

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio ex rel. Claugus Family Farm,)
L.P.,)
)
Relator,)
)
v.)
)
Seventh District Court of Appeals, et al.,)
)
Respondents.)

Case No. 2014-0423

IN MANDAMUS AND PROHIBITION

BRIEF OF RELATOR CLAUGUS FAMILY FARM, L.P. ON THE MERITS

Daniel H. Plumly (S.Ct. #0016936)
(Counsel of Record)
Andrew P. Lycans (S.Ct. #0077230)
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street, P. O. Box 599
Wooster, Ohio 44691
(330) 264-4444
Fax No. (330) 263-9278
plumly@ccj.com

*Counsel for Relator
The Claugus Family Farm, LP*

Michael DeWine (S.Ct. #0009181)
Ohio Attorney General
Sarah Pierce (S.Ct. #008799)
Darlene Fawkes Pettit (S.Ct. #0081397)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2862; Fax No. (614) 728-7592
sarah.pierce@ohioattorneygeneral.gov
darlene.pettit@ohioattorneygeneral.gov

*Counsel for Respondents The Seventh District
Court of Appeals, Judge Gene Donofrio, Judge
Joseph J. Vukovich, and Judge Mary DeGenaro*

Scott M. Zurakowski (S.Ct. #0069040)
William G. Williams (S.Ct. #0013107)
Gregory W. Watts (S.Ct. #0082127)
Aletha M. Carver (S.Ct. #0059157)
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
4775 Munson Street, N.W.
P. O. Box 36963
Canton, OH 44735
(330) 497-0700; Fax No. (330) 497-4020
szurakowski@kwgd.com;
bwilliams@kwgd.com; gwatts@kwgd.com;
acarver@kwgd.com

*Counsel for Intervening Respondent, Beck
Energy Corporation*

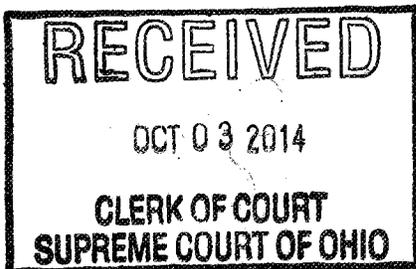
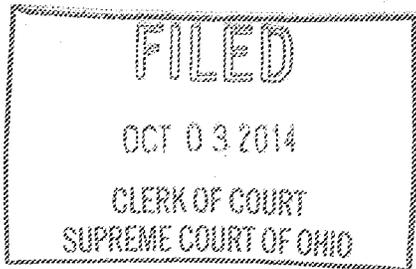


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The Fourteenth Amendment to the United States Constitution and Article 1, § 16 of the Ohio Constitution provide that no person shall be deprived of property without due process of law. In a class action, the level of due process which must be afforded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

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PRELIMINARY STATEMENT

Claugus Family Farm, L.P. (“Claugus Family” or “Relator”) seeks a writ of prohibition barring the Seventh District Court of Appeals (“Seventh District”) from enforcing an order tolling an oil and gas lease on the Claugus Family’s property and a writ of mandamus ordering the Seventh District to vacate that order to the extent it applies to the Claugus Family’s lease. This original action raises fundamental due process issues under both the United States and Ohio Constitutions.

As Intervenor Beck Energy Corporation (“Beck Energy”) has candidly admitted, the Seventh District did not afford the Claugus Family due process in the underlying case because the Claugus Family would be a member of a proposed Civil Rule 23(B)(2) class action.¹ Beck Energy frames the issue simplistically as what due process rights must be afforded a proposed member of a Civil Rule 23(B)(2) class. As the United States Supreme Court has recognized, however, “[t]he procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*.” See *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011) (emphasis in original). Civil Rule 23(b)(2) “does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.” *Id.*

¹ “Relator received the notice to which it was entitled – none.” (Motion to Dismiss of Proposed Intervenor Beck Energy Corporation at 1.) “Its membership in this class affords it absolutely no due process notice or opt-out rights, which would include notice of the Court of Appeals’ tolling order.” (*Id.* at 25.)

The question before the Court is, given the significant rights affected by the tolling order, should the Seventh District have afforded property owners such as the Claugus Family due process in the form of notice of the lawsuit, notice of the tolling order, and the right to opt out of the class? As asked by the United States Supreme Court, would providing such notice and an opportunity to opt out of the class “serve a purpose” given the facts of this case? If we may answer, the Court cannot simply assume that, because the trial court chose to certify the class under Civil Rule 23(B)(2), the Claugus Family is not entitled to any semblance of due process regardless of how the orders subsequently issued by the courts in the purported class action affect absent class members.² In addition, there is a strong argument that the class was not properly certified under Civil Rule 23(B)(2) in the first place. Moreover, even if lower courts complied with the Civil Rules, however, that does not mean that the constitutional requirement of due process was met. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir.1983) (noting that “class actions must comport with constitutional due process” in addition to the civil rules).

It is truly ironic and revealing that Beck Energy has been allowed to intervene in these proceedings because vacating the tolling order as to the Claugus Family would “directly impact” Beck Energy and it has “compelling interests” that will not be adequately represented by others. At the same time Beck Energy fails to see the need to protect the same rights of the Claugus Family. The Claugus Family was certainly “directly impacted” by the tolling order and the record makes clear that no one represented the Claugus Family’s “compelling interest.” Further, the situation of which Beck Energy now complains largely came about as a result of Beck

² Stated differently, before awarding equitable relief against the absent class members by retroactively tolling their leases, did due process require the Seventh District to provide notice to the absent class members because any such tolling order would significantly and materially affect the fundamental rights of the putative class members?

Energy's arguments to the lower courts. In particular, Beck Energy wanted an order tolling all the oil and gas leases of proposed class members, but it fought tooth and nail to avoid disclosing the identity of the proposed class members to the named plaintiffs and to avoid providing all potential class members with notice of the lawsuit. The trial court split the baby by refusing to provide notice and the right to opt out of the proposed class, while only tolling the leases of the named class members who had notice of the lawsuit. The Seventh District then upset the delicate balance adopted by the trial court when it extended the tolling order to the absent class members (who never were provided with notice of the lawsuit and never accepted the risk that their leases would be equitably tolled) while failing to provide those class members with notice and opt out rights.

As set forth below, the due process rights of the Claugus Family and approximately 700 mineral owners throughout Ohio were violated by the tolling order adopted by the Seventh District.³ Beck Energy is directly culpable for those due process violations, having done everything in its power to prevent proposed class members from receiving notice and an opportunity to opt out. If Beck Energy had urged the lower courts to provide due process rather than fighting it, it could have avoided the potential harm to itself of which it now complains. As between innocent mineral owners who were denied the opportunity to participate in the proceedings below in any way and Beck Energy, which brought about the due process violations, the equities clearly favor the Claugus Family and similarly situated mineral owners.

³ The trial court indicated that Beck Energy had executed a Form G&T (83) lease with approximately 415 landowners in Monroe County and approximately 200 to 300 landowners in other counties. (Entry Granting Class Certification, Stipulations at Exhibit 14.) Beck Energy indicated that these leases cover approximately 40,000 acres in 12 counties. (Hearing Transcript, Stipulations at Exhibit 26, p.18.)

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

I. Introduction

This is an original action seeking a writ of prohibition barring the Seventh District Court of Appeals (“Seventh District”) from enforcing a judgment entry issued in the case of *Hupp v. Beck Energy Corporation*, Case Nos. 12 MO 6, 13 MO 3, and 13 MO 11 (“Beck Litigation”) on September 26, 2013, to which Relator will refer as the “Tolling Order.” The Claugus Family further seeks a writ of mandamus ordering the Seventh District to vacate the Tolling Order to the extent it applies to the Claugus Family as an absent member of a class certified by the Monroe County Common Pleas Court under Ohio Rule of Civil Procedure 23(B)(2).

The Tolling Order purports to bind the Claugus Family and other absent class members to an order issued in a potential class action in which the Claugus Family was not a named party, never received notice of the action, never was given the opportunity to opt out of the class, and never was given a chance to be heard. Thus, the Seventh District adjudicated the Claugus Family’s property rights in absentia, despite the fact that those rights are worth hundreds of thousands of dollars. Simply stated, the Tolling Order was issued without due process of law.

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

II. The Claugus Family Property

The Claugus Family is a limited partnership duly organized and existing under the laws of the State of Ohio. (Clausus Affidavit at ¶2, Evidence of Relator Exhibit 1.) The partners are the immediate descendants of Drs. Frederick W. and Frederick C. Claugus, local veterinarians who served the Monroe County area for approximately 60 years, beginning in the 1940’s. Members of the Claugus family have owned and farmed land in Monroe County for at least 140 years. The Claugus Family now owns both the surface and mineral rights to most of that acreage,

including a parcel of approximately 60.181 acres in Green Township that is the subject of this action. (*Id.* at ¶3.)

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

The prior owner of the farm signed a Form G&T (83) oil and gas lease with Beck Energy on February 4, 2004 (hereinafter the “Beck Energy Lease”). (*Id.* at ¶4.) The primary term of the Beck Energy Lease was ten years; the secondary term was to continue “so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas.”⁴ (Beck Energy Lease, Evidence of Relator at Exhibit 3.) No well was drilled on the property during the primary term; oil and gas were not produced during the ten year primary term; Beck Energy did not operate the premises in search of oil or gas during the primary term; Beck Energy expressed no judgment regarding future production; and Beck Energy took no steps to obtain a drilling permit or conduct activities pursuant to the Beck Energy lease. (Clausus Affidavit at ¶6, Evidence of Relator Exhibit 1.) Thus, absent the Tolling Order, the Beck Energy Lease would have terminated at midnight on February 3, 2014.

(*Id.*)

⁴ Beck Energy readily acknowledged before the trial court that, if a well is not developed within the primary term, the lease expires. (Brief in Opposition to MSJ, Stipulations at Exhibit 4, p.11) “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-but these payments can only extend the Lease Agreements from year to year during the ten year primary term.” (*Id.*) XTO also readily admits that, if no development occurs during the primary term, the lease expires. (Black Affidavit at ¶4, Additional Evidence of Intervenor Exhibit C.) The Seventh District also confirmed this interpretation of the lease. *See Hupp*, 2014-Ohio-4255, ¶¶90, 99.

III. The Original Action and Requested Class Certification

On September 14, 2011, four individuals filed suit against Beck Energy in the Monroe County Common Pleas Court. (Complaint, Stipulations at Exhibit 1.) The case was assigned Case No. 2011-345. (*Id.*) The complaint alleged that the Form G&T (83) oil and gas leases the plaintiffs signed with Beck Energy are invalid. (*Id.*) On September 29, 2011, the complaint was amended to assert claims on behalf of a class of landowners who had signed Form G&T (83) oil and gas leases with Beck Energy, thereby potentially transforming the case of four individuals into a class action brought on behalf of hundreds of property owners. (First Amended Complaint, Stipulations at Exhibit 2.) On July 12, 2012, the Common Pleas Court granted summary judgment to the named plaintiffs, holding that the Form G&T (83) leases signed by the named plaintiffs constituted leases in perpetuity in violation of Ohio public policy. (Entry Granting Summary Judgment, Stipulations at Exhibit 5.) The Court held these leases to be void *ab initio*. (*Id.*)

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

On July 19, 2012, one week *after* obtaining summary judgment, the named plaintiffs filed a motion for class certification pursuant to Ohio Civil Rule 23(B)(2). (Motion for Class Certification, Stipulations at Exhibit 6.) Class actions maintained under Civil Rule 23(B)(2) are intended to address conduct of the defendant that applies generally to all affected plaintiffs. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 203, 509 N.E.2d 1249 (1987). Thus, Civil Rule 23(B)(2) actions do not normally require notice to members of the proposed class or the opportunity to opt out of the class because they do not pose a risk of dissimilar impact on the plaintiffs. *See Wal-Mart*, 131 S.Ct. at 2559. The maintenance of a class action under Civil Rule 23(B)(2) is inappropriate however, when the suit may result in a disposition that will affect the proposed class members differently. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d

373, 2013-Ohio-4733, 999 N.E.2d 614, ¶25. An action in which class members may be affected differently or individually should be maintained under Civil Rule 23(B)(3). *See id.*

On February 8, 2013, the Common Pleas Court granted class certification pursuant to Civil Rule 23(B)(2). (Entry Granting Class Certification, Stipulations at Exhibit 14.) The Common Pleas Court certified the class pursuant to Civil Rule 23(B)(2) despite the fact that, if the leases were indeed void *ab initio*, class members would have individual and variable claims against Beck Energy for slander of title and money damages. Beck Energy then appealed this order to the Seventh District, which remanded the case to the Common Pleas Court, *inter alia*, to clarify the definition of the class. (Entry Clarifying Class, Stipulations at Exhibit 18.) On June 10, 2013, the Common Pleas Court defined the class as follows:

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

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

Despite seeking certification pursuant to Civil Rule 23(B)(2), the named plaintiffs filed a "Motion for Approval of Notice to Class and Establishment of Method of Service," explaining that "Class counsel cannot readily inform Class members [of the court's judgment] because the names and addresses of the vast majority of the Class members are not known." (Motion for Approval of Notice, Stipulations at Exhibit 19.) The Court held a hearing on this motion and several other motions on July 23, 2013. (Hearing Transcript, Stipulations at Exhibit 26.) During that hearing, Beck Energy emphasized that no notice was required because the Plaintiffs were

only seeking injunctive relief against Beck Energy. (*Id.* at p.13.) The Court indicated that the motion would not be granted because “if I am correct, there will be notice at the appropriate time [after affirmance on appeal]. If I’m incorrect, you [plaintiffs’ counsel] don’t represent these people.” (*Id.* at p.14).

On August 8, 2013, the Common Pleas Court issued a written order denying the motion to provide notice, along with a prior motion seeking to compel Beck Energy to identify every lessor who had signed a Form G&T (83) lease. (Entry Denying Notice, Stipulations at Exhibit 28.) Taken together, these two decisions foreclosed any possibility that the absent members of the class would receive either notice of the action from the courts or an opportunity to opt out. This was done based upon the trial court’s determination that notice was not necessary prior to the Court of Appeals’ ensuing decision on the merits. (Hearing Transcript, Stipulations at Exhibit 26, p.15.)

This case has had a tortured trek of order, appeal and remand focused on class certification and tolling of leases.⁵ During this process, both the trial court and the Seventh District lost sight of the non-party landowners, including the Claugus Family, who were not parties to the action, but were impacted by the various rulings of the courts. To this day, the Claugus Family has not received any notice from the Court or counsel to the parties of the class action litigation, the Tolling Order, or any other aspect of the case. (Clausus Affidavit at ¶15, Evidence of Relator at Exhibit 1.)

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

On October 1, 2012, Beck Energy filed its first motion to toll leases, which related to the named plaintiffs only, even though those plaintiffs had filed an amended class action complaint more than a year before the motion to toll was filed. (Motion to Toll Leases of Named Plaintiffs,

⁵ See a copy of the partial chronology of the Beck Litigation attached.

Stipulations at Exhibit 12.) At the time, Beck Energy had conceded “equitable tolling should not apply to any other potential class members” unless and until class certification was granted. (Reply in Support of Motion to Toll, Stipulations at Exhibit 13.) On July 16, 2013, Beck Energy filed a second motion, asking the Court to toll the leases of all the proposed class members. (Motion to Toll Leases of Class Members, Stipulations at Exhibit 24.) After the Court indicated that it was not going to provide notice to absent class members during the July 23, 2013 hearing, it addressed the issue of whether a stay should be issued and leases tolled. Even though Beck Energy prevailed on the issue of notice, it then asked the trial court to issue an order “that precludes the Plaintiffs from entering into new leases while this case is on appeal.” (Hearing Transcript, Stipulations at Exhibit 26, p.19.) Beck Energy emphasized that plaintiffs who signed new leases were subjecting themselves to potential future litigation. (*Id.* at p.20-21.) When the Court questioned whether the plaintiffs could be harmed by such a motion, Beck Energy responded “that is the risk the Plaintiffs took when they filed this litigation.” (*Id.* at p.21.)

The Court initially indicated that it was willing to toll the leases of the putative class members in addition to the named plaintiffs, (*Id.* at p.31.), but then suggested (and Beck Energy agreed) that “we may want to give them [the putative class members] notice as to that ... [s]o they know that that’s happened.” (*Id.* at p.32.) The Court then agreed to consider further briefing on the issue. (*Id.* at p.38.)

On August 2, 2013, the Common Pleas Court filed an entry tolling leases of only the named plaintiffs pending the outcome of Beck Energy’s appeals. (Entry Tolling Leases of Named Plaintiffs, Stipulations at Exhibit 27.) In doing so, the Court discussed (but did not toll) “leases that *may eventually be included in this class* if the Plaintiffs prevail and this matter goes forward as a class action.” (*Id.*) The Court thus denied Beck Energy’s motion to toll the leases of absent class members who had not been provided with notice of the lawsuit or the opportunity to

opt out. (*Id.*) Beck Energy appealed this order in its fifth trip to the Court of Appeals related to the Beck Litigation. (Appeal No. 13 MO 16, Evidence of Relator at Exhibit 30.) As a direct consequence of the foregoing, the Claugus Family remained completely ignorant of the fact and results of the legal proceedings.

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

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

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

(Tolling Order, Stipulations at Exhibit 33.)

The Seventh District offered no explanation as to how it could properly toll the leases of lessors who were only "proposed defined class members" without providing notice to them and giving them the opportunity to opt out of the action. It also did not explain how the leases of absent class members could be tolled from October 1, 2012, when the class was not certified by the trial court until February 8, 2013. The Court completely disregarded the need for due process in the face of the extraordinary burden to be imposed on the property rights of absent class members and the different impact the ruling would have on each of the potential class members. The Claugus Family's rights were entirely disregarded by the Court's orders. The Claugus Family (i) was not a named party; (ii) received no notice of the lawsuit from the court; (iii) was not provided a right to opt out of the proposed class action; and (iv) was prejudiced by the order.

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

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

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

The property owned by the Claugus Family is in the heart of the area being developed by oil and gas producers because of its favorable shale formations. Realizing that the Beck Energy Lease was nearing the end of the primary term, the Claugus Family began exploring new leasing opportunities in 2013. On September 30, 2013, the Claugus Family signed a Paid-Up Oil & Gas Lease with Gulfport Energy Corporation (hereinafter the “Gulfport Lease”) covering the property.⁶ (Gulfport Lease, Evidence of Relator at Exhibit 4.) This form of leasing is commonly

⁶ The Claugus Family has other real estate holdings contiguous to the real estate in question. (Clausus Affidavit at ¶21(c), Evidence of Relator at Exhibit 1.) The ability to “block” or aggregate acreage enhances the potential to have a well drilled on the Claugus Family’s property. (*Id.* at ¶21(d).) Consequently, not only is the Claugus Family prejudiced by the tolling of the Beck Energy Lease, the inability to make this acreage available will negatively impact the development of other Claugus Family oil and gas interests. (*Id.*)

referred to as top leasing, and the new lease does not come into play until the prior lease has expired. Top leasing is a common practice in the Ohio oil and gas community.

The Gulfport Lease provides that the Claugus Family will receive a bonus payment of \$7,000 for each net mineral acre as to which title is confirmed as clear, along with a 20% royalty from any oil and gas ultimately produced, versus the 12.5% royalty provided for in the Form G&T (83) lease. (*Id.*; Claugus Affidavit at ¶21(b), Evidence of Relator at Exhibit 1.) Thus, the Claugus Family should receive a payment of \$421,267.00 and potential additional royalties could total millions of dollars. (*Id.* at ¶8.) The Gulfport Lease included a 90 day “title period” from September 30 to December 29, 2013, during which Gulfport reviewed title to the property for title defects. (Gulfport Lease, Evidence of Relator at Exhibit 4.) A 180 day “cure period” followed the title period, during which the Claugus Family could cure any title defects. (*Id.*) That period began to run against the Claugus Family on December 30, 2013, and ended on June 27, 2014. (Claugus Affidavit at ¶18, Evidence of Relator at Exhibit 1.) An oil and gas lease not released of record does not constitute a title defect under the Gulfport Lease if the primary term of such oil and gas lease has expired by its terms and no producing oil and gas well has been drilled pursuant to said lease. (*Id.* at ¶13.) Because the Beck Energy Lease was to expire on February 3, 2014, comfortably within the cure period, the Claugus Family should be entitled to receive the payment from Gulfport and increased royalties from a well drilled under the Gulfport Lease.

The Claugus Family was unaware, four days before it signed the Gulfport Lease (which had been the subject of negotiations for weeks), the Seventh District tolled the Beck Energy Lease indefinitely, retroactive to October 1, 2012. The trial court never had provided the Claugus Family with notice of the class action or any opportunity to opt out. Worse, the Seventh District did not (and still has not) provided the Claugus Family with notice of the Tolling Order, despite

the fact that this order will cost the Claugus Family hundreds of thousands of dollars (if not millions), if it is allowed to stand.

When Relator became aware of the Tolling Order, it immediately notified Gulfport of the Court's ruling.⁷ Absent this notification, Gulfport would have not discovered the Tolling Order when conducting a title examination of the property.⁸ (Mineral Ownership Report, Evidence of Relator at Exhibit 5.) The class action lawsuit also did not attempt to identify the properties held by each of the approximately 700 lessors holding a Form G&T (83) lease—indeed the named plaintiffs' failed attempts to obtain a list of such lessors indicate that they could not have described each of the affected parcels, even if they had wanted to do so. In fact, no one would be able to associate the Tolling Order issued by the Seventh District with any properties other than possibly the properties owned by the named plaintiffs in the class action. When Gulfport learned of the Tolling Order from the Claugus Family's counsel, it took the position that the expired Beck Energy lease constituted a title defect and rejected the lease. (Claugus Affidavit ¶12, Evidence of Relator at Exhibit 1.)

The Claugus Family would not and does not want to be included in the class and would have elected to be excluded from the class had it been provided with notice of the class action and the right to opt out. (*Id.* at ¶16.) The Seventh District's Tolling Order will add years onto the Beck Energy Lease—including five months for a period before the class was even certified by the trial court when the Claugus Family was not even an absent class member and ten months prior to Beck Energy even asking that the leases of absent class members be tolled! The Tolling

⁷ Counsel for Relator became aware of the Tolling Order in October of 2013 during general discussions with counsel for Hupp regarding oil and gas litigation in Ohio.

⁸ A title examiner reviews the record chain of title based upon documents recorded at the county recorder's office. A title examiner also reviews court filings which specifically reference a property. The title search conducted by Gulfport did not reveal that the Tolling Order applied to the Claugus Property, because none of the court filings specifically referenced the Claugus Property.

Order deprives the Claugus Family of valuable property rights⁹ and purports to bind the Claugus Family and other absent class members, despite the due process violations and jurisdictional issues created by an order purporting to bind parties who never were properly before the court and who never were told about the lawsuit or the Tolling Order.

VIII. The Seventh District Affirms Class Certification while Reversing the Relief Awarded to the Class

On September 26, 2014, the Seventh District issued its decision in *Hupp v. Beck Energy Corp*, 2014-Ohio-4255 (7th Dist.). The Seventh District affirmed the trial court's certification of a class action pursuant to Civil Rule 23(B)(2) and the lower court's definition of the class. *Id.* at ¶6. Because the Seventh District determined that the Form G&T (83) is not a no-term, perpetual lease, however, it reversed the trial court's grant of summary judgment to the class based upon the leases being void ab initio as against public policy. *Id.* at ¶4. The Court noted that the Tolling Order remained in effect during the pendency of any appeals to this Court. *Id.* at ¶26. On remand, the trial court will presumably have no choice but to award summary judgment against the class. Thus, the class action has been of no benefit to the absent class members. The net effect of the class litigation will be to burden the absent class members by extending their leases for at least two years, without any compensation for the extension or any notice that it has occurred.

ARGUMENT

Proposition of Law No. 1:

The Fourteenth Amendment to the United States Constitution and Article 1, § 16 of the Ohio Constitution provide that no person shall be deprived of property without due process of law. In a class action, the level of due process which must be afforded to absent class members is dependent upon the

⁹ The Affidavit of Eli Jr. Miller describes the negative economic effect that a lease has on the value of the Claugus Family acreage covered by the tolled Beck Lease. (Miller Affidavit, Evidence of Relator at Exhibit 2.)

property rights that might be affected by the lawsuit. Where a class is certified pursuant to Civil Rule 23(B)(2), and no notice of the lawsuit or opportunity to opt out is provided to the absent plaintiffs, who are at risk of dissimilar impact, a court order tolling the termination date of the absent class members' oil and gas leases violates the due process rights of such absent class members and is unconstitutional.

A. Introduction

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

B. Due Process Dictates whether a Absent Class Members are Entitled to Notice and Any Relief Beyond the Award of Injunctive or Declaratory Relief to the Plaintiffs in a Rule 23(B)(2) Class Action Requires Notice and the Right to Opt Out

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The notice requirements set forth in Civil Rule 23 are designed to comply with due process and guaranty that those bound by a ruling in a class action were accorded their right to notice and an opportunity to be heard. *Chaffee v. A&P Tea Co.*, N.D.Ill. No. 79 C 2735, 1991 WL 5859, at *2 (Jan. 16, 1991). The notice requirement required by each type of class action is central to the protection of due process rights. *Id.*

Class actions certified pursuant to Civil Rule 23(b)(2) do not **ordinarily** require that class members be given notice and opt-out rights. *See Wal-Mart*, 131 S.Ct. at 2559. “The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*.”¹⁰ *Id.* at 2558. In certain circumstances, however, notice and the opportunity to opt out must be provided to Rule 23(b)(2) class members in order to insure the protection of these absent parties. *See Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 225 (2d Cir. 2012); *Pate v. United States*, 328 F.Supp.2d 62, 73 (D.D.C.2004) (quotation omitted). “[W]hen the presence of special circumstances requires prejudgment notice, and the record is devoid of any evidence of notice, the fairness requirement has not been satisfied.” *Pate*, 328 F.Supp.2d at 73.

For example, due process requires notice where the objective of the class action is not limited to equitable relief to be awarded to the class action plaintiffs generally. *See Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir.1979) (noting Rule 23(b)(2) generally assumes that the action will be limited to seeking equitable relief on behalf of the plaintiffs and holding that plaintiff’s suit for nonequitable relief was therefore not barred by prior Rule 23(b)(2) class action). Thus, the courts have generally determined that, where a Rule 23(b)(2) suit seeks something beyond equitable relief against the defendant, notice and an opportunity to opt out are necessary to satisfy due process and to preserve the constitutionality of the proceedings. *See*

¹⁰ While the Seventh District quoted this language in the *Hupp* decision, it failed to analyze whether its decision to issue the Tolling Order without notice to the absent class members (and the opportunity to opt out) complied with due process. *Hupp*, 2014-Ohio-4255, at ¶37. This is one of the fundamental problems with such classes. *See Johnson v. Georgia Highway Exp., Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., concurring) (noting that a (b)(2) class is determined in the absence of 99.9% of those affected and that certifying the class “tacitly assum[es] all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.”)

Palmer v. Combined Ins. Co. of Am., 217 F.R.D. 430, 440 (N.D.Ill.2003); *see also Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (noting that introduction of anything other than a claim for equitable relief against the defendants creates a hybrid suit, in which minimum due process requires the right to opt-out); *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 605 (E.D.Mich.1996) (noting circumstances which may create due process concerns in a Rule 23(b)(2) class action). In fact, the United States Supreme Court has stated that “Rule 23(b)(2) applies *only* when a *single* injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 131 S.Ct. at 2557 (emphasis added)

Thus, class actions certified pursuant to Civil 23(b)(2) do not ordinarily require that class members be given notice and opt-out rights because notice serves no purpose when the plaintiffs seek only equitable relief in the form of an order requiring the defendant to act in a consistent manner with regard to a group of people, each of whom individually could seek injunctive or declaratory relief against the defendant based upon its conduct. *See id.* at 2559. Notice is not required because the declaration (or injunction) should issue as to all of the similarly situated plaintiffs, or should not be issued at all. *Id.*

This narrow circumscription of due process ceases to apply when relief specific to individual members of the class is sought by plaintiffs or defendants. The trial court’s decisions recognize this narrow circumscription, however and anticipated, the due process violations which would result from awarding interim equitable relief to the *defendant* in a Rule 23(B)(2) class action. As noted by the United States Supreme Court, Rule 23(b)(2) applies only to cases where a class of plaintiffs are seeking relief for members of the class in the form of a single injunction or declaratory judgment against the defendant. *Wal-Mart*, 131 S.Ct. at 2557. A fundamental principal of a Rule 23(b)(2) class is that membership in a Rule 23(b)(2) class cannot

be used against the absent class members except as to the resolution of the broad injunctive or declaratory relief necessary to redress the group-wide injury. *See In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 115 (E.D.N.Y.2012).

Troublesome issues of fairness and due process arise when a court expands the scope of a Rule 23(b)(2) action beyond the narrow issue of injunctive or declaratory relief to be awarded against the defendant. *See Marcera v. Chinlund*, 91 F.R.D. 579, 585 (W.D.N.Y.1981) (noting the constitutional issues created by subjecting absent parties in a 23(b)(2) proceeding to judicial sanctions). The tolling of an oil and gas lease term when the lessor brings an action to cancel or terminate a lease is a form of equitable relief, but there is simply no authority for the proposition that a court can grant equitable relief against the members of a Rule 23(B)(2) class who have not been provided with notice or the opportunity to opt out of the lawsuit. *See Feisley Farms Family, L.P. v. Hess Ohio Res., LLC*, Case S.D.Ohio No. 2:14-CV-146, 2014 WL 4206487, at *4 (Aug. 25, 2014). Where such basic due process rights as notice and the right not to participate in the lawsuit have been denied, the *only* lawful outcome is equitable relief *against the defendant*. Thus, the trial court appropriately declined to equitably toll the leases of absent class members who had not been provided with notice of the lawsuit or the right to opt out.

The trial court explicitly recognized, if it tolled the leases of absent class members, it might be necessary to provide notice; in fact, Beck Energy itself agreed the court “may want to” provide notice in that situation. The Seventh District failed to appreciate the constitutional implications of granting equitable relief against absent class members by tolling the hundreds of leases without any attempt to inform the lessors of either the lawsuit or the Tolling Order.

Perhaps the easiest way to understand the issue is by considering whether notice and the right to opt out would have “served a purpose” in the context of the Tolling Order. On the most basic level, mineral owners and oil and gas producers need to know whether leases remain in

effect so that they can avoid unwittingly breaching a lease which (on its face) has expired. The situation created by Beck Energy and the Seventh District is a recipe for chaos and unending litigation. Because Beck Energy successfully opposed efforts to identify the affected leases and to provide notice to the lessors, there could be hundreds of mineral owners who leased their minerals to other oil and gas producers after the apparent expiration of their leases. Oil and gas producers conducting a title search would not discover the Tolling Order, because Beck Energy made no effort to invoke the doctrine of *lis pendens* as to the leases of absent class members. See *Wiley v. Triad Hunter LLC*, S.D. Ohio No. 2:12–CV–00605, 2013 WL 4041772, at *7 (Aug. 8, 2013) (refusing to toll oil and gas leases to relieve lessee’s uncertainty and noting that lessee already had filed notices of *lis pendens* to protect the status quo).

In fact, *not* providing notice to absent class members in this case is what “fails to serve a purpose.” The Tolling Order is a nullity if the affected mineral owners are not eventually notified of this lawsuit and the tolling of their leases. Unaware of the Tolling Order, mineral owners will proceed to sign new leases and oil and gas producers will drill wells on the affected properties. While this would violate Beck Energy’s rights under the tolled leases, it will not matter unless the Tolling Order is brought to the attention of these mineral owners and competing producers. Without that notice, everyone will continue on as if the Tolling Order had never been issued. Thus, *notice will have to be provided at some point*. In fact, the trial court assumed that notice would be provided, but saw no reason to provide notice prior to a final determination of the validity and class certification issues on appeal.

Given that notice will have to be provided eventually, the question becomes why is it not being provided at a point where innocent parties can react to the Tolling Order and avoid breaching their tolled leases with Beck Energy? At least as to the Seventh District, the answer clearly seems to be that the Court failed to appreciate the implications of awarding equitable

relief *to the defendant* in a Rule 23(B)(2) class, where the parties against whom the relief was granted never were informed of the lawsuit or the award of equitable relief by the courts.

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

The mere fact that the critical notice and opt-out protections are mandatory for classes certified under Rule 23(b)(3) does not mean that the same protections are never required in a class certified under Rule 23(b)(2). *Frank v. United Airlines, Inc.*, 216 F.3d 845, 860 (9th Cir.2000) (O'Scannlain, J., concurring in part and dissenting in part). As the Advisory Committee's Note to Federal Rule of Civil Procedure 23 explains, the “mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill the requirements of due process to which the class action procedure is of course subject.” 28 U.S.C. Rule 23 (Adv. Comm. Note). Further, the mere fact that the letter of the civil rules has been followed does not obviate the need to determine whether due process has been afforded to absent class members. *See Holmes*, 706 F.2d at 1160 (11th Cir.1983) (noting that “class actions must comport with constitutional due process” in addition to the civil rules); *Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650, 657 (E.D.La.1975) (“23(d)(2) is, to the extent it leaves notice to the discretion of the court, deceptive; notice may be required as a matter of due process of law, no matter what Rule 23 seems to countenance”). The Rules of Civil Procedure cannot work as substantive law, and this core stricture demands a narrow construction of Rule 23, which must be applied with the interests of absent class members in close view. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir.2011).

Plainly, in certain circumstances, due process may require that notice and the opportunity to opt out be provided even when the class is certified under Rule 23(b)(2). *See Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 811, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (holding that due process required that absent plaintiffs receive notice and an opportunity to opt out under the circumstances even though class was not certified pursuant to (b)(3)); *Holmes*, 706 F.2d at 1160; see also *Planned Parenthood Ass'n. of Cincinnati, Inc. v. Project Jericho*, 1st Dist. Hamilton No. C-860550, 1989 WL 9312, at *7 (Feb. 8, 1989) (holding that individual notice was required to comply with due process, even though the class was not certified pursuant to Rule 23(b)(3)). In fact, Civil Rule 23(d)(2) specifically allows for notice in class actions maintained pursuant to Civil Rule 23(b)(2), and the courts have interpreted Rule 23(d)(5) to allow class members to opt out when necessary to comply with due process requirements. See *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 582 (7th Cir.2000).

In *Oneida Indian Nation of Wisconsin v. State of New York*, an Indian tribe brought suit against a class of approximately 60,000 defendants seeking a declaration of ownership of and right to possess alleged aboriginal territory in State of New York totaling over 5 million acres of land. 85 F.R.D 701, 703, 705 (N.D.N.Y.1980). The tribe sought certification of a class solely for the purpose of determining whether certain transactions entered into between the Oneida Nation and the State of New York in 1785 and 1788 could be attacked in such a manner as to give rise to return the land or award of monetary damages to determinate procedural and substantive issues relating to plaintiffs' standing or ability to bring the action. *Id.* at 703. The Court decided to certify the class pursuant to Rule 23(b)(1)(B) which does not contain notice requirements, but nonetheless determined "due process in this action involving defendants' property rights mandates some type of individual notice to class members." *Id.* at 707, n.9. The Court did determine that an additional 440,000 landowners could be voluntarily excluded from the defendant class (and therefore not be provided with notice) because "so long as those individuals are not included in this action as members of the defendant class, their legal rights with regard to

the land will not be directly in jeopardy since they cannot be bound by [the] determination.” *Id.* at 708.

In this case, however, the Seventh District failed to recognize two critical legal concepts acknowledged by the *Oneida* Court. First, even if the Civil Rules would allow certification of a class of landowners without requiring mandatory notice that a lawsuit had been brought which could deprive them of valuable property rights, due process would not countenance such a lack of notice and opportunity to be heard. Second, where a court decides not to provide absent class members with notice of the class action lawsuit, the absent class members cannot be bound by any determination about their rights to land. This country was founded on the principle that people like the Claugus Family cannot be deprived of their property rights without notice and an opportunity to be heard. The Seventh District’s Tolling Order—which extends a lease which has now expired for an indefinite period of time beginning at a point before the class was even certified, all without notice to the affected property owner—violates the most basic rights embodied in both the federal and state Constitutions.

D. The Class was not Properly Certified under Rule 23(B)(2)

As set forth above, even if the class was properly certified pursuant to Rule 23(B)(2), that would not excuse the failure to provide notice and an opportunity to opt out at the point when equitable relief was awarded against the class of absent class members. However, both Beck Energy and Relator contend that the class was *improperly* certified, although for different reasons.

Class certification under Rule 23(b)(2) is not appropriate when the proposed class action includes individual monetary claims, because individual monetary claims are not general in nature and require the additional procedural protections found in Rule 23(b)(3), namely the right to notice and to opt out of the class. *Wal-Mart*, 131 S.Ct. at 2559. These protections are

sufficiently important that the United States Supreme Court has warned that class counsel should not be allowed to ignore potential monetary claims in order to obtain class certification under Rule 23(b)(2). *Id.*; see also *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir.2000). If the Courts are not on guard against such attempts to deny due process for the convenience of counsel, the class members might then be precluded from pursuing monetary claims as a result of the class action litigation from which they could not withdraw. *Wal-Mart*, 131 S.Ct. at 2559. Thus, “Dukes suggests that a Rule 23(b)(2) class is inappropriate where the claims asserted are the type that are susceptible to monetary damage awards, even if monetary damages are not actually sought by the named plaintiffs.” *Rouse v. Caruso*, E.D.Mich. No. 2:06-CV-10961, 2013 WL 588916, at *5 (Jan. 7, 2013).

If the leases are in fact void *ab initio* as against public policy, the filing of those leases constituted a slander of the landowner’s title. See *Gilson v. Windows & Doors Showcase, L.L.C.*, 2006-Ohio-2921, ¶30 (6th Dist.). In order to prove such a claim, the landowner would also need to establish that the slanderous statements caused actual or special damages. *Id.* at ¶31. Class certification under Rule 23(B)(2) is inappropriate where the absent class members have potential money damages that will be cut off by reason of the class action.¹¹ The fact that the named plaintiffs did not actually assert such monetary claim is irrelevant, because it merely serves to emphasize that the absent class members due process rights have been disregarded in an effort to obtain a quick and easy class certification by ignoring monetary claims.

Similarly, a class should not be certified under Rule 23(b)(2) when the class as a whole will not remain entitled to declaratory relief when relief is granted. *Wal-Mart*, 131 S.Ct. at 2559-60. Accordingly, class certification under Rule 23(b)(2) is inappropriate when the trial court

¹¹ In fact, class certification was most likely inappropriate under provisions of Rule 23(B)(3) as well, because establishing whether up to 700 landowners have established special damages will be nearly impossible in the class action context.

would need to continually reconsider the eligibility of class members for declaratory relief. *Id.* (noting that certification of a class of employees seeking declaratory relief under Rule 23(b)(2) was inappropriate when the trial court would have to evaluate and reevaluate whether plaintiffs remained employed by the defendant, since employees would be entitled to declaratory relief but former employees would not). Were it not so, the trial court could award declaratory relief to plaintiffs who lack standing.

As defined by the trial court, the class includes members who will no longer be entitled to the declaratory relief sought when relief is granted. As the court noted, the class consists of approximately 600 to 700 landowners. Landowners first began signing the Form G&T (83) lease in 1983. Many of those leases have since expired under their own terms, with more expiring day by day. Given the large number of proposed class members and the impossibility of knowing how long the class action would last, the trial court simply should not have granted class certification where many of the proposed class members would no longer be in a lease relationship with Beck Energy at the time the judgment issued. Further, plaintiffs simply are not “similarly situated,” and may not form a class, when some have a right to pursue the relief in question while others do not.

In that regard, “Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous.” *Lemon*, 216 F.3d at 580. “Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound.” *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir.1998). Because a 23(b)(2) class must be cohesive, a trial court should deny certification of a Rule 23(b)(2) class when faced with disparate factual circumstances in the plaintiff class that disrupt the necessary cohesion and homogeneity. *Id.*; *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir.2010) (“cohesiveness is even more important for a Rule 23(b)(2) class because, unlike Rule 23(b)(3),

there is no provision for unnamed class members to opt out of the litigation”); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir.2004) (as cohesiveness in a Rule 23(b)(2) class decreases, the due process to which absent class members are entitled increases). Simply put, the more each plaintiff has to lose, the less likely he will be to put his faith in the class. In such circumstances, presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate. *Clark v. State Farm Mut. Auto. Ins. Co.*, 245 F.R.D. 478, 486 (D.Colo.2007).

In this case, the proposed class simply is not cohesive. For landowners such as the Claugus Family, there was simply no need to bring a lawsuit to have the Form G&T (83) Lease declared void *ab initio*. The Beck Energy Lease on the Claugus Family’s property was already nearing the end of its primary term without any indication that Beck Energy planned to commence drilling operations on the property. For other landowners who were in the beginning years of a Form G&T (83) Lease, having their leases declared void *ab initio* might well be their only opportunity to obtain a large signing bonus and increase the landowner royalty they would be receiving.¹² Under the circumstances, a legal victory would provide significant benefits to those who had recently signed a Form G&T (83) lease, while providing little or no benefit to those whose leases were about to expire. In fact, as to landowners such as the Claugus Family, the net effect of this litigation has been to create a windfall for Beck Energy by extending the terms of their leases for years without any compensation whatsoever. In this instance, the class

¹² This would include a number of the name plaintiffs in the class action. For example, the Hubbards signed a new lease with Beck Energy on August 14, 2008—meaning their lease would not expire until midnight on August 13, 2018—when it will likely be too late to obtain a lease with a large signing bonus and increased royalties.

representatives do not have the same interests as absent class members such as the Claugus Family, who simply wish that their “representatives” would stop contributing to the turmoil.

As one federal court has noted, “23(b)(2) was intended primarily, although not exclusively, for use in “[c]ivil rights cases against parties charged with unlawful, class-based discrimination.” *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509, 519 (M.D.Ala.1998) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Attempts to shoehorn commercial and similar disputes into 23(b)(2) are just not appropriate. *Id.* Outside of the unique circumstances where a legal victory for one is necessarily a legal victory for all, “class members’ right to notice and an opportunity to opt out should be preserved whenever possible.” *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 899 (7th Cir.1999).

Finally, Beck Energy itself contends that the class was improperly certified because the named plaintiffs’ motion for summary judgment was granted prior to the class being certified.¹³ Both the federal and state rules of civil procedure now require the trial court to make a determination whether an action shall be maintained as a class action as soon as practicable after the commencement of an action brought as a class action. *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547-48, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) (quotation omitted). Before 1966, a “recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests.” *Id.* at 547. “This situation—the potential for so-called ‘one-way intervention’—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.”

¹³ The Seventh District determined that the rule against one-way intervention does not apply to a Rule 23(B)(2) class, because the class members are not allowed to opt out and make no decision as to whether to intervene. *Hupp*, 2014-Ohio-4255, at ¶¶50, 54.

Id. The Claugus Family agrees that the class was not properly certified, although for different reasons; given that improper certification, absent “class members” cannot be bound and no tolling order should have been granted as to them.

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

As a consequence of the misapplication of 23(B)(2) and the failure to apply Rule 23(D)(2), the class has not been properly conducted. The United States Supreme Court has recognized that “a handful of discrete and limited exceptions” exist to the “basic premise” that nonparties are not bound by a court’s judgments. *Smith v. Bayer Corp.*, ___ U.S. ___, 131 S.Ct. 2368, 2379, 180 L.Ed.2d 341 (2011). One of these admittedly narrow exceptions allows unnamed members of a class to be bound in a “properly conducted” class action, even though calling such unnamed plaintiffs “parties” is a legal fiction. *Id.* at 2380. This legal fiction cannot be stretched so far as to cover an action improperly conducted and involving proposed class members whom the named plaintiff had been denied leave to represent because “[n]either a proposed class action nor a rejected class action may bind nonparties.” *Id.* at 2379-80. The trial court itself recognized this principle when it stated: “If I’m incorrect, you [Plaintiffs’ counsel] don’t represent these people [the proposed class members].”

In *Bayer*, two different plaintiffs (neither of whom knew about the other’s lawsuit) brought putative class actions in the state courts of West Virginia against the same defendant based upon the same conduct. *Id.* at 2373. One of the suits was removed to federal court, while the other proceeded in state court. *Id.* Although the federal court ultimately refused to certify a class, the plaintiff in the state action was an unnamed member of the proposed class in the federal action. Because their interests were aligned, the defendant asserted in the state action that issue preclusion applied to bar certification of a class in the state court. *Id.* at 2374. Because the named plaintiff in the federal action was unquestionably denied the right to represent absent class

members in any way, the United States Supreme Court held that a decision denying class certification could not bind the unnamed class members. *Id.* at 2380. As a result, the plaintiff in the state action was not bound by the federal proceedings.

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

The foregoing conclusion comports with a fundamental aspect of Anglo-American law: a person is not bound by a judgment unless he is made a party by service of process and that extreme applications of res judicata (including preclusion) are inconsistent with rights guaranteed by the U.S. Constitution. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Absent class members must receive notice of a decision affecting their substantive rights. Certainly notice should be given in any proceeding tolling material property rights. *See Harrison v. Horace Mann Ins. Co.*, 112 So. 3d 1054, 1059 (La.App.2013).

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

“Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right.” *Youngstown v. Traylor*, 123 Ohio St.3d 132, 2009-Ohio-4184, 914 N.E.2d 1026, ¶8 (quotation omitted). In fact, “[t]he Due Process Clause of the Ohio Constitution is generally coextensive with the due process rights provided under the Fourteenth Amendment to the United States Constitution.” *State ex rel. Robinson v. Dayton*, 2012-Ohio-5800, 984 N.E.2d 353, ¶21 (2nd Dist.). Accordingly, this Court has recognized that, because Ohio Civil Rule 23 is virtually identical to Federal Civil Rule 23, “federal authority is an appropriate aid to interpretation of the Ohio rule.” *Cullen*, 2013-Ohio-4733, at ¶14.

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

Likewise, this Court also held in *Cullen* that a class action seeking a declaratory judgment against an insurer should not have been certified when the plaintiffs had not demonstrated that all class members would benefit from the declaratory relief sought because some of the proposed class members were no longer policyholders and the proposed declaration would not benefit them. *Cullen*, 2013-Ohio-4733, at ¶25. The *Cullen* case thus emphasizes why the trial court should not have certified this class under Rule 23(B)(2) in the first instance.

The trial court in this case noted that the stated goal of the class action lawsuit was to declare all Form G&T (83) leases void *ab initio*, which the court believed could only benefit the absent class members. If that assessment were correct, the obligation to provide notice and an opportunity to opt out decreases dramatically, because there is little potential for harm. Thus, given the fact that the court had already granted summary judgment to the named plaintiffs declaring the leases void *ab initio* and no other relief had been requested, it is perhaps understandable why the trial court apparently believed it unnecessary to provide absent class members with notice prior to the Seventh District deciding the appeal.

The situation changed dramatically however, when the Seventh District reached out to toll the leases of all the absent class members retroactively. Even though the class had been certified under Rule 23(B)(2), the case was no longer solely about the named plaintiffs' attempts to obtain a declaration regarding the validity of the Form G&T (83) leases. Instead, the Seventh District arbitrarily disregarded the property rights of the Claugus Family and awarded equitable relief to the *defendant* Beck Energy **against the absent class members**, extending the primary term of the leases beyond what the documents themselves allow by years without any compensation. Absent a successful appeal, the Seventh District's determination that the leases in question are valid means this will be the only relief awarded in this case. Under the circumstances, due process unambiguously required notice to the absent class members and an opportunity to opt out of the litigation, regardless of the fact that the class had been certified under Rule 23(B)(2). *See Henson v. E. Lincoln Twp.*, 108 F.R.D. 107, 112 (C.D.Ill.1985) (noting due process concerns with defendant classes because affirmative relief may be awarded even though the party against whom relief is awarded did not want to be part of the class).

Finally, the class action has not been properly conducted. In fact, the Seventh District implicitly acknowledged that the class might be decertified when it referred to the absent class

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

Proposition of Law No. 2:

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

A long line of cases holds that an action seeking a writ of prohibition is the proper vehicle to challenge the constitutionality of a lower court’s order by non-parties affected by that order. *State ex rel. News Herald v. Ottawa County Court of Common Pleas, Juvenile Div.*, 77 Ohio St.3d 40, 43, 671 N.E.2d 5 (1996). Prohibition is the appropriate remedy both to prevent excesses of lower tribunals and to invalidate orders already issued that exhibit such excesses. *Id.* As an absent class member who was not provided with notice of the class action, an opportunity to opt out, or notice of the order tolling the leases of proposed class members, Relator has been denied due process and its position is directly analogous to that of a non-party. Accordingly, Relator seeks and is entitled to a writ of prohibition.

In the course of proceedings below, the Seventh District ignored the limitations of actions conducted pursuant to Rule 23(B)(2). Without due process, it has ordered that leases of absent

class members be tolled, thereby awarding equitable relief to the prejudice of absent class members and granting a windfall to Beck Energy. It has improperly deprived absent class members of substantial property rights and effectively ceded those property rights to Beck Energy, without the payment of any consideration and contrary to the wishes of the Claugus Family. *See Hecht*, 691 F.3d at 225 (certification of a class under (b)(2) does not excuse the due process requirement that unnamed class members in a class action be provided with notice and right to opt out before being deprived of valuable rights); *Holmes*, 706 F.2d at 1152 (reversing decision not to allow members of a (b)(2) class to opt out and holding that right to opt out must be extended to all members of a 23(b)(2) class where proposed consent decree would deprive individual class members of valuable rights); *see also Phillips*, 472 U.S. at 811 (noting that the due process clause does not normally afford as much protection to absent plaintiffs as to absent defendants because the court normally imposes few burdens on absent plaintiffs).

The Claugus Family and absent class members never were notified that their property rights were in jeopardy and never were given the opportunity to protect their interests. Absent class members were never given the opportunity to opt out of litigation which could drag on for years while drilling units are assembled around the affected property owners and the properties orphaned. Despite this, the Seventh District has imposed significant burdens on the absent class members by tolling their leases retroactively, all without due process.

The end result is not only an unconstitutional denial of the absent plaintiffs' due process rights, but also a significant financial loss to the Claugus Family. The Claugus Family will be deprived of the payment available from granting a new lease and the additional 7.5% landowner royalty (20% in total) provided for in the Gulfport Lease. Moreover, absent class members will be affected in other ways. Many oil and gas leases require the landowner to warrant title to the minerals being leased. Landowners with leases which have expired on their faces would have no

reason to think that they could not warrant title to the minerals, having been provided with no notice of the Beck Litigation or the Seventh District's Tolling Order. In fact, since the Tolling Order is retroactive, it tolls leases that expired up to a year prior to the issuance of the Tolling Order, before Beck Energy even requested that the leases of absent class members be tolled (almost two years after the amended complaint was filed on behalf of a purported class). Further, no title search would reveal the Tolling Order. Such landowners face potential breach of title warranty claims. Although the Claugus Family was careful not to guarantee title, because its Beck Energy Lease was not to expire until approximately four months after the top lease was signed, it still stands to lose almost half a million dollars (plus potentially millions more in additional royalties) because of its inability to fulfill contractual obligations entered into without knowledge of the Tolling Order.

Although the Claugus Family is a member of the proposed class, it has been afforded no more due process than nonparties have been afforded. It never was given notice of the lawsuit itself. It never was given the opportunity to disassociate itself from the lawsuit. It never was notified of the tolling Order. A writ of prohibition enjoining the Respondents from enforcing the retroactive Tolling Order clearly is necessary and appropriate. It is the only effective remedy available to the Claugus Family.

Proposition Of Law No. 3:

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

A writ of mandamus is appropriate when the Relator demonstrates that there is no plain and adequate remedy in the ordinary course of the law, that there has been a gross abuse of discretion on the part of an inferior tribunal, and that the relief sought is not merely to determine a controversy of a strictly private nature. *State ex rel. Libbey-Owens-Ford Glass Co. v. Indus.*

Comm'n of Ohio, 162 Ohio St. 302, Syllabus ¶2, 123 N.E.2d 23 (1954). Mandamus is suited to situations that do not involve disputed facts and in which the right is clear. *Id.* at 307. *See also State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 514, 715 N.E.2d 1062 (1999) (granting a writ of mandamus ordering judges to follow the rules of civil procedure, rules of evidence, and binding precedent of the Ohio Supreme Court notwithstanding contrary provisions passed by the legislature).

In this case, the Claugus Family has no plain and adequate remedy available to it in the ordinary course of law. Both the trial court and the Seventh District (until September 26, 2014) had stated that the class is merely a proposed class. Under this constraint, the Claugus Family could not directly appeal the Tolling Order. Nonetheless, the Seventh District radically altered the Claugus Family's contractual relationship with Beck Energy by extending that relationship for years to come and coextensively depriving it of any new lease relationships, all without consideration or due process. This deprivation is a windfall for Beck Energy has been inflicted simply because other landowners (in no way associated with the Claugus Family) chose to file a lawsuit. To paraphrase Beck Energy arguments to the trial court, the risk of a tolling order was a risk the *named* plaintiffs took when they filed this litigation. Having not participated in the decision to file suit and having not been presented with the opportunity to opt out, this is not a risk that the Claugus Family members assumed.

There also has been a gross abuse of discretion. "The abuse of discretion standard has been defined as more than an error at law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994) (quotations omitted). In this case, the trial court certified a class under Civil Rule 23(B)(2) because it believed the only possible relief sought was a declaration that all Form G&T (83) leases were void—a decision that it had already reached in granting summary

judgment to the named plaintiffs. Theoretically, at this stage, no notice was required because few burdens would be imposed upon the absent plaintiffs. Any lack of notice or an opportunity to opt out of the class would not be harmful. The Seventh District then abruptly changed this balance by issuing an order that is unreasonable, arbitrary and an abuse of discretion.

The Seventh District unreasonably granted equitable relief in the form of a windfall to the *defendant* by tolling the leases of all proposed class members. This action ignored the limitations of Rule 23(B)(2) and was unreasonable, arbitrary and an abuse of discretion. In the absence of due process, the proposed class members were deprived of valuable property interests with no notice and no opportunity to opt out. The decision to issue the Tolling Order immediately shifted the case from one in which few, if any, burdens would be imposed on the absent plaintiffs to one in which the property and contractual rights of such landowners would be heavily burdened for years to come without due process.

The decision to issue the Tolling Order without notice to the landowners also was arbitrary. Absent notice and an opportunity to be heard, there is no justification or basis for applying the Tolling Order to absent class members. Because the order is retroactive to October 1, 2012, the leases in question have already been tolled almost two years, even though the order was not issued until September 26, 2013. Compounding this arbitrary decision, the Seventh District made no provision for notice in its decision on the merits. There is absolutely no justification for the scope of the Tolling Order.

The order also is unconscionable. Blameless landowners have been exposed to potentially ruinous loss and liability because of the Tolling Order. These landowners cannot lease their property to other producers, have no notice of that order, and have no way of knowing how they should conduct their affairs to avoid liability for breach of warranty. This exposure has arisen solely because the Seventh District has denied them due process. These consequences could be

especially dire for landowners who signed new leases before the retroactive Tolling Order was signed. Additionally, the tolled oil and gas leases also will make it more difficult for a landowner to sell their real estate. A potential buyer may not be willing to purchase a property not knowing whether the purchase would entitle the buyer to lease the property to an oil and gas producer or whether the lease with Beck forecloses that opportunity.

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

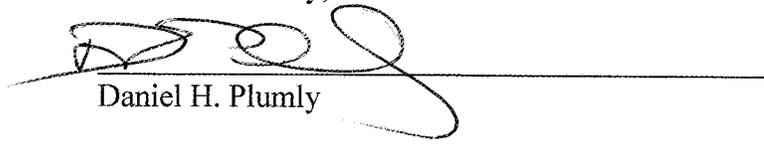
CONCLUSION

This case was certified as a class action under Rule 23(B)(2) because the named plaintiffs sought nothing more than a declaratory judgment against Beck Energy. Without affording such minimal due process as notice or the opportunity to opt out, the Seventh District then imposed significant burdens upon the absent class members by granting equitable relief in the nature of a windfall to Beck Energy against the absent class members by tolling their leases with Beck Energy for years past the expiration dates specified in the contracts. Under the circumstances, the decision not to afford the Claugus Family due process was unreasonable, arbitrary and unconscionable (indeed unconstitutional) and writs of prohibition and mandamus are appropriate to vindicate the Claugus Family's due process rights. While Beck Energy complains of the uncertainty and prejudice it will face if the absent class members are afforded their constitutional

due process rights, any such negative consequences result primarily from Beck Energy's legal strategy of seeking an equitable tolling order while fighting any attempts to identify the absent class members, provide them with notice, or allow them to opt out of the lawsuit. To the extent that Beck Energy may eventually suffer the consequences of the requested writs, they are self-inflicted injuries.

Respectfully submitted,

Daniel H. Plumly, Counsel of Record

A handwritten signature in black ink, appearing to read 'D. Plumly', is written over a horizontal line. The signature is stylized and somewhat cursive.

Daniel H. Plumly

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

CERTIFICATE OF SERVICE

I hereby certify that I served the above *Brief of Relator on The Merits* to the following by regular U.S. Mail this 2nd day of October, 2014:

Sarah Pierce
Tiffany L. Carwile
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215

*Counsel for Respondents
The Seventh District Court of Appeals, Judge
Gene Donofrio, Judge Joseph J. Vukovich, and
Judge Mary DeGenaro*

Scott M. Zurakowski
William G. Williams
Gregory W. Watts
Aletha M. Carver
Krugliak, Wilkins, Griffiths & Dougherty Co.,
L.P.A.
4775 Munson Street, N.W.
P. O. Box 36963
Canton, OH 44735

*Counsel for Intervening Respondent Beck
Energy Corporation*



Daniel H. Plumly

Appendix A

Summary of Beck Class Action Litigation

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

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

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

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

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

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

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

02/08/2013 Trial court grants class certification

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

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

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

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

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

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

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

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

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

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

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

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

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

9/26/2014 Seventh District Case Nos. 12 MO 6, 13 MO 3 and 13 MO 11 Affirmed in Part and Reversed in Part and Remanded. Case No. 13 MO 2 Appeal Dismissed as Moot.

Appendix B

FILED

SEP 26 2013

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

STATE OF OHIO)
MONROE COUNTY) SS: SEVENTH DISTRICT

CLYDE A. HUPP, et al.,)

PLAINTIFFS-APPELLEES,)

VS.)

BECK ENERGY CORPORATION,)

DEFENDANT-APPELLANT.)

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

JUDGMENT ENTRY

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

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

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

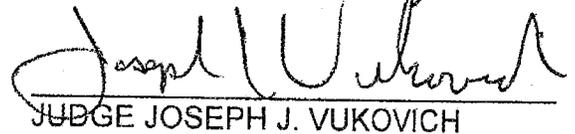
tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal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

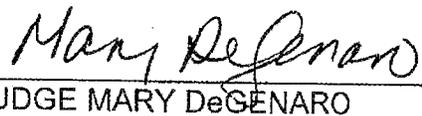
3. The Motion to Dismiss is denied.

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

All until further order of this Court.


JUDGE GENE DONOFRIO


JUDGE JOSEPH J. VUKOVICH


JUDGE MARY DeGENARO