

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0423

STATE OF OHIO EX REL. CLAUGUS
FAMILY FARM, L.P.

Supreme Court Case No. _____

Relator,

v.

SEVENTH DISTRICT COURT OF APPEALS
131 West Federal Street
Youngstown, Ohio 44503

and

GENE DONOFRIO, in his official capacity as a
judge on the Seventh District Court of Appeals
131 West Federal Street
Youngstown, Ohio 44503

and

JOSEPH J. VUKOVICH, in his official
capacity as a judge on the Seventh District
Court of Appeals
131 West Federal Street
Youngstown, Ohio 44503

and

MARY DEGENARO, in her official capacity as
a judge on the Seventh District Court of
Appeals
131 West Federal Street
Youngstown, Ohio 44503

Respondents.

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**MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF PROHIBITION AND
WRIT OF MANDAMUS**

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Introduction

This is an original action seeking a writ of prohibition barring the Seventh District Court of Appeals (“Seventh District”) from enforcing a judgment entry issued in the case of *Hupp v. Beck Energy Corporation*, Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11 (“Beck Litigation”) on September 26, 2013, against Relator Claugus Family Farm, L.P. (“Claugus Family” or “Relator”). Relator will refer to this judgment entry as the “Tolling Order.” The Tolling Order purports to bind the Claugus Family to an order issued in a potential class action in which the Claugus Family was not a named party, never received notice of the action, never was given the opportunity to opt out of the class, and never was given a chance to be heard in this matter. Thus, the Seventh District adjudicated the Claugus Family’s property rights in absentia, despite the fact that those rights are worth hundreds of thousands of dollars.

The Claugus Family further seeks a writ of mandamus ordering the Seventh District to vacate the Tolling Order, to the extent it applies to the Claugus Family as an absent member of a class certified by the Monroe County Common Pleas Court under Ohio Rule of Civil Procedure 23(B)(2). The Tolling Order purports to toll the termination of leases covering land owned by the Claugus Family and other absent members of the class. As with the Claugus Family, these purported class members never were given notice of the litigation, never were given an opportunity to opt out of the class, and never have been given notice of the Tolling Order itself. Simply stated, the Tolling Order was issued without due process of law.

This Court has jurisdiction over this action pursuant to Article IV, Section 2 of the Constitution of Ohio.

B. The Claugus Family Property

Relator Claugus Family is a limited partnership duly organized and existing under the laws of the State of Ohio. The partners are the immediate descendants of Drs. Frederick W. and Frederick C. Claugus, local large animal veterinarians who served the Monroe County area for approximately 60 years, beginning in the 1940's. Members of the Claugus family have lived and farmed in Monroe County for more than 160 years and have owned farmland there for at least 140 years. The Claugus Family now owns both the surface and mineral rights to most of that acreage, including a parcel of approximately 60.181 acres in Green Township that is the subject of this application.

On February 21, 2006, the Claugus Family, acting through an affiliate, purchased the 60.181 acre parcel. The Claugus Family purchased the entire interest in the property, including the interest in the mineral estate. The affiliate formally transferred the farm into the name of the Claugus Family on March 25, 2011.

The prior owner of the farm had signed a Form G&T (83) oil and gas lease with Beck Energy on February 4, 2004 (hereinafter the "Beck Energy Lease"). The primary term of the Beck Energy Lease was ten years; and the secondary term was to continue "so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas." No well was drilled on the property during the primary term; oil and gas were not produced in any quantities during the ten year primary term; Beck Energy did not operate the premises in search of oil or gas during the primary term; Beck Energy expressed no judgment regarding future production; and Beck Energy took no steps to

obtain a drilling permit or conduct activities pursuant to the Beck Energy lease. Thus, absent the Tolling Order, the Beck Energy Lease terminated at midnight on February 3, 2014.

C. The Original Action and Requested Class Certification

On September 14, 2011, four individuals filed suit against Beck Energy Corporation (“Beck Energy”) in the Monroe County Common Pleas Court. The case was assigned Case No. 2011-345. The complaint alleged that the oil and gas leases the plaintiffs signed with Beck Energy are invalid. On September 29, 2011, the complaint was amended to assert claims on behalf of a class of landowners who had signed Form G&T (83) oil and gas leases with Beck Energy, thereby potentially transforming the case of four individuals into the purported class action described herein. On July 12, 2012, the Common Pleas Court granted summary judgment to the named plaintiffs, holding that the Form G&T (83) leases signed by the Plaintiffs constituted leases in perpetuity in violation of Ohio public policy. The Court held these leases to be void *ab initio*.

D. Class Certification and the Denial of Notice to the Proposed Class

On July 19, 2012, one week after obtaining summary judgment, the named plaintiffs filed a motion for class certification pursuant to Ohio Civil Rule 23(B)(2). Class actions maintained under Civil Rule 23(B)(2) are intended to address conduct of the defendant that applies generally to all affected plaintiffs. Thus, Civil Rule 23(B)(2) actions do not normally require notice to members of the proposed class or the opportunity to opt out of the class because they do not pose a risk of dissimilar impact on the plaintiffs. The maintenance of a class action under Civil Rule 23(B)(2) is inappropriate however, when the suit may result in a disposition that will affect the proposed class members differently. An action in which class members may be affected differently or individually should be maintained under Civil Rule 23(B)(3).

On February 8, 2013, the Common Pleas Court granted class certification pursuant to Civil Rule 23(B)(2). The Common Pleas Court certified the class pursuant to Civil Rule 23(B)(2) despite the fact that, if the leases were indeed void *ab initio*, class members would have individual and variable claims against Beck Energy for slander of title and money damages. Beck Energy then appealed this order to the Seventh District, which remanded the case to the Common Pleas Court, *inter alia*, to clarify the definition of the class. On June 10, 2013, the Common Pleas Court defined the class as follows:

all persons who are lessors of property in the State of Ohio, or who are successors in interest of said lessors, under a standard form oil and gas lease with Beck Energy Corporation, known as (G&T (83)", [sic] where Beck Energy Corporation has neither drilled nor prepared to drill a gas/oil well, nor included the property in a drilling unit, within the time period set forth in paragraph 3 of said Lease or thereafter.

The Common Pleas Court further decided that its entry granting summary judgment would apply to all proposed members of the class as of September 29, 2011, when the complaint was first amended to assert claims on behalf of a class of landowners.

Despite seeking certification pursuant to Civil Rule 23(B)(2), the named plaintiffs filed a "Motion for Approval of Notice to Class and Establishment of Method of Service." On August 8, 2013, the Common Pleas Court denied this motion, along with a prior motion seeking to compel Beck Energy to identify every lessor who had signed a Form G&T (83) lease. Taken together, these two decisions foreclosed any possibility that the absent members of the class would receive either notice of the action or an opportunity to opt out.

This case has had a tortured trek of order, appeal and remand focused on class certification and tolling of leases.¹ During this process, both the lower court and the Court of Appeals lost sight of the non-party landowners, including the Claugus Family, who were not

¹ A chronology of the Beck Litigation is attached.

parties to the action, but were impacted by the various rulings of the Court. To this day, the Claugus Family has not received any notice from the Court or counsel to the parties of the class action litigation, the Tolling Order, or any other aspect of the case.

E. The Common Pleas Court Declines to Toll the Leases of Absent Class Members

On October 1, 2012, Beck Energy filed its first motion to toll leases, which related to the named plaintiffs only, even though those plaintiffs had filed an amended class action complaint more than a year before the motion to toll was filed. On July 16, 2013, Beck Energy filed a second motion, asking the Court to toll the leases of all the proposed class members. On August 2, 2013, the Common Pleas Court filed an entry tolling leases of only the named plaintiffs pending the outcome of Beck Energy's appeals. In doing so, the Court discussed (but did not toll) "leases that *may eventually be included in this class* if the Plaintiffs prevail and this matter goes forward as a class action." The Court thus denied Beck Energy's motion to toll the leases of all proposed class members. Beck Energy appealed this order in its fifth trip to the Court of Appeals. Throughout this entire process the Claugus Family remained ignorant of the fact and results of the legal proceedings.

F. The Seventh District Tolls the Leases of Absent Class Members thereby Unconstitutionally Denying Relator Due Process

On September 26, 2013, the Seventh District issued the Tolling Order, which modified the Common Pleas Court's tolling order of August 2, 2013 as follows:

The lease terms are also tolled as to the *proposed* defined class members. The tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any such successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

The Seventh District offered no explanation as to how it could properly toll the leases of lessors who were only “proposed defined class members” without providing notice to them and giving them the opportunity to opt out of the action. The Court completely disregarded the need for due process in the face of the extraordinary burden to be imposed on the property rights of absent class members and the different impact the ruling would have on each of the potential class members. The Claugus Family’s rights were disregarded by the Court’s orders. The Claugus Family (i) was not a named party; (ii) received no notice of the lawsuit from the court; (iii) was not provided a right to opt out of the proposed class action; and (iv) was prejudiced by the order.

The Tolling Order further failed to recognize that, if the Seventh District were to hold that the Common Pleas Court improperly certified the class, the class action would not be “properly conducted,” and absent class members, who were neither parties nor in privity with parties, could not be bound by any orders or judgments issued in the class action. Furthermore, in the event of decertification, both the Common Pleas Court and the Seventh District would lack jurisdiction over the absent class members, and the Seventh District’s Tolling Order purporting to bind absent class members would violate well-established principals of due process.

In sum and substance, the parties to the action were so fully absorbed in the litigation, which occupied considerable time and resources of the trial court and the Seventh District, five appeals having been filed, that the rights of landowners who were not before the Courts, such as the Claugus Family, were simply lost in the shuffle.

G. The Claugus Family Signs a New Lease in Reliance upon the Terms of the Beck Energy Lease

The property owned by the Claugus Family is in the heart of the area being developed by oil and gas producers because of its favorable shale formations. Realizing that the Beck Energy

Lease was nearing the end of the primary term, the Claugus Family began exploring new leasing opportunities in 2013. On September 29, 2013, the Claugus Family signed a Paid-Up Oil & Gas Lease with Gulfport Energy Corporation (hereinafter the “Gulfport Lease”) covering the property.² This form of leasing is commonly referred to as top leasing, and the new lease does not come into play until the prior lease has expired. Top leasing is a common practice in the Ohio oil and gas community.

The Gulfport Lease provides that the Claugus Family will receive a bonus payment of \$7,000 for each net mineral acre as to which title is confirmed as clear, along with a 20% royalty from any oil and gas ultimately produced. Thus, the Claugus Family should receive a payment of \$421,267.00 and potential royalties could total millions of dollars. The Gulfport Lease includes a 90 day “title period” from September 30 to December 29, 2013, during which Gulfport reviewed title to the property for title defects. A 180 day “cure period” follows the title period, during which the Claugus Family may cure any title defects. That period began to run against the Claugus Family on December 30, 2013, and will end on June 27, 2014. An oil and gas lease not released of record does not constitute a title defect under the Gulfport Lease, if the primary term of such oil and gas lease has expired by its terms and no producing oil and gas well has been drilled pursuant to said lease. Because the Beck Energy Lease was to expire on February 3, 2014, comfortably within the cure period, the Claugus Family should be entitled to receive the payment from Gulfport and any royalties from a well drilled under the Gulfport Lease.

² The Claugus Family has other real estate holdings contiguous to the real estate in question. The ability to “block” or aggregate acreage enhances the potential to have a well drilled on the Claugus Family’s property. Consequently, not only is Relator prejudiced by the tolling of the Beck Energy Lease, the inability to make this acreage available may negatively impact the development of other Claugus Family oil and gas interests.

However, the Claugus Family was unaware that, four days before it signed the Gulfport Lease (which had been the subject of negotiations for weeks), the Seventh District tolled the Beck Energy Lease indefinitely, retroactive to October 1, 2012. The Common Pleas Court never had provided the Claugus Family with notice of the class action or an opportunity to opt out. Worse the Seventh District did not (and still has not) provided the Claugus Family with notice of the Tolling Order, despite fact that this order will cost the Claugus Family hundreds of thousands of dollars (if not millions), if it is allowed to stand. When Relator became aware of the Tolling Order, it immediately notified Gulfport of the Court's ruling.³ Gulfport then took the position that the expired Beck Energy lease constitutes a title defect because of the Tolling Order and has rejected the lease.

The Claugus Family does not want to be included in the class and would have elected to be excluded from the class had it been provided with notice of the class action and the right to opt out. The Seventh District's Tolling Order will add years onto the Beck Energy Lease. The Tolling Order deprives the Claugus Family of valuable property rights and purports to bind the Claugus Family and other absent class members, despite the due process violations and jurisdictional issues created by an order purporting to bind parties who never were properly before the court and who never were told about the lawsuit or the Tolling Order.

³ Counsel for Relator became aware of the Tolling Order some time in October of 2013 during general discussions with Plaintiffs' counsel regarding oil and gas litigation in Ohio.

ARGUMENT

PROPOSITION OF LAW NO. 1:

The Fourteenth Amendment to the United States Constitution and Article 1, § 16 of the Ohio Constitution provide that no person shall be deprived of property without due process of law. In a class action, the level of due process which must be afforded to absent class members is dependent upon the property rights that might be affected by the lawsuit. Where a class is certified pursuant to Civil Rule 23(B)(2), and no notice of the lawsuit or opportunity to opt out is provided to the absent plaintiffs, who are at risk of dissimilar impact, a court order tolling the termination date of the absent class members' oil and gas leases violates the due process rights of such absent class members and is unconstitutional.

A. Introduction

It cannot be gainsaid in our system of justice that a party affected by actions of a court is entitled to notice of that action. Yet, in this matter, that fundamental right was denied. While Ohio's rules of civil procedure provide for class action litigation to streamline and effectively administer actions involving large groups, the civil rules also are designed to protect one of our sacred principles of law, namely, that of due process. In this matter, whether by confusion, mistake or misapplication of the civil rules, the Claugus Family has been denied the fundamental right of due process and has been economically damaged by that denial.

B. Rule 23(B)(2) Certification Is Only Appropriate in Limited Circumstances

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Class actions certified pursuant to Civil 23(b)(2),⁴ however, do not ordinarily require that class members be given such notice and opt-out rights. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.

⁴ Ohio labels this provision Civil Rule 23(B) and the Federal Rule labels it 23(b).

2541, 2559 (2011). This is because notice serves no purpose when the plaintiffs only seek an order that would generally impact the class by requiring the defendant to act in a consistent manner with regard to a group of people, each of whom individually could seek injunctive or declaratory relief against the defendant based upon its conduct. *Id.* Notice is not required because the declaration (or injunction) should issue as to all of the similarly situated plaintiffs, or should not be issued at all. The class is generally impacted, and the risk of harm to any individual plaintiff is small, because the only possible outcome of the litigation is either an order that the defendant act in a consistent manner as to all similarly situated plaintiffs, or a finding that the defendant's conduct was legally permissible. This case poses an entirely different scenario.

Class certification under Rule 23(b)(2) is not appropriate when the proposed class action includes individual monetary claims, because monetary claims are not general in nature and require the additional procedural protections found in Rule 23(b)(3), namely the right to notice and to opt out of the class. *Id.* at 2559. These protections are sufficiently important that the United States Supreme Court has warned that class counsel should not be allowed to ignore potential monetary claims in order to obtain class certification under Rule 23(b)(2). *Id.* Otherwise, the class members might then be precluded from pursuing monetary claims as a result of the class action litigation from which they could not withdraw. *Id.*

Similarly, a class should not be certified under Rule 23(b)(2) when the class as a whole will not remain entitled to declaratory relief when relief is granted. *Id.* at 2559-60. Accordingly, class certification under Rule 23(B)(2) is inappropriate when the trial court would need to continually reconsider the eligibility of class members for declaratory relief. *Id.* (noting that

certification of a class of employees seeking declaratory relief under Rule 23(b)(2) was inappropriate when the trial court would have to evaluate and reevaluate whether plaintiffs remained employed by the defendant, since employees would be entitled to declaratory relief but former employees would not). Were it not so, the trial court could award declaratory relief to plaintiffs who lack standing. Further, plaintiffs simply are not “similarly situated,” and may not form a class, when some have a right to pursue the relief in question while others do not.

C. Due Process May Require Notice and the Opportunity to Opt Out Even when the Class is Certified under Rule 23(B)(2)

The mere fact that the letter of the civil rules has been followed does not obviate the need to determine whether due process has been afforded to absent class members. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983) (noting that “class actions must comport with constitutional due process” in addition to the civil rules). Thus, in certain circumstances, due process may require that notice and the opportunity to opt out be provided even when the class is certified under Rule 23(b)(2). *Id.*; *see also Planned Parenthood Ass’n. of Cincinnati, Inc. v. Project Jericho*, Case No. C-860550, 1989 WL 9312, at *7 (1st Dist. Feb. 8, 1989) (holding that individual notice was required to comply with due process, even though the class was not certified pursuant to Rule 23(B)(3)). In fact, Civil Rule 23(D)(2) specifically allows for notice in class actions maintained pursuant to Civil Rule 23(B)(2), and the courts have interpreted Rule 23(D)(5) to allow class members to opt out when necessary to comply with due process requirements. *See Lemon v. Int’l Union of Operating Eng’rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 582 (7th Cir. 2000) (interpreting the equivalent Federal Rules of Civil Procedure). In this case Rule 23(B)(2) was wrongly asserted and the error was compounded by a failure to apply Rule 23(D)(2).

D. Absent Class Members are not Bound if the Class Action is not Properly Conducted

As a consequence of the misapplication of 23(B)(2) and the failure to apply Rule 23(D)(2), the class has not be properly conducted. The United States Supreme Court has recognized that “a handful of discrete and limited exceptions” exist to the “basic premise” that nonparties are not bound by a court’s judgments. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379 (2011). One of these admittedly narrow exceptions allows unnamed members of a class to be bound in a “properly conducted” class action, even though calling such unnamed plaintiffs “parties” is a legal fiction. *Id.* at 2380. This legal fiction cannot be stretched so far as to cover an action improperly conducted and involving proposed class members whom the named plaintiff had been denied leave to represent because “[n]either a proposed class action nor a rejected class action may bind nonparties.” *Id.* at 2379-80.

In *Smith*, two different plaintiffs (neither of whom knew about the other’s lawsuit) brought putative class actions in the state courts of West Virginia against the same defendant based upon the same conduct. *Smith*, 131 S.Ct. at 2373. One of the suits was removed to federal court, while the other proceeded in state court. *Id.* Although the federal court ultimately refused to certify a class, the plaintiff in the state action was an unnamed member of the proposed class in the federal action. Because their interests were aligned, the defendant asserted in the state action that issue preclusion applied to bar certification of a class in the state court. *Id.* at 2374. Because the named plaintiff in the federal action was unquestionably denied the right to represent absent class members in any way, the United States Supreme Court held that a decision denying class certification could not bind the unnamed class members. *Id.* at 2380. As a result, the plaintiff in the state action was not bound by the federal proceedings.

The Seventh Circuit subsequently considered whether an absent class member could be bound by a court's decisions when a class was initially certified but later decertified. *See Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546 (7th Cir. 2012). The Court held that decertification of the class meant that the class action was not "properly conducted;" and the absent class members never became parties to the lawsuit. *Id.* at 551. The Court emphasized that it would be odd if the trial court's mistaken decision to allow the named plaintiffs to represent a class would lead to absent class members being bound, but a correct decision denying the right to represent the purported class would not. *Id.* The Court further buttressed its reasoning by noting that notice never actually was provided to the certified class and that the proposed class members never were given the opportunity to opt out of the class before the certification decision was made. *Id.* at 551-52. Thus, if absent class members are not afforded due process, they are not bound by the judgments issued by the court considering the class action. *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 456 (S.D. Fla. 1988).

The foregoing conclusion comports with a fundamental aspect of Anglo-American law: a person is not bound by a judgment unless he is made a party by service of process and that extreme applications of res judicata (including preclusion) are inconsistent with rights guaranteed by the U.S. Constitution. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996). Absent class members must receive notice of a decision affecting their substantive rights. Certainly notice should be given in any proceeding tolling material property rights. *See Harrison v. Horace Mann Ins. Co.*, Case No. 12-753, 112 So. 3d 1054, 1059 (La. App. 2013).

E. Article 1, § 16 of the Ohio Constitution Mandates Notice and the Opportunity to Opt Out

"Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the

state seeks to infringe a protected liberty or property right.” *Youngstown v. Traylor*, 123 Ohio St. 3d 132, 134 (2009). In fact, “[t]he Due Process Clause of the Ohio Constitution is generally coextensive with the due process rights provided under the Fourteenth Amendment to the United States Constitution.” *State ex rel. Robinson v. Dayton*, 2012-Ohio-5800, at ¶21 (2nd Dist.). Accordingly, this Court has recognized that, because Ohio Civil Rule 23 is virtually identical to Federal Civil Rule 23, “federal authority is an appropriate aid to interpretation of the Ohio rule.” *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-4733, at ¶14.

In *Cullen*, this Court recognized that the United States Supreme Court decision in *Wal-Mart* questioned whether due process allows for class certification under Rule 23(b)(2) when monetary damages are sought, but such damages are allegedly incidental to requested injunctive or declaratory relief. *Id.* at ¶26. This is based upon the fact that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

Likewise, this Court also held in *Cullen* that a class action seeking a declaratory judgment against an insurer should not have been certified when the plaintiffs had not demonstrated that all class members would benefit from the declaratory relief sought because some of the proposed class members were no longer policyholders and the proposed declaration would not benefit them. *Id.* at ¶25. Thus, the *Cullen* case emphasizes why the Common Pleas Court should not have certified this class under Rule 23(B)(2) in the first instance.

The class in the Beck Litigation should never have been certified pursuant to Rule 23(B)(2). The Common Pleas Court noted that the stated goal of the class action lawsuit was to declare all Form G&T (83) leases void *ab initio*, which the Court believed could only benefit the absent class members. If that assessment were correct, the obligation to provide notice and an

opportunity to opt out decreases dramatically, because there is little potential for harm. Thus, given the fact that the Court had already granted summary judgment to the named plaintiffs declaring the leases void *ab initio* and no other relief had been requested, it is perhaps understandable why the Common Pleas Court apparently believed it unnecessary to provide absent class members with notice and an opportunity to opt out.

The situation changed dramatically however, when the Seventh District reached out to toll the leases of all the absent class members retroactively. Even though the class had been certified under Rule 23(B)(2), the case was no longer solely about the named plaintiffs' attempts to obtain a declaration regarding the validity of the Form G&T (83) leases. Instead, the Seventh District arbitrarily disregarded the property rights of the Claugus Family and effectively awarded affirmative relief to Beck Energy against the absent class members, extending the primary term of the leases beyond what the documents themselves allow. Under the circumstances, due process required notice to the absent class members and an opportunity to opt out of the litigation, regardless of the fact that the class had been certified under Rule 23(B)(2). *See Henson v. E. Lincoln Twp.*, 108 F.R.D. 107, 112 (C.D. Ill. 1985) (noting due process concerns with defendant classes because affirmative relief may be awarded even though the party against whom relief is awarded did not want to be part of the class).

Further, if the leases are in fact void *ab initio* as against public policy, the filing of those leases constituted a slander of the landowner's title. *See Gilson v. Windows & Doors Showcase, L.L.C.*, 2006-Ohio-2921, at ¶30 (6th Dist.). In order to prove such a claim, the landowner would also need to establish that the slanderous statements caused actual or special damages. *Id.* at ¶31.

Class certification under Rule 23(B)(2) is inappropriate where the absent class members have potential money damages that will be cut off by reason of the class action.⁵

As defined by the Common Pleas Court, the class includes members who will no longer be entitled to the declaratory relief sought when relief is granted. As the Court noted, the class consists of approximately 600 to 700 landowners. Landowners first began signing the Form G&T (83) lease in 1983. Many of those leases have since expired under their own terms, with more expiring every day. Given the large number of proposed class members and the impossibility of knowing how long the class action would last, the Common Pleas Court simply should not have granted class certification where many of the proposed class members would no longer be in a lease relationship with Beck Energy at the time the judgment issued.

Finally, the class action has not been properly conducted. In fact, the Seventh District implicitly acknowledged that the class might be decertified when it referred to the absent class members as *proposed* class members in the Tolling Order. If the class is decertified, no properly conducted class action exists and absent class members will not be bound by the Tolling Order. *See Thorogood*, 678 F.3d at 551-52. If the named plaintiffs cannot represent the absent class members, then the absent “class members” remain strangers to the litigation and the Seventh District had no authority to toll the leases of parties not before it. *See Smith*, 131 S.Ct. at 2380 n.10 (stating that nonparties cannot be bound by former litigation). Similarly, when a class is decertified, a court lacks jurisdiction over the absent class members. *See Spitzfaden v. Dow Corning Corp.*, 833 So. 2d 512, 515 (La. App. 2002).

⁵ In fact, class certification was most likely inappropriate under provisions of Rule 23(B)(3) as well, because establishing whether up to 700 landowners have established special damages will be nearly impossible in the class action context.

PROPOSITION OF LAW NO. 2:

The issuance of a writ of prohibition is an appropriate remedy to bar enforcement of an unconstitutional court order where the order is directed to absent plaintiffs in a class certified pursuant to Civil Rule 23(B)(2) and such plaintiffs were not provided with notice of the class action, were not given the opportunity to opt out of the class action, and were not provided with notice of the tolling order.

A long line of cases holds that an action seeking a writ of prohibition is the proper vehicle to challenge the constitutionality of a lower court's order by non-parties affected by that order. *State ex rel. News Herald v. Ottawa County Court of Common Pleas, Juvenile Div.*, 77 Ohio St. 3d 40, 43 (1996). Prohibition is the appropriate remedy both to prevent excesses of lower tribunals and to invalidate orders already issued that exhibit such excesses. *Id.* As an absent class member who was not provided with notice of the class action, an opportunity to opt out, or notice of the order tolling the leases of proposed class members, Relator's position is directly analogous to that of a non-party. Accordingly, Relator seeks and is entitled to a writ of prohibition.

In the course of proceedings below, the Seventh District ignored the limitations of actions conducted pursuant to Rule 23(B)(2). Without due process, it has ordered that leases of absent class members be tolled, effectively awarding interim equitable relief against the absent plaintiffs. It has deprived absent class members of substantial property rights and effectively ceded those property rights to Beck Energy, without the payment of any consideration and contrary to the wishes of the Claugus Family. *See Wal-Mart*, 131 S. Ct. at 2558 ("The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class."); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (noting that the due process clause does not

normally afford as much protection to absent plaintiffs as to absent defendants because the court normally imposes few burdens on absent plaintiffs). The Claugus Family and absent class members never were notified that their property rights were in jeopardy and never were given the opportunity to protect their interests. Despite that, the Seventh District has imposed significant burdens on the absent class members by tolling their leases retroactively, all without due process.

The end result is not only an unconstitutional denial of the absent plaintiffs' due process rights, but inflicts financial loss on the Claugus Family in that the Claugus Family will be deprived of the payment available from granting a new lease. Moreover, absent class members may be affected in other ways. Many oil and gas leases require the landowner to warrant title to the minerals being leased. A landowner with a lease which has expired on its face would have no reason to think that they could not warrant title to the minerals, having been provided with no notice of the Beck Litigation or the Seventh District's Tolling Order. (In fact, since the Tolling Order is retroactive, it tolls leases that expired prior to the issuance of the Tolling Order and prior to Beck Energy even requesting that the leases of absent class members be tolled almost two years after the amended complaint was filed on behalf of a class.) Further, no title search would reveal the Tolling Order. Such landowners face potential breach of title warranty claims. Although the Claugus Family was careful not to guarantee title, because its Beck Energy Lease was not to expire until approximately four months after the top lease was signed, it still stands to lose almost half a million dollars because of its inability to fulfill contractual obligations entered into without knowledge of the Tolling Order.

Although Relator is a member of the proposed class, it has been afforded no more due process than nonparties have been afforded. It never was given notice of the lawsuit itself. It never was given the opportunity to disassociate itself from the lawsuit. It never was notified of

the tolling Order. A writ of prohibition enjoining the Respondents from enforcing the retroactive Tolling Order clearly is necessary and appropriate. It is the only effective remedy available to the Claugus Family.

PROPOSITION OF LAW NO. 3:

The issuance of a writ of mandamus is an appropriate remedy to require a lower court to vacate an arbitrary, unreasonable and unlawful order.

A writ of mandamus is appropriate when the Relator demonstrates that there is no plain and adequate remedy in the ordinary course of the law, that there has been a gross abuse of discretion on the part of an inferior tribunal, and that the relief sought is not merely to determine a controversy of a strictly private nature. *State ex rel. Libbey-Owens-Ford Glass Co. v. Indus. Comm'n of Ohio*, 162 Ohio St. 302, Syllabus ¶2 (1954). Mandamus is suited to situations that do not involve disputed facts and in which the right is clear. *Id.* at 307. *See also State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 514 (1999) (granting a writ of mandamus ordering judges to follow the rules of civil procedure, rules of evidence, and binding precedent of the Ohio Supreme Court notwithstanding contrary provisions passed by the legislature).

In this case, the Claugus Family has no plain and adequate remedy available to it in the ordinary course of law. Both the Common Pleas Court and the Seventh District have stated that the class is merely a proposed class. Under this constraint, the Claugus Family cannot directly appeal the Tolling Order. Nonetheless, the Seventh District has altered the Claugus Family's contractual relationship with Beck Energy by extending that relationship for years to come and coextensively deprived it of any new lease relationships, all without consideration or due process. This deprivation has been inflicted simply because other landowners (in no way associated with the Claugus Family) chose to file a lawsuit.

There also has been a gross abuse of discretion. “The abuse of discretion standard has been defined as more than an error at law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Masters v. Masters*, 69 Ohio St. 3d 83, 85 (1994) (quotations omitted). In this case, the Common Pleas Court certified a class under Civil Rule 23(B)(2) because it believed the only possible relief sought was a declaration that all Form G&T (83) leases were void—a decision that it had already reached in granting summary judgment to the named plaintiffs. Theoretically, at this stage, no notice was required because few burdens would be imposed upon the absent plaintiffs. Any lack of notice and an opportunity to opt out of the class would not be harmful. The Seventh District then abruptly changed this balance.

The Seventh District tolled the leases of all proposed class members. This action ignored the limitations of Rule 23(B)(2) and was unreasonable and an abuse of discretion. The proposed class members were deprived of valuable property interests with no notice and no opportunity to opt out. The decision to issue the Tolling Order immediately shifted the case from one in which few, if any, burdens would be imposed on the absent plaintiffs to one in which the property and contractual rights of such landowners would be heavily burdened for years to come.

The decision to issue the Tolling Order without notice to the landowners also was arbitrary. Absent notice and an opportunity to be heard, there is no justification for applying the Tolling Order to absent class members. Because the order is retroactive to late-2012, the leases in question have already been tolled more than a year, even though the order was not issued until September 26, 2013. Compounding this error, the Seventh District made no provision for future notice during the years the leases are to be tolled. There is absolutely no justification for the scope of the Tolling Order.

The order also is unconscionable. Blameless landowners have been exposed to potentially ruinous loss and liability because of the Tolling Order. These landowners cannot lease their property to other producers based upon the Tolling Order, but have no notice of that order and have no way of knowing how they should conduct their affairs to avoid liability for breach of warranty. This exposure has arisen solely because the Seventh District has denied them due process. These consequences could be especially dire for landowners who signed new leases before the retroactive Tolling Order was signed. Additionally, the tolled oil and gas leases may also make it more difficult for a landowner to sell their real estate. A potential buyer may not be willing to purchase a property not knowing whether the potential buyer is entitled to lease the property or whether a lease with Beck forecloses that opportunity.

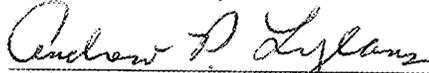
Finally, this controversy is not one of a strictly private nature. The Claugus Family has not brought this issue before the Court because of a controversy of a private nature. The Claugus Family has not asserted that Beck Energy breached the Beck Lease. Rather, the Claugus Family complains that the Seventh District violated its right to due process and the due process rights of hundreds of other landowners. Mandamus is appropriate here because the Claugus Family seeks an order requiring an inferior tribunal to comply with fundamental protections afforded by the federal and state Constitutions whose principles must receive universal application.

CONCLUSION

There are no factual disputes in this case and the orders issued by the lower courts set forth the relevant facts. This case was certified as a class action under Rule 23(B)(2) because the named plaintiffs sought nothing more than a declaratory judgment against Beck Energy. Without affording such minimal due process as notice or the opportunity to opt out, the Seventh District then imposed significant burdens upon the absent class members by tolling their leases with Beck Energy for years past the expiration dates specified in the contracts. Under the circumstances, the decision not to afford the Claugus Family due process was unreasonable, arbitrary and unconscionable and writs of prohibition and mandamus are appropriate.

Respectfully submitted,

Daniel H. Plumly, Counsel of Record



Andrew P. Lycans

COUNSEL FOR RELATOR,
CLAUGUS FAMILY FARM, L.P.

APPENDIX A

Summary of Beck Class Action Litigation

09/14/2011 Complaint filed on behalf of named plaintiffs only

09/29/2011 First Amended Complaint filed (on behalf of class)

07/12/2012 Trial court grants summary judgment to named plaintiffs

07/19/2012 Plaintiffs file motion for class action certification

07/31/2012 Trial court journalizes grant of summary judgment to named plaintiffs

08/28/2012 Beck Energy files appeal designated Case No. 12 MO 06 (grant of summary judgment)

10/01/2012 Beck Energy files motion to toll the leases of named plaintiffs in trial court

02/08/2013 Trial court grants class certification

03/01/2013 XTO files appeal designated Case No. 13 MO 02 (denial of motion to intervene)

03/07/2013 Beck Energy files appeal designated Case No. 13 MO 03 (decision certifying class)

06/10/2013 Trial court decision clarifying the class (per Seventh District Order)

06/24/2013 Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service

07/03/13 Beck Energy files appeal designated Case No. 13 MO 11 (decision clarifying class)

07/10/2013 Beck Energy appeal designated Case No. 13 MO 12 (implicit denial of motion to toll leases)

07/16/2013 Beck motion to toll the leases of all the proposed class members

08/02/2013 Trial court grants motion to toll leases of named plaintiffs

08/08/2012 Trial court denies motion to provide notice to class

08/29/2013 Beck Energy files appeal designated Case No. 13 MO 16 (decision not to toll leases of all the proposed class members)

9/16/2013 Seventh District dismisses Case No. 13 MO 012 (implicit denial of motion to toll leases) and consolidates Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11

9/26/2013 Seventh District issues the Tolling Order (all proposed class members)

11/01/2013 Seventh District dismisses Case No. 13 MO 16 (decision not to toll leases of proposed class members)

APPENDIX B

FILED

SEP 26 2013

SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO)
)
MONROE COUNTY) SS: SEVENTH DISTRICT

CLYDE A. HUPP, et al.,)

PLAINTIFFS-APPELLEES,)

VS.)

BECK ENERGY CORPORATION,)

DEFENDANT-APPELLANT.)

CASE NOS. 12 MO 6, 13 MO 3
13 MO 11

JUDGMENT ENTRY

This matter came on for hearing before this Court on September 23, 2013 on three pending motions: 1) Appellant Beck Energy Corporation's August 16, 2013 emergency motion for injunctive relief pursuant to App.R. 7; 2) Beck's August 30, 2013 emergency motion to set aside supersedeas bond; and 3) The Individual Landowners' September 12, 2013 motion to dismiss this appeal on the grounds of mootness.

On consideration of the parties' respective filings, the responses thereto and their arguments before this Court it is ORDERED:

1. The trial court's August 16, 2013 stay order is hereby modified and continued. The requirement of posting bond is hereby set aside; no bond is required. This stay of execution applies to the named plaintiffs and proposed defined class members for the following judgments: (1) the July 12, 2012 decision granting summary judgment in the Landowners' favor, including the journalization of the trial court's decision on July 31, 2012; (2) the trial court's February 8, 2013 judgment granting class certification; and (3) the trial court's June 10, 2013 judgment defining the class and finding Beck Energy's counterclaims moot and barred by res judicata.
2. The trial court's August 2, 2013, order tolling the lease terms as to the named plaintiffs only is hereby modified and continued. The lease terms are also tolled as to the proposed defined class members. The

tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

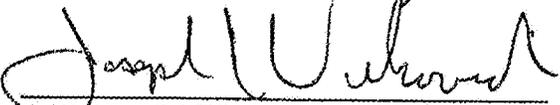
3. The Motion to Dismiss is denied.

Consistent with this Court's September 16, 2013 order setting a briefing schedule in these consolidated appeals, oral argument on the merits is tentatively set for November 20, 2013 before this Court.

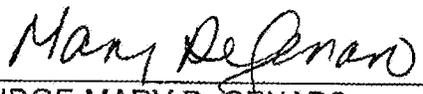
All until further order of this Court.



JUDGE GENE DONOFRIO



JUDGE JOSEPH J. VUKOVICH



JUDGE MARY DeGENARO