IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Claugus Family Farm, L.P.,	)	Case No. 2014-0423
Relator,	)	IN MANDAMUS AND PROHIBITION
v.	)	
Seventh District Court of Appeals, et al.,	)	
Respondents.	)	

STIPULATIONS

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Sarah Pierce (S.Ct. #008799)
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Counsel for Respondents The Seventh District Court of Appeals, Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary DeGenaro

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Counsel for Intervening Respondent, Beck Energy Corporation

FILED
SEP 23 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 23 2014
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Claugus Family Farm, L.P.,	)	Case No. 2014-0423
Relator,	)	
	)	**STIPULATIONS**
v.	)	
Seventh District Court of Appeals, et al.,	)	
Respondents.	)	

Now come the parties to stipulate that the following documents were filed in the matter of *Hupp, et al. v. Beck Energy Corp.*, Monroe County Common Pleas Case No. CV-2011-345 (and the appeals that resulted from that case), and that the attached exhibits are true and accurate copies of the filings in question:

1. Complaint filed on behalf of named plaintiffs only on September 14, 2011;
2. First Amended Complaint filed on behalf of a class on September 29, 2011;
3. Second Amended Class Action Complaint filed on September 30, 2011;
4. Defendant Beck Energy Corporation's Brief in Opposition to Plaintiffs' Motion for Summary Judgment filed April 30, 2012;
5. Trial court entry granting summary judgment to named plaintiffs filed July 12, 2012;
6. Plaintiffs motion for class action certification filed July 19, 2012;
7. Trial court entry journalizing grant of summary judgment to named plaintiffs filed July 31, 2012;
8. Beck Energy appeal regarding grant of summary judgment designated Case No. 12 MO 06 filed August 28, 2012;
9. Third Party XTO Energy Inc.'s Motion to Intervene in Proceedings filed September 7, 2012;

10. Plaintiffs' amended motion for class action certification filed September 12, 2012;

11. Defendant Beck Energy's Memorandum in Opposition to Amended Motion for Class Action Certification filed September 17, 2012;

12. Beck Energy motion to toll the leases of named plaintiffs filed in the trial court on October 1, 2012;

13. Beck Energy's reply in support of motion to toll leases of named plaintiffs filed October 17, 2012;

14. Trial court entry granting class certification filed February 8, 2013;

15. Decision and Order on XTO's Motion to Intervene filed February 8, 2013;

16. Beck Energy appeal regarding class certification designated Case No. 13 MO 03 filed March 7, 2013;

17. Seventh District Judgment Entry filed April 19, 2013;

18. Trial court entry clarifying the class (per Seventh District Order) filed June 10, 2013;

19. Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service filed June 24, 2013;

20. Beck Energy appeal regarding decision clarifying the class designated Case No. 13 MO 11 filed July 3, 2013;

21. Beck Energy's response opposing notice to the class filed July 9, 2013;

22. Beck Energy appeal regarding implicit denial of motion to toll leases designated Case No. 13 MO 12 filed July 10, 2013;

23. Seventh District Judgment Entry filed on July 12, 2013;

24. Beck Energy motion to toll the leases of all proposed class members filed in trial court on July 16, 2013;

25. Plaintiffs' response to motion to toll filed July 22, 2013;

26. Transcript from the Motions Hearing conducted by the Monroe County Court of Common Pleas July 23, 2013;

27. Trial court entry granting motion to toll leases of named plaintiffs filed August 2, 2013;

28. Trial court entry denying motion to provide notice to class filed August 8, 2013;

29. Beck Energy Emergency Motion to Set Aside Supersedeas Bond filed August 22, 2013;

30. Beck Energy appeal of decision not to toll leases of all the proposed class members designated Case No. 13 MO 16 filed August 29, 2013;

31. Seventh District entry dismissing Case No. 13 MO 012 (implicit denial of motion to toll leases) filed September 16, 2013;

32. Seventh District entry consolidating Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11 filed September 16, 2013;

33. Seventh District entry tolling the leases of all proposed class members filed September 26, 2013;

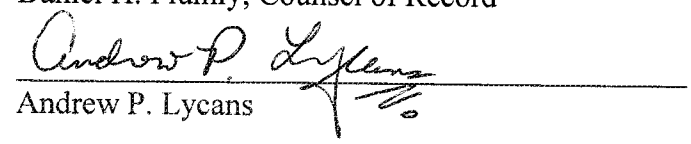
34. Seventh District entry dismissing Case No. 13 MO 16 (decision not to toll leases of proposed class members) filed November 1, 2013.

The parties further stipulate that the following document was filed in the matter of *Donald J. Pniaczek, et al. v. Beck Energy Corp., et al.*, Monroe County Common Pleas Case No. 2012-274, and that the attached exhibit is a true and accurate copy of the filing in question:

35. Judgment Entry from the Monroe County Court of Common Pleas filed August 31, 2012, in *Donald J. Pniaczek, et al. v. Beck Energy Corp., et al.,* Case No. 2012-274.

Respectfully submitted,

Daniel H. Plumly, Counsel of Record



Andrew P. Lycans

COUNSEL FOR RELATOR, CLAUGUS FAMILY FARM, L.P.
Sarah Pierce, Counsel of Record

per email consent 9/22/14

Sarah Pierce, Assistant Attorney General

COUNSEL FOR RESPONDENTS THE SEVENTH DISTRICT COURT OF APPEALS, JUDGE GENE DONOFRIO, JUDGE JOSEPH J. VUKOVICH, AND JUDGE MARY DEGENARO

Scott M. Zurakowski, Counsel of Record

per email consent 9/22/14

Scott M. Zurakowski

COUNSEL FOR INTERVENING RESPONDENT BECK ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that I served the above *Stipulations* to the following by e-mail transmission only this 22nd day of September, 2014:

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Tiffany L. Carwile
Assistant Attorneys General
Constitutional Offices Section
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Counsel for Respondents
The Seventh District Court of Appeals, Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary DeGenaro

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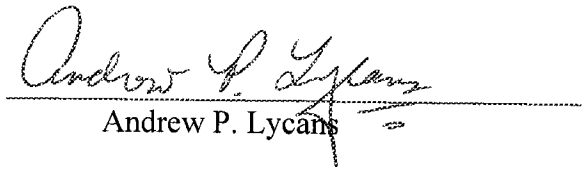
Counsel for Intervening Respondent Beck Energy Corporation



Andrew P. Lycans

EXHIBIT 1

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED
2011 SEP 14 PM 2: 33
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

Clyde A. Hupp 45595 S.R. 78 Woodsfield, Ohio 43793 and Molly A. Hupp 45595 S.R. 78 Woodsfield, Ohio 43793 and Larry A. Hustack 991 Brookpoint Dr. Macedonia, Ohio 44056 and Lori Hustack 991 Brookpoint Dr. Macedonia, Ohio 44056 Plaintiffs vs. Beck Energy Corporation 4857 Harding Ave. Ravenna, Ohio 44266 Defendant	Case No. 2011-345 Judge Julie Selmon **COMPLAINT FOR:** **(a) Declaratory Judgment;** **(b) Quiet Title** **Interrogatories, Requests for Production of Documents and Requests for Admissions Attached**

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____ Deputy Clerk
COMMON PLEAS COURT
MONROE COUNTY, OHIO

SLATER & ZURZ LLP
ATTORNEYS & COUNSELORS AT LAW
ONE CASCADE PLAZA
SUITE 2210
AKRON, OHIO 44308-1135
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COUNT ONE

Now come the Plaintiffs, Clyde A. Hupp and Molly A. Hupp, by and through their undersigned counsel, and for Count One of their Complaint for declaratory judgment against Defendant, Beck Energy Corporation, state that:

(1) Plaintiffs, Clyde A. Hupp and Molly A. Hupp, are individuals residing in Monroe County, Ohio, are husband and wife, and are the titled owners of and in present

possession of certain realty located in Monroe County, Ohio comprised of approximately three hundred and eight (308) acres (hereinafter referenced as "Hupp Acreage").

(2) Defendant, Beck Energy Corporation, is a corporation duly authorized and existing under and pursuant to the laws of the State of Ohio and, at all times relevant hereto, conducted business in Monroe County, Ohio.

(3) On or about May 4, 2004, Plaintiffs and Defendant entered into a certain Oil and Gas Lease relative to the Hupp Acreage (hereinafter "Hupp Lease"), which was subsequently recorded in Vol. 118 and Page 286 of the records of the Monroe County Recorder. A copy of said Hupp lease is attached hereto as Exhibit 1 and incorporated herein as if fully rewritten.

(4) Since the date of the Hupp Lease and in contravention thereof, Defendant has not prepared to drill a well on the Hupp Acreage, has not drilled a well on the Hupp Acreage, and has not paid any royalties to Plaintiff.

(5) Plaintiffs are entitled to a declaratory judgment that the Hupp Lease is forfeited, cancelled, unenforceable, voided and held for naught, for reasons including, but not limited to, the following:

(a) Defendant breached express covenants and breached implied covenants which arose by operation of law and Ohio public policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that effect Plaintiff's royalty interest with reasonable care and diligence; and

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(b) Defendant abandoned the Hupp Lease and the leasehold interest; and

(c) The terms and conditions of the Hupp Lease as to Plaintiffs are unconscionable; and

(d) The terms and conditions of the Hupp Lease are contrary to and violative of Ohio public policy; and

(e) There has been a failure of consideration as to Plaintiffs; and

(f) The equitable remedy of declaring the Hupp Lease to be forfeited, cancelled, unenforceable, voided and held for naught is appropriate and required as any legal remedies would be inadequate, as monetary damages are not ascertainable, as a forfeiture is necessary to do justice to the parties, and as forfeiture is warranted to assure development of the land and the protection of Plaintiffs' interests.

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COUNT TWO

Now come the Plaintiffs, Clyde A. Hupp and Molly A. Hupp, by and through the undersigned counsel, and for Count Two of their Complaint to quiet title against Defendant, state:

(6) Reallege and reaver the allegations contained in Count One as if fully rewritten herein;

(7) Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code 5303.01, quieting their title as to the Hupp Acreage as against Defendant by and through the forfeiture, release and cancellation of the Hupp's Lease as a valid encumbrance of record

and by extinguishing any interest which Defendant has or may claim to have in the Hupp Acreage.

Wherefore, Plaintiffs, Clyde A. Hupp and Molly A. Hupp, request a declaratory judgment as specified in paragraph 5 above; and a judgment quieting title as specified in paragraph 7 above; and for costs and such other and further relief as to which said Plaintiffs may be entitled at law or in equity.

COUNT THREE

Now come the Plaintiffs, Larry A. Hustack and Lori Hustack, by and through their undersigned counsel, and for Count Three of their Complaint for declaratory judgment against Defendant, Beck Energy Corporation, state that:

(8) Plaintiffs, Larry A Hustack and Lori Hustack, are husband and wife and are the titled owners of and in present possession of certain realty located in Monroe County, Ohio comprised of approximately 89.75 acres (hereinafter referenced as "Hustack Acreage").

(9) Defendant, Beck Energy Corporation, is a corporation duly authorized and existing under and pursuant to the laws of the State of Ohio and, at all times relevant hereto, conducted business in Monroe County, Ohio.

(10) On or about August 14, 2008, Defendant, as lessee, and Alonzo F. Wilson and Sherry S. Wilson, husband and wife, as lessors, entered into a certain Oil and Gas Lease which was subsequently recorded in Vol. 174 Page 229 of the records of the Monroe County Recorder (hereinafter referred to as the "Hustack Lease"). A copy of said Hustack Lease is attached hereto as Exhibit 2 and incorporated herein as if fully rewritten. Plaintiffs' ownership of and title to the Hustack acreage is subject to and encumbered by

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the Hustack Lease, as Plaintiffs are the successors in interest to the original lessors as delineated in said Hustack Lease pertaining to the 89.75 acres comprising the Hustack Acreage.

(11) Since the date of the Hustack Lease and in contravention thereof, Defendant has not prepared to drill a well on the Hustack Acreage, has not drilled a well on the Hustack Acreage, and has not paid any royalties to Plaintiffs.

(12) Plaintiffs are entitled to a declaratory judgment that the Hustack Lease is forfeited, cancelled, unenforceable, voided and held for naught, for reasons including, but not limited to, the following:

(a) Defendant breached express covenants and breached implied covenants which arose by operation of law and Ohio public policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that effect Plaintiffs' royalty interest with reasonable care and diligence; and

(b) Defendant abandoned the Hustack Lease and the leasehold interest; and

(c) The terms and conditions of the Hustack Lease as to Plaintiffs are unconscionable; and

(d) The terms and conditions of the Hustack Lease are contrary to and violative of Ohio public policy; and

(e) There has been a failure of consideration as to Plaintiffs; and

(f) The equitable remedy of declaring the Hustack Lease to be forfeited,

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cancelled, unenforceable, voided and held for naught is appropriate and required as any legal remedies would be inadequate, as monetary damages are not ascertainable, as a forfeiture is necessary to do justice to the parties, and as forfeiture is warranted to assure development of the land and the protection of Plaintiffs' interests.

COUNT FOUR

Now come the Plaintiffs, Larry A. Hustack and Lori Hustack, by and through the undersigned counsel, and for Count Four of their Complaint to quiet title against Defendant, state:

(13) Reallege and reaver the allegations contained in Count Three as if fully rewritten herein;

(14) Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code 5303.01, quieting their title as to the Hustack Acreage as against Defendant by and through the forfeiture, release and cancellation of the Hustack's Lease as a valid encumbrance of record and by extinguishing any interest which Defendant has or may claim to have in the Hustack Acreage.

Wherefore, Plaintiffs, Larry A. Hustack and Lori Hustack, request a declaratory judgment as specified in paragraph 12 above; and a judgment quieting title as specified in paragraph 14 above; and for costs and such other and further relief as to which said Plaintiffs may be entitled at law or in equity.

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Respectfully Submitted,

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OIL AND GAS LEASE

COPY

Form 527 (93)

THIS AGREEMENT, made and entered into this 4 day of MAY, in 04, by and between CLYDE A. HUPP AND MOLLY A. HUPP (H&W) 45595 S.R. 78 of WOODSFIELD, OHIO 43793 (Phone) (740)472-0037 hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1076, Kenova, WV 25530

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operation for, producing and removing all oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances into any strata and into any subsurface strata, other than potable water strata and workable coal strata, (including but not limited to the right to inject one wells on the leasehold property and to otherwise conduct all such secondary or tertiary operations as may be required in the opinion of the Lessee,) and to transport by pipelines or otherwise across and through said lands oil, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the leasehold premises shall survive the term of this lease for so long as the transportation of such gas may be desired by the Lessee, and of placing of tanks, equipment, roads and structures thereon to produce and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. 30, 31, 36 of ADAMS Township MONROE County, Ohio, described substantially as follows:

	SECTION 30
North by lands of	T.R. TATE
East by lands of	W. ALLEMAN
South by lands of	SECTION LINE
West by lands of	J. McCARTY AND PALACE

	SECTIONS 31 & 36
	L. CASEHIER
	G. CHAMBLIN, E. MALBAUGH, J. Gillespie
	T. WILLIAM, T. FRYE
	T. STARL, R. BUNKER, J. PLATZGRAF

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 308 acres, more or less, and being the property described in Deed Volume _____, Page _____ of the _____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and 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 and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $ 308.00 dollars each year, payable in advance quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of the grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 16 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted finding temperature of 60° Fahrenheit, without allowance for temperature and barometric variations less any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 30th day after receipt of such funds by the Lessee.

(C) Lessee to deduct from payments in (A) and (B) above from receipt of proceeds by Lessee, Lessor's proportionate share of any tax imposed by any governmental body.

(D) In the event Lessee does not sell the gas to others, Lessee shall be paid on the basis of the highest field market price paid by any public utility in the state at the well head for gas of the kind and quality, and on the same basis that such utility would pay for such gas, including any condition or price that such utility would pay for such gas as if a contract for the sale of same had been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to CLYDE A. HUPP AND MOLLY A. HUPP at SAME AS ABOVE or to the said second person shall continue the Lessor's agent irrevocable any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership as hereinafter provided.

6. The Lessee may, at Lessee's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessee's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any encumbrance or claim by any purchaser of the gas. The first one hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of two hundred thousand cubic feet of gas taken in each year shall be paid for at the last published rate of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessor is to lay and maintain the pipeline and furnish regulators and other necessary equipment at Lessor's expense. Lessee shall also, at the request of Lessor, install a meter to measure said gas. This privilege is upon the condition precedent that the Lessee shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessee shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessee shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties according to the Lessor hereunder. Lessee acknowledges that he has been advised as to the risks incidental to the taking of gas in this manner, and Lessor agrees to assume all such risks whether have to exist by Lessor's fault or negligence, or whether same be caused by Lessee's negligence or not operation, and Lessee agrees to hold Lessee and the well operator and all parties in interest in any well on the leasehold premises harmless from any claims of any nature whatsoever which may arise by the usage of gas free any such well by Lessor, his heirs, successors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises otherwise assumed other than the Lessor is entitled to take the gas under this Paragraph 6, that the gas liberty will be terminated by Lessee until the buyer of the property shall execute an agreement regarding the usage of this gas in the same form as the within agreement. In the absence of such an agreement free gas under this provision shall terminate, the within right of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinbefore provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are added, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are paid and to be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form an oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in accordance with the provisions of this lease, and provided further that the Lessor agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the average consolidated acres in the land number of acres comprising said development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality as this oil and gas lease setting forth the lands or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office at the courthouse in the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinbefore set forth unless the Lessee is furnished with another address. If the well on said development unit shall thereafter be shut in, the land rental for shut-in royalty hereinbefore provided for each year shall be payable in the amount of the pounds of land comprising said unit in the proportion that the acreage of such leased acres in the entire average consolidated. Lessor shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid to such several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further obligations hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any state or lien against the Lessor's interest in the premises as herein leased and thereupon to become subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply as the payment of any existing liens on the premises.

14. The Lessee shall have, when so requested by the Lessor, all pipelines used to conduct oil or gas to, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises to conformance with state laws. Any damages if not mutually agreed upon, or be ascertained and determined by three disinterested persons, one elected to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appraiser and shall share the cost of the third appraiser. Arbitration shall be mandatory. No well shall be drilled within 200 feet of any existing house or dwelling.

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1

20. IN THE EVENT A WELL IS DRILLED AND IS NOT A GOOD PRODUCING WELL, THE LESSOR WILL HAVE THE OPTION OF PURCHASING SAID WELL.

Signed and acknowledged in the presence of:	Witnesses	Social Security or Tax ID No.
James M. Beck	Clyde A. Hupp CLYDE A. HUPP	
	Molly A. Hupp Molly A. Hupp	

STATE OF OHIO ;
COUNTY OF MONROE ; SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named CLYDE A. HUPP AND Molly A. Hupp (H&W)

who acknowledged to me that THEY did execute the foregoing instrument and that the same is Their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at WOODSFIELD, OHIO

this 4 day of MAY, 04.

James M. Beck
Notary Public

JAMES M. BECK
Notary Public, State of Ohio
My Commission Expires 12-12-07

21. THE LESSOR CONFERS THAT IF A GOOD PRODUCING WELL IS DRILLED THAT HIS THREE SONS WOULD HAVE THE OPTION OF PURCHASING GAS AT MARKET PRICE FOR THEIR DWELLINGS.

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1575, Ravenna, OH 44266

VOL 118 PAGE 287

OIL AND GAS LEASE

Area

From

Post Office

Date

Term

Located

No.

037405

MONROE CO. RECORD OF Official Records
VOL 118 PAGE 286
RECEIVED
04 MAY 12 PM 3:29
RECORDED May 11, 2004
MARTHA LOUISE HICKS
RECORDER FEE $28.00

Rec'd for Record
Recorded
Book

Johnson Printing Co., Alliance, Ohio 44601

OIL AND GAS LEASE

Form 985 [illegible]

THIS AGREEMENT, made and entered into this 14th day of Aug, in the year 08, by and between Alonzo F. Wilson and Shanny J. Wilson (Hus) 45429 Bond Ridge Rd. Woodsfield, Ohio 43793 (Phone) 740-472-1060

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1878, Bellaire, OH 43906

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter mentioned, does hereby grant and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances into any sands and into any subsurface strata, other than potable water strata and mineable coal strata, (including but not limited to the right to inject any waste on the leasehold property and to otherwise conduct all such necessary or incidental operations as may be required in the opinion of the Lessee,) and to transport by pipelines or otherwise across and through said lands oil, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the leasehold premises shall exclude the term of this lease so long as the transportation of such gas does not interfere with the operations of the Lessee, and of placing all tools, equipment, roads and structures thereon to procure and operate for the said purposes, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. Sta 4 of Adams & Green Township Monroe County, Ohio, bounded substantially as follows: Adams Twp. Sec. 5 Green Twp. Sec. 4

North by lands of R. Wilson & D. Pletcher & C. Wide Sealy

East by lands of D. Haven, Sr. D. Haven, Sr.

South by lands of TR-B & Hill T.R.-B

West by lands of F. Wilson & Sec. Line T.R.-B

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 108 acres, more or less, and being the property described in Deed Volume ____ Page ____ of the ____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, to the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 dollars each year, payable in advance quarterly until the commencement of a well. A well shall be deemed commenced when preparation for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessor's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for all like grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 16 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted having temperature of 60° Fahrenheit, without allowance for temperature and barometric variations less any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 30th day after receipt of such funds by the Lessee.

(C) Lessee to deduct from payments in (A) and (B) above from receipts or proceeds by Lessee, Lessor's pro-rata share of any tax imposed by any governmental body.

(D) In the event Lessee does not use the gas in others, Lessee shall be paid on the basis of the lowest field market price paid by any public utility in the state of the well head for gas of the kind and quality, and on the same basis that such utility would pay for such gas, including any escalation in price that such utility would pay for such gas as if a contract for the sale of same had been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to: Alonzo F. Wilson and Shanny J. Wilson c/o Alonzo Wilson

and the said second person shall continue as Lessor's agent to receive any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder, until delivery to the Lessee of notice of changes of ownership as hereinafter provided.

6. The Lessor may, at Lessor's sole risk and cost, by a pipeline to pay one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any curtailments or shut-in by any purchaser of the gas. The first two hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of two hundred thousand cubic feet of gas taken in each year shall be paid for at the best published rate of the gas utility in the town or area nearest to the leased premises at the time market rate, whichever is higher. Lessee is to set outside the pipeline and house regulators and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition provided that the Lessor shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessor shall maintain the said pipeline, regulators and equipment in good repair and keep all of gas tanks and equals the same as to and to cause waste or unnecessary loss of gas. If the Lessee shall have excess gas as aforesaid to say gas and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessee hereunder. Lessor acknowledges that he has advised as to the risks inherent in the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessor's fault or negligence, or whether same be caused by Lessee's negligence or non-operation; and Lessor agrees to hold Lessee and the well operator and all parties interest in any well on the leasehold premises harmless from any claims of any nature whatsoever which may rise by the usage of gas from any such well by Lessor, his heirs, successors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises without assumption other than the Lessee is entitled to take the gas under this Paragraph 6, that the gas supply will be terminated by Lessee until the buyer of the property executes an agreement regarding the usage of the gas in the same form as the initial agreement. In the absence of such an agreement then gas under the provision shall terminate, the initial right of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or notify the Lessor after the termination of said twelve month period exclusive of the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinbefore provided for delay rental until production is marketed and sale of the premises or such well is plugged and abandoned according to law. In the event no delay rentals are paid, the advance royalty payable hereunder shall be such as the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether or other producing wells on adjoined or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right of way free of consideration the leased premises or any part thereof or across thereon with other lands to lease on oil and gas development wells of not more than 660 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on each unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in accordance with the provisions of this lease, and provided further that the Lessee agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage contributed hereto is the total number of acres comprising said development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality as this oil and gas lease setting forth the lands or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office of the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinbefore set forth unless the Lessor is furnished with another address. If the unit so said development unit shall thereafter be shut in, the unit rental for shut-in royalty hereinbefore provided for such use shall be payable in the amount of the pounds of land comprising said unit in the proportion that the acreage of contributed hereto to the entire acreage consolidated. Lessor shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than he owns and established for single tracts, then the royalties and rentals herein provided to be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid to such several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. In the change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee waives notice of any assignment or transfer of the within lease. Failure of payment of rentals or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further obligations hereunder. The Lessee further grants to the Lessee, for the production of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises as herein leased and thereupon be thereafter subrogated to the rights of such claimant or the holder, and the right to direct payment of all rentals and royalties to apply on the payment of any outstanding liens on the premises.

14. The Lessee shall have, when so requested by the Lessee, all operations used in connection with or for us, or, through and all the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises in accordance with state law. Any damages if not mutually agreed upon, to be determined and determined by disinterested persons, and thereon to be represented by the Lessee, one by the Lessee, and third by the two so appointed, and the award of such three persons shall be final and conclusive. The Lessee shall have the right to remove all fixtures and equipment placed on the premises by Lessee including any and all casing, tubing and equipment, including any and all casing, tubing or flowing.

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2

[illegible] the parties which it elects to terminate, or by [illegible] as the lease to the Lessor with the endorsement of termination thereof, or by recording [illegible] such or partial termination of this lease, any of which shall be a full and legal surrender of this [illegible] as to all of the premises or such portion thereof as the surrender shall indicate and a [illegible] as of all facilities under the terms of such and all portion hereto relating in any way to the portion or all of the premises indicated on said surrender, and the land rental hereinbefore set forth shall be reduced in proportion to the acreage surrendered.

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee has performed said act or acts and in no event shall the notice have expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

18. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All covenants and conditions between the parties herein shall extend to their heirs, personal representatives, successors and assigns, and the Lessee hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional documents as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required by Lessee or others.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signature	Social Security or Tax ID No.
	x Alonzo F. Wilson	
	x Sherry J. Wilson	

State of Ohio
County of Monroe } SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named Alonzo F. & Sherry J. Wilson (husband and wife)

acknowledged to me that they did execute the foregoing instrument and that the same is their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Woodsfield, Oh.

this 14 day of Aug, A.D. 08

Rebecca Sing
Notary Public
My commission Expires Sept 3, 2012

PSSIGNMENT OF

VOL 0174 PAGE 230

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1378, Kenmore, OH 44286

No. _____ Acres _____ OIL AND GAS LEASE

From _____

Post Office _____ To _____

Date _____, 20 _____ Term _____ Lessor _____

050232

MONROE CO. RECORD OF Official Records
VOL. 174 PAGE 229
RECEIVED
08 AUG 15 PM 2:4[illegible]
RECORDED August 15, 2008
MARTHA LOUISE REID
RECORDER FEE $28.00

Rec'd for Record _____ Recorded _____ Book _____

Jackson Printing Co., Alliance, Ohio 44601

EXHIBIT 2

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2011 SEP 29 PM 3:26

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK
991 Brookpoint Drive
Macedonia, Ohio 44056

And

LORI HUSTACK
991 Brookpoint Drive
Macedonia, Ohio 44056

And

LAWRENCE HUBBARD
3685 Johnston-Alexandria Road
Alexandria, Ohio 43001

And

MICHELLE HUBBARD
3685 Johnston-Alexandria Road
Alexandria, Ohio 43001

And

DONALD W. YONLEY
P.O. Box 248
New Matamoras, Ohio 45767

And

DAVID MAJORS
48433 Keylor Hill Road
Woodsfield, Ohio 43793

Plaintiffs,

CASE NO. 2011-345

JUDGE: JULIE SELMON

AMENDED CLASS ACTION COMPLAINT

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio

By _____ Deputy Clerk

COMMON PLEAS COURT
MONROE COUNTY, OHIO

vs.

BECK ENERGY CORPORATION
4857 Harding Avenue
Ravenna, Ohio 44266

Defendants.

Now come Plaintiffs, Larry and Lori Hustack ("Hustacks"), Lawrence and Michelle Hubbard ("Hubbards"), Donald W. Yonley ("Yonley"), and David Majors ("Majors"), by and through undersigned counsel, and for their Amended Class Action Complaint against Defendant Beck Energy Corporation ("Beck"), allege and aver as follows:

IDENTIFICATION OF PARTIES AND STATEMENT OF JURISDICTION

1. Defendant Beck Energy Corporation is an Ohio corporation with its principal place of business in Portage County, Ohio, and which conducts extensive business in Monroe County, Ohio.

2. The Hustacks, husband and wife, are titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 89.75 acres (hereinafter referenced as "Hustack Acreage").

3. The Hubbards, husband and wife, are titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 46.846 acres (hereinafter referenced as the 'Hubbard Acreage").

4. Donald Yonley, is titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 50 acres (hereinafter referenced as "Yonley Acreage").

5. David Majors, is titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 54 acres (hereinafter referenced as "Majors Acreage").

6. Over the years, Beck Energy Corporation has entered into oil and gas leases with various land owners of realty located in Monroe County, Ohio, constituting in excess of 21,000 acres of land.

7. Beck entered into a standard form oil and gas lease with not only the Hustacks, Hubbards, Yonley and Majors, but also with approximately 400 landowners in Monroe County. The lease terms at issue in this litigation appear identical.

FACTS COMMON TO ALL CAUSES OF ACTION

8. The Hustacks, along with the Hubbards, Yonley, Majors and approximately 400 additional landowners/Lessors in Monroe County, executed oil and gas leases with Beck, or are successors in interest to said lessors, which are essentially identical to Plaintiffs' Exhibits 1-4.

9. All of the leases contain terms and conditions that are contrary to and violative of Ohio Public Policy as they are, among other things, leases in perpetuity without timely development.

10. For all of the leases, the Defendant breached express covenants and implied covenants which arose by operation of law and Ohio Public Policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that affect Plaintiffs' royalty interest with reasonable care and diligence.

COUNT I – DECLARATORY JUDGMENT

11. Plaintiffs, Larry Hustack and Lori Hustack, are husband and wife and are the titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 89.75 acres.

12. On or about August 14, 2008, Defendant, as Lessee, and Alonzo F. Wilson and Sherry S. Wilson, husband and wife as Lessors, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 174, pg. 229, of the records of the Monroe County Recorder (hereinafter referred to as the "Hustack Lease"). A copy of Hustack Lease is attached hereto as Exhibit 1 and incorporated herein as if fully rewritten. Plaintiffs' ownership and title to the Hustack Acreage is subject to and encumbered by the Hustack Lease, as Plaintiffs are the successors in interest to the original Lessors as delineated in said Hustack Lease pertaining to the 89.75 acres comprising the Hustack Acreage.

13. Plaintiffs, Lawrence Hubbard and Michelle Hubbard, are husband and wife and are the titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 46.846 acres.

14. On or about March 2, 2006, Defendant, as Lessee, and Lawrence and Lieselotte Hubbard, husband and wife as Lessors, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 145, pg. 117, of the records of the Monroe County Recorder (hereinafter referred to as the "Hubbard Lease"). A copy of Hubbard Lease is attached hereto as Exhibit 2 and incorporated herein as if fully rewritten. Plaintiffs' ownership and title to the Hubbard Acreage is subject to and encumbered by the Hubbard Lease, as Plaintiffs are the successors in interest to the original Lessors as delineated in said Hubbard Lease pertaining to the 46.846 acres comprising the Hubbard Acreage.

15. Plaintiff, Donald W. Yonley, is the titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 50 acres.

16. On or about January 29, 2003, Defendant, as Lessee, and Donald W. Yonley as Lessor, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 98, pg. 321, of the records of the Monroe County Recorder (hereinafter referred to as the "Yonley Lease"). A copy of Yonley Lease is attached hereto as Exhibit 3 and incorporated herein as if fully rewritten. Plaintiff's ownership and title to the Yonley Acreage is subject to and encumbered by the Yonley Lease.

17. Plaintiff, David Majors, is the titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 54.5 acres.

18. On or about October 11, 2005, Defendant, as Lessee, and David Majors as Lessor, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 139, pg. 260, of the records of the Monroe County Recorder (hereinafter referred to as the "Majors Lease"). A copy of Majors Lease is attached hereto as Exhibit 4 and incorporated herein as if fully rewritten. Plaintiff's ownership and title to the Majors Acreage is subject to and encumbered by the Majors Lease.

19. Since the date of the Hustack, Hubbard, Yonley and Majors Leases, and in contravention thereof, Defendant has not prepared to drill a well on the Hustack, Hubbard, Yonley or Majors Acreage, has not drilled a well on the Hustack, Hubbard, Yonley or Majors Acreage, and has not paid any royalties to any of them.

20. Plaintiffs are entitled to a declaratory judgment that the Hustack Lease, the Hubbard Lease, the Yonley Lease and the Majors Lease are therefore forfeited, cancelled,

unenforceable, voided and held for naught, for reasons including, but not limited to, the following:

(a) Defendant breached express covenants and breached implied covenants which arose by operation of law and Ohio Public Policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that affect Plaintiffs' royalty interest with reasonable care and diligence; and

(b) Defendant abandoned the Hustack, Hubbard, Yonley and Majors Leases and the leasehold interests; and

(c) The terms and conditions of the Hustack, Hubbard, Yonley and Majors Leases as to Plaintiffs are unconscionable; and

(d) The terms and conditions of the Hustack, Hubbard, Yonley and Majors Leases are contrary to and violative of Ohio Public Policy; and

(e) There has been a failure of consideration; and

(f) The equitable remedy of declaring the Hustack, Hubbard, Yonley and Majors Leases to be forfeited, cancelled, unenforceable, voided and held for naught is appropriate and required as any legal remedies would be inadequate, as monetary damages are not ascertainable, as a forfeiture is necessary to do justice to the parties, and as forfeiture is warranted to assure development of the land and the protection of the Plaintiffs' interest.

COUNT II – QUIET TITLE

21. Now come the Plaintiffs, Larry A. Hustack and Lori Hustack, Lawrence and Michelle Hubbard, Donald Yonley and David Majors, by and through the undersigned counsel, and for Count II of their Complaint, as a quiet title against Defendant, state:

a) Reallege and reaver the allegations contained in Count I as if fully rewritten herein;

b) Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code §5303.01, quieting their title as to the Hustack Acreage, the Hubbard Acreage, the Yonley Acreage and the Majors Acreage, as against Defendant by and through the forfeiture, release and cancellation of the Hustack, Hubbard, Yonley and Majors' Leases, as valid encumbrances of record, and by extinguishing any interest which Defendant has or may claim to have in the Hustack, Hubbard, Yonley and Majors Acreage.

CLASS ACTION ALLEGATIONS

22. Plaintiffs bring this suit as a Class Action on behalf of themselves and all other similarly situated (the "Class") under the applicable provisions of Rule 23 of the Ohio Rules of Civil Procedure. Plaintiffs seek certification of the Class defined as "all landowners/Lessors of land in Monroe County, Ohio, who are Lessors under, or who are successors in interest of Lessors under, a standard form oil or gas lease with Beck Energy Corporation, where Beck Energy has not drilled a gas/oil well."

23. This case is brought as a Class Action under Rule 23 (A) and (B)(2) and/or (B)(3) of the Ohio Rules of Civil Procedure, for the reasons set forth in the following paragraphs.

24. Numerosity. The members of the Class are so numerous that separate joinder of each member is impracticable. Upon information and belief, and subject to class discovery, the class consists of approximately 400 members who were Lessors, or who are successors in interest to Lessors, under a Beck oil and gas lease.

25. Commonality and Predominance. There are numerous, substantial significant questions of law and fact common to the Class relating to the Beck Lease which control the determination of liability in this litigation, and which predominate over any other issues that

affect only individual Class members. Among the common questions of law and fact are the following:

> The terms of the written lease between the Lessors and Beck Energy; whether the lease violates public policy in that it is a lease in perpetuity; whether Beck failed to fulfill the express and implied covenants within the lease; whether the lease terms and provisions are unconscionable; whether there was a failure of consideration; and whether the lease and leasehold interest was abandoned.

26. Typicality. The claims of the Hustacks, Hubbards, Yonley and Majors are typical of, if not identical to, the claims of the Class members in that each of the Class members are subject to the same terms of the same lease with Beck.

27. Adequacy of Representation. Plaintiffs Hustack, Hubbard, Yonley and Majors are more than adequate representatives of the Class, in that they each have either executed a lease with Beck Energy Corporation for oil and gas exploration, or are the successors in interest under the same lease, as have all of the other Class Members.

28. Superiority. Class representation provides a fair and efficient method, if not the only method for adjudicating this controversy. It is superior to other available methods. This Court has jurisdiction over the named Plaintiffs as well as the putative Plaintiffs and the Defendant. The Plaintiffs and putative Plaintiffs all own land in this county. The Defendant conducts business in this county. There are no particular overriding and individual interests of any Class member controlling the prosecution of these claims, and the denial of Class treatment and reliance on individual litigation would produce inefficiency, potentially inconsistent adjudication of common issues, and waste litigants' and judicial resources, while pricing many Class members out of Court.

RELIEF SOUGHT

Wherefore, Plaintiffs and the Class Members demand judgment against the Defendant by entering the following orders:

A. Plaintiffs' requested declaratory judgment as specified above, and a judgment quieting title as specified above, and for costs and attorney's fees and other further relief to which said Plaintiffs may be entitled in law or equity.

B. Any and all further relief as this Court deems just and proper.

Respectfully submitted,

Mark A. Ropchock (0029823)
mropchock@ralaw.com
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308
Telephone: 330.376.2700
Facsimile: 330.376.4577

and

Richard V. Zurz (0007978)
Slater & Zurz
One Cascade Plaza, Suite 2210
Akron, OH 44308
Telephone: 330.762.0700
Facsimile: 330.762.3923

and

Jim W. Peters (0009360)
Peters Law Offices
107 W. Court Street
Woodsfield, OH 43793
Telephone: 740.472.1681
Facsimile: 740.472.1718

ATTORNEY FOR PLAINTIFFS

1767410 v_01 \ 0109.0109

OIL AND GAS LEASE

Form 661 (Rev)

THIS AGREEMENT, made and entered into this 14th day of Aug, 20 08, by and between Alonzo F. Wilson and Sherry J. Wilson (H+W) 45429 Bendi Ridge RD. Woodsfield, Ohio 43793 (Phone) 740-472-1060 of

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1378, Bellaire, OH 43906

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances down any formations and into any underground strata, storing them pumable water strata and workable coal strata, including but not limited to the right to inject any such gas into household property and to otherwise conduct of such necessary or incidental operations as may be required in the opinion of the Lessee, and to transport by pipelines or otherwise across and through said lands oil, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the household premises shall survive the term of this lease for as long as the transportation of such gas may be desired by the Lessee, and of placing of tanks, equipment, roads and structures thereon to process and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. 544 of Adams + Colerain Township Monroe County, Ohio, bounded substantially as follows:

North by lands of Adams Twp. Sec 3 R. Wilson + D. Pletcher + C. Webb

East by lands of D. Hoover, Sr. D. Hoover, Sr.

South by lands of T.R.-B + Sally T.R.-B

West by lands of J. Wilson + Sec. line T.R.-B

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 108 acres, more or less, and being the property described in Deed Volume _____, Page _____ of the _____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payment to be made yearly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessor's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of like grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from such well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 16 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted flowing temperature of 60° Fahrenheit, without allowance for temperature and barometric variations but any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month is to be on or about the 30th day after receipt of such funds by the Lessee.

(C) Lessee is entitled from payments in (A) and (B) above from receipt of proceeds by Lessee, Lessor's pro-rata share of any tax imposed by any governmental body.

(D) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of the lowest field market price paid by any public utility in the state at the well head for gas of like kind and quality, and on the same basis that such utility would pay for such gas, including any variation in price that such utility would pay for such gas as if a contract for the sale of same had been entered into of the type of product produced.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to Alonzo F. Wilson and Sherry J. Wilson at Same above address

6. The Lessee may, at Lessee's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessee's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any conditions or stipulations or stand-by fees imposed by any purchaser of the gas. The first ten hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of ten hundred thousand cubic feet of gas taken in each year shall be paid for at the last published rate of the gas utility in the town or city nearest to the leased premises or the field market rate, whichever is higher. Lessee is hereby granted a right of way for such pipeline and other necessary equipment at Lessee's expense. Lessee shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition precedent that the Lessee shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessee shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause unnecessary loss of gas. If the Lessee shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessee hereunder. Lessee acknowledges that he has been advised as to the risks inherent in the taking of gas in this manner, and Lessee agrees to assume all such risks whether same be caused by Lessee's fault or negligence, or whether same be caused by Lessee's employment or not operation; and Lessee agrees to hold Lessee and the well operator and all parties in interest in and on the household premises harmless from any claims of any nature whatsoever which may rise by the escape of gas from any such well by Lessee, its heirs, successors, administrators and assigns. Lessee further agrees that upon the sale or transfer of the household premises wherein someone other than the Lessee is entitled to take the gas under this Paragraph 6, that the gas supply will be terminated by Lessee until the buyer of the property executes an agreement regarding the usage of the gas in the same form as the usual agreement. In the absence of such an agreement from gas under this provision shall terminate, the whole right of way gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an annual royalty in the amount and under the terms hereinbefore provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are paid, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are paid will by accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands or leases so as not gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any unit drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the purposes and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the acres of the tract on which such unit is located any gas or oil in the bedding lands or such owner's lands in accordance with the provisions of this lease, and provided further that the Lessee agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the average consolidated acres in the total number of acres comprising said development unit. The Lessee shall effect such consolidation by recording a declaration of consolidation with the same formality as this oil and gas lease covering both the lessor or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office of the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinbefore set forth unless the Lessee is notified with another address. If the unit so said development unit shall thereafter be shut in, the total rental for shut-in royalty hereinbefore provided for such unit shall be payable to the owners of the parcels of land comprising said unit in the proportion that the acreage of each parcel bears to the entire acreage consolidated. Lessee shall have the right to amend, alter or extend any such consolidation of any tract in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by tong or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid to each separate owner in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no liability for any claim or lien against the Lessee's interest or obligations hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessee's interest in the premises or lands leased and therein to become subrogated to the rights of such claimant or lien holder, and the right to credit payment of all rentals and royalties to apply on the payment of any existing liens on the premises.

14. The Lessee shall bury, when so requested by the Lessee, all pipelines used to connect all or gas in, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises to accordance with other terms. Any damages if not actually agreed upon, to be ascertained and determined by disinterested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appointee and shall share the cost of the third appointee. Arbitration shall be mandatory. No well shall be drilled within 200 feet of any existing barn or dwelling.

EXHIBIT 1

[illegible] which shall be a bill and legal extension of this lease as to all the premises of each party. Rental at the minimum [illegible] shall be reduced in proportion to the acreage surrendered. All payments [illegible] relating in any way to the portion [illegible] the premises indicated as said surrender, and the land model formations and lands shall be reduced in proportion to the acreage surrendered.

16. In the event the Lessee is unable to perform [illegible] of the acts to be performed by the Lessee by reason of force majeure, including but not [illegible] of God, strikes, riots, and governmental restrictions including but not limited to restrictions [illegible] a state of emergency, this lease shall nevertheless remain in full force and effect until the Lessee [illegible] shall not be able and to be able and to be able shall for the entire lease term for a period of ninety days after the termination of any force majeure.

17. In the event Lessee contends that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessee shall notify Lessor in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessee. The service of said notice shall be precedent to the bringing of any action by Lessee on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

18. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All agreements and conditions between the parties herein shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional instruments as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required by Lessee or others.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:

Signature — Social Security or Tax ID No.

x Alonzo F Wilson

x Sherry J Wilson

INDIVIDUAL

STATE OF Ohio
COUNTY OF Monroe } SS:

Before me a Notary Public in and for said county and state personally appeared the above named Alonzo F & Sherry J. Wilson (H&W)

who acknowledged to me that they did execute the foregoing instrument and that the same is their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Woodsfield, Oh.

this 14 day of Aug, 20 08

Rebecca Sing
Notary Public
My commission Expires Sept 3, 2012

VOL 174 PAGE 230

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1978, Ravenna, OH 44266

OIL AND GAS LEASE

No. _____ Acres _____ From _____ Post Office _____ To _____ Date _____, 20 _____ Term _____ Lessee _____

050232

MONROE CO. RECORD OF Official Records
VOL 174 PAGE 229
RECEIVED
08 AUG 15 PM 2:4
RECORDED August 15, 2008
MARTHA LOUISE REINO
RECORDER FEE $28.00

Rec'd for Record _____ Recorded _____ Book _____ County Recorder

Jenkins Printing Co., Alliance, Ohio 44601

THIS AGREEMENT, made and entered this date 2nd mon. 19 96, by and between Lawrence Hudson & Wife Sandra Hudson (Husband & Wife)

of 36947 Rieder Rd. Lordship (Phone) 472-5211 Oh 43793

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1678, Fremont, OH 43420

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter mentioned, have hereby leased and hereby lease the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances into any strata or any substrata strata, other than potable water strata and workable coal seams, (including but not limited to the right to inject any such substances into the leasehold premises and to operate therein such secondary or tertiary operations as may be required in the opinion of the Lessee, and to transport by pipelines or otherwise water and through such lands or, gas and oil and hydrocarbons from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the leasehold premises shall survive the term of this lease for the long or the transportation of such gas may be desired by the Lessee, and of placing of tanks, equipment, flowlines and structures thereon to produce and operate for the said products, together with the right to use but not upon the leased premises all of them be the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. 7 of Section Township Monroe County, Ohio, bounded substantially as follows:

North by lands of Morgan Patterson

East by lands of Amanda Hunt

South by lands of Sandy Cook

West by lands of Sandy & Bonny Hudson

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 55.0 Ac. more, more or less, and being the property described in Deed Volume Page of the County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 hereof.

3. Said term, however, shall nevertheless not cease and the rights of either party hereunder shall remain and terminate unless within twelve months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $56.00 Dollars each year, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(1st) To deliver to the credit of the Lessor or his heirs or successors, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessor's option to pay Lessor the market price for such one-eighth (1/8) royalty oil of the prevailing rate for oil of the grade and gravity prevailing on the day such oil is run into tanks or pipelines.

(2nd) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, calculated in accordance with Ohio's Law for the measurement of gas at varying pressures, or the sum of $5 annual rate 16.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted having temperature of 60° Fahrenheit, without allowance for compressor and barometric variations less any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 25th day after receipt of such funds by the Lessee.

(3rd) Lessee to deduct from payments in (A) and (B) above from receipts of proceeds by Lessee, Lessor's proportionate share of any tax imposed by any government body.

(4th) In the event Lessee does not sell the gas to others, Lessee shall be held on the basis of the lowest field market price paid for any public utility in the state as the only basis for gas of this same or similar quality, and as the same tank that such utility would pay for such gas, including any association in price that such utility would pay for such gas or if a contract for the sale of same shall have been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to the Lessor, at Name, address, of Lordship, Ohio 43793 and the said named person shall continue as Lessor's agent in receipt of any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership or succession provided.

6. The Lessor says, if Lessor's well has not and does, for a pipeline to any gas gas well on the premises, and who gas produced from said well for domestic use in one dwelling house on the leased premises, if Lessor's own risk, subject to the sole and the right of abandonment of the well by the Lessee, and subject to any restrictions or shut-in by any purchaser of the gas. The first five hundred thousand cubic feet of gas taken each year which is free of cost, but all gas in excess of five hundred thousand cubic feet of gas taken in each year shall be paid for at the best published rates of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessee to lay and maintain the pipeline and handle regulators and other necessary equipment at Lessee's expense. Lessee shall also, at the request of Lessor, install a meter to measure said gas. This privilege is upon the condition provided that the Lessee shall conform to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessee shall maintain the said pipeline, regulators and equipment in good repair and the said gas lines and operate the same so as not to waste waste or unnecessary loads of gas. If the Lessee shall take excess gas as allowable in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessee hereunder. Lessee acknowledges that he has been advised to the this advised to the books of gas to this lease, and Lessee agrees to assume all such risks whether same be caused by Lessee's lines or equipment, or whether same be caused by Lessee's equipment or and operation; and Lessee agrees to hold Lessee and the gas operator and all parties to interest in any well on the leasehold premises harmless from any claims of any claims whatsoever which may rise by the usage of gas from any well used by Lessee, his heirs, successors, administrators and assigns. Lessee further agrees that upon the sale or transfer of the leasehold premises interest, whether that the Lessee is entitled to take the gas under this Paragraph 6, that the gas supply will be transferred by Lessee with the Buyer of the property according to agreement regarding the usage of the gas in the same form as the initial agreement. In the absence of such an agreement then gas under this premises shall terminate, the other right of the gas use being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period commence the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an annual royalty in the amount and under the terms hereinbefore provided for every rental well production is restricted and upon all the premises of such well is plugged and abandoned according to law. In the event no delay rental has accrued, the Lessee royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor in advance and full consideration for all the rights herein granted to the Lessee, and the further right of drilling at and drilling on the leased premises, whether or not producing oil or gas or otherwise, as the Lessee may elect.

10. The Lessee hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands in one oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulations for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any unit drilled on said development unit whether or not located on the leased premises, which nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease, provided, however, that only the lease of the lands on which such well is located may take gas for use in one dwelling house on said owner's lands in accordance with the provisions of this lease, and provided further that the Lessee agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage contributed hereby in the total acreage of such development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality as this oil and gas lease calling forth the lands or portion thereof consolidated, the royalty distribution and recording the same in the recorder's office of the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinabove and fully within the Lessee to terminate with another unit. If the well on said development unit shall thereafter be shut in, the net rental for shut-in royalty hereinbefore provided for such lease shall be payable in the amount of the parcels of land comprising said unit in the proportion that the acreage of such parcel bears to the entire acreage contained. Lessee shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rental herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid to each several owners in the proportion that the acreage owned by such each owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery at a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessee agrees that where and if the within lease is assigned, the Lessee herein shall have no further obligations hereunder. The Lessee further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay any taxes or other or fees against the Lessee's interest in the premises as herein forced and thereupon to become subrogated to the rights of such claimant or tax holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing lease on the premises.

14. The Lessee shall keep, when as represented by the Lessee, all pipelines used in connection with or gas to, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises in accordance with state laws. Any damages if not amicably agreed upon, to be constituted and determined by three disinterested persons, one thereof to be appointed by the Lessee, one by the Lessor, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appointee and shall share the cost of the third appointee. Arbitration shall be mandatory. No suit shall be filed within 180 days of arbitration have or pending.

EXHIBIT

2

15. The Lessee shall have the privilege of using sufficient oil, gas and water for operating on the premises and the right at any time during or after the expiration of this lease to remove all pipe, and casing, machinery, equipment or fixtures placed on the premises. The Lessee shall have the right to surrender this lease or any portion thereof by written notice to the Lessor describing the portion which it elects to surrender, or by returning the lease to the Lessor with the endorsement of surrender thereon, or by recording the surrender or partial surrender of this lease, any of which shall be a full and legal surrender of this lease as to all of the premises or such portion thereof as the surrender shall indicate and a cancellation of all liabilities under the terms of such one all portion hereunder relating in any way to the portion or the premises included in said surrender, and the rent and considerations set forth shall be reduced in proportion to the acreage surrendered.

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, that lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the unable lease expire for a period of ninety days after the cessation of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have sixty (60) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be governed by the provisions of paragraph 10 hereof. In the event Lessor has given such notice and the breach alleged shall not be cured within the time herein provided, Lessor may at its option cancel this lease. Neither the service of said notice nor the doing of any act by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

18. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All covenants and conditions between the parties hereto shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional documents as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas based herein and both other instruments relating to the sale of production or any as requested by Lessee or others.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signature	Social Security or Tax ID No.
Rebecca Simms	Lawrence Hubbard Jr.	
	Lucselatte M. Hubbard	

STATE OF Ohio
COUNTY OF Monroe } SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named Lawrence Jr. & Lucselatte Hubbard husband & wife

who acknowledged to me that they did execute the foregoing instrument and that the same is their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Woodsfield, Oh 43793

this 2 day of Mar, 20 06.

My commission expires Sept 3, 2007.

Rebecca Simms
Notary Public

MONROE CO. RECORD OF Official Records
VOL. 145 PAGE 117
RECEIVED
06 APR 14 AM 11:47
RECORDED April 14, 2006
MARTHA LOUISE REID
RECORDER FEE $28.00

045314

330297
6891

This instrument was prepared by: BECK ENERGY CORPORATION, 210 1st St, Barnesville, OH 43924

OIL AND GAS LEASE

No. _____ Assign _____
From _____
To _____
Post Office _____
Date _____, 20
Term _____ Years
Located _____
Rec'd for Record _____, 20
Recorded _____, 20
Book _____ Page _____
County Recorder

Jamison Printing Co., Alliance, Ohio 44601

ma B&T (83)

THIS AGREEMENT, made and entered into this 29 day of JANUARY, 20 03 and between DONALD W. VANLEY (SINGLE) PO. 248 NEW MATAMORAS OH. 45767 (Phone) 1-740-865-3709

reinafter called the Lessor, and

ECK ENERGY CORPORATION, Box 1075, Ravenna, OH 44266

reinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants d agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operation for, producing and removing oil and gas and all the constituents reof, and of injecting air, gas, brine and other substances from any source and into any subsurface strata, other than potable water strata and workable coal strata, (including but not limited the right to inject gas wells on the leasehold property and to otherwise conduct all such secondary or tertiary operations as may be required in the opinion of the Lessee,) and to transport by pelines or otherwise across and through said lands oil, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right transport gas from other properties across the leasehold premises shall survive the term of this lease for so long as the transportation of such gas may be desired by the Lessee, and of placing tanks, equipment, roads and structures thereon to produce and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid rposes, being all that certain tract of land situated in Section/Lot/District No. 29 of JACKSON Township MONROE County, Ohio, unded substantially as follows:

rth by lands of C. MEANDLE

st by lands of U.S.A. AND G. HAUGHT

uth by lands of M. SWALLOW

est by lands of J. TAYLOR

ing all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 50.00 res, more or less, and being the property described in Deed Volume _____ Page _____ of the _____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and so much longer thereafter as oil or gas or their constituents e 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 and as ovided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the te hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of 250.00 Dollars each year, payments be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:
(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of like grade and gravity prevailing on the date such oil is run into tanks or pipelines.
(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per ousand cubic feet of such gas as marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 16 ounces above 14.73 pounds mospheric pressure, at a standard base temperature of 60° Fahrenheit and stipulated flowing temperature of 60° Fahrenheit, without allowance for temperature and barometric variations less any rges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 30th day after receipt of ch lands by the Lessee.
(C) Lessee to deduct from payments to (A) and (B) above from receipts of proceeds by Lessee, Lessor's proratio share of any tax imposed by any government body.
(D) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of the lowest field market price paid by any public utility in the state of the well head for gas of like e and quality, and on the same basis that such utility would pay for such gas, including any escalation in price that such utility would pay for such gas as if a contract for the sale of same d been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to DONALD W. VANLEY at SAME AS ABOVE

r the said named person shall continue as Lessor's agent to receive any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their stituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership as hereinafter provided.

6. The Lessor may, at Lessor's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the ed premises, at Lessor's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any curtailments or shut-in by any purchaser of the gas. The first e hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of two hundred thousand cubic feet of gas taken in each year shall be paid for at the last published es of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessor to lay and maintain the pipeline and furnish regulators and other essary equipment at Lessor's expense. Lessee shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition precedent that the Lessor shall scribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessor shall maintain the said pipeline, regulators and equipment good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessor shall take excess gas as aforesaid in any year and fail to pay for same the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been advised as to the risks ident in the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessor's lines or equipment, or whether same be caused by Lessee's ipment or well operation; and Lessor agrees to hold Lessee and the well operator and all parties in interest in any well on the leasehold premises harmless from any claims of any nature atsoever which may rise by the usage of gas from any such well by Lessor, his heirs, executors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the asehold premises wherein someone other than the Lessor is entitled to take the gas under this Paragraph 6, that the gas supply will be terminated by Lessee until the Buyer of the property ntered an agreement regarding the usage of the gas in the same form as the within agreement. In the absence of such an agreement free gas under this provision shall terminate, the within nt of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, ess within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve nth period resumes the payment of delay rental as hereinabove provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the mises, or should the Lessor desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the sation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and d off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are stated, the advance royalty payable hereunder shall be made on the basis of 00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein nted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form an oil and gas development nit not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more an one well on such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises ith the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, only the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in accordance with the provisions of this lease, and ided further that the Lessor agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage nstituted hears to the total number of acres comprising said development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality his oil and gas lease setting forth the leases or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office at the courthouse in the county in which leased premises are located and by mailing a copy thereof to the Lessor at the address hereinabove set forth unless the Lessee is furnished with another address. If the well on said development shall thereafter be shut in, the well rental for shut-in royalty hereinbefore provided for such use shall be payable to the owners of the parcels of land comprising said unit in the proportion the acreage of each parcel bears to the entire acreage consolidated. Lessee shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rentals herein provided for shall be paid to Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid ch several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly ed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessor waives notice of any assignment or transfer of the within lease. Failure of payment ntal or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further gations hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in premises as herein leased and thereupon to become subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply as the payment ay existing liens on the premises.

14. The Lessee shall bury, when as requested by the Lessor, all pipelines used to conduct oil or gas to, on, through and off the premises and pay all damages to growing crops caused by ations under this lease. Lessee agrees to restore the premises in accordance with state laws. Any damages if not mutually agreed upon, to be ascertained and determined by three interested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and ing on all parties. Each party shall pay the cost of their appraiser and shall share the cost of the third appraiser. Arbitration shall be mandatory. No well shall be drilled within 200 feet of any ing barn or dwelling.

EXHIBIT
tabbies
3

...ertion which it elects to surrender, or by returning the lease to the Lessor when the enforcement or termination thereof is ...
...shall be a full and legal surrender of this lease as to all of the premises or such ... thereof as the surrender shall indicate and a cancellation of all liabilities under the terms of such and ...
...other terms relating in any way to the portion or all the premises indicated on said s... and the land rental therefore set forth shall be reduced in proportion to the acreage s...

5. In the event the Lessee is unable to perform any of the acts to be performed by L...ns by reason of force majeure, including but not limited to acts of God, strikes, riots, ac...mmodat... actions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in ...al shall within lease expire for a period of ninety days after the termination of any force majeure.

7. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in ...respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged ...Lessee. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days ...service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission ...resumption that Lessee has failed to perform all its obligations hereunder.

8. In consideration of the acceptance of this lease by the Lessee, the Lessor agree for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this ...shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

9. All covenants and conditions between the parties hereto shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to ...and the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject ...ter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional ...ments as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required ...Lessee or others.

10. LESSEE IS NOT RESPONSIBLE FOR PRE-EXISTING WELLS ON THIS PROPERTY.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signatures	Social Security or Tax ID No.
James M. Beck	Donald W Yonley	
	DONALD W. YONLEY	

STATE OF Ohio)
COUNTY OF MONROE) SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named DONALD W. YONLEY (SINGLE)

who acknowledged to me that HE did execute the foregoing instrument and that the same is HIS free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at NEW MATAMORAS, OHIO

this 29 day of JANUARY, 20 03.

James M. Beck
Notary Public

MONROE CO. RECORD OF Official Records
VOL: 98 PAGE 321
RECEIVED
03 FEB -5 PM 1:10
RECORDED February 5, 2003
MARTHA LOUISE REID
RECORDER FEE $14.00

NOTARIAL SEAL STATE OF OHIO

JAMES M. BECK
Notary Public, State of Ohio
My Commission Expires 12-12-07

033090

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1878, Ravenna, OH 44266

No. ____ Acres ____
OIL AND GAS LEASE
From ____
Post Office ____ To ____
Date ____, 20 ____
Terms ____ Years
Leased ____
Rec'd for Record ____, 20 ____
Recorded ____, 20 ____
Book ____ Page ____
County Recorder

Jerman Printing Co., Alliance, Ohio 44601

200

COPY

OIL AND GAS LEASE

Form 887 (00)

THIS AGREEMENT, made and entered into this 11 day of OCTOBER, in 05, by and between

DAVID W. MATORS (SINGLE)
48833 KEYLOR HILL RD.
WOODSFIELD, OHIO 43793 Phone 740-472-2130

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, 257 1875, Kansas, OH 43230

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, water and other substances into any strata and into any hydrocarbon bearing strata, water from potable water strata and materials and steam, (including but not limited to the right to inject any waste or the byproducts thereof and to otherwise conduct all such secondary or tertiary operations as may be incident to the nature of the Lessee,) and to transport by pipelines or structures located on or through said lands, all gas and their constituents from any source thereon, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties except the necessary pipelines that service the lease of this lease for as long as the transportation of such gas may be desired by the Lessee, and of placing of tools, equipment, wells and structures thereon to process and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/Fractional No. 2 of CENTER Township, MONROE County, Ohio, bounded substantially as follows:

North by lands of KEYLOR HILL RD.

East by lands of G. BROWN & KEYLOR HILL RD.

South by lands of DEEGEN & MARWALD ETAL

West by lands of H. SPENGLER & L. BRUSSER

Acreage of the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/Fractional or adjoining in Mond/Lick/Section, containing 54 acres, more or less, and being the property described in Deed Volume ____ Page ____ of the ____ County Record of Deeds.

2. This lease and rights granted hereunder be solely subject to the Lessee for a term of one year and as much longer thereafter as oil or gas or their constituents are produced 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 and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of 55.00 dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(a) To deliver to the credit of the Lessor in tanks or pipelines, on royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such 1/8 royalty oil at the published posted price for similar grade and quality prevailing on the date such oil is run into tanks or pipelines;

(b) To pay to the Lessor, as royalty for the gas produced and sold of the premises from each well drilled thereon, the sum of one-eighth (1/8) of the price paid by Lessee per thousand cubic feet of gas for so much of such gas as produced and sold, measured by instruments with Lessee's Line for the measurement of gas of varying pressures, on the basis of 14.73 pounds absolute pressure, at a standard base temperature of 60° Fahrenheit and adjusted to a standard base temperature of 60° Fahrenheit, without allowance for temperature and hydrostatic variations from any charges for transportation or compression paid by Lessee in delivery the gas for sale. Payment of royalty for gas included during any calendar month is to be on or about the 20th day after receipt of such funds by the Lessee.

(c) Lessee is entitled from payments in (b) and (d) above from receipts of revenues by Lessee, Lessee's payments shall be made by any government body.

(d) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of the lowest field posted price paid by any public utility in the state of the well field for gas of like kind and quality, and on the same basis that such utility would pay for such gas, including any escalation in price that such utility would pay for such gas as a condition for the sale of gas and have actual full of the gas of which gas production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to DAVID W. MATORS SAME AS ABOVE

and the said check payee shall constitute the Lessor's agent to receive any and all such payments under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder and delivery to the Lessee of notice of change of ownership or transfer of payment.

6. The Lessee may, at Lessee's own risk and cost, be a pipeline to pay you your gas out on the premises, and take gas produced from said well for domestic use in your dwelling house on the leased premises, at Lessee's own risk, subject to the usual hazards of development of the well by the Lessee, and subject to any restrictions or rules of the gas. The first hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of that hundred thousand cubic feet of gas taken in each year shall be paid for at the field published price of the gas utility in the area, pursuant to the leased premises of the field market rate, published in Ohio. Lessee is hereby authorized to place the meter provided that the Lessee shall be responsible for all of Lessee's expense. Lessee agrees, at the request of Lessee, to install a meter to measure said gas. This privilege is upon the condition provided that the Lessee shall subscribe to and be bound by the reasonable rules and regulations of the Lessee's company in the use of said gas, and Lessee shall indemnify the said company, regulations and conditions of good repair and keep all of gas lines and appurtenances thereof and not let the Lessee's company lines of gas. If the Lessee shall take meters and be responsible to pay for the same, the Lessee may deduct payment for that amount gas from the rentals or royalties accruing to the Lessee hereunder. Lessee acknowledges that he has been advised as to the risks involved in the taking of gas in this manner, and Lessee agrees to assume all such risks whether from the source by Lessee's lines or equipment, or whether same be caused by Lessee's employees or not operations. And Lessee agrees to hold Lessee and the said operator and all parties in interest in any and all the leasehold premises harmless and free of any and all claims, statement or not operations. And Lessee agrees to hold Lessee and the said operator and all parties in interest in any and all the leasehold premises harmless and free of any and all claims, statement or not operations, and Lessee agrees to assume all such risks whether from the source by Lessee's lines or equipment, or whether same be caused by Lessee's employees or not operations. Lessee further agrees that upon the sale or transfer of the property which may sell by the lease of gas from any, and all by Lessee, his heirs, successors, administrators and assigns. Lessee further agrees that upon the sale or transfer of the leasehold premises which may sell by the lease of gas from any, and all by Lessee, his heirs, successors, administrators and assigns. Lessee further agrees that upon the sale or transfer of the leasehold premises which may sell by the lease of gas from any, and all by Lessee, his heirs, successors, administrators and assigns. Lessee further agrees that upon the sale or transfer of the property

20. LESSEE IS NOT RESPONSIBLE FOR ANY WELLS EXISTING ON LESSOR'S PROPERTY.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of	Witnesses	Social Security or Tax ID No.
James M. Beck	David W. Majors	
	DAVID W. MAJORS	

STATE OF OHIO
COUNTY OF MONROE } ss:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named DAVID W. MAJORS (SINGLE)

who acknowledged to me that HE did execute the foregoing instrument and that the same is HIS free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at WOODSFIELD, OHIO

this 11 day of OCTOBER in 05.

James M. Beck
Notary Public

JAMES M. BECK
Notary Public, State of Ohio
My Commission Expires 12-19-07

010139 PAGE 261

This instrument was prepared by: BECK ENERGY CORPORATION,

OIL AND GAS LEASE

No. Series

From

Post Office

To

042062

Date

Term

Location

MONROE CO RECORD OF Official Records
VOL 138 PAGE 260
RECEIVED
05 NOV -2 AM 11:46
RECORDED November 2, 2005
MARTHA LOUISE REID
RECORDER FEE $28.00

Rec'd for Record
Recorded
Rec'd

Jerman Printing Co., Jefferson, Ohio 44047

2

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Amended Class Action Complaint was sent by regular U.S. Mail, postage prepaid, this 30th day of September, 2011, to the following:

Beck Energy Corporation
4857 Harding Avenue
Ravenna OH 44266

James W. Peters
Attorney at Law

EXHIBIT 3

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED
2011 SEP 30 PM 3: 14
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK
991 Brookpoint Drive
Macedonia, Ohio 44056

And

LORI HUSTACK
991 Brookpoint Drive
Macedonia, Ohio 44056

And

LAWRENCE HUBBARD
3685 Johnston-Alexandria Road
Alexandria, Ohio 43001

And

MICHELLE HUBBARD
3685 Johnston-Alexandria Road
Alexandria, Ohio 43001

And

DONALD W. YONLEY
P.O. Box 248
New Matamoras, Ohio 45767

And

DAVID MAJORS
48433 Keylor Hill Road
Woodsfield, Ohio 43793

Plaintiffs,

CASE NO. 2011-345

JUDGE: JULIE SELMON

SECOND AMENDED

CLASS ACTION COMPLAINT

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____ Deputy Clerk

COMMON PLEAS COURT
MONROE COUNTY, OHIO

vs.

BECK ENERGY CORPORATION
4857 Harding Avenue
Ravenna, Ohio 44266

Defendant.

Now come Plaintiffs, L arry and Lori Hustack ("Hustacks"), Lawrence and Michelle Hubbard ("Hubbards"), Donald W. Yonley ("Yonley"), and David Majors ("Majors"), by and through undersigned counsel, and for their Second Amended Class Action Complaint against Defendant Beck Energy Corporation ("Beck"), allege and aver as follows:

IDENTIFICATION OF PARTIES AND STATEMENT OF JURISDICTION

1. Defendant Beck Energy Corporation is an Ohio corporation with its principal place of business in Portage County, Ohio, and which conducts extensive business in Monroe County, Ohio.

2. The Hustacks, husband and wife, are titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 89.75 acres (hereinafter referenced as "Hustack Acreage").

3. The Hubbards, husband and wife, are titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 46.846 acres (hereinafter referenced as the 'Hubbard Acreage").

4. Donald Yonley, is titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 50 acres (hereinafter referenced as "Yonley Acreage").

5. David Majors, is titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 54 acres (hereinafter referenced as "Majors Acreage").

6. Over the years, Beck Energy Corporation has entered into oil and gas leases with various land owners of realty located in Monroe County, Ohio, constituting in excess of 21,000 acres of land.

7. Beck entered into a standard form oil and gas lease with not only the Hustacks, Hubbards, Yonley and Majors, but also with approximately 400 landowners in Monroe County. The lease terms at issue in this litigation appear identical.

FACTS COMMON TO ALL CAUSES OF ACTION

8 The Hustacks, along with the Hubbards, Yonley, Majors and approximately 400 additional landowners/Lessors in Monroe County, executed oil and gas leases with Beck, or are successors in interest to said lessors, which are essentially identical to Plaintiffs' Exhibits 1-4.

9. All of the leases contain terms and conditions that are contrary to and violative of Ohio Public Policy as they are, among other things, leases in perpetuity without timely development.

10. For all of the leases, the Defendant breached express covenants and implied covenants which arose by operation of law and Ohio Public Policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that affect Plaintiffs' royalty interest with reasonable care and diligence.

COUNT I – DECLARATORY JUDGMENT

11. Plaintiffs, Larry Hustack and Lori Hustack, are husband and wife and are the titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 89.75 acres.

12. On or about August 14, 2008, Defendant, as Lessee, and Alonzo F. Wilson and Sherry S. Wilson, husband and wife as Lessors, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 174, pg. 229, of the records of the Monroe County Recorder (hereinafter referred to as the "Hustack Lease"). A copy of Hustack Lease is attached hereto as Exhibit 1 and incorporated herein as if fully rewritten. Plaintiffs' ownership and title to the Hustack Acreage is subject to and encumbered by the Hustack Lease, as Plaintiffs are the successors in interest to the original Lessors as delineated in said Hustack Lease pertaining to the 89.75 acres comprising the Hustack Acreage.

13. Plaintiffs, Lawrence Hubbard and Michelle Hubbard, are husband and wife and are the titled owners of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 46.846 acres.

14. On or about March 2, 2006, Defendant, as Lessee, and Lawrence and Lieselotte Hubbard, husband and wife as Lessors, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 145, pg. 117, of the records of the Monroe County Recorder (hereinafter referred to as the "Hubbard Lease"). A copy of Hubbard Lease is attached hereto as Exhibit 2 and incorporated herein as if fully rewritten. Plaintiffs' ownership and title to the Hubbard Acreage is subject to and encumbered by the Hubbard Lease, as Plaintiffs are the successors in interest to the original Lessors as delineated in said Hubbard Lease pertaining to the 46.846 acres comprising the Hubbard Acreage.

15. Plaintiff, Donald W. Yonley, is the titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 50 acres.

16. On or about January 29, 2003, Defendant, as Lessee, and Donald W. Yonley as Lessor, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 98, pg. 321, of the records of the Monroe County Recorder (hereinafter referred to as the "Yonley Lease"). A copy of Yonley Lease is attached hereto as Exhibit 3 and incorporated herein as if fully rewritten. Plaintiff's ownership and title to the Yonley Acreage is subject to and encumbered by the Yonley Lease.

17. Plaintiff, David Majors, is the titled owner of, and in present possession of, certain realty located in Monroe County, Ohio, comprised of approximately 54.5 acres.

18. On or about October 11, 2005, Defendant, as Lessee, and David Majors as Lessor, entered into a certain oil and gas lease with Beck which was subsequently recorded in Vol. 139, pg. 260, of the records of the Monroe County Recorder (hereinafter referred to as the "Majors Lease"). A copy of Majors Lease is attached hereto as Exhibit 4 and incorporated herein as if fully rewritten. Plaintiff's ownership and title to the Majors Acreage is subject to and encumbered by the Majors Lease.

19. Since the date of the Hustack, Hubbard, Yonley and Majors Leases, and in contravention thereof, Defendant has not prepared to drill a well on the Hustack, Hubbard, Yonley or Majors Acreage, has not drilled a well on the Hustack, Hubbard, Yonley or Majors Acreage, and has not paid any royalties to any of them.

20. Plaintiffs are entitled to a declaratory judgment that the Hustack Lease, the Hubbard Lease, the Yonley Lease and the Majors Lease a re th erefore forfeited, cancelled,

unenforceable, voided and held for naught, for reasons including, but not limited to, the following:

(a) Defendant breached express covenants and breached implied covenants which arose by operation of law and Ohio Public Policy, including but not limited to the covenant to reasonably develop the leasehold, the covenant to drill an exploratory well, and the covenant to conduct all operations that affect Plaintiffs' royalty interest with reasonable care and diligence; and

(b) Defendant abandoned the Hustack, Hubbard, Yonley and Majors Leases and the leasehold interests; and

(c) The terms and conditions of the Hustack, Hubbard, Yonley and Majors Leases as to Plaintiffs are unconscionable; and

(d) The terms and conditions of the Hustack, Hubbard, Yonley and Majors Leases are contrary to and violative of Ohio Public Policy; and

(e) There has been a failure of consideration; and

(f) The equitable remedy of declaring the Hustack, Hubbard, Yonley and Majors Leases to be forfeited, cancelled, unenforceable, voided and held for naught is appropriate and required as any legal remedies would be inadequate, as monetary damages are not ascertainable, as a forfeiture is necessary to do justice to the parties, and as forfeiture is warranted to assure development of the land and the protection of the Plaintiffs' interest.

COUNT II – QUIET TITLE

21. Now come the Plaintiffs, Larry A. Hustack and Lori Hustack, Lawrence and Michelle Hubbard, Donald Yonley and David Majors, by and through the undersigned counsel, and for Count II of their Complaint, as a quiet title against Defendant, state:

a) Reallege and reaver the allegations contained in Count I as if fully rewritten herein;

b) Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code §5303.01, quieting their title as to the Hustack Acreage, the Hubbard Acreage, the Yonley Acreage and the Majors Acreage, as against Defendant by and through the forfeiture, release and cancellation of the Hustack, Hubbard, Yonley and Majors' Leases, as valid encumbrances of record. and by extinguishing any interest which Defendant has or may claim to have in the Hustack, Hubbard, Yonley and Majors Acreage.

CLASS ACTION ALLEGATIONS

22. Plaintiffs bring this suit as a Class Action on behalf of themselves and all other similarly situated (the "Class") under the applicable provisions of Rule 23 of the Ohio Rules of Civil Procedure. Plaintiffs seek certification of the Class defined as "all landowners/Lessors of land in Monroe County, Ohio, who are Lessors under, or who are successors in interest of Lessors, under a standard form oil or gas lease with Beck Energy Corporation, where Beck Energy 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 the lease or thereafter."

23. This case is brought as a Class Action under Rule 23 (A) and (B)(2) and/or (B)(3) of the Ohio Rules of Civil Procedure, for the reasons set forth in the following paragraphs.

24. Numerosity. The members of the Class are so numerous that separate joinder of each member is impracticable. Upon information and belief, and subject to class discovery, the class consists of approximately 400 members who were Lessors, or who are successors in interest to Lessors, under a Beck oil and gas lease.

25. Commonality and Predominance. There are numerous, substantial significant questions of law and fact common to the Class relating to the Beck Lease which control the

determination of liability in this litigation, and which predominate over any other issues that affect only individual Class members. Among the common questions of law and fact are the following:

> The terms of the written lease between the Lessors and Beck Energy; whether the lease violates public policy in that it is a lease in perpetuity; whether Beck failed to fulfill the express and implied covenants within the lease; whether the lease terms and provisions are unconscionable; whether there was a failure of consideration; and whether the lease and leasehold interest was abandoned.

26. Typicality. The claims of the Hustacks, Hubbards, Yonley and Majors are typical of, if not identical to, the claims of the Class members in that each of the Class members are subject to the same terms of the same lease with Beck.

27. Adequacy of Representation. Plaintiffs Hustack, Hubbard, Yonley and Majors are more than adequate representatives of the Class, in that they each have either executed a lease with Beck Energy Corporation for oil and gas exploration, or are the successors in interest under the same lease, as have all of the other Class Members.

28. Superiority. Class representation provides a fair and efficient method, if not the only method for adjudicating this controversy. It is superior to other available methods. This Court has jurisdiction over the named Plaintiffs as well as the putative Plaintiffs and the Defendant. The Plaintiffs and putative Plaintiffs all own land in this county. The Defendant conducts business in this county. There are no particular overriding and individual interests of any Class member controlling the prosecution of these claims, and the denial of Class treatment and reliance on individual litigation would produce inefficiency, potentially inconsistent adjudication of common issues, and waste litigants' and judicial resources, while pricing many Class members out of Court.

RELIEF SOUGHT

Wherefore, Plaintiffs and the Class Members demand judgment against the Defendant by entering the following orders:

A. Plaintiffs' requested declaratory judgment as specified above, and a judgment quieting title as specified above, and for costs and attorney's fees and other further relief to which said Plaintiffs may be entitled in law or equity.

B. Any and all further relief as this Court deems just and proper.

Respectfully submitted,

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mropchock@ralaw.com
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Akron, OH 44308
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and

Jim W. Peters (0009360)
Peters Law Offices
107 W. Court Street
Woodsfield, OH 43793
Telephone: 740.472.1681
Facsimile: 740.472.1718

ATTORNEYS FOR PLAINTIFFS

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OIL AND GAS LEASE

(Form 000-000)

This agreement, made and entered into this 14th day of Aug, 19 08, by and between Alonzo F. Wilson and Sharony T. Wilson (H&W)
14429 Bondi Ridge Rd.
Woodsfield, Ohio 43793 Phone 740-472-1060
hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1928, Lancaster, OH 43130

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable considerations in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, water and other substances into any formation and for any other purposes as may be required in the opinion of the Lessee, and to transport by pipelines or otherwise means and through said lands oil, gas and their constituents from the premised and other lands, regardless of the source of such gas or the location of the wells, which right is to be exercised in such manner as not to damage the premises, together with the right to other lots and upon the leased premises all that for the aforesaid purposes, being all the certain tract of land situated in Section/Lot/District No. 544 of Warren Twp. Twenty Monroe County, Ohio, Section Twp. Sec. 4 located generally as follows: Warren Twp. Sec 8

North by lands of R. Wilson & D. Pletcher & C. White — Bailey
East by lands of D. Haven, Sr. — D. Haven, Sr.
South by lands of To-B State — T.R.-B
West by lands of T. Wilson & Sec. line — T.R.-B

containing 108 acres of the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, as the same may be, and being the property described in Deed Volume ____ Page ____ of the ____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be solely enjoyed by the Lessee for a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, at the happening of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(a) To deliver to the credit of the Lessor or royalty owner, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessor's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the prevailing rate for all the gas and gasoline prevailing on the date such oil is run into tanks or pipelines.

(b) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from such well, quarterly, at the rate of $ as stated above (1/8) percent of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, measured in accordance with Lessee's law for the measurement of gas at regular pressures, on the basis of 16 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted during temperature of 60° Fahrenheit, without allowance for compression and hereinafter calculated from any charges for compression or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month is to be on or about the 30th day after receipt of such funds by the Lessee.

(c) Lessee to defend lease payments to (%) and (%) above from receipts of payments by Lessee, Lessee's payments shall in no way be imposed by any governmental body.

(d) In the event Lessee does not use the gas to inform, Lessee shall be paid on the basis of the lowest field market price paid by any public utility in the state of the well and lease for gas of this kind and quality, and on the same basis that such utility would pay for such gas, including any conditions to pay that such utility would pay for such gas on a contract for the sale of gas had been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and delivered to Alonzo F. Wilson and Sharony T. Wilson at Box Bldg. Sharon Bldg.

6. The Lessor may, at Lessor's own risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessee's gas risk, subject to the use and the right of discontinuance of the well by the Lessee, and subject to any conditions or charges by any government or charges by any government. Lessee shall not be liable for any loss or damage to the premises or to any person or property on the premises, or to the use of gas or oil or gas or their constituents, or to the health or sanitary condition of the premises or any other premises under this lease operations or attempt to comply in the premises, or in the

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signature	Social Security or Tax ID No.
	x Alonzo F. Wilson	
	x Sherry J. Wilson	

STATE OF Ohio
COUNTY OF Monroe

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named Alonzo F. & Sherry J. Wilson (husband and wife)

acknowledged to me that they executed the foregoing instrument and that the same is their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Woodsfield, Oh.

this 14 day of Aug, A.D. 08

Rebecca Sisk
Notary Public
My commission Expires Sept 3, 2012

VOL 174 PAGE 230

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1019, Jeromesville, OH 44240

OIL AND GAS LEASE

From

To

050232

Lessor

Lessee

Date

Term

Post Office

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OIL AND GAS LEASE

Form 887 (R)

This AGREEMENT, made and entered into this 2nd day of Mar., 19 96, by and between Squire [illegible] Hubbard & Gisselle [illegible] Hubbard (Husband & Wife) 36947 Richard Rd. Dodgeville 472-5211 OH 43793

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, [illegible]

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of ten dollars ($10.00) and other valuable considerations in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and marketing oil and gas and all the constituents thereof, and of injecting air, gas, water and other substances into any horizon and into any subsurface strata, other than potable water strata and carbonate rock strata, including but not limited to the right to install any pipeline on the described property and to maintain operations of such nature and by such operations as may be required in the opinion of the Lessee, and to transport by pipeline or otherwise subject and through said lands all gas and oil and other substances from the premises and other lands, regardless of the source of such gas or the location of the lands, which right to transport gas from other properties across the described premises shall confer the use of this lease for as long as the transportation of such gas may be desired by the Lessee, and of placing all tools, equipment, supply and structures thereon to prosecute said operations for the said purposes, together with the right to enter into and upon the listed premises at all times for the aforesaid purposes, being all that certain tract of land situated in Township 7, Section [illegible], County Monroe, State of Ohio, described substantially as follows:

North by lands of Karen Parsons

East by lands of Unknown Trust

South by lands of Larry Cook

West by lands of Moody & Nancy Hudson

being all the property owned by Lessor in which the Lessor may have any rights in that section/lot/tract or adjoining sections/Lots/tracts, containing 35.00 acres, more or less, and being the property described in Deed Volume ____, Page ____, of the ____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunto be jointly enjoyed by the Lessor for a term of ten years unless such longer term shall be or gas or their constituents are produced or are capable of being produced on the premises covering operations, in the judgment of the Lessee, or on the premises shall be operated for the Lessee in the search for other gas and oil provided hereunto.

3. Full time, however, shall terminate and will not all rights of either party hereunto shall cease and terminate unless, within 12 months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall therefor pay a delay rental of $50.00 dollars each year, payments to be made quarterly annually commencing at once. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(a) To deliver to the credit of the Lessor in kind or pipeline, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty of the prevailing market for all of the produced royalty prevailing on the date such oil is run into tanks or pipelines.

(b) To pay to the Lessor, as royalty for the gas produced and used off the premises and produced from such well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as produced and used, measured in accordance with Dodd's Line for the measurement of gas at varying pressures, on the basis of 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted during temperature of 60° Fahrenheit, without allowance for temperature and barometric variations and any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month is to be on or about the 20th day after receipt of such funds by the Lessee.

(c) Lessee is authorized to withhold payments in (a) and (b) above from receipts of proceeds by Lessee, Lessor's pro-rata share of any tax imposed by any government body.

(d) In the event Lessee does not use the gas in others, Lessor shall be paid on the basis of the local field market price paid for any public utility in the field at the well head for gas of the highest cost quality, and either meet tests that such utility would pay for such gas, or if a contract for the sale of such gas has been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to Mr. Squire Hubbard Sr. [illegible] Dodgeville, Oh 43793 and the said listed payee shall continue as Lessor's agent to receive any and all sums payable under this lease regardless of ownership in the premises, or in the oil or gas or their constituents, or in the receipts or operating proceeds hereunder until delivery to the Lessor of notice of change of ownership or termination provided.

6. This lease may, at Lessor's sole risk and cost, be a pipeline to use any gas used on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's own risk, subject to the sole and the right of abandonment of the well by the Lessee, and subject to any contractual or statutory by any successor of the gas. The first two hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of the hundred thousand cubic feet of gas taken in each year shall be paid for at the last published rate of the gas utility in the town or area nearest to the leased premises in the field worked rate, whichever is higher. Lessor to lay and maintain the pipeline and branch connections and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, furnish a meter to measure said gas. The privilege to open the condition provided that the Lessee shall maintain is not to be based by the reasonable rules and regulations of the Lessee according to the use of the gas, and Lessee shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same in a safe manner under a competent body of gas. If the Lessor shall take another gas or discontinue to any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any monies or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been informed to be the sole interest in the mineral of gas in this manner, and Lessee agrees to assume all such risks whether used for interest by Lessee's lessee or purchased, or whether used by Lessee's employees and operations, and Lessee agrees to hold Lessee and the well operator and all parties in interest in any and on the leasehold premises harmless from any claims of any nature whatsoever which may flow by the usage of gas from any well, well holes, operations, abandonment and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises whether sharing other than the Lessor is entitled to take the gas under this Paragraph 6, that the gas supply will be transferred by Lessee and the Buyer of the property executes an agreement regarding the usage of the gas in the same form as the within agreement. In the absence of such an agreement then gas under this provision shall terminate, the whole right of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period requires the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing and and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an annual royalty in the amount and under the same terms and conditions provided for delay rental with production in identical and full all the provisions of said and is plugged and abandoned according to law. In the event no delay rentals are owed, the annual royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor in stipulated and full consideration for all the rights herein granted to the Lessee, with the further right of drilling or not drilling on the leased premises, whether to drill producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessee hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof in whole thereof with other lands to form an oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well in such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the purposes and exposure of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the lease of the lands in which such well is located may take gas for use in one dwelling house on such lessor's lands in accordance with the provisions of this lease, and provided further that the lessor agrees to accept as full of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the average acreage contributed hereunto by the land owners of such developing and development unit. The Lessee shall effect such consolidation by recording a declaration of consolidation with the county recorder in the oil and gas transcribing book for leases or pipeline lease agreement, the royalty distribution and mapping the same in the recorder's office of the county in which the leased premises are located and by posting a copy thereof in the Lessor of the within hereinbefore set forth where the lessee is familiar with such unitization. If the end so said development unit shall thereafter be shut in, the total amount to shut-in royalty hereinbefore provided for such one shall be payable to the owners of the parcels of land comprising said unit in the proportion that the acreage of such parcel bears to the entire average consolidated. Lessee shall have the right to amend, alter or operate any such declaration of any time in the same manner as herein provided.

11. In case the Lessee owns a less interest in the above described premises than the entire and undivided fee simple thereto, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If title fail in several or more parts, or the ownership of any leased parcels should hereafter be questioned by suit, decree or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid in such several proportions between the several owners of such parcels as may bear to the entire acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties before transmission of assignment or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee assumes notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty for any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee hereto shall have no further obligations hereunto. The Lessee further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises or lands leased and thereupon to become subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing lien on the premises.

14. The Lessee shall have, when so requested by the Lessee, all pipelines used in conduct oil or gas to, on, through and off the premises and pay all charges in pending wage earned by operations under this lease. Lessee agrees to secure the premises in accordance with state law. Any damages if not amicably agreed upon, to be determined by three disinterested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appointee and shall share the cost of the third appointee. Arbitration shall be mandatory. The oil shall be delivered within 250 feet of existing lines or facilities.

EXHIBIT
2

16. The Lessee shall have the privilege of using sufficient oil, gas and water for operating on the premises and the right at any time during or after the expiration of this lease to remove all pipe, well casing, equipment, materials or fixtures placed on the premises. The Lessee shall have the right to terminate this lease at any position thereof by written notice to the Lessor stipulating the portion which it desires to surrender, or by recording the lease in the County with the endorsement of surrender thereon, or by recording the surrender or partial surrender of this lease, and in whole shall be a full and final surrender of this lease as to all of the premises or such portion thereof as the surrender shall indicate and a cancellation of all liabilities under the terms of such lease as to portion thereof relating to any part of the portion or all the premises surrendered or said surrender, and the land shall be released or not liable shall be released in proportion to the acreage surrendered.

17. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee for reasons of force majeure, including but not limited to acts of God, nature, state, and governmental institutions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the lessee has perform that act or acts and in no event shall the initial lease exceed or a period ninety days after the termination of any force majeure.

17. In the event Lessee considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessee shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to cure or commence to cure all or any part of the breaches alleged by Lessee. The service of said notice shall be conclusively by the mailing of such notice by Lessee as well lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any act by Lessee aimed to cure all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

18. In consideration of the consideration of this lease by the Lessee, the Lessee agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All covenants and conditions between the parties hereto shall extend to their heirs, personal representatives, successors and assigns, and the lessor hereby covenants and agrees to defend the title to the lands hereunto. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessee further agrees to sign such additional documents or pay to reasonably requested by Lessor to protect Lessor's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required by Lessee or others.

IN WITNESS WHEREOF the Lessor have hereunto set their hands.

Signed and acknowledged in the presence of:	Signature	Social Security or Tax ID No.
Rebecca S. [illegible]	James Hubbard Jr.	
	Lieselotte M. Hubbard	

STATE OF Ohio
COUNTY OF Monroe ss:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named James Jr. & Lieselotte Hubbard (husband & wife)

who acknowledged to me that they did execute the foregoing instrument and that the same is their free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Woodsfield, OH 43793

this 12 day of Mar, A.D. [illegible]

My commission expires Sept 3, 2007.

Rebecca S. [illegible]
Notary Public

MONROE CO. RECORD OF Official Records
VOL. 145 PAGE 117

RECEIVED
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RECORDED April 14, 2006
MARTHA LOUISE REED
RECORDER FEE $28.00

330297
6891

VOL 0145 PAGE 118

This instrument was prepared by: BECK ENERGY CORPORATION, [illegible]

OIL AND GAS LEASE

Date, Lessor, Lessee, Recorded in Book, Page, County Recorder, Rec'd for Record, Time, Fee, Notary Public, Expires, Address

Jenson Printing Co., Alliance, Ohio 44601

OIL AND GAS LEASE

Form 247 (R)

This AGREEMENT, made and entered into this 29 day of JANUARY, in 03, by and between DONALD W. VANLEY (SINGLE) PO. 248 NEW MATAMORAS, OH. 45768 (Phone) 1-740-865-3709 of hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1670, Kenova, OH 44288

hereinafter called the Lessee, witnesseth:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter mentioned, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing all said gas and all the constituents thereof, and of separating oil, gas, brine and other substances from any thereof and into any subsurface strata, other than potable water strata and excludes coal seams, (including but not limited to the right to inject any gas or the constituents thereof into and to otherwise conduct all such secondary or tertiary operations as may be required in the opinion of the Lessee,) and to transport by pipelines or otherwise through said lands all gas and that constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the hereinafter premises shall survive the term of this lease for as long as the transportation of such gas may be desired by the Lessee, and of placing of tanks, equipment, wells and structures thereon to produce and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. 29 of JACKSON Township MONROE County, Ohio, bounded substantially as follows:

North by lands of C. MERRILL

East by lands of U.S.A. AND G. HAUGHT

South by lands of M. SHAILOUR

West by lands of J. TAYLOR

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 50.00 acres more or less, and being the property described in Deed Volume ____, Page ____, of the ____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.

3. ~~Within twelve (12) months~~ from this lease and said and all rights of either party hereunder shall cease and terminate without, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of 250.00 dollars each year, payable on or before each anniversary date of this lease, a well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, on royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of the grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each and drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, computed in accordance with Royal's Law for the measurement of gas at varying pressures, on the basis of 15 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 65° Fahrenheit and adjusted specific temperature of 65° Fahrenheit, without allowance for temperature and barometric variations from any larger for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month is due on or about the 20th day after receipt of such funds by the Lessee.

(C) Lessee to deduct from payments to (A) and (B) above from receipts of proceeds by Lessee, Lessor's proportionate share of any tax imposed by any governmental body.

(D) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of the lowest field market price paid by any public utility in the state of the well head for gas of like and kind quality, and on the same basis that such utility would pay for such gas, including any escalation in price that such utility would pay for such gas as if a contract for the sale of same had been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to DONALD W. VANLEY

SAME AS ABOVE

and the said named person shall continue as Lessor's agent to receive any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership in manner and form provided.

6. The Lessee may, at Lessor's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's sole risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any curtailment or shut-in by any purchaser of the gas. The first one hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of one hundred thousand cubic feet of gas taken in each year shall be paid for at the last published rate of the gas utility in the area nearest to the leased premises at the field market rate, whichever is higher. Lessor to lay and maintain the pipeline and install regulators and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition provided that the Lessor shall abide by and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessor shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessor shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been advised as to the risks thereon in the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessee's lines or equipment, or whether same be caused by Lessee's equipment or well operation; and Lessor agrees to hold Lessee and the well operator and all parties to blame in any well on the leasehold premises harmless from any claims of any nature whatsoever which may arise by the usage of gas from any such well by Lessor, his heirs, executors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises wherein separate other than the Lessor is entitled to take the gas under this Paragraph 6, that the gas royalty will be terminated by Lessee until the buyer of the property enters an agreement regarding the usage of the gas in the same form as the within agreement. In the absence of such an agreement free gas under this provision shall terminate, the within gas of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, above within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the completion of said twelve month period commence the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date next year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the same terms hereinbefore provided for delay rental until production is marketed and all of the producing or such shut in plugged and abandoned according to law. In the event no delay rentals are issued, the advance royalty payable hereunder shall be made on the basis of 1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or whole thereto with other lands to form an oil and gas development unit not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises insofar as the crediting unto the premises and accounts of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that if any the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in accordance with the provisions of this lease, and provided further that the Lessee agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage contained herein in the total acreage of acres comprising said development unit. The Lessee shall effect such consolidation by recording a declaration of consolidation with the county recorder. In the oil and gas leases covering both the leases or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office of the county in which the leased premises are located but by mailing a copy thereof to the Lessor at the address hereinabove set forth unless the Lessee is furnished with another address. If this unit or said development shall thereafter be dissolved, the well owned for shut-in royalty hereinbefore provided for such use shall be payable in the amount of the gross of land comprising said unit in the proportion of that acreage of such parcel bears to the entire acreage consolidated. Lessee shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple estate, then the royalties and rentals herein provided for shall be paid to Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid such several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessee unless notice of any assignment or transfer of the within lease. Failure of payment rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee hereinabove shall have no further obligations hereunder. The Lessee further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises or lands leased and thereupon be subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing liens on the premises.

14. The Lessee shall carry, when as requested by the Lessor, all pipelines used to conduct oil or gas to, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessor agrees to restore the premises in accordance with state laws. Any damages if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appraiser and shall share the cost of the third appraiser. Arbitration shall be mandatory. No suit shall be filed within 180 days of any claim here or pending.

EXHIBIT

3

16. The Lessee shall have the privilege of using sufficient oil, gas and water [illegible] on said premises [illegible] and said casing, machinery, equipment or fixtures placed on the premises. The Lessee [illegible] shall have the right to surrender this lease or any portion thereof by written notice to the Lessor [illegible] a portion which it elects to surrender, or by executing this lease to the Lessor with [illegible] statement of surrender thereof, or by recording the surrender or partial surrender of this [illegible] such shall be a full and legal surrender of this lease as to all of the premises or such portion thereof as the surrender shall indicate and a cancellation of all liabilities under the same [illegible] said parties hereto relating to any way to the portion or all the premises indicated on said surrender, and the land rental installments set forth shall be reduced in proportion to the acreage surrendered.

17. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental situations including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee has performed said act or acts and in no event shall a valid lease expire for a period of ninety days after the termination of any force majeure.

18. In the event Lessor maintains that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

19. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

20. All covenants and conditions between the parties hereto shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional instruments as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required of Lessee or others.

20. LESSEE IS NOT RESPONSIBLE FOR PRE-EXISTING WELLS ON THIS PROPERTY.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signature	Social Security or Tax ID No.
James M. Beck	Donald W. Yoakley	
	DONALD W. YOAKLEY	

STATE OF Ohio, COUNTY OF MONROE, SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named DONALD W. YOAKLEY (SINGLE)

who acknowledged to me that HE did execute the foregoing instrument and that the same is HIS free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at NEW MATAMORAS, OHIO

this 29 day of JANUARY, in 03.

James M. Beck
Notary Public

MONROE CO. RECORD OF Official Records
VOL. 98 PAGE 321
RECEIVED
03 FEB -5 PM 1:10
RECORDED February 5, 2003
MARTHA LOUISE REID
RECORDER FEE $14.00

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VOL 0098 PAGE 322

JAMES M. BECK
Notary Public, State of Ohio
My Commission Expires 12-12-07

This instrument was prepared by: BECK ENERGY CORPORATION, [illegible]

No. _____ Acres _____

OIL AND GAS LEASE

From _____

Post Office _____ To _____

Date _____, 20 _____ Term _____ Years

Located _____

Rec'd for Record _____, 20 _____

Recorded _____, 20 _____

Book _____ Page _____

County Recorder

Jamison Printing Co., Alliance, Ohio 44601

260

COPY

OIL AND GAS LEASE

Form 0&T (83)

THIS AGREEMENT, made and entered into this 11 day of OCTOBER, in 05, by and between DAVID W. MATORS (SINGLE) 48633 KEYLOR HILL RD. of WOODSFIELD, OHIO 43793 (Phone) 740-472-2130

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1378, Kenova, WV 44228

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operating for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances from any source and into any subsurface strata, either that portion under strata and vertically real strata, including but not limited to the right to inject any water on the leasehold property and to otherwise conduct oil field secondary or tertiary operations as may be required in the opinion of the Lessee,) and to transport by pipelines or otherwise across and through said lands all, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right of ingress, egress and structures thereon to process and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. 2 of CENTER Township MONROE County, Ohio, described substantially as follows:

North by lands of KEYLOR HILL RD.

East by lands of G. BARNES + KEYLOR HILL RD.

South by lands of J. EGGER + M. WAHL ETAL

West by lands of H. SPENGLER + L. RAUSSER

being all the property owned by Lessor or in which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing 55 acres, more or less, and being the property described in Deed Volume _____, Page _____ of the _____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 hereofing.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of 55.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the prevailing rate for oil of like grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from such well drilled thereon, the term of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas as marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 16 ounces against 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted during temperatures at 60° Fahrenheit, without allowance for compressors and barometric variations less any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 30th day after receipt of such funds by the Lessee.

(C) Lessee to deduct from payments in (A) and (B) above from receipts of proceeds by Lessee, Lessor's pro-rata share of any tax imposed by any government body.

(D) In the event Lessee does not sell the gas to others, Lessee shall be paid and the funds at the lowest field market price paid by any public utility in the state at the well head for gas of the kind and quality, and on the same basis that such utility would pay for such gas, including any escalation in price that such utility would pay for such gas as it is contract for the sale of same had been entered into at the time of initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to DAVID W. MATORS at SAME AS ABOVE and the said named person shall continue as Lessor's agent to receive any and all money payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership as hereinafter provided.

6. The Lessor may, at Lessor's own risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any ordinances or rules by any purchaser of the gas. The first two hundred thousand cubic feet of gas taken each year shall be free of cost. And all gas in excess of two hundred thousand cubic feet of gas taken in each year shall be paid for at the lowest published rates of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessor to lay and maintain the pipeline and furnish regulators and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition presumed that the Lessor shall exercise it and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas. And Lessor shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessor shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any royalty or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been advised as to the risks inherent in the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessor's fault or negligence, or whether same be caused by Lessee's fault or negligence, or whether same be caused by Lessee's equipment or such operation; and Lessor agrees to hold Lessee and the well operator and all parties in interest in any well on the leasehold premises harmless from any claims of any nature whatsoever which may rise by the usage of gas from any such well by Lessor, his heirs, successors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises whereon someone other than the Lessee is entitled to take the gas under this Paragraph 6, that the gas supply will be terminated by Lessee until the Buyer of the property executes an agreement regarding the usage of the gas in the same form as the within agreement. In the absence of such an agreement free gas under this provision shall terminate. The within right of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged accordingly to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinbefore provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the same terms hereinbefore provided for delay rental until production is resumed and all the premises or such well is plugged and abandoned according to law. In the event the delay rentals are stated, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or unite therein with other lands to form an oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any unit drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in consideration with the provisions of this lease, and provided further that the Lessor agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinbefore provided, that proportion of such one-eighth (1/8) royalty which the acreage contributed hereto by the total acreage of such development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality as this oil and gas lease setting forth the lands so combined, the royalty distribution and ownership thereunder and filed in the recorder's office of the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinbefore and herein given. The Lessee is hereby vested with another address. If the unit so said development unit shall thereafter be sold or, the said rental for such royalty hereinbefore provided for such use shall be payable to the owners of the parcels of land comprising said unit in the proportion that the acreage of such parcel bears to the entire acreage consolidated. Lessee shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple estate, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest thereto should hereafter be transferred by sale, devise or operation of law, said land, royalties, rents, the land, development and operation as aforesaid, and the rentals and royalties shall be divided among and paid to such several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessor waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further obligations hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises as herein leased and discharge to become subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing liens on the premises.

14. The Lessee shall bury, when as requested by the Lessor, all pipelines used to conduct oil or gas to, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises to approximate with state laws. Any damages if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and shall be paid by the Lessee. Lessee shall be responsible.

YM 0139 PAGE 260

EXHIBIT 4

15. The Lessee shall have the privilege of using sufficient oil, gas and water for operating on the premises and the right at any time during or after the expiration of this lease to remove all pipe, well casing, machinery, equipment or fixtures placed on the premises. The Lessee shall have the right to surrender this lease or any portion thereof by written notice to the Lessor describing the portion which it elects to surrender, or by returning the lease to the Lessor with the endorsement of surrender thereon, or by recording the surrender or partial surrender of this lease, any of which shall be a full and legal surrender of this lease as to all of the premises or such portion thereof as the surrender shall indicate and a cancellation of all liabilities under the same of such and all portion hereto relating in any way to the portion or all the premises indicated as such surrender, and the land rental hereinbefore set forth shall be reduced in proportion to the acreage surrendered.

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, airlines, state, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

18. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All covenants and conditions between the parties herein shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional documents as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required by Lessee or others.

20. LESSEE IS NOT RESPONSIBLE FOR ANY WELLS EXISTING ON LESSOR'S PROPERTY.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of:	Signatures	Social Security or Tax ID No.
James M. Beck	David W. Majors DAVID W. MAJORS	

STATE OF Ohio,
COUNTY OF Monroe, SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named DAVID W. MAJORS (SINGLE)

who acknowledged to me that HE did execute the foregoing instrument and that the same is His free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at WOODSFIELD, Ohio

this 11 day of OCTOBER, 05.

James M. Beck
Notary Public

NOTARIAL SEAL STATE OF OHIO

JAMES M. BECK
Notary Public, State of Ohio
My Commission Expires 12-18-07

This instrument was prepared by: BECK ENERGY CORPORATION, Box 1078, Newcomerstown, OH 43832

No. _____ Acres _____

OIL AND GAS LEASE

From _____

Post Office _____

042062

To _____, 20 _____

Date _____ Term _____ Located _____

MONROE CO RECORD OF Official Records
VOL 139 PAGE 260
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ***Amended Class Action Complaint*** was sent by regular U.S. Mail, postage prepaid, this 29th day of September, 2011, to the following:

BECK ENERGY CORPORATION
4857 Harding Avenue
Ravenna OH 44266

James W. Peters
Attorney at Law

EXHIBIT 4

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED
2013 APR 30 PM 12:40
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK, et al.,

Plaintiffs,

v.

BECK ENERGY CORPORATION,

Defendant.

Case No. 2011-345

JUDGE EDWARD LANE

DEFENDANT BECK ENERGY CORPORATION'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filed on Behalf of Defendant Beck Energy Corporation

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IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK, et al., Plaintiffs, v. BECK ENERGY CORPORATION, Defendant.	Case No. 2011-345 JUDGE EDWARD LANE

DEFENDANT BECK ENERGY CORPORATION'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiffs Larry A. Hustack et al. ("Plaintiffs") and Beck Energy Corporation ("Beck Energy") willfully and voluntarily entered into a contractual and legally binding relationship whereupon Beck Energy acquired the right to explore for, develop, drill, produce and operate oil and gas wells on Plaintiffs' properties for a limited period of ten years. Pursuant to the specific terms of the parties' lease agreements, if Beck Energy produces oil and gas or commences operations by way of drilling within the ten year period of time, Beck Energy has the legal right, to continue to produce oil and gas in so far as the well is or wells are capable of being produced.

The ten year term of the subject leases can thus be extended pursuant to the habendum clause, but if Beck Energy fails to produce oil and gas or commence operations by way of drilling within the ten year period of time, the lease terminates upon expiration of the ten year period. That Plaintiffs, years after the lease agreements were executed, now seek to disclaim their legally binding obligations under these agreements is unconscionable and in any event

completely lacking factual or legal support. Most importantly and contrary to Plaintiffs' assertions, their leases with Beck Energy are for a primary term of ten years and are not in any way "perpetual". As such, they cannot be considered to be void as against public policy. Plaintiffs cannot forfeit their lease agreements with Beck Energy, and are not entitled to judgment as a matter of law.

Facts

Beck Energy is a leading Ohio oil and gas producer and operator that employs native Ohioans and partners with Ohio landowners to develop their oil and gas interests. Beginning in or about 2003, Beck Energy entered into a number of oil and gas leases (the "Lease Agreements," a form of which is attached hereto as Exhibit 1) with Plaintiffs and other landowners in Monroe County. The subjects of these Lease Agreements were certain parcels of real estate located in Monroe County (collectively referred to herein as the "Subject Property").[1] In exchange for the right to explore for, develop, drill, produce, and operate oil and gas wells on Plaintiffs' properties for a definitive period of ten years, Beck Energy agreed to pay Plaintiffs a royalty equal to "one-eighth (1/8) of the price paid to [Beck Energy] per thousand cubic feet of such gas so marked and used," or twelve and one-half percent (12.5%) of the proceeds received by Beck Energy from the sale of oil and gas produced from the Subject Property. See Lease Agreements, Section 4(B). If Beck Energy were to produce but not sell the oil or gas, a royalty would be paid based on market prices. See id., Section 4(D).

[1] In and around 2003, Beck Energy utilized a standard uniform lease agreement designated as "Form G&T (83)." Terms addressing the description of the land subject to the lease agreement and the amount of the delay rental payment were written by hand at the time of execution. In some instances, other minor handwritten changes were made. For the purposes of the present matter, however, the relevant terms and conditions of the standard form were identical as among Plaintiffs.

Contrary to Plaintiffs' interpretation stating otherwise, the primary term of the Lease Agreements is **ten (10) years**. See id., Section 2. In their Motion for Summary Judgment and supporting brief, Plaintiffs fail to acknowledge, discuss, or identify this essential and explicit term of the Lease Agreements. The Lease Agreements are unambiguous in this regard: the standard habendum clause contained in each them provides that only if "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 Energy] in the search for oil or gas" can the ten year term of the lease be extended. See id. In other words, Beck Energy has ten years within which it has the right to explore for, develop, drill, produce, and operate oil and gas wells on Plaintiffs' properties. If, and only if, Beck Energy produces oil and gas or commences operations by way of drilling within the ten year period of time, the Lease Agreements will extend beyond the ten year term until such time as oil and gas is no longer capable of being produced. In the instance that Beck Energy does not produce oil and gas or commence operations by way of drilling within the ten year period of time, the Lease Agreements terminate at the expiration of the ten year term and the lease is forfeited.

Notwithstanding the foregoing, Section 3 of the Lease Agreements states that the Lease Agreements will terminate within "_____" (usually twelve (12)) months from the date of execution of the Lease Agreements unless Beck Energy commences the drilling of a well on the Property. See id., Section 3. If the drilling of a well has not commenced within the allotted twelve month period of time, Beck Energy can forestall automatic termination of the Lease Agreements by paying a yearly delayed rental payment equal to "_____" (usually one dollar ($1.00) per acre). See id. Beck Energy, however, can only forestall termination of the Lease Agreements by paying the yearly delayed rental payment for ten years. A well is deemed

"commenced" when preparations for drilling have occurred. See id. No portion of Section 3 of the Lease Agreements modifies or otherwise obviates the ten year definitive lease term as delineated in Section 2.

Consequently, within the number of months provided for in the Lease Agreements, Beck Energy must commence the drilling of a well on the Property. If Beck Energy does not, the Lease Agreements will terminate unless Beck Energy pays a delayed rental payment often equal to $1.00 per acre on an annual basis. The annual delayed rental payment option is only viable for ten years, however, and unless Beck Energy produces oil and gas or commences operations by way of drilling a well within that ten year period of time, the Lease Agreements automatically terminate upon the expiration of that ten year period of time.

Simply put, the Lease Agreements are definitively ten year leases. Plaintiffs' assertions to the contrary are misleading and without any factual or legal support. The Lease Agreements do not shield Beck Energy from forfeiture. To the contrary, as the subject Lease Agreements were executed in or around 2004, if Beck Energy fails to produce oil and gas or commence operations by way of drilling a well in the next two years or so, the Lease Agreements will terminate. The Lease Agreements cannot be construed to extend into perpetuity and therefore contrary to public policy. Rather, the Lease Agreements, standard and consistent with Ohio oil and gas laws, rules, regulations, and industry practices, comports with and furthers public policy regarding the development of mineral resources.

Beck Energy executed the Lease Agreements at issue with the intent to produce oil and gas on the Properties. To date, Beck Energy has not commenced operations or produced on the Properties. As required under the parties' agreements, Beck Energy has made delay rental payments in order to extend the Lease Agreements. By way of example, as to the Lease

Agreements executed in 2004, Beck Energy has until 2014 to explore for, develop, drill, produce, and operate oil and gas wells on Plaintiffs' properties. If Beck Energy does not produce oil and gas or commence operations by way of drilling a well within the next twenty-four months or so, Beck Energy will forfeit its rights under the Lease Agreements and Plaintiffs will be free to contract with another producer/operator. Until that time period expires, however, Plaintiffs are bound by the terms and conditions of the Lease Agreements.

Procedural History

Plaintiffs filed the instant action against Beck Energy by complaint filed in Monroe County, and thereafter twice amended their initial complaint. Beck Energy filed a Motion to Dismiss, or in the Alternative, to Change Venue on or about November 30, 2011. The Honorable Julie Selmon, the judge formerly assigned to this case, recused herself on or about February 16, 2012. The Supreme Court of Ohio assigned the matter to the Honorable Edward Lane. On or about February 16, 2012, Plaintiffs filed a Motion for Summary Judgment and Brief in Support. Pursuant to instruction and scheduling order entered by this Court, Beck Energy now files its opposition to Plaintiffs' Motion for Summary Judgment.

Standard of Review

Ohio Rule of Civil Procedure 56 provides the general framework under which summary judgment motions are considered. It is well settled law that summary judgment should only be granted where the court has determined:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 375 N.E.2d 46, 47 (Ohio 1978). The burden of demonstrating that no genuine issue of material fact exists falls upon the moving party. Id. "[S]ummary judgment should be granted with caution in order to protect the nonmoving party's right to trial." OneWest Bank, FSB v. Dorner, 953 N.E.2d 892, 896 (Ohio Ct. Com. Pl. 2011) (citing Viock v. Stowe–Woodward Co., 467 N.E.2d 1378, 1386 (Ohio Ct. App. 1983).

In the present matter, Plaintiffs have failed to meet their burden demonstrating that no genuine issue of material fact exists. Furthermore, it is incorrect to state that reasonable minds can come to only one conclusion, namely, that the Lease Agreements are perpetual and therefore void as contrary to public policy, and that Beck Energy is in breach of the implied covenant to reasonably develop the Subject Property. Consequently, when the facts are viewed in a light most favorable to Beck Energy as the nonmoving party, Plaintiffs are not entitled to judgment as matter of law, and their Motion for Summary Judgment must be denied.

Argument

I. Under its unambiguous language, the Lease Agreements provide for a primary term of ten years. They are not no-term perpetual leases, and therefore cannot be void and unenforceable as against Ohio public policy.

The rights and remedies of parties to an oil or gas lease "must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form." Lake v. Ohio Fuel Gas Co., 207 N.E.2d 659, 662 (Ohio Ct. App. 1965) (citing Harris v. Ohio Oil Co., 48 N.E. 502 (Ohio 1897)). Oil and gas leases are contracts, "and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." Id. It is well-settled that "contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." Skivolocki v. E. Ohio Gas Co., 313 N.E.2d 374, 376 (Ohio 1974).

Common words appearing in a written contract are to be given their plain and ordinary meaning unless "manifest absurdity" results or an alternative meaning is clearly intended on its face. Alexander v. Buckeye Pipe Line Co., 374 N.E.2d 146, 150 (Ohio 1978).

The terms of the Lease Agreements at issue must be given their plain meaning and interpreted so as to effectuate the intent of the parties. Accordingly, within the stated number of months provided for in the Lease Agreements, Beck Energy must commence drilling of a well on the Subject Property. If Beck Energy fails to do so, the Lease Agreements will terminate unless Beck Energy pays a delay rental payment – but these payments can only extend the Lease Agreements from year to year during the ten-year primary term. If Beck Energy commences production of oil and gas during the ten-year primary terms, and as a result oil and gas is "capable of being produced" on the Subject Property, the Lease Agreements will bind the parties until such time as oil and gas can no longer be extracted in paying quantities. Thus, so long as it continues to make delay rental payments, Beck Energy has only ten years within which to commence drilling. Should Beck Energy not commence drilling within ten years from the date the Lease Agreements were executed, the Lease Agreements terminate. Plaintiffs' proposed interpretation of the Lease Agreements creates the sort of "manifest absurdity" that the cannons of contract interpretation are designed to prevent. A lease agreement with a primary term of ten years, a secondary term for the time of production, and a delayed rental clause, by its plain meaning, does not extend in perpetuity.

Plaintiffs' flawed attempt to characterize the Lease Agreements as perpetual completely ignores the fact that the Lease Agreements provide in unequivocal terms that, unless and until oil and gas or their constituents are produced or capable of being produced, the rights granted thereunder are to "be quietly enjoyed by [Beck Energy] for a term of ten years." See Lease

Agreements, Section 2. Plaintiffs never acknowledge this essential limiting condition of the Lease Agreements. Only by ignoring this plain language can they make the unsupportable contention that Beck Energy has the right to control the Subject Property based upon its subjective judgment for an infinite period.

Plaintiffs also misconstrue the terms of the Lease Agreements to allege that Beck Energy has an improper, subjective means to control when or whether it may develop the minerals on the Subject Property. In reaching this conclusion, Plaintiffs ignore basic oil and gas law conventions regarding Ohio courts' interpretation of the effect to be given to terms such as "capable of being produced." The subjective judgment of an operator like Beck Energy is irrelevant.

First, "a well is capable of production if it is capable of producing in paying quantities without additional equipment [e.g. an actual well] or repairs." Morrison v. Petro Evaluation Serv., Inc., 2005 WL 2715578, at *5 (Ohio Ct. App. 2005) (emphasis added). (citing Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 558 (Tx. 2003)). The Supreme Court of Texas further stated as follows:

> We believe that the phrase 'capable of production in paying quantities' means a well that will produce in paying quantities if the well is turned 'on,' and it begins flowing, without additional equipment or repair. Conversely, a well would not be capable of producing in paying quantities if the well switch were turned 'on,' and the well did not flow, because of mechanical problems or because the well needs rods, tubing, or pumping equipment.

Anadarko Petroleum Corp., 94 S.W.3d 550 at 558 (citations omitted). Equally important is the fact that "potential for production is not enough to hold a lease in its secondary term. The law . . . requires that potential production be translated into actual production." Am. Energy Serv. v. Lekan, 598 N.E.2d 1315, 1320 (Ohio Ct. App. 1992). If "after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the

express terms of the contract herein and by operation of law and revests the leased estate in the lessor." Swallie v. Rousenberg, 942 N.E.2d 1109, 1117 (Ohio Ct. App. 2010) (emphasis added).

Here, the primary lease term is ten years (again, a simple and essential fact that Plaintiffs completely ignore). Pursuant to the terms of the Lease Agreements, the secondary term is for so long as oil and gas or its constituents are produced or capable of being produced on the premises in paying quantities. Under Ohio law, the leases at issues here will automatically terminate at the end of ten years unless the capacity for production exists. To be capable of production in paying quantities means that oil and gas can be produced without additional equipment and repairs. A well on the Subject Property must exist that is flowing. Mere potential for production is insufficient for Beck Energy to hold the lease beyond the ten year primary term. Beck Energy recognizes this fact as a binding condition of the Lease Agreements, and even if it did not, its subjective belief as to production capability is irrelevant as a matter of law. If the Subject Property lacks a well, equipment, and so forth, it cannot be considered to be capable of production.

If actual production has not begun by the end of the primary term, Beck Energy relinquishes its rights under the Lease Agreements. Accordingly, if at the end of the ten year primary term, Beck Energy has not established a functioning well on the Subject Property, production in paying quantities is not possible, and the Lease Agreements will terminate. If before the end of the ten year term a producing well has been established, Beck Energy will have the right to drill for oil and gas, but only until oil and gas is exhausted. Logically, then, the Lease Agreements are not perpetual in nature. They are ten-year leases with the right to continue to use the Subject Property beyond those ten years when actual production occurs.

Plaintiffs rely heavily to the Ohio Supreme Court's decision in Ionno v. Glen-Gery Corp, 443 N.E.2d 504 (Ohio 1983), in support of their argument that the Lease Agreements constitute "no-term" leases. Because the lease agreement at issue in Ionno in no way resembles the Lease Agreements in the present matter, Plaintiffs' reliance upon Ionno is entirely misplaced, and its facts and holding are inapposite to this case. In pertinent part, the lease agreement before the Court in Ionno[2] provided that:

> This Lease shall, at the option of the Lessee, be and remain in full force and effect so long as Lessee shall pay the rent or royalty herein provided, and until all the mineable, merchantable and usable coal and/or clay, upon, in or under the lands herein demised shall have been exhausted; provided, that the right herein given Lessee to use said premises in connection with mining operations conducted on other premises shall, at the option of Lessee, survive and continue thereafter, so long as Lessee shall pay or cause to be paid to Lessors the rent or royalty herein provided, which, after termination of mining operations on the demised promises shall be not less than Nine Hundred Dollars ($900.00) per annum.

Ionno v. Glen-Gery Corp, 1981 WL 6511, at *9 (Ohio Ct. App. 1981), rev'd sub nom. Ionno v. Glen-Gery Corp., 443 N.E.2d 504 (Ohio 1983).

Thus, pursuant to the plain language of the Ionno lease agreement, the lessee in Ionno had the right to hold the land for so long as: (1) coal and/or clay could be extracted; and (2) the lessee paid the rent or royalty payments provided for in the lease agreement. Conceivably, such rent or royalty payments could be made in perpetuity, thereby rendering the Ionno lease a "no term" lease. The lease agreement in Ionno was silent as to a primary term, and because the lease could be extended for an unlimited period of time by payment of rent or royalty, the Ohio Supreme Court construed it as one that could extend forever. Ionno, 443 N.E.2d at 508. That

[2] Despite arguing (incorrectly) that the lease in Ionno and the Lease Agreements at issue here are "no term leases", Plaintiffs failed to even quote the actual terms of the Ionno leases that allegedly create the (non-existent) correspondence in terms with the Beck Energy leases. The citation to the Court of Appeals case below is provided because there is a very vital distinction between the leases involved, which a comparison will disclose.

situation is entirely different from the Lease Agreements at issue before this Court. Unlike the lease in Ionno, the Lease Agreements clearly provide for a primary term of ten years. Pursuant to the habendum clause, that term can extend beyond the initial ten year period only if oil and gas are produced or are capable of being produced on the premises (as mandated by Ohio courts and described more fully, supra). The Subject Property is not capable of production unless operations have been commenced by way of the drilling of a well. If at the end of ten years there is no producing well, the Lease Agreements terminate.

The Lease Agreements must be interpreted so as to carry out the intent of the parties. Common words appearing in the Lease Agreements must be given their plain and ordinary meaning. At the point where Beck Energy has paid the requisite delay rental payments, which it has, the Lease Agreements by and between Beck Energy and the Plaintiffs have a primary term of ten years that extends beyond that ten years only in the specific instance where Beck Energy has drilled a well that is actively producing oil and gas. The Lease Agreements therefore do not, and cannot, extend in perpetuity. The Lease Agreements are valid and enforceable, within the sound public policy of the State of Ohio, and Plaintiffs are bound by their terms and conditions.

II. The Lease Agreements disclaim all implied covenants, including the implied covenant to reasonably develop the land. Even if the Lease Agreements did not contain this disclaimer, Beck Energy is not in breach of the implied covenant to reasonably develop the land.

A. The Lease Agreements contain an express disclaimer of all implied covenants, including the implied covenant to reasonably develop the land.

Under well-settled Ohio law, oil and gas leases do not contain an implied covenant to reasonably develop the land where express provisions to the contrary exist. Bushman v. MFC Drilling Inc., 1995 WL 434409, at *1 (Ohio Ct. App. 1995); Taylor v. MFC Drilling, Inc., 1995 WL 89710, at *2 (Ohio Ct. App. 1995). "The implied covenant arises only when the lease is

silent on the subject." Harris, 48 N.E. at 505. In pertinent part, the Lease Agreements at issue provide as follows:

> It is mutually agreed that this instrument contains and expresses **all** of the agreements and understandings of the parties in regard to the subject matter thereof, **and no implied covenant, agreement or obligation** shall be read into this agreement or imposed upon the parties or either of them.

See Lease Agreements, Section 19 (emphasis added). A disclaimer of all implied covenants is effective to disclaim the implied covenant to reasonably develop the land. Bushman, 1995 WL 434409 at *2; Taylor, 1995 WL 89710 at *2. Thus, the disclaimer of implied covenants, agreements, or obligations contained in Section 19 of the Lease Agreements effectively disclaims the implied covenant to reasonably develop the Subject Property.

Plaintiffs' assertion that the Lease Agreements do not disclaim the implied covenant to reasonably develop the land is founded in neither law nor fact. Plaintiffs' first claim that the disclaimer language found at Section 19 of the Lease Agreements does not contain a specific reference to the implied covenant to reasonably develop the land, and as such, is ineffective. This argument is directly contradicted by Ohio law. Pertinently, the disclaimers at issue in Bushman and Taylor contained the following language:

> It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them.

Id. That disclaimer is **identical** to the disclaimer provisions of Section 19 of the Lease Agreements. In Bushman and Taylor, the Court of Appeals of Ohio, fully cognizant of the Ohio Supreme Court's holding in Ionno,[3] unequivocally held that the language found in those leases

[3] Plaintiffs make a spurious argument that the Court of Appeals in Bushman and Taylor somehow ignored the Ohio Supreme Court's statement in Ionno that there must be an "express" disclaimer of the implied covenant to reasonably develop the land. This contention is without

effectively disclaimed all implied covenants, including the implied covenant to reasonably develop the leased property. Id. Naturally, because the disclaimers in Bushman and Taylor are the same as in the instant case, Section 19 of the Lease Agreements serves to disclaim the implied covenant to reasonably develop the Subject Property.

Plaintiffs' second contention with respect to the waiver of the implied covenant to reasonably develop the land is predicated on the notion that a reference to "implied obligations" in Section 17 of the Lease Agreements creates ambiguity as to the disclaimer provisions of Section 19, and that said ambiguity renders the disclaimer of implied covenants ineffective. This argument makes little sense. Section 17 of the Lease Agreements only concerns notice to Beck Energy, and states that "in the event Lessor considers that [Beck Energy] has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify [Beck Energy]." See Lease Agreements, Section 17. On its face, the plain language of Section 17 does not contradict Section 19, and does nothing to obviate the parties' disclaimer of the implied covenant to reasonably develop the land.

It is a fundamental principle of contract construction that "[a] document be read as a whole in order to identify the intent of the parties. A specific provision controls over a general one." Monsler v. Cincinnati Cas. Co., 598 N.E.2d 1203, 1209 (Ohio Ct. App. 1991). Section 19 is a specific provision with respect to the disclaimer of any and all implied covenants, agreements, and obligations. Section 17 is general notice provision requiring Plaintiffs to provide

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merit. Both Bushman and Taylor were decided over a decade after Ionno, and therefore make clear reference to its holding. See Bushman, 1995 WL 434409 at *1; Taylor, 1995 WL 89710 at *2. As stated in Bushman, although Ionno stands for the proposition that a disclaimer of the implied covenant to reasonably develop must be "express," [t]here is no authority, neither statutorily mandated nor judicially created, removing disclaimer of implied covenants in gas and oil leases from the operation of general contract law." Bushman, 1995 WL 434409 at *2. Thus, "public policy requires [nothing] more than a general waiver of implied covenants." Id. Plaintiffs' representations to the contrary are a blatant mischaracterization of Ohio law.

Beck Energy notice of a claim under the Lease Agreements before instituting court action.[4] Any assertion to the contrary is simply backwards. A notice provision making a general reference to implied obligations cannot control a specific clause that waves all implied covenants. Such a construction is unreasonable, and represents a clear failure by Plaintiffs to read the Lease Agreements as a whole. Moreover, Section 17 states that Beck Energy is to receive notice where lessor "considers," that is, **believes**, that Beck Energy has not complied with an express or implied obligation. A lessor's subjective belief that Beck Energy has breached an implied covenant does not change the fact that such implied covenants have been disclaimed, nor does it revive a right to enforce implied covenants that have otherwise been expressly waived.

The Lease Agreements contain an express disclaimer of all implied covenants, including the implied covenant to reasonably develop the land. That disclaimer is absolutely effective as a matter of law, and it is not changed by a general reference to implied obligations found in the Lease Agreements' notice provision. Accordingly, because the implied covenant to reasonably develop the land has been disclaimed, Plaintiffs are not entitled to a judgment as a matter of law as to that covenant's breach.

B. Even if the Lease Agreements did not disclaim all implied covenants, Beck Energy is not in breach of the implied covenant to reasonably develop the land.

There is an inferred duty of general "diligence" under the implied covenant to reasonably develop the land **only** where a lease agreement **fails** to contain any specific reference to the timeliness of development. Ionno, 443 N.E.2d at 506. Where an oil and gas lease with an express primary term requires forfeiture unless a well is drilled within a certain number of months or a delay rental paid, the lessee has the option to complete wells or pay the rental. Kachelmacher v.

[4] An obligation that Plaintiffs have ignored, thus barring this action. See Section V, infra.

Laird, 110 N.E. 933, 935 (Ohio 1915); see also Hite v. Falcon Partners, 13 A.3d 942, 944 (Pa. Super. Ct. 2011) ("delay rentals function to relieve the lessee of the obligation to develop the leasehold during the primary term of the lease"). Under such terms, the lessee may retain the lease by paying the stipulated rental, or may elect to permit the lease to lapse. Kachelmacher, 110 N.E. at 935. Failure to commence drilling during the primary term under such a lease does not constitute a breach of the implied covenant to develop. Id. (compliance with provision of ten year oil and gas lease, permitting lessee to avoid forfeiture for failure to drill a well by making a specified delay rental payment, held to prevent forfeiture, and to continue the lease in force for the year for which payment is made); accord Hite, 13 A.3d at 944.

The Lease Agreements are **not** silent as to the timeliness of development. To the contrary, the Lease Agreements are quite similar to the oil and gas leases before the court in Kachelmacher. Notwithstanding the ten-year primary term, Section 3 of the Lease Agreements provides that Beck Energy is to commence a well on the Subject Property within "____" (usually twelve (12)) months of execution, or all rights thereunder terminate. See Lease Agreements, Section 3. Beck Energy can only avoid this automatic forfeiture by paying a yearly delayed rental. When the Court is faced with a lease agreement like the one here, Kachelmacher clearly controls. To retain its rights under the Lease Agreements, Beck Energy must pay the rental or begin drilling. Because specific reference is made to the timeframe in which drilling is or is not to take place, the implied covenant to reasonably develop cannot be breached during the primary term of the Lease Agreements so long as delayed rental payments are made. By agreeing to the provisions of Section 3 of the Lease Agreements, the parties also agree that Beck Energy has the right to delay immediate development during the Lease Agreements' primary term.

Plaintiffs "in error rely, with considerable confidence", Kachelmacher, 110 N.E. at 935, upon Ionno, because its holding with respect to the implied covenant to reasonably develop the land simply does not apply in this case. The lease agreement in Ionno failed to contain any reference to the timeliness of development whatsoever, and its habendum clause had neither a primary nor a secondary term, providing only that the lease remained in full force and effect so long as extraction took place or rent/royalty was paid. See Ionno v. Glen Gery Corp, 1981 WL 6511 at *9, rev'd sub nom. Ionno, 443 N.E.2d at 504. In addition, the defendant in Ionno failed to take any efforts to mine for eighteen years. Ionno, 443 N.E.2d at 508.

Beck Energy and Plaintiffs' Lease Agreements by way of contrast have an explicit primary term of ten years (which Plaintiffs ignore), a secondary term for so long as oil and gas or their constituents can be produced, and an automatic forfeiture clause stating that a well must be drilled within "_____" (usually twelve (12)) months of execution unless delayed rental payments are made. See Lease Agreement, Section 3. It has been less than ten years since all of the Lease Agreements at issue were executed. Consequently, the Lease Agreements are in every relevant way distinguishable from the lease agreements at issue in Ionno. Payment by Beck Energy of delayed rent does not, in and of itself, relieve Beck Energy of its obligation to develop the land. Rather, the holding of Kachelmacher clearly stands for the proposition that, in consideration of payment of delayed rent, Beck Energy has the right to extend the time period within which a well must commence for every year that a delayed rental payment is made for the specified period set forth in the Lease Agreements not to exceed ten years. See Kachelmacher, 110 N.E. at 935. The paradigm that Plaintiffs have attempted to fabricate does not exist. Under the Lease Agreements before the Court, the fact that Beck Energy has not yet started drilling does not and cannot constitute a breach of the implied covenant to develop.

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Even if the Lease Agreements did not disclaim all implied covenants, which they did, Beck Energy is not in breach of the implied covenant to reasonably develop the land. In consideration of payment of delayed rent, Beck Energy has the right to extend the period within which a well must commence every year that a delayed rent is paid for a period of ten years. Beck Energy has acted as a reasonably prudent operator facing similar circumstances, and therefore, is not in breach of the implied covenant to reasonably develop the land.

III. Beck Energy's privilege of foregoing development through the payment of delay rentals extends through the ten year primary term of the Lease Agreements. Assuming continued payment of the delay rentals, the Lease Agreements expire at the point where Beck Energy has not established a well producing in paying quantities by the end of the primary term.

The Lease Agreements by and amongst Beck Energy and Plaintiffs have a primary term of ten years, a secondary term for so long as oil and gas or their constituents can be produced, and an automatic forfeiture clause stating that a well must be drilled within "_____" (usually twelve (12)) months of execution unless delayed rental payments are made. See Lease Agreements, Sections 2 and 3. Under Ohio law, the Lease Agreements will automatically terminate at the end of ten years unless production in paying quantities is possible. Production in paying quantities is possible only if oil and gas can be produced without additional equipment and repairs, and the subjective believe of any party as to production capability is irrelevant. The mere potential for production at the end of the ten year primary term is insufficient for Beck Energy to hold the lease beyond that term. Such are the terms and conditions of the Lease Agreements before the court, and Plaintiffs' warped interpretation to the contrary does not comport with law or fact.

Plaintiffs misconstrue and misrepresent the factual scenario found in Hite to suggest that its holding has application here. In Hite, the "term" clause of the lease agreement stated as follows:

> Lessee has the right to enter upon the Property to drill for oil and gas at any time withinone [sic] (1) year from the date hereof and as long thereafter as oil or gas or either of them is produced from the Property, or as operations continue for the production of oil or gas, or as Lessee shall continue to pay Lessors two ($2.00) dollars per acre as delayed rentals, or until all oil and gas has been removed from the Property, whichever shall last occur.

Hite, 13 A.3d at 944. Noting that "delay rentals function to relieve the lessee of the obligation to develop the leasehold during the primary term of the lease," the court held that the defendant was permitted to delay production during the one year primary term of the leases by tendering payment of delayed rent, but when that primary term expired and the defendant failed to commence production, the agreements terminated. Id. at 948-49. The court rejected a proposed construction of the lease that would extend the rights thereunder indefinitely. Id. at 949.

Unlike the lease in Hite, for the reasons set forth in Sections I and II above, the Lease Agreements here cannot be construed as anything but agreements with a ten-year primary term, a secondary term during the production of oil and gas, and a forfeiture clause stating that a well must be drilled within "_____" (usually twelve (12)) months unless delayed rent paid.[5] By citing

[5] Finally but in scant throwaway argument, Plaintiffs mention the ten year term of the Lease Agreements, but suggest that, should the Court view the primary term of the lease as the pre-printed ten year term, the Lease Agreements are illusory because Beck Energy can extend the lease in perpetuity based solely its subjective determination that the Subject Property is capable of producing oil or gas. As Beck Energy sets forth in Sections I and II of this Brief, as a matter of Ohio oil and gas law: (1) a leasehold is capable of production if it is capable of producing in paying quantities without additional equipment; (2) potential for production is not enough to hold a lease in its secondary term; and (3) if after the expiration of the primary term the conditions of the secondary term are not met, the lease terminates. Beck Energy cannot "subjectively" decide when the Subject Property is capable of production. That term is defined at law, and its meaning is clear.

Hite, Plaintiffs illustrate the very point that Beck Energy has made in Section II, supra: parties to an oil and gas lease that agree to the payment of a minimum advance royalty also agree that the lessee thereafter has the right to forego immediate development of the premises during the primary term of the lease. Id. at 947-48; accord Kachelmacher, 110 N.E. at 935. As such, Beck Energy can forestall development, and automatic termination of the Lease Agreements, by paying a yearly delayed rental payment equal to "_____" (usually one dollar ($1.00) per acre leased) but only during the ten-year primary term.

IV. Plaintiffs are not entitled to forfeiture of the Lease Agreements.

Absent fraud, duress, undue influence, unconscionability, and illegality, a court will respect the fundamental principle of freedom to contract and enforce contracted terms. Blount v. Smith, 231 N.E.2d 301, 305 (Ohio 1967). Where causes of forfeiture are specified in an oil and gas lease, others cannot be implied. Beer v. Griffith, 399 N.E.2d 1227, 1230 (Ohio 1980). Under the terms and conditions of such a lease agreement, the remedy for breach of an implied covenant is damages, and damages alone. Id. There is a limited exception to this rule only in those instances where damages are shown to be inadequate. Id.

In the instant case, Plaintiffs cannot prove fraud, duress, undue influence, unconscionability, or illegality. Therefore, the plain terms of the Lease Agreements must be enforced upon Plaintiffs, and they are not entitled to forfeiture. The Lease Agreements disclaim all implied covenants, including the implied covenant to reasonably develop the land, and consequently, forfeiture cannot be sought for breach of this covenant. Even if the implied covenant to develop was not disclaimed, it has not been breached because Beck Energy has the right to delay production during the primary term of the Lease Agreements by paying delayed rent and because Beck Energy has acted as an ordinary, prudent operator. Further, Section 3 of

the Lease Agreements specifies an unambiguous cause of forfeiture: failure to commence drilling of a well within "_____" (usually twelve (12)) months unless delayed rent paid. See Lease Agreements, Section 3. Because of the provisions of Section 3 of the Lease Agreements, no other causes of forfeiture can be implied.

Notwithstanding the foregoing, Plaintiffs have failed to offer any modicum of evidence tending to prove that damages would be an inadequate remedy. Plaintiffs' brief does not state why damages are inadequate, and simply contains a bare averment to the effect that damages would be speculative. This is not enough. Without presenting evidence as to the inadequacy of damages, any finding that such a remedy is insufficient would be based solely on conjecture and speculation, and a grant of forfeiture is therefore inappropriate. See Ionno, 443 N.E.2d at 508. Plaintiffs must be held to the terms and conditions of the Lease Agreements.

V. Pursuant to the plain language of the Lease Agreements, Plaintiffs were required to provide notice to Beck Energy before commencing the instant action.

Plaintiffs have failed to comply with the terms and conditions of the Lease Agreements because Plaintiffs did not provide Beck Energy an opportunity to cure any purported breach. Section 17 of the Lease Agreements provides:

> In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, **Lessor shall notify [Beck Energy] in writing setting out specifically in what respects [Beck Energy] has breached this contract. [Beck Energy] shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on [Beck Energy]**. Neither the service of said notice nor the doing of any acts by [Beck Energy] aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that [Beck Energy] has failed to perform all its obligations hereunder.

See Lease Agreements, Section 17 (emphasis added). By their own admission, Plaintiffs did not provide Beck Energy written notice pursuant to Section 17 of the Lease Agreements before commencing the present action.

The court in Snyder v. Glen Gery Corp., 1981 WL 6203 (Ohio Ct. App. 1981), addressed a situation analogous to the one here, where the plaintiffs failed to abide by the notice and cure provision in an oil and gas lease. In affirming the ruling below, the Snyder court stated that the plaintiffs could not prevail where they "chose not to give the proper notice as required by the lease instrument itself." See Snyder, 1981 WL 6203 at *4. As in Snyder, Plaintiffs never provided notice to Beck Energy, and never allowed for an opportunity to cure any purported breach. Because Plaintiffs failed to provide Beck Energy with the required notice before proceeding with their suit, Plaintiffs are not entitled to judgment as a matter of law.

The rule that "midnight-hour attempts to save [a] lease [are] not . . . sufficient," Am. Energy Serv., 598 N.E.2d at 1320, does not apply here, despite Plaintiffs' contentions otherwise. The court has taken a "too little, too late" approach to an entity's attempt to cure a breach where a lease was about to expire, and the soon-to-be defendant attempted to take action mere days before the end of lease, or right before a party was going to bring suit. See id. There are at least approximately two years before the Lease Agreements terminate. Beck Energy is therefore entitled to take remedial action upon notice by Plaintiffs of a claim, to the extent that any such remedial action is even required. Plaintiffs have failed to specify any action that Beck Energy would have to take under the terms of the Lease Agreements. As shown above, Beck Energy has fully complied with all duties imposed upon it pursuant to its contractual agreements with Plaintiffs. Plaintiffs, by bringing this action with proper, required notice to Beck Energy have

breached their obligations under the Lease Agreements. Consequently this action must be dismissed for this reason alone, as well as for the reasons set forth above.

Conclusion

For the foregoing reasons, Plaintiffs Larry A. Hustack et al. are not entitled to judgment as a matter of law. Therefore, Plaintiffs' Motion for Summary Judgment must be denied.

Respectfully submitted,

KEEVICAN WEISS BAUERLE & HIRSCH LLC

Date: April 26, 2012

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition of Plaintiffs' Motion for Summary Judgment was served via U.S. First Class Mail, postage prepaid, this 26th day of April, 2012, upon the following:

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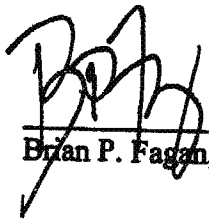

Brian P. Fagan, Esq.

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EXHIBITS

Description	Number
Form of Lease Agreement	1
Appendix	2

OIL AND GAS LEASE

REDACTED

Form G&I (53)

THIS AGREEMENT, made and entered into this _____ day of _____, 20__, by and between

_____

_____

of _____ (_____ County, Ohio)

hereinafter called the Lessor, and

BECK ENERGY CORPORATION, Box 1978, Navarre, OH 44255

hereinafter called the Lessee, WITNESSETH:

1. That the Lessor, for and in consideration of one dollar ($1.00) and other valuable consideration in hand paid by the Lessee, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, does hereby lease and let exclusively unto the Lessee, for the purpose of drilling, operation for, producing and removing oil and gas and all the constituents thereof, and of injecting air, gas, brine and other substances from any source and into any subsurface strata, other than potable water strata and workable coal seams, (including but not limited to the right to inject any wells on the leasehold property and to otherwise conduct all such secondary or tertiary operations as may be required in the opinion of the Lessee,) and to transport by pipelines or otherwise across and through said lands oil, gas and their constituents from the subject and other lands, regardless of the source of such gas or the location of the wells, which right to transport gas from other properties across the leasehold premises shall survive the term of this lease for as long as the transportation of such gas may be desired by the Lessee, use of pipeline of tanks, equipment, roads and structures thereon to produce and operate for the said products, together with the right to enter into and upon the leased premises at all times for the aforesaid purposes, being all that certain tract of land situated in Section/Lot/District No. _____ of _____ Township _____ County, Ohio, bounded substantially as follows:

North by lands of _____

East by lands of _____

South by lands of _____

West by lands of _____

being all the property owned by Lessor or to which the Lessor may have any rights in said Section/Lot/District or adjoining Sections/Lots/Districts, containing _____ acres, more or less, and being the property described in Deed Volume _____, Page _____ of the _____ County Record of Deeds.

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within _____ months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of _____ Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

4. In consideration of the premises the Lessee covenants and agrees:

(A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, the equal one-eighth (1/8) part of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil of the published rate for oil of like grade and gravity prevailing on the date such oil is run into tanks or pipelines.

(B) To pay to the Lessor, as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such gas so marketed and used, measured in accordance with State's Law for the measurement of gas at varying pressures, on the basis of fifteen ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60° Fahrenheit and adjusted flowing temperature of 60° Fahrenheit, without allowance for temperature and barometric variations less any charges for transportation or compression paid by Lessee to deliver the gas for sale. Payment of royalty for gas marketed during any calendar month to be on or about the 30th day after receipt of such funds by the Lessee.

(C) Lessee to deduct from payments in (A) and (B) above from receipts of proceeds by Lessee, Lessor's prorata share of any tax imposed by any government body.

(D) In the event Lessee does not sell the gas to others, Lessor shall be paid on the basis of the lowest field market price paid by any public utility in the state of the well head for gas of like kind and quality, and on the same basis that such utility would pay for such gas, including any commission in price that such utility would pay for such gas as if a contract for the sale of same had been entered into at the time of Initial production.

5. All money due under this lease shall be paid or tendered to the Lessor by check made payable to the order of and mailed to

_____ of _____

and the said named person shall continue as Lessor's agent to receive any and all sums payable under this lease regardless of changes in ownership in the premises, or in the oil or gas or their constituents, or in the rentals or royalties accruing hereunder until delivery to the Lessee of notice of change of ownership as hereinafter provided.

6. The Lessor may, at Lessor's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any curtailments or shut-in by any purchaser of the gas. The first two hundred thousand cubic feet of gas taken each year shall be free of cost, but all gas in excess of two hundred thousand cubic feet of gas taken in each year shall be paid for at the last published rates of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessor to lay and maintain the pipeline and furnish regulators and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, install a meter to measure said gas. This privilege is upon the condition precedent that the Lessor shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of free gas, and Lessor shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessor shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been advised as to the risks incident to the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessor's fault or negligence, or whether same be caused by Lessee's equipment or well operator; and Lessor agrees to hold Lessee and the well operator and all parties in interest in any well on the leasehold premises harmless from any claim of any nature whatsoever which may rise by the usage of gas from any such well by Lessor, his heirs, executors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises wherein someone other than the Lessor is entitled to take the gas under this Paragraph 6, that the gas supply will be terminated by Lessee until the Buyer of the property executes an agreement regarding the usage of the gas in the same form as the within agreement. In the absence of such an agreement free gas under this provision shall terminate, the within right of free gas not being assignable without the consent of the Lessee.

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is resumed and said all the premises or such well is plugged and abandoned according to law. In the event no delay rentals are stated, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether in offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

10. The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form an oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, and the Lessee shall in no event be required to drill more than one well on such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease; provided, however, that only the owner of the lands on which such well is located may take gas for use in one dwelling house on such owner's lands in accordance with the provisions of this lease, and provided further that the Lessor agrees to accept, in lieu of the one-eighth (1/8) oil and gas royalty hereinabove provided, that proportion of such one-eighth (1/8) royalty which the acreage contributed hereto to the total number of acres comprising said development unit. The Lessee shall effect such consolidation by executing a declaration of consolidation with the same formality as the oil and gas lease calling for the leases or portions thereof consolidated, the royalty distribution and recording the same in the recorder's office at the courthouse in the county in which the leased premises are located and by mailing a copy thereof to the Lessor at the address hereinabove set forth unless the Lessee is furnished with another address. If the well on said development unit shall thereafter be shut in, the well rental for shut-in royalty hereinabove provided for such use shall be payable to the owners of the parcels of land comprising said unit in the proportion that the acreage of each parcel bears to the entire acreage consolidated. Lessee shall have the right to amend, alter or correct any such consolidation at any time in the same manner as herein provided.

11. In case the Lessor owns a less interest in the above described premises than the entire and undivided fee simple therein, then the royalties and rentals herein provided for shall be paid to the Lessor only in the proportion which such interest bears to the whole and undivided fee. If said land is owned by two or more parties, or the ownership of any interest therein should hereafter be transferred by sale, devise or operation of law, said land, nevertheless, may be held, developed and operated as an entirety, and the rentals and royalties shall be divided among and paid in such several owners in the proportion that the acreage owned by each such owner bears to the entire leased acreage.

12. No change of ownership in the leased premises or in the rentals or royalties hereunder shall be binding on the Lessee until after notice to the Lessee by delivery of notice in writing duly signed by the parties to the instrument of conveyance or assignment and delivery of a duly certified copy thereof to the Lessee.

13. The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessor waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further obligation hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises as herein leased and thereupon to become subrogated to the rights of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing liens on the premises.

14. The Lessee shall bury, when so requested by the Lessor, all pipelines used to conduct oil or gas to, on, through and off the premises and pay all damages to growing crops caused by operations under this lease. Lessee agrees to restore the premises in accordance with state laws. Any damages if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one thereof to be appointed by the Lessor, one by the Lessee, and the third by the two so appointed, and the award of such three persons shall be final and conclusive and binding on all parties. Each party shall pay the cost of their appraiser and shall share the cost of the third appraiser. Arbitration shall be mandatory. No well shall be drilled within 200 feet of any existing barn or dwelling.

The Lessee shall have the privilege of using sufficient oil, gas and water for operations on the premises and the right at any time during or after the expiration of this lease to remove all personal property, machinery, equipment or fixtures placed on the premises. The Lessee shall have the right to surrender this lease or any portion thereof by written notice to the Lessor describing the portion which it elects to surrender, or by returning the lease to the Lessor with the endorsement of surrender thereon, or by recording the surrender or partial surrender of this lease, any of which shall be a full and legal surrender of this lease as to all of the premises or such portion thereof so the surrender shall indicate and a cancellation of all liabilities under the terms of such lease as pertains hereto relating in any way to the portion or all the premises indicated on said surrender, and the land rental hereinbefore set forth shall be reduced in proportion to the acreage surrendered.

In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall this lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to cure or commence to cure all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

In consideration of the acceptance of this lease by the Lessee, the Lessor agree for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this instrument shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein.

19. All covenants and conditions between the parties herein shall extend to their heirs, personal representatives, successors and assigns, and the Lessor hereby warrants and agrees to defend the title to the lands herein described. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. Lessor further agrees to sign such additional documents as may be reasonably requested by Lessee to perfect Lessee's title to the oil and gas leased herein and such other documents relating to the sale of production as may be required by Lessee or others.

IN WITNESS WHEREOF the Lessors have hereunto set their hands.

Signed and acknowledged in the presence of: Signatures Social Security or Tax ID No.

STATE OF _____)
COUNTY OF _____) SS:

INDIVIDUAL

Before me a Notary Public in and for said county and state personally appeared the above named _____

_____ who acknowledged to me that _____ did execute the foregoing instrument and that the same is _____ free act and deed for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at _____

this _____ day of _____, 20____

Notary Public

Instrument was prepared by: **BECK ENERGY CORPORATION,** Box 1070, Ravenna, OH 44266

OIL AND GAS LEASE

From _____

To _____

Post Office _____

Date _____, 20____

Terms _____ years

Located _____

MONROE CO. RECORD OF
VOL. _____ PAGE. _____
20 20 RECEIVED
RECORDED
MARTHA LOUISE REID
RECORDER FEE

Rec'd Tax Record _____
Recorded _____

Jarman Printing Co., Alliance, Ohio 44601

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK, et al.,

Plaintiffs,

v.

BECK ENERGY CORPORATION,

Defendant.

Case No. 2011-345

JUDGE EDWARD LANE

APPENDIX TO DEFENDANT BECK ENERGY CORPORATION'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filed on Behalf of Defendant Beck Energy Corporation

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APPENDIX OF UNREPORTED CASES

Bushman v. MFC Drilling Inc.,
1995 WL 434409 (Ohio Ct. App. 1995) ..... A

Ionno v. Glen-Gery Corp,
1981 WL 6511, at *9 (Ohio Ct. App. 1981), rev'd sub nom. Ionno v. Glen-Gery Corp., 443 N.E.2d 504 (Ohio 1983) ..... B

Morrison v. Petro Evaluation Serv., Inc.,
2005 WL 2715578 (Ohio Ct. App. 2005) C

Snyder v. Glen Gery Corp.,
1981 WL 6203 (Ohio Ct. App. 1981) ..... D

Taylor v. MFC Drilling, Inc.,
1995 WL 89710 (Ohio Ct. App. 1995) ..... E

1995 WL 434409
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Medina County.

James B. BUSHMAN, Appellant,
v.
MFC DRILLING INC., Appellee.

No. 2403-M. | July 19, 1995.

Appeal from Judgment Entered in the Common Pleas Court County of Medina, No. 93CIV0867.

Attorneys and Law Firms

James A. Amodio & Rochelle E. Boland, Medina, for appellant.

John T. Wigham, Wooster, for appellee, Critchfield, Critchfield & Johnson.

Opinion

DECISION AND JOURNAL ENTRY

QUILLIN, Judge.

*1 James Bushman appeals from the trial court's grant of summary judgment in favor appellee, MFC Drilling, Inc. ("MFC"), regarding a gas and oil lease. We affirm.

On November 5, 1990, Bushman and MFC executed a gas and oil lease that gave MFC the exclusive right to explore, drill, produce and market gas and oil found beneath the surface of a twenty-seven-acre tract of land owned by Bushman. The lease additionally provided MFC with the option of consolidating Bushman's land with other land to form an oil and gas development unit. On November 22, 1991, MFC joined 9.893 acres of Bushman's property within a 66.429 acre oil and gas development unit.

A well was drilled within the unit and production was commenced on March 3, 1992. That well produces gas and oil in commercially paying quantities. Under the lease agreement, Bushman receives twenty-five percent of his proportionate share (9.893 of 66.429 acres) of a one-eighth royalty interest in the gas and oil produced from the well. Additionally, Bushman is entitled to receive 200,000 cubic feet of gas per year free of charge. Seventeen acres of Bushman's property remain undeveloped. Bushman collects no royalties on the undeveloped property.

Bushman, who is dissatisfied with the royalties he is paid under the lease, filed a complaint in the Medina County Court of Common Pleas. In his complaint, Bushman sought damages for MFC's breach of an implied covenant under the lease to develop Bushman's property, for termination of the lease and for reformation of an addendum to the lease. After answering Bushman's complaint, MFC moved for summary judgment on Bushman's claims for relief. Bushman filed a brief opposing summary judgment and a cross-motion for summary judgment.

After review of the documents properly before it, the trial court issued summary judgment in favor of MFC on all of Bushman's claims, except for the claim regarding reformation of the addendum to the oil and gas lease. Bushman voluntarily dismissed his reformation claim and now appeals the trial court's summary judgment order to this court.

Assignment of Error I

"The trial court erred in finding that the vague and general language about implied covenants in the lease clause on integration, assignment and successors was sufficient to expressly disclaim the lessee's implied covenant of reasonable development recognized in every oil and gas lease in Ohio."

In his first assignment of error, Bushman contends that it was error for the trial court to conclude that MFC effectively disclaimed its implied covenant to reasonably develop Bushman's property. We disagree.

It is a well-settled principle in Ohio law that, with respect to oil and gas leases, there exists an implied covenant that the lessee should exercise reasonable diligence in developing the leased property. See, *e.g.*, *Ionno v. Glen-Gery Corp.* (1983), 2 Ohio St.3d 131, paragraph two of the syllabus; *Harris v. The Ohio Oil Co.* (1897), 57 Ohio St. 118, 127. In support of this principle, the Ohio Supreme Court has stated:

> *2 "Certainly the only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving ***

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> royalties based upon the amount of minerals derived from the land. *** Given the nature of these [royalties], there is manifestly an implied covenant on the part of the lessees that they will work the land with ordinary diligence, not simply for their own advantage and profit, but also so that the lessors may secure the actual consideration for the lease, *i.e.,* the production of minerals and the payment of a royalty on the minerals mined."

Ionno at 133-134.

While gas and oil leases contain an implied covenant requiring the lessee to reasonably develop the leased property, Ohio courts have consistently enforced express provisions in such leases that disclaim the implied covenant. *Taylor v. MFC Drilling, Inc.* (Feb. 27, 1995), Hocking App. No. 94CA14, unreported; *Smith v. N.E. Natural Gas* (Sept. 30, 1986), Tuscarawas App. No. 86AP030016, unreported; *Holonko v. Collins* (June 29, 1988), Mahoning App. No. 87CA120, unreported. As stated by the Ohio Supreme Court in *Harris,* "[t]he implied covenant arises only when the lease is silent on the subject." *Id.* at 128. The gas and oil lease executed by Bushman and MFC contains the following language:

> "It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them."

Bushman argues that public policy prohibits a general disclaimer of the implied covenant to develop the leased property. In support of this position, Bushman points out that the gas and oil leases in *Smith* and *Holonko* contained provisions granting the lessee discretion to determine whether to commence drilling operations in addition to a general disclaimer of implied covenants. Bushman goes on to argue that the general disclaimer of implied covenants found in his lease agreement with MFC is ineffective in removing the implied covenant to reasonably develop in the absence of specific language addressing that covenant. We agree with the *Taylor* court, which held that a general disclaimer of implied covenants -- identical to the disclaimer contained in the lease agreement under review -- effectively disclaimed the implied covenant to reasonably develop the leased property. There is no authority, neither statutorily mandated nor judicially created, removing disclaimer of implied covenants in gas and oil leases from the operation of general contract law. Further, upon review of Bushman's arguments, we are unable to conclude that public policy requires anything more than a general waiver of implied covenants.

The first assignment of error is overruled

Assignment of Error II

"MFC's attempted disclaimer of the covenant to develop is unconscionable where MFC also claims that a producing well in the unitized minority of acreage is sufficient to maintain a lease on the entire property."

*3 Bushman additionally argues that even if a general disclaimer of implied covenants effectively waives the lessee's implied covenant to reasonably develop the leased property, such a disclaimer is unconscionable in the instant case. In so arguing, Bushman points out that MFC has consolidated only a small portion of the leased property into a drilling unit and that the acreage remaining undeveloped, but subject to the terms of the lease, remains encumbered and cannot be leased to MFC's competitors for development. As such, MFC is required to pay minimal royalties to Bushman on that portion of the leased property that is consolidated into a drilling unit, while denying Bushman the opportunity to derive profit from that portion of the leased property that is neither developed nor consolidated into a drilling unit.

"Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party. *** Unconscionability thus embodies two separate concepts: (1) unfair and unreasonable contract terms, *i.e.,* 'substantive unconscionability,' and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, *i.e.,* 'procedural unconscionability,' *** These two concepts create what is, in essence, a two-prong test of unconscionability. One must allege and prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable." (Citations omitted.)

Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834. With respect to the procedural unconscionability prong of the test, a court will consider factors bearing on the bargaining power of the contracting parties, including age, education, intelligence, business

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acumen, experience in similar transactions, and who drafted the contract. *Id.* Additionally, the court should consider whether the party who claims that the terms of a contract are unconscionable was represented by counsel at the time the contract was executed. Bushman does not argue on appeal that he was either unsophisticated in such matters or that he was not represented by counsel when the lease was executed. Bushman merely contends that the lease is unconscionable because its terms, as executed, turned out to be unfavorable to him. The mere fact that the terms of an executed contract turn out to be unfavorable to one of the parties does not override the fundamental concept in Ohio law that parties enjoy "freedom of contract" and are bound to the contractual relationship that they create. See *Royal Indemn. Co: v. Baker Protective Services, Inc.* (1986), 33 Ohio App.3d 184, 186. Bushman has failed to demonstrate that the lease was unreasonably favorable to MFC due to any absence of meaningful choice on his part. As such, we must overrule Bushman's second assignment of error.

Judgment affirmed.

End of Document

*4 The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

BAIRD, P. J., and MAHONEY, J., concur.

(MAHONEY, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, 6 (C) Constitution.)

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1981 WL 6511
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.

JOHN M. IONNO, et. al., Plaintiffs-Appellants,
v.
GLEN GERY CORP., et. al. Defendants-Appellees.

CASE NO. CA-5667. | November 25, 1981.

Attorneys and Law Firms

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DALE T. EVANS, 501 MASSILLON BLDG., MASSILLON, OHIO 44646 ATTORNEY FOR PLAINTIFFS-APPELLANTS.

Opinion

OPINION

Before Hon. Robert E. Henderson, P.J., Hon. Norman J. Putman, J., Hon. William F. McKee, J.

HENDERSON, P.J.

*1 This is an appeal from a Judgment of the Common Pleas Court of Stark County, Ohio, refusing a Summary Judgment to Plaintiffs-Appellants and finding that a Coal and Clay Lease dated September 1, 1960, was still in full force and effect and governs the rights of the parties and that Plaintiffs-Appellants landowners are not entitled to a forfeiture of said lease for failure to mine coal and clay.

Plaintiffs-Appellants raise the following Assignments of Error:

I. THE APPELLANTS ASSERT THAT THE TRIAL COURT ERRED IN ITS JUDGMENT, BY CONCLUDING THAT THERE IS NO IMPLIED DUTY TO PERFORM A MINING LEASE CONTRACT WITHIN A REASONABLE TIME; THERE BEING NO EXPRESS AGREEMENT AS TO TIME OF PERFORMANCE: AND FURTHER THAT A NON-MINING OR NON-PERFORMANCE OF EIGHTEEN (18) YEARS DOES NOT ENTITLE LESSOR TO FORFEITURE.

II. THE APPELLANTS ASSERT THAT THE TRIAL COURT ERRED, IN ITS JUDGMENT BY CONCLUDING THAT THERE IS VALID CONSIDERATION IN A MINING LEASE WHERE ALL PAYMENTS MADE ARE "ADVANCED ROYALTIES", WHEREIN CREDIT IS CHARGED AGAINST FUTURE MINING OPERATIONS.

All of the facts in this case have been stipulated and are contained in the record. There is no transcript of testimony. A copy of the Agreed Statement of Facts is attached hereto, marked Exhibit "A" and is made a part hereof. Also, attached to this opinion, marked Exhibit "B" and made a part hereof, is the Coal and Clay Lease dated September 1, 1960.

From the Agreed Statement of Facts, we find that there has been no mining activity or operations on the property owned by Plaintiffs-Appellants and their predecessors in title since the date of the lease except for certain test drilling on or about the year 1964. We find further from reading the Coal and Clay Lease that there is no time requirement for performance of mining operations. Said lease does provide for annual payments of $600.00 on September 1 of each year, which by the terms of the lease are held to be minimum advance royalties which are to be credited against amounts that "thereafter shall become due for or on account of the removal, mining or hauling of coal and/or clay as provided". We find further from the Agreed Statement of Facts that on August 29, 1979 and September 18, 1979 notices of cancellation and forfeiture were delivered to Defendants-Appellees and that the 1979 payment of $600.00 was received, but was refused by Plaintiffs-Appellants and returned to Defendants-Appellees.

This is an action brought by Plaintiffs-Appellants seeking forfeiture and cancellation of this Coal and Clay Lease for reasons of nonperformance and failure of consideration. The trial court made Findings of Fact and Conclusions of Law, a

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copy of which is marked Exhibit "C", is attached hereto and is made a part hereof. Also attached, marked Exhibit "D" and made a part hereof is the opinion of the court filed in this case. The trial court found for Defendants-Appellees on the ground that the rights of the parties are to be determined solely by the lease dated September 1, 1960, and that there was no violation of the provisions of said lease and that none of the covenants therein were breached and there was no showing of an intent to abandon the lease by any of the Defendants-Appellees and that there was no inadequacy of consideration in the lease and the court refused to apply any implied duty to perform the mining lease within a reasonable time.

*2 Defendants-Appellees have cited this court's opinion in Case No. 5490, out of Stark County, Ohio, filed on March 31, 1981, which held in a similar case under facts which were different from the facts in the case sub judice, (1) that the term of said lease was unilaterally controlled by the lessees; (2) that lessees had fully performed the conditions and covenants of said lease; (3) that the landowners had ratified said lease by agreeing to amendments over a period of years; (4) and that in those situations where there are express covenants in the lease and where certain causes of forfeiture are specified in such leases, other causes of forfeiture will not be implied. We distinguish the Snyder v. Glen Gery Corp. case, being Case No. CA-5490, Stark County, Ohio, decided and filed on March 31, 1981 for the reasons set forth in our discussion with regard to the Assignments of Error raised by Plaintiffs-Appellants in this case.

I.

The first Assignment of Error is that the trial court erred in its judgment by concluding that there is no implied duty to perform a mining lease contract within a reasonable time in those leases where there is no express agreement as to time of performance.

We find that the prevailing law of contracts requires the fixing of a reasonable time for performance when a contract is absent on such terms. (See 18 O. Jur. 3d, Page 97 et. seq.) The lease attached hereto as Exhibit "B" is completely lacking in time for performance by the lessee with regard to mining operations and counsel for Defendants-Appellees argue that the time for performance in this lease is not a "reasonable time", but, forever.

We hold that forfeiture is a remedy that is appropriate for a lessees' violation of an implied covenant in those cases where legal remedies prove to be inadequate. In the case of Beer v. Griffith, 61 Ohio St. 2d 119, 399 NE 2d 1227, the court had before it a lease that had a primary term of one year which was extended by its express terms for a period as long as oil or gas was produced from the land. In this case, the lessee had drilled four wells, but because of certain financial difficulties, the lessee had not worked on the lease property for a years time. Here, the court held that although the lessee did not violate any express provision of the lease, lessee did breach an implied covenant, to wit: to reasonably develop the land.

In the case at bar, the lessees have done no mining for 19 years at the time of the hearing and at this point for 21 years. The lease between the parties to this lawsuit contains no specific requirements to develop and work the land. However, this goes against the very purpose of taking this type of lease and is against public policy. The Lessor anticipates that Lessee will within a reasonable time mine for coal or clay.

We are holding as did the court in Beer, supra, that there is an implied covenant to reasonably develop lands covered by mineral leases. Defendants-Appellees' arguments have been throughout this case that there is no legal requirement outside of the lease. However, the Beer case, supra, settles that question as follows: (Paragraph 2 of the Syllabus)

> *3 "Absent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land. (Harris v. Ohio Oil Co., 57 Ohio St. 118, paragraphs two and three of the Syllabus, approved and followed.)"

The sole purpose of this implied covenant is to assure that the land is developed and that the lessors' interest is protected. Why would anyone tie up his land forever without a reasonable expectation that a lessee in a mineral lease will develop the land to the mutual benefit of both lessor and lessee within a reasonable time?

In Beer, supra, the court further has held that forfeiture is the correct remedy where the remedy of damages is inappropriate. In the case at bar, damages are not ascertainable. The loss in value of the lessor due to the inactivity of the lessees is the criteria of damages, but here no coal and no clay has been mined. How can we determine how many tons of the same are buried beneath this soil? Also, since there have been various recorded assignments of the mineral rights, who are to be held responsible for damages? We find that forfeiture or cancellation is the only appropriate remedy under the facts of this case.

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See also Fickes v. Ryan, 16 Ohio Supp. 185; 44 Ohio Law Abstract 141, where the court held:

> "A lease executed for the removal of coal is upon the condition, either express or implied, that the lessee will proceed with due diligence."

In that case, the court found after a fifteen month period of time where a lessee had failed to develop the premises, that said lessee had failed to develop within a reasonable time and had failed to use ordinary diligence in working and removing coal and ordered the lease forfeited. The Fickes case, supra, involved facts wherein the lessor was entitled to royalty payments based on the amount of coal mined. Defendants-Appellees have argued that the landowner in this case has received periodic annual payments. We note however after a close study of Exhibit "B", the Coal and Clay Lease, that the payments provided therein are actually minimum advance royalties. All annual payments that have been made are to be credited against royalties due from coal or clay mined at a later date. Such payments are, in fact, royalties from mined coal and clay and not rental payments.

We choose to follow the prevailing law throughout the country which is that a mineral lease is limited by the implied conditions that it must be performed in a reasonable time. See the cases cited in 60 A.L.R. 901 et. seq. and 76 A.L.R. 2d 721 et. seq.

See also Murray v. Barnhart, 117 LA. 1023, 42 So. 489. In this case which was similar to the case at bar, the court held as follows:

"We agree with plaintiffs that the sole and exclusive obligation of the contract was to exploit the land for oil and gas, save only that, in case of delay in fulfilling that obligation, defendant should pay, by way of penalty or liquidated damages, $4 for every three months'delay. In other words, the obligation to make these quarterly payments was not an alternative obligation of equal rank with that to complete a well, and the fulfillment of which would have been as effectual for fulfilling the contract but it was simply a penal clause or accessory obligation, whose fulfillment would in no wise contribute towards the fulfillment of the real obligation of the contract. . . . .

*4 If this stipulation for quarterly payments were not a mere penal clause, but were an alternative obligation, the lessee might, by making the payments, keep the land idle and undeveloped for oil and gas for the entire term of the lease; and thus the contract be perverted from one to exploit the land in the immediate future for oil and gas into one by which the land might be effectually shut off from all exploration for oil or gas for a quarter of a century. Such a construction needs only to be stated to be at once repudiated."

Defendants-Appellees say that there is no termination clause in the lease in question. If this, in fact, is true and if the lessees may permit this land to remain idle and undeveloped forever by the mere payment of $600.00 annually as an advance royalty, then the whole purpose of the lease will be changed "from one to exploit the land into one by which the land might be effectually shut off from all exploration". The purpose in the giving of the lease had to be considered in this case. The landowners expected that the lessees would mine for coal and for clay and that they would receive royalties as provided for in the lease. To permit Defendants-Lessees herein forever to pay the $600.00 advance royalty and to not work the lease would be to pervert the very purpose in the granting of the original lease and we are finding that the complete inactivity of Defendants-Appellees is mining the premises for the past twenty-one years entitles Plaintiffs-Appellants to forfeiture and to termination of this lease.

For the reasons set forth hereinabove, we hereby sustain both Assignments of Error of Plaintiffs-Appellants and we reverse the Judgment of the Common Pleas Court of Stark County, Ohio and we remand this case to said court for further proceedings consistent with this opinion.

Putman, J., and McKee, J., concur

JOHN M. IONNO, et al., Plaintiffs,

v.

GLEN-GERY CORPORATION, Defendants.

Case No. 79-1151.

Court of Appeals of Ohio, Stark County.

Attorney for Plaintiffs.

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Attorney for Defendant Glen-Gery Corporation.

Attorneys for Defendant Crescent Brick Company, Inc.

Attorney for Defendants Richard James, Jr. and Kermit James.

Demis

AGREED STATEMENT OF FACTS

The parties, being John M. Ionno and Lucinda S. Ionno plaintiffs, and Glen-Gery Corporation, Crescent Brick Company Inc., Richard James, Jr., and Kermit James, defendants, hereby agreed that the following facts may be accepted as true for the purposes of the trial of this case:

A. That "Joint Exhibit A", hereto attached, is a true and correct copy of a Coal and Clay Lease executed on or about September 14, 1960, by and between Oscar William Menges and Dolores T. Menges, as Lessors, and Natco Corporation, as Lessee, and subsequently recorded in Volame 123, at page 442, Stark County Lease Records.

B. That the name of Natco Corporation was changed to "Fuqua Industries, Inc."; and "Joint Exhibit B", hereto attached, is a true and correct copy of an "Assignment of Coal and Clay Leases", dated March 31, 1968, from Fuqua Industries, Inc. to Glen-Gery Shale Brick Corporation, which was recorded in Volame 154, at page 323, Stark County Lease Records.

*5 C. That the name of Glen-Gery Shale Brick Corporation was changed to "Glen-Gery Corporation"; and "Joint Exhibit C", hereto attached, is a true and correct copy of a Memorandam of Sublease, by and between Glen-Gery Corporation, as Sublessor, and Richard James, Jr., and Kermit James, as Sublessees, executed May 18, 1978, but effective June 17, 1976, which is recorded in Volame 193, at page 337, Stark County Lease Records.

D. That "Joint Exhibit D", hereto attached, is a true and correct copy of an Assignment from Glen-Gery Corporation, Assignor, to the defendant Crescent Brick Company, Inc., Assignee, dated October 16, 1978, which was recorded in Volame 194, at page 872, Stark County Lease Records.

E. That "Joint Exhibit E", hereto attached, is a true and correct copy of a deed from Oscar William Menges, Grantor, to Dolores T. Menges, Grantee, dated November 6, 1965, received for record December 21, 1968, and recorded in Volume 3196, at page 252, Stark County Deed Records.

F. That "Joint Exhibit F", hereto attached, is a true and correct copy of an Administrators' Deed from Don E. Caplea and Paul H. Menges, Co-administrators of the Estate of Dolores T. Menges, deceased, to John M. Ionno and Lucinda S. Ionno, or survivor, dated October 12, 1978, and recorded in Volame 4109, at page 313, Stark County Deed Records.

G. That "Joint Exhibit G", hereto attached, is a true and correct copy of a letter, dated August 29, 1979, from the plaintiff John M. Ionno to the defendant Glen-Gery Corporation.

H. That "Joint Exhibit H", hereto attached, is a true and correct copy of a letter dated September 5, 1979, from Donald A. Stewart, Vice-Chairman of the defendant Glen-Gery Corporation, to the plaintiff John M. Ionno.

I. That "Joint Exhibit I", hereto attached, is a true and correct copy of Check No. 239742 of Glen-Gery Corporation, dated September 7, 1979, which was mailed to the plaintiffs.

J. That "Joint Exhibit J", hereto attached, is a true and correct copy of a letter dated September 18, 1979, from the plaintiffs to the defendants Glen-Gery Corp. and Crescent Brick Company, with which Check No. 239742 was returned.

K. That no mining operations have been conducted by the defendants or their predecessor on the leased property, except for test-drilling on or about 1964.

L. That plaintiffs became the successors in interest and sole assignees of the Lessors' interest, rights and obligations under the subject Lease (Joint Exhibit A) as of the date of the conveyance to plaintiffs (Joint Exhibit F).

Dated January 9, 1981.

COAL AND CLAY LEASE

THIS AGREEMENT, made at East Canton, Stark County, Ohio, this 14th day of September, 1960, effective as of September 1, 1960, by and between OSCAR WILLIAM MENGES and DOLORES T. MENGES, husband and wife, of R. D. 2, East Canton, Ohio, hereinafter called the "Lessors," and NATCO CORPORATION, a Pennsylvania

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corporation, having its principal office at 327 Fifth Avenue, Pittsburgh 22, Pennsylvania, hereinafter called the "Lessee," WITNESSETH:

*6 That the Lessors, for and in consideration of the rents, royalties and covenants hereinafter set forth, and to be paid, kept and performed by the Lessee, does hereby grant, demise and to mine let and lease unto the Lessee, its successors and assigns, all the merchantable, mineable, and usuable coal in the No. 5 and No. 6 vat of coal and all the merchantable, mineable and usuable clay which may be removed or recovered by either the deep mining method, or by the strip mining method of mining, and which is in, on or underlying the following described premises:

Situated in the Township of Oanaburg, County of Stark and State of Ohio: and known as being a part of the N. E. and part of the N. W. Quarter Section #15, Twp. #18 (Oanaburg) Range #7 North of the Ohio River Base and East of the Pennsylvania-Ohio Meridian, beginning at the Northwest corner of said Northeast Quarter and running thence East on the North line of said Quarter 20 and $^{58}/_{100}$ chains to the Northeast corner of the tract conveyed to B. F. Chriswell by deed recorded in Vol. 154 page 145, Stark County Records; thence South 3 degress West with the East line of said tract 40 and $^{59}/_{100}$ chains to the South line of said Quarter; thence West on said South line 0.68 of a chain to the center of the road; thence West with the center of the road the following courses and distances: North 46 degrees West 11 and $^{4}/_{10}$ chains; North 55.5 degrees West 4 and $^{5}/_{10}$ chains; South 58.5 degrees West 4.25 chains; South 70.75 degrees West 4.75 chains; thence West still with said road into the said Northwest Quarter 2 and $^{25}/_{100}$ chains; and thence North 45.75 degrees West 10 chains to the South line of a tract conveyed to Frank Stackey by deed recorded in Vol. 554 page 505 Stark County Deed Records; thence East 2.8 chains to a corner of said tract so conveyed to said Criswell as aforesaid; thence North 3 degrees East along the West line of said tract so conveyed to said Criswell 28.5 chains to the North line of said Northwest Quarter; thence East on said North line 8.3 chains to the place of beginning; containing 99 and $^{25}/_{100}$ acres.

Excepting however from the above all those certain coal and clay rights as set forth in a certain conveyance dated June 8, 1924, from Anna E. Criswell, et al, to Frank Bollinger as recorded in Vol. 16 page 256 Stark County Lease Records to which reference is hereby made.

Also excepting the following described premises, to wit - being a part of the Northwest Quarter of Sec. 15, Township 18 (Osnaburg) Range 7, Stark County, Ohio and is bounded and described as follows: Beginning at an iron pin at the Northeast corner of said Quarter Section; thence South & degrees and 30 minutes West along the East line of said Quarter Section a distance of 858.6 feet to an iron pin which is the true place of beginning of the tract hereby described; thence continuence South 4 degrees and 30 minutes West along the East line of said Quarter Section a distance of 1444.0 feet to an iron pin in the conter of the old road; thence South 77 degrees and 39 minutes West along center of old road a distance of 141.8 feet to a point in the center of the brick payement of the Lincoln Highway; thence North 58 degrees and 4 minutes West a distance of 212.8 feet to a point in the brick pavement; thence North 45 degrees and 30 minutes West a distance of 600 feet to an iron pin; thence South 75 degrees 8 minutes East a distance of 237.6 feet to an iron pin; thence North 4 degrees and 30 minutes East a distance of 1136.3 feet to an iron pin; thence South 77 degrees and 2 minutes East a distance of 553.8 feet to the true place of beginning and containing 1830 acres of land.

*7 Also excepting the following tract being part of the Northeast Quarter of Section #15 Township #18 (Osnaburg) Range #7; beginning at the Southeast corner of the first above described 99.25 acre tract; thence North 88 degrees West 44 and $^{88}/_{100}$ feet to the point of intersection of the Quarter Section line with the center of the old road; thence Westward with the conter of the old road the two following courses: North 46 degrees West 752.4 feet thence North 55 degrees 30 minutes West 297 feet; thence South 86 degrees 57 minutes East 866 feet; thence South 3 degrees West 647.07 feet to the place of beginning containing 6.35 acres of land, be the same more or less but subject to all legal highways. Property to be leased containing 74.6 acres more or less.

TOGETHER will all and singular the rights, privileges, licenses and easements necessary and incident or in anywise appertaining to the proper prosecution of the business of mining by either the strip mining method or by the deep mining method, as well as the stripping, removing, transporting, preparing and selling of said coal in the No. 5 and No. 6 veins and/or clay; including, but not limited to, the right to prospect and test drill the demised premises for the purpose of ascertaining the presence of merchantable, mineable and usable coal and/or clay; the right to enter upon said premises at a and all times; a right-of-way on and over the surface and/or subsurface of the demised premises and

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any land on which a right-of-way or easement for access to or agress from said premises is located, for all necessary roads, power lines, haulage ways, air or ventilating shafts, escape ways and drainage holes, and the right to construct and use the same; the right to use so much of the surface or sub-surface of said premises as may be necessary for storing coal and/or clay and depositing refuse and overburdon; and the right to erect on said premises such buildings, structures and fixtures as may be necessary or incident to the proper prosecution of the business of mining, stripping, removing, producing, transporting, preparing and selling of coal and/or clay.

Lessors reserve the right to sell and remove from the demised premises gravel, sand, rock and any material other than coal or clay, provided that the removal of the same shall not be such as to interfere with current or future operations by Lessee under the terms as herein provided in this Lease.

Lessee agrees that Lessee shall not at any time during the term of this Lease, unless Lessors grant permission in writing so to do, conduct mining operations within a rectangle on said premises, on which a house and barn are now located, which rectangle area has its west end 60 ft. west of and parallel to the west end of the barn, its north side 40 ft. north of and parallel to the north side of the barn, its east end 130 ft east of and parallel to the east end of the house, and its south side 65 ft. south of and parallel to the south side of the house.

*8 It is further agreed that Lesses shall have the right to transport coal and/or clay mined upon lands other than the land herein leased, materials, equipment and supplies, over, through or under demised premises, and Lessee shall have the right to use the surface and sub-surface of the demised premises, and all roads, drains, airways, power lines and structures on said demised premises, and the fixtures and equipment relating thereto for such purpose and for depositing on or removing from the demised premises ground and earth, unusable coal, unusable clay, overburden, and other waste materials incident to mining operations, as mining conditions may require, provided Lessee has the same or reciprocal rights on adjoining lands and any excess spoil or other waste material from stripping on adjoining lands and deposited on demised premises shall be graded to the approximate contour of the demised premises.

Lessee covenants and agrees to pay Lessors as rent or royalty for all coal and clay mined and removed from the demised premises and for transportation of coal or clay under, through, or over the same, the following amounts, which shall be payable on or before the 20th day of each calendar month hereafter during the term of this Lease with respect to royalties or rents earned for the preceding calendar month:

(1) Ten cents (10¢) per net ton of two thousand (2000) pounds for all clay so mined and removed from the demised premises;

(2) Twenty-five cents (25¢) per net ton of two thousand (2000) pounds for all coal from the No. 5 vein so mined and removed from the demised premises;

(3) Thirty-five cents (35¢) per net ton of two thousand (2000) pounds for all coal from the No. 6 vein so mined and removed from the demised premises;

(4) One and one-half cents (1 1/2¢) per net ton of two thousand (2000) pounds for all coal or clay mined on other premises and hauled or transported on, under, through or over the demised premises.

Lessee shall pay to Lessors as minimum rent or royalty the sum of Three Hundred Dollars ($300.00) per year for the first two years, and beginning September 1, 1962, the minimum royalty shall be Six Hundred Dollars ($600.00) per year. The minimum royalty for the first year is payable forthwith upon the execution and delivery of this Lease. The minimum royalty for each succeeding year shall be due at the anniversary date of this Lease. All sums paid on account of minimum rent or royalty shall be credited against the amount or amounts that shall thereafter become due for or on account of the removal, mining or hauling of coal and/or clay as provided in this Lease.

Lessee shall keep complete and accurate record of all coal and/or clay mined and removed from the leased premises, and of all coal or clay hauled on, under, through, or over the same, and after the commencement of mining operations on said premises, shall furnish Lessors a statement thereof at the time of payment of rent or royalties as herein provided.

It is further understood and agreed that Lessee shall be the sole judge as to what is usable, merchantable and mineable coal and/or clay, and its decision or decisions in this respect shall be final and binding insofar as the terms of this Lease are concerned.

*9 It is further agreed that the Lessors shall not be liable to Lessee for any damages to Lessee's equipment, unless the same she be caused by Lessors, or their agents, or under their direction.

Lessors hereby release and waive any and all right to surface support or claims for damages by reason of the subsidence of

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the surface of the demised premises, or the removal thereof, or of its support, or for the destruction or removal of trees, crops, ditches fences, lanes, springs or water courses, and Lessors hereby waive a release Lessee from any and all liability for damages to the Lessor or their assigns resulting in anywise from the removal of said coal and/or clay.

Lessee covenants and agrees that it will conduct its mini-operations in accordance with good mining practice and in a proper and skillful manner, and that it will comply with all valid laws not in force or which may hereafter be enacted pertaining to and regulating the mining operations herein contemplated; and that it will protect and indemnify the Lessors from and against all liability, claims and damages for injury to the persons or property of others, which includes the disruption of their water supply, caused by the Lessee in operating under this Lease.

Lessee agrees that in the event payment of the rent or royalty due under the terms of this Lease is not made within thirty (30) days after the same shall become due and payable, or if the Lessee shall fail to keep and perform any of the covenants on its part to be kept and performed, and such default shall continue for a period of thirty (30) days after notice in writing shall have been given to the Lessee, then this Lease shall, at the option of the Lessors, become null and void and of no further force or effect.

It is agreed that if the operations conducted by Lessee under this Lease shall be such as to prevent the use of the lane or road to Lessor's buildings, then Lessee shall provide for Lessors a road to such buildings equal to or better than the road as it exists at the time of execution of this Lease.

The Lessors covenant and agree that so long as the Lessee shall keep, perform and observe all the obligations, covenants and agreements of this Lease on its part to be kept, performed and observed, Lessee shall occupy and enjoy said leased premises free from any molestation or hindrance from Lessors or any other person.

This Lease shall, at the option of the Lessee, be and remain in full force and effect so long as Lessee shall pay the rent or royalty herein provided, and until all the mineable, merchantable and usable coal and/or clay, upon, in or under the lands herein demised shall have been exhausted; provided, that the right herein given Lessee to use said premises in connection with mining operations conducted on other premises shall, at the option of Lessee, survive and continue thereafter, so long as Lessee shall pay or cause to be paid to Lessors the rent or royalty herein provided, which, after termination of mining operations on the demised promises shall be not less than Nine Hundred Dollars ($900.00) per annum. Hauling over the demised premises from other property, after the completion of mining operations on the demised property, shall be confined to one (1) road, which shall be located by mutual agreement of the parties.

*10 All the agreements, covenants provisions and privileges of this Lease shall inure to the benefit of and be binding upon the parties, their heirs, executors, administrators, successors or assigns.

IN WITNESS WHEREOF, the Lessors have signed this Lease and the Lessee has caused the same to be signed and its corporate seal attached by its duly authorized officers, the day and year first above written.

STATE OF OHIO

STARK COUNTY

SS:

Before me, a Notary Public in and for said County and State, personally appeared Oscar William Menges and Dolores T. Menges husband and wife, who acknowledged that they signed the foregoing Lease, and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at East Canton, Ohio, this 14 day of September, 1960.

OPINION AND JUDGMENT ENTRY

This matter came on for trial and all parties were represented in Court, John Ionno and Lucinda Ionno, the Plaintiffs, represented by Attomey Dale Evans; the Glen-Gery Corporation was represented by Attorney Donald W. Raley; the Crescent Brick Corporation was represented by Attomeys Gene Barnhart and Scott Sandrock. The James Brothers were represented by Attomey Ronald W. Dougherty. Pursuant to agreement of the parties, the matter was presented to the Court on a stipulation of the evidence and no further testimony was presented in Court.

The Plaintiffs seek to set aside and cancel a certain lease for coal and clay entered into between Oscar William Menges and Delores T. Menges, husband and wife, as lessors to the NATCO Corporation as lessee, said lease dated September 1, 1960, and recorded in Volume 123, Page 442

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of the Stark County Lease Record. NATCO Corporation later became Fuqua Industries, Inc. and subsequently Fuqua Industries, Inc. assigned their lease to Glen-Gery Shale Brick Company, which subsequently became known as Glen-Gery Corporation. Glen-Gery Corporation assigned coal and coal mining rights to Richard James, Jr. and Kermit James, who were made parties herein after the institution of the original action. Glen-Gery then assigned its rights in various leases to the Crescent Brick Company, Inc. which assignment included its interest in the clay rights on the Menges property and also the lease to the James Brothers.

The Plaintiffs, John M. Ionno and Lucinda Ionno, acquired title to the real estate, thereby becoming assignees of the lessors' interest by Administrator's Deed dated October 17, 1978, and recorded in Volume 4109, Page 313 of the Stark County Deed Records.

The Plaintiffs seek to set aside the lease herein for the following reasons:

1. Inadequacy of consideration.

2. Failure to develop or to institute mining proceedings within a reasonable time.

3. Failure to pay the annual advanced royalty on time even though it was tendered within the 30 day grace period.

4. Division or separation of rights under the lease to various sub-lessees in contravention of Chapter 1513 R.C.

The Court having reviewed the stipulations; having reviewed the various instruments affecting these transactions; and having reviewed the applicable law, finds that the original lease entered into between the Menges and NATCO contained express covenants relative to cancellation or termination. The Court finds that the express terms of the lease were not violated and further that the payment that was due was made within the grace period set forth in the original lease.

*11 The Court finds no violations of the provisions of Chapter 1513 Revised Code that would provide relief for Plaintiffs.

The Court further finds that no demand was made on the lessees to begin mining nor was notice given to the lessees that any covenant of the lease was breached other than as to the late payment. Plaintiffs rely on the case of Beer v Griffith (6105 2d 119) in support of their contentions and this Court has carefully reviewed the findings in that case to see how they compare herein.

Unlike the Beer case, there is no intent to abandon the lease by the lessee shown in our present case. The Beer case also rests on the fact that there were no express provisions for cancellation contained in the lease. In our instant case there were express provisions for cancellation. The Beer case further holds that where causes of forfeiture are specified, others cannot be implied. We hold accordingly herein.

There are two other circumstances that cause this Court to rule in favor of the Defendants herein. First, the age-old maxim that "the law abhors forfeitures." Second, the fact that the Plaintiffs had other adequate remedies either at law or equity. In our present case an absolute forfeiture, without giving the lessees the opportunity to rectify their non-action would work an unfair burden upon them. Obviously the original lessors were not dissatisfied with their lease for almost 18 years. There is no evidence that they sought legal relief or made claims of any kind. A more appropriate remedy herein would appear to be either (1) an action in equity to enforce provisions of the lease, (2) a declaratory judgment to declare the rights and obligations of the parties, or (3) an action at law for damages. Plaintiffs have attempted neither of these remedies, but instead have gone directly to the remedy of forfeiture. This Court cannot sustain their position.

Actually in this instant case, the passage of time has worked to the detriment of the landowner due to inflation and the current price of minerals. However, this is not justification for cancellation or forfeiture. Had this action been brought by the Menges, who waited patiently for eighteen years, to have their land mined, the Court might have been inclined to take some action in favor of the land owner. However, no apparent demand having been made by the Menges to the lessees to begin mining operations, and the Plaintiffs having purchased said real estate with full knowledge that a valid lease existed on said real estate, the Court will leave them as it finds them.

It is therefore ordered that judgment herein be rendered in favor of the Defendants Glen-Gery Corporation, Crescent Brick Company, Richard James, Jr., and Kermit James, and against the Plaintiffs, John M. Ionno and Lucinda Ionno.

It is further ordered that costs herein be taxed to the Plaintiffs.

FINDING OF FACT AND CONCLUSIONS OF LAW

Pursuant to motion filed by the Plaintiffs herein, the Court hereby sets forth its Finding of Facts and Conclusions of Law even though the Court feels that its Opinion and Judgment Entry heretofore filed satisfies the requirements of Rule 52 and specifically the last paragraph of said Rule.

*12 The Court makes the following Findings of Fact:

1. Oscar William Menges and Delores T. Menges, husband and wife, entered into a lease to the Natco Corporation dated September 1, 1960.

2. Said lease was thereafter assigned by Natco to Glen-Gery Shale Brick Company, later known as Glen-Gery Corporation.

3. Glen-Gery Corporation assigned coal and coal mining rights to Richard James, Jr. and Kermit James.

4. Glen-Gery Corporation assigned its rights in said lease to the Crescent Brick Company, Inc.

5. Plaintiffs John M. Ionno and Lucinda Ionno acquired title to the real estate by administrators deed dated October 17, 1978, and recorded in Volume 4109, Page 313 of the Stark County Deed Records.

6. Plaintiffs John M. Ionno and Lucinda Ionno succeeded to the rights of the Menges in the original lease dated September 1, 1960.

7. The original lease dated September 1, 1960, and recorded in Volume 123, Page 442 of the Stark County Lease Records is still in full force and effect.

8. No violation of the terms of said lease have been shown to the Court other than a late payment of annual advance royalty which was paid within the grace period.

9. There were no mining operations begun on said land prior to the filing of this law suit.

10. There was no notice given to the lessors of any breach of covenant of the lease nor any request made to the lessees to begin mining operations.

The Court makes the following Conclusions of Law:

1. The rights of the parties are determined solely by the lease dated September 1, 1960, and recorded in Volume 123, Page 442.

2. There was no violation of the provisions of said lease nor were any covenants thereof breached.

3. There is no violation of the provisions of Chapter 1513 of the Revised Code of Ohio.

4. There is no showing of an intent to abandon the lease by any of the Defendants herein.

5. There was an adequacy of consideration herein.

6. Judgment should be rendered against the Plaintiffs and in favor of the Defendants as to all issues herein.

The Court makes the following Conclusions of Law:

1. The rights of the parties are determined solely by the lease dated September 1, 1960, and recorded in Volume 123, Page 442.

2. There was no violation of the provisions of said lease nor were any covenants thereof breached.

3. There is no violation of the provisions of Chapter 1513 of the Revised Code of Ohio.

4. There is no showing of an intent to abandon the lease by any of the Defendants herein.

5. There was an adequacy of consideration herein.

6. Judgment should be rendered against the Plaintiffs and in favor of the Defendants as to all issues herein.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum-Opinion on file, we hereby specifically sustain both Assignments of Error raised by Plaintiffs-Appellants and we reverse the Judgment of the Common Pleas Court of Stark County, Ohio, and we remand this case to said court for further proceedings consistent with this opinion.

End of Document

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2005 WL 2715578

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Morrow County.

Robert MORRISON, et al. Plaintiff-Appellee
v.
PETRO EVALUATION SERVICES, INC. Defendant-Appellant.

No. 2004 CA 0004. | Decided Oct. 21, 2005.

Civil Appeal from Morrow County Court of Common Pleas Case 25,113, Affirmed.

Attorneys and Law Firms

John Barrigton, Wooster, for Plaintiff-Appellee.

Timothy B. Pettorini, Tricia L. Plant, Wooster, for Defendant-Appellant.

Opinion

HOFFMAN, P.J.

*1 {¶ 1} Defendant-appellant Petro Evaluation Services, Inc. appeals the March 16, 2004 Journal Entry of the Morrow County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶ 2} Plaintiffs-appellees Robert and Karen Morrison own approximately 70 acres of land in Perry Township, Morrow County, Ohio.

{¶ 3} On or about June 20, 1986, appellees, as lessors, executed and delivered to appellant Petro Evaluation Services, Inc., as lessee, an oil and gas lease covering the approximate 70 acres. The oil and gas lease, which was recorded on June 24, 1986, in Volume 128, page 672 of the Morrow County Records, stated, in relevant part, as follows:

{¶ 4} "3. This lease shall remain in force for a primary term of one year(s) *and as long thereafter as operations described above are being conducted on the premises, or oil or gas is produced or is capable of being produced from the premises.* This lease shall continue in full force as long as there is a well or wells on the leased premises capable of producing oil or gas, but in the event all such wells are shut in and not producing for any reason beyond the reasonable control of Lessee for a continuous period of sixty days, then, thereafter, Lessee shall pay to Lessor a rental of One Hundred Dollars for each month following the end of said sixty day period during which all such wells are shut in, which payments may be made by Lessee monthly, or annually....

{¶ 5} "5. If operations for a well are not commenced on said land within one months of the date of this lease, this lease shall terminate as to both parties unless the Lessee or his assigns, on or before that date, shall pay or tender to Lessor or his successors or assigns, the sum of $1.00 + O.V.C. Paid up lease upon signing which shall operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date. Lessee will pay said rentals annually. This lease shall not terminate for failure to pay rental for any period or for any part of the lease until and unless Lessor gives Lessee written notice by certified mail of the failure to pay such rental and said rental is not paid within ten days of the receipt of said notice by Lessee." (Emphasis added).

{¶ 6} In June of 1987, a well was drilled on appellees' property at a cost of approximately $67,000 to $70,000. Because sour sulphur gas was coming out of the hole, rock and soil analysis samples were taken. The samples revealed the well produced sour gas, which has a high sulfur content and needs to be "scrubbed" to get rid of the hydrogen sulfide before it can be used for domestic purposes. Without scrubbing, the sour gas cannot be used for domestic purposes, but can only be sold to farmers or anyone else who dries corn. When the well was drilled in 1987, appellant did not have access to a scrubbing facility.

{¶ 7} In June of 1988, appellant sent appellees a check in the amount of $1,200.00 to cover the shut-in rentals for the period September 15, 1987, to September 15, 1988. No further shut in rentals have been paid.

*2 {¶ 8} Thereafter, in 1991, the Ohio Department of Natural Resources contacted appellant in regard to plugging the well. In response, a separator and gas line were brought to the well site in order to convince the Ohio Department of Natural Resources the well should not be plugged and was capable of production. In a letter dated June 10, 1991, from appellant Petro Evaluation to the Ohio Oil and Gas Review Board, appellant indicated the well was "capable of producing oil and/or gas in commercial quantities" and "pipelineeight (sic) of ways are currently being negotiated." Transcript at 26.

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{¶ 9} On or about October 8, 1993, appellees signed an affidavit stating as follows:

{¶ 10} "a. The well is capable of producing natural gas and oil in paying quantities.

{¶ 11} "b. The loss of my 1/8 income from this well and the 500,000 cubic feet of free gas per year is unjustifiable.

{¶ 12} "c. 1 am able to hook up my corn dryer and use this well for my own use.

{¶ 13} "d. 1 know of no environmental problems on this well ."

{¶ 14} Appellee Robert Morrison testified the purpose of the affidavit was to ensure the Ohio Department of Natural Resources did not plug the well.

{¶ 15} On or about December 2, 1999, appellee Robert Morrison sent a certified letter to appellant stating as follows: "Shut-in fees due from Sept. 15, 1988 through Sept. 15, 1999 now total $13,200 as spelled out in paragraph 3 of the oil and gas lease ." However, appellees did not receive any shut-in royalties from appellant in response.

{¶ 16} Thereafter, on September 25, 2000, appellees filed a complaint against appellant in the Morrow County Court of Common Pleas, alleging, in relevant part, as follows:

{¶ 17} "3. Prior to July 15, 1987, a well capable of producing oil and/or gas was completed on the premises belonging to the plaintiffs pursuant to the provisions of said lease attached as Exhibit A hereto.

{¶ 18} "4. As a result of circumstances beyond the reasonable control of Lessee such well was shut in and not producing on or after July 15, 1987.

{¶ 19} "5. On or about June 13, 1988, defendant sent a letter to plaintiffs regarding the shut in royalty payments and paid to plaintiffs the sum of $1,200 to cover the shut in royalty payments for the period from September 15, 1987 through September 15, 1988....

{¶ 20} "6. Said well has remained shut in through the present time, but defendant has failed to make the payments due monthly or annually since September 15, 1988, to plaintiffs' damage in the amount of $14,400 through September 15, 2000, plus interest, and continuing at the rate of $100 per month after September 15, 2000."

{¶ 21} On July 1, 2002, appellant filed a Motion for Summary Judgment, arguing that the well was neither a producing well nor a well capable of production and, therefore, the oil and gas lease was not valid and no shut in royalties were due under the same. Appellant, in its motion, further argued that the lease had expired by its own terms and, therefore, no shut in royalties were due.

*3 {¶ 22} After the trial court denied appellant's motion, the case proceeded to a bench trial. At trial, testimony was adduced that in July of 2002, appellant had installed a sales line to the pipeline which could be used to transport the gas to a scrubbing facility.

{¶ 23} As memorialized in a Journal Entry filed March 16, 2004, the trial court found appellant owed appellees "a shut in rental, being the sum of $100 per month for each month since September 15, 1998, in the total amount of $18,700 as of March 15, 2002, plus interest at the rate of 10% per annum from the date of this Journal Entry." The trial court, therefore, granted judgment in favor of appellees and against appellant in such amount.

{¶ 24} Appellant now raises the following assignments of error on appeal:

{¶ 25} "I. THE TRIAL COURT ERRED IN ITS RULINGS AND IN ITS INTERPRETATION OF THE LEASE THAT THE LEASE DID NOT EXPIRE BY ITS OWN TERMS, IT WAS STILL VALID IN ITS SECONDARY TERM WHEN NO SHUT-IN ROYALTIES WERE PAID AND THE WELL WAS NOT PUT INTO ACTUAL PRODUCTION. AS SUCH, THE TRIAL COURT ERRED IN DENYING DEFENDANT/APPELLANT'S MOTION FOR SUMMARY JUDGMENT, DIRECTED VERDICT AND FINDING FOR THE PLAINTIFFS/APPELLEES IN ITS JUDGMENT ENTRY.

{¶ 26} "II. THE TRIAL COURT ERRED IN RULING THAT THE WELL IS 'CAPABLE OF PRODUCING' WHEN THE UNDISPUTED EVIDENCE PRESENTED AT TRIAL SHOWED THE WELL WAS ONLY CAPABLE OF PRODUCING 'SOUR GAS'.

{¶ 27} "III. THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANT/APPELLANT IS ESTOPPED FROM CLAIMING THE LEASE EXPIRED SINCE THE PLAINTIFFS/APPELLEES FAILED TO PRESENT THE NECESSARY ELEMENTS OF ESTOPPEL AT TRIAL."

I, II

{¶ 28} Appellant, in its first assignment of error, argues the trial court erred in entering judgment in favor of appellees since the well was neither a producing well nor a well capable of production and, therefore, the lease was not valid and no shut-in royalties were due under the same. Appellant further argues the lease expired by its own terms and, therefore, no shut-in royalties were due under the lease. Appellant, in its second assignment of error, contends the trial court erred in holding the well was "capable of producing."

{¶ 29} The general rule is contracts should be construed so as to give effect to the intention of the parties. *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. Thus, it is a fundamental principle in contract construction contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132, 509 N.E.2d 411.

*4 {¶ 30} During the course of the judicial examination of a contract, the reviewing court should give the language of the instrument its plain and ordinary meaning unless some other meaning is evidenced within the document. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245, 374 N.E.2d 146. If the terms of the contract are determined to be clear and unambiguous, the interpretation of the language is a question of law reviewed de novo on appeal. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172, 628 N.E.2d 1377. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. See *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N .E.2d 949. Only in the event a term of a contract is determined to be ambiguous will the matter be labeled as a question of fact. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

{¶ 31} With respect to oil and gas leases, the Supreme Court of Ohio, in the case *of Harris v. Ohio Oil Co.* (1897), 57 Ohio St. 118, 129, 48 N.E. 502, stated as follows: "The rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." See also *Lake v. Ohio Fuel Gas Co.* (1965), 2 Ohio App.2d 227, 231, 207 N.E.2d 659.

{¶ 32} As stated supra, paragraph three of the oil and gas lease in the case sub judice states as follows:

{¶ 33} "3. This lease shall remain in force for a primary term of one year(s) *and as long thereafter as operations described above are being conducted on the premises, or oil or gas is produced or is capable of being produced from the premises.* This lease shall continue in full force as long as there is a well or wells on the leased premises capable of producing oil or gas, but in the event all such wells are shut in and not producing for any reason beyond the reasonable control of Lessee for a continuous period of sixty days, then, thereafter, Lessee shall pay to Lessor a rental of One Hundred Dollars for each month following the end of said sixty day period during which all such wells are shut in, which payments may be made by Lessee monthly, or annually...." (Emphasis added.)

{¶ 34} This clause, which is known as a habendum clause, has two parts. The first part, or the primary term, is of definite duration and is one year in this case. The second part is of indefinite duration and operates to extend the lease for "as long thereafter as operations described above are being conducted on the premises, or *oil and gas is produced or is capable of being produced from the premises.*" (Emphasis added). As noted by this Court in American Energy *Services, Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 598 N.E.2d 1315, "[i]f after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law and revests the leased estate in the lessor." Id. at 212, citing *Gisinger v. Hart* (1961), 115 Ohio App. 115, 184 N.E.2d 240.

*5 {¶ 35} At issue in the case sub judice is how long the oil and gas lease remained in effect. As noted by appellant, the lease requires one of the following conditions be satisfied to keep the lease from expiring by its own terms (1) the production of oil or gas, or (2) the payment of shut-in royalties to extend the lease despite non-production. While appellant argues the well is neither producing or capable of producing gas and, therefore, the lease expired in September of 1988,

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in accordance with paragraph 3 since no shut-in royalties were paid after such date to extend the term of the lease, appellees argue the well was capable of producing sour gas and, therefore, was "capable of producing" and, therefore, the lease continued in full force and effect.

{¶ 36} In *Tisdale v. Walla* (Dec. 23, 1994), Ashtabula App. No. 94-A-0008, 1994 WL 738744, the oil and gas leases stated, in the habendum clause, as follows: " "2. TO HAVE AND TO HOLD said premises for the purposes aforesaid during the term of ten (10) years from the date hereof [called 'primary term'], and as long thereafter as drilling operations for oil and gas are conducted thereon, hereunder, or oil or gas is produced therefrom hereunder, and-or so long as said premises are used for underground storage of gas as herein provided."

{¶ 37} The Court, in *Tisdale,* in interpreting the term "produced" as used in such clause, held such term means "produced in paying quantities" and the gas produced for the parties' domestic use [1] did not serve to extend the term of the leases. In so holding, the court in *Tisdale* stated at page 3 as follows: "In *Delta Gas Corp. v. Thompson* (Dec. 3, 1991), C.A.6 No. 90-6486, a condition in the habendum clause similarly provided that the term would extend as long as oil was "produced" the court concluded:

{¶ 38} "Defendants maintain that production did not cease if one considers the household use of gas by plaintiffs' son. However, it is not disputed that no gas was produced for sale. Production, as defined under the term of the lease, does not include production for household use by the lessors as the lease expressly provides for such use and no profit was generated by such production. See *Cumberland Contacting Co. v. Coffey,* 405 S.W.2d 553 [Ky.1966] [production in profitable quantities is required, as the payment of a reasonable royalty is the object of leasing oil and gas rights]." Id. at Fn 2." See also, *Lekan,* supra, in which this Court held the term "produced" required "actual production" and potential for production was not enough. Id at. 213.

{¶ 39} While, in this matter, the habendum clause contains somewhat different language than in *Tisdale* and requires the well be either "produced" or "capable of production", we find the same legal concept applies. We concur with appellant the term "produced" in a habendum clause means "produced in paying quantities", then the phrase "capable of production" means "capable of producing in paying quantities." Recently, the Texas Supreme Court reviewed a habendum clause in a gas lease that stated "[t]his lease shall remain in force for a term of one year and as long thereafter as gas is *or can be* produced." (Emphasis added.) The court held that "a well is capable of production if it is capable of producing in paying quantities without additional equipment or repairs." *Anadarko Petroleum Corp. v. Thompson* (2003), 94 S.W.3d 550, 558.

*6 {¶ 40} Thus, the issue becomes whether the well in this case was capable of producing in paying quantities. At the trial in this matter, testimony was adduced the well has never produced domestically usable gas and, at best, was only capable of producing "sour gas". Testimony also was adduced "sour gas" is not marketable, unless scrubbed, and appellant has not obtained a contract with a scrubbing facility. However, we find the evidence supports the trial court's conclusion the well was capable of producing gas [in paying quantities]. Even sour gas is marketable. The fact appellant did not have ready access to a scrubbing facility in 1987, does not necessarily mean access was not available or possible.

{¶ 41} Appellant advised the Ohio Department of Natural Resources in 1991, the well was capable of production in commercial quantities and pipeline right of ways were being negotiated. In July 2002, appellant was on appellee's property installing a sales line to the pipeline which can transport the gas to a scrubbing facility. Appellant had discussed arrangements to have the gas scrubbed. If the well was capable of production in 1991, and in 2002, appellant was preparing to transport the sour gas for scrubbing, appellant has failed to demonstrate why it could not have made the well capable of production in 1988. Because the well was capable of production, the lease did not terminate in September, 1988, and appellees were entitled to the shut-in royalties after such time.

{¶ 42} Appellant's first and second assignments of error are overruled.

III

{¶ 43} Appellant, in its third assignment of error, argues the trial court erred in ruling appellant is estopped from claiming the lease expired in September of 1988. We disagree.

{¶ 44} The trial court, in its Journal Entry, held, in relevant part, as follows:

{¶ 45} "9. The Defendant's actions, since the commencement of this case of installing a sales line, show an intention to treat the Lease as being in full force and effect, which intention

creates an attendant duty on the part of the Defendant to perform its duties under the contract, including the duty to pay accrued shut in rentals.

{¶ 46} "10. The Defendant is estopped from claiming that the leasehold terminated prior to July, 2002, since by its own actions, from the commencement of this action, it installed a sales line on the Plaintiffs' property."

{¶ 47} This Court, in *Stitzlein v. Willey* (Dec. 12, 1979), Holmes App. No. CA-318, 1979 WL 209691, held that "R.C. 5301 .01 precludes the concept that a [oil and gas] lease may be "reborn by estoppel"." Id. at 3. In that case, the appellee contended certain statements evidenced an intent to retain an oil and gas lease in full force and effect past its expiration time. This Court noted "[t]he lease had already expired at the time of the alleged statements, and the verbal statement would be ineffective to either revive the lease, or to create a new lease. See R.C. 5301.01." Id. at 3.

*7 {¶ 48} Having found in our analysis of appellant's first and second assignments of error the lease did not expire in 1998, because it was "capable of producing", the concept of "reborn by estoppel" we discussed in *Stitzlein* is inapplicable here. We find the trial court properly found appellant was estopped from claiming the lease terminated prior to July, 2002.

{¶ 49} Appellant's third assignment of error is overruled.

{¶ 50} The judgment of the Morrow County Court of Common Pleas is affirmed.

WISE, J. concurs.

EDWARDS, J., dissents.

EDWARDS, J.

{¶ 51} I respectfully dissent from the majority's analysis and disposition of appellant's three assignments of error.

{¶ 52} As noted by the majority in its opinion, the issue in the case sub judice is whether the well was capable of producing in paying quantities. At the trial in this matter, testimony was adduced that the well has never produced domestically usable gas and, at best, was only capable of producing "sour gas". Testimony also was adduced that "sour gas" is not marketable, unless scrubbed, and that appellant has not obtained a contract with a scrubbing facility. Since the oil and gas well was neither producing nor capable of producing gas in paying quantities, and since no shut-in royalties were paid after September of 1988 to extend the term of the lease in the event of non-production, I would find that the lease automatically expired by its own terms in September of 1988 and that appellees, therefore, were not entitled to shut-in royalties after such time.

{¶ 53} The majority, in its opinion, states, in part, as follows: "[i]f the well was capable of production in 1991, and in 2002, appellant was preparing to transport the sour gas for scrubbing, appellant has failed to demonstrate why it could not have made the well capable of production in 1988." However, no scrubbing facility existed in Morrow County in 1988. The evidence is clear that, to be marketable, the gas needed to be scrubbed.

{¶ 54} For the above reasons, I would sustain appellant's first and second assignments of error.

{¶ 55} Appellant, in its third assignment of error, argues that the trial court erred in ruling that appellant is estopped from claiming that the lease expired in September of 1988. I agree.

{¶ 56} As noted by the majority, this Court, in *Stitzlein v. Willey* (Dec. 12, 1979), Holmes App. No. CA-318, 1979 WL 209691, held that "R.C. 5301.01 precludes the concept that a [oil and gas] lease may be "reborn by estoppel"." Id. at 3. In such case, the appellee contended that certain statements evidenced an intent to retain an oil and gas lease in full force and effect past its expiration time. This Court noted that "[t]he lease had already expired at the time of the alleged statements, and the verbal statement would be ineffective to either revive the lease, or to create a new lease. See R.C. 5301.01." Id. at 3.

*8 {¶ 57} While the majority concludes that the lease did not expire in 1988, as is stated above, I would find that the lease did expire in 1988 since it was not producing or capable of production and since appellant failed to pay shut-in royalties after such date to extend the lease despite non-production. Since the lease expired by its own terms in 1998, appellant's actions subsequent to such time do not operate to revive the lease. I would, therefore, also sustain appellant's third assignment of error.

{¶ 58} Based on the foregoing, I would reverse the judgment of the Morrow County Court of Common Pleas and remand this case to the trial court.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is affirmed. Costs assessed to appellant.

Parallel Citations

169 Oil & Gas Rep. 575, 2005 -Ohio- 5640

Footnotes

1 The parties took free gas from the well to use for domestic purposes and to use in a pig farming operation.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.

S.E. SNYDER, et. al., Plaintiffs-Appellants,
v.
GLEN GERY CORP., et. al., Defendants-Appellees.

Case No. CA 5490. | March 31, 1981.

Attorneys and Law Firms

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Opinion

OPINION

Before Hon. Robert E. Henderson, P.J., Hon. John R. Milligan, J., Hon. Saul G. Stillman, J.

HENDERSON, P.J.

*1 This is an appeal from the Judgment Entry of the Common Pleas Court of Stark County, Ohio by which the Court found that a coal and clay lease dated July 2, 1956 as amended on November 9, 1967 and December 13, 1967 was still in full force and effect and governs the rights of the parties, and that Plaintiffs-Appellants are required to permit Defendant-Appellee, its agents or sub-lessees to mine coal and clay in accordance with lease as amended.

Plaintiffs-Appellants raise the following Assignment of Error:

> I. THE APPELLANTS FOR THEIR ASSIGNMENT OF ERROR SAY THAT THE JUDGMENT RENDERED BY THE COMMON PLEAS COURT OF STARK COUNTY, OHIO IS CONTRARY TO LAW; IN THAT, FAILURE TO MINE FOR A PERIOD IN EXCESS OF EIGHT YEARS VIOLATES AN IMPLIED COVENANT TO REASONABLY DEVELOP THE LAND AND SHOULD ENTITLE THE LESSOR TO FORFEITURE OF THE LEASE.

This cause came before the Trial Court on an agreed statement of facts and briefs of the parties. The evidence indicates that a written lease was executed between the Plaintiffs-Appellants and the Natco Corporation, which lease was later assigned to Glen Gery Corporation and subsequently to Defendant-Appellee, Crescent Brick Company, Inc., whereby Defendant-Appellee was to mine coal and clay from the land of the Plaintiffs-Appellants. The term of the lease was unilaterally controlled by the lessee, or Defendant-Appellee as it is to remain in full force until the exhaustion of usable coal and clay or default on the part of the lessee. The evidence further indicates that the lease provides for the lessee to pay to the land owner Plaintiffs-Appellants the sum of $300.00 per year as minimum rent or voyalty in those years where no coal or clay is mined or the royalty from the coal and clay mined does not amount to $300.00. The evidence further indicates that from the year 1971 through 1978 no coal or clay was mined but that the Plaintiffs-Appellants were paid the minimum royalty of $300.00 per year under the terms of the lease, but that Plaintiffs-Appellants have elected not to cash the two most recent royalty payments. The evidence further indicates that the lease provides for a royalty on a tonnage basis for all coal and clay extracted from Plaintiffs-Appellants premises. The lease grants to lessors the option to terminate the lease only upon the following conditions: (1) If lessee fails to pay the annual rental or royalties due under the lease, (2) If lessee fails to keep or perform other covenants to be kept and performed by it, and if such default continues for a period of thirty days after notice in writing has been given to lessee, or (3) If mining operations have not been commenced on or prior to the expiration to the tenth anniversary of the lease.

Parties to this action have stipulated that all minimum rental payments have been timely made since the date of re-affirmation in December, 1967. In addition the evidence indicates that mining operations were conducted on the premises during the years 1968, 1969 and 1970 and that royalties were paid to Plaintiffs-Appellants for minerals removed. The evidence further indicates that during late 1976, sub-lessees of Defendant-Appellee applied for a strip mining permit from the Ohio Department of Natural Resources. The parties have stipulated the genuineness of the strip mining

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permit which was issued August 8, 1977. The evidence further indicates that sub-lessees are presently surface mining property adjacent to Plaintiffs-Appellants' premises and that there are current plans for the sub-lessees to mine the Snyder premises.

*2 Plaintiffs-Appellants argue that by law a lease carries with it an implied condition of due diligence and that Defendant-Appellee violated that condition by not mining for seven years. Plaintiffs-Appellants further argue that acceptance of minimum rent or royalty does not alter Defendant-Appellee's duty to fulfill the purpose of the lease with due diligence. As a result thereof, Plaintiffs-Appellants contend the Defendant-Appellee breached the lease and that they are entitled to rescind the agreement.

Defendants-Appellee have outlined the following arguments in support of the validity of the lease:

(1) The express terms of the written lease as amended, define and control the rights of the parties.

(2) Defendant-Appellee and its predecessors have fully performed all conditions and covenants of the lease.

(3) Plaintiffs-Appellants are estopped from challenging the enforceability of the lease by their acts of ratification.

(4) Plaintiffs-Appellants have no basis under Ohio law to seek termination of the lease as amended.

We affirm the Judgment Entry of the Trial Court below for the following reasons:

> 1) The terms of a written lease instrument relating to mining rights govern as between the parties if the instrument on its face is clear as to its terms and is not contrary to law.

Plaintiffs-Appellants have alleged no ambiguity in the lease instrument relating to any term or condition thereof and there is no claim that the lease is contrary to law, thus Plaintiffs-Appellants can seek termination of the lease only under the express causes for termination as provided in the lease agreement. The terms of the lease at Page 5, thereof provide as follows:

> "Lessee agrees that in the event payment of the rent or royalty, due under the terms of this Lease, is not made within thirty (30) days after the same shall become due and payable, or if the Lessee shall fail to keep and perform any of the covenants on its part to be kept and performed and such default shall continue for a period of thirty (30) days after notice in writing shall have been given to Lessee, then this Lease, at the option of the Lessors, shall become null and void and of no further force or effect.

The evidence indicates in this case that Plaintiffs-Appellants did not follow any of the provisions of the lease with regard to termination of said lease at any time prior to the filing of the lawsuit involved herein. That is, Plaintiffs-Appellants did not give the thirty day notice in writing to lessee, alleging that lessee had failed to keep and perform one of the covenants set forth in the lease. The evidence on the other hand does indicate that Defendant-Appellee and its predecessors have fully complied with the express terms of the lease. All annual royalty payments have been made to Plaintiffs-Appellants, although the evidence does show that the last two annual royalty payment checks have not been cashed. We find that Plaintiffs-Appellants' decision not to cash these checks has no legal significance, since Defendant-Appellee's obligation has been fulfilled by the timely tender of such payment.

*3 It is also significant that Plaintiffs-Appellants have entered into two amendments to the original lease, both in the year 1967, and under both amendments the express terms of said amendments ratified and affirmed the original lease. For eleven years after the re-affirmation, Plaintiffs-appellants accepted all royalty payments tendered by Defendant-Appellee's predecessors including the royalties for minerals removed from the premises. Thus, Plaintiffs-Appellants have accepted the consideration called for by the lease.

Plaintiffs-Appellants have cited the case of Ohio Oil Company v. Hurlburt, 14 O.C.C. 144 (1897), as Ohio authority for their position. This case is authority for the proposition that while a lessor may have a right to cancel and rescind a lease because of delay in drilling for oil and gas, the lessor waives that right by accepting annual rental payments during the delay without complaint or protest. The Hurlburt case, supra, also stands for the proposition that is is the duty of the lessee in an oil and gas lease not to delay the development and operations under the lease for any unreasonable length of time and that if there is unreasonable delay the lessor may insist that the lessee either sink oil wells or abandon the premises not withstanding the payment of a delay rental every year. The Court concludes, however, as follows:

"But, if the lessor fails to avail himself of such unreasonable delay to forfeit the lease until after the lessee has again, with his consent, commenced operations and sunk wells on the land, the right of the lessor to insist on a forfeiture for the previous unreasonable delay, is waived."

2) Plaintiffs-Appellants contend that even though there are express covenants in this lease, there is still an implied covenant to develop the mine or produce the mineral. There is no question but that in Ohio a mineral lease is made upon the implied condition that the lessee will proceed with due diligence since it would be unjust and unreasonable to permit a lessee to hold mineral land for any length of time without making a reasonable effort to operate in accordance with the purpose of the lease. Even where a land owner gives a mineral lease which provides that the lessee shall make an annual payment for every year he fails to operate thereunder, it is nevertheless the duty of the lessee not to delay the development and operations thereunder for any unreasonable length of time, unless the obligation of or unreasonable delay by the lessee in such respect is waived. The law is, therefore, in this state that where the agreement provides for the lessee to make a payment of a minimum annual rent in addition to royalties and the agreement contains express provisions for forfeiture of the lease, as long as the lessee makes the payments required by the lease and does not otherwise breach the lease agreement, such an implied covenant does not exist. In the recent case of Beer v. Griffith, 61 Ohio St. 2d 119, 399 N.E. 2d 1227, the Ohio Supreme Court in 1980 approved and followed the case of Harris v. The Ohio Oil Company, 57 Ohio St. 118, 48 N.E. 502. The Court in Syllabus 2 and 3 states as follows:

> *4 "2. Absent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land. (Harris v. Ohio Oil Company, 57 Ohio St. 118, approved and followed.)"

3. Where certain causes of forfeiture are specified in an oil and gas lease, others cannot be implied. Under such a lease, the remedy for a breach of an implied covenant, without more, is damages, and not forfeiture of the lease, in whole or in part. (Harris v. Ohio Oil Company, 57 Ohio St. 118, Paragraphs 2 and 3 of the syllabus, approved and followed.)

A reading of the Beer case, supra, indicates that the facts in that case are really distinguishable from our case. In the first place, the lease required no annual rental payments apart from royalties and secondly, the term of the lease was expressly contingent upon the exercise of reasonable diligence by the lessee and the continued production of oil or gas from the land. The case does stand, however, for the proposition that leased property can be considered abandoned only where there is an intent to abandon the property, which certainly is not the case here and second, the Court reaffirms the case of Harris v. The Ohio Oil Company, supra, which stands for the proposition that when a lease specifies certain causes of forfeiture, others cannot be implied.

We approve the Court's finding below that in this case Plaintiffs-Appellants failed to follow the procedures as outlined in the lease that the lessor was required to follow when Plaintiffs-Appellants believed that Defendant-Appellee failed to execute due diligence in mining the coal and clay. In accordance with said lease this procedure required Plaintiffs-Appellants to provide Defendant-Appellee with written notive of default. Here, Plaintiffs-Appellants chose not to give the proper notice as required by the lease instrument itself and, in fact, continued to accept the minimum payments provided by the Defendant-Appellee.

For the reasons set forth hereinabove, we overrule Plaintiffs-Appellants' Assignment of Error and affirm the Judgment of the Common Pleas Court of Stark County, Ohio.

Milligan, J. and Stillman, J., concur

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, Plaintiffs-Appellants' sole Assignment of Error is overruled and the Judgment of the Common Pleas Court of Stark County, Ohio is affirmed.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Hocking County.

Richard P. TAYLOR, Trustee Plaintiff-Appellant.
v.
MFC DRILLING, INC., et al. Defendants-Appellees.

No. 94CA14. | Feb. 27, 1995.

Attorneys and Law Firms

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Critchfield, Critchfield & Johnston, David J. Wigham, Wooster, Ohio, for appellees.

Opinion

DECISION AND JUDGMENT ENTRY

HARSHA, J.

*1 Richard P. Taylor appeals from a judgment of the Hocking County Court of Common Pleas granting summary judgment to MFC Drilling, Inc., and the Oxford Oil Company. Appellant assigns one error:

> THE TRIAL COURT ERRED IN RULING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT DEFENDANT-APPELLEE WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

On January 8, 1992, the Winland family, appellant's predecessor in interest, granted an oil and gas lease to appellees for the one hundred seven acre property at issue. Appellees previously created an oil and gas development unit on October 28, 1991, when the Ohio Division of Oil and Gas issued permit number 3349. The Winland family joined this voluntary pooling agreement adding 6.13 acres of the property now owned by appellant to the pooled acreage. Appellees recorded a declaration of consolidation on January 15, 1992, in the Hocking County Recorder's office. This declaration delineated the territorial boundaries of the development unit and the proportionate share of each owner's property within the unit. The property now owned by appellant constituted a 3.83 percent proportionate share. The well on the development unit has yielded oil and gas in commercially paying quantities since June 1992.

On November 20, 1992, appellant bought the Winland family's one hundred seven acre property at a sheriff's sale. The recorded deed stated that the property was subject to appellees' oil and gas lease.

On March 3, 1994, appellant filed a complaint alleging that appellees' well, located on the pooled acreage, was draining oil and gas from the one hundred one acres owned by appellant but which was not part of the development unit. Appellant alleged that appellees breached an implied duty of fair dealing and that as a result of appellees' actions, appellant suffered a loss to the property value and continues to lose royalties. Appellant demanded an order directing appellees to drill a well on the remaining one hundred one acres of appellant's property or in the alternative, for an order declaring the lease canceled as to the undeveloped one hundred one acres.

Appellees filed a motion for summary judgment. The trial court granted the motion by entry making findings of undisputed facts and conclusions of law. The trial court found that the lease granted to appellees by the Winland family contained a "pooling" clause allowing appellees to combine acreage from appellant's land with that of adjoining property owners to create a drilling unit. The pooling clause states that development of a drilling unit including a portion of appellant's property will be deemed development of the entire property even if the well is not on appellant's property. The trial court then found that the lease contained a valid express exclusion of all implied covenants and therefore appellees were entitled to judgment as a matter of law.

In his sole assignment of error, appellant challenges the trial court's decision granting appellees summary judgment. In reviewing a summary judgment, the lower court and the appellate court utilize the same standard, *i.e.*, we review the judgment independently and without deference to the trial court's determination. *Midwest Specialties, Inc. v. Firestone Co.* (1988), 42 Ohio App.3d 6, 8. Summary judgment is appropriate when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter

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of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in its favor. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; cf., also, *State ex rel. Coulverson v. Ohio Adult Parole Auth.* (1991), 62 Ohio St.3d 12, 14; Civ.R. 56(C). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Additionally, a motion for summary judgment forces the nonmoving party to produce evidence on any issue for which (1) that party bears the burden of production at trial, and (2) for which the moving party has met its initial burden. See *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, and *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus.

*2 Appellant alleged in his complaint that appellees breached an implied covenant of fair dealing by including in the development unit only 6.13 acres of the one hundred seven acres subject to the lease. Absent express provisions to the contrary, oil and gas leases include several generally recognized implied covenants, including the implied covenant to reasonably develop the leased premises. *Ionno v. Glen-Geary Corp.* (1983), 2 Ohio St.3d 131, 132. We have not found any Ohio case specifically recognizing an implied covenant of fair dealing in mineral leases. However, the nature of appellant's complaint appears to fall within the implied covenant to reasonably develop the leased premises. [1]

The lease to which appellant's property was subject provides in part:

> 20. All covenants and conditions between the parties, hereto shall extend to their heirs, personal representatives, successors and assigns * * *. It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement, or obligation shall be read into this agreement or imposed upon the parties or either of them.

We note that two appellate courts have allowed lessees to disclaim all implied covenants using language identical to that used in the lease between appellees and appellant's predecessor in interest. See *Smith v. N.E. Natural Gas* (Sept. 30, 1986), Tuscarawas App. No. 86AP30016, unreported; *Holonko v. Collins* (June 29, 1988), Mahoning App. No. 87CA120, unreported. We agree that the general language found in this lease effectively disclaims all implied covenants. Accordingly, the trial court properly granted summary judgment to the appellees.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Footnotes

1 See *Ionno, supra:* "[T]here is manifestly an implied covenant on the part of the lessees that they will work the land with ordinary diligence, not simply for their own advantage and profit, but also so that lessors may secure the actual consideration for the lease, i.e., the production of minerals and the payment of a royalty * * *."

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EXHIBIT 5

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2012 JUL 12 AM 10: 06
BETH ANN ROSE
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No. 2011-345
vs.	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION (On Pending Motions)

The above styled action is before the Court on the Complaint of the Plaintiff, Clyde A. Hupp and Molly A. Hupp, et al., for declaratory judgment and quiet title. This action was filed on September 14, 2011 and the two subsequent Complaints for Class Action and Amended Class Action were filed on September 29, 2011 and September 30, 2011, respectively. The Defendant, Beck Energy Corporation, has not filed an answer in this action, but has made an appearance. This action has not been certified as a class action as of the date of this decision. The Court is considering the pending motions prior to undertaking the required hearings in regard to class certifications. **Clyde A. and Molly Hupp are parties of record in this case and the correct style of the case is as set forth above. For some reason, unknown to this Court, the parties in this case have changed the style of this case. All future filings in this case will be correctly titled or subsequently stricken by Court order.**

The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion to

COMMON PLEAS COURT MONROE COUNTY, OHIO
I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By
Deputy Clerk

Dismiss on January 5, 2012. On the same date, the Plaintiffs also filed a response to the Defendant's Motion to change venue. On February 16, 2012 the Plaintiffs filed a Motion for Summary Judgment with a supporting brief. On March 19, 2012 Chief Justice Maureen O'Connor of The Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr., Judge of the Washington County Court of Common Pleas. On March 19, 2012 the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. Thereafter, on March 23, 2012, the Court ordered the matter set for a Status Conference. The purpose of the Status Conference was to establish a briefing schedule for all of the motions that were being filed in this action. All attorneys of record participated in the Status Conference. A Status Conference was held by means of telephone conferencing on April 20, 2012. A Journal Entry was entered on April 25, 2012 establishing a briefing schedule for the pending motions. The briefing schedule required all responses to be filed by April 30, 2012 and replies to responses by April 13, 2012. All motions and replies have been timely filed either pursuant to an extension of time granted by the Court or within the original deadlines. The Defendant filed its Brief in Opposition to the Plaintiff's Motion for Summary Judgment on April 30, 2012 and the Plaintiffs filed a reply to that Brief on May 14, 2012. The matter has been under review by the Court since that date. The Court has reviewed all of the pleadings, all of the motions, memorandums and supporting affidavits provided to this Court and filed in this action. At present there are six named individual plaintiffs in this action. One plaintiff, Donald W. Yonally, was voluntarily dismissed without prejudice on April 12, 2012.

The Court will address all of the issues presented in the parties' various motions in this decision.

FACTUAL BACKGROUND

The Plaintiffs own various tracts of land in Monroe County, Ohio. The Defendant, Beck Energy, is an Ohio oil and gas producer that develops oil and gas interests in Ohio. Beginning in 2003 the Defendant entered into a number of oil and gas leases in Monroe County, Ohio. The Plaintiffs maintain that they have a potential class of 248 lessors. The leases that are involved in this action are leases generated by the Defendant. All leases are identical except as to a few blanks on each of the form leases that were filled in by the Defendant's representatives. These variations are: the date of the lease, the names and addresses of the lessors, and a rough description of the land by township and county. All leases have written in the blank in paragraph three a twelve month primary period/term. The delayed rental payment varies per lease and the name of the lessors varies with each lease. To date, no wells have been drilled in Monroe County pursuant to any of the leases that are involved in this action.

There are certain provisions of the form lease (see Plaintiffs' Exhibit 2 as attached to Plaintiffs' Complaint) that are at issue in this case. The key paragraphs are set forth below:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.
>
> 3. This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.
>
> * * *

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event as well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay th Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are started, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessor may elect.

***

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches

shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

***

19. . . . no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties. . . .

MOTION TO CHANGE VENUE

At the present time, no jury demand has been filed in this action. If this matter proceeds as an action to the Court, there has been a de facto change of venue by reason of Judge Selmon recusing herself from this case and The Chief Justice of The Supreme Court of Ohio assigning this case to the undersigned. If a jury demand is timely filed in the future, the Court will revisit the issue of venue should it be brought to the Court's attention in a subsequent motion. The motion to change venue is denied without prejudice.

DEFENDANT'S MOTION TO DISMISS

On November 30, 2011 the Defendant filed a combined Motion to Dismiss and/or Change Venue. Pursuant to Oh. Civ. R. 12(B)(6) the Defendant seeks to have this Court dismiss this action pursuant to the provisions of paragraph 17 of the lease.

The Plaintiffs admit that they have not complied with paragraph 17 of the subject lease.

A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of a complaint. Dowdy v. Jones, 7th Dist. No. 10-CO-21, 2011-Ohio-3168, ¶14. For a trial court to dismiss a complaint pursuant to Civ.R.

12(B)(6), it must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to the relief sought. Ohio Bureau of Workers' Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, __ N.E.2d __, ¶12. "The allegations in the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* Moreover, a complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theories on which the plaintiffs rely. Fahnbulleh v. Strahan, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). Instead, the Court must examine the complaint to determine whether the allegations provide for any relief on any possible theory. *Id.*

Defendant's motion to dismiss herein is predicated on a single proposition: that Plaintiffs did not provide thirty days written notice to this Defendant prior to commencing this action. The Plaintiffs maintain that the Leases which form the contractual basis for these parties are void as against public policy and unenforceable, and under any reasonable construction of said Leases, were materially and substantially breached by the Defendant reducing the contractual requirement of a notice to a meaningless act from which no benefit could be derived.

Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or

indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also* State v. Baldwin Producing Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension

between lessors, lessees and the courts. Jacobs v. CNG Transmission Corp., 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions, one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

The Plaintiffs' position in this matter is that their leases with the Defendant are a no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in

paying quantities pursuant to paragraph 2.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in Ionno v. Glen-Gery Corp., 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. ***Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.***

This Court must, under the current state of Ohio law, consider the allegations in the Plaintiffs' Complaint as true, and must draw any reasonable inferences from them in favor of the Plaintiffs. When doing so, this Court cannot say beyond doubt that the Plaintiffs can prove no set of facts that would entitle them to the relief sought. Therefore, for all of the reasons set forth

herein above and hereafter, the Defendant's Motion to Dismiss is not well taken and the same shall be denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs filed their Motion for Summary Judgment in this action on February 16, 2012. The Defendant filed its Brief in Opposition on April 30, 2012. The Plaintiffs further filed a reply to the Defendant's opposition on May 14, 2012 and on March 19, 2012 filed a reply brief in support of their Motion for Summary Judgment.

The Plaintiffs' Motion for Summary Judgment sets forth several distinct issues. First, the Plaintiffs maintain that their lease with the Defendant is a lease in perpetuity and as such is void and unenforceable as against the public policy of The State of Ohio. Secondly, the Plaintiffs maintain that the Defendant breached the implied covenant to reasonably develop their land and by doing so the leases are now null and void. Thirdly, the Plaintiffs maintain that the lease provisions for foregoing development by the payment of delayed rentals has expired because the Defendant failed to commence a well within the required times. The Defendant has countered the Plaintiffs' assertions by stating that it had not received the written notice required from the Plaintiffs setting forth any alleged noncompliance by the Defendant with the lease's terms. Plaintiffs maintain that they do not have to give notice because the leases were void *ab initio*. The Defendant also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease.

A Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation." Gross v. Western-Southern Life Ins. Co., 85 Ohio App.3d 662, 667, 621 N.E.2d 412 (1st Dist. 1993). A Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [civil rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Todd Development Co. v. Morgan, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, &22. *See also* Civ.R. 1(B).

Civ.R. 56(C) mandates that a court enter summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* When a motion for summary judgment has been made and properly supported, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The parties moving for summary judgment need only prove their own case: the movants do not bear the initial burden of addressing any affirmative defenses the nonmovant may assert. *Id.*, syllabus and &13.

"Summary judgment is appropriate where no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the nonmoving party's claim or defense." Gross, 85 Ohio App.3d at 667. The mere existence of a factual dispute is insufficient to preclude summary judgment only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Id.* "The construction of written contracts and instruments of conveyance is a matter of law." Alexander v. Buckeye Pipe Line Co., 553 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. This Court finds that the instant case involves the construction of written leases

and in light of the Defendant's undisputed failure to commence any development activity pursuant to those leases, the clear public policy of Ohio has been violated. There is no dispute as to any material fact; reasonable minds can reach no conclusion other than one reached herein by this Court that is adverse to the Defendant; and Plaintiffs are entitled to judgment as a matter of law on this issue.

The Plaintiffs also maintain that their leases with the Defendant are perpetual leases under which there has been no development of oil and gas and therefore the leases are void and unenforceable as against public policy. Central to the understanding of this issue are paragraphs two and three of these parties' leases. Paragraph two provides as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the lessee for a term of ten years and as 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 and gas and as provided in paragraph 7 following."

Paragraph 7 of the parties' leases deal with the event that if a well is drilled that is a dry hole. Paragraph number 3 of the parties' lease is also central to an understanding of the issue at hand. Paragraph 3 of the parties' leases provide that:

> "This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of _____ Dollars each year, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved

herein. If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed rental can be paid. Further, paragraph 2 provides that the leases have a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. It also leaves the determination of what paying quantities means up to the Defendant. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. There is no deadline for the completion of a well. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs.

Public policy analysis requires this Court to consider the impact of the contract at issue upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio Spp.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> "Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

> Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy."

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-321, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

The Ohio Supreme Court has clearly and unequivocally articulated the public policy of the State of Ohio in regard to the extraction of oil and gas. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also State v. Baldwin Producing

Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; Northampton Building Co at 198-99. It would be inconsistent to permit a private operator to unilaterally ban the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. The Plaintiffs are also entitled to summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs' acreage. This provision violates the implied covenant to reasonably develop.

The leases in this case are, in effect, a no-term leases: through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2 provides that the leases shall continue in force for a term of ten years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3 provides that the leases shall become null and void if a well is not commenced

within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of ____ Dollars each year, ..." but likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals. Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779 . Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The coal leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation within which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.

Id. At 134.

The "long term" lease in *Ionno* and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. Like the lease in *Ionno* under which there had been no development, the leases herein are unenforceable as against public policy.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question seriously offend public policy in that they are perpetual leases. The Plaintiffs are also entitled to Summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land and by failing to drill any wells on any of the acreage that implied covenant has been violated.

"[T]he only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving *** royalties based upon the amount of minerals derived from the land." Ionno, 2 Ohio St.3d at 133 n.2, 443 N.E.2d 504. "[W]here a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* At 133. In *Ionno*, the Ohio Supreme Court found a lease to be subject to the implied covenant to reasonably develop where it set forth

no time period in which mining operations were required to commence, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.* At 133.

The leases in this case contain neither a "specific reference to the timeliness of development" no "a time period in which mining operations were required to commence." Paragraph 3 of the lease provides that the lease shall "terminate" if a well is not commenced within the twelve-month period, the remainder of that paragraph ostensibly permits the Defendant to delay development indefinitely by paying annual delay rentals. Paragraph 2 of the lease also permits the Defendant to delay development indefinitely by determining in its judgment that oil or gas is "capable of being produced on the premises in paying quantities." A lease in which the development period can be delayed into perpetuity at the option of the lessee clearly satisfies the *Ionno* criteria under which an implied covenant will arise.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill and initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. V. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams,* 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The court saw no need to resort to the law of the state in which the case arose, stating that the covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *Id.* At 278-79.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the minerals to which its lease applied.

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. At 281.

The Defendant maintains that its lease clearly disclaims all implied covenants. The lease does contain a general disclaimer of implied covenants. However, the lease also later refers to implied covenants.

In Ohio, as elsewhere, "[a]bsent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land." *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

Ambiguities in contracts are to be construed against the proponent of the instrument. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* "In determining whether contractual language is ambiguous, the contract must be construed as a whole *** so as to give reasonable effect to every provision in the agreement." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (applying Ohio law). Where a contract as a whole can be reasonably interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue, and must be construed against the drafter. *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003).

In this case, the parties' lease first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.

This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to

reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective.

Where general provisions of a contract conflict with specific provisions of the same document, the specific provisions generally control. *Edmondson v. Motorists Mutual ins. Co.*, 48 Ohio St.2d 52, 53, 356 N.E.2d 722 (1976); *Hoepker v. Zurich American Inc., Co.*, 3d Dist. No. 140318, 2003-Ohio-5138, ¶11; *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10th Dist. 1991). Paragraph 17 of the Beck Lease sets forth specific procedures to be followed in the event a lessor believes Beck to have breached either an express or implied obligation. Paragraph 19 generally disclaims all implied obligations. In that the specific provision in paragraph 17 setting forth a lessor's rights in the event Beck breaches an implied condition controls over the general disclaimer in paragraph 19, the disclaimer is ineffective.

The stated purpose of this lease is "drilling, operation for, producing and removing oil and gas and all the constituents thereof." The lease contains no suggestion that either defendant or lessor had any other objective. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the express purpose of the lease.

To give effect to the fundamental purpose of an oil and gas lease as well as to the implied covenant to reasonably develop the land, provisions in the lease bearing on the extent of development may modify or reflect the standard of reasonableness in the implied covenant.

Streck v. Reed, 9th Dist. No. 1221, 1983 WL 4132, *3 (June 8, 1983). The lease must be construed in a manner that will give effect to all the provisions in the lease, both express and implied. *Id.*

The provision in a mineral lease for annual advance payments does not relieve the lessee of its obligation to reasonably develop the land. *Ionno*, 2 Ohio St.3d at 134, 443 N.E.2d 504.

> The questions of working diligently and of paying rent or royalties are entirely separately matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum.

Paragraph 3 of this lease specifies that the Lease "shall become null and void" and the rights of the parties "shall cease and terminate" unless a well is commenced within twelve months (subject to the effect of paying delay rentals). The parties necessarily determined that twelve months was a reasonable time in which to commence a well. In construing this lease, the Court hereby finds that the implied covenant to reasonably develop the land required the Defendant to commence a well within one year. As the Defendant failed to do so, and in fact, has failed to commence a single well on any portion of any of the Plaintiffs' acreage, even though more than three years have elapsed since the lease covering the Hustacks' property was executed, almost six years have elapsed since the Hubbards executed their lease, nine years have elapsed since Donald Yonley executed his Lease, and more than six years have elapsed since David Majors executed his Lease, it has breached the implied covenant to reasonably develop Plaintiffs' Acreage.

When construing the evidence most strongly in favor of the Defendant as required by the Ohio Rules of Civil Procedure, this Court is convinced that reasonable minds can come to but one conclusion, and that conclusion is adverse to the Defendant. This Defendant's lease clearly and unequivocally breaches the implied covenant to reasonably develop the Plaintiffs' land and violates the public policy of the State of Ohio and the Plaintiffs are entitled to summary judgment on this issue. As stated herein above, the lease involved in this action is a lease in perpetuity. By paying delayed rentals, this land could potentially never be developed by the Defendant's payment of a very minimal payment to the Plaintiffs.

While not controlling, our neighboring state of Pennsylvania has decided the issues presented by this course. It is interesting because Pennsylvania has taken the same position taken by the Ohio Supreme Court on the issues presently before this Court in this matter. *Hite v. Falcon Partners*, 2011 Pa.Supr. 2, 13 A.3d 942 (2011), is in many respects similar to the instant case. The *Hite* lease and this lease are both "unusual" types of no-term leases. 13 A.3d at 947. They do not contain traditional habendum clauses which definitively designate a primary term (the time period in which the lessee has the right to develop the leased premises) and a secondary term (the period following the primary term in which the lessee can reap a long-term return on the efforts and funds expended to develop the premises.) The *Hite* lease and this lease each contain language purporting to enable the lessee to indefinitely extend the primary term at the lessee's option.

The *Hite* lease provided for a one-year primary term that the lessees could extend indefinitely either by continuing operations for production of oil or gas, or by paying annual delay rentals of two dollars per acre. 13 A.3d at 944. The lessees in *Hite* simply paid delay

rentals for years without commencing any drilling, depriving the lessors of the royalties they would have received from the production of their oil or gas.

The court noted that "[r]oyalty-based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties." *Id.* At 945. The court reviewed the history of mineral leases, noting the evolution from a definite term that left the lessee at a disadvantage if minerals were discovered near the end of the term, to a variable term expressed by a habendum clause providing for a fixed period for development, with an option to extend the lease for "as long thereafter" or "so long as" the specified minerals were produced in paying quantities, enabling the lessee to continue to reap a return for the money spent to develop the property. *Id.* At 946.

Even if a written lease did not expressly require the lessee to develop the property in a timely manner or suffer forfeiture, courts recognized an implied obligation to develop the leasehold. *Id.* As a result, leases specifying a fixed primary term with a "thereafter" clause began to incorporate "delayed rental" clauses relieving lessees of the obligation to immediately develop the property. *Id.* "[C]ourts have interpreted delay rentals to be 'limited to the initial term of the lease.'" *Id* at 947; *Jacobs*, 332 F.Supp.2d at 786.

As noted in Plaintiffs' public policy argument, section II.B., *supra*, lessees began crafting leases permitting the lessee to extend the exploration period for as long as he considered payment of the delay rental worthwhile, giving rise to the "no term lease," which courts rejected under one of two rationales. *Hite* at 947. One rationale was that because the lease did not fix a time beyond which the lessee could not delay actual development and the payment of royalties-the consideration for the lease-the lease was unfair and therefore unenforceable against the lessor. *Id.*

The other rationale was that no-term leases contained an implied condition requiring the lessee to drill within a reasonable time or forfeit the lease. *Id.*

The *Hite* court observed that to a landowner unsophisticated in the legalities of leasing minerals the terms of the lease indicated a one-year term during which the lessee was to commence development. 2011 Pa.Super.2, 13 A.3d at 948. "If the lease could be extended in perpetuity though the payment of $2.00 per acre per year, there would be little need for the parties to agree on a one-year lease term." *Id.* Rejecting the lessee's contention that the leases enabled it to maintain production rights indefinitely as long as delay rentals were paid, the court opined that delay rentals relieve the lessee of the obligation to develop the land during the primary term only. *Id.* Accordingly, a single two-dollar-per-acre delay rental relieved the lessee of any obligation to develop the leasehold during the one-year primary term. *Id.* Once that primary term expired, the mere payment of delay rentals could not preserve the lessee's drilling rights. *Id.*

Permitting the lessee to pay delay rentals indefinitely, thereby denying the lessors the financial benefits of actual production, would contravene the presumed intention of the parties in executing the leases in the first place, as well as the notion that delay rentals are intended to "spur the lessee toward development." *Id.* Moreover, construing the leases as creating an indefinite term would provide the lessee with vested property rights for the mere payment of a nominal delay rental, a concept at odds with the traditional construction of the property rights conveyed by an oil and gas lease. 13 A.3d at 949. Accordingly, the *Hite* court held that the terms of the leases being construed limited the privilege of foregoing production by paying delay rentals to

the one-year primary term; once the primary term ended and the lessee failed to commence production, the leases expired. *Id.*

Like the *Hite* lease, this lease is a no-term lease which, on its face, purports to enable the Defendant to extend the term indefinitely, without any development, by simply paying nominal delay rentals and/or determining that the leased acreage is capable of producing.

A contract is illusory when, by its terms, the promisor "retains an unlimited right to determine the nature or extent of his performance; the unlimited right in effect destroys his promise and thus makes it merely illusory." *Century 21 v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist. 1980); *Thomas v. Am. Elec. Power Co.*, 10th Dist. No. 03AP1192, 2005-Ohio-1958, ¶32. Courts generally disfavor interpretations that render contracts illusory, preferring a meaning that gives the contract vitality. *Thomas*, ¶32.

Construing this lease consistently with *Hite*, limiting the Defendant's ability to forego development to the twelve-month primary term set forth in paragraph 3, would prevent the Defendant's promise to drill from being illusory and would promote public policy and the expressed intent of the parties to develop the Acreage.

For all the reasons set forth herein above the Plaintiffs are entitled to summary judgment. The remaining issue is whether or not forfeiture is an appropriate remedy for the Plaintiffs and whether or not the Defendant is entitled to a 30 day notice of cure as provided for in the lease. For the reasons set forth herein after, this Court believes that forfeiture of these leases is the appropriate remedy because they were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice.

When causes of forfeiture are specified in an oil and gas lease, other causes cannot be implied. *Beer*, 61 Ohio St.2d at 119, 399 N.E.2d 1227, paragraph three of the syllabus. However, "[w]here legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant." *Id.*, paragraph four of the syllabus. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. *Iomno*, 2 Ohio St.3d at 135, 443 N.E.2d 504. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of an implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. *Id.*

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore*, 2008-Ohio-5953, &48. Where a lessee's failure to drill or mine within a reasonable period of time would allow the lessee to encumber the lessor's property in perpetuity, without any return of income to the lessor arising from drilling or mining operations, breach of the implied covenant to develop the land could result in forfeiture. *Id.* The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Id.*, ¶51.

In *Beer*, the court upheld a partial forfeiture (or cancellation) where the lessee had performed no work on the leased property for over a year, and had financial and operating difficulties. 61 Ohio St.2d at 121-22, 399 N.E.2d 1227. The court stated that even if the lessee had sufficient resources from which to pay damages, forfeiture of the lessee's continued interest in unexploited acreage was warranted to assure the development of the land and the protection of the lessor's interests. *Id.* at 122, 399 N.E.2d 1227. In *Lekan*, the court upheld a forfeiture where

the lessee had limited experience; had drilled but never sold gas from a well on the lessor's property, even though he had placed three wells on other lessors' property into production; and functioned as a "mom and pop" operation without employees. 75 Ohio App.3d at 216-17, 598 N.E.2d 1315.

In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate.

Plaintiffs did not provide written notice to the Defendant pursuant to paragraph 17 of the lease, "setting out specifically in what respects lessee has breached this contract," and affording the Defendant thirty days to cure any breach. However, the Defendant lacks the means to cure either the defects in or its breaches of the lease. Plaintiffs' compliance with the technical requirement of providing notice prior to commencing this action would serve no purpose.

A lessee's "midnight-hour attempts to save the lease" are insufficient to preserve the lessee's rights under an oil and gas lease that has been breached. *American Energy Services v. Lekan*, 75 Ohio App.3d 205, 214, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶50; *Gisinger v. Hart*, 115 Ohio App. 115, 184 N.E.2d 240 (4th Dist. 1961). In *Lekan*, the court found that once the conditions of the lease had ceased to

be met, the lease terminated "by the express terms of the contract *** and by operation of law and revest[ed] the leased estate in the lessor." 75 Ohio App.3d at 212, 214.

In *Gisinger*, the lessees made no effort to develop the leasehold until ten days before expiration of the primary term. Finding it improbable that gas or oil would be produced before the end of the term, the court held the effort was "too little too late," and rejected the lessees' claim for an extension of the term. 115 Ohio App. At 117.

Moreover, it is well settled that the law will not require a vain act. *E.g., State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 603, 138 N.E. 881 (1922); *Gerhold v. Papathanasion*, 130 Ohio St.342, 346, 199 N.E.353 (1936); *Coleman v. Portage County Engineer*, 191 Ohio App.3d 32, 2010-Ohio-6255, 944 N.E.2d 756, ¶38 (11th Dist.). In the instant case, the purpose of the notice requirement in paragraph 17 of the lease is to provide the Defendant with an opportunity to cure any breach. However, the lease is void as against public policy. The Defendant cannot cure its breach in a timely manner. The Plaintiffs are entitled to summary judgment as requested and to the forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties. The Defendant's rights in the subject bases are forfeited. Court costs shall be assessed against the Defendant.

ENTER AS OF DATE OF FILING:

/s/ Ed Lane

Judge Ed Lane

c: Attorney Zurz/Ropchok/Peters
Attorney Bauerle/Hirsch

EXHIBIT 6

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2012 JUL 19 AM 9:22
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUPP, et al. Plaintiffs, vs. BECK ENERGY CORPORATION Defendant.	CASE NO. 2011-345 JUDGE: ED LANE **PLAINTIFFS' MOTION FOR CLASS ACTION CERTIFICATION**

Now come Plaintiffs, Larry and Lori Hustack ("Hustacks"), Lawrence and Michelle Hubbard ("Hubbards"), and David Majors ("Majors") (collectively "Plaintiffs"), by and through the undersigned counsel, and respectively move this Court for an Order that this action be maintained as a Class Action pursuant to Civil Rule 23(B)(2). As is more fully set forth in the Memorandum attached hereto and incorporated herein, it is clear that the prerequisites to a Class Action set forth in Civil Rule 23(A) have been met as have the requirements of Civil Rule 23(B)(2). Accordingly, this Court should certify this case as a class action under Civil Rule 23(B) (2). For the Court's convenience, a proposed Order is attached hereto.

COMMON PLEAS COURT
MONROE COUNTY, OHIO

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____ Deputy Clerk

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS
LARRY AND LORI HUSTACK,
LAWRENCE AND MICHELLE HUBBARD,
AND DAVID MAJORS

I. INTRODUCTION

This case arises out of a form oil and gas lease ("Beck Lease") utilized by the Beck Energy Corporation of Ravenna, Ohio (hereinafter "Beck"), which Beck executed with approximately 415 landowners in Monroe County and approximately 200 to 300 landowners in other South East Ohio counties. These form leases purportedly grant Beck the mineral rights to approximately 32,280 acres in Monroe County. The leases were entered into over the past approximately 21 years. Of this acreage, Beck has not drilled an oil or gas well on approximately 21,000 acres in Monroe County and several thousand acres in other counties, which are the parcels at issue in this case.[1] The Beck leases only paid the non-drilled parcel landowners somewhere between $1 to $5 per acre per year in "delay rentals."[2] Additionally, had wells actually been drilled and produced gas/oil, the leases only provided for a one/eighth (12.5%) royalty to the landowner.[3]

As this Court is well aware, the recent oil and gas boom in Southeastern Ohio and Monroe County in particular, has resulted in up-front delay rental payments to the landowners of upwards of $6,000, and possibly beyond, per acre for a five year lease term.[4] The fact that the landowners in this case executed these form leases with Beck prevents them from leasing their property today to one of the new drillers.

In fact, since the filing of the Complaint in this case, specifically, on December 21st, 2011, Beck Energy purported to assign the leases which are the subject matter of this action to

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[1] From Monroe County records.

[2] See Exhibits A-C, the affidavits and leases of the Hustacks, the Hubbards, and Majors, respectively.

[3] Even though Beck drilled no wells on the land at issue in this lawsuit, the 12.5% (1/8th) royalty provision is still a significant term. This is because if Beck assigns the lease to another driller, which he has already attempted to do, the landowner would be locked into the 12.5% royalty rate, instead of what is currently available in the marketplace, 17.5% or more. Thus, in the assignment scenario, Beck could not only keep for himself all of the "up front" money (with the landowner receiving nothing), but also the "spread" on the royalties- between 12.5% and 17.5% or more.

[4] The Court may take Judicial notice of this figure as it has been reported in various newspapers and public meetings, as well as can be verified by Monroe County records for recently leased lands.

Exxon Mobil Corporation/XTO Energy Inc.[5] Beck assigned the "deep" drilling rights, but maintained for itself the "shallow" drilling rights. As a result of this assignment, the Lessors/Landowners/Putative Plaintiffs herein will likely receive NONE of the upfront money for the assignment of their mineral rights, and will not receive any increase in royalty above 12.5% and whatever increased royalty Beck negotiated with Exxon.

However, the Beck lease is not merely just a "bad deal" which the landowners made and with which they would otherwise be stuck. The Beck leases are void on their face as has already been held by this Court.[6] Accordingly, the Plaintiffs are requesting that a class be certified of all landowners in Ohio who executed leases with Beck where Beck did not drill a well on their property. The Plaintiffs herein request a certification from this Court to proceed as a Class Action under Civ. R. 23 (B) (2). The leases of the Plaintiffs herein have already been declared void against public policy, violative of implied covenants and forfeited.

II. FACTS

Beck Energy Corporation is a small family run oil and gas exploration company owned and operated by Raymond Beck, and located in Ravenna, Portage County, Ohio. The ODNR website indicates that over the years, Beck Energy has drilled approximately 347 oil and gas wells, located primarily in the eastern one-third of the state.[7] However, most of Beck's activities have been centered in Monroe County, Ohio. Between 1980 and the present, Beck Energy drilled approximately 165 wells in the county. From 2002-2007, Beck drilled an average of 15

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[5] A copy of the Assignment, which also includes a list of the landowners, some of which are putative Plaintiffs herein, is attached hereto as Exhibit D.

[6] See 7/12/12 Decision of Judge Lane attached hereto and incorporated herein by reference as Exhibit E.

[7] It is believed all of these facts are undisputed. In order to evidence good faith belief, citation is made to the best available evidence under the circumstances, the ODNR website and Monroe County records. Plaintiffs afforded Defendant the opportunity to provide competing information in response to Discovery requests, which were served upon the Defendant months ago. Instead, Defendants chose to object to those requests and provide no meaningful documentation whatsoever. Those evasive responses thus form the basis of a Motion to Compel, filed contemporaneously herewith.

wells per year in Monroe County. At that rate, it would take 27 years for Beck to drill all of the leases he had executed in Monroe County.[8] Virtually all these wells were, by today's standards, considered "shallow," drilling only down to the Berea Sandstone level, approximately 1,000 feet.[9]

By contrast, the oil and gas exploration which is currently being undertaken in the county involves drilling into the Marcellus shale (approximately 3,500 feet), and the deeper Utica shale (approximately 6,000 feet). These newer Marcellus and Utica wells require "horizontal" boring technology: A single well shaft is drilled and then horizontal borings extend out from the main shaft, which are then filled with high pressure fluids, and, thus, "fracted." Wells of this nature are much more difficult and expensive to drill than the "shallow" wells, but may have incredible yields.

Against this backdrop, Beck Energy, through either the efforts of Mr. Beck himself or his agent, over the years have entered into oil and gas leases with numerous Lessors (landowners) of property located primarily in Monroe, and several of its surrounding counties. From review of the Monroe County records, it appears as though Beck Energy entered into leases for approximately 32,280 acres in the county between the years 1996 and 2011. Between 1996 and 2001, Beck entered into 1, 1, 3, 0, 7 and 7 leases per year, respectively, in Monroe County. Then, in 2002, he entered into 96.[10] Regardless, Beck has tied up over 30,000 acres in the county. For approximately 10,000 of these acres, Beck has not drilled a well, despite having years to do so, and has thus effectively prevented exploration of any of the mineral wealth located beneath this large swath of Monroe County and in areas in Monroe's neighboring

[8] ODNR website, Public Records.
[9] ODNR website, Public Records.
[10] Monroe County Records and ODNR Records.

counties. For this acreage, Beck has managed to tie up the property by paying only a trivial amount in delay rentals per year, if he even paid any rentals at all.

In entering into the lease agreements with the Ohio landowners, Beck used a "form" lease. Accordingly, it is believed that all of the leases which Beck recorded in Ohio contain the exact same language and provisions. The only differences in the lease are inconsequential: The name and address of the Lessor (landowner), the amount of the acreage and its location, the amount of the delay rental (which varied with the amount of acreage), and occasionally, the duration of the primary term of the lease.[11] Thus, the essential terms of the lease are identical between the Plaintiffs in the case herein. The Hustacks, the Hubbards, and Mr. Majors, all executed the same form lease. These leases are attached to this Motion as Exhibits A, B, and C, respectively.

These leases were all recorded by Beck Energy. Accordingly, the leases grant the mineral rights of the Lessors to Beck Energy. They are thus a cloud upon the title of the property. The Lessor landowners cannot negotiate with new drillers who are offering thousands and thousands of dollars per acre as "signing bonuses" and royalties of approximately 17.5% versus the 12.5% under the old Beck leases. Most importantly, Beck has not drilled wells or attempted to drill wells on any of the parcels at issue in this case.[12] The mineral rights are thus wasting.

As indicated, the leases are identical and contain several relevant provisions which are at issue in this case. The first is paragraph 2, which states as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as much longer thereafter as oil

[11] Virtually all of the Ohio Beck leases counsel has examined contain a primary term of twelve months. A few of them have a shorter time period, such as six months.

[12] See Affidavits of the three Plaintiffs, Exhibits, A, B, and C.

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 and as provided in paragraph 7 following."

Paragraph 3 also states:

"This lease, however, shall become null and void and the rights of either party hereunder shall cease and terminate unless, within ____ (typically 12 months) from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $____ (typically $5.00) each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

Paragraph 13 states:

"The Lessee shall have the right to assign and transfer the within lease in whole or in part....Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part."

Paragraph 17 states:

"In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied..."

As all of the Parties' rights and responsibilities, whether by contract or by operation of law, arise from this lease, this case is one almost by definition which should be resolved via class treatment. Additionally, this Court has already found the Beck "form" lease to be violative of public policy, that Beck violated its implied covenants contained in the "form" lease, and that the "form" lease is void *ab initio*. Accordingly, if the lease is void for one landowner, it must be void for all landowners, where Beck has not drilled a well.

More recently, Beck has purported to "assign" all of the deep drilling rights in this acreage to Exxon Mobil Corporation, a New Jersey Corporation, and its affiliate, XTO Energy Inc., of Texas. Beck executed and recorded this purported assignment well after the filing of this lawsuit, on December 21, 2011, thus flaunting the jurisdiction of this Court. The arrogance of

this attempted assignment will become even more apparent to the Court, when viewed through the lens of its Summary Judgment ruling. The assignment includes a list of Lessors (landowners) whose mineral rights Beck has sold to Exxon. For these landowners, they will undoubtably receive none of the "upfront" money on the lease, nor will they receive any increase in royalty over the base 12.5% in their Beck leases, and whatever new rate Beck negotiated for himself in the assignment, perhaps as much as 17-18% . Thus, Beck may potentially pull $70-80,000,000 in up front money alone out of Monroe County, while the landowners of the County receive nothing. In any event, the assignment conclusively proves, for class certification purposes, as does the Court's ruling, that all of these cases are identical and thus subject to class treatment.

Accordingly, this Court's ruling on July 12, 2012, that the Beck form lease is void, has resolved the issues in this case on behalf of **all** non-drilled Beck Lessors. Plaintiffs are confident that for the reasons set forth in the Complaint as well as the Court's ruling on Summary Judgment, that this Court will certify this class, and allow *all* Ohio landowners to negotiate new leases with new drillers for economically competitive rates, and thus to fully explore the mineral wealth of Monroe and its neighboring counties.

III. LAW AND ARGUMENT

A. Civil Rule 23(A) -- Class Action Standard.

Plaintiffs satisfy the requirements for class certification as the class is so numerous that joinder is impracticable, there are legal and factual issues common to the class, the claims of the parties are typical of the class and the representative parties will protect the interests of the class.

A motion for class certification is not an occasion for examination of the merits of the case. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir. 1999). There is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained

as a class action. . ." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Instead, the Court must determine if the plaintiffs have proffered evidence to meet each of the requirements of Rule 23. No weighing of competing evidence is appropriate at this stage of the litigation. *Caridad*, 191 F.3d at 293. See also *Cleveland Board of Education v. Armstrong World Industries, Inc.* (C.P. 1985) 22 Ohio Misc.2d 18. (Holding in ruling on class certification the Court may take the allegations of the complaint as true and the Court should not examine the merits of the case during the certification hearing).

i. Policy Behind Class Actions.

The policy behind class action is to protect members of even a small class from being deprived of their day in Court. See *Blumenthal v. Medina Supply Co.* (2000) 139 Ohio.App.3d. 283 citing Amchem Prods., Inc. v. Windsor (1997), 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689; Marks v. C.P. Chem. Co., Inc. (1987), 31 Ohio St.3d 200, 31 OBR 398, 509 N.E.2d 1249; 7A Wright, Miller & Kane, Federal Practice and Procedure (2 Ed.1986), Section 1777; 5 Moore's Federal Practice (3 Ed.1997), Section 23.44. See Also Anderson's Ohio Civil Practice § 36.02. "Where resolution of a class action may result in benefits to the large number of class members whose claims are so small that their size does not provide the impetus to bring individual actions" a class action is considered the preferred method of adjudication. See *M. Verenson Co. v. First Faneuil Hall Market Place*, 100 F.R.D. 468, 471 (D. Mass. 1985). Correspondingly, the United States Supreme Court has found that a class action is appropriate to "vindicate the rights of individuals who otherwise might not consider it worth the trouble to embark on litigation in which the optimum result might be more than consumed by the cost." *Guaranty National Bank v. Roper*, 445 U.S. 3326, 338 (1980).

ii. Rule 23(A) Prerequisites for Class Certification.

The Court may exercise its discretion to certify a class when Plaintiff establishes the prerequisites of Ohio Civil Rule 23[13] by a preponderance of the evidence. See *Cleveland Board of Education v. Armstrong World Industries Inc.*, 22 Ohio Misc 2d 18. Civil Rule 23 provides that one or more members of a class may sue as representative parties only if:

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

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

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

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

a) Joinder of All Members is Impracticable.

Joinder of all plaintiffs is impracticable. Impracticability of joinder is left to the trial court judge's discretion based on the particular facts of the case. See *Logsdon v. National City Bank* (1991), 62 Ohio Misc.2d 449; *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. The requirement is that the class be so numerous that joinder of all members is impracticable. "Impracticable" does not mean "impossible." See *Planned Parenthood Association of Cincinnati v. Project Jericho* (1990) 52 Ohio.St.3d 56, 64, citing Gentry v. C & D Oil Co. (W.D.Ark.1984), 102 F.R.D. 490, 493

In that regard, there is no "magic number" for determining the number of parties that make joinder impractical. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. Federal Courts have ruled that "[g]enerally, the numerosity requirement is satisfied where the class exceeds 100 members. Fox v. Prudent Resources Trust,

[13] Civil Rule 23(F) is the sole distinction between the Federal Rules and Ohio Rules on class actions. Civil Rule 23(F) provides that claims of the class shall be aggregated in determining the jurisdiction of the court. Otherwise, the only difference between Federal Rule of Civil Procedure 23 and Ohio Rule of Civil Procedure 23 are minor stylistic changes.

69 F.R.D. 74, 78 (E.D.Pa.1975); see, also, *Krominick v. State Farm Ins. Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986). Ohio Courts have ruled that numerosity can be established with even a much smaller class. For example, in *Grubbs*, four (4) named plaintiffs were former tenants of a landlord. The four (4) named plaintiffs brought a class action against the landlord alleging that security deposits were wrongfully withheld. The landlord owned approximately fifty (50) different properties containing two hundred fifty (250) rental units. The court found the class alleged by plaintiffs was large enough to make joinder impracticable.

In *Bennett v. First Energy Corp.* (2002), 118 Ohio Misc.2d 174, 2002-Ohio-2745, the court found that a proposed class of one hundred twenty-five (125) former employees laid off was so numerous that joinder of all members was impracticable and satisfied numerosity requirements for certification of the class in the action brought by former employees.

The numerosity requirement in the instant action is satisfied. Based upon a review of the public records of the recorder's office, the instant action pertains to approximately 415 Monroe County landowners, who entered into leases with Beck, wherein he did not drill an oil and gas well.[14] A similar review of neighboring counties revealed perhaps 2-300 more. Thus, the number of putative Plaintiffs is so numerous, the numerosity requirement for class action purposes has been satisfied, as the class is so numerous that joinder of all members would be impracticable.

b) Putative Plaintiffs Have Common Questions of Law and Fact.

Plaintiffs also satisfy the requirement that there are questions of law or fact common to the class, as the class consists of Lessors under Beck oil/gas leases on whose property Beck did not drill a well. This Court has already deterimined that the leases are all void, yet as

[14] See County Records and Affidavits.

encumbrances of record in the Lessors' land title, they prohibit the landowners from re-leasing and exploiting the mineral wealth of their lands.

Wide discretion is afforded trial courts in deciding commonality, Caruso v. Celsius Insulation Resources, Inc. (M.D.Pa.1984), 101 F.R.D. 530, 533, but its resolution may be satisfied by the allegations contained in the complaint. Miles v. N.J. Motors, supra, 32 Ohio App.2d at 356, 291 N.E.2d 758. The commonality requirement of a class action does not require that all questions of law or fact which are in dispute be common. *Planned Parenthood Assn. of Cincinnati v. Project Jericho* at 64 citing, Marks v. C.P. Chemical Co. (1987), 31 Ohio St.3d 200; see, also, *Estate of Reed v. Hadley* (2005), 163 Ohio App.3d 464. The commonality requirement does not require that all questions of law or fact be common to every single member of the class; rather, at least one issue must be common to the claims of all the class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §3.10 at 154 (3d ed. 1992); 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, §1763, at 198 (1986). Courts have not considered commonality a difficult hurdle; the requirement should be "construed permissively." *Hanlon*, 150 F.3d at 1019. Generally courts in Ohio have ruled that the commonality requirement is satisfied when the plaintiffs demonstrate a "common nucleus of operative facts." See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91.

Ohio courts have found that there is a "common nucleus of facts" surrounding claims against a funeral home by states which sought class action certification, even though the funeral home used different contracts over the class, where the funeral home sold each of the proposed class members the same or similar guaranty, and the funeral home shareholder acknowledged the

same sales practices applied when selling funeral arrangements. See *Estate of Reed v. Hadley* (2005), 163 Ohio App.3d 464.

Federal Courts have ruled:

> [B]ecause Rule 23(a) (2) requires only a single issue common to all members of the class, the requirement is easily met. [*Citing* 1 NEWBERG § 3.10, at 3-50]. The fact that class members must individually demonstrate their right to recovery, or that they may suffer varying degrees of injury, will not bar a class action. [*Citing NEWBERG at 3-69*]. Nor is a class action precluded by the presence of individual defenses against class plaintiffs. *See id.* Moreover, the court may certify the class initially and then, if appropriate under all the circumstances, decertify the class after an adjudication of liability. Citing NEWBERG at 3-70. *Feret v. Corestates Financial Corp.* 1998 WL 512933 (E.D. Pa. 1998), at *7.

As set forth above, all of the Lessors, putative Plaintiffs, are governed by the same lease/contract, and will be subject to the same Beck defenses. Specifically, Beck leased mineral rights from the Plaintiffs. All of the deep drilling rights under the leases have been assigned to Exxon under one instrument. Thus, Beck himself is treating these leases as a "class." The question common to all Plaintiffs as has already been answered by this Court is: is that lease void? In the instant action, Plaintiffs satisfy the commonality of questions of law and/or fact in that every single member of the class was governed by the same operative lease terms.[15]

c) Typicality of Claims and Defenses.

The claims of the class members and the representative parties are typical. Similarly, the defenses of the Defendant as to the class members and class representatives are also typical.

"Typical" has been held to mean a "lack of adversity between the class members." Tober v. Charnita, Inc., (M.D.Pa.1973), 58 F.R.D. 74, 80. Ohio courts have held that plaintiffs' claims satisfy the typicality requirement when the claim arises from the same event, practice, or course of conduct from which the claims of other class members arise and if the plaintiffs' claims are

[15] As the Court can see in the leases of the three Plaintiffs herein, the lease terms are identical. Additionally, all of the leases Plaintiffs' counsel have reviewed spanning the years are the same form lease.

based on the same legal theory. *Baughman v. State Farm Mutual Auto Insurance Company* (2000), 88 Ohio St.3d 480. However, the claims or defenses need not be identical in granting class certification. See *Cincinnati Planned Parenthood, Inc. v. Project Jericho* at 64 citing Federal Class Actions, at 204; 7A Wright & Miller, *supra,* Section 1764; see, also, Twyman v. Rockville Hous. Auth. (D.C.Md.1983), 99 F.R.D. 314, 321.

In the present matter, the Plaintiffs' claims all arise from the same lease, and the same conduct of Beck in his not drilling a well on the Plaintiffs' property. Correspondingly, Plaintiffs' claims are all based on the same legal theories, which is that the Beck leases are void due to their terms being perpetual, and due to Beck's violation of the implied covenant to drill, and other express and implied covenants. Beck engaged in the same conduct against each of the class members by signing them to perpetual leases and not drilling on their property during the lease's primary term, and in also violating the same express and implied covenants with each of the Plaintiffs. Thus, the class representatives' claims are identical to those of the putative class plaintiffs.

d) Representative Parties Will Fairly and Adequately Protect Class Interests.

The class action Plaintiffs also satisfy the fourth requirement for a class action in that the representative parties will fairly and adequately protect the interests of the class.

Adequacy of representation essentially has two (2) components designed to ensure absent class members' interests are pursued: (1) that the interests of plaintiffs and class members are aligned, and (2) class counsel is qualified to serve the interests of the entire class. See Rule 23(a)(4).

(1) Interests of the Class are Aligned.

First, "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees" *Amchem Products v. Windsor*, 521 U.S. 591, 625 (1997). A class representative is generally considered adequate as long as his interests are not antagonistic to that of the other class members. See *Marks v. C.P. Chemical Company, Inc.* (1987), 31 Ohio St.3d 200, see also *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98.

No conflicts exist between Plaintiffs and the class members in this case. The named Plaintiffs challenge the same unlawful conduct and seek the same relief as the class. The right to relief of the named Plaintiffs, like that of the absent members, depends on demonstrating that Beck executed and recorded void perpetual leases with the landowners, while not drilling a well on their property, and/or by violating any other express or implied duties which arose by the lease/contract, or by operation of law.

In the instant matter, the Hustacks, Hubbards and Mr. Majors are adequate representatives of the class. All of them signed the same Beck lease and did not have wells drilled on their property. The proposed class representatives have taken an active role and control in the litigation to protect the class' interests. Further, the Hustacks, Hubbards and Mr. Majors have participated in selection of counsel, communicated with class members, monitored the litigation and vigorously prosecuted the case on behalf of the class.[16] Additionally, as the Court has already ruled upon the Summary Judgment Motion, this case is essentially concluded.

(2) Counsel is Qualified.

Secondly, class counsel must be qualified to serve the interests of the entire class. Civil Rule 23(a) (4). Ohio courts have held that an attorney is competent to handle a class action if the attorney has experience in handling litigation of the type involved in the case before the class certification is allowed. See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91, 98.

[16] See Affidavits of the Hustacks, Hubbards and Majors.

Plaintiffs' counsel consists of Attorneys Mark Ropchock, Richard Zurz and James Peters. All three of these attorneys have been previously appointed class counsel by this Court in *John Lucio, et al. v. Safe Auto Insurance Co., et al.*, Monroe Co. Common Pleas Case No.: 2007-09, which resulted in a multi-million dollar recovery for the class members.

Mark Ropchock, has significant trial experience in handling hundreds of cases in multiple states, has tried multi-million dollar cases to verdict and has over twenty five (25) years of practice as a litigator, most recently receiving a three million dollar ($3,000,000.00) verdict in Portage County, Ohio.

Richard Zurz is a leading personal injury attorney with offices in Akron, Canton and Columbus, Ohio. Richard V. Zurz has thirty (30) years of trial experience and is an active member in good standing with the Akron Bar Association, the Ohio State Bar Association, the American Bar Association, the Ohio Academy of Trial Lawyers, and American Association for Justice. Mr. Zurz practices in business and commercial litigation, personal injury, employer intentional torts and numerous other areas of the law. He has tried many cases.

James W. Peters also represents Plaintiffs. Mr. Peters is an attorney in Woodsfield, Ohio with over thirty (30) years experience practicing law. Mr. Peters is admitted to the Ohio Supreme Court, West Virginia Supreme Court, U.S. Court of Appeals, Fourth Circuit, U.S. Court of Appeals, Sixth Circuit, both of the U.S. District Courts in Ohio, and both U.S. District Courts in West Virginia. Mr. Peters has served as Special Counsel to the Ohio Attorney General and in private practice. Additionally, Mr. Peters is approved counsel for a number of corporations. Mr. Peters currently serves as a Judge in Monroe County Ohio. Mr. Peters has received a verdict of three million five hundred thousand dollars ($3,500,000.00).

B. **Civil Rule 23(B).**

In addition to satisfying the prerequisites set forth in Civil Rule 23(A), Plaintiffs also satisfy the requirements set forth in Civil Rule 23(B). Civil Rule 23(B) requires Plaintiffs to satisfy one (1) of the requirements of subdivision (B) (1)-(3) for certification to be deemed appropriate.

1. **Rule 23(B) states as follows:**

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition, * * * (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *." This is the exact situation presented in the within action. The party opposing the class herein, Beck Energy, has acted on grounds generally applicable to the entire class, [form lease, no well drilled] and declaratory relief with respect to the class as a whole is appropriate.

As discussed extensively above, all the putative plaintiffs herein are landowners in Monroe and its neighboring counties, whose property is subject to and impaired by an oil and gas mineral lease with Beck Energy. Beck Energy will presumably defend every case in an identical fashion since whatever defenses are available under the lease would be applicable to all of the putative plaintiffs since the same terms would control. Beck has not drilled wells on any of the properties within the lease term. All the putative plaintiffs would find it impossible to lease their land to a new driller with the Beck Energy lease presenting a cloud upon the title of their property.

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.

In *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 817 N.E. 2d 59, a 2004 case, the Ohio Supreme Court had the opportunity to address the requirements of class certification under Rule 23(B) (2). The Supreme Court held that certification under the B (2) subdivision of Rule 23 entailed two requirements: (1) The action must seek primarily injunctive relief, and, (2) the class must be cohesive. *Wilson*, at 541, 63.

a. Injunctive Relief

As outlined above, Plaintiffs' Complaint consists of two counts. Count I is a request for declaratory judgment stating at paragraph 20, "Plaintiffs are entitled to a declaratory judgment that the Hustack lease, the Hubbard lease and the Majors lease are therefore forfeited, canceled, unenforceable, voided and held for naught, for reasons including but not limited to, the following * * *. Count II is a quiet title action which states in paragraph 21 (b), "Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code § 5303.01 quieting their title as to the Hustack acreage, the Hubbard acreage and the Majors acreage as against Defendant by and through the forfeiture, release and cancellation of the Hustack, Hubbard and Majors leases as valid encumbrances of record and by extinguishing any interests which Defendant has or may claim to have in the Hustack, Hubbard and Majors acreage."

These allegations clearly meet the first requirement of *Wilson* that the action must seek primarily injunctive relief. As the *Wilson* case and others have generally described, in making this determination, there is oftentimes confusion as to whether the Complaint specifically is requesting injunctive relief or damages. The distinction is often difficult to make. In *Wilson*, for

instance, Plaintiffs sought medical monitoring. This presented a difficult analysis for the Court as to whether future medical monitoring was primarily in the form of damage or injunctive relief.

In the present action, no such dilemma or difficulty in analysis exists. There simply is no claim in the Complaint for any sort of monetary damages whatsoever. The Complaint exclusively requests declaratory and quiet title relief. Accordingly, the first requirement of 23(B) (2) is satisfied.

b. Cohesiveness

The second requirement for 23(B) (2) certification as discussed in the *Wilson* case is that the class must be cohesive. In discussing the cohesiveness standard, the *Wilson* court noted, although this court has not had an opportunity to address the cohesiveness requirement of Civil Rule 23(B) (2) class certification, there are a "myriad federal cases providing us guidance," *citing Barnes v. Am. Tobacco Co.* (C.A. 3, 1998), 161 F.3d 127, 142-143. The federal cases indicate the cohesiveness analysis is essentially the same as a predominance analysis, which is discussed with much more frequency in the case law.

The predominance inquiry pertains to the focus on legal or factual questions that qualify each class member's case as a genuine controversy. See *Hoang v. E*Trade Group Inc.* (2003), 151 Ohio App.3d 363, 2003-Ohio-301.

> The predominance test...involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved...[as] a class action.... *Schmidt v. Avco Corp.* (1984), 15 Ohio App.3d 81.

Plaintiffs must show that common or generalized proof will predominate at trial. See *Lumco Industries, Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168 (E.D. Pa 1997). Common questions must be able to be resolved for all members of the class in a single adjudication. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 2000. "While potential dissimilarity in remedy is a

factor to be considered in determining whether individual questions predominate over common questions, that alone does not prevent a court from certifying a cause as a class action." *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98. See also Lowe v. Sun Refining & Marketing Co. (1992), 73 Ohio App.3d 563, 572, 597 N.E.2d 1189.

Courts have found that when a common fraud is perpetrated on a group of plaintiffs, those plaintiffs should be able to pursue the claim without focusing on questions affecting individual members. Cope, 82 Ohio St.3d at 430, 696 N.E.2d 1001. In this regard, fraud cases that involve a single underlying scheme and common misrepresentations or omissions across the class are particularly subject to common proof. Id. at 432, 696 N.E.2d 1001. Once the plaintiff establishes that there are common misrepresentations or omissions affecting all class members, a class action can be certified notwithstanding the need to prove reliance. Hamilton, 82 Ohio St.3d at 83-84, 694 N.E.2d 442.

It would be difficult to imagine a case in which the prospective plaintiffs are more cohesive as a class than the within action. As noted, all of these individuals are landowners who are unable to lease their land to new drillers. The court can recognize the fact that these landowners would obviously wish to obtain thousands of dollars per acre for their property in up front money, not to mention potentially hundreds of thousands of dollars in royalties versus the present arrangement with Beck Energy, wherein they are receiving a few dollars per acre per year and no royalties whatsoever. The disparity is obviously egregious. However, that disparity is not alone the reason the group is cohesive.

This group is cohesive to the extent of near identity of interest. Their properties are all encumbered by the same leases with Beck Energy with the same terms that hold their property hostage. As noted, other than the fact that the names are different on the leases and the acreage

and its location are different, the terms of the lease were boilerplate and, thus, since the Court has already found the lease void in one instance, the lease would clearly be void in all. The reverse is also true. There are few individual claims or defenses available in the within action. If certain plaintiffs do have other claims against Beck, those are not part of this lawsuit. Accordingly, the cohesiveness analysis of the present action under the *Wilson* case is easily established.

There are additional reasons why this case is appropriate for class treatment, such as under a Rule 23(b) (1) analysis. Rule 23(b) (1) defines two related types of class actions, both designed to prevent prejudice to the parties arising from multiple potential suits involving the same subject matter. *See Feret v. Corestates Financial Corp.* 1998 WL 512933 (E.D. Pa. 1998), at * 13 citing 1 NEWBERG § 4.03, at 4-10. Rule 23(b) (1) (A) is used to "obviate the actual or virtual dilemma which would ... confront the party opposing the class" if separate lawsuits were decided differently so as to result in "incompatible standards" for that opposing party. See *Feret* at *13, citing WB Music Corp. v. Rykodisc, Inc., 1995 WL 631690, at *3 (E.D.Pa. Oct. 26, 1995) (quoting Fed.R.Civ.P. 23(b) (1) (A) advisory committee notes). Conversely, Rule 23(b) (1) (B) is used when separate actions might lead to adjudications that could be dispositive of nonparty class members' interests or substantially impair their ability to protect their interests. See *Feret* at 13. Certifications under both of these clauses are common in labor relations cases because defendants often provide "unitary treatment to all members of [a] putative class [in this] ... area" and thus the rights of absent "class member[s] [are often] ... implicated by litigation brought by other class members." *Feret* at *13 citing 5 MOORE'S §§ 23.41[4], 23.42[3] [c].

Correspondingly, Ohio courts have held that there is a risk of inconsistent adjudications when the validity of a lease contract could be found valid in one action and invalid in another,

this would lead to incompatible standards of conduct for the defendant. See, *Warner v. Waste Management*, (1988), 36 Ohio St.3d 91, 95. Footnote 2.

In the instant action, there is a risk that the validity of the Beck lease and course of conduct with the landowners could be valid in one action but invalid in another, thereby leading to inconsistent adjudications. Consequently, conflicting decisions regarding the legality of the Beck lease would affect the interests of all putative Plaintiffs. This is an additional reason why class treatment is needed.

Federal case law is in accord. In the case of *Walls v. Sagamore Ins. Co.*, 274 F.R.D. 243 (2011), the District Court for the Western District of Arkansas had the opportunity to analyze a 23(B) (2) certification motion. In *Walls*, an insured brought an action, on behalf of herself and all other similarly situated, for breach of an insurance contract claiming that the insurer's method of sending notice of cancellation for non-payment of premium was illegal. In certifying the class, the District Court went through a certification analysis. After first reviewing the numerosity, commonality, typicality and adequacy of representation requirements of Rule 23(A), the court next looked at the 23(B) (2) requirements. The court began its analysis by noting that, "The Eighth Circuit has held that Rule 23(B) (2) certification is appropriate when plaintiffs seek injunctive relief from the acts of a [defendant] on (the) grounds generally applicable to the class." *Wells* at 256, quoting *Paxton v. Union National Bank*, 688 Fed.2d 552 (8th Circuit 1982). The court then continued: "there are implicit requirements found in Rule 23(B) (2). These include, first, that the class definition must enable the court to determine objectively who was included in the class and, thus, who was bound by the ruling, and the class representatives must be members of the proposed class." *Citing, Dumas v. Albers Med., Inc.*, WL 2172030 (W.D. MO. September 7, 2005).

In this case, the class is readily ascertainable from the County records. This inquiry has already been undertaken and completed as discussed above. Secondly, the class representatives are clearly members of the proposed class, again, as outlined above. Accordingly, class certification is appropriate.

In a case involving oil and gas leases very similar to the present action, class certification was authorized under Rule 23(B) (3). *See, Schell v. Oxy USA, Inc.* (2009 WL 2355792), (D.Kan.). Accordingly, there can be little doubt that this case is appropriate for 23(B) (2) certification.

IV. CONCLUSION

Based on the above, class action certification is appropriate in the instant action as the four prerequisites to a class action set forth in Civil Rule 23(A) are satisfied and the requirements of Civil Rule 23(b)(2) are also satisfied. In that regard, the Court should grant class certification. Class certification in the instant action will result in the most efficient resolution of the claims of individuals involved in the action, eliminates repetitious litigation and inconsistent adjudications involving common questions, and related events. Therefore, Plaintiffs respectfully move the Court to grant class certification, appoint Mark Ropchock, Richard Zurz and James Peters class counsel, and appoint the Hustacks, the Hubbards and Majors as class representatives.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS
LARRY AND LORI HUSTACK,
LAWRENCE AND MICHELLE HUBBARD
AND DAVID MAJORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following parties via regular U.S. Mail, postage prepaid this 17 day of July, 2012:

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IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK, et al.	)	CASE NO. 2011-345
	)	
Plaintiffs	)	JUDGE JULIE SELMON
	)	
vs.	)	
	)	
BECK ENERGY CORPORATION	)	**AFFIDAVIT OF PLAINTIFF, LARRY A HUSTACK**
	)	
Defendant	)	

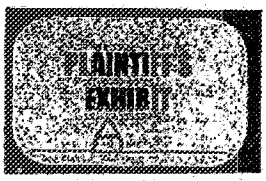
STATE OF OHIO)
) ss:
MONROE COUNTY)

Plaintiff Larry A. Hustack, being first duly sworn and cautioned, deposes and states as follows:

1. I am a Plaintiff in the above-captioned action. I am over eighteen years of age, and competent to testify. The statements in this Affidavit are true and accurate, based on my personal knowledge.

2. The Oil and Gas Lease (Lease) attached as Exhibit A1 is a true and accurate copy of a lease which currently encumbers certain real property located at 45429 Bondi Ridge Road, Woodsfield, Ohio (Hustack Acreage). My spouse and I purchased the Hustack Acreage subject to the Lease, which had been executed by our predecessors in title and duly recorded.

3. I have personal knowledge of any and all operations that have been conducted on the Hustack Acreage from the date on which we purchased it to the present date.



4. At the time we purchased the Hustack Acreage, there was no evidence that Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation had drilled a well or prepared to drill a well thereon. There were no wells, and there was no drilling equipment or any sign that such equipment had been situated on the Hustack Acreage.

5. At no time since we purchased the Hustack Acreage has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, drilled or prepared to drill a well on the Hustack Acreage, or placed equipment on the Hustack Acreage, or conducted any other operations thereon.

6. I telephoned the offices of Beck Energy Corporation in Ravenna, Ohio on three (3) separate occasions in July, 2010, June, 2011 and July, 2011 and inquired as to what their plans were regarding the Hustack Acreage and whether they were going to drill. I was told by the representative of Beck Energy Corporation that "they had no intentions of drilling because there is no pipeline in that part of the county". When I then asked if they would cancel my lease, they told me "No".

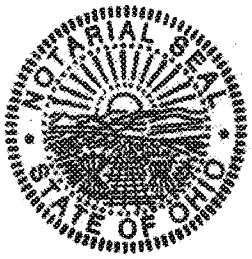
7. At no time since we purchased the Hustack Acreage has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, paid or transmitted any royalty to either me or my spouse.

Larry A. Hustack

Larry A. Hustack

SWORN TO before me and subscribed in my presence in this 7 day of February, 2012.

Loreen J. Link
Notary Public



LOREEN J. LINK
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Summit County
My Comm. Exp. 3/21/16

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUSTACK, et al.	)	CASE NO. 2011-345
	)	
Plaintiffs	)	JUDGE JULIE SELMON
	)	
vs.	)	
	)	
BECK ENERGY CORPORATION	)	AFFIDAVIT OF PLAINTIFF,
	)	LAWRENCE HUBBARD
Defendant	)	

STATE OF OHIO)
) ss:
MONROE COUNTY)

Plaintiff Hubbard, being first duly sworn and cautioned, deposes and states as follows:

1. I am a Plaintiff in the above-captioned action. I am over eighteen years of age, and competent to testify. The statements in this Affidavit are true and accurate, based on my personal knowledge.

2. The Oil and Gas Lease (Lease) attached as Exhibit B1 is a true and accurate copy of a lease which encumbers certain real property known as 36957 Riesbeck Rd., Woodsfield, Ohio (Hubbard Acreage). My spouse and I inherited the Hubbard Acreage subject to the Lease, which had been executed by my parents and predecessors in title and duly recorded.

3. I have personal knowledge of any and all operations that have been

conducted on the Hubbard Acreage from the date on which we executed the Lease to the present date.

4. At no time since we executed the Lease has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, drilled or prepared to drill a well on the Hubbard Acreage, placed equipment on the Hubbard Acreage, or conducted any operations thereon.

5. At no time since we executed the Lease has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, paid or transmitted any royalty to either me or my spouse.

Lawrence Hubbard

SWORN TO before me and subscribed in my presence in this 9 day of February, 2012.

Notary Public

MATTHEW HALEY
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 04-14-13

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

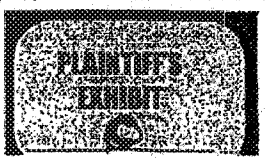
LARRY A. HUSTACK, et al.	)	CASE NO. 2011-345
	)	
Plaintiffs	)	JUDGE JULIE SELMON
	)	
vs.	)	
	)	
BECK ENERGY CORPORATION	)	AFFIDAVIT OF PLAINTIFF
	)	DAVID W. MAJORS
Defendant	)	

STATE OF OHIO)
) ss:
MONROE COUNTY)

David W. Majors, being first duly sworn and cautioned, deposes and states as follows:

1. I am a Plaintiff in the above-captioned action. I am over eighteen years of age, and competent to testify. The statements in this Affidavit are true and accurate, based on my personal knowledge.

2. The Oil and Gas Lease (Lease) attached as Exhibit D1 is a true and accurate copy of a lease which I executed on October 11, 2005. The Lease currently encumbers certain real property which I own, located at 48433 Keylor Hill Road,



Woodsfield, Ohio (Majors Acreage).

3. I have resided on said Majors Acreage continuously since I executed the Lease, and have personal knowledge of any and all operations that have been conducted on the Majors Acreage from the date on which I executed the Lease to the present date.

4. At no time since I executed the Lease has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, drilled or prepared to drill a well on the Majors Acreage, placed equipment on the Majors Acreage for the purpose of drilling, or conducted any operations to drill thereon.

5. In approximately 2006, Beck Energy Corporation placed a pipeline across the Majors acreage to transport gas from other wells. At that time, Beck Energy Corporation promised to drill a well on the Majors Acreage, but never did.

6. At no time since I executed the Lease has Beck Energy Corporation, any representative of Beck Energy Corporation, or any other person acting on behalf of Beck Energy Corporation, paid or transmitted any royalty to me.

David W. Majors

David W. Majors

SWORN TO before me and subscribed in my presence in this 9th day of February, 2012.

Marcia E. Shipp

Notary Public

NOTARIAL SEAL STATE OF OHIO

MARCIA E. SHIPP
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 6/19/2016

7/2

ASSIGNMENT AND BILL OF SALE

THE STATE OF OHIO §
§
COUNTY OF MONROE §

Beck Energy Corporation, an Ohio corporation, with a mailing address of 4857 Harding Avenue, Ravenna, Ohio 44266 ("Assignor"), for Ten Dollars and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), does hereby GRANT, BARGAIN, SELL, CONVEY, ASSIGN, TRANSFER, SET OVER, and DELIVER Exxon Mobil Corporation, a New Jersey corporation, c/o its affiliate, XTO Energy Inc., whose address is 810 Houston Street, Fort Worth, Texas, 76102, ("Assignee"), all of Assignor's undivided interests (as set forth in Exhibit A) in and to the following described properties, rights and interests:

A. The oil and gas leases more fully described in Exhibit A, less and except the shallow rights which are more particularly described below (the "Leases"), subject to the operating agreements, pooling and unitization agreements, declarations of pooling or unitization, pooling orders, farmout and farmin agreements, participation agreements, assignments, oil sales contracts, gas sales, gas processing, gas gathering, and transportation agreements, rights-of-way, easements, permits, licenses, and other instruments and agreements pertaining thereto of record as of the Effective Time or disclosed to Assignee prior to Closing (the "Existing Contracts").

B. Unitization and pooling agreements and rights under pooling orders applicable to the Leases and all rights under the Existing Contracts.

C. Without limiting the foregoing, all other right, title and interest of Assignor of whatever kind or character, whether legal or equitable, vested or contingent, in and to the oil, gas and other minerals in and under or that may be produced from or attributable to the lands covered by the Leases, including oil and gas leases, overriding royalties, production payments, fee mineral interests, fee royalty interests and other interests in such lands whether such lands are specifically described in Exhibit A, and even though Assignor's interest in such oil, gas or other minerals may be incorrectly described in or omitted from Exhibit A.

D. Copies of all files, records and data relating to the items described in subsections A through C above including title records (including abstracts of title, title opinions, title reports and title curative documents), contracts, correspondence, and all related matters in the possession of Assignor.

Customer Requested
No Cross References
By [illegible] Date 12/2/11

EXHIBIT D

The properties, rights and interests identified in subsections A through D above are collectively called the "Assets."

Notwithstanding anything contained in this Assignment and Bill of Sale to the contrary, the Assets do not include, and there is EXCEPTED if owned by third parties and RESERVED unto Assignor if owned by Assignor, and Assignor does not grant, bargain, sell, convey, assign, transfer, set over or deliver to Assignee hereby: (i) all rights, assets, properties, and business of Assignor, including subsurface formations and rights, related to all depths above the stratigraphic equivalent of the top of the Burkett Formation, which occurs at a true vertical depth of 3,860 feet in well number 34121240720000, Seneca Township, Noble County, Ohio, together with any rights, liabilities, or obligations associated therewith, provided, however, Assignee shall have the right to drill through such depths to operate and produce the depths hereby acquired; and (ii) the wellbores of the wells, with the right to continue to produce the depths currently drilled by such wells, listed on Exhibit B; and (iii) an overriding royalty interest in the Leases, on a Lease-by-Lease basis, equal to the positive difference, if any, between 18.75% and existing lease burdens, which shall be proportionately reduced to the extent the applicable Lease covers less than 100 percent of the minerals in the lands covered by the Lease or if the Lease covers less than 100 percent of the working interest in such Lease. Assignee may pool the Overriding Royalty interest without obtaining the additional consent of Assignor.

TO HAVE AND TO HOLD the Assets unto Assignee, its successors and assigns, forever. Assignor hereby agrees to warrant and defend the title to the Assets hereby assigned unto Assignee against the claims of any party arising by, through, or under Assignor, but not otherwise. Additionally, to the extent transferable, Assignor hereby assigns to Assignee, its successors and assigns, full power and right of substitution and subrogation in and to all covenants and warranties (including warranties of title) by owners in Assignor's chain of title, vendors, or others, given or made with respect to the Assets or any part thereof prior to the Effective Time. This Assignment and Bill of Sale shall be binding upon and inure to the benefit of the Assignor and Assignee, and their respective successors and assigns.

EXCEPT WITH REGARD TO THE SPECIAL WARRANTY OF TITLE FROM ASSIGNOR TO ASIGNEE SET FORTH ABOVE, THIS ASSIGNMENT AND BILL OF SALE IS MADE WITHOUT WARRANTIES OR COVENANTS, EXPRESSED OR IMPLIED IN FACT OR IN LAW, AS TO TITLE, MERCHANTABILITY, DURABILITY, USE, OPERATION, FITNESS FOR ANY PARTICULAR PURPOSE, CONDITION, SAFETY OF THE PROPERTY, COMPLIANCE WITH REGULATORY AND ENVIRONMENTAL REQUIREMENTS OR OTHERWISE. ASSIGNOR DOES NOT IN ANY WAY REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY INFORMATION, DATA OR OTHER MATERIALS (WRITTEN OR ORAL) FURNISHED TO ASSIGNEE BY OR ON BEHALF OF ASSIGNOR. ASSIGNEE HEREBY AGREES THAT IT HAS INSPECTED OR HAS BEEN GIVEN THE OPPORTUNITY TO

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INSPECT THE ASSETS, INCLUDING THE LEASES AND ASSOCIATED AGREEMENTS, WELLS, PERSONAL PROPERTY, AND EQUIPMENT ASSIGNED AND CONVEYED HEREIN AND THAT IT ACCEPTS THE SAME "AS IS, WHERE IS" AND "WITH ALL FAULTS".

This Assignment shall be effective as of December 20, 2011, at 7:00 a.m. local time where the Assets are located (the "Effective Time") and shall be subject to that certain Purchase and Sale Agreement dated November 9, 2011 by and between Assignor and XTO Energy Inc., an affiliate of Exxon Mobil Corporation.

Assignor and Assignee agree to execute and deliver to each other, from time to time, such other and additional instruments, notices, division orders, transfer orders and other documents, and to do all such other and further acts and things as may be necessary to effectively grant, convey and assign to Assignee the Assets.

IN WITNESS WHEREOF this Assignment and Bill of Sale has been executed on December 20, 2011, but effective for all purposes as of the Effective Time.

ASSIGNOR:

BECK ENERGY CORPORATION

By: _____
Raymond T. Beck, President

ASSIGNEE:

EXXON MOBIL CORPORATION

By: _____
Name: Edwin S. Ryan, Jr.
Title: Attorney - in - Fact

STATE OF OHIO §
§
COUNTY OF PORTAGE §

The foregoing instrument was acknowledged before me on December 20, 2011, by Raymond T. Beck, as President of Beck Energy Corporation, an Ohio corporation, on behalf of the corporation.

Dianna Roberts
Notary Public in and for the State of Ohio DiannaRoberts
My Commission Expires: 5/29/2016

STATE OF OHIO §
§
COUNTY OF PORTAGE §

The foregoing instrument was acknowledged before me on December 20, 2011, by Edwin S. Ryan, Jr., Attorney - in - Fact, of Exxon Mobil Corporation, a New Jersey corporation, on behalf of the corporation.

Dianna Roberts
Notary Public in and for the State of Ohio Dianna Roberts
My Commission Expires: 5/29/2016

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EXHIBIT "A"

Attached to that Assignment and Bill of Sale dated December 28, 2011 between Beck Energy Corporation as Assignor and Exxon Mobil Corporation c/o its affiliate XTO Energy Inc. as Assignee

County	Township	Section	Lease Name	Pool Name(s)	Acres	Lease Date	Bonus Price
Monroe	Benton	17	Wilson	Cadle, Cooper	1.12	2/8/2007	993 233
Monroe	Benton	18	Gibson	Grand Falls/Clinton	35.34	11/18/2001	883 535
Monroe	Benton	7	Boone	Cooper, Tippecanoe	47.8	1/7/1997	886 535
Monroe	Benton	6	Kinney	Clay, Brown, Osborn	39.66	2/26/2001	888 331
Monroe	Benton		Schmidt	McCloch, Stockton	63.15	12/11/1997	872 896
Monroe	Benton		Lemon	Cloche, Shelby	58.68	4/14/2000	882 425
Monroe	Benton		Schmidt	Cloche, Linda	77.86	3/26/2001	840 075
Monroe	Benton		Boyer	Lane, Clodac	40.86	2/21/1998	888 855
Monroe	Benton		Hoppel	Stewart	63.56	3/13/2006	857 336
Monroe	Benton	18	Wilkins	Hall, Bacon	59.80	2/9/2003	884 864
Monroe	Benton		Wylie	Stewart	35.50	12/29/2003	882 427
Monroe	Benton		Brown	Pink, Hinton, Osborn	167.54	3/31/2003	886 055
				Ripon, Alnach, Clodac			
Monroe	Benton		Schmidt	Linda	78.00	2/14/2001	863 743
Monroe	Benton		Clodac	Mary, Linda	527.00	2/13/2002	840 320
Monroe	Benton		Hoppel	Stewart, Zilas	258.00	2/14/2002	857 990
Monroe	Benton	18	[illegible]	Stewart, Court Ave	58.93	1/7/2003	883 797
Monroe	Benton	17	Clabor	Mary, Berge	171.00	3/13/2003	886 233
Monroe	Benton	2	Kolbed	Stewart, Shelby	155.00	2/9/2003	884 860
Monroe	Benton	11,12	Barley	Hoyt, Tippe	89.00	5/19/2003	885 230
Monroe	Benton	12	Taylor	Clodac, Clodac	9.93	3/3/2003	868 040
Monroe	Benton	12	Stewart	Edward, Elm Ave	91.00	12/2/2003	886 643
Monroe	Benton	15	Miller	Sidney	68.48	10/21/2003	887 258
Monroe	Benton	5,11	Drake	Hoffer, Hollywood	120.00	10/30/2003	893 456
Monroe	Benton	3,4	Kawabata	Amber	193.88	12/5/2001	881 761
Monroe	Benton	17	Wilkins	Hill, Stewart	78.00	9/8/2003	891 265
Monroe	Benton	11	Ellinger	Tree, Cooper	58.16	9/8/2003	892 865
Monroe	Benton	1	Hoot	Kenneth, Pavilion	495	2/9/2003	884 135
Monroe	Benton	13,18	Walter	Hillock, Stacy	54.00	3/3/2003	893 943
Monroe	Benton	8	Wylie	David, Charlotte	30.00	12/12/2003	882 239
Monroe	Benton	17,20	Barley	David, Geneva	343.00	10/21/2003	893 223
Monroe	Benton	1	King	Cory, Curtis	38.00	1/5/2001	883 224
Monroe	Benton	1	Lake	Edward, Wanda	39.00	12/18/2001	881 383
Monroe	Benton	21-27	Thompson	Bess	248.00	2/13/2003	891 154
Monroe	Benton	20	Hoppel	Hall, Barbara	94.00	9/7/2003	889 347
Monroe	Center	28,29	Kasson/Bolster	Lane, Yvonne/Bunce	64	11/20/2003	148 276
Monroe	Benton	33	Kosciusko	Mark, Debra	123.68	1/2/2004	113 093
Monroe	Benton, Perry	2,3	Lee	Lane, Barbara	139.00	11/18/2003	881 261
Monroe	Center		Barkley	Hood		2/12/2007	162 277
Monroe	Center		Hagan	Gerald	8.24	3/23/2007	163 233
Monroe	Center		Dallmann	Carl, Pauline	8.93	3/28/2007	166 621
Monroe	Center	6	Kosciusko/Bolster		152	10/12/2010	113 283
Monroe	Center	18	Taylor	Thomas, Diana	93	3/22/2007	129 292
Monroe	Center	18,19	Parks	Wagner	178.88	3/21/2006	129 366
Monroe	Center		Monroe Co.	Agricultural Society	8.85	8/13/2004	149 278
Monroe	Center		Monroe Co.	Agricultural Society	9.46	8/13/2004	149 278
Monroe	Center		Monroe Co.	Agricultural Society	8.37	8/13/2004	149 278
Monroe	Center		Monroe Co.	Agricultural Society	36.00	8/13/2004	149 278
Monroe	Center	27	Rogers	Dale	73.00	3/18/2004	133 219
Monroe	Center	27,28	Mace	Lewis, Shelley	106.71	3/5/2004	133 253
Monroe	Center	27	Marron	Wilson, Chris	100.00	3/13/2004	133 353
Monroe	Center	28,34	Bishop	Fox, Rainer, Jeb, John	100.00	10/19/2004	133 499
Monroe	Center	1	Kasson	Lane, Yvonne	139.00	3/18/2004	131 648
Monroe	Center	22	Lundblad	Rogers, Lara	32.00	11/11/2004	133 823
Monroe	Center	34	Mace	Stokes, Jacob	57.00	11/12/2004	133 893
Monroe	Center	21,27	Wood	Lucas	41.00	12/13/2004	134 004
Monroe	Center	27,28	Kinney	Rosado, Mary	33.00	12/7/2004	136 093
Monroe	Center	33	Wood	Mike, Jane	37.00	11/8/2004	133 687
Monroe	Center	21,22	Goody	Dunn, Hazel	107.00	12/12/2004	133 163
Monroe	Center	34	Kinnard	Mark, Cynthia	37.00	3/12/2005	134 863
Monroe	Center	35	Park Assoc. Form. 53.5"		28.00	3/13/2005	137 987
Monroe	Center	35	S.L. Kinnard	Rosado	30.00	3/13/2005	137 378
Monroe	Center		Hughes	Jacob	31.33	3/14/2005	137 378
Monroe	Center	16	Fowler	Mike, Tonya	100.00	3/3/2005	133 197
Monroe	Center	21,22	Kirkham	Lunsford, Rita	102.00	9/12/2004	133 599
Monroe	Center	1	Fowler	Stewart, Robin	63.00	10/12/2004	133 413
Monroe	Center	23	Kinney	Tuggey	81.00	3/13/2005	133 188
Monroe	Center	4,34	Bess	Mike	65.00	3/7/2005	143 355
Monroe	Center	26	Kosciusko	Shofell, Barbara	33	3/13/2005	138 381
Monroe	Center	24	Blakenship	Shofell, Rita	62.00	3/9/2005	138 199
Monroe	Center	29	Kasper	Mashburn, Esther	18.00	3/13/2005	138 383
Monroe	Center	28,33	Flood	Mark, Lynnea	9	3/13/2005	138 239
Monroe	Center	1	Kasper	Walker, Sally	39.00	4/4/2005	143 127
Monroe	Center	22	Young	Dale	108.00	8/21/2005	137 977
Monroe	Center		Cox	Hobson, Allison	119.00	9/2/2005	143 955
Monroe	Center	26	Kasper	Day, Anna	35.00	12/7/2004	136 099
Monroe	Center	19,21,29	Monroe Co.	Airport Authority	149.00	8/23/2006	147 399

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EXHIBIT "A"

Attached to that Assignment and Bill of Sale dated December 20, 2011 between Berk Energy Corporation as Assignor and Exxon Mobil Corporation c/o its affiliate XTO Energy Inc. as Assignee

County	Township	Section	Lease Name	First Mortgagee	Acres	Lease Date	Book/Page
Monroe	Center		Monroe Co.	Chase/Indenture	35.53	3/16/2006	169 563
Monroe	Center	29	Stephens	Bank, Cordes	61.00	3/13/2006	155 396
Monroe	Center	31	Lutz/Gonzales	Cook, Barry	61.63	3/13/2006	155 602
Monroe	Center	33	Dolch/Fox	Fedro, Fidrop	33.90	3/27/2006	145 669
Monroe	Center	33	Hughes	Rolfand, Mary	33.00	3/13/2006	145 579
Monroe	Center	32	Stewart	Russell, Shirley	40	3/13/2006	145 635
Monroe	Center	35	Morris	Dale, Wilma	34.00	3/20/2007	157 272
Monroe	Center	2,33	McKinney	Fidro, Barbara	40.16	3/13/2007	154 [illegible]
Monroe	Center		Richmond	Developmental	35.63	3/6/2006	145 115
Monroe	Center		Kendall	Fox, Polly	13.31	3/6/2006	145 [illegible]
Monroe	Center	34	Cutrell	Brown, Sally	1.000	3/13/2007	157 445
Monroe	Center	15	Hudson	Smith	133.00	3/13/2006	139 197
Monroe	Center	10,20	Yanek	Holland, Ross	117.00	3/20/2006	153 [illegible]
Monroe	Center	35	Brown	Fox, Lucas	79.00	3/13/2006	139 [illegible]
Monroe	Center	19,20	Yanek	Richmond 63	186.00	3/20/2006	158 [illegible]
Monroe	Center	28	Reed	[illegible], Brenda	19.75	3/20/2006	158 [illegible]
Monroe	Center	28	Lang	Williams, Mary	5.33	3/20/2006	158 [illegible]
Monroe	Center		Dyer	Ross Charlie, Amanda	117.00	3/13/2006	158 [illegible]
Monroe	Center	25	[illegible]	Echo, Edith	124.00	3/13/2007	159 [illegible]
Monroe	Center	13,18	Dannenfelser	Donald, Charlene	221.00	3/13/2006	139 [illegible]
Monroe	Center	29	Rosenbaum	Ross Kelley, Diana	30.00	3/20/2006	159 [illegible]
Monroe	Center	31	Grubb	Lynch, Susan	118.57	3/13/2006	145 [illegible]
Monroe	Center	12,18	Franklin	Ruby, Janet	190.56	3/6/2006	139 [illegible]
Monroe	Center	3,4	Kelley	Dodge	33	3/13/2006	141 [illegible]
Monroe	Center		Village of Woodfield		69.87	3/20/2006	159 [illegible]
Monroe	Center		Wilson	Fred, Judy	41.00	10/13/2007	165 [illegible]
Monroe	Center		Oakley	Tracy, Chris	100.00	3/13/2006	167 [illegible]
Monroe	Center		Newham	Chester	9.24	3/20/2007	165 [illegible]
Monroe	Center		Swarthout	Bruce, Ed	9.67	3/13/2007	164 [illegible]
Monroe	Center		Baker	Ruff, Carol	40.67	12/21/2006	154 [illegible]
Monroe	Ravenna, Wayne	22,31,32	Grant	Fritz, Rebecca	160.00	3/20/2006	151 [illegible]
Monroe	Franklin		Cunningham	Hughes, Deborah	160.00	3/13/2006	155 [illegible]
Monroe	Franklin	16,15	Hawkesworth	Williams, Charlotte	146.00	3/13/2006	159 [illegible]
Monroe	Franklin	35,31	Wells	Jones, Carol	191.00	12/20/2006	155 [illegible]
Monroe	Green	3,8,9	Bush	Kenneth, Marsha	383.57	4/6/2006	158 [illegible]
Monroe	Green	3,33,34	Thompson	Donald, Barbara	137.52	3/20/2006	158 [illegible]
Monroe	Green	3,4	Kline	Gallagher	196.00	3/13/2006	158 [illegible]
Monroe	Green	2	Kroeger	Bolton, Lulu	191.00	3/13/2006	155 [illegible]
Monroe	Jackson	18	Kring	Lawrence, Bush, Mary	13.33	7/11/2006	163 [illegible]
Monroe	Jackson	14	Kring	Lawrence, Bush, Mary	13.33	7/11/2006	166 [illegible]
Monroe	Jackson	14	Kline	Lawrence, Bush, Mary	1.33	7/11/2006	166 [illegible]
Monroe	Jackson	18	Kring	Lawrence, Bush, Mary	2.33	7/11/2006	166 [illegible]
Monroe	Jackson	20	Kring	Brown, Vicki, Sherry, Abi	2.33	3/20/2006	166 [illegible]
Monroe	Jackson	13	Wilson	Bush, Janet	43	3/13/2006	164 [illegible]
Monroe	Jackson	13,18	Wilson	Bush, Janet	2000	3/13/2006	164 [illegible]
Monroe	Jackson	19	Barner	Hanson, Kelley	163	10/20/2006	166 [illegible]
Monroe	Jackson	31	Murray	Lake, Susie	40.00	3/13/2006	80 [illegible]
Monroe	Jackson	31	Smith	Lane	53.50	12/20/2006	163 [illegible]
Monroe	Jackson	33	Rinaldo	Mitchell, Doris Jean	78.00	12/20/2006	163 [illegible]
Monroe	Jackson	31	Bredenfeld	Donald Lynn, Diane	40.00	12/20/2006	163 [illegible]
Monroe	Jackson	31	Cooley	Hanson, Suzy	38.00	3/20/2006	155 [illegible]
Monroe	Jackson	31	Rutland	Williams, Wanda	39.00	3/13/2006	163 [illegible]
Monroe	Jackson	31	Kring	Lawrence, Bush	41.00	4/06/2006	163 [illegible]
Monroe	Jackson		Lowery	Clancy	135.00	3/13/2006	155 [illegible]
Monroe	Jackson	19	Kybolt	Hinnefeld, Linda	157.00	4/6/2006	165 [illegible]
Monroe	Jackson	8,10	Smith	Lane	69.50	3/13/2006	165 [illegible]
Monroe	Jackson	9	Landefeld	David, Joyce / Young, S	137.10	3/6/2006	158 [illegible]
Monroe	Perry	2	Barnes	Ford, Diana	151.00	3/6/2006	160 [illegible]
Monroe	Perry	2	Chaffee	Chaffee, Dixon	136.00	3/13/2006	166 [illegible]
Monroe	Perry	2	Wilson	Tracy, Jones	39.00	3/13/2006	171 [illegible]
Monroe	Perry	2	Hightower	Chaffee, Lisa	39.00	3/20/2006	170 [illegible]
Monroe	Perry	4,10	Chase	Chase, Charlene	200	3/13/2006	171 [illegible]
Monroe	Perry	3,4,34	Fiedler	Chandler	199.00	3/13/2006	170 [illegible]
Monroe	Perry	23	Banks	Kurey, Linda	38.00	3/13/2006	170 [illegible]
Monroe	Perry	23	Hudson	Kurey, Pam	39.00	3/13/2006	170 [illegible]
Monroe	Perry		Hughbanks	Williams, Billy	166.00	3/13/2006	169 [illegible]
Monroe	Salem	26,33	Pierce	Wanda	173.00	4/13/2006	317 [illegible]
Monroe	Ravenna	20	Carpenter	Black, Wanda	40	4/13/2006	158 [illegible]
Monroe	Ravenna		Brooks	Charles, Rochelle	38.00	4/6/2006	159 [illegible]
Monroe	Ravenna		Kilbarger	Donald, Mary	38.00	4/6/2006	159 [illegible]
Monroe	Warren	22	Hart	Williams, Randy	41.00	3/13/2006	166 [illegible]
Monroe	Warren	22	Rudolph	Holland, Cynthia	49.00	3/13/2006	172 [illegible]
Monroe	Warren	21	Gallagher	Dowell, Mindy	34.00	3/13/2006	170 [illegible]
Monroe	Warren	21	Hill	Martin	33	3/13/2006	170 [illegible]
Monroe	Warren	28	Hoffman	Hood, Susan	39.00	3/20/2006	171 [illegible]
Monroe	Warren		Gray	Gallagher Southwest	30.00	3/20/2006	31 [illegible]
Monroe	Warren		Rosalie Ann 77,8,9,10		190		
Monroe	Warren		Dunlapper	Flood, Mabel	115.00	3/13/2006	169 [illegible]

W0211 M0905

EXHIBIT "A"

Attached to that Assignment and Bill of Sale dated December 28, 2011 between Bank Energy Corporation as Assignor and Exxon Mobil Corporation c/o its affiliate XTO Energy Inc. as Assignee

County	Township	Section	Lease Name	Field Name(s)	Acres	Lease Date	Book Page
Monroe	Wayne	22	Lehrke	Bishop	37.24	3/13/2006	199 233
Monroe	Wayne	32	Zimmerle	Wayne, Jackson	39.00	4/13/2006	199 237
Monroe	Wayne	36	Technical of OCS Land School	Wayne	31.25	8/1/2006	199 486
Monroe	Wayne	36	Lehrke	Lawrence, Ford	115.00	4/10/2007	199 207
Monroe	Wayne	25	Bodkopodder	Ross, Tomb	64.00	4/10/2006	199 639
Monroe	Wayne		Lemmon	Thomas, Smith	78.00	10/23/2009	191 [illegible]

WO211 PAG906

EXHIBIT B

THE WELLS

Dave Early #2	Marcellus
Kenny Cisler #1	Marcellus
Harry Cisler #3	Marcellus
Norm Beaver #1	Marcellus
Tuel #1	Marcellus

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MONROE CO. RECORD OF Official Records
VOL 211 PAGE 900
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ASSIGNMENT AND BILL OF SALE

THE STATE OF OHIO §
§
COUNTY OF MONROE §

Beck Energy Corporation, an Ohio corporation, with a mailing address of 4857 Harding Avenue, Ravenna, Ohio 44266 ("Assignor"), for Ten Dollars and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), does hereby GRANT, BARGAIN, SELL, CONVEY, ASSIGN, TRANSFER, SET OVER, and DELIVER Exxon Mobil Corporation, a New Jersey corporation, c/o its affiliate, XTO Energy Inc., whose address is 810 Houston Street, Fort Worth, Texas, 76102, ("Assignee"), all of Assignor's undivided interests (as set forth in Exhibit A) in and to the following described properties, rights and interests:

A. The oil and gas leases more fully described in Exhibit A, less and except the shallow rights which are more particularly described below (the "Leases"), subject to the operating agreements, pooling and unitization agreements, declarations of pooling or unitization, pooling orders, farmout and farmin agreements, participation agreements, assignments, oil sales contracts, gas sales, gas processing, gas gathering, and transportation agreements, rights-of-way, easements, permits, licenses, and other instruments and agreements pertaining thereto of record as of the Effective Time or disclosed to Assignee prior to Closing (the "Existing Contracts").

B. Unitization and pooling agreements and rights under pooling orders applicable to the Leases and all rights under the Existing Contracts.

C. Without limiting the foregoing, all other right, title and interest of Assignor of whatever kind or character, whether legal or equitable, vested or contingent, in and to the oil, gas and other minerals in and under or that may be produced from or attributable to the lands covered by the Leases, including oil and gas leases, overriding royalties, production payments, fee mineral interests, fee royalty interests and other interests in such lands whether such lands are specifically described in Exhibit A, and even though Assignor's interest in such oil, gas or other minerals may be incorrectly described in or omitted from Exhibit A.

D. Copies of all files, records and data relating to the items described in subsections A through C above including title records (including abstracts of title, title opinions, title reports and title curative documents), contracts, correspondence, and all related matters in the possession of Assignor.

Customer Requested
No Cross References
By A Blue Date 12/21/11

MR 021 1 MR 908

The properties, rights and interests identified in subsections A through D above are collectively called the "Assets."

Notwithstanding anything contained in this Assignment and Bill of Sale to the contrary, the Assets do not include, and there is EXCEPTED if owned by third parties and RESERVED unto Assignor if owned by Assignor, and Assignor does not grant, bargain, sell, convey, assign, transfer, set over or deliver to Assignee hereby all rights, assets, properties, and business of Assignor, including subsurface formations and rights, related to all depths above the stratigraphic equivalent of the top of the Burkett Formation, which occurs at a true vertical depth of 3,860 feet in well number 34121240720000, Seneca Township, Noble County, Ohio, together with any rights, liabilities, or obligations associated therewith, provided, however, Assignee shall have the right to drill through such depths to operate and produce the depths hereby acquired.

The overriding royalty interest affecting the Leases which was conveyed in that certain Assignment of Overriding Royalty dated December 20, 2011, from Beck Energy Corporation to TD LLC, and recorded in Volume 211, Page 766 in the Official Public Records of Monroe County, Ohio, shall apply to any extension or renewal of any Lease which is executed no more than ninety (90) days from the expiration of the primary term of such Lease; provided, however, Assignee may pool such overriding royalty interest without obtaining the additional consent of Assignor.

TO HAVE AND TO HOLD the Assets unto Assignee, its successors and assigns, forever. Assignor hereby agrees to warrant and defend the title to the Assets hereby assigned unto Assignee against the claims of any party arising by, through, or under Assignor, but not otherwise. Additionally, to the extent transferable, Assignor hereby assigns to Assignee, its successors and assigns, full power and right of substitution and subrogation in and to all covenants and warranties (including warranties of title) by owners in Assignor's chain of title, vendors, or others, given or made with respect to the Assets or any part thereof prior to the Effective Time. This Assignment and Bill of Sale shall be binding upon and inure to the benefit of the Assignor and Assignee, and their respective successors and assigns.

EXCEPT WITH REGARD TO THE SPECIAL WARRANTY OF TITLE FROM ASSIGNOR TO ASIGNEE SET FORTH ABOVE, THIS ASSIGNMENT AND BILL OF SALE IS MADE WITHOUT WARRANTIES OR COVENANTS, EXPRESSED OR IMPLIED IN FACT OR IN LAW, AS TO TITLE, MERCHANTABILITY, DURABILITY, USE, OPERATION, FITNESS FOR ANY PARTICULAR PURPOSE, CONDITION, SAFETY OF THE PROPERTY, COMPLIANCE WITH REGULATORY AND ENVIRONMENTAL REQUIREMENTS OR OTHERWISE. ASSIGNOR DOES NOT IN ANY WAY REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY INFORMATION, DATA OR OTHER MATERIALS (WRITTEN OR ORAL) FURNISHED TO ASSIGNEE BY OR ON BEHALF OF ASSIGNOR. ASSIGNEE HEREBY

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AGREES THAT IT HAS INSPECTED OR HAS BEEN GIVEN THE OPPORTUNITY TO INSPECT THE ASSETS, INCLUDING THE LEASES AND ASSOCIATED AGREEMENTS, WELLS, PERSONAL PROPERTY, AND EQUIPMENT ASSIGNED AND CONVEYED HEREIN AND THAT IT ACCEPTS THE SAME "AS IS, WHERE IS" AND "WITH ALL FAULTS".

This Assignment shall be effective as of December 20, 2011, at 7:00 a.m. local time where the Assets are located (the "Effective Time") and shall be subject to that certain Purchase and Sale Agreement dated November 9, 2011 by and between Assignor and XTO Energy Inc., an affiliate of Exxon Mobil Corporation.

Assignor and Assignee agree to execute and deliver to each other, from time to time, such other and additional instruments, notices, division orders, transfer orders and other documents, and to do all such other and further acts and things as may be necessary to effectively grant, convey and assign to Assignee the Assets.

IN WITNESS WHEREOF this Assignment and Bill of Sale has been executed on December 20, 2011, but effective for all purposes as of the Effective Time.

ASSIGNOR:

BECK ENERGY CORPORATION

By: _____
Raymond T. Beck, President

ASSIGNEE:

EXXON MOBIL CORPORATION

By: _____
Name: Edwin S. Ryan, Jr.
Title: Attorney - in - Fact

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COPY

STATE OF OHIO §
§
COUNTY OF PORTAGE §

The foregoing instrument was acknowledged before me on December 20, 2011, by Raymond T. Beck, as President of Beck Energy Corporation, an Ohio corporation, on behalf of the corporation.

Dianna Roberts
Notary Public in and for the State of Ohio Dianna Roberts
My Commission Expires: 5/29/2016

STATE OF OHIO §
§
COUNTY OF PORTAGE §

The foregoing instrument was acknowledged before me on December 20, 2011, by Edwin S. Ryan, Jr., Attorney - in - Fact, of Exxon Mobil Corporation, a New Jersey corporation, on behalf of the corporation.

Dianna Roberts
Notary Public in and for the State of Ohio Dianna Roberts
My Commission Expires: 5/29/2016

2011 MAR 11

EXHIBIT "A"

Attached to that Assignment and Bill of Sale dated December 28, 2011 between Beck Energy Corporation as Assignor and Exxon Mobil Corporation c/o its affiliate XTO Energy Inc. as Assignee

County	Township	Section	Lease Name	First Grantor	Acres	Lease Date	Book/ Page
Monroe	Center	14	Hall	Wilson	50.35	3/18/2009	182 139
Monroe	Jackson	24	Hammond	Rubin, David	84.00	3/31/2010	201 039
Monroe	Jackson, Benton	1, 34	Hogan	Slade	63.00	9/22/2010	196 087
Monroe	Jackson	13	Kilkenbucky	Nelson, Elmer	6.38	8/20/2010	196 098
Monroe	Jackson	13	Washbook Harlow Inc		21.00	8/20/2010	[illegible]
Monroe	Lee	9	Hall	Lewis	17.00	5/8/2009	182 157
Monroe	Lee	29	Potts	Hudson, Donna	31.50	12/8/2005	179 022
Monroe	Lee	3	Dickson	Sims, Jesse	1.00	11/28/2005	179 284
Monroe	Lee	33	Johnson	Sims, Joseph	4.00	11/28/2005	179 285
Monroe	Madison	22	Knoll	Lacy, Glenda	29.91	7/16/2007	163 201
Monroe	Perry	16	Hall	Wilson Louis	75.16	3/15/2009	182 163
Monroe	Seneca	3,4	Hall	Wilson Louis	80.00	3/9/2009	182 161
Monroe	Switzer	32	Leather	Kennedy, David	38.00	7/7/2008	174 079
Monroe	Center	14	Hayes	Cindy	22.00	5/28/2008	171 438
Monroe	Central	19	Pocock	Donald, Mary Jane	115.00	10/19/2009	186 600
Monroe	Franklin	3, 6	Blackstone	Kenneth, Bobye	70.50	9/2/2008	173 548
Monroe	Jackson	20	Carpenter	Hubbard, Mary	40.00	9/18/2008	175 547
Monroe	Jackson	7	Conley	Carl	46.72	9/18/2008	175 543
Monroe	Jackson	33	Cutter	Charles, Bob Lynn	33.00	9/21/2010	201 835
Monroe	Jackson	33	Jones	Hale, Tassey	30.00	12/17/2010	197 299
Monroe	Lee	32	Cochran	Dennis	5.47	12/8/2008	179 390
Monroe	Lee		Hallman	Bason, Wendy	15.00	9/22/2008	175 549
Monroe	Lee	5	Hallman	Jennifer	12.66	9/22/2008	175 551
Monroe	Adams, Green	34,35	Donelson	Williams, Sandra	160.00	9/23/2004	118 352
Monroe	Adams	20,21,34	Hayes	Davis, Kelly	300.00	3/4/2004	118 286
Monroe	Benton	27	Johnson	Dougan, Heather	9.95	7/14/2004	123 183
Monroe	Center, Perry	13,18	Cutter	Williams, Willis, Robert	138.00	4/14/2004	118 224
Monroe	Center	18	Cook	Dennis, Angie	32.00	9/14/2004	124 049
Monroe	Center	21	Hayes	Robert, Rudy	23.00	8/17/2004	123 175
Monroe	Center	14	Hall	[illegible]	152.00	8/11/2004	123 123
Monroe	Center, Green	11,9,8	Moredor	John, Shelba	151.00	8/31/2004	126 872
Monroe	Center	14	Moredor	John, Shelba	40.00	7/21/2004	123 169
Monroe	Green	7	Stanford	Lounsbury	52.00	3/18/2004	118 238
Monroe	Green	35, 36	Thrasher	George, Patricia	75.00	3/8/2004	118 214
Monroe	Green	30	Dobbinsley	Mark, Harvey	84.00	3/22/2004	119 599
Monroe	Green	25	Hollenbeck	Mark, Nancy	168.00	3/7/2004	124 041
Monroe	Green	9	Jeffers	Brooks, Barbara	84.00	2/4/2004	118 218
Monroe	Green	30	Lawson	Bullard, Diane	152.00	6/13/2004	120 863
Monroe	Green	2, 8	Naylor	Christopher, Lynda	136.00	8/11/2004	123 177
Monroe	Green	26,27,22,23	Knob	Pool, Ben	171.00	3/19/2004	118 222
Monroe	Green	27	Lafayette	Harold, Eleanor	30.00	6/29/2004	120 783
Monroe	Green	18, 21	Mattoon	Wheeler, LeeAnn	38.00	8/14/2004	124 045
Monroe	Green	19	Silverdale	Hunter	80.00	4/22/2004	118 278
Monroe	Green	12	Arthur	Daniel, Brenda	140.00	6/14/2004	123 917
Monroe	Green	3	Clayton	John, Brenda	34.00	3/24/2004	118 234
Monroe	Green	27	Randall	Clark	87.00	7/7/2004	120 799
Monroe	Green	1,2,22	Reed	Perry, Judy	153.00	2/24/2004	118 242
Monroe	Green	35,19,8	Shaw	John, Martha	176.00	7/27/2004	123 152
Monroe	Green	29	Stone	Wood, Minnie	43.00	8/11/2004	123 393
Monroe	Green	22	Sugarcreek	Douglas, Pauline	127.00	3/19/2004	118 234
Monroe	Green	3,4,33,34	Thomas	Williams, Glenda	211.00	3/4/2004	118 230
Monroe	Green	27,21	Hunt	Cook, Wanda	150.00	5/11/2004	120 807
Monroe	Green	32, 36	Wells	Donald, Rose Marie	94.00	4/27/2004	118 282
Monroe	Green	27	Wilson	Donald, Rudy	25.00	3/29/2004	120 795
Monroe	Green	26	Yellow	Lunsford, Charlene	60.00	3/29/2004	120 791
Monroe	Jackson	31	Perkins	Robinson	40.00	6/7/2011	202 897
Monroe	Madison	20	Rosenberg	Cook, Lee	119.57	8/1/2009	182 661
Monroe	Perry	37	Galbraith	Stanley, Nancy	20.25	8/30/2004	123 183
Monroe	Strasburg	21	Dickson	Christopher, Karen	227.00	3/13/2009	187 780
Monroe	Wayne	33	Mintz	Lewis, Shirley	136.00	6/3/2004	120 884
Monroe	Adams	8	McPhedrick	Mitz, Pauline	30.00	4/9/2003	131 288
Monroe	Adams	2	Smith	Wilson, Judy	27.00	11/18/2003	127 498
Monroe	Adams	34	Taylor	Hopkins, Charlotte	78.50	5/12/2003	133 334
Monroe	Adams	36	White	Clayton, Jonnavaun	98.00	9/26/2003	129 618
Monroe	Adams, Green	3,4	Wilson	Adams, Sherry	166.00	8/14/2003	134 239
Monroe	Benton	2	Cox	Lewis	60.25	9/26/2003	136 383
Monroe	Benton	2	McConnell	Kerr, Linda	120.00	11/10/2003	146 145
Monroe	Center, Green	9,16	Cleaton	Clark	84.00	8/20/2003	131 533
Monroe	Center		Conlison	Beaumont, Kathy	0.16	2/13/2002	168 456
Monroe	Center	16	Pennington	Kerr, Linda	30.00	3/3/2003	150 365
Monroe	Center, Adams	11,3	Oakes	Dickson, Barbara Ann	36.00	8/11/2003	136 243

Page 1 of 2

Monroe Exhibit A-1

EXHIBIT "A"

Attached to that Assignment and Bill of Sale dated December 20, 2011 between Beck Energy Corporation as Assignor and Exxon Mobil Corporation c/o its affiliate XTO Energy Inc. as Assignee

County	Township	Section	Lease Name	First Name(s)	Acres	Lease Date	Book/ Page
Monroe	Center	7	Hubbard	Lawrence, Lissalotte	35.00	1/22/2008	145 117
Monroe	Center		Hubbard	Bay, Dolores		3/10/2008	143 151
Monroe	Center, Green	10,3,4	Kelley	Wilson, Chas	159.00	10/25/2004	125 465
Monroe	Center		Keefe	Lawrence, Rhonda	1.95	3/11/2008	130 617
Monroe	Center	34,35	Long	Dishon	20.00	3/18/2005	133 542
Monroe	Center	11	Mizen	Joseph, Teri	63.00	3/14/2005	130 585
Monroe	Center		Monroe Co Park Board		4.49	10/9/2007	137 371
Monroe	Center	10	Paulus	Jain, Tonza	39.00	6/13/2005	133 881
Monroe	Center	15	Roberts	Alvis, Clarence	24.00	5/3/2005	133 598
Monroe	Center	13,18	Saffell	Charles	80.00	8/13/2004	148 439
Monroe	Center		Sebgg	Jacquelyn, Richard	3.54	3/25/2008	120 615
Monroe	Center	35	Singleton	Kelley	6.00	3/11/2004	148 155
Monroe	Center	18	Smith	Wilson, Rita	34.00	4/23/2005	133 545
Monroe	Center		Stoffel	Hubbard	0.70	3/13/2008	138 652
Monroe	Center		Templeton	Sanford, Dorothy	2.28	3/11/2008	138 458
Monroe	Center		Westfall	Jain, Mary	25.00	3/6/2008	171 221
Monroe	Center, Adams	11,5	Wilson	Robert	41.00	8/14/2008	174 527
Monroe	Franklin	6	McConnell	Lewis, Ruth	148.00	10/9/2005	140 676
Monroe	Green	7,8	Arnold	Daniel, Jeanette	146.00	3/12/2005	128 695
Monroe	Green	7	Arnold	Daniel, Jeanette	31.00	3/12/2005	128 695
Monroe	Green	8	Arnold	Daniel, Jeanette	86.00	3/12/2005	128 695
Monroe	Green	3	Blackburn	Chas	80.00	10/5/2004	
Monroe	Green	35	Craig	Robert, Nellie	35.00	11/30/2005	146 882
Monroe	Green	2	Gelbard	James	153.00	3/10/2008	144 456
Monroe	Green	28	Hall	Vorhard, Elizabeth	41.00	4/23/2005	132 541
Monroe	Green	31,32	Kistler	Irvin, Jane	300.00	10/14/2004	125 411
Monroe	Green	31	Kubale	Rigney, Jane	57.00	11/10/2004	126 627
Monroe	Green	33	Kopp	Kenneth, Renee	33.00	3/17/2005	127 906
Monroe	Green	33	Gilpin	Thomas, Mary Ann	33.00	11/24/2004	126 639
Monroe	Green	13,14,19,24	Rahmer	Chas, Emma	280.00	3/16/2005	128 087
Monroe	Green	28,22	Stalder	Rinhard, Linda	92.00	3/8/2008	143 936
Monroe	Green	13, 14	Tinsbridge	Wilson, Kathryn	38.00	11/23/2005	143 934
Monroe	Green	3	Whipkey	Gary	26.00	5/10/2005	133 602
Monroe	Jackson	30	Cast	Lemon	41.00	9/30/2008	196 881
Monroe	Jackson	24,33	Cross Bridge LLC	Ohio Bluy	7.96	9/28/2010	196 891
Monroe	Jackson	30	Highley	Jackie, Margaret	48.00	3/1/2008	143 928
Monroe	Jackson	24,34	Monroe Resources LLC		3.80	9/28/2010	196 889
Monroe	Jackson	13	Weaver	Jones, Jim	17.00	9/28/2010	197 260
Monroe	Lee	3	Zellinger	Gary, Thomas	99.70	7/8/2010	193 385
Monroe	Wayne	26	Hoffman	Mack, Susan	110.00	5/6/2009	181 268

MONROE CO. RECORD OF Official Records
VOL 211 PAGE 908
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RECORDED December 21, 2011.
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RECORDER FEE $80.00

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IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE HUPP, et al.	CASE NO. 2011-345
Plaintiffs,	JUDGE: ED LANE
vs.	
BECK ENERGY CORPORATION	**JOURNAL ENTRY**
Defendant.	

This matter came to be heard upon multiple motions July 12, 2012. The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion on January 5, 2012, and on that same day also filed a Response to the Defendant's Motion to Change Venue. After reviewing said motions, and the relative briefing, the Court finds that Defendant's Motion to Dismiss and Defendant's Motion to Change Venue are not well taken, and therefore, both are denied. However, the Defendant may renew its Motion to Change Venue in the event a jury trial in any remaining matter is appropriate, and, if a jury trial in such remaining matter is demanded by either party

Further, on February 16, 2012, the Plaintiffs filed a Motion for Summary Judgment with supporting brief. On March 19, 2012, the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. On that same date, Chief Justice Maureen O'Connor, of the Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr. The

EXHIBIT
E

Court then issued an order on March 23, 2012 to set a status conference. The purpose of the status conference was to establish a briefing schedule. Said status conference was held telephonically on April 20, 2012 with all counsel in attendance. Pursuant to the status conference and its resulting order, the Defendant filed its brief in opposition to the Plaintiffs' Motion for Summary Judgment on April 30, 2012, and the Plaintiff filed a reply to that brief on May 14, 2012. Additionally, Plaintiff Donald Yonley was voluntarily dismissed on April 12, 2012.

After careful consideration of the motions, briefing and supporting documentation, the Court hereby finds that Plaintiffs' Motion for Summary Judgment is well taken and is therefore granted. The reasoning in support of the granting of the Summary Judgment Motion and denial of the Motion to Change Venue/Dismiss can be found in the Court's Decision on Pending Motions dated July 12, 2012, which is attached hereto and incorporated herein by reference.

As a result of the Court's finding, the Court hereby further orders the Monroe County Recorder's Office to mark as void and forfeited and strike from the county records the Beck Energy leases of Plaintiffs, Larry and Lori Hustack, Lawrence and Michelle Hubbard and David Majors, as the Court has found, among other things, those leases are void as against public policy.

On July 18, 2012 Plaintiffs filed for leave to file a Third Amended Complaint to include all landowners in Ohio located outside Monroe County who may be affected by this Court's filing of July 12, 2012. On July 18, 2012 Plaintiffs also filed a Motion for Class Certification. Those two motions are still pending. Accordingly, as this entry does not dispose of all pending matters, this is not a final appealable order.

JUDGE ED LANE

cc: All Parties of Record

EXHIBIT 7

2012 JUL 31 AM 9:41
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE HUPP, et al.	CASE NO. 2011-345
Plaintiffs,	JUDGE: ED LANE
vs.	
BECK ENERGY CORPORATION	**JOURNAL ENTRY**
Defendant.	

This matter came to be heard upon multiple motions. The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion on January 5, 2012, and on that same day also filed a Response to the Defendant's Motion to Change Venue. After reviewing said motions, and the relative briefing, the Court finds that Defendant's Motion to Dismiss and Defendant's Motion to Change Venue are not well taken, and therefore, both are denied. However, the Defendant may renew its Motion to Change Venue in the event a jary trial in any remaining matter is appropriate, and, if a jary trial in such remaining matter is demanded by either party.

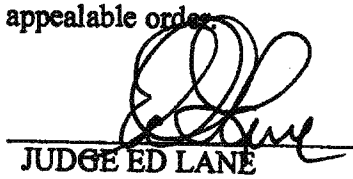
Further, on February 16, 2012, the Plaintiffs filed a Motion for Summary Judgment with supporting brief. On March 19, 2012, the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. On that same date, Chief Justice Maureen O'Connor, of the Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr. The

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court Monroe Co. Ohio
By Beth Ann Rose
Deputy Clerk

Court then issued an order on March 23, 2012 to set a status conference. The purpose of the status conference was to establish a briefing schedule. Said status conference was held telephonically on April 20, 2012 with all counsel in attendance. Pursuant to the status conference and its resulting order, the Defendant filed its brief in opposition to the Plaintiffs' Motion for Summary Judgment on April 30, 2012, and the Plaintiff filed a reply to that brief on May 14, 2012. Additionally, Plaintiff Donald Yonley was voluntarily dismissed on April 12, 2012.

After careful consideration of the motions, briefing and supporting documentation, the Court hereby finds that Plaintiffs' Motion for Summary Judgment is well taken and is therefore granted. The reasoning in support of the granting of the Summary Judgment Motion and denial of the Motion to Change Venue/Dismiss can be found in the Court's Decision on Pending Motions dated July 12, 2012, which is attached hereto and incorporated herein by reference as if fully rewritten.

On July 18, 2012 Plaintiffs filed for leave to file a Third Amended Complaint to include in the proposed class all landowners/lessors in Ohio located outside Monroe County who may be affected by this Court's filing of July 12, 2012. On July 18, 2012 Plaintiffs also filed a Motion for Class Certification. Those two motions are still pending. Accordingly, as this entry does not dispose of all pending matters, this is not a final appealable order.



JUDGE ED LANE

cc: All Parties of Record

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE CO., OHIO
2012 JUL 12 AM 10:06
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No. 2011-345
vs.	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION (On Pending Motions)

The above styled action is before the Court on the Complaint of the Plaintiff, Clyde A. Hupp and Molly A. Hupp, et al., for declaratory judgment and quiet title. This action was filed on September 14, 2011 and the two subsequent Complaints for Class Action and Amended Class Action were filed on September 29, 2011 and September 30, 2011, respectively. The Defendant, Beck Energy Corporation, has not filed an answer in this action, but has made an appearance. This action has not been certified as a class action as of the date of this decision. The Court is considering the pending motions prior to undertaking the required hearings in regard to class certifications. **Clyde A. and Molly Hupp are parties of record in this case and the correct style of the case is as set forth above. For some reason, unknown to this Court, the parties in this case have changed the style of this case. All future filings in this case will be correctly titled or subsequently stricken by Court order.**

The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion to

Dismiss on January 5, 2012. On the same date, the Plaintiffs also filed a response to the Defendant's Motion to change venue. On February 16, 2012 the Plaintiffs filed a Motion for Summary Judgment with a supporting brief. On March 19, 2012 Chief Justice Maureen O'Connor of The Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr., Judge of the Washington County Court of Common Pleas. On March 19, 2012 the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. Thereafter, on March 23, 2012, the Court ordered the matter set for a Status Conference. The purpose of the Status Conference was to establish a briefing schedule for all of the motions that were being filed in this action. All attorneys of record participated in the Status Conference. A Status Conference was held by means of telephone conferencing on April 20, 2012. A Journal Entry was entered on April 25, 2012 establishing a briefing schedule for the pending motions. The briefing schedule required all responses to be filed by April 30, 2012 and replies to responses by April 13, 2012. All motions and replies have been timely filed either pursuant to an extension of time granted by the Court or within the original deadlines. The Defendant filed its Brief in Opposition to the Plaintiff's Motion for Summary Judgment on April 30, 2012 and the Plaintiffs filed a reply to that Brief on May 14, 2012. The matter has been under review by the Court since that date. The Court has reviewed all of the pleadings, all of the motions, memorandums and supporting affidavits provided to this Court and filed in this action. At present there are six named individual plaintiffs in this action. One plaintiff, Donald W. Yonally, was voluntarily dismissed without prejudice on April 12, 2012.

The Court will address all of the issues presented in the parties' various motions in this decision.

FACTUAL BACKGROUND

The Plaintiffs own various tracts of land in Monroe County, Ohio. The Defendant, Beck Energy, is an Ohio oil and gas producer that develops oil and gas interests in Ohio. Beginning in 2003 the Defendant entered into a number of oil and gas leases in Monroe County, Ohio. The Plaintiffs maintain that they have a potential class of 248 lessors. The leases that are involved in this action are leases generated by the Defendant. All leases are identical except as to a few blanks on each of the form leases that were filled in by the Defendant's representatives. These variations are: the date of the lease, the names and addresses of the lessors, and a rough description of the land by township and county. All leases have written in the blank in paragraph three a twelve month primary period/term. The delayed rental payment varies per lease and the name of the lessors varies with each lease. To date, no wells have been drilled in Monroe County pursuant to any of the leases that are involved in this action.

There are certain provisions of the form lease (see Plaintiffs' Exhibit 2 as attached to Plaintiffs' Complaint) that are at issue in this case. The key paragraphs are set forth below:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.
>
> 3. This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.
>
> * * *

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event as well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay th Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are started, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessor may elect.

***

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches

shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

***

19. . . . no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties. . . .

MOTION TO CHANGE VENUE

At the present time, no jury demand has been filed in this action. If this matter proceeds as an action to the Court, there has been a de facto change of venue by reason of Judge Selmon recusing herself from this case and The Chief Justice of The Supreme Court of Ohio assigning this case to the undersigned. If a jury demand is timely filed in the future, the Court will revisit the issue of venue should it be brought to the Court's attention in a subsequent motion. The motion to change venue is denied without prejudice.

DEFENDANT'S MOTION TO DISMISS

On November 30, 2011 the Defendant filed a combined Motion to Dismiss and/or Change Venue. Pursuant to Oh. Civ. R. 12(B)(6) the Defendant seeks to have this Court dismiss this action pursuant to the provisions of paragraph 17 of the lease.

The Plaintiffs admit that they have not complied with paragraph 17 of the subject lease.

A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of a complaint. Dowdy v. Jones, 7th Dist. No. 10-CO-21, 2011-Ohio-3168, ¶14. For a trial court to dismiss a complaint pursuant to Civ.R.

12(B)(6), it must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to the relief sought. Ohio Bureau of Workers' Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, __ N.E.2d __, ¶12. "The allegations in the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* Moreover, a complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theories on which the plaintiffs rely. Fahnbulleh v. Strahan, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). Instead, the Court must examine the complaint to determine whether the allegations provide for any relief on any possible theory. *Id.*

Defendant's motion to dismiss herein is predicated on a single proposition: that Plaintiffs did not provide thirty days written notice to this Defendant prior to commencing this action. The Plaintiffs maintain that the Leases which form the contractual basis for these parties are void as against public policy and unenforceable, and under any reasonable construction of said Leases, were materially and substantially breached by the Defendant reducing the contractual requirement of a notice to a meaningless act from which no benefit could be derived.

Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or

indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also* State v. Baldwin Producing Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension

between lessors, lessees and the courts. Jacobs v. CNG Transmission Corp., 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions, one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

The Plaintiffs' position in this matter is that their leases with the Defendant are a no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in

paying quantities pursuant to paragraph 2.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in Ionno v. Glen-Gery Corp., 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. ***Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.***

This Court must, under the current state of Ohio law, consider the allegations in the Plaintiffs' Complaint as true, and must draw any reasonable inferences from them in favor of the Plaintiffs. When doing so, this Court cannot say beyond doubt that the Plaintiffs can prove no set of facts that would entitle them to the relief sought. Therefore, for all of the reasons set forth

herein above and hereafter, the Defendant's Motion to Dismiss is not well taken and the same shall be denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs filed their Motion for Summary Judgment in this action on February 16, 2012. The Defendant filed its Brief in Opposition on April 30, 2012. The Plaintiffs further filed a reply to the Defendant's opposition on May 14, 2012 and on March 19, 2012 filed a reply brief in support of their Motion for Summary Judgment.

The Plaintiffs' Motion for Summary Judgment sets forth several distinct issues. First, the Plaintiffs maintain that their lease with the Defendant is a lease in perpetuity and as such is void and unenforceable as against the public policy of The State of Ohio. Secondly, the Plaintiffs maintain that the Defendant breached the implied covenant to reasonably develop their land and by doing so the leases are now null and void. Thirdly, the Plaintiffs maintain that the lease provisions for foregoing development by the payment of delayed rentals has expired because the Defendant failed to commence a well within the required times. The Defendant has countered the Plaintiffs' assertions by stating that it had not received the written notice required from the Plaintiffs setting forth any alleged noncompliance by the Defendant with the lease's terms. Plaintiffs maintain that they do not have to give notice because the leases were void *ab initio*. The Defendant also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease.

A Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation." Gross v. Western-Southern Life Ins. Co., 85 Ohio App.3d 662, 667, 621 N.E.2d 412 (1st Dist. 1993). A Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [civil rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Todd Development Co. v. Morgan, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, &22. *See also* Civ.R. 1(B).

Civ.R. 56(C) mandates that a court enter summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* When a motion for summary judgment has been made and properly supported, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The parties moving for summary judgment need only prove their own case: the movants do not bear the initial burden of addressing any affirmative defenses the nonmovant may assert. *Id.*, syllabus and &13.

"Summary judgment is appropriate where no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the nonmoving party's claim or defense." Gross, 85 Ohio App.3d at 667. The mere existence of a factual dispute is insufficient to preclude summary judgment only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Id.* "The construction of written contracts and instruments of conveyance is a matter of law." Alexander v. Buckeye Pipe Line Co., 553 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. This Court finds that the instant case involves the construction of written leases

and in light of the Defendant's undisputed failure to commence any development activity pursuant to those leases, the clear public policy of Ohio has been violated. There is no dispute as to any material fact; reasonable minds can reach no conclusion other than one reached herein by this Court that is adverse to the Defendant; and Plaintiffs are entitled to judgment as a matter of law on this issue.

The Plaintiffs also maintain that their leases with the Defendant are perpetual leases under which there has been no development of oil and gas and therefore the leases are void and unenforceable as against public policy. Central to the understanding of this issue are paragraphs two and three of these parties' leases. Paragraph two provides as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the lessee for a term of ten years and as 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 and gas and as provided in paragraph 7 following."

Paragraph 7 of the parties' leases deal with the event that if a well is drilled that is a dry hole. Paragraph number 3 of the parties' lease is also central to an understanding of the issue at hand. Paragraph 3 of the parties' leases provide that:

> "This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of _____ Dollars each year, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved

herein. If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed rental can be paid. Further, paragraph 2 provides that the leases have a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. It also leaves the determination of what paying quantities means up to the Defendant. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. There is no deadline for the completion of a well. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs.

Public policy analysis requires this Court to consider the impact of the contract at issue upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio Spp.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> "Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

> Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy."

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-321, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

The Ohio Supreme Court has clearly and unequivocally articulated the public policy of the State of Ohio in regard to the extraction of oil and gas. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northumpton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also State v. Baldwin Producing

Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; Northampton Building Co at 198-99. It would be inconsistent to permit a private operator to unilaterally ban the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. The Plaintiffs are also entitled to summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs' acreage. This provision violates the implied covenant to reasonably develop.

The leases in this case are, in effect, a no-term leases: through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2 provides that the leases shall continue in force for a term of ten years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3 provides that the leases shall become null and void if a well is not commenced

within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of ____ Dollars each year, ..." but likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals. Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779 . Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The coal leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation within which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.

Id. At 134.

The "long term" lease in *Ionno* and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. Like the lease in *Ionno* under which there had been no development, the leases herein are unenforceable as against public policy.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question seriously offend public policy in that they are perpetual leases. The Plaintiffs are also entitled to Summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land and by failing to drill any wells on any of the acreage that implied covenant has been violated.

"[T]he only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving *** royalties based upon the amount of minerals derived from the land." Ionno, 2 Ohio St.3d at 133 n.2, 443 N.E.2d 504. "[W]here a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* At 133. In *Ionno*, the Ohio Supreme Court found a lease to be subject to the implied covenant to reasonably develop where it set forth

no time period in which mining operations were required to commence, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.* At 133.

The leases in this case contain neither a "specific reference to the timeliness of development" no "a time period in which mining operations were required to commence." Paragraph 3 of the lease provides that the lease shall "terminate" if a well is not commenced within the twelve-month period, the remainder of that paragraph ostensibly permits the Defendant to delay development indefinitely by paying annual delay rentals. Paragraph 2 of the lease also permits the Defendant to delay development indefinitely by determining in its judgment that oil or gas is "capable of being produced on the premises in paying quantities." A lease in which the development period can be delayed into perpetuity at the option of the lessee clearly satisfies the *Ionno* criteria under which an implied covenant will arise.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill and initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. V. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams,* 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The court saw no need to resort to the law of the state in which the case arose, stating that the covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *id.* At 278-79.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the minerals to which its lease applied.

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. At 281.

The Defendant maintains that its lease clearly disclaims all implied covenants. The lease does contain a general disclaimer of implied covenants. However, the lease also later refers to implied covenants.

In Ohio, as elsewhere, "[a]bsent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land." *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

Ambiguities in contracts are to be construed against the proponent of the instrument. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* "In determining whether contractual language is ambiguous, the contract must be construed as a whole *** so as to give reasonable effect to every provision in the agreement." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (applying Ohio law). Where a contract as a whole can be reasonably interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue, and must be construed against the drafter. *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003).

In this case, the parties' lease first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.

This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to

reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective.

Where general provisions of a contract conflict with specific provisions of the same document, the specific provisions generally control. *Edmondson v. Motorists Mutual ins. Co.,* 48 Ohio St.2d 52, 53, 356 N.E.2d 722 (1976); *Hoepker v. Zurich American Inc., Co.*, 3d Dist. No. 140318, 2003-Ohio-5138, ¶11; *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10th Dist. 1991). Paragraph 17 of the Beck Lease sets forth specific procedures to be followed in the event a lessor believes Beck to have breached either an express or implied obligation. Paragraph 19 generally disclaims all implied obligations. In that the specific provision in paragraph 17 setting forth a lessor's rights in the event Beck breaches an implied condition controls over the general disclaimer in paragraph 19, the disclaimer is ineffective.

The stated purpose of this lease is "drilling, operation for, producing and removing oil and gas and all the constituents thereof." The lease contains no suggestion that either defendant or lessor had any other objective. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the express purpose of the lease.

To give effect to the fundamental purpose of an oil and gas lease as well as to the implied covenant to reasonably develop the land, provisions in the lease bearing on the extent of development may modify or reflect the standard of reasonableness in the implied covenant.

Streck v. Reed, 9th Dist. No. 1221, 1983 WL 4132, *3 (June 8, 1983). The lease must be construed in a manner that will give effect to all the provisions in the lease, both express and implied. *Id.*

The provision in a mineral lease for annual advance payments does not relieve the lessee of its obligation to reasonably develop the land. *Ionno*, 2 Ohio St.3d at 134, 443 N.E.2d 504.

> The questions of working diligently and of paying rent or royalties are entirely separately matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum.

Paragraph 3 of this lease specifies that the Lease "shall become null and void" and the rights of the parties "shall cease and terminate" unless a well is commenced within twelve months (subject to the effect of paying delay rentals). The parties necessarily determined that twelve months was a reasonable time in which to commence a well. In construing this lease, the Court hereby finds that the implied covenant to reasonably develop the land required the Defendant to commence a well within one year. As the Defendant failed to do so, and in fact, has failed to commence a single well on any portion of any of the Plaintiffs' acreage, even though more than three years have elapsed since the lease covering the Hustacks' property was executed, almost six years have elapsed since the Hubbards executed their lease, nine years have elapsed since Donald Yonley executed his Lease, and more than six years have elapsed since David Majors executed his Lease, it has breached the implied covenant to reasonably develop Plaintiffs' Acreage.

When construing the evidence most strongly in favor of the Defendant as required by the Ohio Rules of Civil Procedure, this Court is convinced that reasonable minds can come to but one conclusion, and that conclusion is adverse to the Defendant. This Defendant's lease clearly and unequivocally breaches the implied covenant to reasonably develop the Plaintiffs' land and violates the public policy of the State of Ohio and the Plaintiffs are entitled to summary judgment on this issue. As stated herein above, the lease involved in this action is a lease in perpetuity. By paying delayed rentals, this land could potentially never be developed by the Defendant's payment of a very minimal payment to the Plaintiffs.

While not controlling, our neighboring state of Pennsylvania has decided the issues presented by this course. It is interesting because Pennsylvania has taken the same position taken by the Ohio Supreme Court on the issues presently before this Court in this matter. *Hite v. Falcon Partners*, 2011 Pa.Supr. 2, 13 A.3d 942 (2011), is in many respects similar to the instant case. The *Hite* lease and this lease are both "unusual" types of no-term leases. 13 A.3d at 947. They do not contain traditional habendum clauses which definitively designate a primary term (the time period in which the lessee has the right to develop the leased premises) and a secondary term (the period following the primary term in which the lessee can reap a long-term return on the efforts and funds expended to develop the premises.) The *Hite* lease and this lease each contain language purporting to enable the lessee to indefinitely extend the primary term at the lessee's option.

The *Hite* lease provided for a one-year primary term that the lessees could extend indefinitely either by continuing operations for production of oil or gas, or by paying annual delay rentals of two dollars per acre. 13 A.3d at 944. The lessees in *Hite* simply paid delay

rentals for years without commencing any drilling, depriving the lessors of the royalties they would have received from the production of their oil or gas.

The court noted that "[r]oyalty-based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties." *Id.* At 945. The court reviewed the history of mineral leases, noting the evolution from a definite term that left the lessee at a disadvantage if minerals were discovered near the end of the term, to a variable term expressed by a habendum clause providing for a fixed period for development, with an option to extend the lease for "as long thereafter" or "so long as" the specified minerals were produced in paying quantities, enabling the lessee to continue to reap a return for the money spent to develop the property. *Id.* At 946.

Even if a written lease did not expressly require the lessee to develop the property in a timely manner or suffer forfeiture, courts recognized an implied obligation to develop the leasehold. *Id.* As a result, leases specifying a fixed primary term with a "thereafter" clause began to incorporate "delayed rental" clauses relieving lessees of the obligation to immediately develop the property. *Id.* "[C]ourts have interpreted delay rentals to be 'limited to the initial term of the lease.'" *Id* at 947; *Jacobs*, 332 F.Supp.2d at 786.

As noted in Plaintiffs' public policy argument, section II.B., *supra*, lessees began crafting leases permitting the lessee to extend the exploration period for as long as he considered payment of the delay rental worthwhile, giving rise to the "no term lease," which courts rejected under one of two rationales. *Hite* at 947. One rationale was that because the lease did not fix a time beyond which the lessee could not delay actual development and the payment of royalties-the consideration for the lease-the lease was unfair and therefore unenforceable against the lessor. *Id.*

The other rationale was that no-term leases contained an implied condition requiring the lessee to drill within a reasonable time or forfeit the lease. *Id.*

The *Hite* court observed that to a landowner unsophisticated in the legalities of leasing minerals the terms of the lease indicated a one-year term during which the lessee was to commence development. 2011 Pa.Super.2, 13 A.3d at 948. "If the lease could be extended in perpetuity though the payment of $2.00 per acre per year, there would be little need for the parties to agree on a one-year lease term." *Id.* Rejecting the lessee's contention that the leases enabled it to maintain production rights indefinitely as long as delay rentals were paid, the court opined that delay rentals relieve the lessee of the obligation to develop the land during the primary term only. *Id.* Accordingly, a single two-dollar-per-acre delay rental relieved the lessee of any obligation to develop the leasehold during the one-year primary term. *Id.* Once that primary term expired, the mere payment of delay rentals could not preserve the lessee's drilling rights. *Id.*

Permitting the lessee to pay delay rentals indefinitely, thereby denying the lessors the financial benefits of actual production, would contravene the presumed intention of the parties in executing the leases in the first place, as well as the notion that delay rentals are intended to "spur the lessee toward development." *Id.* Moreover, construing the leases as creating an indefinite term would provide the lessee with vested property rights for the mere payment of a nominal delay rental, a concept at odds with the traditional construction of the property rights conveyed by an oil and gas lease. 13 A.3d at 949. Accordingly, the *Hite* court held that the terms of the leases being construed limited the privilege of foregoing production by paying delay rentals to

the one-year primary term; once the primary term ended and the lessee failed to commence production, the leases expired. *Id.*

Like the *Hite* lease, this lease is a no-term lease which, on its face, purports to enable the Defendant to extend the term indefinitely, without any development, by simply paying nominal delay rentals and/or determining that the leased acreage is capable of producing.

A contract is illusory when, by its terms, the promisor "retains an unlimited right to determine the nature or extent of his performance; the unlimited right in effect destroys his promise and thus makes it merely illusory." *Century 21 v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist. 1980); *Thomas v. Am. Elec. Power Co.*, 10th Dist. No. 03AP1192, 2005-Ohio-1958, ¶32. Courts generally disfavor interpretations that render contracts illusory, preferring a meaning that gives the contract vitality. *Thomas*, ¶32.

Construing this lease consistently with *Hite*, limiting the Defendant's ability to forego development to the twelve-month primary term set forth in paragraph 3, would prevent the Defendant's promise to drill from being illusory and would promote public policy and the expressed intent of the parties to develop the Acreage.

For all the reasons set forth herein above the Plaintiffs are entitled to summary judgment. The remaining issue is whether or not forfeiture is an appropriate remedy for the Plaintiffs and whether or not the Defendant is entitled to a 30 day notice of cure as provided for in the lease. For the reasons set forth herein after, this Court believes that forfeiture of these leases is the appropriate remedy because they were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice.

When causes of forfeiture are specified in an oil and gas lease, other causes cannot be implied. *Beer*, 61 Ohio St.2d at 119, 399 N.E.2d 1227, paragraph three of the syllabus. However, "[w]here legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant." *Id.*, paragraph four of the syllabus. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. *Ionno*, 2 Ohio St.3d at 135, 443 N.E.2d 504. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of an implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. *Id.*

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore*, 2008-Ohio-5953, &48. Where a lessee's failure to drill or mine within a reasonable period of time would allow the lessee to encumber the lessor's property in perpetuity, without any return of income to the lessor arising from drilling or mining operations, breach of the implied covenant to develop the land could result in forfeiture. *Id.* The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Id.*, ¶51.

In *Beer*, the court upheld a partial forfeiture (or cancellation) where the lessee had performed no work on the leased property for over a year, and had financial and operating difficulties. 61 Ohio St.2d at 121-22, 399 N.E.2d 1227. The court stated that even if the lessee had sufficient resources from which to pay damages, forfeiture of the lessee's continued interest in unexploited acreage was warranted to assure the development of the land and the protection of the lessor's interests. *Id.* at 122, 399 N.E.2d 1227. In *Lekan*, the court upheld a forfeiture where

the lessee had limited experience; had drilled but never sold gas from a well on the lessor's property, even though he had placed three wells on other lessors' property into production; and functioned as a "mom and pop" operation without employees. 75 Ohio App.3d at 216-17, 598 N.E.2d 1315.

In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate.

Plaintiffs did not provide written notice to the Defendant pursuant to paragraph 17 of the lease, "setting out specifically in what respects lessee has breached this contract," and affording the Defendant thirty days to cure any breach. However, the Defendant lacks the means to cure either the defects in or its breaches of the lease. Plaintiffs' compliance with the technical requirement of providing notice prior to commencing this action would serve no purpose.

A lessee's "midnight-hour attempts to save the lease" are insufficient to preserve the lessee's rights under an oil and gas lease that has been breached. *American Energy Services v. Lekan*, 75 Ohio App.3d 205, 214, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶50; *Gisinger v. Hart*, 115 Ohio App. 115, 184 N.E.2d 240 (4th Dist. 1961). In *Lekan*, the court found that once the conditions of the lease had ceased to

be met, the lease terminated "by the express terms of the contract *** and by operation of law and revest[ed] the leased estate in the lessor." 75 Ohio App.3d at 212, 214.

In *Gisinger,* the lessees made no effort to develop the leasehold until ten days before expiration of the primary term. Finding it improbable that gas or oil would be produced before the end of the term, the court held the effort was "too little too late," and rejected the lessees' claim for an extension of the term. 115 Ohio App. At 117.

Moreover, it is well settled that the law will not require a vain act. *E.g., State ex rel. Marcolin v. Smith,* 105 Ohio St. 570, 603, 138 N.E. 881 (1922); *Gerhold v. Papathanasion,* 130 Ohio St.342, 346, 199 N.E.353 (1936); *Coleman v. Portage County Engineer,* 191 Ohio App.3d 32, 2010-Ohio-6255, 944 N.E.2d 756, ¶38 (11th Dist.). In the instant case, the purpose of the notice requirement in paragraph 17 of the lease is to provide the Defendant with an opportunity to cure any breach. However, the lease is void as against public policy. The Defendant cannot cure its breach in a timely manner. The Plaintiffs are entitled to summary judgment as requested and to the forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties. The Defendant's rights in the subject bases are forfeited. Court costs shall be assessed against the Defendant.

ENTER AS OF DATE OF FILING:

/s/ Ed Lane

Judge Ed Lane

c: Attorney Zurz/Ropchok/Peters
Attorney Bauerle/Hirsch

EXHIBIT 8

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.,	
Plaintiffs-Appellees,	CASE NO. 2011-345
vs.	JUDGE ED LANE
BECK ENERGY CORPORATION,	
Defendant-Appellant.	

NOTICE OF APPEAL

Notice is hereby given that Defendant, Beck Energy Corporation, by and through the undersigned counsel, hereby appeals to the Court of Appeals, Monroe County, Ohio, Seventh Appellate District, from the Journal Entry of the Monroe County Court of Common Pleas, in Case No. 2011-345, entered on July 31, 2012. A copy of the Journal Entry is attached hereto as Exhibit "A." A request for the full record has been filed with this Notice of Appeal.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____ Deputy Clerk

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ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

00374238-1 / 22585.00-0012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail this 27th day of August 2012, to:

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Peters Law Office Co., L.P.A.
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ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

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CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE HUPP, et al.	CASE NO. 2011-345
Plaintiffs,	JUDGE: ED LANE
vs.	
BECK ENERGY CORPORATION	**JOURNAL ENTRY**
Defendant.	

This matter came to be heard upon multiple motions. The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion on January 5, 2012, and on that same day also filed a Response to the Defendant's Motion to Change Venue. After reviewing said motions, and the relative briefing, the Court finds that Defendant's Motion to Dismiss and Defendant's Motion to Change Venue are not well taken, and therefore, both are denied. However, the Defendant may renew its Motion to Change Venue in the event a jary trial in any remaining matter is appropriate, and, if a jary trial in such remaining matter is demanded by either party.

Further, on February 16, 2012, the Plaintiffs filed a Motion for Summary Judgment with supporting brief. On March 19, 2012, the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. On that same date, Chief Justice Maureen O'Connor, of the Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr. The

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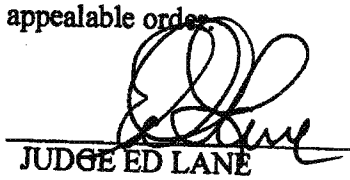
Court then issued an order on March 23, 2012 to set a status conference. The purpose of the status conference was to establish a briefing schedule. Said status conference was held telephonically on April 20, 2012 with all counsel in attendance. Pursuant to the status conference and its resulting order, the Defendant filed its brief in opposition to the Plaintiffs' Motion for Summary Judgment on April 30, 2012, and the Plaintiff filed a reply to that brief on May 14, 2012. Additionally, Plaintiff Donald Yonley was voluntarily dismissed on April 12, 2012.

After careful consideration of the motions, briefing and supporting documentation, the Court hereby finds that Plaintiffs' Motion for Summary Judgment is well taken and is therefore granted. The reasoning in support of the granting of the Summary Judgment Motion and denial of the Motion to Change Venue/Dismiss can be found in the Court's Decision on Pending Motions dated July 12, 2012, which is attached hereto and incorporated herein by reference as if fully rewritten.

On July 18, 2012 Plaintiffs filed for leave to file a Third Amended Complaint to include in the proposed class all landowners/lessors in Ohio located outside Monroe County who may be affected by this Court's filing of July 12, 2012. On July 18, 2012 Plaintiffs also filed a Motion for Class Certification. Those two motions are still pending. Accordingly, as this entry does not dispose of all pending matters, this is not a final appealable order.



JUDGE ED LANE

cc: All Parties of Record

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE CO., OHIO
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CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No. 2011-345
vs.	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION (On Pending Motions)

The above styled action is before the Court on the Complaint of the Plaintiff, Clyde A. Hupp and Molly A. Hupp, et al., for declaratory judgment and quiet title. This action was filed on September 14, 2011 and the two subsequent Complaints for Class Action and Amended Class Action were filed on September 29, 2011 and September 30, 2011, respectively. The Defendant, Beck Energy Corporation, has not filed an answer in this action, but has made an appearance. This action has not been certified as a class action as of the date of this decision. The Court is considering the pending motions prior to undertaking the required hearings in regard to class certifications. **Clyde A. and Molly Hupp are parties of record in this case and the correct style of the case is as set forth above. For some reason, unknown to this Court, the parties in this case have changed the style of this case. All future filings in this case will be correctly titled or subsequently stricken by Court order.**

The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion to

Dismiss on January 5, 2012. On the same date, the Plaintiffs also filed a response to the Defendant's Motion to change venue. On February 16, 2012 the Plaintiffs filed a Motion for Summary Judgment with a supporting brief. On March 19, 2012 Chief Justice Maureen O'Connor of The Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr., Judge of the Washington County Court of Common Pleas. On March 19, 2012 the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. Thereafter, on March 23, 2012, the Court ordered the matter set for a Status Conference. The purpose of the Status Conference was to establish a briefing schedule for all of the motions that were being filed in this action. All attorneys of record participated in the Status Conference. A Status Conference was held by means of telephone conferencing on April 20, 2012. A Journal Entry was entered on April 25, 2012 establishing a briefing schedule for the pending motions. The briefing schedule required all responses to be filed by April 30, 2012 and replies to responses by April 13, 2012. All motions and replies have been timely filed either pursuant to an extension of time granted by the Court or within the original deadlines. The Defendant filed its Brief in Opposition to the Plaintiff's Motion for Summary Judgment on April 30, 2012 and the Plaintiffs filed a reply to that Brief on May 14, 2012. The matter has been under review by the Court since that date. The Court has reviewed all of the pleadings, all of the motions, memorandums and supporting affidavits provided to this Court and filed in this action. At present there are six named individual plaintiffs in this action. One plaintiff, Donald W. Yonally, was voluntarily dismissed without prejudice on April 12, 2012.

The Court will address all of the issues presented in the parties' various motions in this decision.

FACTUAL BACKGROUND

The Plaintiffs own various tracts of land in Monroe County, Ohio. The Defendant, Beck Energy, is an Ohio oil and gas producer that develops oil and gas interests in Ohio. Beginning in 2003 the Defendant entered into a number of oil and gas leases in Monroe County, Ohio. The Plaintiffs maintain that they have a potential class of 248 lessors. The leases that are involved in this action are leases generated by the Defendant. All leases are identical except as to a few blanks on each of the form leases that were filled in by the Defendant's representatives. These variations are: the date of the lease, the names and addresses of the lessors, and a rough description of the land by township and county. All leases have written in the blank in paragraph three a twelve month primary period/term. The delayed rental payment varies per lease and the name of the lessors varies with each lease. To date, no wells have been drilled in Monroe County pursuant to any of the leases that are involved in this action.

There are certain provisions of the form lease (see Plaintiffs' Exhibit 2 as attached to Plaintiffs' Complaint) that are at issue in this case. The key paragraphs are set forth below:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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 and as provided in Paragraph 7 following.
>
> 3. This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.
>
> * * *

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event as well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay th Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are started, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessor may elect.

***

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches

shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

***

19. . . . no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties. . . .

MOTION TO CHANGE VENUE

At the present time, no jury demand has been filed in this action. If this matter proceeds as an action to the Court, there has been a de facto change of venue by reason of Judge Selmon recusing herself from this case and The Chief Justice of The Supreme Court of Ohio assigning this case to the undersigned. If a jury demand is timely filed in the future, the Court will revisit the issue of venue should it be brought to the Court's attention in a subsequent motion. The motion to change venue is denied without prejudice.

DEFENDANT'S MOTION TO DISMISS

On November 30, 2011 the Defendant filed a combined Motion to Dismiss and/or Change Venue. Pursuant to Oh. Civ. R. 12(B)(6) the Defendant seeks to have this Court dismiss this action pursuant to the provisions of paragraph 17 of the lease.

The Plaintiffs admit that they have not complied with paragraph 17 of the subject lease.

A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of a complaint. Dowdy v. Jones, 7th Dist. No. 10-CO-21, 2011-Ohio-3168, ¶14. For a trial court to dismiss a complaint pursuant to Civ.R.

12(B)(6), it must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to the relief sought. Ohio Bureau of Workers' Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, __ N.E.2d __, ¶12. "The allegations in the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* Moreover, a complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theories on which the plaintiffs rely. Fahnbulleh v. Strahan, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). Instead, the Court must examine the complaint to determine whether the allegations provide for any relief on any possible theory. *Id.*

Defendant's motion to dismiss herein is predicated on a single proposition: that Plaintiffs did not provide thirty days written notice to this Defendant prior to commencing this action. The Plaintiffs maintain that the Leases which form the contractual basis for these parties are void as against public policy and unenforceable, and under any reasonable construction of said Leases, were materially and substantially breached by the Defendant reducing the contractual requirement of a notice to a meaningless act from which no benefit could be derived.

Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or

indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also* State v. Baldwin Producing Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension

between lessors, lessees and the courts. Jacobs v. CNG Transmission Corp., 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions, one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

The Plaintiffs' position in this matter is that their leases with the Defendant are a no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in

paying quantities pursuant to paragraph 2.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in Ionno v. Glen-Gery Corp., 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. ***Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.***

This Court must, under the current state of Ohio law, consider the allegations in the Plaintiffs' Complaint as true, and must draw any reasonable inferences from them in favor of the Plaintiffs. When doing so, this Court cannot say beyond doubt that the Plaintiffs can prove no set of facts that would entitle them to the relief sought. Therefore, for all of the reasons set forth

herein above and hereafter, the Defendant's Motion to Dismiss is not well taken and the same shall be denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs filed their Motion for Summary Judgment in this action on February 16, 2012. The Defendant filed its Brief in Opposition on April 30, 2012. The Plaintiffs further filed a reply to the Defendant's opposition on May 14, 2012 and on March 19, 2012 filed a reply brief in support of their Motion for Summary Judgment.

The Plaintiffs' Motion for Summary Judgment sets forth several distinct issues. First, the Plaintiffs maintain that their lease with the Defendant is a lease in perpetuity and as such is void and unenforceable as against the public policy of The State of Ohio. Secondly, the Plaintiffs maintain that the Defendant breached the implied covenant to reasonably develop their land and by doing so the leases are now null and void. Thirdly, the Plaintiffs maintain that the lease provisions for foregoing development by the payment of delayed rentals has expired because the Defendant failed to commence a well within the required times. The Defendant has countered the Plaintiffs' assertions by stating that it had not received the written notice required from the Plaintiffs setting forth any alleged noncompliance by the Defendant with the lease's terms. Plaintiffs maintain that they do not have to give notice because the leases were void *ab initio*. The Defendant also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease.

A Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation." Gross v. Western-Southern Life Ins. Co., 85 Ohio App.3d 662, 667, 621 N.E.2d 412 (1st Dist. 1993). A Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [civil rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Todd Development Co. v. Morgan, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, &22. *See also* Civ.R. 1(B).

Civ.R. 56(C) mandates that a court enter summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* When a motion for summary judgment has been made and properly supported, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The parties moving for summary judgment need only prove their own case: the movants do not bear the initial burden of addressing any affirmative defenses the nonmovant may assert. *Id.*, syllabus and &13.

"Summary judgment is appropriate where no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the nonmoving party's claim or defense." Gross, 85 Ohio App.3d at 667. The mere existence of a factual dispute is insufficient to preclude summary judgment only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Id.* "The construction of written contracts and instruments of conveyance is a matter of law." Alexander v. Buckeye Pipe Line Co., 553 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. This Court finds that the instant case involves the construction of written leases

and in light of the Defendant's undisputed failure to commence any development activity pursuant to those leases, the clear public policy of Ohio has been violated. There is no dispute as to any material fact; reasonable minds can reach no conclusion other than one reached herein by this Court that is adverse to the Defendant; and Plaintiffs are entitled to judgment as a matter of law on this issue.

The Plaintiffs also maintain that their leases with the Defendant are perpetual leases under which there has been no development of oil and gas and therefore the leases are void and unenforceable as against public policy. Central to the understanding of this issue are paragraphs two and three of these parties' leases. Paragraph two provides as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the lessee for a term of ten years and as 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 and gas and as provided in paragraph 7 following."

Paragraph 7 of the parties' leases deal with the event that if a well is drilled that is a dry hole. Paragraph number 3 of the parties' lease is also central to an understanding of the issue at hand. Paragraph 3 of the parties' leases provide that:

> "This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of _____ Dollars each year, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved

herein. If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed rental can be paid. Further, paragraph 2 provides that the leases have a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. It also leaves the determination of what paying quantities means up to the Defendant. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. There is no deadline for the completion of a well. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs.

Public policy analysis requires this Court to consider the impact of the contract at issue upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio Spp.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> "Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy."

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-321, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

The Ohio Supreme Court has clearly and unequivocally articulated the public policy of the State of Ohio in regard to the extraction of oil and gas. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northumpton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also State v. Baldwin Producing

Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; Northampton Building Co at 198-99. It would be inconsistent to permit a private operator to unilaterally ban the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. The Plaintiffs are also entitled to summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs' acreage. This provision violates the implied covenant to reasonably develop.

The leases in this case are, in effect, a no-term leases: through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2 provides that the leases shall continue in force for a term of ten years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3 provides that the leases shall become null and void if a well is not commenced

within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of ____ Dollars each year, ..." but likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals. Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779 . Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The coal leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation within which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.

Id. At 134.

The "long term" lease in *Ionno* and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. Like the lease in *Ionno* under which there had been no development, the leases herein are unenforceable as against public policy.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question seriously offend public policy in that they are perpetual leases. The Plaintiffs are also entitled to Summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land and by failing to drill any wells on any of the acreage that implied covenant has been violated.

"[T]he only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving *** royalties based upon the amount of minerals derived from the land." Ionno, 2 Ohio St.3d at 133 n.2, 443 N.E.2d 504. "[W]here a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* At 133. In *Ionno,* the Ohio Supreme Court found a lease to be subject to the implied covenant to reasonably develop where it set forth

no time period in which mining operations were required to commence, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.* At 133.

The leases in this case contain neither a "specific reference to the timeliness of development" no "a time period in which mining operations were required to commence." Paragraph 3 of the lease provides that the lease shall "terminate" if a well is not commenced within the twelve-month period, the remainder of that paragraph ostensibly permits the Defendant to delay development indefinitely by paying annual delay rentals. Paragraph 2 of the lease also permits the Defendant to delay development indefinitely by determining in its judgment that oil or gas is "capable of being produced on the premises in paying quantities." A lease in which the development period can be delayed into perpetuity at the option of the lessee clearly satisfies the *Ionno* criteria under which an implied covenant will arise.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill and initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. V. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams,* 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The court saw no need to resort to the law of the state in which the case arose, stating that the covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *id.* At 278-79.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the minerals to which its lease applied.

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. At 281.

The Defendant maintains that its lease clearly disclaims all implied covenants. The lease does contain a general disclaimer of implied covenants. However, the lease also later refers to implied covenants.

In Ohio, as elsewhere, "[a]bsent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land." *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

Ambiguities in contracts are to be construed against the proponent of the instrument. *Doe v. Ronan,* 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* "In determining whether contractual language is ambiguous, the contract must be construed as a whole *** so as to give reasonable effect to every provision in the agreement." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (applying Ohio law). Where a contract as a whole can be reasonably interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue, and must be construed against the drafter. *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003).

In this case, the parties' lease first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.

This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to

reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective.

Where general provisions of a contract conflict with specific provisions of the same document, the specific provisions generally control. *Edmondson v. Motorists Mutual ins. Co.,* 48 Ohio St.2d 52, 53, 356 N.E.2d 722 (1976); *Hoepker v. Zurich American Inc., Co.*, 3d Dist. No. 140318, 2003-Ohio-5138, ¶11; *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10th Dist. 1991). Paragraph 17 of the Beck Lease sets forth specific procedures to be followed in the event a lessor believes Beck to have breached either an express or implied obligation. Paragraph 19 generally disclaims all implied obligations. In that the specific provision in paragraph 17 setting forth a lessor's rights in the event Beck breaches an implied condition controls over the general disclaimer in paragraph 19, the disclaimer is ineffective.

The stated purpose of this lease is "drilling, operation for, producing and removing oil and gas and all the constituents thereof." The lease contains no suggestion that either defendant or lessor had any other objective. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the express purpose of the lease.

To give effect to the fundamental purpose of an oil and gas lease as well as to the implied covenant to reasonably develop the land, provisions in the lease bearing on the extent of development may modify or reflect the standard of reasonableness in the implied covenant.

Streck v. Reed, 9th Dist. No. 1221, 1983 WL 4132, *3 (June 8, 1983). The lease must be construed in a manner that will give effect to all the provisions in the lease, both express and implied. *Id.*

The provision in a mineral lease for annual advance payments does not relieve the lessee of its obligation to reasonably develop the land. *Ionno*, 2 Ohio St.3d at 134, 443 N.E.2d 504.

> The questions of working diligently and of paying rent or royalties are entirely separately matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum.

Paragraph 3 of this lease specifies that the Lease "shall become null and void" and the rights of the parties "shall cease and terminate" unless a well is commenced within twelve months (subject to the effect of paying delay rentals). The parties necessarily determined that twelve months was a reasonable time in which to commence a well. In construing this lease, the Court hereby finds that the implied covenant to reasonably develop the land required the Defendant to commence a well within one year. As the Defendant failed to do so, and in fact, has failed to commence a single well on any portion of any of the Plaintiffs' acreage, even though more than three years have elapsed since the lease covering the Hustacks' property was executed, almost six years have elapsed since the Hubbards executed their lease, nine years have elapsed since Donald Yonley executed his Lease, and more than six years have elapsed since David Majors executed his Lease, it has breached the implied covenant to reasonably develop Plaintiffs' Acreage.

When construing the evidence most strongly in favor of the Defendant as required by the Ohio Rules of Civil Procedure, this Court is convinced that reasonable minds can come to but one conclusion, and that conclusion is adverse to the Defendant. This Defendant's lease clearly and unequivocally breaches the implied covenant to reasonably develop the Plaintiffs' land and violates the public policy of the State of Ohio and the Plaintiffs are entitled to summary judgment on this issue. As stated herein above, the lease involved in this action is a lease in perpetuity. By paying delayed rentals, this land could potentially never be developed by the Defendant's payment of a very minimal payment to the Plaintiffs.

While not controlling, our neighboring state of Pennsylvania has decided the issues presented by this course. It is interesting because Pennsylvania has taken the same position taken by the Ohio Supreme Court on the issues presently before this Court in this matter. *Hite v. Falcon Partners*, 2011 Pa.Supr. 2, 13 A.3d 942 (2011), is in many respects similar to the instant case. The *Hite* lease and this lease are both "unusual" types of no-term leases. 13 A.3d at 947. They do not contain traditional habendum clauses which definitively designate a primary term (the time period in which the lessee has the right to develop the leased premises) and a secondary term (the period following the primary term in which the lessee can reap a long-term return on the efforts and funds expended to develop the premises.) The *Hite* lease and this lease each contain language purporting to enable the lessee to indefinitely extend the primary term at the lessee's option.

The *Hite* lease provided for a one-year primary term that the lessees could extend indefinitely either by continuing operations for production of oil or gas, or by paying annual delay rentals of two dollars per acre. 13 A.3d at 944. The lessees in *Hite* simply paid delay

rentals for years without commencing any drilling, depriving the lessors of the royalties they would have received from the production of their oil or gas.

The court noted that "[r]oyalty-based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties." *Id.* At 945. The court reviewed the history of mineral leases, noting the evolution from a definite term that left the lessee at a disadvantage if minerals were discovered near the end of the term, to a variable term expressed by a habendum clause providing for a fixed period for development, with an option to extend the lease for "as long thereafter" or "so long as" the specified minerals were produced in paying quantities, enabling the lessee to continue to reap a return for the money spent to develop the property. *Id.* At 946.

Even if a written lease did not expressly require the lessee to develop the property in a timely manner or suffer forfeiture, courts recognized an implied obligation to develop the leasehold. *Id.* As a result, leases specifying a fixed primary term with a "thereafter" clause began to incorporate "delayed rental" clauses relieving lessees of the obligation to immediately develop the property. *Id.* "[C]ourts have interpreted delay rentals to be 'limited to the initial term of the lease.'" *Id* at 947; *Jacobs*, 332 F.Supp.2d at 786.

As noted in Plaintiffs' public policy argument, section II.B., *supra*, lessees began crafting leases permitting the lessee to extend the exploration period for as long as he considered payment of the delay rental worthwhile, giving rise to the "no term lease," which courts rejected under one of two rationales. *Hite* at 947. One rationale was that because the lease did not fix a time beyond which the lessee could not delay actual development and the payment of royalties-the consideration for the lease-the lease was unfair and therefore unenforceable against the lessor. *Id.*

The other rationale was that no-term leases contained an implied condition requiring the lessee to drill within a reasonable time or forfeit the lease. *Id.*

The *Hite* court observed that to a landowner unsophisticated in the legalities of leasing minerals the terms of the lease indicated a one-year term during which the lessee was to commence development. 2011 Pa.Super.2, 13 A.3d at 948. "If the lease could be extended in perpetuity though the payment of $2.00 per acre per year, there would be little need for the parties to agree on a one-year lease term." *Id.* Rejecting the lessee's contention that the leases enabled it to maintain production rights indefinitely as long as delay rentals were paid, the court opined that delay rentals relieve the lessee of the obligation to develop the land during the primary term only. *Id.* Accordingly, a single two-dollar-per-acre delay rental relieved the lessee of any obligation to develop the leasehold during the one-year primary term. *Id.* Once that primary term expired, the mere payment of delay rentals could not preserve the lessee's drilling rights. *Id.*

Permitting the lessee to pay delay rentals indefinitely, thereby denying the lessors the financial benefits of actual production, would contravene the presumed intention of the parties in executing the leases in the first place, as well as the notion that delay rentals are intended to "spur the lessee toward development." *Id.* Moreover, construing the leases as creating an indefinite term would provide the lessee with vested property rights for the mere payment of a nominal delay rental, a concept at odds with the traditional construction of the property rights conveyed by an oil and gas lease. 13 A.3d at 949. Accordingly, the *Hite* court held that the terms of the leases being construed limited the privilege of foregoing production by paying delay rentals to

the one-year primary term; once the primary term ended and the lessee failed to commence production, the leases expired. *Id.*

Like the *Hite* lease, this lease is a no-term lease which, on its face, purports to enable the Defendant to extend the term indefinitely, without any development, by simply paying nominal delay rentals and/or determining that the leased acreage is capable of producing.

A contract is illusory when, by its terms, the promisor "retains an unlimited right to determine the nature or extent of his performance; the unlimited right in effect destroys his promise and thus makes it merely illusory." *Century 21 v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist. 1980); *Thomas v. Am. Elec. Power Co.*, 10th Dist. No. 03AP1192, 2005-Ohio-1958, ¶32. Courts generally disfavor interpretations that render contracts illusory, preferring a meaning that gives the contract vitality. *Thomas*, ¶32.

Construing this lease consistently with *Hite*, limiting the Defendant's ability to forego development to the twelve-month primary term set forth in paragraph 3, would prevent the Defendant's promise to drill from being illusory and would promote public policy and the expressed intent of the parties to develop the Acreage.

For all the reasons set forth herein above the Plaintiffs are entitled to summary judgment. The remaining issue is whether or not forfeiture is an appropriate remedy for the Plaintiffs and whether or not the Defendant is entitled to a 30 day notice of cure as provided for in the lease. For the reasons set forth herein after, this Court believes that forfeiture of these leases is the appropriate remedy because they were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice.

When causes of forfeiture are specified in an oil and gas lease, other causes cannot be implied. *Beer*, 61 Ohio St.2d at 119, 399 N.E.2d 1227, paragraph three of the syllabus. However, "[w]here legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant." *Id.*, paragraph four of the syllabus. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. *Ionno*, 2 Ohio St.3d at 135, 443 N.E.2d 504. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of an implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. *Id.*

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore*, 2008-Ohio-5953, &48. Where a lessee's failure to drill or mine within a reasonable period of time would allow the lessee to encumber the lessor's property in perpetuity, without any return of income to the lessor arising from drilling or mining operations, breach of the implied covenant to develop the land could result in forfeiture. *Id.* The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Id.*, ¶51.

In *Beer*, the court upheld a partial forfeiture (or cancellation) where the lessee had performed no work on the leased property for over a year, and had financial and operating difficulties. 61 Ohio St.2d at 121-22, 399 N.E.2d 1227. The court stated that even if the lessee had sufficient resources from which to pay damages, forfeiture of the lessee's continued interest in unexploited acreage was warranted to assure the development of the land and the protection of the lessor's interests. *Id.* at 122, 399 N.E.2d 1227. In *Lekan*, the court upheld a forfeiture where

the lessee had limited experience; had drilled but never sold gas from a well on the lessor's property, even though he had placed three wells on other lessors' property into production; and functioned as a "mom and pop" operation without employees. 75 Ohio App.3d at 216-17, 598 N.E.2d 1315.

In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate.

Plaintiffs did not provide written notice to the Defendant pursuant to paragraph 17 of the lease, "setting out specifically in what respects lessee has breached this contract," and affording the Defendant thirty days to cure any breach. However, the Defendant lacks the means to cure either the defects in or its breaches of the lease. Plaintiffs' compliance with the technical requirement of providing notice prior to commencing this action would serve no purpose.

A lessee's "midnight-hour attempts to save the lease" are insufficient to preserve the lessee's rights under an oil and gas lease that has been breached. *American Energy Services v. Lekan*, 75 Ohio App.3d 205, 214, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶50; *Gisinger v. Hart*, 115 Ohio App. 115, 184 N.E.2d 240 (4th Dist. 1961). In *Lekan*, the court found that once the conditions of the lease had ceased to

be met, the lease terminated "by the express terms of the contract *** and by operation of law and revest[ed] the leased estate in the lessor." 75 Ohio App.3d at 212, 214.

In *Gisinger,* the lessees made no effort to develop the leasehold until ten days before expiration of the primary term. Finding it improbable that gas or oil would be produced before the end of the term, the court held the effort was "too little too late," and rejected the lessees' claim for an extension of the term. 115 Ohio App. At 117.

Moreover, it is well settled that the law will not require a vain act. *E.g., State ex rel. Marcolin v. Smith,* 105 Ohio St. 570, 603, 138 N.E. 881 (1922); *Gerhold v. Papathanasion,* 130 Ohio St.342, 346, 199 N.E.353 (1936); *Coleman v. Portage County Engineer,* 191 Ohio App.3d 32, 2010-Ohio-6255, 944 N.E.2d 756, ¶38 (11th Dist.). In the instant case, the purpose of the notice requirement in paragraph 17 of the lease is to provide the Defendant with an opportunity to cure any breach. However, the lease is void as against public policy. The Defendant cannot cure its breach in a timely manner. The Plaintiffs are entitled to summary judgment as requested and to the forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties. The Defendant's rights in the subject bases are forfeited. Court costs shall be assessed against the Defendant.

ENTER AS OF DATE OF FILING:

/s/ Ed Lane

Judge Ed Lane

c: Attorney Zurz/Ropchok/Peters
Attorney Bauerle/Hirsch

EXHIBIT 9

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2012 SEP -7 AM 10: 04

CLERK OF COURTS

COMMON PLEAS COURT
MONROE COUNTY, OHIO

Clyde A. Hupp, et. al.	:	
Plaintiffs	:	Case No. 2011-345
vs.	:	Judge Ed Lane (sitting by Assignment)
Beck Energy Corporation,	:	
Defendant	:	

THIRD PARTY XTO ENERGY INC.'S MOTION TO INTERVENE IN PROCEEDINGS

Third party XTO Energy Inc. ("XTO") seeks leave of court to intervene in these proceedings because it is a necessary and indispensable party to this declaratory action to void oil and gas leases in which it possesses a significant interest of record (the "Leases"). In support of this Motion, XTO states as follows:

BACKGROUND

1. On September 30, 2011, the Plaintiffs filed a Second Amended Complaint, which remains the operative complaint.

2. In the Second Amended Complaint, the Plaintiffs sought a declaration that the Plaintiffs' leases with Defendant Beck Energy Corporation ("Beck") were unenforceable and void because Beck: (1) breached express and implied covenants in the leases; (2) the leases were abandoned; (3) the terms of the leases were unconscionable; (4) the leases violated public policy; and (5) there was a failure of consideration under the leases. *See* Second Am. Complaint at ¶ 5.

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3. Pursuant to the recorded Assignments and Bills of Sale (the "Assignments") that were attached as Exhibit E to the Plaintiffs' Motion for Summary Judgment, dated effective as of December 20, 2011, Beck assigned to XTO certain interests under the Leases to depths greater than 3860 feet. *See* Exhibit E to Motion for Summary Judgment.

4. By virtue of the recorded Assignments, XTO acquired a present real property interest in the Leases, which included the right to explore for and produce the oil, gas and minerals situated under those lands.

ARGUMENT

5. Under Ohio law, Revised Code ("R.C.") 2712.12 provides that "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." *See* R.C. 2721.12(A).

6. The absence of a necessary party is a jurisdictional defect that precludes any declaratory judgment. *See Cincinnati v. Whitman* (1975), 44 Ohio St.2d 58, 73 O.O.2d 283, 337 N.E.2d 773 ("The absence of a necessary party constitutes a jurisdictional defect which precludes a Court of Common Pleas from rendering a declaratory judgment.") (citing *Zanesville v. Zanesville Canal & Mfg. Co.* (1953), 159 Ohio St. 203, 50 O.O. 254, 111 N.E.2d 922.

7. The "failure to join necessary parties renders any declaration by the court void." *Cerio v. Hillrock Condo Unit Assoc.*(8th Dist. 2004), 2004-Ohio-1254, at ¶10 (citing *Bretton Ridge Homeowners Club v. DeAngelis* (1988), 51 Ohio App. 3d 183, 185, 555 N.E.2d 663, 665).

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8. In determining who is a necessary party to a declaratory judgment action under R.C. 2712.12, Ohio courts have adopted the same analysis that is applied under Ohio Civ. Rule 19. *See Young v. Wells* (4th Dist. 2007), 2007-Ohio-4568, at ¶17

9. Pursuant to Rule 19(A), "[t]itled owners of real property, or persons with some purported interest in real property, are necessary and indispensable parties to litigation seeking to divest those owners of their interest therein." *See Young* (4th Dist. 2007), 2007-Ohio-4568, at ¶20; *Congress Lake Club v. Witte* (5th Dist. 2006), 2006-Ohio-59, at ¶¶29, 34; *Korenko v. Kelleys Island Park Dev. Co.* (6th Dist. 2007), 2007-Ohio-2145, at ¶20.

10. XTO is a necessary party pursuant to Civ. R. 19 and is therefore a necessary party under R.C. 2721.12, because it possesses an interest in the Leases that are the subject matter of this action, as contemplated in Civ. R. 19(A)(2).

11. Further, pursuant to the recorded Assignments, XTO is an assignee of rights to an interest in real property under the Leases that are the subject matter of this action, as contemplated in Civ. R. 19(A)(3).

12. Because the Leases provide XTO with an interest in the properties, they are a necessary party in litigation that seeks to void the Leases, which in turn would invalidate XTO's interest in real property.

13. Because XTO is a necessary party whose absence from this litigation renders the Court without jurisdiction to enter relief on the Plaintiffs' declaratory judgment claims to void their Leases, its joinder in this lawsuit is mandatory

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14. To the extent this Court nonetheless determines that the traditional considerations for intervention of right pursuant to Civ. R. 24(A)(2) still apply, intervention is equally supported under this approach.

15. To intervene as of right pursuant to Civ. R. 24(A)(2), the party seeking intervention must establish four prerequisites: (1) claim an interest relating to the property or transaction that is the subject of the action; (2) be so situated that the disposition of the action may, as a practical matter, impair or impede the intervener's ability to protect his or her interest; (3) demonstrate that his or her interest is not adequately represented by the existing parties; and (4) demonstrate that the motion to intervene is timely made." *See McKesson Medical-Surgical Minnesota, Inc. v. Medico Medical Equip. & Supplies, Inc.* (8th Dist. 2005), 2005-Ohio-2325.

16. XTO meets the first requirement for intervention of right because pursuant to the Assignment it has a present interest in the Leases that are the subject matter of the litigation, and pursuant to those Leases, a present interest in the properties, that the Plaintiffs seek to void through their lawsuit. *See Young* (4th Dist. 2007), 2007-Ohio-4568, at ¶23.

17. XTO meets the second requirement because the lawsuit seeks to void Leases in which XTO possesses a present interest and pursuant to which XTO possesses an interest in the oil, gas and minerals underlying the properties.

18. XTO meets the third requirement because Beck has not and cannot adequately protect XTO's interest in the litigation, because Beck has no present interest in

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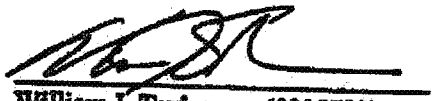
a significant portion of the value of Leases that it assigned to XTO, including the oil, gas and minerals situated in the Marcellus Shale and Utica formations.

19. XTO's intervention in this lawsuit is timely because the Plaintiffs have moved for leave to file another amended complaint, and there is no prejudice because both parties were aware of XTO's interest no later than the time that the Plaintiffs filed their motion for summary judgment. Moreover, intervention is timely because XTO's presence in this lawsuit is required to cure the jurisdictional defect caused by the absence of a necessary party.

20. As required by Civ. R. 24(C), XTO has attached an Answer to the Second Amended Complaint to this Motion.

WHEREFORE, for the reasons set forth above and explained in detail in the accompanying Memorandum of Law, third party XTO Energy Inc. is a necessary party who should be permitted to intervene in this lawsuit, because absent the joinder of XTO, this Court lacks jurisdiction to enter declaratory relief, and any judgment entered is void.

Respectfully submitted:



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Admission for Pro-Hac Vice Pending

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. Mail on the 6th day of September, 2012 on the following:

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COMMON PLEAS COURT
MONROE COUNTY, OHIO

Clyde A. Hupp, et. al.	:	
Plaintiffs	:	Case No. 2011-345
vs.	:	Judge Ed Lane (sitting by Assignment)
Beck Energy Corporation,	:	
Defendant	:	

MEMORANDUM IN SUPPORT OF THIRD PARTY
XTO ENERGY INC.'S MOTION TO INTERVENE IN PROCEEDINGS

Third party XTO Energy Inc. ("XTO") seeks leave of court to intervene in these proceedings because it is a necessary and indispensable party to this declaratory action to void oil and gas leases in which it possesses a significant real property interest (the "Leases"). XTO's interest in the Leases is clearly disclosed in the recorded Assignments and Bills of Sale (the "Assignments") which were attached as Exhibit E to the Plaintiffs' Motion for Summary Judgment. Pursuant to the recorded Assignments, Defendant Beck Energy Corporation ("Beck") assigned to XTO all of its present interests under the Leases to depths greater than 3860 feet. Inexplicably, neither the Plaintiffs nor Beck sought to join XTO as a necessary party pursuant to Civ. R. 19. As XTO has a present real property interest in the Leases, it is a necessary and indispensable party to this litigation, as the relief sought, voidance of the Leases, will divest XTO of its real property interest.

Because XTO is a necessary and indispensable party to this declaratory action, this Court presently lacks jurisdiction to render a declaratory judgment, and all judgments that

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have been entered as to the Leases on the merits to date are void *ab initio* and have no force and effect under Ohio law. Joinder of XTO is necessary for this Court to cure this plain jurisdictional defect and to acquire jurisdiction to render declaratory relief as to all of the parties who are interested in the Leases. Accordingly, XTO seeks leave of Court to intervene as of right in the above-captioned action pursuant to Civ. R. 24(B)(2).

I. BACKGROUND

A. Procedural History

The Plaintiffs filed their original complaint for declaratory judgment and to quiet title on September 14, 2011, in the Court of Common Pleas of Monroe County, Ohio. On September 29, 2011, the Plaintiffs filed an Amended Class Action Complaint, and on September 30, 2011, the Plaintiffs filed a Second Amended Complaint, which remains the operative complaint. In the Second Amended Complaint, the Plaintiffs sought a declaration that the Plaintiffs' leases with Beck were unenforceable and void because Beck: (1) breached express and implied covenants in the leases; (2) the Leases were abandoned; (3) the terms of the leases were unconscionable; (4) the leases violated public policy; and (5) there was a failure of consideration under the leases. *See* Second Am. Complaint at ¶ 5. The Second Amended Complaint alleged that money damages would be inadequate and that the equitable remedies of forfeiture and cancellation were necessary. *Id.*

Beck moved to dismiss the Second Amended Complaint on November 30, 2011. The Plaintiffs moved for Summary Judgment on their claims for declaratory relief and to quiet title on February 16, 2012. On July 12, 2012, the Court entered a Decision denying

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Defendant Beck's Motion to Dismiss and instead granting the Plaintiffs' Motion for Summary Judgment.

In its Decision, the Court found that "the Plaintiffs' are entitled to summary judgment as requested and to forfeiture of all rights of the Defendant to the oil and gas under the Plaintiffs' properties...The Defendant's rights in the subject bases are forfeited." *See* Decision, p. 29.

On July 19, 2012, the Plaintiffs filed a motion for class action certification, as well as leave to file a Third Amended Complaint.

B. <u>Beck Assigns A Partial Interest in the Leases to XTO</u>

Attached to the Plaintiffs' Motion for Summary Judgment are two recorded Assignments and Bill of Sales, recorded at Volume 0211, Pages 900-918 of the Official Records of Monroe County, Ohio (the "Assignments"). *See* Exhibit E to Motion for Summary Judgment. The Assignments are dated effective as of December 20, 2011. *See id.* Pursuant to the Assignments, Beck assigned all of its undivided interests in the certain properties, rights and interests to Exxon Mobil Corporation, c/o its affiliate XTO Energy Inc. *See id.* Among the interests assigned to XTO were Beck's interests in certain oil and gas leases described in the attached Exhibit A to each Assignment below 3,860 feet. *See id.* Exhibit A to the Assignments includes leases of the named Plaintiffs, Larry A. Hustack and Lori Hustack, Lawrence Hubbard and Michelle Hubbard, and Donald W. Yonley and David Majors. By virtue of the recorded Assignments, XTO acquired all of Beck's

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interests in the Leases, including, but not limited to, the right to explore, drill for and produce natural gas, in formations below 3860 feet, as of December 20, 2011.[1]

As a party to the Assignment, Beck was aware of the assignment of rights of the Leases to XTO. No later than the time the Plaintiffs filed their Motion for Summary Judgment on February 16, 2012, the Plaintiffs were also aware of the Assignments, as they attached the Assignment to their Motion. Nevertheless, XTO was never joined as a party nor did any party raise the issue of a lack of a necessary party to the Court.

LEGAL ARGUMENT

As a result of the Assignments, XTO possesses a present real property interest in the Leases which are the subject matter of this litigation, and is therefore a necessary party to this litigation, which seeks to void the Leases. Absent intervention and joinder of XTO to this lawsuit, the Court lacks jurisdiction to enter a declaratory judgment as to the Leases, and any judgment previously entered as to those Leases by this Court is void for lack of jurisdiction.

A. The Lack of Joinder of Necessary Parties to a Declaratory Judgment Action Deprives the Court of Jurisdiction To Enter Declaratory Relief

Under Ohio law, "R.C. 2712.12 governs the inclusion of parties for declaratory actions." *Cerio v. Hilroc Cond. Unitowners Assn* (8th District 2004), 2004-Ohio-1254, at ¶10; *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St. 3d 17, 540 N.E.2d 266 (recognizing that "declaratory judgment actions are a special remedy not available at

[1] Although the original caption named Clyde A. Hupp and Molly Hupp as plaintiffs, these parties appear to have been dropped from subsequent pleadings.

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common law or at equity ... [and] jurisdiction to hear this type of relief is dependent on statutory authorization."). Revised Code ("R.C.") 2712.12 provides that "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." *See* R.C. 2721.12(A). This statute "governs jurisdiction, which any party may challenge." *See Cerio*, 2004-Ohio-1254, at ¶13. Enforcement of R.C. 2721.12(A) "ensures that all parties will have their interests protected and there will be no ongoing controversies." *Bretton Ridge Homeowners Club v. DeAngelis* (8th Dist. 1988), 51 Ohio App.3d 183, 185, 555 N.E.2d 663. The rationale for "requiring joinder is that the issue should be settled now and not piecemeal in numerous cases." *See id.*

The absence of a necessary party is a jurisdictional defect that precludes any declaratory judgment. *See Cincinnati v. Whitman* (1975), 44 Ohio St.2d 58, 59, 337 N.E.2d 773 ("The absence of a necessary party constitutes a jurisdictional defect which precludes a Court of Common Pleas from rendering a declaratory judgment.") (citing *Zanesville v. Zanesville Canal & Mfg. Co.* (1953), 159 Ohio St. 203, 111 N.E.2d 922); *see also Cerio*, 2004-Ohio-1254, at ¶10; *Bretton Ridge*, 51 Ohio App. 3d 183 at 185, 555 N.E.2d at 665 ("The absence of a necessary party is a jurisdictional defect and a declaratory judgment is precluded."). "Thus, failure to join necessary parties renders any declaration by the court void." *Cerio*, 2004-Ohio-1254, at ¶10 (citing *Bretton Ridge*, 51 Ohio App. 3d at 185). "A judgment entered by a court lacking jurisdiction is void *ab initio* ... Appellate courts have inherent power to vacate a judgment that is void *ab initio*, and the judgment can be challenged at any time." *Young v. Wells* (4th Dist. 2007), 2007-Ohio-4568, at ¶17 (citing *Patton v. Diemer* (1988), 35 Ohio St. 3d 68, 518 N.E.2d 941)). Where jurisdiction to enter

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the judgment is lacking, "other issues are moot ... including the merits." *Bretton Ridge*, 51 Ohio App. 3d at 185 (citing *Cincinnati*, 44 Ohio St. 2d 58 at 61 and *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 35 O.O.2d 147, 216 N.E.2d 379). "The defense of failure to join a party in a declaratory judgment action cannot be waived." *Young*, 2007-Ohio-4568, at ¶16 (citing *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn.* (1999), 86 Ohio St.3d 318, 1999-Ohio-109, 715 N.E.2d 127).

B. XTO is a Necessary Party to this Lawsuit And Therefore Should Be Joined

"Whether a nonparty is a necessary party to a declaratory -judgment action depends upon whether that nonparty has a legally protectable interest in rights that are the subject matter of the action." *Rumpke Sanitary Landfill, Inc. v. State* (2010), 128 Ohio St.3d 41, 44, 2010-Ohio-6037, 941 N.E.2d 1161. In determining who is a necessary party to a declaratory judgment action under R.C. 2712.12, Ohio courts have adopted the same analysis that is applied under Ohio Civ. Rule 19. *See Young*, 2007-Ohio-4568, at ¶19 (recognizing that in the context of a declaratory judgment claim, "Ohio Civ. R. 19(A) is instructive on determining who is a necessary party."). Rule 19 provides that "[a] person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor,

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assignee, subrogor, or subrogee." *Young*, 2007-Ohio-4568, at ¶19 (quoting Ohio Civ. R. 19(A)).

Pursuant to Rule 19(A), "[t]itled owners of real property, or persons with some purported interest in real property, are necessary and indispensable parties to litigation seeking to divest those owners of their interest therein." *See Young*, 2007-Ohio-4568, at ¶20; *Congress Lake Club v. Witte* (5th Dist. 2006), 2006-Ohio-59, at ¶¶29, 34; *Korenko v. Kelleys Island Park Dev. Co.* (6th Dist. 2007), 2007-Ohio-2145, at ¶20. In *Young*, the plaintiffs obtained a declaratory judgment finding that an oral contract existed relating to a conveyance of property. *See Young*, 2007-Ohio-4568, at ¶¶2-6. On appeal, the appellate court declared the judgment void based upon the failure of the trial court to join a party who purportedly had been conveyed a partial interest in the property, ruling that the failure to join a party with a purported interest in the property that was the subject of the lawsuit constituted a jurisdictional defect. *See id.* at ¶23. The appellate court remanded with instructions to dismiss the complaint for failure to join an indispensable party. *See id.* Similarly, in *Witte*, the plaintiff had leased property to the defendant, who conveyed an interest to her son. The plaintiff filed a detainer action, but did not join the son. *See id.* The trial court found the son was not a necessary party, but the appellate court reversed, finding that the purported interest in the real property, even if later held to be invalid, made the son a necessary party the action. *See id.* In *Korenko*, the court held that the trial court

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erred in failing to permit intervention by right to a party claiming adverse possession over property whose ownership was in dispute. *See id.*[2]

XTO is a necessary party pursuant to Civ. R. 19 and is therefore a necessary party under R.C. 2721.12. Pursuant to the recorded Assignments, XTO possesses an real property interest in the Leases that are the subject matter of this action, as contemplated in Civ. R. 19(A)(2). Pursuant to those Leases, XTO possesses a present real property interest to explore for, develop and produce oil, gas and minerals underlying the Plaintiffs' properties. Further, pursuant to the Assignment, XTO is an assignee of rights under the Leases that are the subject matter of this action, as contemplated in Civ. R. 19(A)(3). Because the Leases provide XTO a real property interest in the subject properties, they are a necessary party in litigation which seeks to void the Leases, which in turn would invalidate XTO's interest in real property. Accordingly, XTO is a necessary party to this action and its absence renders the Court without jurisdiction to enter judgment on the Plaintiffs' claim for declaratory relief as to the Leases, and all judgments entered by this

---

[2] Because XTO's interest in the Plaintiffs' Leases constitutes an interest in the minerals underlying the leasehold properties, analogy to cases involving real property interests is appropriate. The result is no different if the Leases are treated as ordinary contracts. It is a well-settled rule that all parties to a contract are necessary parties to litigation seeking to invalidate the contract. *See Russian Collections, Ltd. v. Melamid*, 2009 U.S. Dist. LEXIS 113733 (S.D. Ohio Nov. 18, 2009) (citing *Onyx Waste Systems, Inc. v. Mogan* (E.D. Mich. 2002), 203 F. Supp. 2d 777, 787); *Nat. Union Fire Ins. Co. v. Rite Aid*, 2010 F.3d 246, 252 (4th Cir. 2000). Although these cases are decided under the federal equivalent of Rule 19, Ohio courts have recognized that federal decisions on Rule 19 are instructive in interpreting Civ. R. 19. *See Dublin Transportation Inc. v. Goebel* (10th Dist. 1999), 133 Ohio App. 3d 272, 727 N.E.2d 938 ("Because *Civ.R. 19(A)* is patterned after *Fed.R.Civ.P. 19* (see Staff Note to *Civ.R. 19*), an analysis of cases interpreting *Fed.R.Civ.P. 19* is appropriate.").

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Court as to the Leases are void due to a lack of jurisdiction. XTO should therefore be granted leave to intervene in this action to cure this jurisdictional deficiency and to enable the Court to enter complete relief as to all interested parties.

C. All the Requirements of Rule 24(A)(2) Have Been Met.

For the reasons stated above, intervention and joinder of XTO in this lawsuit is required because XTO is a necessary party whose absence from this litigation renders the Court without jurisdiction to enter relief on the Plaintiffs' declaratory judgment claims to void their Leases. To the extent this Court nonetheless determines that the traditional considerations for intervention of right pursuant to Civ. R. 24(A)(2) still apply, intervention is equally supported under this approach.

Civ. R. 24(A) governs a motion for intervention by right. It provides that "[u]pon 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, unless the applicant's interest is adequately represented by existing parties." To intervene as of right pursuant to Civ. R. 24(A)(2), the party seeking intervention must establish four prerequisites: (1) claim an interest relating to the property or transaction that is the subject of the action; (2) be so situated that the disposition of the action may, as a practical matter, impair or impede the intervener's ability to protect his or her interest; (3) demonstrate that his or her interest is not adequately represented by the existing parties; and (4) demonstrate that the motion to

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intervene is timely made." *See McKesson Medical-Surgical Minnesota, Inc. v. Medico Medical Equip. & Supplies, Inc.* (8th Dist. 2005), 2005-Ohio-2325.

XTO meets the first requirement for intervention of right because pursuant to the Assignment it has a present interest in the Leases that are the subject matter of the litigation, and pursuant to those Leases, a present interest in the subject properties, which the Plaintiffs seek to void through their lawsuit. *See Young* (4th Dist. 2007), 2007-Ohio-4568, at ¶23.

XTO meets the second requirement because the lawsuit seeks to void Leases in which XTO possesses a present interest and pursuant to which XTO possesses an interest in the oil, gas and minerals underlying the subject properties.

XTO meets the third requirement because Beck has not and cannot adequately protect XTO's interest in the litigation. Beck assigned to XTO a significant interest under the Leases. The interests assigned by Beck include the majority of the value of the Leases – including the minerals situated in the Marcellus Shale and Utica formations. Because Beck has no present interest in that portion of the subject property, it cannot adequately represent XTO's property interests in this lawsuit. Further, although it was a party to the Assignment, Beck never informed the Court that it had conveyed a significant portion of its interests under the Leases to XTO. Beck also never sought to join XTO as a necessary party pursuant to Civ. R. 19, which mandates XTO's joinder in this lawsuit because XTO possesses a real property interest in the Leases that are the subject matter of this litigation and has a present interest in real property that would divested if judgment is entered on the Plaintiffs' claims as to the Leases. Moreover, Beck never sought to join XTO despite the

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fact that R.C. 2721.12(A) requires XTO's joinder for the Court to acquire jurisdiction over the Plaintiffs' declaratory judgment claims as to the Leases. For these reasons, Beck is incapable of representing XTO's interests in the Leases as it relates to the deep mineral rights, and has not adequately or effectively represented XTO's interests in this litigation.

In analyzing whether a motion for intervention is timely, Ohio courts consider the following factors: "(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention." *Visconsi Royalton, Ltd. v. City of Strongsville* (Cuyahoga Cty. 2008), 2008-Ohio-4862, at ¶12. Based on these factors, XTO's motion for intervention is timely. The case is still in the pleading stage, as the Plaintiffs are seeking leave to file an amended Complaint which will necessitate further pleadings (and the currently pending Second Amended Complaint has not been answered). There is no prejudice to any of the parties to the action because both parties knew of the Assignment to XTO prior to moving for summary judgment (the Plaintiffs' attached the Assignment to their Motion) but nonetheless did not seek to join XTO as a necessary party. The purpose for intervention is to cure the jurisdictional defect that now exists due to the lack of joinder of all necessary and interested parties, which deprives the Court of jurisdiction pursuant to R.C. 2721.12

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and renders any judgment issued by the Court void on its face. Accordingly, for all of these reasons, intervention by XTO is timely.

D. **Procedural Requirements of Civ. R. 24(C) Are Met**

Ohio Civil Rule 24(C) provides that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene." Ohio courts have interpreted this Rule as requiring that the intervening party attach an Answer to its motion to intervene. *See Grove Court Condo. Unit Assoc. v. Hartman* (Cuyahoga Cty. 2011), 2011-Ohio-218, at ¶19 ("Civ.R. 24(C) mandates that the motion to intervene shall be accompanied by a pleading, as defined in Civ.R. 7(A) setting forth the claim or defense for which intervention is sought. Civ.R. 7(A) defines a pleading as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, or a third-party answer.").

Consistent with this case law, XTO has attached to its Motion an Answer and Affirmative Defenses to the now-operative Second Amended Complaint.

CONCLUSION

For the reasons stated above, XTO's motion for intervention should be granted because it is a necessary party to this litigation because it possesses an interest in the Leases that are the subject matter of the litigation. Absent joinder of XTO, this Court lacks

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jurisdiction to enter declaratory relief as to the Leases, and any judgment entered as to the Leases is void.

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EXHIBIT 10

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2012 SEP 12 PM 12: 57

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

LARRY A. HUPP, et al. Plaintiffs, vs. BECK ENERGY CORPORATION Defendant.	CASE NO. 2011-345 JUDGE: ED LANE **PLAINTIFFS' AMENDED MOTION FOR CLASS ACTION CERTIFICATION**

Now come Plaintiffs, Larry and Lori Hustack ("Hustacks"), Lawrence and Michelle Hubbard ("Hubbards"), and David Majors ("Majors") (collectively "Plaintiffs"), by and through the undersigned counsel, and respectively file this amended request for an Order that this action be maintained as a Class Action pursuant to Civil Rule 23(B)(2). The only reason for the filing of this amended motion is to request the Court certify a class consisting of only *Monroe County* landowners (as was set forth in Plaintiff's Second Amended Complaint), as opposed to a class of *all* Ohio landowners (as was set forth in Plaintiff's Third Amended Complaint, which has now been withdrawn). Plaintiffs are filing this amended motion merely to reconcile their Motion for Class Certification with their *Second* Amended Complaint, since Plaintiffs have recently withdrawn their Motion for Leave to File a *Third* Amended Complaint. Otherwise, Plaintiffs incorporate by reference as if restated herein, the briefing and argument contained in its original Motion for Class Certification.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

As was more fully set forth in the Memorandum attached to the original Motion for Class Certification incorporated herein, it is clear that the prerequisites to a Class Action set forth in Civil Rule 23(A) have been met as have the requirements of Civil Rule 23(B)(2). Accordingly, this Court should certify this case as a class action under Civil Rule 23(B) (2). For the Court's convenience, a proposed Order is attached hereto.

Respectfully submitted,

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LARRY AND LORI HUSTACK,
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent this 12 day of September, 2012, postage prepaid, pursuant to Civil Rule (5)(B)(2)(c), to the following:

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IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE HUPP, et al. Plaintiffs, vs. BECK ENERGY CORPORATION Defendant.	CASE NO. 2011-345 JUDGE: ED LANE **ORDER CERTIFYING CLASS**

In accordance with the findings and conclusions contained in the Opinion filed concurrently with this Order, it is, Ordered:

1. *Class Certification.* Civil Action No. 2011-345, styled *Clyde Hupp, et al. v. Beck Energy Corp.* shall be maintained as a class action on behalf of the following class of Plaintiffs:

> "Plaintiffs bring this suit as a Class Action on behalf of themselves and all other similarly situated (the "Class") under the applicable provisions of Rule 23 of the Ohio Rules of Civil Procedure. Plaintiffs seek certification of the Class defined as "all landowners/Lessors of land in Monroe County, Ohio, who are Lessors under, or who are successors in interest of Lessors, under a standard form oil and gas lease with Beck Energy Corporation, where Beck Energy 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 the lease or thereafter."

2. *Class Representatives; Class Counsel.* Subject to further Order of the Court, Plaintiffs, Larry and Lori Hustack ("Hustacks"), Lawrence and Michelle Hubbard ("Hubbard") and David Majors ("Majors"), are designated as Class Representatives, and Slater & Zurz, and Peters Law Offices are designated as counsel for the Class.

EXHIBIT A

3. *Notice.* (a) Class counsel shall by _____ cause to be mailed in the name of the Clerk by first class mail, postage prepaid, to all Monroe County landowners with Beck leases or whose property Beck has not drilled, nor prepared to drill a well, as can be identified through reasonable efforts, a notice of written in plain language and approved by the Court.

4. *Exclusion.* The Notice of Class Members must inform them as to how they may exclude themselves from the Class.

5. *List of Class Members.* Class Counsel will file with the Clerk by _____ an Affidavit identifying the persons to whom Notice has been mailed and who have not timely requested exclusion.

IT IS SO ORDERED on this _____ day of _____, 2012.

_____
JUDGE ED LANE

cc: All Parties of Record

EXHIBIT 11

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2012 SEP 17 AM 10: 24

SUSAN ANN RUSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al. Plaintiff, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE

DEFENDANT, BECK ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION TO AMENDED MOTION FOR CLASS ACTION CERTIFICATION

Now comes the Defendant, Beck Energy Corporation (hereinafter "Defendant"), by and through the undersigned counsel, and respectfully submits its Memorandum in Opposition to Plaintiffs Clyde A. Hupp, et al.'s, (hereinafter "Plaintiffs") Amended Motion for Class Action Certification.

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MEMORANDUM OF LAW

I. FACTS

The following facts are pertinent, for the purpose of this limited remand, by the Seventh District Court of Appeals. On July 12, 2012, the trial court issued a decision granting Plaintiffs Clyde A. Hupp, et al.'s Motion for Summary Judgment on the basis that Defendant's leases violate public policy and are void ab initio. On this same date, the trial court overruled Defendant's Motion to Dismiss and/or Change of Venue.[1] On July 31, 2012, the trial court issued a Journal Entry incorporating the Decision it previously issued on July 12, 2012.

On July 18, 2012, prior to the issuance of the Journal Entry, Plaintiffs moved for leave to file a Third Amended Class Action Complaint to include in the proposed class all landowners/lessors, in Ohio, located outside Monroe County who may be affected by the trial court's Decision filed on July 12, 2012. On this same date, Plaintiffs also filed a Motion for Class Action Certification. In its Journal Entry, the trial court specifically indicated that, "[t]hose two motions are still pending. Accordingly, as this entry does not dispose of all pending matters, this is not a final appealable order." (Journal Entry, July 31, 2012, at p. 2).

Defendant filed a Notice of Appeal, of the trial court's Journal Entry, on August 28, 2012. On September 10, 2012, the Seventh District Court of Appeals issued a Judgment Entry ordering a remand to the trial court to address pending motions. (Judgment Entry, Sept. 10, 2012, at p. 1).

On September 12, 2012, Plaintiffs filed Notice of Withdrawal to File Third Amended Class Action Complaint. Plaintiffs also filed an Amended Motion for Class Action Certification requesting the trial court certify a class consisting only of Monroe County

[1] The trial court indicated it would reconsider Defendant's Motion for Change of Venue in the event a jury trial in any remaining matter is appropriate. (Journal Entry, July 31, 2012, at p. 1).

landowners as opposed to a class of all Ohio landowners. Therefore, the only issue remaining to be determined, on limited remand, is Plaintiffs' Amended Motion for Class Action Certification.

II. SUMMARY OF ARGUMENT

The trial court must deny Plaintiffs' Amended Motion for Class Action Certification and strike Plaintiffs' Amended Class Action Complaint for two reasons. First, a trial court is required to rule on a request for class action certification prior to its decision on the merits of the case so as not to violate the rule against one-way intervention. Second, Plaintiffs may not assert the trial court's favorable ruling, on their Motion for Summary Judgment, as offensive collateral estoppel because the decision only binds the current Plaintiffs and not the putative class (i.e. all landowners/lessors in Monroe County).

III. LAW AND ARGUMENT

A. RULE AGAINST ONE-WAY INTERVENTION

Pursuant to the rule against one-way intervention, Plaintiffs are not permitted to await merit rulings prior to seeking a decision on class action certification. The rule against one-way intervention "* * * refers to a situation in which a potential class member will seek to refrain from participation in a class action until the outcome, whether favorable or unfavorable, appears discernible. If a favorable outcome is likely, the class members will attempt to intervene; if the outcome will be unfavorable, the member will remain on the sidelines to avoid the res judicata effect of the verdict." 3 *Newberg on Class Actions*, Section 8:10 (4th Ed.2012). See, also, *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir.2012) ("The rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action." *Am. Pipe & Const. Co., v. Utah*, 414 U.S. 538, 546, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)); *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 430 (6th Cir.1999) (explaining that the rule against

one-way intervention "limited the opportunity of the absent class members to sit on the sidelines without committing to the class.")

In 1966, Fed.R.Civ.P. 23 was amended to prevent one-way intervention. See *Biechele v. Norfolk & Western Railway Co.*, 309 F.Supp. 354, 356 (N.D.Ohio 1969). Ohio Civ.R. 23(C)(1) mirrors the federal rule. The Staff Notes to Ohio Civ.R. 23 indicate Ohio Civ.R. 23 is based upon the present version of Fed.R.Civ.P. 23. However, prior to the amendment, "* * * one-way intervention was possible since the rule did not establish a procedure for certification of the class. The rule permitted potential members of the class to await the determination of the trial court on the merits before submitting themselves to the jurisdiction of the court and gaining the benefits of a favorable ruling, but not the risks of an unfavorable one." *McCornock v. People's Savings Assoc.*, 6th Dist. No. L-80-350, 1981 WL 5741, *3 (Aug. 7, 1981). See, also, Federal Rule Advisory Committee Note re Federal Rule 23 as amended and effective July 1, 1966.

Pursuant to the 1966 amendment, Fed.R.Civ.P. 23(c)(1) provides that the court's class action determination shall be made "[a]s soon as practicable after the commencement of an action brought as a class action." *Bercherer, supra*, at 425. "The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgment." *Am. Pipe & Constr. Co., supra*, at 547. See, also, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Jiminez v. Weinberger*, 523 F.2d 689, 698 (7thCir.1975); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 352-353 (7thCir.1974).

Ohio Civ.R. 23(C)(1) provides, in pertinent part:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

In *Bass v. Ohio Med. Indem. Inc.*, 1st Dist. No. C-76273, 1977 WL 19936, *2 (Aug. 3, 1977), the Ohio court of appeals explained that the language contained in Civ.R. 23(C)(1) imposes a mandatory duty "* * * to make a prompt determination as to the compliance of a purported class action with all of the requirements of Civ.R. 23 and to place on the record an order reflecting its decision in regard thereto, even in the absence of any request to do so by one of the parties to the action." See *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1243 (6thCir.1974). Thus, "* * * certification of a suit as a class action <u>must precede, or, at the very least, accompany the court's decision on the merits of the action</u>. [Emphasis added.] *Bass, supra*, at *2, citing *Am. Pipe and Constr. Co., supra*, at 552; *Larionoff v. U.S.*, 533 F.2d 1167, 1182-1183 (D.C.Cir.1976); *Peritz, supra*, at 353; *Katz v. Carte Blance Corp.*, 496 F.2d 747, 758 (3rdCir.1974); *Glodgett v. Betit*, 368 F.Supp. 211, 214 (D.Vt.1973).

The court further explained, in *Bass*, that:

> * * * [P]ostponement of a certification determination until after a decision on the merits would unduly delay the adjudication of a number of issues - - such as the ability of the representative to adequately protect the interests of the class, and the necessity and form of pre-judgment notice to be served upon members of the purported class -- which are vital to the fair and effective prosecution of a class action, and which thus are more properly resolved prior to the entry of any final judgment therein. [Citation omitted.] Indeed, the language of subparagraph (C)(1) itself effectively precludes its implementation once the merits of an action have been decided; the express permission contained therein to alter or amend a certification order *before a decision on the merits* "plainly implies disapproval of such alteration or amendment therafter." [Emphasis *sic.*]

Bass, supra, at *3, citing *Jiminez, supra*, at 697.

Pursuant to the above analysis, the *Bass* court concluded the trial court's failure to enter an order authorizing maintenance of the suit, as a class action, before a judgment on the merits, precluded a class certification determination. *Bass, supra*, at *3. Specifically, the court explained, "[t]he procedure adopted by the trial court thus failed to comply with the requirements of Civ.R. 23 (C)(1) that such a determination be made 'as soon as practicable after the commencement of the action,' and, in our opinion, invited the very procedural deficiencies attending the post-merit certification of a class which that provision of the Rules was designed to prevent." *Id.*[2]

In the matter currently under consideration, Plaintiffs filed two subsequent Complaints for Class Action Certification and Amended Class Action Certification on September 29, 2011, and September 30, 2011, respectively. Despite the Amended Class Action Certification Complaint pending approximately ten (10) months prior to the trial court's Decision on Plaintiffs' Motion for Summary Judgment, that decided the merits of the case, the trial court did not rule on whether the proposed class should be certified. In fact, Plaintiffs never filed a Motion Requesting Class Certification until July 18, 2012, <u>after</u> the trial court issued its Decision granting Plaintiffs' Motion for Summary Judgment on July 12, 2012.

Plaintiffs' conduct in seeking class certification, <u>after</u> receiving a favorable ruling on their Motion for Summary Judgment, is exactly the type of conduct prohibited by the rule against one-way intervention. The proposed class members have sat on the sidelines, until the trial court issued a favorable ruling for existing Plaintiffs, and six (6) days thereafter sought to take advantage of that favorable ruling by filing a Motion for Class Action Certification. For this

[2] It should also be noted the court of appeals concluded plaintiff was precluded from raising the class certification issue on appeal because plaintiff either waived the issue for purposes of appeal or invited the error. *Bass, supra*, at *4.

reason, the trial court must deny Plaintiffs' Amended Motion for Class Action Certification and strike Plaintiffs' Amended Complaint for Class Action Certification.

B. THE USE OF COLLATERAL ESTOPPEL

Plaintiffs may not offensively assert collateral estoppel to justify class certification after a favorable ruling on summary judgment. In fact, in a recent law review article, this exact issue was addressed:

> As the Federal Judicial Study documented, almost all pre-certification summary judgment motions are filed by defendants. This fact comports with common sense because there would be little or no point for a plaintiff to file a putative class action, and then request a court to determine whether the plaintiff was entitled to summary judgment. Until the court certifies a class action, the litigation remains an individual lawsuit against the defendant. Thus, assuming a court granted a plaintiff's summary judgment prior to class certification, that ruling would only bind the named class representative, but not the putative class (which has not yet been certified).

Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L.Rev. 1197, 1212-1213 (2010). The article recognized that to allow certification, after a favorable ruling on summary judgment for plaintiff, would violate the rule against one-way intervention. "In theory a plaintiff could attempt, after a positive summary judgment ruling, to assert that ruling as collateral estoppel after class certification. The author knows of no reported decision permitting offensive collateral estoppels of a plaintiff-favoring summary judgment rule prior to class certification, asserted after class certification. [Emphasis added.] *Id.* at fn. 72.

That is the exact factual scenario present in this matter. After having received a favorable ruling on their Motion for Summary Judgment, Plaintiffs now seek to assert the trial court's ruling, as offensive collateral estoppel, in order to certify a class that includes all landowners in Monroe County. For these reasons, the trial court must deny Plaintiff's Amended

Motion for Class Action Certification and Strike Plaintiffs' Amended Complaint for Class Action Certification. Plaintiffs may not use offensive collateral estoppel to certify the proposed class when Plaintiffs failed to timely request certification prior to the trial court's decision on the merits of this case.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court to deny Plaintiffs' Amended Motion for Class Action Certification and strike Plaintiffs' Amended Complaint for Class Action Certification.

Scott M. Zurakowski (J.A.G.)

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Nathan D. Vaughan (0077713),
John A. Burnworth (0077151),
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ATTORNEYS FOR DEFENDANT

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EXHIBIT 12

2012 OCT -1 10:02
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al. Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE (*Sitting by Assignment*) ORIGINAL

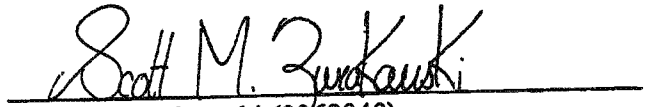
DEFENDANT, BECK ENERGY CORPORATION'S, MOTION TO TOLL ALL TERMS OF THE OIL AND GAS LEASES ENTERED INTO BETWEEN PLAINTIFFS AND DEFENDANT, BECK ENERGY CORPORATION

Now comes the Defendant, Beck Energy Corporation (hereinafter "Defendant"), by and through the undersigned counsel, and respectfully requests that this Court toll all of the terms of the oil and gas leases entered into between Plaintiffs and Defendant from September 14, 2011, (the date Plaintiffs filed their Complaint) during the pendency of this litigation, as Plaintiffs' claims effectively prevent Defendant from drilling a well, or otherwise exercising its lease rights. A Memorandum in support of Defendant's Motion is attached hereto and incorporated herein by reference.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

00396152-2 / 22585.00-0012

Respectfully submitted



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ATTORNEYS FOR DEFENDANT

MEMORANDUM

I. FACTS

On September 14, 2011, Plaintiffs filed their Complaint against Defendant seeking to have this court enter a declaratory judgment that the oil and gas leases (hereinafter "Lease" or "Leases") entered into between Plaintiffs and Defendant be deemed forfeited, cancelled, unenforceable, voided and held for naught due to allegations that Defendant breached express covenants and implied covenants, that Defendant abandoned the leasehold interests, the terms and conditions of the Leases are unconscionable, violative of Ohio public policy, and that there has been a failure of consideration. In addition, Plaintiffs also sought to have the Court quiet title to their real property encumbered by the Leases and to have this court extinguish any interest which Defendant may claim to have in and to the Plaintiffs' real property as a result of the Leases.

Thereafter, on September 29, 2011, the Plaintiffs filed an Amended Class Action Complaint adding additional plaintiffs and making class action allegations, in addition to the Plaintiffs' claims for declaratory judgment and to quiet title. One day later, on September 30, 2011, Plaintiffs filed their Second Amended Class Action Complaint naming additional plaintiffs, without seeking leave from this Court, as expressly required by Ohio Civ. R. 15.

On July 12, 2012, the Trial Court issued a decision granting Plaintiffs', Clyde A. Hupp, et al.'s, Motion for Summary Judgment on the basis the Leases violate public policy and are therefore void *ab initio*. On this same date, the Trial Court overruled Defendant's Motion to Dismiss and/or Change of Venue.[1] On July 31, 2012, the Trial Court issued a Journal Entry incorporating the decision it previously issued on July 12, 2012.

[1] The trial court indicated it would reconsider Defendant's Motion for Change of Venue in the event a jury trial in any remaining matter is appropriate (Journal Entry, July 31, 2012, at p. 1).

On July 18, 2012, prior to the issuance of the Journal Entry, Plaintiffs moved for leave to file a Third Amended Class Action Complaint to include in the proposed class all landowners/lessors in Ohio, located outside Monroe County who may be affected by the Trial Court's decision filed on July 12, 2012. On this same date, Plaintiffs also filed a Motion for Class Action Certification. In its Journal Entry, the Trial Court specifically indicated that, "[T]hose two motions are still pending. Accordingly, as this entry does not dispose of all pending matters, this is not a final appealable order." (Journal Entry, July 31, 2012, at p. 2).

Defendant filed a Notice of Appeal, of the Trial Court's Journal Entry, on August 28, 2012. On September 10, 2012, the Seventh District Court of Appeals issued a Judgment Entry ordering a remand to the Trial Court to address pending motions. (Judgment Entry, September 10, 2012, at p. 1).

On September 12, 2012, Plaintiffs filed Notice of Withdrawal to File Third Amended Class Action Complaint. Plaintiffs also filed an Amended Motion for Class Action Certification requesting the Trial Court certify a class consisting of only Monroe County landowners as opposed to a class of all Ohio landowners. As a result, on September 14, 2012, Defendant immediately filed its Answer and Counterclaim to the Second Amended Class Action Complaint.

On September 17, 2012, Defendant filed a Memorandum in Opposition to Plaintiffs' Amended Motion for Class Action Certification and Plaintiffs filed a Motion to Strike Defendant's Answer and Counterclaims and/or Motion for Default Judgment.

Finally, on Monday, September 17, 2012, this Court held a status conference ordering all parties to file any desired motions, including Defendant's Motion to Toll the Lease Terms.

II. SUMMARY OF ARGUMENT

The Trial Court must grant Defendant's Motion to toll all terms of Leases, during the pendency of the litigation, for three reasons. First, if this Trial Court does not grant Defendant's Motion to Toll, the Leases could terminate during the pendency of this litigation, causing unnecessary and unfair prejudice to Defendant. In other words, Defendant could ultimately win the battle on appeal but lose the war. This is particularly crucial considering the Ohio Supreme Court has determined perpetual leases to be valid and enforceable. See, *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N.E.2d 281 (1904); *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943); and *Myers v. East Ohio Gas Co.*, 51 Ohio St.2d 121, 364 N.E.2d 1369 (1977).[2] Finally, recent case precedent in Monroe County Common Pleas Court has determined it is appropriate to toll an oil and gas lease's term, when the oil and gas lease is being attacked, during the pendency of the litigation.

III. LAW AND ARGUMENT

1. Tolling is an Appropriate Remedy when an Oil and Gas Leases Validity is Attacked.

Tolling is appropriate when "a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation," so that "the obligations of lessee to lessor are suspended during the time such claims of forfeiture are being asserted." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir. 1982); *H&G Fossil Fuels Company v. Roach*, 103 N.M. 793, 795-97, 715 P.2d 66 (1986) (reversing lower court's refusal to toll lease in finding that "an extension of the [oil and gas lease] term is an appropriate remedy"); *Chesapeake Exploration, L.L.C. v. Valence Operating Co.*, 2008 WL 4240486, *4-7 (S.D.Tex., 2008) (holding where repudiation by lessee occurred approximately six months prior to end of primary term, lease was

[2] The parties' Memorandums on Summary Judgment failed to include any mention of these Ohio Supreme Court cases.

tolled so as to put the parties back in their original position and the lessee will be given six months to meet habendum clause obligations).

Tolling is appropriate to prevent a lessor who wrongfully repudiates a lessee's lease from profiting from the wrong. *B.B. Energy L.P. v. Devon Energy Production Co., L.L.P.*, 2008 WL 216583 at *11 (N.D.Tex. May 23, 2008) (citing *Kothmann v. Boley,* 158 Tex. 56, 60-61, 308 S.W.2d 1, 4 (1958). "[R]epudiation of a lease by a lessor relieves the lessee from any obligation to conduct any operation on the land in order to maintain the lease in force pending a judicial resolution of the controversy between the lessee and lessor over the validity of the lease." *Cheyenne Resources, Inc. v. Criswell,* 714 S.W.2d 103, 105 (Tex.App.-Eastland 1986, no writ).

In the present matter, there are three Leases at issue, the Hustack Lease; the Hubbard Lease; and the Majors Lease. The primary term of the Hustack Lease will expire on August 13, 2018. The primary term of the Hubbard Lease will expire on March 1, 2016, and the primary term of the Majors Lease will expire on October 10, 2015. Each lease contains essentially the same terms, including a ten (10)-year primary term and a delay rental clause, which Plaintiffs and Defendant paid and bargained for as a part of the Lease. At the end of the primary term, including any extension thereof, if Defendant does not drill a well that produces in paying quantities, the Lease typically terminates.

Defendant believes Plaintiffs' claims are without merit and not supported by Ohio Supreme Court case law. In fact, current Ohio Supreme Court case law supports Defendant's position that the oil and gas leases at issue are valid and enforceable. See, *Central Ohio Natural Gas & Fuel Co. v. Eckert, Id.*; *Hallock v. Kintzler, Id.*; and *Myers v. East Ohio Gas Co., Id.* Yet, this Court has granted Plaintiffs' Motion for Summary Judgment determining the leases at issue to be void *ab initio*. As this Court and all counsel is well aware, once the necessary issues are

resolved, the Defendant will be filing a Notice of Appeal of the Court's summary judgment decision.

By doing so, this Court has put Defendant between a rock and hard place – or in a position that it could ultimately win the battle on appeal but lose the war as the Leases could terminate, during the pendency of this litigation. For this reason, the Trial Court must grant Defendant's Motion to Toll the Terms of the Leases during the pendency of this litigation.

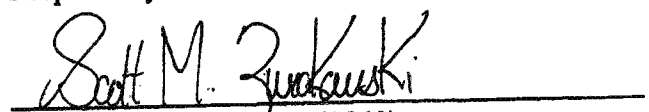
2. **Monroe County Court of Common Pleas Case Precedent Supports Defendant's Motion to Toll.**

The Monroe County Court of Common Pleas has also recently recognized that tolling of an oil and gas lease is an appropriate remedy, where a landowner, whose property is subject to the lease, has filed a complaint seeking to invalidate the oil and gas lease. *See*, *Three Waters, LLC v. Northwood Energy Corporation*, Monroe County Court of Common Pleas Case No. CVH2012-042. In the *Northwood Energy Corporation* case, Judge Julie Selmon entered an order denying Three Waters, LLC's motion to stop the tolling, and permitted Northwood Energy Corporation's lease terms to be tolled during the pendency of the litigation. A copy of said Judgment Entry is attached hereto as Exhibit "A". As such, this Court is bound by the Monroe County Court of Common Pleas case precedent, and for this reason this Court should grant Defendant's Motion to toll the terms of the leases pending the outcome of the litigation so as to not prejudice the rights of Defendant.

IV. CONCLUSION

For the foregoing reasons, Defendant, Beck Energy Corporation, respectfully requests that this Court grant Defendant's Motion to Toll the Lease Terms during the pendency of the within litigation.

Respectfully submitted.



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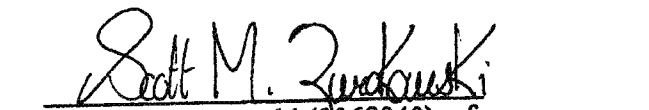
XTO Energy, Inc.



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00396152-2 / 22585.00-0012

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2012 AUG -9 PM 1:29
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF
MONROE COUNTY, OHIO

DOCKET & JOURNAL ENTRY

THREE WATERS, LLC

Plaintiff, Case No. 2012-042

Vs.

NORTHWOOD ENERGY CORPORATION,

Defendant.

Date of Entry: August 9, 2012

The within matter is before the Court on Plaintiff's *Motion to Stop Tolling Period* and Defendant's *Memorandum in Opposition to Plaintiff's Motion to Stop Tolling Period.*

Plaintiff's *Motion* is hereby **denied.** This Court's prior orders hereby remain unchanged.

(COPIES SENT THIS DAY TO:
Attorney Ethan Vessels, Attorney Flite Freimann, Attorney Gregory D. Russell, Attorney Thomas H. Fusonie, and Attorney Lija K. Kaleps-Clark)

(Approved)

JULIE R. SELMON, JUDGE

Journal_____ Page_____

jd

EXHIBIT A

EXHIBIT 13

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2012 OCT 17 PM 2:11

BETH ANN ROSE
CLERK OF COURTS

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE (Sitting by Assignment)

DEFENDANT BECK ENERGY CORPORATION'S REPLY TO PLAINTIFFS' RESPONSE TO BECK ENERGY'S MOTION TO TOLL ALL TERMS OF THE OIL AND GAS LEASES

Now comes the Defendant, Beck Energy Corporation (hereinafter "Beck Energy"), by and through the undersigned counsel, and submits the following Reply to Plaintiffs' Response to Beck Energy's Motion to Toll the Lease Terms (hereinafter "Motion to Toll").

I. LAW AND ARGUMENT

A. Tolling of The Oil and Gas Leases at Issue Commences When The Oil and Gas Leases Were Challenged.

When the Lessor actively asserts to Beck Energy that his lease is terminated, or is subject to cancellation because Beck Energy has failed to comply with obligations under the lease, or for any other reason, the obligations of Beck Energy to Lessor are suspended during the time such claims of forfeiture are being asserted. *See, Jicarialla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir., 1982) ("When a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation, the obligations of lessee to lessor are suspended during the

time such claims of forfeiture are being asserted."); *Morrison Oil & Gas Co. v. Berger*, 423 F.2d 1178, 1182-1183 (5th Cir. (Tex.), 1970) (same). *See also, Two Summers Oil & Gas*, Section 14:36 (3rd Ed.) ("Where a lessor has repudiated a lease by notice or suit for cancellation for alleged breach by the lessee of its express or implied covenants, or on the ground that the lease has expired by its own terms under the drilling or habendum clause, such act of the lessor relieves the lessee of the duty to continue further operations until the controversy is settled and estops the lessor from claiming such cessation of operations by the lessee as grounds for termination of the lease."). [Emphasis added].

This is consistent with Ohio Supreme Court cases holding the term of an oil and gas lease will be extended, beyond the primary term, where the lessee could have produced if the acts of the lessor had not prevented or interfered with such production. *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338, 339 (1955). The purpose of tolling is not to punish the lessor for asserting his claim, but to restore to the parties the position they occupied originally. *Jicarialla Apache Tribe* at 1341.

As a result, tolling of the terms of the oil and gas leases at issue should commence from September 14, 2011, the date Plaintiffs filed their first Complaint, challenging the Beck Energy oil and gas leases and seeking to have same voided.

B. **Beck Energy's Motion to Toll Only Seeks to Toll The Terms of The Oil and Gas Leases of The Present Plaintiffs.**

Beck Energy's Motion to Toll only seeks to toll the lease terms of the present Plaintiffs, that being, Larry and Lori Hustack, Lawrence and Michelle Hubbard, and David Majors. Beck Energy's Motion to Toll does not seek any relief against putative class members. Beck Energy is in agreement that equitable tolling should not apply to any other potential class members, unless and until such time as this Court grants class certification.

C. **Beck Energy Should Not Be Prevented, From Exercising Its Rights Under The Oil and Gas Lease Terms, If This Court Vacates Its Judgment or The Judgment Is Overturned On Appeal.**

The oil and gas leases should be tolled, as against both Plaintiffs and Beck Energy as long as the Court's finding that the leases are void ab initio remains the law of the case. However, if this Court, or the court of appeals, vacates that finding, and the leases are no longer considered void ab initio, Beck Energy should be permitted, during the pendency of the litigation, to take whatever action it deems appropriate under the oil and gas leases at issue. Such action would include the ability to drill wells, consolidate property into units, and any other action that it lawfully permitted under the terms of the leases.

Beck Energy would knowingly take such action, at its own risk, using its business judgment. Further, if prohibited from taking such action, Beck Energy may find itself in a position in which it has no ability to drill and generate revenue on these oil and gas leases, currently under consideration by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Scott M. Zurakowski (0069040), of
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ATTORNEYS FOR DEFENDANT

EXHIBIT 14

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 FEB -8 PM 2:47

BETH ANN ROSE
CLERK OF COURTS

COMMON PLEAS COURT
MONROE COUNTY, OHIO

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION AND ORDER (On Plaintiff's Motion for Class Action Certification)
	:	

The above styled action is before the Court on the Motion of Plaintiffs for Class Action Certification. The Plaintiffs filed their motion in this action on July 19, 2012. The Defendant, Beck Energy, filed a Memorandum of Law in Opposition to this motion on August 2, 2012. The Plaintiffs filed a Reply Brief in Support of their motion on August 7, 2012. There are affidavits and exhibits attached to the Plaintiffs' Motion also. The Court has reviewed all matters submitted by the parties in this regard.

This case arises out of a form oil and gas lease ("Beck Lease") utilized by the Beck Energy Corporation of Ravenna, Ohio (hereinafter "Beck"), which Beck executed with approximately 415 landowners in Monroe County and approximately 200 to 300 landowners in other South East Ohio counties. These form leases cover approximately 32,280 acres in Monroe County. The leases were entered into over the past approximately 21 years. Plaintiff alleges that Beck has not drilled an oil or gas well on approximately 21,000 acres in Monroe County and several thousand acres in other counties.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

This Court has held in this matter that Beck's leases are void on their face as has already been held by this Court. Accordingly, the Plaintiffs are requesting that a class be certified of landowners in Ohio who executed leases with Beck where Beck did not drill a well on their property. The Plaintiffs herein request a certification from this Court to proceed as a Class Action under Civ.R. 23(B)(2). The leases of the Plaintiffs herein have already been declared void against public policy, violative of implied covenants and forfeited.

In entering into leases in Eastern Ohio Beck used a pre-printed lease that it refers to as "Form G&T (83)." These leases were recorded by the Defendant, Beck Energy.

Beck argues that these leases are not all identical, as some of the leases have certain paragraphs crossed out in its standard form and the amount of delayed rental varies.

The Plaintiffs call the Court's attention to Beck's assignment of the deep drilling rights to XTO. Beck made this assignment after this action was filed and recorded it on December 21, 2011. The assignment includes a list of lessors or landowners whose mineral rights Beck sold to XTO.

The Plaintiffs note that for these landowners, they will undoubtedly receive none of the "upfront" money on the lease, nor will they receive any increase in royalty over the base 12.5% in their Beck leases, and whatever new rate Beck negotiated for himself in the assignment, perhaps as much as 17-18%. Thus, Beck may potentially pull $70-80,000,000 in up front money out of Monroe County alone, while the landowners of the County receive nothing. In any event, the assignment is evidence for class certification purposes, as that all of these cases are identical and thus subject to class treatment.

The standard for deciding whether to grant class action certification is set forth in Civ.R.

23(A) which provides that:

RULE 23. Class Actions

(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if
(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.
(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(d) the difficulties likely to be encountered in the management of a class action.

In summary, a Court may exercise its discretion to certify a class when Plaintiff establishes the required prerequisites of Ohio Civil Rule 23 by a preponderance of the evidence. See *Cleveland Board of Education v. Armstrong World Industries Inc.*, 22 Ohio Misc 2d 18. Civil Rule 23 provides that one or more members of a class may sue as representative parties

only if:

(1) the class is so numerous the joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interest of the class.

Plaintiffs satisfy the requirements for class certification as the class is so numerous that joinder is impracticable, there are legal and factual issues common to the class, the claims of the parties are typical of the class and the representative parties will protect the interests of the class.

A motion for class certification is not an occasion for examination of the merits of the case. *Caridad v. Metro-North Commuter R.R.*, 191 F3d 283, 291 (2nd Cir. 1999). There is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action..." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Instead, the Court must determine if the Plaintiffs have proffered evidence to meet each of the requirements of Rule 23. No weighing of competing evidence is appropriate at this stage of the litigation. *Caridad*, 191 F.3d at 293. See also *Cleveland Board of Education v. Armstrong World Industries, Inc.* (C.P 1985) 22 Ohio Misc.2d 18. (Holding in ruling on class certification the Court may take the allegations of the complaint as true and the Court should not examine the merits of the case during the certification hearing).

The policy behind class action is to protect members of even a small class from being deprived of their day in Court. See *Blumenthal v. Medina Supply Co.* (2000) 139 Ohio.App.3d 283 citing Amchem Prods., Inc. v. Windsor (1997), 521 U.S. 591, 117 S.Ct. 2231, 138, L.Ed.2d 689; Marks v. C.P. Chem. Co., Inc. (1987), 31 Ohio St.3d 200 31 OBR 398, 509 N.E.2d 1249;

7A Wright, Miller & Kane, Federal Practice and Procedure (2 Ed. 1986), Section 1777; 5 Moore's Federal Practice (3 Ed 1997), Section 23.44.

Correspondingly, the United States Supreme Court has found that a class action is appropriate to "vindicate the rights of individuals who otherwise might not consider it worth the trouble to embark on litigation in which the optimum result might be more than consumed by the cost." *Guaranty National Bank v. Roper*, 445 U.S. 3326, 338 (1980).

a) Joinder of All Members is Impracticable.

Joinder of all plaintiffs is impracticable. Impracticability of joinder is left to the trial court judge's discretion based on the particular facts of the case. See *Logsdon v. National City Bank* (1991), 62 Ohio Misc.2d 449; *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. The requirement is that the class be so numerous that joinder of all members is impracticable. "Impracticable" does not mean "impossible." See *Planned Parenthood Association of Cincinnati v. Project Jericho* (1990) 52 Ohio.St.3d 56, 64, citing Gentry v. C & D Oil Co. (W.D.Ark.1984), 102 F.R.D. 490, 493.

In this regard, there is no "magic number" for determining the number of parties that make joinder impractical. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. Federal Courts have ruled that "[g]enerally, the numerosity requirement is satisfied where the class exceeds 100 members. Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D.Pa.1975); see, also, *Krominick v. State Farm Ins. Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986).

The numerosity requirement in the instant action is satisfied. Based upon a review of the public records of the recorder's office by the Plaintiffs' attorneys, the instant action pertains to approximately 415 Monroe County landowners, who entered into leases with Beck, wherein

Beck did not drill an oil and gas well. A similar review of neighboring counties revealed perhaps 2-300 more. Thus, the number of putative Plaintiffs is so numerous, the numerosity requirement for class action purposes has been satisfied, as the class is so numerous that joinder of all members would be impracticable.

b) Putative Plaintiffs Have Common Questions of Law and Fact.

Plaintiffs also satisfy the requirement that there are questions of law or fact common to the class, as the class consists of Lessors under Beck oil/gas leases on whose property Beck did not drill a well. This Court has already determined that the leases are all void, yet as encumbrances of record in the Lessors' land title, they prohibit the landowners from re-leasing and exploiting the mineral wealth of their lands.

Wide discretion is afforded trial courts in deciding commonality, Caruso v. Celsius Insulation Resources, Inc. (M.D.Pa.1984), 101 F.R.D. 530, 533, but its resolution may be satisfied by the allegations contained in the complaint. Miles v. N.J. Motors, supra, 32 Ohio App.2d at 356, 291 N.E.2d 758. The commonality requirement of a class action does not require that all questions of law or fact which are in dispute be common. *Planned Parenthood Assn. of Cincinnati v. Project Jericho* at 64 citing, Marks v. C.P. Chemical Co. (1987), 31 Ohio St.3d 200; see, also, *Estate of Reed v. Hadley* (2005), 163 Ohio App.3d 464. The commonality requirement does not require that all questions of law or fact be common to every single member of the class; rather, at least one issue must be common to the claims of all the class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §3.10 at 154 (3d ed. 1992); 7A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d, §1763, at 198 (1986). Courts have not considered

commonality a difficult hurdle; the requirement should be "construed permissively." *Hanlon*, 150 F.3d at 1019. Generally courts in Ohio have ruled that the commonality requirement is satisfied when the plaintiffs demonstrate a "common nucleus of operative facts." See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91.

e) Typicality of Claims and Defenses.

All of the Lessors, i.e. putative Plaintiffs, are governed by the same lease/contract, and will be subject to the same Beck defenses. Specifically, Beck leased mineral rights from the Plaintiffs. All of the deep drilling rights under the leases have been assigned to Exxon under one instrument. Thus, Mr. Beck himself is treating these leases as a "class." The question common to all Plaintiffs as has already been answered by this Court is: is that lease void? In the instant action, Plaintiffs satisfy the commonality of questions of law and/or fact in that every single member of the class was governed by the same operative lease terms.

The claims of the class members and the representative parties are typical. Similarly, the defenses of the Defendant as to the class members and class representatives are also typical.

"Typical" has been held to mean a "lack of adversity between the class members." Tober v. Charnita, Inc., (M.D.Pa.1973), 58 F.R.D. 74, 80. Ohio courts have held that plaintiffs' claims satisfy the typicality requirement when the claim arises from the same event, practice, or course of conduct from which the claims of other class members arise and if the plaintiffs' claims are based on the same legal theory. *Baughman v. State Farm Mutual Auto Insurance Company* (2000), 88 Ohio St.3d 480. However, the claims or defenses need not be identical in granting class certification. See *Cincinnati Planned Parenthood, Inc. v. Project Jericho* at 64 citing Federal Class Actions, at 204; 7A Wright & Miller, *supra*, Section 1764; see, also, Twyman v.

Rockville Hous. Auth. (D.C.Md.1983), 99 F.R.D. 314, 321.

In the present matter, the Plaintiffs' claims all arise from the same lease, and the same conduct of Beck in not drilling a well on the Plaintiffs' properties. Correspondingly, Plaintiffs' claims are all based on the same legal theories, which is that the Beck leases are void due to their terms being perpetual, and due to Beck's violation of the implied covenant to drill, and other express and implied covenants. Beck engaged in the same conduct against each of the class members by signing them to perpetual leases and not drilling on their property during the lease's primary term, and in also violating the same express and implied covenants with each of the Plaintiffs. Thus, the class representatives' claims are identical to those of the putative class plaintiffs.

d) Representative Parties Will Fairly and Adequately Protect Class Interests.

In this action Plaintiffs also satisfy the fourth requirement for a class action in that the representative parties will fairly and adequately protect the interests of the class.

Adequacy of representation essentially has two (2) components designed to ensure absent class members' interests are pursued: (1) that the interests of plaintiffs and class members are aligned, and (2) class counsel is qualified to serve the interests of the entire class. See Rule 23(a). They and their counsel have displayed diligence and competence in their handling of this matter to date. Beck's counsel has made a vain attempt to delay these proceedings by the filing of an appeal when no appealable order had been entered by this Court. XTO's counsel attempted to engage in the unauthorized practice of law by appearing at a pretrial without following the proper procedure for admission to the Ohio Bar "pro hoc vice."

(1) Interests of the Class are Aligned.

First, "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees" *Amchem Products v. Windsor*, 521 U.S. 591, 625 (1997). A class representative is generally considered adequate as long as his interests are not antagonistic to that of the other class members. See *Marks v. C.P. Chemical Company, Inc.* (1987), 31 Ohio St.3d 200, see also *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98.

No conflicts exist between Plaintiffs and the class members in this case. The named Plaintiffs challenge the same unlawful conduct and seek the same relief as the class. The right to relief of the named Plaintiffs, like that of the absent members, depends on demonstrating that Beck executed and recorded void perpetual leases with the landowners, while not drilling a well on their property, and/or by violating any other express or implied duties which arose by the lease/contract, or by operation of law.

In the instant matter, the Hustacks, Hubbards and Mr. Majors are adequate representatives of the class. All of them signed the same Beck lease and did not have wells drilled on their property. The proposed class representatives have taken an active role and control in the litigation to protect the class' interests. Further, the Hustacks, Hubbards and Mr. Majors have participated in selection of counsel, communicated with class members, monitored the litigation and vigorously prosecuted the case on behalf of the class.

(2) Counsel is Qualified.

Secondly, class counsel must be qualified to serve the interests of the entire class. Civil Rule 23(a) (4). Ohio courts have held that an attorney is competent to handle a class action if the attorney has experience in handling litigation of the type involved in the case before the class certification is allowed. See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91, 98.

Plaintiffs' counsel consists of Attorneys Mark Ropchock, Richard Zurz and James Peters. All three of these attorneys have been previously appointed class counsel by this Court in *John Lucio*, et al. v. *Safe Auto Insurance Co.*, et al., Monroe Co. Common Pleas Case No.: 2007-09, which resulted in a multi-million dollar recovery for the class members.

Mark Ropchock, has significant trial experience in handling hundreds of cases in multiple states, has tried multi-million dollar cases to verdict and has over twenty five (25) years of practice as a litigator, most recently receiving a three million dollar ($3,000,000.00) verdict in Portage County, Ohio.

Richard Zurz is a leading personal injury attorney with offices in Akron, Canton and Columbus, Ohio. Richard V. Zurz has thirty (30) years of trial experience and is an active member in good standing with the Akron Bar Association, the Ohio State Bar Association, the American Bar Association, the Ohio Academy of Trial Lawyers, and American Association for Justice_ Mr. Zurz practices in business and commercial litigation, personal injury, employer intentional torts and numerous other areas of the law. He has tried many cases.

James W. Peters also represents Plaintiffs. Mr. Peters is an attorney in Woodsfield, Ohio with over thirty (30) years experience practicing law. Mr. Peters is admitted to the Ohio Supreme Court, West Virginia Supreme Court, U.S. Court of Appeals, Fourth Circuit, U.S. Court of Appeals, Sixth Circuit, both of the U.S. District Courts in Ohio, and both U.S. District Courts in West Virginia. Mr. Peters has served as Special Counsel to the Ohio Attorney General and in private practice. Additionally, Mr. Peters is approved counsel for a number of corporations. Mr. Peters currently serves as a Judge in Monroe County Ohio. Mr. Peters has received a verdict of three million five hundred thousand dollars ($3,500,000.00).

In addition to satisfying the prerequisites set forth in Civil Rule 23(A), Plaintiffs also satisfy the requirements set forth in Civil Rule 23(B). Civil Rule 23(B) requires Plaintiffs to satisfy one (1) of the requirements of subdivision (B) (1)-(3) for certification to be deemed appropriate.

Civ.R. 23(B) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition, * * * (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *

This is the exact situation presented in this case. The party opposing the class herein, Beck Energy, has acted on grounds generally applicable to the entire class, [form lease, no well drilled] and declaratory relief with respect to the class as a whole is appropriate.

In this case, all of the putative plaintiffs herein are landowners in Monroe and its neighboring counties, whose property is subject to and impaired by an oil and gas mineral lease with Beck Energy. Beck Energy will presumably defend every case in an identical fashion since whatever defenses are available under the lease would be applicable to all of the putative plaintiffs since the same terms would control. Beck has not drilled wells on any of the properties within the lease term. All the putative plaintiffs would find it impossible to lease their land to a new driller with the Beck Energy lease presenting a cloud upon the title of their property.

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.

In *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 817 N.E. 2d 59, a 2004 case, the Ohio Supreme Court had the opportunity to address the requirements of class certification ender Rule 23(B) (2). The Supreme Court held that certification under the B (2) subdivision of Rule 23 entailed two requirements: (1) The action must seek primarily injunctive relief, and, (2) the class must be cohesive. *Wilson*, at 541, 63.

a. Injunctive Relief

As outlined above, Plaintiffs' Complaint consists of two counts. Count 1 is a request for declaratory judgment stating at paragraph 20, "Plaintiffs are entitled to a declaratory judgment that the Hustack lease, the Hubbard lease and the Majors lease are therefore forfeited, canceled, unenforceable, voided and held for naught, for reasons including but not limited to, the following * * *. Count II is a quiet title action which states in paragraph 21 (b), "Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code § 5303.01 quieting their title as to the Hustack acreage, the Hubbard acreage and the Majors acreage as against Defendant by and through the forfeiture, release and cancellation of the Hustack, Hubbard and Majors leases as valid encumbrances of record and by extinguishing any interests which Defendant has or may claim to have in the Hustack, Hubbard and Majors acreage."

These allegations clearly meet the first requirement of *Wilson* that the action must seek primarily injunctive relief. As the *Wilson* case and others have generally described, in making this determination, there is oftentimes confusion as to whether the Complaint specifically

is requesting injunctive relief or damages. The distinction is often difficult to make. In *Wilson*, for instance, Plaintiffs sought medical monitoring. This presented a difficult analysis for the Court as to whether future medical monitoring was primarily in the form of damage or injunctive relief.

In the present action, no such dilemma or difficulty in analysis exists. There simply is no claim in the Complaint for any sort of monetary damages whatsoever. The Complaint exclusively requests declaratory and quiet title relief. Accordingly, the first requirement of 23(B) (2) is satisfied.

b. Cohesiveness

The second requirement for 23(B) (2) certification as discussed in the *Wilson* case is that the class must be cohesive. In discussing the cohesiveness standard, the *Wilson* court noted, although this court has not had an opportunity to address the cohesiveness requirement of Civil Rule 23(B) (2) class certification, there are a "myriad federal cases providing us guidance," *citing Barnes v. Am. Tobacco Co.* (C.A. 3, 1998), 161 F.3d 127, 142-143. The federal cases indicate the cohesiveness analysis is essentially the same as a predominance analysis, which is discussed with much more frequency in the case law.

The predominance inquiry pertains to the focus on legal or factual questions that qualify each class member's case as a genuine controversy. See Hoang v. E*Trade Group Inc. (2003), 151 Ohio App.3d 363, 2003-Ohio-301.

> The predominance test...involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved... [as] a class action.... Schmidt v. Avca Corp. (1984), 15 Ohio App.3d 81.

Plaintiffs must show that common or generalized proof will predominate at trial. See *Lumco Industries, Inc. v..Jeld-Wen, Inc.*, 171 F.R.D. 168 (E.D. Pa 1997). Common questions must be able to be resolved for all members of the class in a single adjudication. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 2000. "While potential dissimilarity in remedy is a factor to be considered in determining whether individual questions predominate over common questions, that alone does not prevent a court from certifying a cause as a class action." *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98. See also Lowe v. Sim Refining & Marketing Co. (1992), 73 Ohio App_3 d 563, 572, 597 N.E.2d 1189.

It would be difficult to imagine a case in which the prospective plaintiffs are more cohesive as a class than the within action. As noted, all of these individuals are landowners who are unable to lease their land to new drillers. The court cannot imagine why these landowners would not wish to obtain thousands of dollars per acre for their property in up front money, and potentially hundreds of thousands of dollars in royalties versus the present arrangement with Beck Energy, wherein they are receiving a few dollars per acre per year and no royalties whatsoever.

This group is cohesive to the extent of near identity of interest. Their properties are all covered by the same leases with Beck Energy with the same basic terms. As noted, other than the fact that the names are different on the leases and the acreage and its location are different, the terms of the lease were boilerplate and, thus, since the Court has already found the lease void in one instance, the lease would clearly be void in all. The reverse is also true. There are few individual claims or defenses available in the within action. If certain plaintiffs do have other claims against Beck, those are not part of this lawsuit. Accordingly, the cohesiveness analysis of

the present action under the *Wilson* case is easily established.

There are additional reasons why this case is appropriate for class treatment, such as under a Rule 23(b) (1) analysis. Rule 23(b) (1) defines two related types of class actions, both designed to prevent prejudice to the parties arising from multiple potential suits involving the same subject matter. See *Feret v. Corestates Financial Corp.* 1998 WL 512933 (ED. Pa. 1998), at * 13 citing 1 NEWBERG § 4.03, at 4-10. Rule 23(b) (1) (A) is used to "obviate the actual or virtual dilemma which would ... confront the party opposing the class" if separate lawsuits were decided differently so as to result in "incompatible standards" for that opposing party. See *Feret* at *13, citing WB Music Corp. V. Rykodisc, Inc., 1995 WL 631690, at *3 (E.D.Pa. Oct. 26, 1995) (quoting Fed.R.Civ.P. 23(b) (1) (A) advisory committee notes). Conversely, Rule 23(b) (1) (B) is used when separate actions might lead to adjudications that could be dispositive of nonparty class members' interests or substantially impair their ability to protect their interests.

Correspondingly, Ohio courts have held that there is a risk of inconsistent adjudications when the validity of a lease contract could be found valid in one action and invalid in another, this would lead to incompatible standards of conduct for the defendant. See, *Warner v. Waste Management*, (1988), 36 Ohio St.3d 91, 95. Footnote 2.

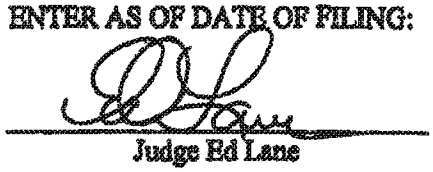
In the instant action, there is a risk that the validity of the Beck lease and course of conduct with the landowners could be valid in one action but invalid in another, thereby leading to inconsistent adjudications. Consequently, conflicting decisions regarding the legality of the Beck lease would affect the interests of all putative Plaintiffs. This is an additional reason why class treatment is needed.

This is an appropriate case for class action status. Therefore, Plaintiffs' Motion for Class

Certification is hereby granted.

SO ORDERED.

ENTER AS OF DATE OF FILING:



Judge Ed Lane

c: Attorney Ropchock/Zurz
Attorney Zurakowski
Attorney Kincaid
Attorney Abbott

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST REASON FOR DELAY.

EXHIBIT 15

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 FEB -8 PM 2:49

CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION AND ORDER (On XTO's Motion To intervene)

The above styled action is before the Court on the Motion of XTO Energy, Inc. (Herein after referred to as "XTO"), filed on September 7, 2012 to intervene in the above styled action. The Plaintiff's Brief in Opposition was filed on September 17, 2012. The Court also heard oral arguments on this motion. Post hearing briefs have also been filed. The Court has also been provided, under seal, a separate copy of the Purchase and Sale Agreement between the Defendant, Beck Energy Corporation (herein after referred to as "Beck"), and XTO. The Court has reviewed all of the materials provided to the Court in this matter.

XTO maintains that this Court does not have jurisdiction of this case and did not have jurisdiction when it granted to the Plaintiffs summary judgment on July 12, 2012. XTO's position is that it was a necessary party at the time the decision was entered by this Court.

The relevant facts in this regard are straight forward. A Complaint to Quiet Title was filed in this action on September 14, 2011. An Amended Class Action Complaint was filed on September 29, 2011. All Complaints that have been filed to date seek the cancellation of various

oil and gas leases between the Plaintiffs and Beck. The Plaintiffs filed a Motion For Summary Judgment on February 16, 2012. The Court entered a briefing schedule on the Plaintiff's Motion for Summary Judgment on April 25, 2012. The final deadline for briefs was May 14, 2012. On July 12, 2012 this Court entered a decision that granted the Plaintiffs' Motion for Summary Judgment that essentially declared the subject leases void.

A key fact in this time line is that on November 9, 2011 the Defendant, Beck, entered into a Purchase and Sale Agreement with the Movant, XTO, for the sale of Beck's rights to XTO for what is commonly referred to as the "Marcellus Oil and Gas" strata on the leases involved in this action and other leases throughout eastern Ohio. At p. 18 of their sale agreement the contracting parties noted this lawsuit under a clause titled: "Pending Litigation, Claims, and Disputes." Their agreement noted the style of this case and the correct case number.

It is clear that XTO knew of this litigation and its potential consequences prior to purchasing the "deep rights" to the Plaintiffs' leases and well in advance of these Plaintiffs' Motion For Summary Judgment. XTO now asserts that this Court was without jurisdiction because it was a necessary party. XTO was not a necessary party at the time this action was filed. To accept XTO's position would subject courts and litigants to endless legal procedures where potentially no final resolution could ever be achieved. Pursuant to O.R.C. 2721.12 this Court had jurisdiction when this case was filed because all parties who had an interest in the subject matter were parties.

R.C. 2721.12 clearly provides that:

> "...when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding..."

The determination of jurisdiction is made at the time the action is commenced. *Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428, 111 S.Ct. 858, 112 L.Ed.2s 951 (1991); *Am. National Bank and Trust Co. v. Bailey*, 750 F.2d 577, 582 (7th Cir. 1984). When the instant action was commenced and the Complaint amended September, 2011, Beck was the only entity with an interest in the subject leases. XTO did not acquire its putative interest by assignment until December 21, 2011. Movant does not dispute that all persons and/or entities with an interest in the Beck Leases were made parties when the Complaint, Amended Complaint, and Second Amended Complaint were filed. This Court acquired jurisdiction herein on September, 2011.

Once a court has jurisdiction over both the subject matter of an action and the parties to it, the right to hear and determine the case has been perfected, and decisions as to every question arising thereafter are simply the exercise of the jurisdiction thus conferred. *Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 499 (1854); *State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 384, 582 N.E.2d 992 (1992); *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶34.

After a court has acquired jurisdiction over the persons and the subject matter of the litigation, subsequent events will not operate to divest the court of that jurisdiction. *Freeport-McMonRan*, 498 U.S. at 428; *Bailey*, 750 F.2d at 583; *Weinberger v. Weinberger*, 43 Ohio App.2d 129, 131, 334 N.E.2d 514 (9th Dist. 1974); *State ex rel. Vernon Place Extended Care Ctr., Inc. v. State Certificate of Need Review Board*, 10th Dist. No. 82AP-1044, 1983 Ohio App. LEXIS 15646, *7 (Aug. 11, 1983).

Accordingly, Beck's November 9, 2011 sales agreement and December 20, 2011 assignment to XTO of the deep rights under the subject Leases did not divest this Court of

subject matter jurisdiction to decide the declaratory judgment and quiet title claims set forth in Plaintiffs' Second Amended Complaint. Rather, subject matter jurisdiction had already attached, and continued notwithstanding Beck's unilateral assignment of an interest in those leases. Beck's assignment to XTO merely triggered the question as to whether XTO could or should be made a party pursuant to the Civil Rules.

In *Bailey*, the court observed that if jurisdiction were subject to divestiture based on events occurring after jurisdiction had attached, a defendant could indefinitely avoid federal diversity jurisdiction simply by moving to the Plaintiff's state after suit was filed. 750 F.2d at 582. Similarly, if this Court's jurisdiction could be divested every time Beck - or its assignee - assigned some interest in the Leases to a non-party, Beck could avoid any adverse judgment in perpetuity.

Movant's position in this regard is not only unreasonable if adopted by this Court it would have a crippling effect on the orderly resolution of legal disputes.

Further, Civ.R. 25(C) provides that:

> (C) Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (A) of this rule."

In point of fact in their sale agreement Beck and XTO provided that Beck would defend the title to the subject leases. Beck is contractually obligated to warrant and defend the subject lease and to hold XTO harmless from all claims. Beck has done that. In fact despite knowledge of this litigation for months XTO sat on the sidelines and let Beck fulfill its obligations in this regard. XTO did not seek to intervene in this action until after this Court's decision of July 12,

2012.

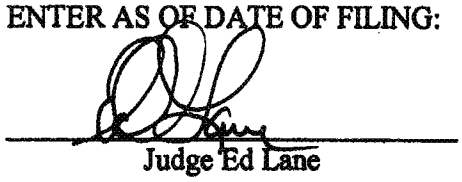
Additionally, Civ.R. 57 specifically requires that the procedure for obtaining a declaratory judgment shall be in accordance with the civil rules.

The sale from Beck to XTO was after this Court obtained jurisdiction in this case. The sale was made with the knowledge of these proceedings by both XTO and Beck. Their sales agreement noted the sale and additionally provides that Beck would defend title to these leases. These parties cannot divest a Court of its jurisdiction once it has been obtained. XTO's rights are derivative of Beck's rights.

For all of the reasons set forth herein above XTO's Motion to divest this Court of jurisdiction is not well taken. This Court has already determined that the leases XTO purchased are void. There is no reason for XTO to intervene at this time. They have no interest to protect. For all of the reasons set forth hereinabove, XTO's Motion to Intervene is denied.

SO ORDERED.

ENTER AS OF DATE OF FILING:



Judge Ed Lane

c: Attorney Ropchock/Zurz
Attorney Zurakowski
Attorney Kincaid
Attorney Abbott

NOTICE TO CLERK'S OFFICE
FINAL APPEALABLE ORDER

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST REASON FOR DELAY.

EXHIBIT 16

COPY

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 MAR -7 PM 1:50

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.,	
Plaintiffs-Appellees,	CASE NO. 2011-345
vs.	JUDGE ED LANE (Sitting by assignment)
BECK ENERGY CORPORATION,	12-MO-03
Defendant-Appellant.	

NOTICE OF APPEAL

Notice is hereby given that Defendant, Beck Energy Corporation, by and through the undersigned counsel, hereby appeals to the Court of Appeals, Monroe County, Ohio, Seventh Appellate District, from the Journal Entry of the Monroe County Court of Common Pleas, in Case No. 2011-345, entered on February 8, 2013. A copy of the Journal Entry is attached hereto as Exhibit "A." A request for the full record has been filed with this Notice of Appeal.

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

Scott M. Zurakowski (0069040), of
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ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

00507473-1 / 22585.00-0012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail this 5th ~~4th~~ day of March 2013, to:

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COMMON PLEAS COURT
MONROE COUNTY, OHIO

2013 FEB -8 PM 2:47
CLERK OF COURT

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION AND ORDER (On Plaintiff's Motion for Class Action Certification)
	:	

The above styled action is before the Court on the Motion of Plaintiffs for Class Action Certification. The Plaintiffs filed their motion in this action on July 19, 2012. The Defendant, Beck Energy, filed a Memorandum of Law in Opposition to this motion on August 2, 2012. The Plaintiffs filed a Reply Brief in Support of their motion on August 7, 2012. There are affidavits and exhibits attached to the Plaintiffs' Motion also. The Court has reviewed all matters submitted by the parties in this regard.

This case arises out of a form oil and gas lease ("Beck Lease") utilized by the Beck Energy Corporation of Ravenna, Ohio (hereinafter "Beck"), which Beck executed with approximately 415 landowners in Monroe County and approximately 200 to 300 landowners in other South East Ohio counties. These form leases cover approximately 32,280 acres in Monroe County. The leases were entered into over the past approximately 21 years. Plaintiff alleges that Beck has not drilled an oil or gas well on approximately 21,000 acres in Monroe County and several thousand acres in other counties.

EXHIBIT A

This Court has held in this matter that Beck's leases are void on their face as has already been held by this Court. Accordingly, the Plaintiffs are requesting that a class be certified of landowners in Ohio who executed leases with Beck where Beck did not drill a well on their property. The Plaintiffs herein request a certification from this Court to proceed as a Class Action under Civ.R. 23(B)(2). The leases of the Plaintiffs herein have already been declared void against public policy, violative of implied covenants and forfeited.

In entering into leases in Eastern Ohio Beck used a pre-printed lease that it refers to as "Form G&T (83)." These leases were recorded by the Defendant, Beck Energy.

Beck argues that these leases are not all identical, as some of the leases have certain paragraphs crossed out in its standard form and the amount of delayed rental varies.

The Plaintiffs call the Court's attention to Beck's assignment of the deep drilling rights to XTO. Beck made this assignment after this action was filed and recorded it on December 21, 2011. The assignment includes a list of lessors or landowners whose mineral rights Beck sold to XTO.

The Plaintiffs note that for these landowners, they will undoubtedly receive none of the "upfront" money on the lease, nor will they receive any increase in royalty over the base 12.5% in their Beck leases, and whatever new rate Beck negotiated for himself in the assignment, perhaps as much as 17-18%. Thus, Beck may potentially pull $70-80,000,000 in up front money out of Monroe County alone, while the landowners of the County receive nothing. In any event, the assignment is evidence for class certification purposes, as that all of these cases are identical and thus subject to class treatment.

The standard for deciding whether to grant class action certification is set forth in Civ.R.

23(A) which provides that:

RULE 23. Class Actions

(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if
(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.
(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(d) the difficulties likely to be encountered in the management of a class action.

In summary, a Court may exercise its discretion to certify a class when Plaintiff establishes the required prerequisites of Ohio Civil Rule 23 by a preponderance of the evidence. See *Cleveland Board of Education v. Armstrong World Industries Inc.*, 22 Ohio Misc 2d 18. Civil Rule 23 provides that one or more members of a class may sue as representative parties

only if:

(1) the class is so numerous the joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interest of the class.

Plaintiffs satisfy the requirements for class certification as the class is so numerous that joinder is impracticable, there are legal and factual issues common to the class, the claims of the parties are typical of the class and the representative parties will protect the interests of the class.

A motion for class certification is not an occasion for examination of the merits of the case. *Caridad v. Metro-North Commuter R.R.*, 191 F3d 283, 291 (2nd Cir. 1999). There is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action..." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Instead, the Court must determine if the Plaintiffs have proffered evidence to meet each of the requirements of Rule 23. No weighing of competing evidence is appropriate at this stage of the litigation. *Caridad*, 191 F.3d at 293. See also *Cleveland Board of Education v. Armstrong World industries, Inc.* (C.P 1985) 22 Ohio Misc.2d 18. (Holding in ruling on class certification the Court may take the allegations of the complaint as true and the Court should not examine the merits of the case during the certification hearing).

The policy behind class action is to protect members of even a small class from being deprived of their day in Court. See *Blumenthal v. Medina Supply Co.* (2000) 139 Ohio.App.3d 283 citing Amchem Prods., Inc. v. Windsor (1997), 521 U.S. 591, 117 S.Ct. 2231, 138, L.Ed.2d 689; Marks v. C.P. Chem. Co., Inc. (1987), 31 Ohio St.3d 200 31 OBR 398, 509 N.E.2d 1249;

7A Wright, Miller & Kane, Federal Practice and Procedure (2 Ed. 1986), Section 1777; 5 Moore's Federal Practice (3 Ed 1997), Section 23.44.

Correspondingly, the United States Supreme Court has found that a class action is appropriate to "vindicate the rights of individuals who otherwise might not consider it worth the trouble to embark on litigation in which the optimum result might be more than consumed by the cost." *Guaranty National Bank v. Roper*, 445 U.S. 3326, 338 (1980).

a) Joinder of All Members is Impracticable.

Joinder of all plaintiffs is impracticable. Impracticability of joinder is left to the trial court judge's discretion based on the particular facts of the case. See *Logsdon v. National City Bank* (1991), 62 Ohio Misc.2d 449; *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. The requirement is that the class be so numerous that joinder of all members is impracticable. "Impracticable" does not mean "impossible." See *Planned Parenthood Association of Cincinnati v. Project Jericho* (1990) 52 Oliio.St.3d 56, 64, citing Gentry v. C & D Oil Co. (W.D.Ark.1984), 102 F.R.D. 490, 493.

In this regard, there is no "magic number" for determining the number of parties that make joinder impractical. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, *Grubbs v. Rine* (1974), 39 Ohio Misc. 67. Federal Courts have ruled that "[g]enerally, the numerosity requirement is satisfied where the class exceeds 100 members. Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D.Pa.1975); see, also, *Krominick v. State Farm Ins. Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986).

The numerosity requirement in the instant action is satisfied. Based upon a review of the public records of the recorder's office by the Plaintiffs' attorneys, the instant action pertains to approximately 415 Monroe County landowners, who entered into leases with Beck, wherein

Beck did not drill an oil and gas well. A similar review of neighboring counties revealed perhaps 2-300 more. Thus, the number of putative Plaintiffs is so numerous, the numerosity requirement for class action purposes has been satisfied, as the class is so numerous that joinder of all members would be impracticable.

b) Putative Plaintiffs Have Common Questions of Law and Fact.

Plaintiffs also satisfy the requirement that there are questions of law or fact common to the class, as the class consists of Lessors under Beck oil/gas leases on whose property Beck did not drill a well. This Court has already determined that the leases are all void, yet as encumbrances of record in the Lessors' land title, they prohibit the landowners from re-leasing and exploiting the mineral wealth of their lands.

Wide discretion is afforded trial courts in deciding commonality, Caruso v. Celsius Insulation Resources, Inc. (M.D.Pa.1984), 101 F.R.D. 530, 533, but its resolution may be satisfied by the allegations contained in the complaint. Miles v. N.J. Motors, supra, 32 Ohio App.2d at 356, 291 N.E.2d 758. The commonality requirement of a class action does not require that all questions of law or fact which are in dispute be common. *Planned Parenthood Assn. of Cincinnati v. Project Jericho* at 64 citing, Marks v. C.P. Chemical Co. (1987), 31 Ohio St.3d 200; see, also, *Estate of Reed v. Hadley* (2005), 163 Ohio App.3d 464. The commonality requirement does not require that all questions of law or fact be common to every single member of the class; rather, at least one issue must be common to the claims of all the class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §3.10 at 154 (3d ed. 1992); 7A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d, §1763, at 198 (1986). Courts have not considered

commonality a difficult hurdle; the requirement should be "construed permissively." *Hanlon*, 150 F.3d at 1019. Generally courts in Ohio have ruled that the commonality requirement is satisfied when the plaintiffs demonstrate a "common nucleus of operative facts." See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91.

c) Typicality of Claims and Defenses.

All of the Lessors, i.e. putative Plaintiffs, are governed by the same lease/contract, and will be subject to the same Beck defenses. Specifically, Beck leased mineral rights from the Plaintiffs. All of the deep drilling rights under the leases have been assigned to Exxon under one instrument. Thus, Mr. Beck himself is treating these leases as a "class." The question common to all Plaintiffs as has already been answered by this Court is: is that lease void? In the instant action, Plaintiffs satisfy the commonality of questions of law and/or fact in that every single member of the class was governed by the same operative lease terms.

The claims of the class members and the representative parties are typical. Similarly, the defenses of the Defendant as to the class members and class representatives are also typical.

"Typical" has been held to mean a "lack of adversity between the class members." Tober v. Charnita, Inc., (M.D.Pa.1973), 58 F.R.D. 74, 80. Ohio courts have held that plaintiffs' claims satisfy the typicality requirement when the claim arises from the same event, practice, or course of conduct from which the claims of other class members arise and if the plaintiffs' claims are based on the same legal theory. *Baughman v. State Farm Mutual Auto Insurance Company* (2000), 88 Ohio St.3d 480. However, the claims or defenses need not be identical in granting class certification. See *Cincinnati Planned Parenthood, Inc. v. Project Jericho* at 64 citing Federal Class Actions, at 204; 7A Wright & Miller, *supra*, Section 1764; see, also, Twyman v.

Rockville Hous. Auth. (D.C.Md.1983), 99 F.R.D. 314, 321.

In the present matter, the Plaintiffs' claims all arise from the same lease, and the same conduct of Beck in not drilling a well on the Plaintiffs' properties. Correspondingly, Plaintiffs' claims are all based on the same legal theories, which is that the Beck leases are void due to their terms being perpetual, and due to Beck's violation of the implied covenant to drill, and other express and implied covenants. Beck engaged in the same conduct against each of the class members by signing them to perpetual leases and not drilling on their property during the lease's primary term, and in also violating the same express and implied covenants with each of the Plaintiffs. Thus, the class representatives' claims are identical to those of the putative class plaintiffs.

d) Representative Parties Will Fairly and Adequately Protect Class Interests.

In this action Plaintiffs also satisfy the fourth requirement for a class action in that the representative parties will fairly and adequately protect the interests of the class.

Adequacy of representation essentially has two (2) components designed to ensure absent class members' interests are pursued: (1) that the interests of plaintiffs and class members are aligned, and (2) class counsel is qualified to serve the interests of the entire class. See Rule 23(a). They and their counsel have displayed diligence and competence in their handling of this matter to date. Beck's counsel has made a vain attempt to delay these proceedings by the filing of an appeal when no appealable order had been entered by this Court. XTO's counsel attempted to engage in the unauthorized practice of law by appearing at a pretrial without following the proper procedure for admission to the Ohio Bar "pro hoc vice."

(1) Interests of the Class are Aligned.

First, "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees" *Amchem Products v. Windsor*, 521 U.S. 591, 625 (1997). A class representative is generally considered adequate as long as his interests are not antagonistic to that of the other class members. See *Marks v. C.P. Chemical Company, Inc.* (1987), 31 Ohio St.3d 200, see also *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98.

No conflicts exist between Plaintiffs and the class members in this case. The named Plaintiffs challenge the same unlawful conduct and seek the same relief as the class. The right to relief of the named Plaintiffs, like that of the absent members, depends on demonstrating that Beck executed and recorded void perpetual leases with the landowners, while not drilling a well on their property, and/or by violating any other express or implied duties which arose by the lease/contract, or by operation of law.

In the instant matter, the Hustacks, Hubbards and Mr. Majors are adequate representatives of the class. All of them signed the same Beck lease and did not have wells drilled on their property. The proposed class representatives have taken an active role and control in the litigation to protect the class' interests. Further, the Hustacks, Hubbards and Mr. Majors have participated in selection of counsel, communicated with class members, monitored the litigation and vigorously prosecuted the case on behalf of the class.

(2) Counsel is Qualified.

Secondly, class counsel must be qualified to serve the interests of the entire class. Civil Rule 23(a) (4). Ohio courts have held that an attorney is competent to handle a class action if the attorney has experience in handling litigation of the type involved in the case before the class certification is allowed. See *Warner v. Waste Management Inc.* (1988), 36 Ohio St.3d 91, 98.

Plaintiffs' counsel consists of Attorneys Mark Ropchock, Richard Zurz and James Peters. All three of these attorneys have been previously appointed class counsel by this Court in *John Lucio,* et al. v. *Safe Auto Insurance Co.*, et al., Monroe Co. Common Pleas Case No.: 2007-09, which resulted in a multi-million dollar recovery for the class members.

Mark Ropchock, has significant trial experience in handling hundreds of cases in multiple states, has tried multi-million dollar cases to verdict and has over twenty five (25) years of practice as a litigator, most recently receiving a three million dollar ($3,000,000.00) verdict in Portage County, Ohio.

Richard Zurz is a leading personal injury attorney with offices in Akron, Canton and Columbus, Ohio. Richard V. Zurz has thirty (30) years of trial experience and is an active member in good standing with the Akron Bar Association, the Ohio State Bar Association, the American Bar Association, the Ohio Academy of Trial Lawyers, and American Association for Justice_ Mr. Zurz practices in business and commercial litigation, personal injury, employer intentional torts and numerous other areas of the law. He has tried many cases.

James W. Peters also represents Plaintiffs. Mr. Peters is an attorney in Woodsfield, Ohio with over thirty (30) years experience practicing law. Mr. Peters is admitted to the Ohio Supreme Court, West Virginia Supreme Court, U.S. Court of Appeals, Fourth Circuit, U.S. Court of Appeals, Sixth Circuit, both of the U.S. District Courts in Ohio, and both U.S. District Courts in West Virginia. Mr. Peters has served as Special Counsel to the Ohio Attorney General and in private practice. Additionally, Mr. Peters is approved counsel for a number of corporations. Mr. Peters currently serves as a Judge in Monroe County Ohio. Mr. Peters has received a verdict of three million five hundred thousand dollars ($3,500,000.00).

In addition to satisfying the prerequisites set forth in Civil Rule 23(A), Plaintiffs also satisfy the requirements set forth in Civil Rule 23(B). Civil Rule 23(B) requires Plaintiffs to satisfy one (1) of the requirements of subdivision (B) (1)-(3) for certification to be deemed appropriate.

Civ.R. 23(B) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition, * * * (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *

This is the exact situation presented in this case. The party opposing the class herein, Beck Energy, has acted on grounds generally applicable to the entire class, [form lease, no well drilled] and declaratory relief with respect to the class as a whole is appropriate.

In this case, all of the putative plaintiffs herein are landowners in Monroe and its neighboring counties, whose property is subject to and impaired by an oil and gas mineral lease with Beck Energy. Beck Energy will presumably defend every case in an identical fashion since whatever defenses are available under the lease would be applicable to all of the putative plaintiffs since the same terms would control. Beck has not drilled wells on any of the properties within the lease term. All the putative plaintiffs would find it impossible to lease their land to a new driller with the Beck Energy lease presenting a cloud upon the title of their property.

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.

In *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 817 N.E. 2d 59, a 2004 case, the Ohio Supreme Court had the opportunity to address the requirements of class certification ender Rule 23(B) (2). The Supreme Court held that certification under the B (2) subdivision of Rule 23 entailed two requirements: (1) The action must seek primarily injunctive relief, and, (2) the class must be cohesive. *Wilson*, at 541, 63.

a. Injunctive Relief

As outlined above, Plaintiffs' Complaint consists of two counts. Count 1 is a request for declaratory judgment stating at paragraph 20, "Plaintiffs are entitled to a declaratory judgment that the Hustack lease, the Hubbard lease and the Majors lease are therefore forfeited, canceled, unenforceable, voided and held for naught, for reasons including but not limited to, the following * * *. Count II is a quiet title action which states in paragraph 21 (b), "Plaintiffs are entitled to a judgment, pursuant to Ohio Revised Code § 5303.01 quieting their title as to the Hustack acreage, the Hubbard acreage and the Majors acreage as against Defendant by and through the forfeiture, release and cancellation of the Hustack, Hubbard and Majors leases as valid encumbrances of record and by extinguishing any interests which Defendant has or may claim to have in the Hustack, Hubbard and Majors acreage."

These allegations clearly meet the first requirement of *Wilson* that the action must seek primarily injunctive relief. As the *Wilson* case and others have generally described, in making this determination, there is oftentimes confusion as to whether the Complaint specifically

is requesting injunctive relief or damages. The distinction is often difficult to make. In *Wilson*, for instance, Plaintiffs sought medical monitoring. This presented a difficult analysis for the Court as to whether future medical monitoring was primarily in the form of damage or injunctive relief.

In the present action, no such dilemma or difficulty in analysis exists. There simply is no claim in the Complaint for any sort of monetary damages whatsoever. The Complaint exclusively requests declaratory and quiet title relief. Accordingly, the first requirement of 23(B) (2) is satisfied.

b. Cohesiveness

The second requirement for 23(B) (2) certification as discussed in the *Wilson* case is that the class must be cohesive. In discussing the cohesiveness standard, the *Wilson* court noted, although this court has not had an opportunity to address the cohesiveness requirement of Civil Rule 23(B) (2) class certification, there are a "myriad federal cases providing us guidance," *citing Barnes v. Am. Tobacco Co.* (C.A. 3, 1998), 161 F.3d 127, 142-143. The federal cases indicate the cohesiveness analysis is essentially the same as a predominance analysis, which is discussed with much more frequency in the case law.

The predominance inquiry pertains to the focus on legal or factual questions that qualify each class member's case as a genuine controversy. See Hoang v. E*Trade Group Inc. (2003), 151 Ohio App.3d 363, 2003-Ohio-301.

> The predominance test...involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved... [as] a class action.... Schmidt v. Avca Corp. (1984), 15 Ohio App.3d 81.

Plaintiffs must show that common or generalized proof will predominate at trial. See *Lumco Industries, Inc. v..Ield-Wen, Inc.*, 171 F.R.D. 168 (E.D. Pa 1997). Common questions must be able to be resolved for all members of the class in a single adjudication. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 2000. "While potential dissimilarity in remedy is a factor to be considered in determining whether individual questions predominate over common questions, that alone does not prevent a court from certifying a cause as a class action." *Vinci v. American Can Company* (1984), 9 Ohio St.3d 98. See also Lowe v. Sim Refining & Marketing Co. (1992), 73 Ohio App_3 d 563, 572, 597 N.E.2d 1189.

It would be difficult to imagine a case in which the prospective plaintiffs are more cohesive as a class than the within action. As noted, all of these individuals are landowners who are unable to lease their land to new drillers. The court cannot imagine why these landowners would not wish to obtain thousands of dollars per acre for their property in up front money, and potentially hundreds of thousands of dollars in royalties versus the present arrangement with Beck Energy, wherein they are receiving a few dollars per acre per year and no royalties whatsoever.

This group is cohesive to the extent of near identity of interest. Their properties are all covered by the same leases with Beck Energy with the same basic terms. As noted, other than the fact that the names are different on the leases and the acreage and its location are different, the terms of the lease were boilerplate and, thus, since the Court has already found the lease void in one instance, the lease would clearly be void in all. The reverse is also true. There are few individual claims or defenses available in the within action. If certain plaintiffs do have other claims against Beck, those are not part of this lawsuit. Accordingly, the cohesiveness analysis of

the present action under the *Wilson* case is easily established.

There are additional reasons why this case is appropriate for class treatment, such as under a Rule 23(b) (1) analysis. Rule 23(b) (1) defines two related types of class actions, both designed to prevent prejudice to the parties arising from multiple potential suits involving the same subject matter. See *Feret v. Corestates Financial Corp.* 1998 WL 512933 (ED. Pa. 1998), at * 13 citing 1 NEWBERG § 4.03, at 4-10. Rule 23(b) (1) (A) is used to "obviate the actual or virtual dilemma which would ... confront the party opposing the class" if separate lawsuits were decided differently so as to result in "incompatible standards" for that opposing party. See *Feret* at *13, citing WB Music Corp. V. Rykodisc, Inc., 1995 WL 631690, at *3 (E.D.Pa. Oct. 26, 1995) (quoting Fed.R.Civ.P. 23(b) (1) (A) advisory committee notes). Conversely, Rule 23(b) (1) (B) is used when separate actions might lead to adjudications that could be dispositive of nonparty class members' interests or substantially impair their ability to protect their interests.

Correspondingly, Ohio courts have held that there is a risk of inconsistent adjudications when the validity of a lease contract could be found valid in one action and invalid in another, this would lead to incompatible standards of conduct for the defendant. See, *Warner v. Waste Management*, (1988), 36 Ohio St.3d 91, 95. Footnote 2.

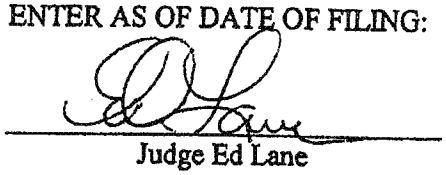
In the instant action, there is a risk that the validity of the Beck lease and course of conduct with the landowners could be valid in one action but invalid in another, thereby leading to inconsistent adjudications. Consequently, conflicting decisions regarding the legality of the Beck lease would affect the interests of all putative Plaintiffs. This is an additional reason why class treatment is needed.

This is an appropriate case for class action status. Therefore, Plaintiffs' Motion for Class

Certification is hereby granted.

SO ORDERED.

ENTER AS OF DATE OF FILING:



Judge Ed Lane

c: Attorney Ropchock/Zurz
Attorney Zurakowski
Attorney Kincaid
Attorney Abbott

THIS IS A FINAL APPEALABLE ORDER AND THERE IS NO JUST REASON FOR DELAY.

EXHIBIT 17

rs

FILED
APR 19 2013
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO)
)
MONROE COUNTY) SS:

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

CLYDE HUPP, et al.,

PLAINTIFFS-APPELLEES,

VS.

BECK ENERGY CORPORATION,

DEFENDANT-APPELLANT.

CASE NO. 12 MO 6

JUDGMENT ENTRY

A series of orders have been entered by the Monroe County Common Pleas Court in underlying civil case number 2011-345. This appeal (12MO6) is from a July 31, 2012 judgment entry granting defendant-appellees summary judgment on a complaint for declaratory judgment and quiet title. The order was entered after the trial court filed a lengthy decision on July 12, 2012 concluding that the lease between the parties was void as against public policy (offend public policy as perpetual leases). And, that appellees were entitled to "forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties." In the July 31, 2012 judgment entry, the trial court acknowledged it was not a final order since motions for class certification and leave to file a third amended complaint had not been ruled on.

On September 10, 2012, this Court noted that the appeal was premature and would not be effective until final judgment was entered. Subsequently, on February 8, 2013, the trial court entered an order denying XTO Energy, Inc.'s (successor in interest in certain rights of Beck Energy Corporation) motion to intervene and granting plaintiffs-appellees' motion or class certification.

XTO Energy, Inc. appealed the separate orders of February 8, 2013, as well as the grant of summary judgment of July 31, 2012 (identified on the notice of appeal by the trial court's decision date of July 12, 2012). That appeal was assigned Appeals Case No. 13MO2. (On March 28, 2013, this Court issued an order in 13MO2 limiting XTO to challenging only the order denying intervention.)

Beck Energy Corporation separately filed an appeal from the February 8, 2013 entry on March 7, 2013. That appeal was assigned Appeals Case No. 13MO3.

Given the above case history, we now address appellant's March 8, 2013 Notice of Potential Non-Final Appealable Orders.

Despite the orders of February 8, 2013 and appellees withdrawal of their motion for leave to file a third amended complaint, appellants contend that the July 31, 2012 judgment entry may not be a final or appealable order. Arguably, the class has not been defined. Second, certain counterclaims filed by Beck Energy remain pending for determination.

Appellant seeks a limited remand to allow the trial court to clearly identify the class membership and include Civ.R. 54(B) language to allow this appeal from the July 31, 2012 judgment entry to proceed.

Based on the record of trial court orders filed to date, a limited remand is ordered for sixty (60) days to allow the trial court to take further action in aid of this appeal, as identified above, should it deem it appropriate to do so at this point in the proceedings.

So Ordered. Copy to counsel and Judge Ed Lane.

JOSEPH J. VUKOVICH,

CHERYL L. WAITE,

MARY DeGENARO, JUDGES.

EXHIBIT 18

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 JUN 10 AM 11:21

BETH ANN ROSE
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	JOURNAL ENTRY

The above styled action is before the Court on remand from The Court of Appeals of Ohio, Seventh District, for Monroe County, Ohio. The Court of Appeals remanded this case by a Judgement Entry filed on April 19, 2013. This remand is limited to two issues. This Court is to clearly define the class and review Defendant's counter claims.

On May 6, 2013 this Court conducted a pre-trial by phone with the attorneys for the respective parties. Thereafter, this Court entered a scheduling order for the filing of briefs. That order has been complied with.

The first issue this Court must address is the definition of the class. The Plaintiffs assert that the class should be defined to include all persons who are lessors of property in the State of Ohio, or who are successors in interest, under the standard form oil and gas lease with the Defendant, Beck Energy Corporation, known as "G&T (83)." The Defendant notes that the Plaintiffs in their amended Motion for Class Certification, only sought to have the class consist of Monroe County landowners.

For a lawsuit to be maintained as a class action under Civ.R. 23, an identifiable class

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

must exist and the definition of the class must be unambiguous. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91. A description of a class is sufficiently definite if it is administratively feasible for the Court to determine whether a particular individual is a member. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67. A trial court has wide discretion in describing a class and can sua sponte modify a class description requested by a party, as long as the chosen description is unambiguous such that all plaintiffs are sufficiently identifiable. *Ritt v. Billy Blanks Enterprises*, 2003 Ohio 3645 (8th Dist.). (Also, see *Baughman v. State Farm Mutual Automobile Insurance Company* (2000), 88 Ohio St.3d 480, where the Ohio Supreme Court sua sponte modified a class description). In fact, the law in Ohio not only permits but encourages a trial court to modify a class. *Konarzewski v. Ganley, Inc.*, 2009 Ohio 5827 (8th Dist.).

Accordingly, this Court has discretion to describe the certified class in any manner which complies with Civ. R. 23 and the interpretive case law. Therefore, this Court hereby determines that the definition of the class in this action shall be 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)", 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."

This decision, this Court's prior summary judgment, declaratory judgment and quiet title relief applies in this case to all members of the class in existence on September 29, 2011, the date of filing the original class action complaint in this action.

This is the class delineation that best serves the interests of finality, judicial economy and justice. Determination of the members of this class will not be difficult. This is a clear and unambiguous class definition. It will resolve these issues once and for all and prevent years of

numerous and protracted litigation.

The Plaintiffs seek this Court to strike the Defendant Beck Energy Corporation's Answer and Counter Claims for being filed out of rule. The Defendants Memorandum in Opposition to Plaintiff's Motion For a Further Order in Aid of Appeal sets out in detail what this Court finds to be an accurate time line of the relevant dates on this issue. This Court finds that Beck Energy Corporation's Answer and Counter Claims were timely filed. However, this Court specifically finds that the Defendant's Counter Claims for declaratory judgment, permanent injunction, and quiet title are moot and res judicata as all of the issues raised in the Defendant's answer and counter claims have already been decided by this Court in its prior decisions. The Defendant has fully participated and argued its position in regard to these issues. Additionally, Defendant's counter claim for estoppel fails to state a viable claim as the doctrine of estoppel does not create a cause of action, it prevents a party from raising a claim it would otherwise have.

It is hereby ORDERED that:

(1) The class which was certified in the February 8, 2013 Decision and Order on Plaintiffs' Motion for Class Certification is now defined 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)", 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."

and;

(2) The Decision On Pending Motion of July 12, 2012, the Journal Entry of July 31,

2012, the Decision And Order on Plaintiffs' motion for Class Action Certification of February 8, 2013; the Decision And Order on XTO's Motion to Intervene of February 8, 2013, and any and all prior Docket and Journal Entries entered herein, including the declaratory, quiet title and other relief granted therein, shall apply to each and every member of the certified class; and

(3) The Answer and Counterclaims of the Defendant are moot in as much as the issues raised therein are now moot and res judicata; and

(4) The Journal Entry of July 31, 2012 is a final appealable order and there is no just reason for delay.

(5) This Journal Entry is a final appealable order and there is no just reason for delay.

ALL OF WHICH IS ORDERED AND ADJUDGED ACCORDINGLY.

ENTER AS OF DATE OF FILING:

Judge Ed Lane

c: Attorney Ropchock/Zurz
Attorney Zurakowski/Reaves
Attorney Kincaid/Taylor
Attorney Abbott
Attorney Peters
Attorney Pollis

EXHIBIT 19

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 JUN 24 PM 2:26

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.	)	CASE NO. 2011-345
	)	
Plaintiffs	)	JUDGE ED LANE
	)	
vs.	)	
	)	**MOTION OF PLAINTIFFS FOR**
BECK ENERGY CORPORATION	)	**APPROVAL OF NOTICE TO CLASS**
	)	**AND ESTABLISHMENT OF**
Defendant	)	**METHOD OF SERVICE**

Now come Plaintiffs, by and through counsel, and respectfully move the Court: (1) to approve their proposed Notice to all members of the plaintiff class (hereinafter "Class") certified herein, and (2) to establish the method by which said Class is to be provided with notice as to the existence of this lawsuit and their rights and options as Class members. A copy of the proposed Notice is attached as Exhibit A.

Respectfully submitted,

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Mark A. Ropchock (0029823)
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Akron OH 44308-1135
(330) 762-0700
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rzurz@slaterzurz.com
mropchock@slaterzurz.com

Attorneys for Plaintiffs

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

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MEMORANDUM IN SUPPORT OF MOTION

I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

Plaintiffs brought this action seeking a declaration that certain form oil and gas leases entered between Ohio landowners and Defendant Beck Energy Corporation (Beck) are void, and quiet title relief. On July 31, 2012, the Court granted the plaintiffs' motion for summary judgment. Journal Entry, July 31, 2012.

On February 8, 2013, this Court certified this case as a Civ.R. 23(B)(2) class action. Decision and Order on Plaintiffs' Motion for Class Action Certification at 15-16. The Class includes "landowners in Ohio who executed leases with [Defendant] Beck [Energy Corporation] where Beck did not drill a well on their property." *Id.* at 2. Beck timely appealed that order. By a judgment entry filed on April 19, 2013, the Court of Appeals remanded this case so that this Court could, *inter alia*, clearly define the Class. Journal Entry, Monroe County Court of Common Pleas, June 10, 2013.

By its Journal Entry filed June 10, 2013, the 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)", 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 2.

The Court further provided that "this decision, this Court's prior summary judgment, declaratory judgment and quiet title relief applies in this case to all members of the class in existence on September 29, 2011, the date of filing the original class action complaint in this action." *Id.* As this Court observed, the determination of class

members will not be difficult, as the Class has been clearly and unambiguously defined. *Id.*

No notice of this lawsuit has been given to the Class. However, in that Beck mails quarterly "delay rental" payments to its lessors on whose land no well has been drilled, the names and addresses of the Class members are readily ascertainable from Beck's records. Plaintiffs now seek approval of their proposed Notice to Class members, and further request that the Court establish the method by which notice is to be delivered.

II. LAW AND ARGUMENT

Notice to class members in a case certified pursuant to Civ.R. 23(B)(2) is not expressly required. *See* Civ.R. 23(C)(2); *Intl. Union, United Auto., Aerospace, and Agricultural Implement Workers*, 497 F.3d 615, 630 (6th Cir. 2007); *Penland v. Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986); *Alexander v. Aero Lodge No. 735, Intl. Assn. of Machinists and Aerospace Workers, AFL-CIO*; 565 F.2d 1364, 1373 (6th Cir. 1977). However, it is within the court's discretion to order that notice be given in a Civ.R. 23(B)(2) case:

> In the conduct of actions to which this rule applies, the court may make appropriate orders * * * 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[.]"

Civ.R. 23(D)(2). In *Sweet v. Gen. Tire & Rubber Co.*, 74 F.R.D. 333, 337 n.12, the court observed that while prejudgment notice may not be required, it is within the court's

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discretion "to order the giving of notice at some later time, *i.e.* if the plaintiffs prevail on the merits."

In non-class action litigation, Civ.R. 58(B) requires that upon signing a judgment, the court order service of notice upon the parties in the manner prescribed by Civ.R. 5(B). Civ.R. 5(B) permits service upon represented parties by serving their counsel. In this case, although the attorneys for both the named plaintiffs and the Class have notice of the judgment and the status of this case, Class counsel cannot readily inform Class members because the names and addresses of the vast majority of Class members are not known.

In class action litigation, the trial court "must act as the guardian of the rights of the absentee class members." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 337 (E.D. Wis. 2012).

> Providing adequate class notice is among the "important * * * fiduciary duties shared by counsel and the court" and "ensures that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests."

Rowe v. E.I. du Pont de Nemours and Co., D. N.J. Nos. 06-1810 (RMB/AMD), 06-3080 (RMB/AMD), 2011 U.S. Dist. LEXIS 96450, *24 (Aug. 26, 2011). *See also Greenfield v. Villager Inds., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 747 (N.D. Ohio 1975).

With respect to Civ.R. 23(B)(3) cases, the rule provides for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Civ.R. 23(C)(2). Where the names and addresses of class members of the class can be easily ascertained, due process

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dictates that the best notice practicable under the circumstances would be individual notice. *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 126 (3d Cir. 2012). Where class members have an ongoing business relationship with the defendant, it is not uncommon for a mailing list to be compiled from the defendant's records. *E.g., Larson* at 126-30; *Mamula v. Satralloy, Inc.*, 578 F.Supp. 563, 572 (S.D. Ohio 1983).

In the instant case, judgment has been granted in favor of both the named individual plaintiffs and the Class. Without notice of this case, Class members cannot decide whether to exercise their rights under Civ.R. 23(D) nor determine how best to utilize or protect their mineral rights.

Plaintiffs do not know the names and addresses of all members of the Class, or in which counties they reside. In that Beck mails quarterly delay rental payments to every lessor upon whose land no well has been drilled, a list of all Class members should be easily ascertainable from Beck's records. Although this Court has declined to require Beck to produce more extensive discovery as to its lessors, Plaintiffs herein submit that the list Beck uses for the mailing of delay rental payments, containing Class members' names and addresses--and only Class members' names and addresses--would be the most expedient basis for determining the identities of all Class members.

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III. CONCLUSION

It is critical that absentee Class members have knowledge of these proceedings, in which final judgment directly affects their interests. The "best notice practicable under the circumstances" herein would be individual notice, served by mail upon each Class member. Accordingly, Plaintiffs respectfully request that the Court approve the proposed Notice attached as Exhibit A, and establish the procedure by which notice is to be provided to each Class member.

In that only Beck has a readily accessible list of the Class members' names and addresses, Plaintiffs request that Beck be required to make available said list under such terms as the Court deems just and proper.

Respectfully submitted,

Richard V. Zurz, Jr. (0007978)
Mark A. Ropchock (0029823)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum in Support was served by ordinary U.S. mail on this 24 day of June, 2013, upon the following:

Scott M. Zurakowski
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY
4775 Munson St. NW
P.O. Box 36963
Canton OH 44735-6963

Attorney for Defendant

Richard W. Zurz, Jr. #0007978
Attorney for Plaintiffs

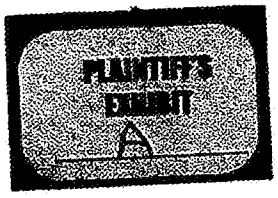
If you own land in Ohio that is subject to an oil and gas lease with Beck Energy Corporation, and if Beck Energy has not drilled a well on your land, a class action lawsuit may affect your rights.

A court authorized this Notice. This is not a solicitation from a lawyer.

- Ohio landowners have sued Beck Energy Corporation, claiming that a certain form lease, designated "Form G&T (83)," violates public policy and is void.
- The Court has allowed the lawsuit to be a class action on behalf of all Ohio landowners:
  - (1) whose land is subject to the "Form G&T (83)" lease with Beck Energy, if
  - (2) Beck Energy has not drilled a well within the time period specified in paragraph 3 of the lease, and
  - (3) the time period specified in paragraph 3 of the lease expired on or before September 29, 2011.
- The Court has ruled that these leases, identified as "Form G&T (83)" leases on the first page just above the date and the lessors' names, are void because these leases can be extended indefinitely even if Beck Energy never drills a well on the landowners' property.
- The Court has also ruled that these leases are forfeited because Beck Energy breached the implied covenant to reasonably develop.
- Beck Energy has appealed the Court's rulings that the leases are void and forfeited, and that this case can be a class action. This means that the Court's rulings could be overturned at some point in the future.
- Class members will be notified of the Court of Appeals' ruling.
- The lawsuit seeks only "equitable" relief–a declaration that the Beck Energy form leases are void, and "quiet title" relief removing the Beck Energy leases as an encumbrance on title to class members' land, thereby enabling class members to enter new leases with Beck Energy or any other company of the class member's choice, or to not enter into a lease.
- No money damages have been requested in the lawsuit, because successful resolution of the lawsuit will enable class members to bargain for new leases that could result in higher up-front payments and higher royalties than what is provided for in the Beck Energy leases.

What you must do:

Contact the attorneys identified below as "class counsel" if there is a better address at which you would prefer to receive notices concerning this lawsuit.



Landowners who fit within the description of the class are automatically included as class members in the lawsuit. You do not have to do anything to remain a member of the class, nor can you "opt out" of the class.

You will automatically receive notice of future court decisions that directly impact on whether the "Form G&T (83)" Beck Energy leases are void or valid.

You will automatically receive notice if a higher court agrees that this case can remain a class action, or whether a higher court decides that this case cannot be a class action.

For further information on the lawsuit or your rights at this stage of the case, please contact the attorneys representing the class ("class counsel"):

Richard V. Zurz, Jr., Esq.
Mark A. Ropchock, Esq.
SLATER & ZURZ, LLP
One Cascade Plaza, Suite 2210
Akron OH 44308-1135

(330) 762-0700 *OR* (800) 297-9191

EXHIBIT 20

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 JUL -3 PM 2: 34

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.,	
Plaintiffs-Appellees,	CASE NO. 2011-345
vs.	JUDGE ED LANE (Sitting by assignment)
BECK ENERGY CORPORATION,	
Defendant-Appellant.	

NOTICE OF APPEAL

Notice is hereby given that Defendant, Beck Energy Corporation, by and through the undersigned counsel, hereby appeals to the Court of Appeals, Monroe County, Ohio, Seventh Appellate District, from the Journal Entry of the Monroe County Court of Common Pleas, in Case No. 2011-345, entered on June 10, 2013. A copy of the Journal Entry is attached hereto as Exhibit "A." A request for the full record has been filed with this Notice of Appeal.

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

00507473-1 / 22585.00-0012

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail this 2nd day of July 2013, to:

James W. Peters
Peters Law Office Co., L.P.A.
107 West Court Street
Woodsfield, Ohio 43793

Richard V. Zurz, Jr.
Slater & Zurz, LLP
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Akron, Ohio 44308-1135

Kevin C. Abbott
Reed Smith, LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222

Andrew S. Pollis
1305 Yellowstone
Cleveland, Ohio 44121

Mark A. Ropchock
Slater & Zurz, LLP
One Cascade Plaza, Suite 2210
Akron, Ohio 44308-1135

Clair E. Dickinson
Brouse McDowell
388 S. Main Street, Suite 500
Akron, Ohio 44311

William J. Taylor
Kincaid, Taylor & Geyer
50 North 4th Street
Zanesville, Ohio 43701

Scott M. Zurakowski

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 JUN 10 AM 11:21

BETH ANN ROSE
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	JOURNAL ENTRY

The above styled action is before the Court on remand from The Court of Appeals of Ohio, Seventh District, for Monroe County, Ohio. The Court of Appeals remanded this case by a Judgement Entry filed on April 19, 2013. This remand is limited to two issues. This Court is to clearly define the class and review Defendant's counter claims.

On May 6, 2013 this Court conducted a pre-trial by phone with the attorneys for the respective parties. Thereafter, this Court entered a scheduling order for the filing of briefs. That order has been complied with.

The first issue this Court must address is the definition of the class. The Plaintiffs assert that the class should be defined to include all persons who are lessors of property in the State of Ohio, or who are successors in interest, under the standard form oil and gas lease with the Defendant, Beck Energy Corporation, known as "G&T (83)." The Defendant notes that the Plaintiffs in their amended Motion for Class Certification, only sought to have the class consist of Monroe County landowners.

For a lawsuit to be maintained as a class action under Civ.R. 23, an identifiable class

EXHIBIT A

must exist and the definition of the class must be unambiguous. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91. A description of a class is sufficiently definite if it is administratively feasible for the Court to determine whether a particular individual is a member. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67. A trial court has wide discretion in describing a class and can sua sponte modify a class description requested by a party, as long as the chosen description is unambiguous such that all plaintiffs are sufficiently identifiable. *Ritt v. Billy Blanks Enterprises*, 2003 Ohio 3645 (8th Dist.). (Also, see *Baughman v. State Farm Mutual Automobile Insurance Company* (2000), 88 Ohio St.3d 480, where the Ohio Supreme Court sua sponte modified a class description). In fact, the law in Ohio not only permits but encourages a trial court to modify a class. *Konarzewski v. Ganley, Inc.*, 2009 Ohio 5827 (8th Dist.).

Accordingly, this Court has discretion to describe the certified class in any manner which complies with Civ. R. 23 and the interpretive case law. Therefore, this Court hereby determines that the definition of the class in this action shall be 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)", 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."

This decision, this Court's prior summary judgment, declaratory judgment and quiet title relief applies in this case to all members of the class in existence on September 29, 2011, the date of filing the original class action complaint in this action.

This is the class delineation that best serves the interests of finality, judicial economy and justice. Determination of the members of this class will not be difficult. This is a clear and unambiguous class definition. It will resolve these issues once and for all and prevent years of

[illegible]rous and protracted litigation.

The Plaintiffs seek this Court to strike the Defendant Beck Energy Corporation's Answer and Counter Claims for being filed out of rule. The Defendants Memorandum in Opposition to Plaintiff's Motion For a Further Order in Aid of Appeal sets out in detail what this Court finds to be an accurate time line of the relevant dates on this issue. This Court finds that Beck Energy Corporation's Answer and Counter Claims were timely filed. However, this Court specifically finds that the Defendant's Counter Claims for declaratory judgment, permanent injunction, and quiet title are moot and res judicata as all of the issues raised in the Defendant's answer and counter claims have already been decided by this Court in its prior decisions. The Defendant has fully participated and argued its position in regard to these issues. Additionally, Defendant's counter claim for estoppel fails to state a viable claim as the doctrine of estoppel does not create a cause of action, it prevents a party from raising a claim it would otherwise have.

It is hereby ORDERED that:

(1) The class which was certified in the February 8, 2013 Decision and Order on Plaintiffs' Motion for Class Certification is now defined 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)", 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."

and;

(2) The Decision On Pending Motion of July 12, 2012, the Journal Entry of July 31,

2012, the Decision And Order on Plaintiffs' motion for Class Action Certification of February 8, 2013, the Decision And Order on XTO's Motion to Intervene of February 8, 2013, and any and all prior Docket and Journal Entries entered herein, including the declaratory, quiet title and other relief granted therein, shall apply to each and every member of the certified class; and

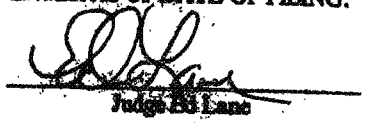
(3) The Answer and Counterclaims of the Defendant are moot in as much as the issues raised therein are now moot and res judicata; and

(4) The Journal Entry of July 31, 2012 is a final appealable order and there is no just reason for delay.

(5) This Journal Entry is a final appealable order and there is no just reason for delay.

ALL OF WHICH IS ORDERED AND ADJUDGED ACCORDINGLY.

ENTER AS OF DATE OF FILING:



Judge Eli Lanc

c: Attorney Ropchock/Zurz
Attorney Zurzikowski/Reaves
Attorney Kincaid/Taylor
Attorney Abbott
Attorney Peters
Attorney Pollis

EXHIBIT 21

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 JUL -9 PM 2:31

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE (Sitting by Assignment)

DEFENDANT BECK ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR APPROVAL OF NOTICE TO CLASS AND ESTABLISHMENT OF METHOD OF SERVICE

Now comes the Defendant, Beck Energy Corporation, (hereinafter "Beck Energy"), by and through the undersigned counsel, and files this Memorandum in Opposition to Plaintiff's Motion for Approval of Notice to Class and Establishment of Method of Service (hereinafter "Plaintiffs' Motion"). A Memorandum in Support is attached hereto and incorporated herein by reference.

Respectfully submitted:

Scott M. Zurakowski (By F.A.X.)

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W./P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____ Deputy Clerk
COMMON PLEAS COURT MONROE COUNTY, OHIO

MEMORANDUM IN SUPPORT OF OPPOSITION

I. INTRODUCTION/SUMMARY

Plaintiffs seek to have this Court approve their proposed Notice about the litigation, to all members of the Plaintiff class (hereinafter "Class"), and to establish the method by which said Class is to be notified about this lawsuit regarding their rights and options as Class members. The Court must deny Plaintiffs' Motion based on four separate and distinct reasons.[1] First, Civ. R. 23 does not require any notice to be given to Class members because the Class sought and was granted declaratory relief. As a Civ. R. 23(B)(2) class action seeking declaratory relief, no notice is required to be given to the Class. Second, the Court must deny Plaintiffs' Motion because it does not have jurisdiction to address issues of notice and/or the method and manner or the service of said notice. Third, Plaintiffs' Motion is simply premature as Beck Energy filed a Motion for Stay seeking to stay the Court's decisions concerning Plaintiffs' Motion for Summary Judgment, class certification and class composition. Finally, any notice to the Class, at this time, would confuse Class members and result in an unnecessary and costly expense to Beck Energy.

II. LAW AND ARGUMENT

A. Civ. R. 23 does not require notice to Class members.

Civ. R. 23 does not require any notice to Class members since Plaintiffs' Complaint seeks to have the Court declare the Beck Energy GT 83 oil and gas lease void. *See* Plaintiffs' Second Amended Class Action Complaint at Count I. Also, Plaintiffs' Complaint does not seek monetary damages. *Id.*

[1] In responding to Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service, Defendant does not waive its argument that the Court improperly certified a class action in violation of the rule against one-way intervention.

Civ. R. 23 recognizes two distinct types of class action cases. Civ. R. 23(B)(2) classes require injunctive or declaratory relief to be the primary relief requested. Civ. R. 23(B)(3) classes generally seek monetary damages. Whether Class members are entitled to notice and the ability to opt out of the Class is dependent upon the type of relief sought.

The requirements under Civ. R. 23(B)(2) and (B)(3) are distinctive because of the policies supporting each provision, as well as Civ. R. 23(C)'s notice and opt out provisions. Civ. R. 23(B)(2) is designed for situations where the Class members, as a whole, request declaratory or injunctive relief, and that relief is the primary relief sought. "Certification under the rule that allows for class actions requesting injunctive relief is dependent upon the form of relief primarily sought; thus, if injunctive relief is merely incidental to the primary claim for money damages, certification under the rule is inappropriate." *Blankenship v. CFMOTO Powersports, Inc.*, 166 Ohio Misc.2d 21, 2011-Ohio-6946, 961 N.E.2d 750, ¶52.

Monetary damages may be requested as relief under Ohio Civ. R. 23(B)(2), but the declaratory relief must be the primary relief. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶17. Thus, the Court requires a certain level of cohesiveness between the Class members that goes beyond the requirements of Ohio Civ. R. 23(B)(3). *Id.* at ¶24, 817 N.E.2d 59. This increased level of cohesiveness required is partially due to the inability of its Class members to opt out of the Class. *Id.* These (B)(2) Class members are bound by favorable and unfavorable decisions by the Court, thus the need for an additional cohesiveness requirement recognized by the courts. "[T]he cohesiveness requirement enunciated by both this court and the Supreme Court extends beyond Rule 23(B)(3) class actions. Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class. This is so because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Wilson,*

supra, at ¶24, 817 N.E.2d 59, citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-143 (3rd Cir. 1998).

Pursuant to Civ. R. 23, (B)(2) classes are not required to receive notice and they are not permitted to opt out of the class. However, Plaintiffs' claim that said notice is necessary because "without notice of this case, Class members cannot decide whether to exercise their rights, nor determine how best to utilize and protect their mineral rights. (Plaintiffs' Motion at p. 5). Plaintiffs' reasoning is baseless as the Class members are bound by the judgment of this Court. In other words, there is absolutely no decision for the Class members to make or rights of the Class members to be exercised. The Class members cannot opt out of this Court's decision. Plaintiffs' Motion, filed under the guise of the Notice and Method and Manner of Service, is really an attempt by Plaintiffs' counsel to now financially profit by contacting Class members and inducing them to sign an exorbitant Fee Agreement, for the marketing and sale of the Class members' lease rights. As Plaintiffs admit in Plaintiffs' Motion, notice to Class members in a case certified pursuant to Civ. R. 23(B)(2) is not required. (Plaintiffs' Motion at p. 3). On this basis alone, the Court must deny Plaintiffs' Motion.

B. **The Court lacks jurisdiction to decide Plaintiffs' Motion because Beck Energy appealed this Court's July 12, 2012 and July 31, 2012, Judgment Entries; this Court's February 8, 2013, Judgment Entry; and this Court's June 10, 2013, Judgment Entry.**

On August 28, 2012, Beck Energy appealed this Court's Judgment Entry granting Plaintiffs' Motion for Summary Judgment. Thereafter, on March 7, 2013, Beck Energy filed its Notice of Appeal of this Court's decision certifying the class. Finally, on July 3, 2013, Beck Energy filed its Notice of Appeal of this Court's decision defining the Class. As a result of these pending appeals, the Court lacks jurisdiction to entertain Plaintiffs' Motion since the Motion does not present a collateral issue for the Court's determination.

First, this Court was divested of jurisdiction once Beck Energy filed its Notices of Appeal. "[W]hen an appeal is pending, the trial court is divested of jurisdiction except to take action in aid of the appeal * * *" *Garcia v. Wayne Homes, LLC*, 7th Dist. No. 2002 CA 35, 2002-Ohio-7286, ¶3, citing *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994). The purpose of the court of appeals' limited remand, on April 19, 2013, was for that specific purpose – to aid in the appeal – by providing clarification of class membership and addressing Beck Energy's pending counterclaims in order to render a final appealable order. The court of appeals granted the Court no additional jurisdiction other than what was specifically set forth in its Judgment Entry. Therefore, the Court may only take such action as is permitted by the limited remand. Addressing Plaintiff's motion, after notices of appeal have been filed, is clearly not within the Court's jurisdiction for purposes of the limited remand.

Second, a trial court is not permitted to take any action that is "inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." Rather, the trial court's retained jurisdiction concerns only collateral issues such as contempt, appointment of a receiver, and injunction. *Faubel v. Faubel*, 7th Dist. Nos. 05-MA-101, 05-MA-210, 2006-Ohio-4679, ¶58. *Id.* As this Court recognized in denying Plaintiffs' Motion to Compel discovery, in order to obtain information needed to communicate with Class members, granting any motion which would permit such contact at this point in the litigation would be inconsistent with the court of appeals' jurisdiction since one of the issues on appeal is whether this Court properly certified a class. If the court of appeals determines the Court erred in certifying the Class, and reverses the Court's Decision and Order, there will be no need for Plaintiffs to contact the potential Class members.

Plaintiffs filed this Motion in response to the Court's Judgment Entry of June 10, 2013, defining the Class and the Court's February 8, 2013, Judgment Entry certifying the Class. Beck Energy appealed both of those decisions to the Seventh District Court of Appeals and, as a result, this Court is divested of jurisdiction since Plaintiffs' Motion does not concern merely a collateral issue.

C. **Any decision by this Court prior to ruling on Beck Energy's Motion for Stay would be premature, confusing and result in unnecessary costs for Beck Energy.**

On July 8, 2013, Beck Energy filed a Motion for Stay seeking to have this Court stay enforcement of three judgment entries entered by this Court. Specifically, Beck Energy sought to stay the enforcement of this Court's Judgment Entry dated July 12, 2012, and July 31, 2012 - granting Plaintiffs' Motion for Summary Judgment; this Court's Judgment Entry dated February 8, 2013 – certifying the Class; and this Court's Judgment Entry dated June 10, 2013 – defining the Class. Any decision on Plaintiffs' Motion is premature for several reasons.

First, should this Court grant Beck Energy's Motion for Stay, Plaintiffs' Motion is moot, pending the outcome of the three appeals. Second, if this Court grants Plaintiffs' Motion, the result would confuse Class members and create unnecessary costs to Beck Energy, in light of the fact that Beck Energy's Motion for Stay could potentially render the Notice moot, not to mention the further confusion which would result, depending on the decisions from the Seventh District Court of Appeals.

Third, granting Plaintiffs' Motion could also result in additional litigation concerning the rights under the Beck Leases given any further entries by this Court or the court of appeals concerning a stay of execution, or the effect of the doctrine of *lis pendens* or the effect and validity of any subsequent leases negotiated by potential plaintiffs. Furthermore, as this Court is aware, it is common for oil and gas leases to contain warrants of title concerning a

lessor's ability to enter into an oil and gas lease, which would potentially be breached upon signing if a potential Class member were to negotiate and enter into an oil and gas lease prior to a decision from the court of appeals, potentially causing additional litigation and unnecessary expense to potential Class members.

Any notice by the Plaintiffs, at this stage in the litigation, is simply premature and would result in confusion to the Class members. In addition, it may result in Beck Energy paying for notice to the Class members unnecessarily, depending upon this Court's decision on Beck Energy's Motion for Stay and the Seventh District Court of Appeals' decision on the three pending appeals. Finally, any notice by the Plaintiffs has the ability to cause needless expense and litigation involving potential Class members as well as third purties.

D. **Plaintiffs' attempt to request a copy of Beck Energy's delay rental payment list is nothing more than an attempt to circumvent this Court's Judgment Entry denying Plaintiffs' Motion to Compel.**

Plaintiffs' suggestion that they would be satisfied with this Court ordering Beck Energy to disclose its delay rental payment list is nothing more than an attempt to circumvent the Court's Judgment Entry denying Plaintiffs' Motion to Compel. On April 30, 2013, Plaintiffs requested that Beck Energy be compelled to produce certain documents, including, among other things, a copy of every oil and gas lease concerning realty located in Ohio. Beck Energy filed its Memorandum in Opposition claiming that since all pending decisions made by the Court had been appealed to the Seventh District Court of Appeals, this Court was divested of jurisdiction and could not rule on Plaintiffs' Motion to Compel. On May 31, 2013, this Court denied Plaintiffs' Motion stating: "[T]he Court does not find the Motion to Compel and Request for Production of Documents to be well taken and hereby orders the same DENIED."

Furthermore, Plaintiffs' disingenuously state in their Motion that "only Beck has a readily accessible list of the Class members' names an addresses." However, each Ohio County

Recorder's office maintains a publically available list of the any Class members' names and addresses, as each appear in the Beck Energy leases of record.

Despite this Court's Judgment Entry denying Plaintiffs' Motion to Compel, and the public availability of this information, Plaintiffs' yet again seek information from Beck Energy that this Court has previously determined is not needed at this time because it no longer has jurisdiction over these matters.

E. **Should this Court grant Plaintiffs' Motion, any notice should include a statement of explanation regarding Slater and Zurz's fee agreement and *lis pendens*.**

If this Court grants Plaintiffs' Motion, Plaintiffs' proposed Notice should be amended to include:

- A statement of explanation regarding Slater & Zurz's fee agreement cautioning each potential plaintiff to consult with independent counsel; and
- Notice of *lis pendens*.

Plaintiffs' proposed Notice fails to include two very important statements, which each class member should know. First, Plaintiffs' fee agreement would result in any class member paying Slater & Zurz 30% of any lease signing bonus; paying Slater & Zurz an additional 20% for the renewal of said lease; and assigning to Slater & Zurz a 2% royalty interest on any oil and gas income generated for the lifetime of any well drilled on the client's property ("e.g., if client signs a lease to receive a gross 15.5% royalty, less 2% royalty to attorneys, equals a net royalty to client of 13.5%." *See* Fee Agreement at paragraph 2, attached hereto as Exhibit "A").

Exhibit "A" includes as an exhibit Case No. 2012 01 0275, captioned *Beck Energy Corporation v. Richard V. Zurz, Jr., et. al.*, filed in the Summit County Court of

Common Pleas. In that case, at no time did Slater & Zurz or any defendant to said action deny the authenticity of said fee agreement, nor deny requesting potential clients to execute said fee agreement. While Slater & Zurz claims that its litigation is nothing more than an attempt to break an oil and gas lease, with no financial interest, this could not be further from the truth. Class members would be required to pay Slater & Zurz 30% of any lease signing bonus, an amount that is six times the normal and customary market rate for such a transaction; require Class members to pay Slater & Zurz an additional 20% if and when the lease renews; and require each landowner to permanently assign to Slater & Zurz 2% of the royalty on all oil and gas produced by the well. Such a hook is something this Court should require to be provided to Class members, in order to protect them from Slater & Zurz's fee agreement. Plaintiffs' cite *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 337 (E.D. Wis.2012) for the proposition that a trial court "must act as the guardian of the rights of absentee Class members [sic],"[2] which quote Beck Energy agrees should govern any notice given now or in the future to potential Class members concerning any fee arraignment that may be presented by counsel for Plaintiffs.

It is abundantly clear that Plaintiffs' motivation in filing the Motion for Approval of Notice to Class and Establishment of Method of Service is primarily to circulate and secure engagement letters requiring Class members to pay Slater & Zurz 30% of any lease signing bonus; 20% if and when the lease renews; and to permanently assign to Slater & Zurz 2% of the royalty on all oil and gas produced by the well.

---

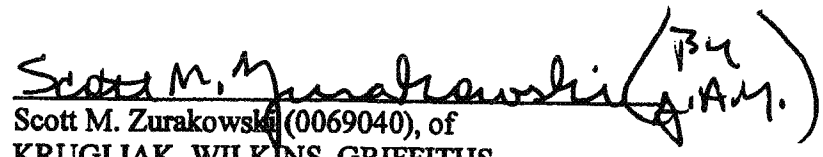
[2] Although not properly cited as such in Plaintiffs' Motion, said quote was the court in *Reliable* quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3rd Cir.1973), which in full provided: "Responsibility for compliance is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class, for, in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court. The ultimate responsibility of course is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power." (Emphasis Added.) (internal citations omitted) *Id.* at 832.

In addition, Class members should be notified of the doctrine of *lis pendens*, as this Court's underlying decisions remain on appeal and subject to the decision of the Seventh District Court of Appeals and also the Ohio Supreme Court. Should the Court find Notice to Class members appropriate at this state of the proceedings, Beck Energy has attached, as Exhibit "B", its proposed Notice.

III. CONCLUSION

For the foregoing reasons, Beck Energy respectfully requests that this Court deny Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service.

Respectfully submitted:



Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W./P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT

PROOF OF SERVICE

A copy of the foregoing was served on July 9, 2013, pursuant to Civ.R. 5(B)(2)(c), by mailing it by United States mail to:

James W. Peters
Peters Law Office Co., L.P.A.
107 West Court Street
Woodsfield, Ohio 43793

Mark A. Ropchock
Richard V. Zurz
Slater & Zurz, LLP
One Cascade Plaza, Suite 2210
Akron, Ohio 44308-1135

Kevin C. Abbott
Nicolle R. Bagnell
Reed Smith LLP
225 Fifth Avenue, Suite 1200
Pittsburgh, Pennsylvania 15222

William J. Taylor
Kincaid, Taylor & Geyer
50 North 4th Street
Zanesville, Ohio 43701

Scott M. Zurakowski (BY J.A.M.)
Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT

EXHIBIT A

ATTORNEY FEE AGREEMENT

This Agreement is made this _____ day of _____, 2011 at _____, Ohio between Carl Cashe and _____ (hereinafter referred to as "Clients") and Peters Law Office Co., LPA and Slater & Zurz, LLP, and Rostoal & Andrews, LPA (hereinafter collectively referred to as "Attorneys").

In consideration for the mutual promises contained herein, the parties hereto agree as follows:

1. PURPOSE OF REPRESENTATION. The Client hereby retains and employs Attorneys to perform all acts and take all actions, including but not limited to investigation, negotiation, litigation, compromise and settlement, which are necessary to:

(a) have a certain oil and gas lease entered into between Client and Beck Energy Corporation and/or each of their predecessors, parents, subsidiaries, assigns or heirs, if any (hereinafter the "Beck lease") relative to approximately 46.7 acres of property owned by Client in Monroe County, Ohio, released, cancelled, forfeited, declared null and void, and/or renegotiated or settled;

(b) thereafter, and in consideration for having obtained either the release, cancellation, forfeiture, declaration of nullity, renegotiation or settlement of the Beck lease, Client grants to Attorneys the sole and exclusive right to act as Client's agent to negotiate and enter into a lease for the aforesaid acreage with a Lessor acceptable to Attorneys and Client, by way of an oil and gas lease (as defined in Ohio Revised Code Section 5301.09) which provides for the following:

(i) an "up-front" or "bonus payment" calculated on a per acre basis; and
(ii) a royalty payment, calculated on a percentage basis of all of the oil and gas and all the constituents thereof, removed or recovered from the leased premises; and
(iii) a primary term of limited duration as possible;
(iv) if a secondary term is offered, a secondary term of as limited duration as possible, and which provides for a renewal or a secondary term "bonus payment" calculated on a per acre basis; and
(v) such other reasonable terms as Attorneys and Client deem acceptable, understanding that Attorneys will strive to obtain, through their best efforts, the maximum commercially reasonable lease terms then available to the Client, in view of the then prevailing market conditions;

(c) Client further understands and acknowledges, that in the event Attorneys and Client jointly determine that it is in the best interest of Client to negotiate a settlement with Beck, either through Beck retaining partial mineral rights on

clients' property, or through Beck's receipt of some portion of the "up-front" money or royalty, the "up front" money or royalty payments Client ultimately receives may be somewhat lower than what would otherwise be the then commercially reasonable market rate at that time for bonus and royalty payments.

(d) enforce the terms of the negotiated lease and collect all monies due thereunder.

2. ATTORNEY'S FEES. In consideration of the services rendered and to be rendered by Attorneys, Client hereby agrees that Attorneys shall be paid and shall receive the following:

(a) 30% of any and all "up-front" or "bonus payments" to which Client receives or to which Client is entitled; and

(b) 20% of any and all renewal or secondary term bonus payments (if any) which Client receives or to which Client is entitled; and

(c) 2% of well production royalty payments for the duration of the wells' production, but in no event will client receive a net royalty less than 12.5% (e.g., if client signs a lease to receive a gross 16.5% royalty, less 2% royalty to attorneys, equals a net royalty to client of 13.5%).

3. EXPENSES - DEDUCTION OF EXPENSES. All reasonable expenses incurred by the Attorneys in the course of representation shall be deducted by Attorneys from Client's share of any recovery after receiving the fees set forth in paragraph 2 above, which expenses may include, but not be limited to, the following:

I. If the claim is settled, the expenses may consist of the costs required to obtain records, duplicating expenses and expert witness consultation and reports;

II. If a complaint (lawsuit) is filed, costs to obtain records and reports, photographs, filing fees, arbitration/mediation costs, appeal costs, deposition fees and costs, expert witness fees, costs for preparing evidentiary exhibits, copying costs, telephone charges, as well as other types or kinds of costs.

4. COOPERATION OF CLIENT. The Client shall keep the Attorneys informed of his/her whereabouts at all times, shall appear on reasonable notice at any and all appointments, depositions and court appearances, and shall execute and tender any and all documents which are reasonably necessary, in Attorneys' sole judgment, to investigate, pursue, prosecute, negotiate, resolve, settle or compromise the matters for which Attorneys have been employed hereunder, and/or to assure that Attorneys are paid and receives the fees and reimbursed expenses as set forth herein.

5. **ATTORNEYS' RIGHT TO WITHDRAW.** It is further agreed that, in the event the Attorneys negotiate and recommend acceptance of what the Attorneys, in their sole discretion, consider to be a fair and equitable settlement of the matter for which the Attorneys are hereby employed, and the Client refuses to accept said settlement, the Attorneys shall thereupon have the right to withdraw from further representation of the Client. If after completing its investigation Attorneys no longer believe there is a viable claim or no longer wish to pursue the matter, the Attorneys shall thereupon have the right to withdraw from further representation of the Client. Should Client fail to cooperate, the Attorneys shall thereupon have the right to withdraw from further representation of the Client.

6. **OHIO LAW TO APPLY.** This Agreement shall be construed under and in accordance with the laws of the State of Ohio.

7. **PARTIES BOUND.** This Agreement shall be binding on and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, representatives, assigns and successors in interest.

8. **ENTIRE AGREEMENT.** This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the within subject matter.

Executed on the day and year first above written.

CLIENT(S):

Carl E. Carley

ATTORNEYS:

Slater & Zurz LLP

By: _____
Richard V. Zurz, Jr., Attorney at Law

Peters Law Office Co., LPA

By: _____
James W. Peters, Attorney at Law

Roetzel & Andress, LPA

By: _____
Mark A. Ropchock, Attorney at Law

EXHIBIT B

If you own land in Ohio that is subject to one certain oil and gas lease form with Beck Energy Corporation, and if Beck Energy has not drilled a well on your land, or a well that unitizes a portion of your land for the purposes of oil or gas production, a class action lawsuit may affect your rights.

A court authorized this Notice. This is not a solicitation from a lawyer.

- Four Ohio landowners have sued Beck Energy Corporation, claiming that a certain form lease, designated "Form G&T (83)," violates public policy and is void. The Court's ruling extends only to the specific "Form G&T (83)" lease, and does not include or affect any other lease form currently in place with Beck Energy Corporation, or any form used by any other oil and gas producer.
- The Court has allowed the lawsuit to be a class action on behalf of all Ohio landowners, defining the class as:
    - "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 Court has ruled that these leases, identified as "Form G&T (83)" leases on the first page just above the date and lessors' names, are void because these leases can be extended indefinitely even if Beck Energy never drills a well on the landowners' property—however, the Court's ruling is limited to only those leases upon which no well has been drilled and to which there are no alterations to the "Form G&T (83)" language by hand-written or type-written alterations thereto.
- The Court has also ruled that these leases are forfeited because Beck Energy breached the implied covenant to reasonably develop.
- Beck Energy has appealed the Court's rulings to the Seventh District Court of Appeals that the leases are void and forfeited, that the leases contain any implied covenants and that this case can be a class action. The appeal of the Court's rulings remains pending, and therefore, this means that the Court's rulings could be overturned at some point in the future.
- Class members will be notified of the Court of Appeals' ruling.
- The lawsuit seeks only "equitable" relief-a declaration that Beck Energy form leases are void, and "quiet title" relief removing the Beck Energy leases as an encumbrance on title to class members' land, thereby enabling class members to enter new leases with Beck Energy or any

other company of the class member's choice, or to not enter into a lease. No money damages have been requested or granted in the lawsuit, because successful resolution of the lawsuit will potentially enable class members to bargain for new leases that could result in higher up-front payments and higher royalties than what is provided for in the Beck Energy leases.

- The Court desires to advise any landowner potentially affected by the class action suit that they have no further obligation to the law firm of Slater & Zurz, and that any lease negotiations that may occur when and if the Seventh District Court of Appeals affirms the Court's ruling do not need to be negotiated by Slater & Zurz.
- The Court further desires to notify those landowners potentially affected by the class action suit that the law firm of Slater & Zurz has previously requested such landowners to enter into a fee agreement that provides that in exchange for negotiating an oil and gas lease, Slater & Zurz is to receive 30% of any lease signing bonus, 20% of any subsequent payments or renewals, and requires all landowner-clients to assign to Slater & Zurz 2% of any and all royalties to be paid pursuant to the lease for as long as the lease may last (e.g., if client signs a lease to receive a gross 15.5% royalty, less 2% royalty to Slater & Zurz, equals a net royalty to client of 13.5%), plus charging each client for all reasonable expenses incurred by Slater & Zurz. The Court cautions all landowners to consult with independent counsel regarding the agreement terms offered by Slater & Zurz in order to assure each landowner that such terms are favorable, fair and consistent with fees charged by other Ohio law firms or other Ohio attorneys for such services.
- The Court must caution each landowner that is potentially affected by the class action decision that until and unless the Seventh District Court of Appeals issues a ruling agreeing with this Court's decision, the doctrine of *Lis Pendens* prevents any landowner from negotiating and entering into a new oil and gas lease that would become effective during the term stated in the Beck Energy lease, or any extension thereto during the pendency of the appeal.

What you must do:

Contact the attorneys identified below as "class counsel" if there is a better address at which you would prefer to receive notices concerning the lawsuit.

You will automatically receive notices of future court decisions that directly impact on whether the "Form G&T (83)" Beck Energy leases are void or valid.

For further information on the lawsuit or your rights at this stage in the case, please contact the attorneys representing the class ("class counsel")—however, the Court strongly urges any landowner presented with a fee agreement from Slater & Zurz to have the fee agreement reviewed by an independent attorney prior to entering into or agreeing to any terms of the fee agreement:

Richard V. Zurz, Jr., Esq.

Mark A. Ropchock, Esq.

SLATER & ZURZ, LLP

One Cascade Plaza, Suite 2210

Akron Ohio 44308-1135

(330) 762-0700 OR (800) 297-9191

To locate an independent attorney to discuss the above matter with, or to review any fee agreement regarding the negotiation of an oil and gas lease, please contact the Ohio Bar Association, who may refer you to an independent Ohio attorney:

Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
Phone: (800) 282-6556

EXHIBIT 22

COPY

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 JUL 10 PM 3:25

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., Plaintiffs-Appellees, vs. **BECK ENERGY CORPORATION,** Defendant-Appellant.	CASE NO. 2011-345 13-MO-12 JUDGE ED LANE (Sitting by assignment)

NOTICE OF APPEAL

Notice is hereby given that Defendant, Beck Energy Corporation, by and through the undersigned counsel, hereby appeals to the Court of Appeals, Monroe County, Ohio, Seventh Appellate District, from the Journal Entry of the Monroe County Court of Common Pleas, in Case No. 2011-345, entered on June 10, 2013. A copy of the Journal Entry is attached hereto as Exhibit "A." A request for the full record has been filed with this Notice of Appeal.

Scott M. Zurakowski (BY J.A.T.)

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/P.O. Box 36963
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Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

00507473-1 / 22585.00-0012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail this 10th day of July 2013, to:

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Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 JUN 10 AM 11:21

BETH ANN ROSE
CLERK OF COURTS

COMMON PLEAS COURT
MONROE COUNTY, OHIO

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	JOURNAL ENTRY

The above styled action is before the Court on remand from The Court of Appeals of Ohio, Seventh District, for Monroe County, Ohio. The Court of Appeals remanded this case by a Judgement Entry filed on April 19, 2013. This remand is limited to two issues. This Court is to clearly define the class and review Defendant's counter claims.

On May 6, 2013 this Court conducted a pre-trial by phone with the attorneys for the respective parties. Thereafter, this Court entered a scheduling order for the filing of briefs. That order has been complied with.

The first issue this Court must address is the definition of the class. The Plaintiffs assert that the class should be defined to include all persons who are lessors of property in the State of Ohio, or who are successors in interest, under the standard form oil and gas lease with the Defendant, Beck Energy Corporation, known as "G&T (83)." The Defendant notes that the Plaintiffs in their amended Motion for Class Certification, only sought to have the class consist of Monroe County landowners.

For a lawsuit to be maintained as a class action under Civ.R. 23, an identifiable class

EXHIBIT A

must exist and the definition of the class must be unambiguous. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91. A description of a class is sufficiently definite if it is administratively feasible for the Court to determine whether a particular individual is a member. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67. A trial court has wide discretion in describing a class and can sua sponte modify a class description requested by a party, as long as the chosen description is unambiguous such that all plaintiffs are sufficiently identifiable. *Ritt v. Billy Blanks Enterprises*, 2003 Ohio 3645 (8th Dist.). (Also, see *Baughman v. State Farm Mutual Automobile Insurance Company* (2000), 88 Ohio St.3d 480, where the Ohio Supreme Court sua sponte modified a class description). In fact, the law in Ohio not only permits but encourages a trial court to modify a class. *Konarzewski v. Ganley, Inc.*, 2009 Ohio 5827 (8th Dist.).

Accordingly, this Court has discretion to describe the certified class in any manner which complies with Civ. R. 23 and the interpretive case law. Therefore, this Court hereby determines that the definition of the class in this action shall be 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)", 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."

This decision, this Court's prior summary judgment, declaratory judgment and quiet title relief applies in this case to all members of the class in existence on September 29, 2011, the date of filing the original class action complaint in this action.

This is the class delineation that best serves the interests of finality, judicial economy and justice. Determination of the members of this class will not be difficult. This is a clear and unambiguous class definition. It will resolve these issues once and for all and prevent years of

[illegible]ous and protracted litigation.

The Plaintiffs seek this Court to strike the Defendant Beck Energy Corporation's Answer and Counter Claims for being filed out of rule. The Defendants Memorandum in Opposition to Plaintiff's Motion For a Further Order in Aid of Appeal sets out in detail what this Court finds to be an accurate time line of the relevant dates on this issue. This Court finds that Beck Energy Corporation's Answer and Counter Claims were timely filed. However, this Court specifically finds that the Defendant's Counter Claims for declaratory judgment, permanent injunction, and quiet title are moot and res judicata as all of the issues raised in the Defendant's answer and counter claims have already been decided by this Court in its prior decisions. The Defendant has fully participated and argued its position in regard to these issues. Additionally, Defendant's counter claim for estoppel fails to state a viable claim as the doctrine of estoppel does not create a cause of action, it prevents a party from raising a claim it would otherwise have.

It is hereby ORDERED that:

(1) The class which was certified in the February 8, 2013 Decision and Order on Plaintiffs' Motion for Class Certification is now defined 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)", 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."

and;

(2) The Decision On Pending Motion of July 12, 2012, the Journal Entry of July 31,

2012, the Decision And Order on Plaintiffs' motion for Class Action Certification of February 8, 2013, the Decision And Order on XTO's Motion to Intervene of February 8, 2013, and any and all prior Docket and Journal Entries entered herein, including the declaratory, quiet title and other relief granted therein, shall apply to each and every member of the certified class; and

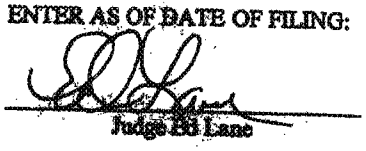
(3) The Answer and Counterclaims of the Defendant are moot in as much as the issues raised therein are now moot and res judicata; and

(4) The Journal Entry of July 31, 2012 is a final appealable order and there is no just reason for delay.

(5) This Journal Entry is a final appealable order and there is no just reason for delay.

ALL OF WHICH IS ORDERED AND ADJUDGED ACCORDINGLY.

ENTER AS OF DATE OF FILING:

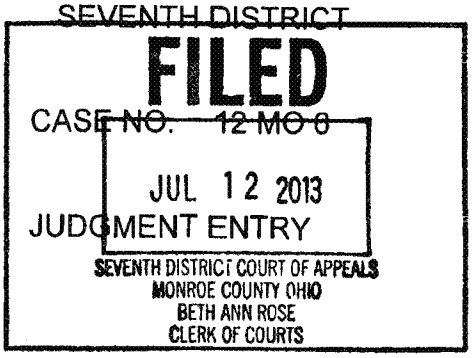


Judge Ed Lane

c: Attorney Ropchock/Zurz
Attorney Zurzikowski/Reaves
Attorney Kincaid/Taylor
Attorney Abbott
Attorney Peters
Attorney Pollis

EXHIBIT 23

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
MONROE COUNTY) SS: SEVENTH DISTRICT



CLYDE HUPP, et al.,)
)
PLAINTIFFS-APPELLEES,)
)
VS.)
)
BECK ENERGY CORP.,)
)
DEFENDANT-APPELLANT.)

CASE NO. 12 MO 6

JUDGMENT ENTRY

On June 10, 2013 the trial court entered a further order In compliance with a remand order from this Court. This appeal and companion appeals 13 MO 2 and 13 MO 3 may now proceed to a merit determination.

In view of the final order being entered on June 10, 2013 the following unresolved motions are now being addressed as follows:

1. Appellees September 7, 2012 Motion to Dismiss is overruled;

2. Motion of XTO Energy Inc. for Leave to File an Amicus Curiae Brief is sustained. Leave is granted as of May 1, 2013 to file said brief;

3. The April 11, 2013 motion of United Association of Plumber and Pipefitters HVAC Technicians and Sprinkler Fitters Local Union 396, et al. sustained. Said amicus brief is attached to the April 11, 2013 motion.

We note appellant's opposition to the filing of amicus briefs, but in the interest of providing justice to the parties to the litigation and other stakeholders in the outcome of this Court's ruling; we will consider all briefs filed.

This appeal, 13 MO 2 and 13 MO 3 will be scheduled for oral argument on the same day.

Mary DeGenaro

Joseph J. Vukovich

Cheryl L. Waite

JUDGES

EXHIBIT 24

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 JUL 16 AM 10: 11

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE (*Sitting by Assignment*)

DEFENDANT BECK ENERGY CORPORATION'S MOTION TO TOLL ALL TERMS OF THE OIL AND GAS LEASES ENTERED INTO BETWEEN THE CLASS ACTION PLAINTIFFS AND DEFENDANT BECK ENERGY CORPORATION

The Defendant, Beck Energy Corporation (hereinafter "Beck Energy"), by and through the undersigned counsel, respectfully requests this Court toll all of the terms of the oil and gas Leases entered into between the class action Plaintiffs (hereinafter collectively "class action Plaintiffs") and Beck Energy Corporation from September 14, 2011, the date the original three (3) named Plaintiffs (hereinafter "named Plaintiffs") filed their Complaint, during the pendency of this litigation. Tolling the Leases' terms is necessary to protect the class action Plaintiffs' and Beck Energy's interests should the Seventh District Court of Appeals find the Leases are not void *ab initio*. A Memorandum in Support is attached hereto and incorporated herein.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Court must grant Beck Energy's Motion to Toll all terms of the Leases, during the pendency of the litigation, for the following reasons.

(1) Case law supports Beck Energy's request to toll all terms of the oil and gas Leases entered into between Beck Energy and the class action Plaintiffs:

(a) First, if the Court does not grant the Motion to Toll, the Leases could terminate during the pendency of this litigation causing unnecessary and unfair prejudice to Beck Energy if the Seventh District Court of Appeals and/or the Ohio Supreme Court determines Beck Energy's Leases are not void *ab initio* as against public policy.

(b) Second, the failure to toll the Leases exposes the class action Plaintiffs to future litigation by Beck Energy, for lost revenue, if the Seventh District Court of Appeals reverses this Court's decision concluding the Leases are not void *ab initio* and the Leases terminate during the pendency of this litigation.

(2) Recent Monroe County case law precedent finds it appropriate to toll an oil and gas lease's term, during the pendency of litigation, when the validity of the lease is challenged. *See Three Waters, LLC v. Northwood Energy Corp.*, Monroe County Case No.

2012-042 (Aug. 9, 2012) attached as Exhibit A and *Ilaina Carter, et al. v. Beck Energy Corp.*, Monroe County Case No. 2013-092 (May 21, 2013) attached as Exhibit B.

II. FACTS/PROCEDURAL HISTORY

The following procedural history and facts are relevant to Beck Energy's Motion to Toll. The named Plaintiffs filed their original Compliant for Declaratory Judgment and to Quiet Title on September 14, 2011. The named Plaintiffs filed their Amended Class Action Complaint on September 29, 2011. One day later, the named Plaintiffs filed a Second Amended Class Action Complaint. Beck Energy filed a Motion to Dismiss and/or Change of Venue on November 30, 2011. The named Plaintiffs moved for summary judgment on February 16, 2012.

The Court granted the named Plaintiffs' Motion for Summary Judgment and denied Beck Energy's Motion to Dismiss and/or Change Venue on July 12, 2012. The Court journalized its Decision on July 31, 2012, and Beck Energy appealed on August 28, 2012. Shortly after granting summary judgment, the named Plaintiffs moved for leave to file a Third Amended Class Action Complaint on July 19, 2012. The Seventh District Court of Appeals remanded the matter to address pending motions on September 10, 2012. The named Plaintiffs withdrew their Motion to File Third Amended Class Action Complaint on September 12, 2012, and reverted back to their Second Amended Class Action Complaint requesting certification of a class consisting of only Monroe County landowners as opposed to a class of Ohio landowners.

On February 8, 2013, the Court granted the named Plaintiffs' request to certify a class. Beck Energy appealed the Court's decision on March 7, 2013. The Seventh District Court of Appeals issued a limited remand on April 19, 2013, in order for the Court to address the issue of class definition and Beck Energy's pending counterclaims. The Court issued a decision on June 10, 2013, defining the class to include all Ohio landowners, under the G&T 83 Lease, where Beck Energy 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 the Lease. Beck Energy appealed this decision on July 3, 2013.

Beck Energy previously asked the Court to toll all terms of the oil and gas leases entered into between the named Plaintiffs and Beck Energy by way of a motion filed on October 1, 2012. The named Plaintiffs opposed the motion and the Court scheduled a non-oral hearing on the motion for October 25, 2012. The Court never issued a decision on Beck Energy's motion to toll the leases as to the named Plaintiffs.

On June 10, 2013, the Court impliedly overruled the Motion to Toll when it issued a final appealable order, on limited remand from the court of appeals, wherein the Court defined the class and found Beck Energy's counterclaims moot and barred by *res judicata*. *See Young v. Eich*, 7th Dist. No. 10 MA 191, 2012-Ohio-1687, ¶16 ("[T]he trial court mentioned, but did not explicitly rule on Appellee's motion to strike when it entered judgment. Under Ohio law, 'when the trial court enters judgment without expressly determining a pending motion, the motion is * * * impliedly overruled.' *Portofe v. Portofe*, 153 Ohio App.3d 207, 2003-Ohio-3469, 792 N.E.2d 742, ¶16. Thus, the record reflects that the trial court implicitly did deny Appellee's motion to strike."); *Bayus v. Woodland Park Properties, Ltd.*, 7th Dist. No. 05 MA 169, 2007-Ohio-3147, ¶46 ("The trial court judge never explicitly ruled on Appellant's motion for recusal. However, it is well settled that motions not expressly ruled on are deemed impliedly overruled. *Takacs v. Baldwin* (1995), 106 Ohio App.3d 196, 209, 665 N.E.2d 736; *Kline v. Morgan* (Jan. 3, 2001), 4th Dist. Nos. 00CA2702 & 00CA2712. <u>Further, a trial court's final decision impliedly denies any outstanding motions.</u> *Seff v. Davis*, 10th Dist. No. 03AP-159, 2003-Ohio-7029, at ¶16, citing *Hayes v. Smith* (1990), 62 Ohio St. 161, 56 N.E. 879. Accordingly, the trial court denied Appellant's motion." (Emphasis added.))

On July 10, 2013, Beck Energy appealed, to the Seventh District Court of Appeals, the denial of its Motion to Toll, as it pertains to the named Plaintiffs. Therefore, this Motion to Toll pertains only to the Plaintiffs comprising the class action certified by the Court on June 10, 2013.

III. LAW AND ARGUMENT

A. Tolling is Required When the Validity of an Oil and Gas Lease is Challenged.

Tolling is required when "a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation," so that "the obligations of lessee to lessor are suspended during the time such claims of forfeiture are being asserted." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir.1982); *H&G Fossil Fuels Co. v. Roach*, 103 N.M. 793, 795-797, 715 P.2d 66 (1986) (reversing lower court's refusal to toll lease in finding that "an extension of the [oil and gas lease] term is an appropriate remedy"); *Chesapeake Exploration, L.L.C. v. Valence Operating Co.*, 2008 WL 4240486, *4-7 (S.D.Tex.2008) (holding where repudiation by lessee occurred approximately six months prior to end of primary term, lease was tolled so as to put the parties back in their original position and the lessee will be given six months to meet habendum clause obligations).

Tolling is appropriate to prevent a lessor who wrongfully repudiates a lessee's lease from profiting from the wrong. *B.B. Energy L.P. v. Devon Energy Production Co., L.L.P.*, 2008 WL 216583 at *11 (N.D.Tex. May 23, 2008) (citing *Kothmann v. Boley*, 158 Tex. 56, 60-61, 308 S.W.2d 1, 4 (1958). "[R]epudiation of a lease by a lessor relieves the lessee from any obligation to conduct any operation on the land in order to maintain the lease in force pending a judicial resolution of the controversy between the lessee and lessor over the validity of the lease." *Cheyenne Resources, Inc. v. Criswell*, 714 S.W.2d 103, 105 (Tex.App.Eastland 1986).

In the present matter, there are hundreds of Leases at issue as a result of the class certification encompassing all landowners, in the State of Ohio, with Beck Energy G&T 83 Leases. All of the Leases have varying expiration dates. Despite these varying expiration dates, each Lease contains essentially the same terms, including a ten (10)-year primary term and a delay rental clause, which the class action Plaintiffs and Beck Energy paid and bargained for as part of the Lease. At the end of the primary term, including any extension thereof, if Beck Energy does not drill a well that produces in paying quantities, the Lease typically terminates.

Beck Energy currently has a total of four appeals pending before the Seventh District Court of Appeals stemming from this Court's decision granting Plaintiff's Motion for Summary Judgment and certifying a class action. Due to the number of pending appeals and the complexity of the issues presented, it is anticipated that a decision will not be rendered within the next year. By not granting Beck Energy's Motion to Toll – the Court puts Beck Energy between a rock and a hard place – it could eventually win the battle on appeal but lose the war as the Leases could terminate during the pendency of the litigation. For this reason, the Court must grant Beck Energy's Motion to Toll the Terms of the Leases.

Further, failure to toll the Leases also exposes the class action Plaintiffs to possible liability. If this Court does not toll the terms of the Leases and the Seventh District Court of Appeals reverses this Court's Decision granting Plaintiffs' summary judgment, Beck Energy may seek compensation for any lost revenue it incurred as a result of the expiration of the Leases during the pendency of the litigation. Therefore, tolling the Lease terms protects both parties and maintains the status quo during the pendency of the litigation.

B. **Monroe County Case Law Precedent Favors Tolling Oil and Gas Leases During the Pendency of Litigation.**

Monroe County Court of Common Pleas case law precedent supports Beck Energy's Motion to Toll All Terms of the Oil and Gas Leases where a landowner, whose property is subject to an oil and gas lease, has filed a complaint seeking to invalidate the lease. *See Three Waters, LLC, supra.*[1] In *Three Waters, LLC*, Judge Selmon entered an order denying Three Waters, LLC's motion to stop the tolling, and permitted Northwood Energy Corporation's lease terms to be tolled during the pendency of the litigation. More recently, Judge Selmon granted a Motion to Toll All Terms of the Oil and Gas Lease in *Carter, supra.*[2]

This Court is bound by the precedent established by Judge Selmon in the *Three Waters, LLC* and *Carter* cases. For this reason, the Court should grant Beck Energy's request to toll all terms of the Leases pending the outcome of this litigation so as not to prejudice the rights of either Beck Energy or the class action Plaintiffs.

IV. **CONCLUSION**

For the foregoing reasons, Beck Energy respectfully requests the Court grant its Motion to Toll All Terms of the Oil and Gas Leases Entered Into Between Class Action Plaintiffs and Defendant Beck Energy Corporation. The tolling period would commence on September 14, 2011, the date the named Plaintiffs filed their Complaint, and continue during the pendency of the litigation, including appeals by either party.

Beck Energy proposes the tolling period expire on the seventh day following the date the time period ends for filing a notice of appeal of the Court's last appealable judgment entry. At the expiration of the tolling period, Beck Energy, and any successor/assigns would

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[1] Attached as Exhibit A.

[2] Attached as Exhibit B.

have as much time to meet any and all obligations under the oil and gas Leases as they had as of September 14, 2011. During the tolling period, Beck Energy would be prohibited from drilling any wells pursuant to the oil and gas Leases tolled.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail, pursuant to Civ.R. 5(B)(2)(c), this 12 day of July 2013, to:

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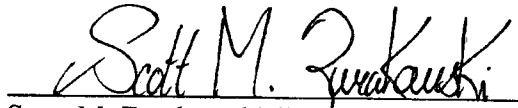

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
2012 AUG -9 PM 1:29
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

DOCKET & JOURNAL ENTRY

THREE WATERS, LLC

Plaintiff, Case No. 2012-042

Vs.

NORTHWOOD ENERGY CORPORATION,

Defendant.

Date of Entry: August 9, 2012

The within matter is before the Court on Plaintiff's *Motion to Stop Tolling Period* and Defendant's *Memorandum in Opposition to Plaintiff's Motion to Stop Tolling Period.*

Plaintiff's *Motion* is hereby **denied.** This Court's prior orders hereby remain unchanged.

(COPIES SENT THIS DAY TO:
Attorney Ethan Vessels, Attorney Flite Freimann, Attorney Gregory D. Russell, Attorney Thomas H. Fusonie, and Attorney Lija K. Kaleps-Clark)

(Approved)

JULIE R. SELMON, JUDGE

Journal_____ Page_____

jd

EXHIBIT A

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED

2013 MAY 21 PM 2:39

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
~~BELMONT~~ MONROE COUNTY, OHIO

ILAINA CARTER, et al. Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2013-092 JUDGE JULIE SELMON ORIGINAL

JUDGMENT ENTRY / ORDER

This cause came to be heard upon the filing of Defendant, Beck Energy Corporation's Motion to Toll All the Terms of the Oil and Gas Lease, and the opposition thereto. For good cause, the Court does hereby

ORDER, ADJUDGE AND DECREE to toll all of the terms of the oil and gas lease, including any amendments and/or ratifications to said oil and gas lease entered into between Plaintiffs, and/or Plaintiffs' predecessors in title, and Beck Energy, including, but not limited to: the oil and gas lease dated April 13, 2004, between Willa Carter and Beck Energy, dated April 14, 2004, and recorded at the Monroe County Official Records at Volume 118, Page 274 on May 11, 2004.

The tolling period shall commence on March 13, 2013 (the date Plaintiff filed her Complaint) and shall continue during the pendency of the litigation, including any appeals by

EXHIBIT B

either party. The tolling period shall expire on the seventh day following the date the time period ends for filing a notice of appeal of the Court's last appealable judgment entry. 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 as they had as of March 13, 2013.

During the tolling period, Beck Energy is prohibited from drilling any wells pursuant to the oil and gas lease tolled.

IT IS SO ORDERED.

JUDGE JULIE SELMON

Approved by:

Scott M. Zurakowski

Scott M. Zurakowski (0069040), of
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EXHIBIT 25

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO
FILED
2013 JUL 22 PM 2:21
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.	)	CASE NO. 2011-345
	)	
Plaintiffs	)	JUDGE ED LANE
	)	
vs.	)	
	)	**RESPONSE TO DEFENDANT'S**
BECK ENERGY CORPORATION	)	**MOTION TO TOLL THE LEASES**
	)	**BETWEEN BECK AND CLASS**
Defendant	)	**ACTION PLAINTIFFS**

SLATER & ZURZ LLP
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SUITE 2210
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I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

Plaintiffs brought this action on September 14, 2011 seeking, *inter alia*, a declaration that certain form oil and gas leases ("Leases" or "Beck Leases") between themselves as lessors and Defendant Beck Energy Corporation (Beck) as lessee are void as against public policy because said Leases can be extended in perpetuity with no development of the leased property. On September 29, 2011, Plaintiffs filed an amended complaint as a class action on behalf of similarly situated Monroe County landowners with Beck Leases. One day later, Plaintiffs filed their second amended complaint, making a minor change in the class description but retaining the class action character of this lawsuit.

On November 30, 2011, Beck filed a motion to dismiss and/or for change of venue. Beck did not file a motion to toll the provisions of the Leases of either the named plaintiffs or the putative class at that time.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

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Plaintiffs responded to Beck's motion to dismiss and/or change venue, and on February 16, 2012, Plaintiffs filed a motion for summary judgment. Because Beck failed to respond to the motion for summary judgment, on March 19, 2012, Plaintiffs filed a reply brief addressing arguments they anticipated Beck might have raised if it had responded to their motion. It was only after the Court established a briefing schedule with fixed deadlines that Beck finally responded to Plaintiffs' motion. Beck did not request that the Leases be tolled, either in its response to the motion for summary judgment or in a separate motion.

On July 12, 2012, the Court issued a decision granting Plaintiffs' motion for summary judgment and denying Beck's motion to dismiss. That decision, concluding that the Beck Leases are void *ab initio*, was journalized on July 31, 2012. After issuance of the Court's July 12 decision, Plaintiffs on July 19, 2012 filed a motion for class action certification.

On August 2, 2012, Beck filed a memorandum in opposition to class certification. In its opposition, Beck argued that certification should be denied because "Plaintiffs' request for injunctive or declaratory relief would automatically accrue to the benefit of others who are similarly situated." Memorandum of Law in Opposition to Plaintiffs' Motion for Class Action Certification at 3. Beck did not file a motion to toll the provisions of the Leases of either the named plaintiffs or the putative class at that time, nor did Beck request tolling within its memorandum opposing certification.

It was not until October 1, 2012–<u>three months after the Leases had been declared void *ab initio*</u>–that Beck for the first time requested that the named plaintiffs' Leases be tolled. Moreover, even though Beck recognized that the Court's ruling as to

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the Leases between Beck and the named plaintiffs would apply to Leases between Beck and putative class members, Beck made no request that class members' Leases be tolled.

The Court set a non-oral hearing on Beck's motion to toll for October 25, 2012, indicating that any filings submitted beyond the non-oral hearing date would not be considered. Beck failed to file any request that putative class members' Leases be tolled in the event that the Court ultimately certified this case as a class action. No decision on Beck's request for tolling was issued. Even though Plaintiffs' motion to certify and Beck's October 1, 2012 motion to toll remained pending, Beck filed a notice of appeal from the July 31, 2012 judgment voiding the named plaintiffs' Leases.

On February 8, 2013, the Court certified the case as a class action. Beck did not request a ruling on its motion to toll the named plaintiffs' Leases, nor did Beck request that the class members' Leases be tolled.

On June 10, 2013, the Court further defined the class, and explicitly stated that its prior rulings, including the decision on summary judgment, applied to all class members, thereby clearly establishing that like the named plaintiffs' Leases, class members' Leases are void *ab initio*. It was not until July 12, 2013, that Beck finally moved to toll all terms of the class members' Leases. However, before filing its Motion to Toll, Beck appealed this Court's June 10, 2013 Journal Entry, on the theory that by rendering final judgment without ruling on Beck's prior motion to toll, the Court implicitly denied that motion. *See* Motion to Toll at 4. Beck's appeal from the June 10, 2013 judgment is directed to the Court's implicit denial of the first motion to toll. *Id.*

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II. LAW AND ARGUMENT

A. BY APPEALING THE IMPLICIT DENIAL OF ITS OCTOBER 1, 2012 MOTION TO TOLL, BECK DIVESTED THIS COURT OF JURISDICTION TO CONSIDER ITS JULY, 2013 MOTION TO TOLL.

The filing of an appeal generally divests a trial court of jurisdiction to act except over issues not inconsistent with the jurisdiction of the appellate court to reverse, modify or affirm the judgment from which the appeal has been taken. *Bank of New York v. Bartmas*, 10th Dist. No. 04AP1011, 2005-Ohio-6099, ¶14; *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994); *Garcia v. Wayne Homes, LLC*, 7th Dist. No. 2002 CA 35, 2002-Ohio-7286, ¶3. By appealing this Court's implicit denial of the motion to toll the named plaintiffs' Leases during all or part of the pendency of this case, Beck divested this Court of jurisdiction to decide Beck's motion to toll the named plaintiffs' Leases.[1]

This Court has explicitly held that rulings applicable to the named plaintiffs are equally applicable to all class members. Journal Entry, June 10, 2013, at 3-4. The subject of Beck's appeal from the Court's June 10, 2013 Journal Entry–the Court's implicit denial of Beck's motion to toll the named plaintiffs' Leases–is identical to the subject of Beck's Motion to Toll class members' Leases. *See* Motion to Toll at 4.

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[1]Beck itself argued that "this Court was divested of jurisdiction once Beck Energy filed its Notices of Appeal. '[W]hen an appeal is pending, the trial court is divested of jurisdiction except to take action in aid of the appeal[.] * * * The purpose of the court of appeals' limited remand, on April 19, 2013, was for that specific purpose–to aid in the appeal–by providing clarification of class membership and addressing Beck Energy's pending counterclaims to make this Court's summary judgment Decision a final appealable order. The court of appeals granted the Court no additional jurisdiction other than what was specifically set forth in its Judgment Entry. Therefore, the Court may only take such action as is permitted by the limited remand." Memorandum in Opposition to Plaintiffs' Motion to Compel Defendant to Respond to Plaintiffs' Second Set of Interrogatories and Requests for Production of Documents, May 19, 2013 at 2-3.

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A ruling tolling class members' Leases would be inconsistent with a decision by the appellate court affirming the denial of tolling as to named plaintiffs' Leases. Because Beck has divested this Court of jurisdiction to decide whether the named plaintiffs' Leases should be tolled, this Court lacks jurisdiction to decide the identical issue with respect to class members' Leases.

Beck could have avoided this predicament by filing a motion to toll before issuance of final orders. In fact, like most other litigants, Beck could have requested that the Leases be tolled early in the case for the named plaintiffs, and shortly after the class action complaint was filed with respect to members of the putative class. An order granting the relief Beck seeks is now precluded by Beck's inexplicable delay in requesting that class members' Leases be tolled, and its July 10, 2013 appeal from the June 10, 2013 judgment.

B. BECAUSE TOLLING IS AN EQUITABLE REMEDY, BECK'S FAILURE TO DILIGENTLY PURSUE THAT REMEDY MILITATES AGAINST GRANTING SAID RELIEF.

Tolling is an equitable remedy. *E.g., Cardinale v. Ottawa Regional Planning Comm.*, 89 Ohio App.3d 747, 754, 627 N.E.2d 611 (6th Dist. 1993); *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833. "[W]here the rights of the parties are not clearly defined in law, broad equitable principles of fairness apply and will determine the outcome of each case individually." *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, 781 N.E.2d 1023, ¶22 (7th Dist.); *Byers*, ¶57 (quoting *McCarthy*). The time within which one must comply with contractual conditions or statutes of limitations may be tolled when it is equitable to do so. *Cardinale* at 754; *Byers*, ¶52. However, "[o]ne

who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Byers*, ¶55. Claims for equitable relief are subject to an abuse of discretion standard. *Byers*, ¶57.

In *Cardinale*, the plaintiff developer was prevented from satisfying certain conditions applicable to an approved project by the legal intervention of adjoining property owners who filed an R.C. Chapter 2506 appeal challenging the regional planning commission's approval of the project. The trial court refused to declare that the appeal tolled the time within which the developer was required to satisfy the conditions. 89 Ohio App.3d at 749, 627 N.E.2d 611.

On appeal, the developer argued that litigation that prevents a developer from satisfying project conditions should automatically toll the time limit until final adjudication of the lawsuit. Although the argument for an automatic stay was persuasive, the appellate court nonetheless held that where a developer is prevented from satisfying the stated conditions by the legal intervention of third party adversaries, "the developer's time within which to comply with the conditions should be tolled *when it is equitable* to do so." (Emphasis added.) *Id.* at 753-54.

The court noted that in some circumstances, a developer might not be proceeding with due diligence, while in other circumstances, an intervening change occurring with the passage of time might cause an automatic stay to prejudice the community. *Id.* at 753. *See also In re Certificate of Need Application of Holzer Consol. Health Sys. v. Ohio Dept. Of Health*, 10th Dist. No. 03AP1020, 2004-Ohio-5533, ¶16 (upholding equitable tolling of administrative rule where applicant acted with due

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diligence but was hindered by an affected party's objection; and tolling effectuated the purpose behind the rule to require diligence and a full and fair review).

In the instant case, Beck's dilatory effort to toll the Leases reflects its conduct throughout this litigation. The lawsuit was filed because despite Beck's ostensible promise to develop the Lessors' lands, Beck did nothing. After Plaintiffs moved for summary judgment, Beck filed no response for over two months, and did so only after the Court imposed a response deadline. After Beck assigned the "deep rights" under its Leases to XTO, neither Beck nor XTO took any action to add XTO as a party until after the Court had entered summary judgment for Plaintiffs, at which point Beck and XTO sought to relitigate summary judgment, insinuating that it was Plaintiffs' fault that XTO had not been made a party.

After Plaintiffs filed this action–when the Beck Leases were presumptively valid–Beck could have moved to toll the named plaintiffs' Leases, but it failed and neglected to do so. When Plaintiffs filed their first class action complaint, Beck could have moved to toll the putative class members' Leases in the event that a class was certified, but again Beck failed and neglected to do so. When Plaintiffs moved for summary judgment, Beck again failed and neglected to move for tolling of any Leases. When Plaintiffs moved for class action certification, Beck argued that certification was unnecessary because the declaratory relief "would automatically accrue to the benefit of others who are similarly situated"–but again, Beck failed and neglected to request that the named plaintiffs' Leases or the putative class members' Leases be tolled.

Beck did not request that any Leases be tolled until three months after this Court declared the Leases void *ab initio*. Although Plaintiffs had filed their motion for class

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action certification, Beck requested only that the named plaintiffs' Leases be tolled. Now that the Leases have been declared void, and multiple appeals are pending, Beck insists that the Court must toll the class members' Leases.

Plaintiffs brought this action because Beck had not commenced any development for years; since that time Beck has delayed and obstructed this litigation by its repeated failures to act in a timely manner. Beck now seeks to indefinitely postpone any development on Plaintiffs' lands, by Beck or any other developer, pursuant to its last-minute motion to toll the Leases–the precise result Plaintiffs sought to avoid when they commenced this action. To grant Beck's motion to toll class members' Leases throughout Ohio, thereby permitting Beck to single-handedly halt development on any lands subject to a Beck Lease, would work an undue hardship upon class members, and would contravene fundamental principles of fairness and equity.

C. BECAUSE THIS COURT HAS ALREADY DECLARED THE LEASES VOID *AB INITIO*, THERE IS NOTHING TO TOLL, EFFECTIVELY MOOTING BECK'S MOTION TO TOLL CLASS MEMBERS' LEASES.

When Plaintiffs commenced this litigation, their lands were subject to presumptively valid Leases. Even though the Leases do not specify a primary term, a secondary term, or limit the period during which Beck could retain its mineral interests without developing Plaintiffs' property[2], the Leases were nonetheless facially valid. Had

[2]In its current motion to toll, Beck asserts that its Leases contain a ten-year primary term. In its appellate brief, Beck argued that if its Lease is construed as perpetual, as Plaintiffs have argued and as this Court found, the Lease is valid because early Ohio case law permitted perpetual leases. Beck seems unable to decide whether its Leases are perpetual or whether they have a fixed, ten-year primary term during which, based on language imported from other cases that does not appear in its Leases, Beck must either commence a well or forfeit its leasehold interest. If the Leases are perpetual, then tolling is unnecessary.

Beck moved to toll the named plaintiffs' Leases in a timely manner, shortly after the original complaint was filed, and moved to toll the class members' Leases soon after the first class action complaint was filed, there were lease terms that could be tolled.

Now that the Court has declared the Leases void *ab initio*, there is nothing to toll. A contract that is void does not exist; it is as if it never existed. *See Benson v. Rosler*, 19 Ohio St.3d 41, 46, 482 N.E.2d 599 (1985) (Celebrezze, J., dissenting). When printed clauses in a contract are judicially declared void, it is as if those clauses were never inserted. *Id.* at 48 (Brown, J., dissenting). A party has no obligations under a contract that is declared void *ab initio*; the contract is considered never to have been executed. *Medical Protective Co. v. Fragatos*, 190 Ohio App.3d 114, 2010-Ohio-4487, 940 N.E.2d 1011, ¶29 (8th Dist.). In that there is nothing to toll, the Court must overrule Beck's motion to toll class members' Leases.

D. IF THE COURT DECIDES TO GRANT BECK'S MOTION TO TOLL CLASS MEMBERS' LEASES, TOLLING SHOULD NOT BEGIN BEFORE BECK OBTAINS A STAY, CONDITIONED UPON NO DEVELOPMENT OF PLAINTIFFS' LEASES DURING THE PENDENCY OF THE APPEAL.

Beck argues that because it has not had the benefit of its leasehold interest since this lawsuit was filed, tolling class members' Leases would be equitable. However, Plaintiffs have sought only declaratory judgment and quiet title relief. Plaintiffs never requested an injunction to prevent Beck from development during the pendency of this litigation.

In fact, Beck tried to develop the real estate owned by then-putative class members Donald J. Pniaczek, Mary Jane Pniaczek, John Pniaczek and Deborah L.

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Pniaczek after summary judgment was granted, forcing the Pniaczeks to file a separate action to stop Beck's development. *See* Donald Pniaczek, et al. v. Beck Energy Corporation, Monroe County Court of Common Please Case No. 2012-274. In that it was never judicially enjoined from development, Beck has had the benefit of the Leases during this lawsuit. Any reticence by Beck to develop was a business decision based on the possibility that the leases may be void.

When the Court addresses Beck's motion to toll class members' Leases, equity requires the Court to consider the plaintiffs' interests. Even under Beck's current position that its Leases contain ten-year primary terms and its conclusion that the class was not certified until June 10, 2013, the terms of some Leases may have run during the period between the filing of the original complaint and certification of the class. Even though Beck was not prevented from developing those Leases, Beck now asks the Court to retroactively toll Leases that have expired. That is not equity.

If the Court is inclined to use its discretion to toll the class members leases, tolling should only occur from the time that Beck obtains a stay, conditioned upon no development of class members' leases during the pendency of the appeal.

III. CONCLUSION

By divesting this Court of jurisdiction to rule on its Motion to Toll, by waiting until the Leases had been declared void *ab initio* before filing its first motion to toll, and by failing to diligently pursue the equitable remedy of tolling, Beck has effectively doomed its own Motion. Accordingly, Plaintiffs respectfully request that the Court overrule Beck's Motion to Toll.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was served by ordinary U.S. mail on this 22nd day of July, 2013, upon the following:

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EXHIBIT 26

ORIGINAL

1 IN THE COURT OF COMMON PLEAS
2 MONROE COUNTY, OHIO

3 *

4 CLYDE A. HUPP, et al.,
5 Plaintiffs,
6 v.
7 BECK ENERGY CORPORATION, CASE NO. 2011-345
8 Defendant. JUDGE LANE

9 *

10 MOTIONS HEARING

11 Transcript of the proceedings had in the
12 above-captioned matter held on July 23, 2013 in
13 Courtroom B, Washington County, Ohio, before THE
14 HONORABLE ED LANE, Judge, Court of Common Pleas, Monroe
15 County, Ohio, by assignment.

16 CHERYL G. MUNSON
17 Transcriber
18 REALTIME REPORTERS
19 713 Lee Street
20 Charleston, WV 25301
21 (304) 344-8463

EXHIBIT B

1 Ohio Supreme Court. So, I'm -- the motion is denied.
2 Okay?
3 And I don't think it's necessary for the
4 Court of Appeals' decision. I think it's -- and I think
5 that when it comes back, if I -- if you prevail and if
6 I'm affirmed, there'll have to be a new notice in that.
7 There we go.
8 Okay, the second motion that was filed
9 with the Court, what do you want to address, second one?
10 MR. ZURAKOWSKI: Your Honor, if we could,
11 I think, address our renewed motion for stay?
12 THE COURT: Okay. Attorney Zurakowski?
13 MR. ZURAKOWSKI: Your Honor, Ohio Civil
14 Rule 62(B) permits a trial court to issue a stay of
15 execution of a judgment without requiring any bond.
16 Beck Energy is solvent, having negotiated over a
17 thousand leases in 12 different counties in Ohio. It
18 has close ties to the community, having paid lessors,
19 landowners over 12 million dollars in royalty payments
20 since 1978.
21 The question for this Court is, is Beck
22 Energy entitled to a stay of execution without a bond
23 being required? And we believe the answer to that
24 question is absolutely yes.

1 I think it's clear -- and I think the
2 Hupp Plaintiff's Counsel would agree with me -- that
3 this Court has the discretion to enter a stay order
4 without requiring a bond. And so, I will submit that
5 what we've set forth in our briefs in that matter, is --
6 is enough, and not to waste the Court's time, as --
7 THE COURT: And I've read your briefs,
8 gentlemen, and actually made notes and underlined them,
9 studied them, took them home and read them. I actually
10 read some of these last -- some of the stuff you gave me
11 last year on my Thanksgiving trip to California.
12 Okay, Attorney Zurk (sic)?
13 MR. ZURAKOWSKI: Your -- Your Honor, may
14 I have a few more minutes, please?
15 THE COURT: Zurz. Oh, yeah. Zurz. Okay.
16 MR. ZURAKOWSKI: In determining whether
17 to require --
18 THE COURT: Don't take a breath; I'll --
19 I'll rule.
20 MR. ZURAKOWSKI: -- a bond, the Court
21 must consider two relevant factors.
22 THE COURT: Okay.
23 MR. ZURAKOWSKI: And those are the only
24 two relevant factors to be considered by this Court, and

1 those are Beck Energy's solvency and whether Beck Energy
2 has well established ties to the community.
3 Beck Energy is solvent. It's been in
4 business since 1978. As I said, it's entered into over
5 a thousand oil and gas leases with landowners in the
6 State of Ohio, it's paid those landowners over 12
7 million dollars in royalties.
8 In addition, it has very close knit ties
9 to the community. It has drilled and operates currently
10 over 346 wells, as I said, in 12 different counties.
11 We believe that Civil Rule 62(B) clearly
12 indicates that there are two factors for this Court to
13 consider and two factors only, and that's solvency and
14 ties to the community.
15 In addition to that, I think what you're
16 going to hear from the Hupp Plaintiffs is that they're
17 going to be deprived of some ability to profit or may be
18 subject to future financial loss. But those are not
19 factors to be considered by this Court under 62(B) when
20 determining whether to grant a motion to stay.
21 Plaintiff's arguments that their clients
22 are somehow going to suffer some loss, doesn't withstand
23 logic and it's pure conjecture and speculation when you
24 carry this to its legal conclusion. And as the Court

1 has indicated, it's read the briefs.
2 I will say this: Beck Energy stands to
3 lose a heck of a lot more than the Hupp Plaintiffs. The
4 Plaintiffs have asked that this Court issue a motion for
5 stay on condition that Beck put up a 50 million dollar
6 bond. And the Hupp Plaintiffs have set forth in their
7 briefing a formula, assuming that every one of the Hupp
8 Plaintiffs class members' acreage is worth $3500 an acre
9 as far as a signing bonus. If we use that formula and
10 you calculate how many acres that Beck Energy has under
11 lease -- which is approximately 40,000 -- when
12 multiplied by $3500, that's over 140 million dollars.
13 Second of all, one size doesn't fit all.
14 The differing locations of each one of these leases and
15 market forces prohibit any assumptions on value, as the
16 Plaintiffs are trying to get this Court to believe. The
17 amount that a -- a landowner receives for a sign-on
18 bonus -- and for that matter, a royalty -- is dictated
19 by the county in which they're located, the township in
20 which they're located, the range in which they're
21 located, and in some cases, the side of the street that
22 they're situated on.
23 So, to say that all of these Hupp class
24 members who are strewn over 12 different counties in

1 Ohio -- some of whom are situated in the Utica Shale
2 play, others who are not -- just doesn't make sense to
3 use this one size fits all formula.
4 Further, market forces continue to change
5 in the State of Ohio as it relates to these oil and gas
6 leases in the Utica Shale play. I think it's no
7 surprise that Chesapeake is no longer flooding the
8 market with sign-on bonuses and royalty payments.
9 You've got Anadarko, who's decided to pull out of Ohio.
10 You've got Devon Energy, who's decided to pull out of
11 Ohio.
12 Your Honor, finally, we think if this
13 Court is going to issue a stay -- which we think is
14 absolutely necessary in this case while the appeal is
15 pending, without any bond -- the Plaintiffs -- well,
16 there must be language in that order, that precludes the
17 Plaintiffs from entering into new leases while this case
18 is on appeal, because that's what's happening. There
19 are folks out there, that are contacting these
20 Plaintiffs and the Plaintiffs are organizing themselves,
21 and they're entering into new leases.
22 Now, the validity of the Beck lease, GT
23 83 lease, remains an open issue, and I think we can all
24 agree with that. Pending the outcome of what happens in

1 the Seventh Appellate District and what happens possibly
2 at the Ohio Supreme Court, it's an open issue, it's
3 still subject to adjudication, and the Plaintiffs, by
4 entering into these new leases, are subjecting
5 themselves to potential future litigation for
6 interference of the contract, interference of the
7 business relationship, and that's just another reason
8 why this Court needs to grant the motion to stay without
9 requiring any bond.
10 Thank you, Your Honor.
11 THE COURT: Well, you know, I'm not --
12 this case has the -- the largest case I ever had was 44
13 million. And it wasn't appealed; it was a trial to the
14 Court. But this -- these are astronomical figures, it's
15 -- you know, gentlemen. But you say they're sound; I've
16 never seen a Beck financial statement. I mean, I don't
17 know if they -- if they borrowed money to drill, if they
18 -- you know, I don't know what they owe investors, what
19 -- you know, I don't know the whole financial picture.
20 And I don't even know what people are
21 getting for an acre. I mean, you hear everything. And
22 I -- and I mean, I imagine if you stood out on the
23 street, you'd hear 10,000, 20,000, I -- I don't know
24 where it's at.

1 But if this case comes back, two, three,
2 four years from now and the oil market's crashed, what I
3 -- well, bo-- is there -- is there a cause for damages,
4 if the case is affirmed and now all of the sudden, they
5 can't get any money out of these leases? I don't --
6 I've never known that to happen, but I mean, it's a
7 natural, judicial progression, but I'm just wondering.
8 MR. ZURAKOWSKI: That -- that is the risk
9 the Plaintiffs took when they filed this litigation, and
10 that's Beck Energy's position.
11 In addition to that, Your Honor, I think
12 the bigger risk here is, without a motion for stay,
13 these Plaintiffs are subjecting themselves to potential
14 future litigation, if the case goes up and is reversed
15 in some way, shape, or form, and comes back down and
16 have entered into other leases.
17 THE COURT: Well, and I don't want an
18 answer to this question, but I'm going to -- it's -- I'm
19 going to be candid with you. In the back of my mind, I
20 know, because I saw the -- the sealed document, the
21 amount of money --
22 MR. ZURAKOWSKI: Sure.
23 THE COURT: -- that Beck got. I assume,
24 if this is -- if I'm affirmed, they're going to have to

1 pay that money back, but I don't know that. And that
2 would be a big drain.
3 MR. ZURAKOWSKI: Well, if you want me to
4 answer that, I can.
5 THE COURT: If you want to. You don't
6 have to.
7 MR. ZURAKOWSKI: Your Honor, I would -- I
8 would like to -- I'm going to reserve judgment on that.
9 I may or may not --
10 THE COURT: Yeah. I don't care whether
11 you answer it or not, I mean.
12 MR. ZURAKOWSKI: Thank you.
13 THE COURT: But I mean, I -- I've often
14 wondered. I mean, this has serious consequences for
15 both sides. Everybody.
16 Okay. Attorney Zurz?
17 MR. ZURZ: Your Honor, Beck is entitled
18 to a stay, provided that they post the bond and that
19 bond amount is in your discretion and the conditions of
20 that bond, again, are in your discretion.
21 Let's remember what happened earlier in
22 this case. In August of 2012, Beck filed a premature
23 motion to stay, relative to the three named Plaintiffs'
24 leases. In that motion, they indicated that XTO bought

1 the deep rights in those three leases for a million
2 dollars, and Beck was offering to post ten percent bond,
3 or a hundred thousand dollars.
4 Now that you've certified this class --
5 and we learn now that there's what, 35,000 acres in play
6 here -- all the sudden, Beck doesn't want to post any
7 bond.
8 Well, maybe it's speculative as to what
9 the 35,000 acres are worth, but we know what at least
10 7,500 acres in Monroe County are worth, because XTO
11 bought those deep rights from -- from Beck.
12 THE COURT: Mm-hum. And you know that
13 amount, too.
14 MR. ZURZ: I know that amount, Judge.
15 It's 7500 times 3,000, so it's in excess of 20 million
16 dollars, so that's not speculative. At least 7,000
17 acres in Monroe County, the deep rights were purchased
18 by XTO, Beck received those monies. So, we don't have
19 to guess as to -- to what was exchanged. Perhaps the
20 value of the other mineral rights are in dispute, but
21 they have a value, Judge.
22 THE COURT: Now, my question for you,
23 Attorney Zurz, is this: If it's -- if it prevails, and
24 I keep saying if it prevails, I -- but it may not, I

1 mean, you know, I don't know -- I -- I certainly can't
2 think out of the box as much as you gentlemen can; I
3 mean, you have looked at this so many ways, it's amazing
4 to me, and I don't know how you have time to get this
5 stuff to me so quick -- but if it comes back, and you --
6 your clients prevail, you're only seeking to have them
7 vacated, voided, and given their lease back. What's it
8 -- why do you need money for damages? Why do we need a
9 bond for --
10 MR. ZURZ: We have not asked for monetary
11 damages, but Judge, the statutes allow for a bond, even
12 if no money damages were requested.
13 THE COURT: So, what's the bond covering?
14 If you -- it's -- it's -- I mean, what would they need
15 the -- what would you need -- your clients need the 25
16 million for? That's what I'm trying to get my head --
17 head around.
18 MR. ZURZ: Because Beck's asking for the
19 privilege of encumbering these properties on a void
20 lease for probably two more years. There's got to be
21 some security for that privilege.
22 THE COURT: So, if they prevail, they
23 will have lost the potential to sell --
24 MR. ZURZ: Correct.

1 THE COURT: -- to lease their land at the
2 top of the market?
3 MR. ZURZ: Right.
4 THE COURT: They will have lost the
5 potential to get any royalties if the wells had been
6 drilled.
7 MR. ZURZ: Correct, Judge.
8 THE COURT: But there won't be -- even if
9 you -- even if you -- the thing stopped today and you
10 got your leases back, they wouldn't all get a Utica
11 well.
12 MR. ZURZ: No, and they wouldn't all get
13 bonuses of 6,000 an acre.
14 THE COURT: Yeah.
15 MR. ZURZ: I mean, there are -- there's
16 some value there. That value -- I'll admit, the value
17 depends upon where the property's at, what county is it
18 in and what township, what part of the township is it
19 in.
20 So, I -- I can't sit here and tell you
21 that we have a figure today, as to what all the mineral
22 rights of these class members are worth, because I don't
23 even know who's in my class, Judge.
24 THE COURT: Yeah.

1 MR. ZURZ: I don't know where the acreage
2 is.
3 THE COURT: And that's my fault, because
4 I didn't make them serve notice, but -- okay.
5 MR. ZURZ: So, I guess our position is
6 this: For years, Beck has encumbered these properties
7 on a void lease. It failed to develop those leases, and
8 now flip those leases for millions of dollars and it
9 wants, after you declared the leases void, to continue
10 to encumber the properties and not post a bond. That
11 doesn't seem fair, Judge.
12 So, I think the amount and the condition
13 are up to your discretion.
14 THE COURT: I'm prepared to rule on this.
15 Is there -- do you want to say anything else?
16 MR. ZURAKOWSKI: I would, Your Honor.
17 Because Beck Energy is financially solvent and has
18 strong ties to the community, those are the two issues
19 that this Court needs to take into consideration under
20 62(B).
21 And as this Court aptly noted, this is
22 not a case where the Hupp Plaintiffs are seeking
23 damages.
24 THE COURT: Mm-hum.

1 MR. ZURAKOWSKI: As the Hupp Plaintiffs
2 admit, they have no idea what this acreage is worth. As
3 the Hupp Plaintiffs have just said, it's purely
4 speculative what those Hupp Plaintiffs may or may not
5 receive, and how much they may receive in both a signing
6 bonus and a royalty payment.
7 THE COURT: So, you think the only
8 appropriate bond is as -- of course, I've certified the
9 class.
10 MR. ZURAKOWSKI: No question you have.
11 THE COURT: Okay, I'm prepared to rule.
12 Does anybody else want to say anything?
13 I'm going to order a stay and I'm going
14 to order bond at 14 million dollars.
15 MR. ZURAKOWSKI: 14 million, Your Honor?
16 THE COURT: Yeah. And I think that's a
17 reasonable bond. I --
18 MR. ZURAKOWSKI: Your Honor, for
19 clarification purposes, is -- will Beck Energy be able
20 to post a percentage of that, to secure that bond?
21 THE COURT: What's your position on that?
22 MR. ZURE: Our position, Judge, is you
23 know how much money Beck Energy got from the sale to
24 XTO. The funds are available. It should be the entire

1 14 million.
2 THE COURT: I -- and I think that's a --
3 I think that's a -- that's a -- I don't want to chastise
4 myself. I think that's a reasonable bond. I'm not
5 going to try to make them cover the worst case scenario
6 or the best case scenario. I'd just as soon the money
7 be posted, rather than a percent. I don't know -- I've
8 never had this. I don't know what other judges do in
9 this. I -- I've never posted this large of an appeal
10 bond, but I think they either post it through a surety
11 or cash. They can do it through a bonding company, or
12 they can do it with cash. And if they go through a
13 bonding company, it won't cost them the whole 14
14 million.
15 Okay? I don't -- I rarely -- I don't
16 think I've even taken a ten percent bond ever in a
17 criminal case.
18 So there you are.
19 Okay, the stay is granted, it's a 14
20 million dollar bond.
21 Okay. We've done motion to notice,
22 motion for bond, motion for stay. Now we have the
23 motion to toll the terms. So, it'll be cash or surety.
24 MR. ZURAKOWSKI: Thank you, Your Honor.

EXHIBIT 27

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 AUG -2 PM 1:58

BETH ANN ROSE
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION AND ENTRY

This matter is before this Court on the Motion of the Defendant, Beck Energy Corporation, to toll the operation of the original Plaintiff's leases pending this appeal. This motion was filed in this Court October 1, 2012, three months after this court's decision granting the Plaintiffs' Summary Judgment. That decision is currently on appeal. The Court of Appeals for Monroe County, Ohio, Seventh Judicial District, recently remanded the case for this Court to decide two very limited issues. This Court has now dealt with the issues presented on remand.

It is this Court's desire that all matters in controversy be presented to the Court of Appeals so that this case be processed as expeditiously as possible. The Plaintiffs note that this Court's failure to toll the provisions of these leases is one of the issues presented to the Court of Appeals by this Defendant.

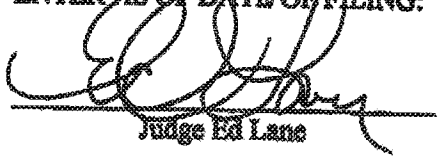
The Defendant notes that the Monroe County Common Pleas Court has recently tolled lease provisions involving leases that may eventually be included in this class if the Plaintiffs prevail and this matter goes forward as a class action. This Court has recently granted a stay in this action, provided the Defendant posts an appellant bond.

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Clerk

This court believes the leases of the original Plaintiffs in this action should be tolled pending the Defendant's appeal. This is the relief previously requested by the Defendant and not decided by this court. This decision is in keeping with the current line of decisions of the Monroe County Common Pleas Court. If the Defendant desires to have this order expanded it can present that issue to the Court of Appeals.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED ACCORDINGLY.

ENTER AS OF DATE OF FILING:



Judge Ed Lane

c: Attorneys of record

NOTICE TO CLERK'S OFFICE
FINAL APPEALABLE ORDER

EXHIBIT 28

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 AUG -8 AM 10: 21

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., Plaintiffs, vs. **BECK ENERGY CORPORATION,** Defendant.	CASE NO. 2011-345 JUDGE ED LANE (Sitting by Assignment)

ORIGINAL

DECISION AND ENTRY (ON PLAINTIFFS' MOTION FOR APPROVAL OF NOTICE TO CLASS AND ESTABLISHMENT OF METHOD OF SERVICE)

This cause came before this Court on the Motion of the Plaintiffs for Approval of Notice to Class and Establishment of Method of Service. Defendant, Beck Energy Corporation filed a Memorandam in Opposition to Plaintiffs' Motion and the Court heard oral arguments on July 23, 2013.

The Court, having reviewed Plaintiffs' Motion, Defendant's Memorandam in Opposition, and having considered the oral arguments, does not find Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service to be well taken and hereby ORDERS the same DENIED.

IT IS SO ORDERED.

Enter as of date of filing:

JUDGE ED LANE

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

NOTICE TO CLERK'S OFFICE
FINAL APPEALABLE ORDER

Approved by:

Scott M. Zurakowski/AMC

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szurakowski@kwgd.com,
ATTORNEYS FOR DEFENDANT,
BECK ENERGY CORPORATION

Mark A. Ropchock/AMC/per email consent

Mark A. Ropchock (0029823)
Richard V. Zurz, Jr. (0007978)
SLATER & ZURZ, LLP
One Cascade Plaza, Suite 2210
Akron, Ohio 44308
ATTORNEYS FOR PLAINTIFFS

EXHIBIT 29

FILED
AUG 22 2013
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al., **Plaintiffs/Appellees,** **vs.** **BECK ENERGY CORPORATION,** **Defendant/Appellant.**	**CASE NO. 2013-MO-11** **On Appeal from the Monroe County Court of Common Pleas Case No. 2011-345**

APPELLANT BECK ENERGY CORPORATION'S EMERGENCY MOTION TO SET ASIDE SUPERSEDEAS BOND

I. INTRODUCTION

Appellant, Beck Energy Corporation ("Beck Energy") moves this Honorable Court, pursuant to App.R. 7(A), to set aside the trial court's imposition of a fourteen million dollar ($14,000,000) bond. App. R. 7(A) provides a motion for such relief may be made to the court of appeals, provided the motion illustrates "that the trial court has, by journal entry, denied an application or failed to afford the relief which the applicant requested."

Here, Beck Energy moved the trial court for an order to stay execution of the judgment, specifically without the requirement of posting a supersedeas bond. However, the trial court granted the relief only in part: it issued a stay, but conditioned the stay upon the posting of

a fourteen million dollar ($14,000,000.00) bond (Exhibit A). Indeed, filing a motion to set aside the bond amount, in the trial court, would be impracticable given that it already considered the request of not imposing a supersedeas bond, but rejected it. Such an application is neither practicable nor contemplated by App.R. 7 or R.C. 2505.09. Accordingly, Beck Energy now comes before this Honorable Court, requesting a modification to reflect the relief originally sought; i.e., no requirement that a supersedeas bond be posted.

II. LAW AND ARGUMENT

A. Under App.R. 7, this Court May Review the Trial Court's Decision Regarding a Stay of Execution.

Civ.R. 62(B) does not mandate a bond before a stay can be granted and "the trial court may exercise its discretion and stay the execution of judgment without requiring the appellant to post a supersedeas bond." *Whitlatch & Co. v. Stern*, 9th Dist. No. 15345, 1992 WL 205071 (Aug. 19, 1992). Further, this Court explained in *McCarthy v. Lippitt*, 7th Dist. No. 04-MO-1, 2004-Ohio-5367, ¶38, that "[t]he Supreme Court of Ohio specifically adopted App.R. 7 to allow for review of a trial court's decision denying a motion to stay pending appeal." In accordance with this power to review, Beck Energy requests that the Court reconsider the trial court's bond determination.

It is not disputed that the trial court is ordinarily better able to determine whether a bond is necessary to cover the potential losses to appellee if appellant should lose the appeal. However, it is important to recognize the purpose of such a bond is "to secure the appellee's right to collect on the judgment during the pendency of the appeal." *Mahoney v. City of Berea*, 33 Ohio App.3d 94, 96, 514 N.E.2d 889 (8th Dist.1986). Significantly, in the present matter, Appellees did not request monetary damages, were not awarded monetary damages and only

sought to have the trial court declare certain oil and gas leases void as against public policy, which the trial court ultimately found.

B. <u>No Bond is Required Under the Facts of this Case.</u>

1. The Posting of a Bond is Only Required Where a Judgment Has Been Rendered for Monetary Damages.

A bond only serves its purpose if an appellee has an interest at stake that could be lost or squandered by appellant during the appeal. As noted above, Appellees never requested monetary damages and none were awarded by the trial court. Rather, the trial court improperly awarded declaratory relief, in the summary judgment proceedings, thereby finding Beck Energy's leases void as against public policy.

In addressing the necessity of a supersedeas bond, courts throughout Ohio have consistently concluded that a bond is only required where a judgment has been rendered for monetary damages. *See Boothby v. Twp. Bd. of Zoning Appeals*, 12th Dist. No. CA2000-08-062, 2001 WL 30622 (Jan.8, 2001); *Trademark Homes v. Avon Lake Bd. of Zoning Appeals*, 92 Ohio App.3d 214, 634 N.E.2d 685 (9th Dist.1993); *Mahoney, supra*; *Houghtaling v. Medina Bd. of Zoning Appeals*, 134 Ohio App.3d 541, 731 N.E.2d 733 (9th Dist.1999); *Martin v. City of Bedford Heights*, 8th Dist. No. 73725, 1998 WL 51854 (Aug. 20, 1998).

In *Natl. City Bank Northeast v. Beyer*, 6th Dist. No. H-99-017, 1999 WL 1203742 (Dec. 17, 1999), a case addressing declaratory relief and the need for a supersedeas bond, the court specifically determined that a bond was not required because the underlying action was a declaratory judgment action. The court reasoned:

> No judgment for money damages has been rendered in this case. Rather, this court has determined that the Beyers are the rightful owners of their sister's share of the corpus of a trust presently held by National City Bank. Moreover, * * * no purpose would be served in requiring New Jersey to post a bond under the

> circumstances of this case. The Beyers have no interest at stake "that could be lost or squandered by" New Jersey while the appeal is pending. *Id.* at *3, 1999 WL 1203742.

Similarly, in the present matter, the judgment rendered by the trial court only involved declaratory relief – not monetary damages. The trial court determined Beck Energy's leases are void and Beck Energy is challenging that determination on appeal. However, in doing so, Appellees have no interest at stake that could be lost or squandered by Beck Energy while the appeal is pending.[1] Therefore, as in the *Beyer* decision, a supersedeas bond is not required due to the nature of the relief requested and granted by the trial court.

Finally, the language of R.C. 2505.09 also supports the conclusion that a supersedeas bond is only required where monetary damages are awarded. The statute's language requires a supersedeas bond "in such sum, not less than, <u>if applicable</u>, the amount of the final order, judgment, or decree and interest involved, as is directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken." (Emphasis added.) The inclusion of the language "if applicable," in referencing the amount of the bond, indicates the amount should be commensurate with the amount of the final order, judgment or decree. Thus, a bond need only be posted when a sum of money has been awarded as damages by the court.

2. ***Even If the Court Concludes a Supersedeas Bond is Required, Appellees Failed to Establish What Damages They May Suffer Pending Appeal.***

There is no evidence establishing what damages Appellees may incur while this appeal is pending and therefore, the trial court's imposition of a fourteen million dollar ($14,000,000) bond is not justified. The imposition of this bond amount is merely based upon an

[1] This conclusion is further supported by the argument contained in Section (B)(2) regarding Appellees' failure to make any showing of damages they may incur while the appeal is pending.

alleged potential injury. In fact, Appellees presented no evidence, to the trial court, in support of their argument that they will be harmed financially because of potential changes in the oil and gas market.[2] It is pure speculation to conclude that if indeed the leases are found to be void on appeal, the new leases Appellees may enter into would be less lucrative than the leases they could have entered into while the appeal was pending. This speculation on Appellees' part is not the type of evidence a court should consider when determining the amount of bond to be posted.

Absent any evidence regarding potential damages to support their request for a bond, including evidence that Beck Energy is not in a position to pay damages that may accrue during the pendency of the appeal, the trial court erred when it set bond at $14 million dollars ($14,000,000). Bond should not be based upon a potential for injury and speculative damages.

3. ***Beck Energy's Business Standing and Ties to the Community Obviate the Need for a Supersedeas Bond.***

When considering the evidence and facts as presented before the trial court, the purpose of a bond in this case is obviated due to Beck Energy's ties to the community and business standing. An Affidavit from Raymond T. Beck, President of Beck Energy, attached to the Motion for Stay in the trial court (Exhibit C), demonstrates Beck Energy's financial solvency: the company has been in business since 1978; it has entered into over one thousand (1,000) oil and gas leases; and it has paid landowners more than twelve million dollars ($12,000,000) in royalties.

Further, Beck Energy has well-established close-knit ties to the community: it has continuously and properly maintained all permits; it has cooperated with landowners to ensure the safety, protection and environmental quality of its leases and wells; and it maintains

[2] See Hearing Transcript, July 23, 2013, pp. 15-28, attached as Exhibit B.

offices in Ravenna, Ohio and Woodsfield, Ohio. *See Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, 451-452, 770 N.E.2d 1105 (9th Dist.2002) (affirming that no supersedeas bond was required given appellants' solvency and well-established ties to the community.)

III. CONCLUSION

Under App.R. 7, this Court has the authority to review the amount of bond ordered by the trial court. In doing so, the facts of this case support the conclusion that a bond is not required during the pendency of this appeal because: (1) no bond is required for the appeal of a declaratory judgment action; (2) Appellees failed to establish they will be damaged and the amount of the alleged damages; and (3) Beck Energy's business standing and strong ties to the community make the posting of a bond unnecessary. For these reasons, Beck Energy requests that the Court grant its request to set aside the supersedeas bond.

Respectfully submitted,

Scott M. Zurakowski (0069040), of
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szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT/APPELLANT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail, pursuant to App.R. 13(C)(3), this 21 day of August 2013, to:

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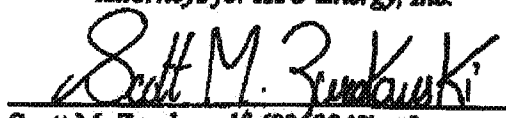

Scott M. Zurakowski (0069040), of
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& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT/APPELLANT

EXHIBIT 30

COPY

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 AUG 29 PM 3:42

BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.,	
Plaintiffs-Appellees,	CASE NO. 2011-345
vs.	JUDGE ED LANE (Sitting by Assignment)
BECK ENERGY CORPORATION,	13-MO-016
Defendant-Appellant.	

NOTICE OF APPEAL

Notice is hereby given that Defendant, Beck Energy Corporation, by and through the undersigned counsel, hereby appeals to the Court of Appeals, Monroe County, Ohio, Seventh Appellate District, from the Decision and Entry of the Monroe County Court of Common Pleas, in Case No. 2011-345, entered on August 2, 2013. A copy of the Journal Entry is attached hereto as Exhibit "A." A request for the full record has been filed with this Notice of Appeal.

Scott M. Zurakowski

Scott M. Zurakowski (0069040), of
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ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

00638093-1 / 22585.00-0012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by Ordinary U.S. Mail this 28th day of August 2013, to:

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Scott M. Zurakowski (0069040), of
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& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT-APPELLANT
BECK ENERGY CORPORATION

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 AUG -2 PM 1:58

BETH ANN RUSE
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No.: 2011-345
-vs-	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION AND ENTRY

This matter is before this Court on the Motion of the Defendant, Beck Energy Corporation, to toll the operation of the original Plaintiff's leases pending this appeal. This motion was filed in this Court October 1, 2012, three months after this court's decision granting the Plaintiffs' Summary Judgment. That decision is currently on appeal. The Court of Appeals for Monroe County, Ohio, Seventh Judicial District, recently remanded the case for this Court to decide two very limited issues. This Court has now dealt with the issues presented on remand.

It is this Court's desire that all matters in controversy be presented to the Court of Appeals so that this case be processed as expeditiously as possible. The Plaintiffs note that this Court's failure to toll the provisions of these leases is one of the issues presented to the Court of Appeals by this Defendant.

The Defendant notes that the Monroe County Common Pleas Court has recently tolled lease provisions involving leases that may eventually be included in this class if the Plaintiffs prevail and this matter goes forward as a class action. This Court has recently granted a stay in this action, provided the Defendant posts an appellant bond.

EXHIBIT A

This court believes the leases of the original Plaintiffs in this action should be tolled pending the Defendant's appeal. This is the relief previously requested by the Defendant and not decided by this court. This decision is in keeping with the current line of decisions of the Monroe County Common Pleas Court. If the Defendant desires to have this order expanded it can present that issue to the Court of Appeals.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED ACCORDINGLY.

ENTER AS OF DATE OF FILING:

Judge Ed Lane

c: Attorneys of record

NOTICE TO CLERK'S OFFICE
FINAL APPEALABLE ORDER

Court of Common Pleas
Monroe County, Ohio
FILED
AUG 30 2013
Beth Ann Rose
Clerk of Courts

IN THE COMMON PLEAS COURT
MONROE COUNTY, OHIO

CLYDE A. HUPP, et al.	)	
	)	Trial Court No.
Plaintiff(s)-Appellees ,	)	Court of Appeals Case No. 13-MO-016
v.	)	**PRAECIPE**
BECK ENERGY CORPORATION	)	Pursuant to 7th Dist. Loc. R. VII
Defendant(s)-Appellant.	)	

TO THE CLERK OF THE TRIAL COURT:

Immediately prepare and assemble the original papers and exhibits filed in the trial court in this case and a certified copy of the docket and journal entries, pursuant to App. R. 9(A).

In addition, the record in this appeal will (check only one):

_X_ 1. Include a complete transcript pursuant to App. R. 9(B), which I have ordered. See below.

____ 2. Include a partial transcript pursuant to App. R. 9(B), which I have ordered. See below.
Enumerate here the segments of the trial and/or hearings to be transcribed pursuant to Loc. R. State specifically the trial and/or hearing dates, the type of hearing and the segments you want transcribed.

Complete transcript from Motion Hearing conducted on July 23, 2013.

____ 3. Include a statement of evidence or proceedings pursuant to App. R. 9(C) (no report (i.e. record of testimony) made or transcript available).

____ 4. Include an agreed statement pursuant to App. R. 9(D).

____ 5. Video tapes to be filed.

____ 6. The record was made in an administrative hearing and filed with the trial court, including/not including a transcript.

____ 7. No transcript is required.

Date 8/28/13

Scott M. Zurakowski (0069040)

COURT REPORTER ACKNOWLEDGMENT OF REQUEST TO PREPARE TRANSCRIPT -- MUST BE COMPLETED BY COURT REPORTER AND ATTACHED TO NOTICE OF APPEAL

Estimated Completion Date (Give specific date) Completed

Estimated Number of Pages (Give specific number) 41

8/26/2013
Date

Court Reporter's Signature

00638116-1 / 22585.00-0012

EXHIBIT 31

FILED

SEP 16 2013

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

STATE OF OHIO	)	IN THE COURT OF APPEALS OF OHIO
	)	
MONROE COUNTY	) SS:	SEVENTH DISTRICT
CLYDE A. HUPP, et al.,	)	
	)	
PLAINTIFFS-APPELLEES,	)	CASE NOS. 12 MO 6, 13 MO 3
	)	13 M0 11
VS.	)	
	)	
BECK ENERGY CORPORATION,	)	JUDGMENT ENTRY
	)	
DEFENDANT-APPELLANT.	)	

Appellant Beck Energy's August 19, 2013 motion to stay Case Numbers 13MO3, 13MO11 and 13MO12 pending the resolution of 12MO6 is denied. Case Numbers 12MO6, 13MO3 and 13MO11 are sua sponte consolidated for hearing and Opinion purposes.

Only 13MO11 remains to be briefed as 13MO12 has been sua sponte dismissed in a separate entry. To expedite hearing of this matter, Appellant Beck Energy shall have 30 days from the time-stamped date of this entry to file a brief in 13MO11, Appellees shall have 20 days to respond, and thereafter Appellant Beck shall have 10 days to file a reply brief, if any. No further leaves will be granted.

Motion by Appellant Beck Energy requesting a prehearing conference is denied as the Court does not deem it necessary at this time.

Emergency motions for injunctive relief and to set aside supersedeas bond remain pending for determination by the Court.

All until further order of the Court.

JUDGE GENE DONOFRIO

JUDGE JOSEPH J. VUKOVICH

JUDGE MARY DeGENARO

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By Beth Ann Rose
Deputy Clerk

EXHIBIT 32

FILED

SEP 16 2013

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

STATE OF OHIO	)	IN THE COURT OF APPEALS OF OHIO
	)	
MONROE COUNTY	) SS:	SEVENTH DISTRICT
CLYDE A. HUPP, et al.,	)	
	)	
PLAINTIFFS-APPELLEES,	)	CASE NOS. 12 MO 6, 13 MO 3
	)	13 M0 11
VS.	)	
	)	
BECK ENERGY CORPORATION,	)	JUDGMENT ENTRY
	)	
DEFENDANT-APPELLANT.	)	

Appellant Beck Energy's August 19, 2013 motion to stay Case Numbers 13MO3, 13MO11 and 13MO12 pending the resolution of 12MO6 is denied. Case Numbers 12MO6, 13MO3 and 13MO11 are sua sponte consolidated for hearing and Opinion purposes.

Only 13MO11 remains to be briefed as 13MO12 has been sua sponte dismissed in a separate entry. To expedite hearing of this matter, Appellant Beck Energy shall have 30 days from the time-stamped date of this entry to file a brief in 13MO11, Appellees shall have 20 days to respond, and thereafter Appellant Beck shall have 10 days to file a reply brief, if any. No further leaves will be granted.

Motion by Appellant Beck Energy requesting a prehearing conference is denied as the Court does not deem it necessary at this time.

Emergency motions for injunctive relief and to set aside supersedeas bond remain pending for determination by the Court.

All until further order of the Court.

JUDGE GENE DONOFRIO

JUDGE JOSEPH J. VUKOVICH

JUDGE MARY DeGENARO

I certify the foregoing to be a true and correct copy of the original.

Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
By _____
Deputy Clerk

EXHIBIT 33

FILED
SEP 26 2013
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO)
)
MONROE COUNTY) SS:

IN THE COURT OF APPEALS

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

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co. Ohio
By Beth Ann Rose
Deputy Clerk

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

EXHIBIT 34

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FILED
NOV - 1 2013
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
MONROE COUNTY) SS: SEVENTH DISTRICT

CLYDE HUPP, et al.,)
) CASE NO. 13 MO 16
PLAINTIFFS-APPELLEES,)
)
VS.) JUDGMENT ENTRY
)
BECK ENERGY CORPORATION,)
)
DEFENDANT-APPELLANT.)

Motion of appellant Beck Energy Corporation filed on October 4, 2013 to voluntary dismiss this appeal is sustained. Appeal dismissed. Costs taxed against appellant.

Mary DeGenaro
PRESIDING JUDGE

I certify the foregoing to be a true and correct copy of the original.
Beth Ann Rose, Clerk
Common Pleas Court, Monroe Co., Ohio
Beth Ann Rose
Deputy Clerk

EXHIBIT 35

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

2012 AUG 31 AM 11:42
CLERK OF COURT

DONALD J. PNIACZEK, et al.,

Plaintiffs,

vs.

Case No. 2012-274

BECK ENERGY CORPORATION, et al.,

Defendants.

JUDGMENT ENTRY ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

This matter came before the Court on the 31st day of August, 2012 for hearing on *Plaintiff's Motion for Temporary Restraining Order and Motion for Preliminary Injunction.*

Plaintiffs Donald Pniazcek, Mary Jane Pniazcek, John Pniaczek and Deborah Pniaczek ("Pniazceks") were present through their counsel, Mark A. Ropchock, Esq. of Slater & Zurz, LLP.

Defendant Beck Energy Corporation ("Beck") was present through its counsel, Scott M. Zurakowski, Esq. and Nathan D. Vaughan, Esq. of Krugliak, Wilkins, Griffiths & Dougherty Co,, L.P.A.

The Court finds that a *Certification of Plaintiffs' Counsel* was filed avering that Defendant Exxon Mobil Corporation was advised of said hearing.

Evidence was presented.

Based upon the filing of Pniazceks, the arguments of counsel and the evidence presented, the Court hereby makes the following Findings and Orders:

Pniaczeks have moved this Court for an immediate Temporary Restraining Order to prevent Beck from including ten (10) acres of the Pniaczeks' property in a twenty (20) acre drilling unit related to an oil and gas well to be drilled on their neighbors' property, the Dannemillers.

This Court, through the Hon. Ed Lane, in *Case No. 2011-345, Clyde A. Hupp, et*

COURT OF
COMMON PLEAS
MONROE COUNTY
JULIE R. SELMON
JUDGE

al. v Beck Energy Corporation, ruled in its *Journal Entry* filed on July 31, 2012 that Beck leases were void *ab initio* as perpetual leases, and second, that the leases were void for Beck's failure to timely develop them under the implied covenant to reasonably develop the land, which covenant was impliedly contained in the Beck leases.

Said ruling was appealed on August 28, 2012 and *Defendant Beck Energy Corporation's Motion for Stay* is currently scheduled for hearing before the Hon. Ed Lane.

Beck applied for a permit to drill on Pniaczeks' property after this Court's aforementioned finding and ruling that these purported class members' Beck leases were void.

The Pniaczeks three-year lease with Beck was signed on September 3, 2009 and set to expire on September 3, 2012. To date, no well has been drilled on Pniaczeks' property.

Mary Jane Pniazcek testified that she contacted Beck following the ruling in the *Hupp v Beck* case and advised them of Pniazceks intention not to renew the lease. Subsequent to that conversation, Pniaczeks received a letter from Beck's counsel, dated August 22, 2012, advising of Beck's intention to consolidate the Pniaczeks' lease with other oil and gas leases to form an oil and gas development unit.

Pniazceks are purported class members in the above referenced proposed class action, *Hupp v Beck Energy Corporation*.

The Court finds that immediate and irreparable injury, loss and damage will result to Pniaczeks if a temporary restraining order is not issued, by way of: (1) the potential extraction of minerals from Pniaczeks' realty pursuant to an oil and gas lease which has already been declared void *ab initio* by this Court; (2) the elimination of Pniaczeks' ability to participate in a putative class action; and (3) the potential further

encumbrance of Pniaczeks' realty by production under the existing oil and gas lease of Beck.

Accordingly, the Court hereby ***grants Plaintiff's Motion for Temporary Restraining Order and Motion for Preliminary Injunction.***

Wherefore, it is hereby Ordered, Adjudged and Decreed that Beck Energy Corporation, and its agent, employees, representatives, and assigns, and all person in active concert and participation with them, be and hereby are restrained from, in any manner, either directly or indirectly:

(1) from entering upon Pniaczeks' realty for the purposes of making any preparations fro the drilling of an oil and gas well;

(2) from conducting any drilling operations on Pniazceks' realty; and

(3) from including any portion of Pniazceks in an oil and gas well drilling unit.

IT IS SO ORDERED.

JULIE R. SELMON, JUDGE
Dated as of the date of filing

COPIES SENT THIS DAY TO:
Mark A. Ropchock, Esq. and Richard V. Zurz, Jr., Esq.
Scott M. Zurakowski, Esq., William G. Williams, Esq., [redacted],
Gregory W. Watts, Esq. and Aletha M. Carver, Esq.
Exxon Mobil Corporation c/o Ronnie Blackwell, Esq., XTO Energy, Inc., 714 Main St., Fort Worth, TX 76102-6290

kss

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JUDGE