okla. Stat. tit. 12A, § 5-116(a). "The jurisdiction whose law is chosen

need not bear any relation to the transaction." *Id*. If the parties to a letter of credit did not include a choice-of-law provision, "the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located." *Id*. § 5-116(b).

The SLOC in this case stated that it was "subject to International Standby Practices (ISP 98) International Chamber of Commerce," with the exception of "article 3.14 of the ISP[ ]98," which was "expressly waived." Aplt. App. at 31. ISP 98 "reflects generally accepted practice, custom, and usage of standby letters of credit" and "provides separate rules for standby letters of credit in the same sense that the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG) do for commercial letters of credit and independent bank guarantees." U.N. Secretary-General, *International Standby Practices (ISP 98)*, at 4, U.N. Doc. A/CN.9/477, annex II (Apr. 5, 2000). Notably, however, ISP 98 does not provide a comprehensive legal framework for resolving claims such as the breach of warranty claim asserted by plaintiffs against Devon Energy. Because the SLOC otherwise contains no choice-of-law provision, we conclude that the choice-of-law rule set forth in Okla. Stat. tit. 12A, § 5-116(b) applies, meaning that the liability of Devon Energy in connection with the breach of

statutory warranty claim asserted by plaintiffs "is governed by the law of the jurisdiction in which [it] is located," i.e., Oklahoma.[5]

Plaintiffs have also asserted two tort claims against Devon Energy, one for unjust enrichment and the other for fraud. For tort cases, "the Oklahoma choice of law rule requires application of the law of the state with the most significant relationship to the parties." *Moore v. Subaru of Am.*, 891 F.2d 1445, 1448 (10th Cir. 1989). Although the parties do not address this issue, it appears to us, based upon the undisputed evidence in the record, that Oklahoma has the most significant relationship to the parties because that is where Devon Energy is based, where the draw on the SLOC was made from, and where the funds from the SLOC were initially sent. Thus, we conclude that Oklahoma state law applies to plaintiffs' two tort claims.

Did the district court misconstrue Section 3.2 of the Closing Agreement?

Plaintiffs' primary argument on appeal is that the district court, in determining whether Devon Energy made a proper draw on the SLOC, misconstrued the phrase in Section 3.2 of the Closing Agreement that states that EFLO "shall be solely liable to and indemnify and defend [Devon Canada] from and against all Losses which [Devon

[5] The SLOC expressly refers to the Closing Agreement, but did not incorporate the Closing Agreement's choice-of-law provision, which stated that the law of the Province of Alberta would apply to all disputes between the parties to the Closing Agreement. And, because Devon Energy was not a party to the Closing Agreement, the Closing Agreement's choice-of-law provision has no impact here. *See Mut. Exp. Corp. v. Westpac Banking Corp.*, 983 F.2d 420, 423 (2d Cir. 1993) ("[L]etters of credit must be interpreted on their face, independent of other contracts and the underlying transaction.").

Canada] *may* suffer, sustain, pay or incur as a result of any act, omission, matter or thing related to the Environmental Liabilities . . . .'" Aplt. Br. at 24–25 (emphasis added by EFLO) (internal quotation marks omitted). The district court, EFLO argues, "read the term 'may' to expand the indemnity obligation to include a prospective loss." *Id*. at 25. "That reasoning," EFLO asserts, "places too much import on the term 'may.'" *Id*. EFLO asserts that "[t]he natural and logic[al] reading of the term ['may'] is that at the time the Closing Agreement was drafted, the drafter intended to convey at some time in the future, Devon Canada actually 'may' suffer, sustain, pay or incur a loss—at which point EFLO's duty to indemnify would be triggered." *Id*. EFLO argues that "[t]he term 'may' does not . . mean if Devon Canada merely faced a risk of a future loss, EFLO had a duty to preemptively indemnify against that loss." *Id*. Indeed, EFLO argues, "[t]he duty to indemnify arises only after a liability has attached, and the Closing Agreement uses the term in precisely that manner, because it adopts the conventional framework whereby the duty to 'indemnify' *after* a loss is incurred is paired with a distinct duty to 'defend' against the *prospect* of a loss." *Id.*

We reject plaintiffs' arguments. To begin with, the district court's analysis did not, as plaintiffs would have us believe, hinge on the meaning of the term "may," as employed in Section 3.2 of the Closing Agreement, but rather on the broad manner in which the Closing Agreement defines the term "Losses." To be sure, the district court correctly noted "that some of the indemnity provisions in the Agreements include the language 'Losses suffered, sustained, paid or incurred,'" whereas

"Section 3.2 of the Closing Agreement . . . references Losses that Devon Canada 'may suffer, sustain, pay or incur.'" Aplt. App. at 313. But, as far as we can determine, the district court did not draw any conclusions from these textual differences. Instead, the district court proceeded to note that "[t]he term Losses is broadly defined [in the Closing Agreement] and includes 'claims and demands.'" *Id*. (quoting Closing Agreement at § 1.1(h)). In addition, the district court noted that "[t]he term Environmental Liabilities is broadly defined" in the Closing Agreement, and the district court "f[ound] that it include[d] the abandonment and reclamation costs that [we]re the subject of the Indemnity letter," i.e., the May 15, 2018 letter that Devon Canada sent to EFLO informing it of Paramount's claims against Devon Canada. *Id*.

As we shall proceed to explain, we agree with the district court that the term "Losses" and the phrase "Environmental Liabilities" are defined in the Closing Agreement in such a broad manner as to include the demands and claims that Paramount made against Devon Canada. The first sentence of Section 3.2 of the Closing Agreement sets the stage for the remainder of the language in Section 3.2 by stating: "It is acknowledged that [EFLO] has been provided with the right and the opportunity to conduct due diligence investigations with respect to existing or potential Environmental Liabilities." Aplt. App. at 95. In the second sentence of Section 3.2, EFLO "agree[d]," "[p]roviding Closing occurs," "that [Devon Canada] shall have no liability whatsoever for any Environmental Liabilities and in this regard, [EFLO] shall be solely liable to and indemnify and defend [Devon Canada]

from and against all Losses which [Devon Canada] may suffer, sustain, pay or incur as a result of any act, omission, matter or thing related to the Environmental Liabilities except to the extent that any such Losses are matters or things for which [EFLO] is entitled to indemnification pursuant to clause 5.1 of the Sale Agreement." *Id*. The language of this sentence is both unequivocal and broad: in sum, the parties agreed that Devon Canada would incur no liability "whatsoever" for any Environmental Liabilities, that EFLO would bear sole responsibility for such Environmental Liabilities, and that EFLO would indemnify and defend Devon Canada (with a narrow exception, and one inapplicable in this case, carved out for "matters or things for which" EFLO was "entitled to indemnification" under clause 5.1 of the Sale Agreement) with respect to any Loss that Devon Canada suffered after the Closing Agreement was finalized. Presumably to emphasize that Devon Canada would have no responsibility whatsoever for any Environmental Liabilities, the last portion of the second sentence refers to "all Losses which [Devon Canada] may suffer, sustain, pay or incur as a result of any act, omission, matter or thing related to the Environmental Liabilities." *Id*.

Section 3.2 of the Closing Agreement employs the phrase "Environmental Liabilities" and the term "Loss," both of which, consistent with the intent expressed in Section 3.2, are expressly and broadly defined elsewhere in the Closing Agreement. Specifically, the Closing Agreement broadly defines the phrase "Environmental Liabilities" as follows:

> "Environmental Liabilities" means
>
> (i) any and all damage, contamination or other adverse situations pertaining to the Environment and relating to or caused by the Assets or operations thereon or related thereto, however and by whomsoever caused, and whether such damage, contamination or other adverse situations occur or arise in whole or in part prior to, at or subsequent to the date hereof; and
>
> (ii) all past, present and future obligations and liabilities arising directly or indirectly, whether before or after the date hereof, from:
>
> (A) Environmental Matters;
>
> (B) non-compliance with, violation of or liability under any Regulations pertaining to the Environment; or
>
> (C) the Abandonment and Reclamation Obligations[.]

Id. at 93. In turn, the Closing Agreement broadly defines the term "Losses" to mean

> all losses, death, injuries, damage, expenses, interest, charges, assessments, damages, liabilities, fines, penalties, *actions*, *causes of action*, *suits*, *claims* and *demands*, including all reasonable legal and other professional fees and expenses in relation thereto on a full recovery basis, but notwithstanding the foregoing shall not include any income tax liabilities or any liability for indirect or punitive damages including without limitation any consequential losses or loss of profits.

Id. at 94 (emphasis added).

Considering the language of Section 3.2 of the Closing Agreement in light of these two definitions, we have little trouble concluding that the demand for contribution that Paramount asserted in its April 13, 2018 letter to Devon Canada, and the claims that Paramount subsequently asserted against Devon Canada in the lawsuit that it filed in the Supreme Court of Yukon on June 14, 2018, constitute "Losses" that Devon Canada actually suffered and was entitled to be indemnified

against by EFLO.[6] Although plaintiffs argue that Devon Canada might never incur any actual liability to Paramount, that is irrelevant in light of the manner in which "Losses" are defined in the Closing Agreement.[7] That is because, under the broad definition of "Losses" set forth in the Closing Agreement, a demand or claim asserted against Devon Canada, standing alone, constitutes a "Loss" suffered by Devon Canada. Plaintiffs also argue that EFLO has no duty to indemnify Devon Canada against the demands and claims asserted against it by Paramount because the precise amount of those demands and claims has yet to be determined. We reject this argument. To be sure, Paramount did not assert in either its April 13, 2018 demand letter or the statement of claim that it filed against Devon Canada a precise dollar figure that Devon Canada owed to Paramount. But the April 13, 2018 demand letter did state that "Paramount has incurred approximately $13 million in Remediation Costs to date on behalf of all existing and past working interest partners," "was required to provide letters of credit totaling $7.5 million," and would likely incur

[6] We note that Devon Canada's May 15, 2018 letter to EFLO notifying EFLO of Paramount's April 13, 2018 demand for contribution satisfied the 30-day notice requirement outlined in Article 2.2 of the Closing Agreement. Although Devon Canada did not send EFLO another letter following Devon Canada's receipt of Paramount's lawsuit, we conclude that was unnecessary under Article 2.2 of the Closing Agreement.

[7] Generally speaking, Oklahoma law provides that "[u]pon an indemnity against claims or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." Okla. Stat. tit. 15, § 427(2). But Oklahoma law also provides that this general rule does not apply if "a contrary intention appears" in the contract at issue. *Id*. § 427. And that is precisely what occurred here.

"[s]ignificant additional Remediation Costs . . . on an ongoing basis as the Remediation work on the Wells and Facility continues." *Id*. at 187–88. In turn, the statement of claim that Paramount filed against Devon Canada alleged that Devon Canada had a 22.98935% working interest in the JOA and, as a result, was responsible for its proportionate share of the abandonment, remediation and reclamation liabilities incurred by Paramount. *Id*. at 200–01. Together, the demand letter and the statement of claim establish that the amount of the "Loss" actually suffered by Devon Canada as a result of the demands and claims asserted against it by Paramount was, at a minimum, approximately $4.71 million dollars, an amount that exceeded the value of the SLOC.[8]

Finally, plaintiffs argue that interpreting the Closing Agreement in this manner ignores the well-established distinction between the "duty to defend" and the "duty to indemnify." We reject this argument for two reasons. First, as Devon Energy correctly notes in its response brief, plaintiffs did not assert this argument below in response to Devon Energy's motion for summary judgment, and we typically do not address arguments raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120, (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Second, even if we were to recognize an exception to this general rule, it is readily apparent that plaintiffs'

[8] We arrived at this amount by multiplying the total amount that Paramount alleged in its demand letter that it had incurred to date, $20.5 million dollars, by the amount of Devon Canada's working interest in the JOA, 22.98935%.

argument lacks merit in light of the broad scope of Section 3.2 of the Closing Agreement. Specifically, Section 3.2 makes clear that (a) EFLO shall bear all costs and liabilities arising out of the Environmental Liabilities associated with the purchased assets, (b) Devon Canada shall bear no such costs or liabilities, and (c) EFLO's responsibility for liability, indemnification, and defense applies in all situations, including where, as here, a demand or claim has been asserted against Devon Canada.

For these reasons, we agree with the district court that Devon Energy's draw from the SLOC was proper and that, as a result, Devon Energy was entitled to summary judgment with respect to all of the claims asserted against it in plaintiffs' amended complaint.

The alternative bases for summary judgment

Devon Energy also argued below that there were alternative reasons why it was entitled to summary judgment with respect to each of the three claims asserted against it by plaintiffs. As we shall discuss below, we agree with Devon Energy on each of these points.

1) Plaintiffs' claim for breach of statutory warranties

The first claim for relief in the amended complaint alleged that Devon Energy breached statutory warranties, in violation of Okla. Stat. tit. 12A, § 5-110, because "Devon Energy falsely stated the draw was proper pursuant to Section 2.2 of the Closing Agreement" and because "Devon Energy knew no indemnity claim had been made against EFLO." Aplt. App. at 23–24.

The statute cited in this claim for relief, Article 5 of Title 12A, Oklahoma's Commercial Code, governs letters of credit. Section 5-110, entitled "Warranties," provides as follows:

> (a) If its presentation is honored, the beneficiary warrants:
>
> (1) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in subsection (a) of Section 5-109 of this title; and
>
> (2) *To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit*.
>
> (b) The warranties in subsection (a) of this section are in addition to warranties arising under Articles III, IV, VII and VIII of this title because of the presentation or transfer of documents covered by any of those articles.

Okla. Stat. tit. 12A, § 5-110 (emphasis added).

Uniform Commercial Code Comment 2 to this statute explains how the warranty outlined in subsection (a)(2) operates:

> The warranty in Section 5-110(a)(2) assumes that payment under the letter of credit is final. It does not run to the issuer, only to the applicant. In most cases the applicant will have a direct cause of action for breach of the underlying contract. *This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary*. It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108(a). *It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor*. If, for example, an underlying sales contract authorized the beneficiary to draw only upon "due performance" and the beneficiary drew even though it had breached the underlying contract by delivering defective goods, honor of its draw would break the warranty. By the same token, if the underlying contract authorized the beneficiary to

> draw only upon actual default or upon its or a third party's determination of default by the applicant and if the beneficiary drew in violation of its authorization, then upon honor of its draw the warranty would be breached. *In many cases, therefore, the documents presented to the issuer will contain inaccurate statements (concerning the goods delivered or concerning default or other matters), but the breach of warranty arises not because the statements are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction*.

Id., Uniform Commercial Code Comment, ¶ 2 (emphasis added).

In its motion for summary judgment, Devon Energy argued that EFLO's "claim for breach of statutory warrant fail[ed] for two reasons: (1) [Devon Energy] [wa]s not a party to the Closing Agreement or the Sales Agreement and accordingly, the Draw Request could not have been in violation of any agreement between [Devon Energy] and EFLO or Pacific, which is not a party to the Agreements either; and (2) in any event, the Draw Request was proper under the terms of the Agreements." Aplt. App. at 79.

Although we have already concluded that Devon Energy's draw on the SLOC was proper, we also agree with Devon Energy's first argument. Devon Energy was not a party to, and otherwise played no role in, either the Sale Agreement or the Closing Agreement. Nor did Devon Energy have any dealings with EFLO. Devon Energy was named as the beneficiary on the SLOC only due to an error on EFLO's part, and Devon Canada repeatedly asked EFLO to correct that error but EFLO failed to do so. Thus, there was no "agreement between the applicant and the beneficiary or any other agreement intended by them to be augmented by the letter of credit." Okla. Stat. tit. 12A, § 5-110(a)(2). To be sure, EFLO and Devon Canada intended for the

SLOC to augment the Sale Agreement and Closing Agreement, but Devon Energy was not a party to those agreements.

2) The unjust enrichment claim

The second claim for relief alleged in the amended complaint was for unjust enrichment. The amended complaint alleged that, "[t]hrough its wrongful draw on the [SLOC], Devon Energy obtained funds to which it had no right to receive." Aplt. App. at 24.

Under Oklahoma law, "[u]njust enrichment arises," in pertinent part, when "one party holds property that, in equity and good conscience, it should not be allowed to retain." *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 374 P.3d 820, 828 (Okla. 2016) (internal quotation marks omitted). "[A] party is not entitled to pursue a claim for unjust enrichment when it has an adequate remedy at law for breach of contract." *Id*.

Devon Energy argued below that it was entitled to summary judgment on the unjust enrichment claim because it was "no longer in possession of the SLOC funds" and because "Plaintiffs have an adequate remedy at law." Aplt. App. at 87. The district court agreed that Devon Energy was entitled to summary judgment on the enrichment claim "[b]ecause . . . the draw was proper, and because [Devon Energy] promptly transferred the funds from the draw to Devon Canada." *Id*. at 317.

Notably, plaintiffs' amended complaint concedes that the funds obtained by Devon Energy from the draw on the SLOC have now been transferred to Devon Canada. *Id*. at 26–27 ("Devon Energy . . . sen[t] the money it received from the draw

on the Letter of Credit to Canada . . . upon receipt"). Likewise, in their response to Devon Energy's motion for summary judgment, plaintiffs conceded that Devon Energy transferred the draw funds to Devon Canada. *Id*. at 77, 233. Because it is undisputed that Devon Energy is no longer in possession of the funds from the SLOC, we conclude there is no basis for an unjust enrichment claim under Oklahoma law. Although plaintiffs argue in their appellate brief that Devon Energy would be liable for unjust enrichment, "irrespective [of] whether [it] still possess[es]" the funds, "if it had knowledge of its obligation to return the [funds] before it transferred [them] to Devon Canada," plaintiffs cite no Oklahoma law in support of that proposition and we have found none. Aplt. Br. at 34.

3) The fraud claim

The third and final claim alleged in the amended complaint was for fraud. The amended complaint alleged in support of this claim that, "[a]t all material times, Devon Canada . . . was the agent for Devon Energy with respect to Devon Energy's communications to EFLO regarding the draw on the [SLOC]." Aplt. App. at 25. It further alleged that in late May 2019, Devon Canada communicated with EFLO and "represented to EFLO that Devon Energy would draw only if EFLO did not timely renew and extend the [SLOC]," and that "an EFLO representative advised both Devon Energy and Devon Canada . . . that the [SLOC] would be extended before its expiration and amended as requested." *Id*. The amended complaint alleged that "Devon Energy misled EFLO and failed to disclose its true intentions." *Id*. at 26. Specifically, the amended complaint alleged that "[o]n June 3, 2019, Devon Canada

. . . represented to EFLO that Devon Energy would draw on the [SLOC] the week after next, if EFLO did not timely extend the [SLOC]," but that Devon Energy actually drew on the SLOC "only 4 days" thereafter. *Id*. The amended complaint also alleged that Devon Energy "fail[ed] to give consent to the Bank for the renewal of the [SLOC] with Devon Canada . . . as beneficiary." *Id*. In addition, the amended complaint alleged that "Devon Energy's conduct was willful, malicious, reckless, and made with the specific intent to harm EFLO." *Id*. at 27.

Devon Energy argued in its motion for summary judgment that "Plaintiffs [were] suffer[ing] from . . . confusion" because Devon Energy "acted as Devon Canada's agent in all matters relating to the Draw Request, not the other way around." *Id*. at 85. Devon Energy argued that because it "was Devon Canada's agent, [it could not], as a matter of law, be held liable for any alleged tortious statements of Devon Canada." *Id*. Devon Energy further argued that "Plaintiffs have not alleged[,] nor can they produce any evidence of[,] any fraudulent conduct on the part of [Devon Energy]." *Id*. at 86.

The district court addressed the fraud claim and noted that, "[t]o establish a claim for fraud" under Oklahoma law, plaintiffs had to show, in pertinent part, "that [Devon Energy] made a false material representation either knowingly or with reckless disregard for the truth." *Id*. at 314 (citing *Bowman v. Presley*, 212 P.3d 1210, 1217–18 (Okla. 2009)). The district court further noted that, under Oklahoma law, plaintiffs had "the burden of proving at trial, by clear and convincing evidence, that [Devon Energy] acted with knowledge of falsity or reckless disregard for the

truth regarding a material representation." *Id*. Notably, the district court then stated: "The Court finds Plaintiffs have presented no evidence of fraud by [Devon Energy]." *Id*. at 315. The district court noted in support that there were "multiple weaknesses in Plaintiffs' arguments" in support of the fraud claim. *Id*. For example, the district court concluded that EFLO "was not justified in relying upon an impermissible assertion that Devon Canada would draw on the [SLOC] unless it was renewed." *Id*. at 316. Further, the district court concluded that "to the extent [EFLO] relied on Devon Canada's statement that it would 'have no choice but to draw on the [SLOC] . . . unless we clearly see an amendment/extension,' Devon Canada did exactly what it said it would." *Id*. Because the district court "f[ound] no false material representation by Devon Canada," the district court concluded it was "unnecessary to address Plaintiffs' allegations regarding agency and [Devon Energy's] responsibility for Devon Canada's [alleged] misrepresentations." *Id*. at 317.

Plaintiffs argue in their appeal, albeit in a footnote, that the district court committed reversible error because it *sua sponte* and "without prior notice or opportunity to brief or present evidence on the issue, . . . analyzed whether EFLO and Pacific . . . reasonably relied on statements made by Devon Energy and Devon Canada for purposes of the Fraud claim." Aplt. Br. at 24 n.9. We reject this argument for three reasons. First, the district court applied well-established principles of Oklahoma law regarding fraud claims to the undisputed facts of the case. Second, plaintiffs make no attempt in their appellate brief to challenge the substance of the district court's analysis. And third, we conclude that the district

court's analysis on this point was correct, i.e., the statements alleged by plaintiffs to be fraudulent were either true or, in one instance, could not reasonably be relied on by plaintiffs.

Plaintiffs also argue in their appellate brief that "Devon Energy did not move on any element of Fraud save for the notion it [could not] be liable for any representation" made by Devon Canada. *Id*. at 33. That is also incorrect. As we have noted, Devon Energy argued, in pertinent part, that that "Plaintiffs have not alleged[,] nor can they produce any evidence of[,] any fraudulent conduct on the part of [Devon Energy]." *Id*. at 86. The district court agreed with Devon Energy on this point and plaintiffs have not seriously challenged the district court's conclusion.

III

The judgment of the district court is AFFIRMED.