

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Relator,

vs.

SEVENTH DISTRICT COURT OF
APPEALS, ET AL.,

Respondents.

CASE NO. 14-0423

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

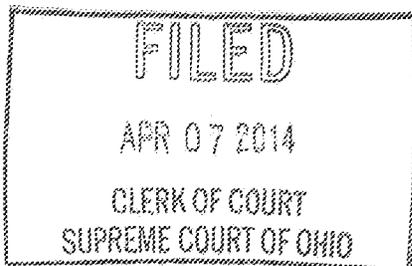
MOTION TO INTERVENE AS RESPONDENT OF BECK ENERGY
CORPORATION

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**MOTION TO INTERVENE AS RESPONDENT OF BECK ENERGY
CORPORATION**

Pursuant to Ohio Civ.R. 24(A)(2), Beck Energy Corporation ("Beck Energy"), moves to intervene as a respondent in this proceeding. For the reasons in the attached memorandum: 1) Beck Energy has compelling interests relating to the matters that are the subject of this action; 2) the disposition of this action may impair or impede Beck Energy's ability to protect its interests; and 3) these interests are not adequately represented by existing parties.

Beck Energy also attaches a responsive pleading, pursuant to S.Ct.Prac.R. 12.04(A) and Ohio Civ.R. 24(C), moving to dismiss the Complaint in Writ of Prohibition and Mandamus that Relator Claugus Family Farm, L.P. filed on March 18, 2014.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Relator's Complaint in Writ of Prohibition and Mandamus seeks to vacate a Judgment Entry issued by Respondent Seventh District Court of Appeals, et al. ("Court of Appeals") on September 26, 2013, in Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11.

Vacating the Judgment Entry, as Relator suggests, would alter the status quo as it relates to a portion of the Court of Appeals' Judgment Entry that addressed the tolling of Beck Energy's leases. The Court of Appeals modified and continued the trial court's tolling order by: 1) expanding the tolling order to include the class action members; 2) commencing the tolling period effective 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; 3) continuing the tolling order during the pendency of all appeals, including any appeals to this Court; and 4) by adding, at the expiration of the tolling period, as much time to meet any and all obligations under the oil and gas leases as Beck Energy had as of October 1, 2012.

Relator's Complaint asks this Court to vacate the Court of Appeals' tolling order, which directly impacts Beck Energy. Therefore, Beck Energy has a direct interest in the matters that are the subject of this Complaint and requests intervention as of right. In pertinent part, Ohio Civ.R. 24 provides:

(A) Intervention of right.

Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest * * *

Beck Energy also attaches a responsive pleading, moving to dismiss Relator's filing as an improper request for extraordinary writs of prohibition and mandamus. Depending

on the Court's disposition of this original action, Beck Energy's ability to protect its lease interests may be impaired or impeded. The Court of Appeals' Judgment Entry protects Beck Energy by preventing its leases from expiring while the Court of Appeals decides whether the trial court properly found the G&T 83 lease void ab initio as against public policy. Any action by this Court affecting the Court of Appeals' tolling order would necessarily have an immediate negative financial impact on Beck Energy.

Finally, neither Relator nor Respondents, nor any other party that might intervene, can adequately represent Beck Energy's interests. As the affected party whose leases are being challenged, Beck Energy's interests are unique and cannot be adequately represented by any other party. Therefore, Beck Energy respectfully requests that the Court grant its Motion to Intervene.

Respectfully submitted,

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Relator,

vs.

**SEVENTH DISTRICT COURT OF
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Respondents.

CASE NO. 14-0423

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

**MOTION TO DISMISS OF PROPOSED INTERVENOR
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ORIGINAL ACTION IN
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**MOTION TO DISMISS OF PROPOSED INTERVENOR
BECK ENERGY CORPORATION**

Pursuant to S.Ct.Prac.R. 12.02 and 12.04 and Ohio Civ.R. 12(B)(6), Proposed Intervening Respondent Beck Energy Corporation ("Beck Energy"), respectfully moves the Court to dismiss the Complaint in Prohibition and Mandamus that Relator Claugus Family Farm, L.P. filed March 18, 2014. The grounds for this motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

This Complaint in Prohibition and Mandamus attempts to extend notice and opt-out due process rights to Civ.R. 23(B)(2) class members in order to create an alleged due process violation thereby entitling Relator to its requested relief. The Court must reject Relator's due process argument because, as a member of a Civ.R. 23(B)(2) class, Relator received the notice to which it was entitled – none. For this reason, Relator was not denied due process and is not entitled to the relief requested in its Complaint in Prohibition and Mandamus.

Admittedly, Relator, Claugus Family Farm, L.P. ("Relator"), stands to reap significant financial gains, including bonus money totaling \$421,267.00 and potential royalties totaling millions of dollars, from entering into an oil and gas lease agreement with Gulfport Energy Corporation. (Complaint in Prohibition and Mandamus, Mar. 18, 2014, ¶33) The only obstacle standing in its way is a Judgment Entry from the Respondents, the Seventh District Court of Appeals, et al. ("Court of Appeals"), tolling Beck Energy's leases preventing their expiration while the Court of Appeals determines whether the leases are void ab initio as against public policy. (*Id.* at ¶6, ¶25)

In an effort to cure any title defects during an allotted 180-day "cure period," Relator seeks to circumvent the pending appeal, in the Court of Appeals, in favor of a collateral attack on the Court of Appeals' tolling order by bringing an original action on due process grounds. For financial reasons, Relator does not want to await the Court of Appeals' decision on appeal. Instead, Relator filed this Complaint, to circumvent the appellate process through prohibition and mandamus, in its effort to satisfy the 180-day "cure period" deadline. (*Id.* at ¶36)

Relator asks this Court to step in and derail the appellate process, by preventing enforcement of and vacating the tolling order, even though the order has been in effect since September 26, 2013, and is critical so as not to render the pending appeal moot. Relator supports its requested relief by arguing a violation of its due process rights occurred when it was not afforded notice of the class action, notice of the tolling order or allowed to opt-out of the class action lawsuit certified by the trial court. (*Id.* at ¶42)

The history of this case is long, convoluted, and complex. It not only involves oil and gas law, but also procedural issues surrounding class certification. The appeal that is currently pending before the Court of Appeals has been fully briefed and awaits scheduling for oral argument. The Court of Appeals should be afforded deference to hear this matter, on appeal, and issue a decision because Relator has not been denied due process.

Relator has a heavy burden to establish the Court of Appeals should be prohibited from enforcing a tolling order that serves to maintain the status quo of the appeal while it decides the merits of the case. Although Relator objects to the Court of Appeals' issuance and enforcement of the tolling order because of its financial impact to Relator, this financial impact does not necessitate a finding that its due process rights were violated by the Court of Appeals' tolling order.

In fact, many courts have taken the same approach when asked to decide oil and gas lease disputes because, without a tolling order, the lease that is the subject of the dispute may expire before the issue giving rise to the lawsuit is decided by a court thereby rendering the appeal moot. Thus, a tolling order is not only necessary for the issues to remain viable for appeal but is common in oil and gas lease dispute cases.

The Court should reject Relator's proposed writs and require Relator to pursue its challenges through the existing, adequate legal remedies. For these reasons and additional reasons more fully set forth herein, Relator's Complaint should be dismissed.

II. **FACTUAL BACKGROUND**

A. THE G&T 83 LEASE.

Beck Energy is an Ohio oil and gas producer that employs native Ohioans and partners with Ohio landowners to develop their oil and gas interests. In approximately 2003, Beck Energy began using an oil and gas lease form designated as "G&T 83." Beck Energy used the G&T 83 lease when it entered into lease agreements with each of the named Plaintiffs ("Hupp Plaintiffs") in the case of *Clyde A. Hupp, et al. v. Beck Energy Corporation*, Monroe County Case No. 2011-345. (*Id.* at ¶9)

The G&T 83 lease contains a standard habendum clause granting Beck Energy a fee simple determinable interest in the Hupp Plaintiffs' oil and gas rights. The primary term of the Hupp Plaintiffs' leases is 10 years. (*Id.* at ¶9) The secondary term of the Hupp Plaintiffs' leases provides for the leases to continue "so long as oil and gas or their constituents are produced or are capable of being produced in paying quantities" or if "the premises shall be operated by [Beck] in the search for oil or gas." (*Id.*)

B. THE HUPP PLAINTIFFS CHALLENGE THE G&T 83 LEASE.

After many years of accepting delay rental payments under their respective leases, the Hupp Plaintiffs eventually regretted their contractual obligation due to the recent Utica Shale development in eastern Ohio. The Hupp Plaintiffs challenged their leases by filing a Complaint for Declaratory Judgment and Quiet Title Action, in the Monroe County Court of Common Pleas, on September 14, 2011 (Case No. 2011-345). (*Id.* at ¶9)

In a Second Amended Complaint, the Hupp Plaintiffs asserted class action claims. (*Id.* at ¶10) After the parties fully briefed the issues raised in the Hupp Plaintiffs' Motion for Summary Judgment, on July 12, 2012, the trial court entered a Decision granting the Hupp Plaintiffs' Motion for Summary Judgment. (*Id.* at ¶11) The trial court concluded Beck Energy's leases violated public policy and were therefore void ab initio. (*Id.*)

Seven days *after* the trial court decided the merits of the case and entered summary judgment in the Hupp Plaintiffs' favor, the Hupp Plaintiffs moved to certify a Civ.R. 23(B)(2) class action. (*Id.* at ¶12) Beck Energy filed a Notice of Appeal of the summary judgment decision (Case No. 12 MO 06). Beck Energy also filed a Motion to Toll the named Hupp Plaintiffs' leases on October 1, 2012. (*Id.* at ¶15) On February 8, 2013, the trial court retroactively granted the Hupp Plaintiffs' request for class certification under Civ.R. 23(B)(2). (*Id.* at ¶16)

On March 7, 2013, Beck Energy appealed the trial court's grant of class certification and subsequently filed a Notice of Potential Non-Final Appealable Orders with the Court of Appeals (Case No. 13 MO 3). (*Id.* at ¶18) On April 19, 2013, the Court of Appeals granted a 60-day limited remand to identify class membership and address Beck Energy's pending counterclaims should the trial court choose to do so. (*Id.*) In a Judgment Entry issued on June 10, 2013, the trial court defined the Civ.R. 23(B)(2) class as:

[A]ll 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.

(*Id.* at ¶19)

The trial court also found that its summary judgment decision would apply to all proposed class members as of September 29, 2011, when the Hupp Plaintiffs first amended the Complaint to assert claims on behalf of a landowners' class. (*Id.* at ¶20) Beck Energy appealed the trial court's decision (Case No. 13 MO 11). On July 16, 2013, Beck Energy filed, in the trial court, a motion to toll the leases of all the class action members. (*Id.* at ¶21) On August 2, 2013, the trial court issued a decision tolling only the named Hupp Plaintiffs' leases. (*Id.* at ¶22) Beck Energy appealed the trial court's decision declining to toll the leases of the proposed class members (Case No. 13 MO 16). (*Id.* at ¶23) The trial court also denied the Hupp Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service on August 8, 2013. (*Id.* at ¶24)

Thereafter, Beck Energy sought relief, in the Court of Appeals, by filing an emergency motion for injunctive relief and emergency motion to set aside supersedeas bond. Following a hearing on the pending motions, the Court of Appeals issued a Judgment Entry on September 26, 2013. (*Id.* at ¶25) In its entry, the Court of Appeals, among other things, modified the trial court's tolling order to include the Civ.R. 23(B)(2) class members. (*Id.*) The Court of Appeals tolled the leases as of 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. (*Id.*)

To date, all of the appeals arising from the trial court's decisions are presently pending before the Seventh District Court of Appeals and have been fully briefed. The matter is currently awaiting scheduling for oral argument. On March 18, 2014, Relator filed its Complaint in Prohibition and Mandamus. The Complaint attacks the Court of Appeals' tolling order, on constitutional grounds, and asks this Court to enjoin enforcement and to vacate its order. (*Id.* at ¶51 (a) and (b)) Relator asserts a due process challenge on the basis that it was not provided

notice of the lawsuit, notice of the tolling order, or provided an opportunity to opt-out of the class action. (*Id.* at ¶42)

III. **RESPONSE TO PROPOSITION OF LAW NO. 1: Relator was not denied due process because it is a member of an Ohio Civ.R. 23(B)(2) class and therefore, has no notice or opt-out rights.**

A. THE HUPP CLASS ACTION MEMBERS ARE SIMILARLY SITUATED AND SEEK ONLY DECLARATORY RELIEF, NOT MONETARY DAMAGES.

The Hupp class action members satisfy the definition of a Civ.R. 23(B)(2) class¹ because they requested only declaratory relief and a judgment quieting title in their Second Amended Complaint. (Decision and Order (On Plaintiff's (sic) Motion for Class Action Certification), Feb. 8, 2013, at pp. 11-12, attached as Exhibit 4 to the Affidavit of Bruce A. Claugus)

In *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2558, 180 L.Ed.2d 374 (2011), the Supreme Court explained the nature of a (b)(2) class:

The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

(Emphasis sic.) *Id.* at 2557.

“If [Civ.R. 23(A)] prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under [Civ.R. 23(b)(2)].”

¹ In making this argument, Beck Energy does not concede that the trial court properly certified a class action. Beck Energy continues to dispute that issue in an appeal that is currently pending before the Seventh District Court of Appeals (Case Nos. 13 MO 3; 13 MO 11).

Hamilton v. Ohio Savings Bank, 82 Ohio St.3d 67, 87, 1998-Ohio-365, 694 N.E.2d 442, quoting Wright, Miller & Kane, Federal Practice and Procedure, Section 1775, at 470 (2Ed.1986). A class certified under 23(b)(2) presents the most traditional justification for class treatment, namely “that the relief sought must perforce affect the entire class at once.” *Dukes, supra*, at 2558.

The Sixth Circuit Court of Appeals recently explained, in *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402 (6th Cir.2011), that contract cases are particularly suited for (b)(2) class action certification, even where plaintiffs may also be requesting monetary damages. Since oil and gas leases are considered contracts, *Gooch* supports the conclusion that the Hupp class action satisfies (B)(2) class requirements. *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897) (“Such leases [oil and gas] are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.”)

The *Gooch* case acknowledged that (b)(2) certification is properly utilized when plaintiffs seek a declaration about the meaning of a contract. *Id.* at 427. In *Gooch*, plaintiff asked “the district court certify a ‘Declaratory Relief Class ... pursuant to *Rule 23(b)(2)* ... and at such time as the Court deems proper, then certify the Restitution/Monetary Relief Sub-Class as a class action pursuant to *Rule 23(B)(3)*.’ ” (Emphasis sic.) *Id.*

The Sixth Circuit Court of Appeals concluded that “certifying declaratory relief under Rule 23(b)(2) is permissible even when the declaratory relief serves as a predicate for later monetary relief, which would be certified under Rule 23(b)(3).” *Id.* at 429. Thus, even if the Hupp class action members were requesting monetary damages, which they clearly are not, (B)(2) certification for purposes of interpreting the lease language was proper.

The reason the Hupp class action members never requested monetary damages was because their ultimate goal in filing suit, as is Relator's goal herein, was to have the trial court declare the G&T 83 lease void, as against public policy, so they could enter into new, more lucrative lease deals. In fact, in its Decision and Order (On Plaintiff's (sic) Motion for Class Action Certification), the trial court specifically found that the Hupp Plaintiffs requested only declaratory and not monetary relief:

Likewise, meeting the second requirement of Rule 23(B)(2), the **Plaintiffs are requesting declaratory relief** from the court in the form of a quiet title action in favor of the landowners against Beck Energy. The Plaintiffs are simply requesting that the court hold the Beck leases void (which it has already done), and clear the landowners' title to the property, once again vesting in them their full mineral rights. **As the Complaint does not even request any form of monetary damages**, the second requirement is easily met.

(Emphasis added.) (Decision and Order (On Plaintiff's (sic) Motion for Class Action Certification), Feb. 8, 2013, at pp. 11-12, attached as Exhibit 4 to the Affidavit of Bruce A. Claugus)

However, in order to position itself to make a due process argument, Relator asserts the Hupp class action members are not "similarly situated" because they allegedly have individual slander of title and monetary claims, with only some class members having the right to pursue the relief in question. (Memorandum in Support of Complaint for Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, at pp. 10-11; Complaint in Prohibition and Mandamus, Mar. 18, 2014, ¶17) This allegation completely contradicts the relief the Hupp Plaintiffs requested as evidenced by the trial court's finding that the Second Amended Complaint does not request any form of monetary damages.

The Hupp Plaintiffs have never asserted claims for slander of title or monetary damages – they have only ever sought declaratory and quiet title relief. Further, provided the

trial court properly certified a class action, there has never been any doubt that all class members are similarly situated (i.e., lessors under a G&T 83 lease where Beck Energy has not drilled, prepared to drill, nor included their property in a drilling unit, during the lease's primary term).

These two facts, the class action members' request for declaratory and quiet title relief, and the fact that the class members' interests are aligned, render this a (B)(2) class action. Relator's attempt to convince this Court otherwise, in order to bootstrap itself into due process notice and opt-out rights it does not otherwise deserve, is misleading.

B. CIV.R. 23(B)(2) CLASS MEMBERS HAVE NO DUE PROCESS NOTICE OR OPT-OUT RIGHTS.

Relator's argument that due process notice and opt-out rights must be afforded Civ.R. 23(B)(2) class action members is wrong and contradicts a recent Supreme Court decision. According to the Supreme Court's recent pronouncement in *Dukes*, *supra*, because the class action members are 23(B)(2) class members, they do not possess any notice or opt-out due process rights, which would necessarily include notice of a tolling order. *Dukes*, 131 S.Ct. at 2558. Ohio has held similarly. See *Ford Motor Credit Co. v. Agrawal*, 8th Dist. Cuyahoga No. 96413, 2011-Ohio-6474, ¶65, *rev'd on other grounds*, 137 Ohio St.3d 561, 2013-Ohio-5199, 2 N.E.3d 238; *Gross v. Standard Oil Co.*, 45 Ohio Misc. 45, 50, 345 N.E.2d 89 (1975); *McDonald v. Med. Mut. of Cleveland, Inc.*, 8th Dist. Cuyahoga No. 33779, 1975 WL 182685, *3 (Mar.6, 1975).

The reason for this is because a (b)(2) class is a *mandatory* class. Rule 23 "provides no opportunity for * * * (b)(2) class members to opt out, *and does not even oblige* * * * [a] court to afford them notice of the action." (Emphasis added.) *Id.* at 2557. Notice and opt-out rights are irrelevant to (b)(2) classes because "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into

whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.” *Id.*

Rule 23“(b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought * * * that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this matter complies with the Due Process Clause.” (Emphasis added.) *Id.* at 2559. Only in the context of a 23(b)(3) class action predominately for money damages has the Court found the absence of notice and opt-out violates due process. *Id.*

Despite this clear pronouncement from the Supreme Court, Relator references three cases in support of its argument that Civ.R. 23(D)(2)² required the trial court to give notice to class action members even though the court certified the class under (B)(2). However, none of Relator’s cited cases support this conclusion since the Hupp class action members are a cohesive, identifiable class that seeks only injunctive relief and not monetary damages.

The first case Relator cites is *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir.1983). The *Holmes* decision presented a unique set of facts. The court held the right to opt-out of the class, normally accorded only (b)(3) class members, must be extended to all members of the (b)(2) class because the class lacked cohesiveness due to a small lump sum fund that had to be divided among a relatively large class. *Id.* at 1160.

Significantly, the *Holmes* court based its conclusion “on the federal class action rule rather than on the mandates of the due process clause * * * [and explained that] [a]lthough

² Ohio Civ.R. 23(D)(2) provides as follows: “In the conduct of actions to which this rules [*sic*] applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action * * *”

class actions must comport with constitutional due process, our construction of subsection (b)(2) obviates the need for a due process inquiry.” *Id.* Therefore, due process did not require notice to the (b)(2) class members, but rather under these unique set of facts, the class action rule did.

The second case Relator cites is *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 1st Dist. Hamilton Nos. C-860550, C-860659, C-870015, C-860580, C-860577, C-860878, C-860825, C-870086, C-870150, C-870757, 1989 WL 9312 (Feb. 8, 1989), *rev'd in part, aff'd in part*, 52 Ohio St.3d 56, for the proposition that even in (B)(2) classes, notice under Ohio Civ.R. 23(D)(2) is sometimes required to satisfy due process requirements. This case is distinguishable from the present matter and does not require that notice be given to the Hupp class action members under Ohio Civ.R. 23(D)(2).

The *Planned Parenthood* case dealt with certification of a defendants’ class rather than a plaintiffs’ class. *Id.* at *6. Also, the defendants were not a cohesive, identifiable group because they comprised various groups of picketers that were not actively coordinated and supervised, under the direction of any specific group. *Id.* The court of appeals found the picketers were “such an amorphous group that individuals * * * [were] not readily identifiable.” *Id.*

Because the defendant class members were not easily identified, the court concluded defendants should have been provided with notice reasonably calculated, under all circumstances, to apprise them of the pendency of the action. The court of appeals explained:

[T]he class is so broad that all persons who are served with a copy of the preliminary injunction are class members. Thus, members of the class who did not violate the injunction after being served are drawn into this litigation as class members even though they obeyed the injunction and did not do anything wrong. As a result, it is highly probable that a number of class members would not know that they are members of the class since they did not violate the injunction.

Id. at *7.

Based on this deficiency and others, the court of appeals found the trial court abused its discretion in determining the cause of action should be certified as a class action. *Id.* at *9. The *Planned Parenthood* decision does not support Relator's due process notice argument. In the present matter, the class of lessors is readily identifiable and cohesive. Therefore, the reasons supporting notice to the (B)(2) class, in the *Planned Parenthood* case, are not present in the current matter.

Third, Relator relies on *Lemon v. Internatl. Union of Operating Engineers*, 216 F.3d 577 (7th Cir.2000) as a basis for requiring notice in a (B)(2) class. However, the *Lemon* decision is also distinguishable because it dealt with a class that sought monetary damages in addition to equitable relief. *Id.* at 580. Under those circumstances, the court of appeals vacated the district court's (b)(2) class certification order, and remanded the case for the court to consider alternative class certification options since the monetary damages were not merely incidental to the requested equitable relief. *Id.* at 582. The Hupp class action members do not request monetary damages in addition to declaratory relief. For this reason, *Lemon* is inapplicable.

Under the Supreme Court's decision in *Dukes*, (b)(2) classes are not entitled to due process notice and opt-out rights. The case law cited by Relator presents unique factual circumstances not present in the pending matter and does not support Relator's argument that the Court of Appeals was required to provide it notice of the tolling order, under Ohio Civ.R. 23(D)(2), to satisfy due process requirements. Rather, the controlling case law indicates properly certified (B)(2) classes are not entitled to any notice of the pending lawsuit, which necessarily includes notice of a tolling order, nor are they afforded the opportunity to opt-out of a class action.

C. RELATOR IS A MEMBER OF THE CLASS AND IS THEREFORE BOUND BY THE COURT OF APPEALS' TOLLING ORDER.

Relator is currently a member of a Civ.R. 23(B)(2) class action which has no due process notice or opt-out rights.

Relator cites three cases, *Smith v. Bayer Corp.*, ____ U.S. ____, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011); *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546 (7th Cir.2012); and *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.C. 450, (S.D.Fl.1988), in support of its argument that, as an absent class member, it cannot be bound if the class action is not properly conducted. Beck Energy does not dispute this general proposition of law that a person or entity, not a party to a lawsuit, cannot be bound by a court's decisions.

However, in making this argument, Relator overlooks the fact that it currently is a member of the class and, as a current class action member, is bound by the Court of Appeals' decisions made in this case. In fact, it would be premature for this Court to conclude that the trial court did not properly certify the class action and that Relator is not a proper party to the class action because both of these issues are presently pending before the Court of Appeals.

Further, adequate representation of the class ensures that the due process rights of absent class members are not violated. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.E. 22 (1940). Relator makes no claim that class action members have not been competently and effectively represented in this matter. Indeed, the trial court made a thorough analysis required by Civ.R. 23(A) when it determined that the named Hupp Plaintiffs are qualified to represent the class action members. (See Decision and Order (On Plaintiff's (sic) Motion for Class Action Certification), Feb. 8, 2013, at pp. 4-16, attached as Exhibit 4 to the Affidavit of Bruce A. Claugus)

The trial court also found the Hupp Plaintiffs' counsel competent to represent the proposed class members' interests. *Id.* at 16. The trial court spent an entire page of its Decision and Order explaining Attorneys Mark Ropchock, Richard Zurz and James Peters' qualifications finding them competent to handle this matter as a class action. *Id.* The trial court having concluded the named Hupp Plaintiffs and their counsel could provide effective representation for the class members, Relator had its interests competently and effectively represented at the hearing the trial court conducted regarding Beck Energy's request for a tolling order.

Therefore, Relator received the due process to which it was entitled as a Civ.R. 23(B)(2) class member – representation by the named Hupp Plaintiffs, with whom its interests align, and representation by competent and effective counsel. A failure of due process only occurs “in those cases where it cannot be said that the procedure adopted fairly ensures the protection of the interests of absent parties who are to be bound.” *Id.* at 42. As a (B)(2) class member, Relator received its constitutional day in court.

D. ARTICLE I, § 16 OF THE OHIO CONSTITUTION DOES NOT MANDATE NOTICE AND AN OPPORTUNITY TO OPT OUT OF A CIV.R. 23(B)(2) CLASS.

This argument is nothing more than Relator's attempt to state its due process argument in a different light. However, as previously explained, under *Dukes*, the (B)(2) class action members have no notice or opt-out due process rights. Relator's reliance on *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614 does not support this conclusion nor does Relator's argument that the landowners' class should have never been certified in the first place. (Memorandum in Support of Complaint for Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, p. 13)

In *Cullen*, the Ohio Supreme Court concluded the trial court abused its discretion when it certified a (B)(2) class because the declaratory relief plaintiffs sought merely laid a

foundation that State Farm's practices were illegal and violated fiduciary obligations, for a subsequent individual determination of monetary damages. *Id.* at ¶27. Therefore, the class did not satisfy (B)(2) requirements for certification. *Id.* at ¶28. Relator also relies on *Cullen* for the proposition that a class is improperly certified where some of the class members are no longer policyholders and therefore, would not benefit from the requested declaration. (Memorandum in Support of Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, p. 14)

Cullen is not dispositive of this matter. The Hupp class action members do not request declaratory and monetary relief. The purpose of their class action has always been solely for declaratory relief. Although Relator argues class action members may have claims for slander of title if the leases are in fact found to be void ab initio, these claims are not alleged in the present lawsuit. Further, such claims could never be part of a class action simply because each property owners' damages would vary based on such factors as acres owned, lease rates at the time they could have entered into a new lease, and the location of their property.

Also, the Court of Appeals' tolling order prevents the situation discussed, in *Cullen*, where some class members would no longer qualify for class membership. Tolling maintains the status quo of the leases as of October 1, 2012. The leases will remain in their primary term, and there is no danger the leases will expire while this case is addressed through the appellate process.

Relator also asserts the Court of Appeals' tolling order triggered due process notice rights because the order extended the primary term of the class action members' leases. (Memorandum in Support of Complaint for Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, at p. 15) The Tenth District Court of Appeals addressed a similar due process notice argument in *Clifton Care Center, Inc. v. McKenna*, 10th Dist. Franklin No. 80AP-149, 1980 WL

353818 (Dec. 4, 1980), concerning a (B)(1) or (B)(2) class member's right to notice of a 60(B) motion for relief from judgment.

In *Clifton Care Center*, plaintiff argued he was denied due process because he did not receive any notices in the class action proceeding, particularly as to the hearing for a motion for relief from judgment. *Id.* at *2.

The court of appeals flatly rejected plaintiff's due process notice argument:

Concluding that appellant was not entitled to notice by reason of class certification [because this was not a (B)(3) class for money damages], the remaining due process consideration is whether notice to appellant of the hearing upon appellee's motion for relief after judgment was constitutionally mandated. The notice in question was one which the court clearly had discretionary authority to require besent (sic) under Civ.R. 23(D)(2). While the notice was no doubt ordered out of an abundance of caution for the benefit of absent class members, *we do not perceive upon what basis it was constitutionally required.* * * * Given the identity of the common interests of all plaintiffs under the record, the probability of effective representation of absent class members continued to exist. *From our review of the record, the representation of all parties was competent and effective and no contention is made otherwise by appellant below or here. Hence, irrespective of whether the notice was received, appellant received his constitutional day in court.*

(Emphasis added.) *Id.* at *4. See also *McDonald v. Med. Mut. of Cleveland, Inc.*, 41 Ohio Misc. 158, 169, 324 N.E.2d 785 (1974) ("If individual notice is not necessary to bind Rule 23(B)(2) class members to a final judgment, no individual notice is necessary for approval of this settlement.")

The *Clifton Care Center* and *McDonald* cases refute Relator's argument that the filing of the tolling order triggered due process notice rights. These cases establish that a properly certified (B)(2) class is not entitled to *any* notice, including notice of such proceedings as a motion for relief from judgment or approval of a settlement. As a (B)(2) class member, Relator was not entitled to notice of the Court of Appeals' tolling order.

For these reasons, Relator never possessed any notice or opt-out due process rights that the Court of Appeals could deny when it issued its tolling order. Therefore, Relator cannot state a claim entitling it to relief, and Beck Energy's Motion to Dismiss must be granted.

IV. RESPONSE TO PROPOSITION OF LAW NO. 2: Relator cannot satisfy the necessary elements entitling it to a writ of prohibition.

A writ of prohibition is an "extraordinary remedy which is customarily granted with caution and restraint, * * * issued only in cases of necessity arising from the inadequacies of other remedies." *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297 (1981). The purpose of the writ is to restrain lower courts from exceeding their jurisdiction and it is not available as a substitute for a proceeding on appeal or to anticipate an erroneous decision of a lower court." *State ex rel. Duffy v. Common Pleas Court of Cuyahoga Cty.*, 133 Ohio St. 277, 281, 13 N.E.2d 233 (1938).

In order to be entitled to a writ of prohibition, Relator must demonstrate, "(1) that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying a writ will result in injury for which no other adequate remedy exists in the ordinary course of law." *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 234-235, 638 N.E.2d 541, citing *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 629 N.E.2d 446 (1994). Because of its extraordinary nature, the Court will not grant a writ of prohibition "routinely or easily." *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 540, 1996-Ohio-286, 660 N.E.2d 458 (1996). Rather, the right to prohibition "must be clear, and in a doubtful or borderline case its issuance should be refused." *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.*, 137 Ohio St. 273, 277, 28 N.E.2d 641 (1940). Thus, "[w]hen a court has at least basic statutory jurisdiction to act and an appeal is available in the ordinary course of law, a

writ of prohibition will not lie.” *State ex rel. Aycock v. Mowrey*, 45 Ohio St.3d 347, 352, 544 N.E.2d 657 (1989).

A. THE SEVENTH DISTRICT COURT OF APPEALS IS NOT “ABOUT TO EXERCISE JUDICIAL OR QUASI-JUDICIAL POWER.”

Relator cannot satisfy the first element necessary for a writ of prohibition. Namely, Relator cannot demonstrate that the Court of Appeals is “*about to*” exercise judicial or quasi-judicial power because the actions Relator seeks to prohibit are embodied in an existing tolling order that the Court of Appeals modified on September 26, 2013. Writs of prohibition are not meant for reviewing the regularity of acts already performed.

As this Court explained in *State ex rel. Moss v. Clair*, 148 Ohio St. 642, 76 N.E.2d 883 (1947):

A writ of prohibition may be awarded only to prevent the unlawful usurpation of jurisdiction and *does not lie to prevent the enforcement of a claimed erroneous judgment previously entered or the administrative acts following the rendition of a judgment * * ** It may be invoked only to prevent proceeding in a matter in which there is an absence of jurisdiction and *not to review the regularity of an act already performed.*

(Emphasis added.) *Id.* at paragraph one of the syllabus. *See also State ex rel. Stove Co. v. Coffinberry*, 149 Ohio St. 400, syllabus, 79 N.E.2d 123 (1948) (“Prohibition will not lie to prevent the enforcement of an order of the Industrial Commission, claimed to have been rendered without jurisdiction, where at the time such writ is sought the order is a *fait accompli*.”)

Ignoring this fundamental requirement for a writ of prohibition to issue, Relator asks the Court to vacate the Court of Appeals’ September 26, 2013, Judgment Entry. Specifically, Relator asks the Court to permanently enjoin the Court of Appeals from enforcing the tolling order and to vacate the tolling order to the extent that it applies to it. (Complaint in Prohibition and Mandamus, Mar. 18, 2014, at ¶¶51(a), (b)) Thus, Relator’s Complaint asks this

Court to undo an order the Court of Appeals already made and enforced as of September 26, 2013.

Relator justifies its requested relief by attacking how the trial court handled certification of the class action in this matter. Relator claims it was denied due process because it did not receive notice of the class action proceeding, notice of the tolling order, nor was it given an opportunity to opt out of the class. (*Id.* at ¶42) Indeed, Beck Energy also disagrees with the manner in which the trial court certified this matter as a class action and has challenged the trial court's decision on appeal. Specifically, Beck Energy appealed the trial court's decision to certify a class action challenging the timing of the trial court's class action certification order (i.e., the trial court certified the class action *after* it granted summary judgment in the Hupp Plaintiffs' favor) as well as the definition of the proposed class.

In an effort to move this matter along in order to comply with the 180-day "cure period," Relator improperly seeks to use prohibition to bypass the appellate process that is already well underway. In fact, the issues Relator raises in its Complaint in Prohibition and Mandamus are issues that the parties already briefed and will be directly addressed and decided by the Court of Appeals. Because prohibition is a preventative and not a corrective remedy, it cannot be used to circumvent the appellate review process. *See State ex rel. Celebrezze v. Butler Cty. Common Pleas Court*, 60 Ohio St.2d 188, 190, 398 N.E.2d (1979), wherein this Court explained:

"Prohibition is a preventative writ rather than a corrective remedy and is designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine. * * * It cannot be used to review the regularity of an act already performed." *State ex rel. Stefanick v. Municipal Court* (1970), 21 Ohio St.2d 102, 104, 255 N.E.2d 634, 635. Thus, prohibition cannot lie here to correct any errors made by a respondent court. * * * We express no view in the correctness in respondent court's

determinations. Our only concern is the correctness in granting a writ. If there were errors or defects by respondent court, there is a suitable remedy by way of appeal. It is well-settled that prohibition does not function as a substitute for an appeal. *State ex rel. Rhodes v. Solether* (1955), 162 Ohio St. 559, 124 N.E.2d 411.

Further, in support of its request for a writ in prohibition, Relator references only one case, *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juvenile Div.*, 77 Ohio St.3d 40, 43, 1996-Ohio-354, 671 N.E.2d 5. The remaining authority cited by Relator concerns class action case law. Relator relies on the *News Herald* case for the proposition 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.” (Memorandum in Support of Complaint for Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, at p. 17) Relator claims its position is directly analogous to that of a non-party. (*Id.*)

Relator’s reliance on the *News Herald* case is misplaced because it has absolutely no application to the facts presented herein. In fact, the *News Herald* case held that a writ of prohibition was the appropriate remedy to challenge the constitutionality of a gag order preventing nonparty newspapers from publishing certain information lawfully gathered by them in judicial proceedings that were open to the public. *Id.* at 44. The Court based its reasoning on that fact that “historically, it has been held that prohibition is the *only remedy* available to nonparties who wish to challenge an order which restricts the rights of free speech and press of such nonparties.” (Emphasis added.) *Id.* at 43.

Thus, the Court’s focus in such cases is not on whether the party filing the writ is a non-party, but whether any other remedy exists in the ordinary course of law that would afford the non-party the relief it seeks. Because an appeal is currently pending in the Court of Appeals, and Relator is a class action member and therefore, a party to the appeal, it has an adequate remedy in the ordinary course of law. The grant of an extraordinary writ is not required.

Relator also argues throughout its Complaint in Prohibition and Mandamus and the Memorandum in Support of its Complaint that it was not provided notice and an opportunity to opt-out of the class action suit. By making this argument, Relator essentially concedes that it is part of the class action that is currently pending before the Court of Appeals. For these reasons alone, Relator's Complaint must be dismissed and the appellate process allowed to resolve the issues presented herein.

B. THE SEVENTH DISTRICT COURT OF APPEALS DID NOT LACK JURISDICTION.

Relator also cannot establish that the Court of Appeals' actions are unauthorized by law. It is fundamental that a case in prohibition tests "solely and only" the subject-matter jurisdiction of the respondent. *See State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988). Relator does not challenge the subject matter jurisdiction of the Court of Appeals in its Complaint in Prohibition and Mandamus or in its Memorandum in Support of its Complaint. Rather, Relator only challenges the enforcement of the tolling order as applied to Claugus Family Farm, L.P., with the sole purpose of evading the tolling of its lease in order to satisfy the 180-day "cure period." (*See* Complaint in Prohibition and Mandamus, Mar. 18, 2014, at ¶51(a), (b).)

However, even if Relator did challenge the Court of Appeals' subject matter jurisdiction, in the absence of a "patent and unambiguous" lack of jurisdiction, the Court of Appeals "can determine its own jurisdiction" and a party contesting that jurisdiction has an adequate remedy by appeal. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶19.

C. RELATOR DOES NOT LACK ADEQUATE REMEDIES AT LAW.

Finally, Relator is not entitled to a writ of prohibition because it has adequate legal remedies. “Prohibition will not lie to prevent an anticipated erroneous judgment.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 74, 701 N.E.2d 1002 (1998). Nor is prohibition a substitute for an appeal. *State ex rel. Ragozine v. Shaker*, 96 Ohio St.2d 201, 2002-Ohio-3992, 772 N.E.2d 1192, ¶7. See also *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, ¶28 (“Prohibition will not issue as a substitute for appeal to review mere errors in judgment”); *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 578, 757 N.E.2d 357 (2001) (appeal of an order denying intervention after a final judgment is an adequate remedy in the ordinary course of law that bars a writ of mandamus); *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶28 (motion to intervene and appeal from any adverse judgment constituted an adequate remedy in the ordinary course of law that precludes a writ of mandamus); *McClellan v. Mack*, 129 Ohio St.3d 504, 2011-Ohio-4216, 954 N.E.2d 123, ¶2 (res judicata is not an appropriate basis for extraordinary relief because it does not divest a trial court of jurisdiction to decide its applicability, and the denial of the defense of res judicata by the trial court can be adequately challenged by post-judgment appeal).

Beck Energy appealed the trial court’s handling of class certification. Beck Energy specifically challenges the class definition and the fact that the trial court certified the class action *after* it granted summary judgment in the Hupp Plaintiffs’ favor. The issue of whether the trial court properly certified the class is an issue currently pending before the Court of Appeals, and therefore, Relator has an adequate remedy at law. Relator is unable to satisfy any of the necessary elements entitling it the relief it requests in its Writ of Prohibition. Therefore, Beck Energy requests that the Court dismiss Relator’s Writ of Prohibition.

V. PROPOSITION OF LAW NO. 3: Relator cannot satisfy the necessary elements entitling it to a writ of mandamus.

Many of the reasons discussed above, with regard to Relator's request for a writ of prohibition, also support dismissal of Relator's request for a writ of mandamus. Like a writ of prohibition, a writ of mandamus is an extraordinary remedy, and it should be granted only under exceptional circumstances. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). To be entitled to a writ of mandamus, a relator must prove that (1) the respondent has a clear legal duty to perform the act requested; (2) the relator has a clear legal right to the relief requested, and (3) the relator has no plain and adequate remedy in the ordinary court of the law. *State ex rel. Bennett v. Bds. of Edn.*, 56 Ohio St.3d 1, 2-3, 564 N.E.2d 407 (1990).

Relator sets forth the same arguments raised in its Propositions of Law Nos. 1 and 2, namely: (1) it has no adequate remedy at law; and (2) the Court of Appeals' issuance of the tolling order was a gross abuse of discretion, arbitrary and unconscionable allegedly because it denied Relator its due process notice and opt-out rights. (Memorandum in Support of Complaint for Writ of Prohibition and Writ of Mandamus, Mar. 18, 2014, at pp. 19-21)

Beck Energy addressed all of these arguments in its responses to Propositions of Law Nos. 1 and 2 and will not reiterate the reasons why Relator's arguments lack merit. Relator cannot satisfy the necessary elements required to entitle it to relief under its Writ of Mandamus. For these reasons, Beck Energy requests that the Court grant its Motion to Dismiss Relator's Writ of Mandamus.

VI. EQUITY COMPELS DISMISSAL OF RELATOR'S COMPLAINT.

Not only has Relator failed to establish the necessary elements for prohibition and mandamus, but equity requires the Court dismiss Relator's Complaint. The focus of Relator's

Complaint is the Court of Appeals' tolling order. However, the tolling order is necessary to maintain the viability of the leases while the Court of Appeals decides the pending appeal. Without the tolling order, many of the leases may expire while the legal issues presented are reviewed on appeal, as evidenced by the fact that, without the tolling order, Relator's lease would have expired at midnight on February 3, 2014. (Complaint in Prohibition and Mandamus, Mar. 18, 2014, at ¶31) Thus, one purpose of the tolling order is to prevent mootness.

The application of the mootness doctrine to expired leases is most commonly an issue found in landlord/tenant disputes. See *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, (1st Dist.); *Haven House Manor Ltd. v. Gabel*, 6th Dist. Wood No. WD-02-073, 2002-Ohio-6750, ¶19.

The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case. Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues.

Schwab, supra, at ¶10. A lease that expires during the pendency of the appeal renders the appeal moot.

In addition to preventing mootness, the tolling order also serves an equitable purpose. "[T]he extensive review of Ohio case law provided by the Parties makes clear that tolling is appropriate only after the Court has ruled on the validity of the leases." *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, 2014 WL 366723, *1 (Feb. 3, 2014). In the present matter, the trial court ruled on the validity of the G&T 83 lease on July 12, 2011, when it granted the Hupp Plaintiffs' Motion for Summary Judgment. Beck Energy filed its initial request to toll the Hupp Plaintiffs' leases on October 1, 2012, before the trial court certified this lawsuit as a class action.

After the trial court further defined the class in a Judgment Entry issued on June 10, 2013, following a limited remand from the Court of Appeals, Beck Energy moved on July 16, 2013, to toll the class action members' leases. The Court of Appeals extended the tolling order to the class action members on September 26, 2013, making the tolling order effective as of October 1, 2012. All of this occurred *after* the trial court found the G&T lease void. Therefore, in issuing the tolling order, the trial court complied with prior court precedent on the issue.

Also, Relator is a member of the class that filed this lawsuit and it is disingenuous for Relator to now claim that Beck Energy does not have the right to toll the running of the leases while it challenges the trial court's decision through the appellate process. Under such a scenario, if Beck Energy is correct in its assertion that its leases do not violate public policy, it "may win the battle, but lose the war" if its leases expire and lessors enter into new leases before this matter is conclusively decided on appeal. Therefore, equity requires that the Court grant Beck Energy's Motion to Dismiss Relator's Complaint in Prohibition and Mandamus.

VII. CONCLUSION

Relator is a member of a Civ.R. 23(B)(2) class. Its membership in this class affords it absolutely no due process notice or opt-out rights, which would also include notice of the Court of Appeals' tolling order. Relator's interests are currently adequately and effectively represented by the Hupp Plaintiffs' class action counsel, which also represented Relator's interests at the time the Court of Appeals issued the tolling order in this matter. Because Relator has an adequate remedy at law, by way of the appeal that is currently pending in the Seventh District Court of Appeals, Relator's Complaint in Prohibition and Mandamus must be dismissed for failure to state a claim upon which relief can be granted.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served by Ordinary U.S. Mail,
pursuant to App.R. 13(C), this 7th day of April 2014 upon:

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