

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Relator,

vs.

SEVENTH DISTRICT COURT OF
APPEALS, ET AL.,

Respondents.

CASE NO. 14-0423

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

BRIEF OF INTERVENING RESPONDENT BECK ENERGY
CORPORATION ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.....	5
A. Beck Energy and the GT83 Lease	5
B. The GT83 Lease at issue	6
C. The <i>Hupp</i> litigation.....	6
D. Impact of the <i>Hupp</i> litigation.....	8
E. The <i>Hupp</i> litigation is public knowledge.	9
F. Relator breached its lease with Beck Energy.	9
G. The Seventh District Court of Appeals' Decision in <i>Hupp</i>	10
III. LAW AND ARGUMENT.....	11
A. RESPONSE TO PROPOSITION OF LAW NO. 1: Relator was not denied due process because it is a member of an Ohio Civ.R. 23(B)(2) class, requested only declaratory/quiet title relief, and therefore, has no due process notice or opt-out rights.....	11
1. Relator's arguments concerning the Civ.R. 23(B)(2) class are moot.	11
2. The purpose of the Civ.R. 23(B)(2) class	13
3. Ohio law recognizes Civ.R. 23(B)(2) class members are not entitled to notice and an opportunity to opt out.....	14
4. The tolling order maintained class membership.....	18
5. Notice and an opportunity to opt out would have served no purpose.	21
6. Notice and an opportunity to opt out is only required in Civ.R. 23(B)(2) classes where the predominant relief sought is monetary damages.	22
7. The trial court properly conducted the Civ.R. 23(B)(2) class action.	24
8. Article 1, § 16 of the Ohio Constitution does not mandate notice and an opportunity to opt out of the Civ.R. 23(B)(2) class action.	25
B. RESPONSE TO PROPOSITION OF LAW NO. 2: Relator is not entitled to a writ of prohibition because it cannot satisfy the necessary elements entitling it to such relief.....	27

1.	The Seventh District Court of Appeals is not “about to exercise judicial or quasi-judicial power.”	28
2.	Relator may not challenge the Seventh District Court of Appeals’ administrative act of extending the tolling order to the Civ.R. 23(B)(2) class.	32
3.	The Seventh District Court of Appeals did not lack jurisdiction when it extended the tolling order to the Civ.R. 23(B)(2) class members.....	33
4.	Relator does not lack adequate remedies at law.	33
C.	PROPOSITION OF LAW NO. 3: Relator cannot satisfy the necessary elements entitling it to a writ of mandamus and the requested relief violates R.C. 2731.03.....	35
1.	A writ of mandamus may not control judicial discretion.	35
IV.	EQUITY REQUIRES DISMISSAL OF RELATOR’S COMPLAINT IN PROHIBITION AND MANDAMUS.	36
A.	The doctrine of laches and unclean hands bar Relator’s requested relief in its Complaint in Prohibition and Mandamus.	36
1.	The doctrine of laches.....	36
2.	The doctrine of unclean hands.....	38
V.	CONCLUSION	38
	PROOF OF SERVICE.....	40

TABLE OF AUTHORITIES

	<u>PAGE</u>
CASES	
<i>Cameron v. Hess Corp.</i> , S.D.Ohio No 2:12-CV-00168, 2014 WL 1653119 (Apr. 23, 2014).....	20
<i>Cameron v. Hess Corp.</i> , S.D.Ohio No. 2:12-CV-00168, 2014 WL 366723 (Feb. 3, 2014).....	20
<i>Clifton Care Ctr., Inc., v. McKenna</i> , 10th Dist. Franklin No. 80AP-149, 1980 WL 353818 (Dec. 4, 1980).....	15, 18
<i>Cullen v. State Farm Mut. Auto. Ins. Co.</i> , 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614.....	13, 14, 25, 26
<i>Donald J. Pniaczek v. Beck Energy Corp.</i> , Monroe C.P. No. 2012-274.....	8
<i>Egnot v. Triad Hunter LLC</i> , S.D.Ohio No. 2:12-cv-1008, 2013 WL 5487059 (Sept. 30, 2013).....	20
<i>Feisley Farms Family, L.P. v. Hess Ohio Res., LLC</i> , S.D.Ohio Case No. 2:14-CV-146, 2014 WL 4206487 (Aug. 25, 2014)	17
<i>Frank v. United Airlines, Inc.</i> , 216 F.3d 845 (9th Cir.2000).....	23
<i>Fuller v. Fruehauf Trailer Corp.</i> , 168 F.R.D. 588 (E.D.Mich.1996).....	17
<i>Goldstein v. Christiansen</i> , 70 Ohio St.3d 232, 638 N.E.2d 541.....	27
<i>Griffith v. Hess Corp.</i> , S.D.Ohio No. 2:14-CV-00337, 2014 WL 1407953 (Apr. 11, 2014).....	20
<i>Haven House Manor Ltd. v. Gabel</i> , 6th Dist. Wood No. WD002-073, 2002-Ohio-6750.....	19
<i>Hecht v. United Collection Bur., Inc.</i> , 691 F.3d 218 (2nd Cir.2012)	16
<i>Holmes v. Continental Can Co.</i> , 706 F.2d 1144 (11th Cir.1983).....	23
<i>Hoston v. U.S. Gypsum Co.</i> , 67 F.R.D. 650 (U.S.Dist.Ct.E.D.La.1975).....	23
<i>Hupp, et al. v. Beck Energy Corp., et al.</i> , 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2011-345, 2014-Ohio-4255	passim

<i>Hupp, et al. v. Beck Energy Corp.</i> , Monroe C.P. Case No. 2011-345	passim
<i>Johnson v. Gen. Motors Corp.</i> , 598 F.2d 432 (5th Cir.1979).....	17
<i>Kinner v. Lake Shore & Michigan Southern Ry. Co.</i> , 69 Ohio St. 339, 69 N.E. 614 (1904)	38
<i>Klier v. Elf Atochem N. Am., Inc.</i> , 658 F.3d 468 (5th Cir.2011)	23
<i>Lemon v. Internatl. Union of Operating Engineers Loc. No. 139, AFL-CIO</i> , 216 F.3d 577 (7th Cir.2000).....	24
<i>McClellan v. Mack</i> , 129 Ohio St.3d 504, 2011-Ohio-4216, 954 N.E.2d 123	34
<i>McDonald v. Med. Mut. of Cleveland, Inc.</i> , 41 Ohio Misc. 158, 324 N.E.2d 785 (1974)	15, 18
<i>Mills v. Green</i> , 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed.2d 293 (1895).....	13
<i>Miner v. Witt</i> , 82 Ohio St. 237, 92 N.E. 21 (1910).....	12, 13
<i>Molski v. Gleich</i> , 318 F.3d 937 (9th Cir.2003).....	17
<i>Oneida Indian Nation v. State of New York</i> , 85 F.R.D. 701, (U.S.Dist.Ct.NY 1980).....	24
<i>Palmer v. Combined Ins. Co. of Am.</i> , 217 F.R.D. 430 (N.D.Ill.2003)	17
<i>Pate v. United States</i> , 328 F.Supp.2d 62 (D.D.C.2004)	17
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985)	23
<i>Planned Parenthood Assn. of Cincinnati v. Project Jericho</i> , 1st Dist. Hamilton Nos. C-860550, C-860659, C-870015, C-860580, C-860577, C-860878, C-860829, C- 870086, C-870150, C-870757, 1989 WL 9312, (Feb. 8, 1989).....	24
<i>Schwab v. Lattimore</i> , 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912 (1st Dist.)	19, 20
<i>Shipp v. Memphis Area Office, Tennessee Dept. of Emp. Sec.</i> , 581 F.2d 1167, (6th Cir., 1978).....	14
<i>Smith v. Bayer Co.</i> , ___ U.S. ___, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011)	25
<i>State ex rel. Aycock v. Mowrey</i> , 45 Ohio St.3d 347, 544 N.E.2d 657 (1989)	28
<i>State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas</i> , 74 Ohio St.3d 536, 1996-Ohio-286, 660 N.E.2d 458 (1996)	28
<i>State ex rel. Bell v. Pfeiffer</i> , 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181.....	33

<i>State ex rel. Bennett v. Bds. of Edn.</i> , 56 Ohio St.3d 1, 564 N.E.2d 407 (1990)	35
<i>State ex rel. Carroll v. Corrigan</i> , 91 Ohio St.3d 331, 2001-Ohio-54, 744 N.E.2d 771	36
<i>State ex rel. Celebrezze v. Butler Cty. Common Pleas Court</i> , 60 Ohio St.2d 188, 398 N.E.2d (1979).....	30
<i>State ex rel. Crabtree v. Franklin Cty. Bd. of Health</i> , 77 Ohio St.3d 247, 673 N.E.2d 1281 (1997)	35
<i>State ex rel. Denton v. Bedinghaus</i> , 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99	34
<i>State ex rel. Duffy v. Common Pleas Court of Cuyahoga Cty.</i> , 133 Ohio St. 277, 13 N.E.2d 233 (1938).....	27
<i>State ex rel. Eaton Corp. v. Lancaster</i> , 40 Ohio St.3d 404, 534 N.E.2d 46 (1988)	33
<i>State ex rel. Ford Motor Co. v. Corrigan</i> , 8th Dist. Cuyahoga No. 96287, 2011-Ohio- 354	36
<i>State ex rel. Gaydosh v. Twinsburg</i> , 93 Ohio St.3d 576, 757 N.E.2d 357 (2001).....	34
<i>State ex rel. Henry v. Britt</i> , 67 Ohio St.2d 71, 424 N.E.2d 297 (1981).....	27
<i>State ex rel. Jones v. Suster</i> , 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998).....	33
<i>State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.</i> , 137 Ohio St. 273, 28 N.E.2d 641 (1940)	28
<i>State ex rel. Moss v. Clair</i> , 148 Ohio St. 642, 76 N.E.2d 883 (1947)	28, 32
<i>State ex rel. Nalls v. Russo</i> , 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522	34
<i>State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juvenile Div.</i> , 77 Ohio St.3d 40, 671, 1996-Ohio-354, 671 N.E.2d 5	29, 31
<i>State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections</i> , 74 Ohio St.3d 143, 1995-Ohio- 269, 656 N.E.2d 1277	37
<i>State ex rel. Ragozine v. Shaker</i> , 96 Ohio St.2d 201, 2002-Ohio-3992, 772 N.E.2d 1192	34
<i>State ex rel. Stove Co. v. Coffinberry</i> , 149 Ohio St. 400, 79 N.E.2d 123 (1948)	29
<i>Thorogood v. Sears, Roebuck & Co.</i> , 678 F.3d 546 (7th Cir.2012).....	25
<i>Wal-Mart Stores, Inc. v. Dukes</i> , ____ U.S. ____, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)	14

<i>Wick v. Youngstown Sheet & Tube Co.</i> , 46 Ohio App. 253, 188 N.E. 514 (7th Dist.1932).....	13
<i>Wiley v. Triad Hunter LLC</i> , S.D.Ohio Case No. 2:12-CV-00605, 2013 WL 4041772 (Aug. 8, 2013).....	20
<i>Yoskey v. Eric Petroleum, Inc.</i> , 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790	19

STATUTES

R.C. 2731.03.....	35
-------------------	----

OTHER AUTHORITIES

Article 1, § 16 of the Ohio Constitution.....	25
James W. Slater, <i>Ohio Attorneys Get Court to Rule Certain Inactive Oil and Gas Leases are Void</i> , Daily Jeffersonian (July 2, 2013).....	9, 22
Staff, Public Notices, <i>Beck Energy Corporation Announcement</i> , The Beacon (October 17, 2013).....	9, 22

RULES

Civ.R. 23(A)	13
Civ.R. 23(b)(2)	passim
Civ.R. 23(B)(2).....	passim
Civ.R. 23(b)(3)	23
Civ.R. 23(d)(2)	23
Civ.R. 23(D)(2).....	passim

I. INTRODUCTION

As a basis for its Complaint in Prohibition and Mandamus, Relator, Claugus Family Farm, L.P. (“Relator”), asserts facts that do not exist, relies on speculation, and ignores certain other pertinent facts – all of which establish Relator is not entitled to the relief requested in its original action. *Hupp, et al. v. Beck Energy Corp.*, Monroe C.P. No. 2011-345, the underlying lawsuit giving rise to this original action, commenced when four plaintiffs filed a declaratory judgment/quiet title action against Beck Energy Corporation (“Beck Energy”). Plaintiffs asked the Monroe County Court of Common Pleas to find their GT83 Leases with Beck Energy void. By way of summary judgment, the trial court granted plaintiffs declaratory relief finding their GT83 Leases void ab initio. Beck Energy appealed the trial court’s decision to the Seventh District Court of Appeals.

Following the trial court’s determination on the merits, these same plaintiffs moved to certify a class action under Civ.R. 23(B)(2). Beck Energy filed a motion to toll the leases of the named plaintiffs, but the trial court never ruled on the pending motion. The trial court eventually certified a (B)(2) class consisting of all Ohio lessors who executed a GT83 Lease with Beck Energy, where Beck Energy had neither drilled nor prepared to drill a well, nor included the property in a drilling unit. Following class certification, Beck Energy filed a second motion to toll, this time asking the trial court to toll the leases of the named plaintiffs and class members. The trial court declined to do so and tolled only the leases of the named plaintiffs.

Thereafter, Beck Energy requested tolling in the Seventh District Court of Appeals asking the court to toll the leases of all class members while the appeal remained pending. The court of appeals granted Beck Energy’s request and tolled the class members’

leases until the court decided the pending appeal and, in case of an appeal to this Court, until this Court accepts or declines jurisdiction.

Relator filed a Complaint in Mandamus and Prohibition claiming its due process rights were violated when the court of appeals extended the tolling order to the Civ.R. 23(B)(2) class members without giving it notice and an opportunity to opt out of the class. In determining the merits of this original action, Relator asks the Court to decide two issues:

(1) Is Relator a member of a properly certified Civ.R. 23(B)(2) class action?

(2) If so, as a member of a properly certified Civ.R. 23(B)(2) class, were Relator's due process rights violated because it did not receive notice of the court of appeals' tolling order and was not provided an opportunity to opt out of the class action?

Relator's requested relief fails on both issues. First, since the filing of this original action, the Seventh District Court of Appeals decided Beck Energy's appeal concluding the trial court properly certified a Civ.R. 23(B)(2) class. Therefore, any claims by Relator that the class was not properly certified as a (B)(2) class or that it is not a member of the class are moot. Second, as a member of the (B)(2) class, Relator had no right to notice or an opportunity to opt out when the court of appeals extended the tolling order to all class members.

However, Relator disregards these facts and instead, requests relief outside of the pending class action by filing its Complaint in Prohibition and Mandamus. Motivated by the possibility of a lucrative lease deal with Gulfport Energy Corporation ("Gulfport"), Relator has gone to great lengths to convince the Court that it is not a member of the class, that the Civ.R. 23(B)(2) class was not properly certified and that the GT83 Lease should not be subject to the court of appeals' tolling order. Therefore, according to Relator, its GT83 Lease expired under its own terms on February 3, 2014.

The extent to which Relator will go in its attempt to create an alleged due process violation is best demonstrated by its incorrect factual assertion that the underlying action involves monetary damages. The *Hupp* Plaintiffs never requested any type of monetary relief and have only ever sought declaratory/quiet title relief asking the Monroe County Court of Common Pleas to declare Beck Energy's GT83 Lease void and to quiet title in their favor. Because the *Hupp* Plaintiffs only requested declaratory relief, this case fits squarely within the definition of a Civ.R. 23(B)(2) class. Relator's attempt to recast this class action as something other than a properly certified (B)(2) class directly contradicts the relief requested by the *Hupp* Plaintiffs and the court of appeals' recent decision concluding the trial court properly certified a (B)(2) class.

Relator also relies on speculation to support its due process argument by asking the Court to assume that, absent the tolling order, Beck Energy would not have drilled on its acreage during Relator's lease's 10-year primary term, thereby allowing its lease to expire. Relator further asks the Court to assume that the extension of the primary term, as a result of the tolling order, will cause it monetary damages because it cannot presently enter into a more lucrative lease and, once it has the ability to do so, it will receive less favorable lease terms. Such assertions are speculation, and speculation cannot form the basis of a due process violation.

Relator also asks the Court to ignore the fact that it has an adequate remedy at law to pursue for the relief it requests. After the Court granted Relator's alternative writ, the Seventh District Court of Appeals issued its decision in *Hupp, et al. v. Beck Energy Corp., et al.*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2011-345, 2014-Ohio-4255. (Supplemental Evidence Intervening Respondent Beck Energy, Exhibit B(24)) Among other things, the court of appeals determined the trial court erred when it found Beck Energy's GT83

Lease void ab initio. On this basis, the court of appeals reversed and remanded the matter to the Monroe County Court of Common Pleas for further proceedings. *Id.* at ¶134.

Upon remand, Relator can intervene in the trial court, as a certified member of the Civ.R. 23(B)(2) class. Further, Relator may also intervene in the proposed jurisdictional appeal to this Court. Allowing Relator to pursue its own interests, outside of the class action, promotes disparate treatment among similarly situated class members and encourages other class members to pursue the same relief. To date, at least 84 other class members' GT83 Leases covering approximately 5,000 acres would have expired absent the tolling order. (Beck Affidavit, Exhibit A, ¶28) Because other class members may be similarly situated, the Monroe County Court of Common Pleas is in the best position to consider Relator's, and any other class members', alleged due process violations.

Finally, any notion that Beck Energy somehow created the situation in which Relator currently finds itself is simply wrong. Beck Energy did not file the *Hupp* lawsuit. Rather, it has been forced to defend the validity of its GT83 Lease, against over 700 lessors, resulting in a devastating impact on its business. When it certified the class action, the trial court specifically determined counsel for the *Hupp* Plaintiffs would adequately represent their interests. As a class member, Relator is bound by class counsels' decision to request only declaratory judgment/quiet title relief on behalf of the class and to not challenge the tolling order issued by the Seventh District Court of Appeals.

In fact, at the hearing conducted by the Monroe County Court of Common Pleas concerning notice to the class, class counsel agreed that notice would not be necessary until after the court of appeals decided the various issues that were pending on appeal. (Zurakowski Affidavit, Exhibit B(23), p. 11) This was certainly based on the fact that, at that point in the

proceedings, it was unclear whether a Civ.R. 23(B)(2) class had been properly certified and who comprised the class. Thus, notice and an opportunity to opt out would have served no purpose while these fundamental prerequisites for a valid class action remained undecided.

For these reasons, Beck Energy asks the Court to deny the relief Relator requests in its Complaint in Prohibition and Mandamus. Relator's Complaint is based on facts that do not exist and relies on speculation to assert its alleged due process violation. Since this matter is currently on remand to the Monroe County Court of Common Pleas for further proceedings, and class counsel for the *Hupp* Plaintiffs intend to appeal to this Court (*see* Intervening Respondent Beck Energy's Notice of Mootness and Motion for Stay, Oct. 21, 2014), Relator has an adequate remedy at law by way of intervention in the Civ.R. 23(B)(2) class. For these reasons and additional reasons more fully set forth herein, Relator is not entitled to the relief requested in its original action.

II. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Beck Energy and the GT83 Lease

Beck Energy is an Ohio for-profit corporation engaged in the exploration, drilling, and production of oil and gas throughout the Appalachian Basin in Ohio. (Evidence of Intervening Respondent, Beck Affidavit, Exhibit A, ¶3) Raymond T. Beck formed Beck Energy in 1978 with offices located in Ravenna and Woodsfield, Ohio. (*Id.*, ¶4) Since its inception, Beck Energy has completed 360 wells in 13 counties throughout the State of Ohio. (*Id.*, ¶5) Beck Energy currently has 15 employees. (*Id.*, ¶6) Traditionally, Beck Energy has drilled shallow oil and gas wells with each well costing, on the average, \$300,000. (*Id.*, ¶7)

Throughout its history, Beck Energy utilized the GT83 Oil and Gas Lease, which is a form lease used by not only Beck Energy, but other Ohio producers as well. (*Id.*, ¶¶9, 11)

Since the inception of this lease form, Beck Energy has entered into over 700 GT83 Leases, covering tens of thousands of acres of land throughout the State of Ohio. (*Id.*, ¶12)

B. The GT83 Lease at issue

On February 4, 2004, Beck Energy entered into a GT83 lease with Francis W. Jeffers and Barbara J. Jeffers (“Jeffers Lease”) who resided in Woodsfield, Monroe County, Ohio. (*Id.*, ¶13) Claugus subsequently acquired the Jeffers Lease. (*Id.*) The Jeffers Lease covers 64 acres located in Section 9, Green Township, Monroe County. (*Id.*, ¶14) The lease contains a primary term of 10 years and a secondary term so long as oil, gas, and other constituents are produced or are capable of being produced. (*Id.*, ¶15) The Jeffers Lease requires the payment of \$64 per year delay rental, which Beck Energy has paid in full since the Lease’s inception. (*Id.*, ¶16) To date, no well has been drilled per the Jeffers Lease, nor has it been pooled or unitized with other acreage. (*Id.*, ¶17)

C. The Hupp litigation

In the *Hupp* litigation, the Monroe County Court of Common Pleas found the GT83 Lease void ab initio and granted summary judgment in favor of the *Hupp* Plaintiffs. (*Id.*, ¶18; Zurakowski Affidavit, Exhibit B(4)) Seven days after the trial court decided the merits of the case, the *Hupp* Plaintiffs moved to certify a Civ.R. 23(B)(2) class action. (Zurakowski Affidavit, Exhibit B(5)) On October 1, 2012, Beck Energy filed a Motion to Toll the named *Hupp* Plaintiffs’ leases. (*Id.*, Exhibit B(9)) The trial court never ruled on this pending motion. On February 8, 2013, the trial court certified this matter as a class action. (Beck Affidavit, Exhibit A, ¶19; Zurakowski Affidavit, Exhibit B(10)) Slater & Zurz, LLP, a law firm in Akron, has served as class counsel since the inception of the *Hupp* litigation. (Beck Affidavit, Exhibit

A, ¶39) In certifying the class, the trial court specifically found Slater & Zurz qualified to represent the class members. (*Id.*, ¶40; Zurakowski Affidavit, Exhibit B(10), pp. 9-10)

On June 10, 2013, following a limited remand from the Seventh District Court of Appeals, the trial court further defined the members of the class as all Ohio lessors who have entered into GT83 Leases with Beck Energy on which no well has been drilled and no pooling or unitizing of the Lease has occurred. (Zurakowski Affidavit, Exhibit B(13), p. 3) The Jeffers Lease satisfies the class definition and is included in the *Hupp* class action. (Beck Affidavit, Exhibit A, ¶¶21, 41)

Thereafter, on July 16, 2013, Beck Energy moved to toll the leases of all the class members. (Zurakowski Affidavit, Exhibit B(16)) The trial court declined to do so, tolling only the leases of the named class plaintiffs. (*Id.*, Exhibit B(17)) The trial court also denied the *Hupp* Plaintiffs' Motion for Approval of Notice to Class and Establishment of Method of Service. (Beck Affidavit, Exhibit A, ¶20; Zurakowski Affidavit, Exhibit B(18)) Slater & Zurz did not appeal the trial court's decision regarding notice presumably because class counsel believed the stay prohibited any class member from signing a new lease, from selling their mineral interests, or otherwise acting upon their GT83 Lease. (Zurakowski Affidavit, Exhibit B(23), p. 34)

Subsequently, Beck Energy sought relief, in the Seventh District Court of Appeals, by filing an Emergency Motion for Injunctive Relief and Emergency Motion to Set Aside Supersedeas Bond. (*Id.*, Exhibit B(19)) Following a hearing, the court of appeals issued a Judgment Entry on September 26, 2013, modifying the trial court's tolling order to include the Civ.R. 23(B)(2) class members. (*Id.*, Exhibit B(21)) The court of appeals tolled the leases as of October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. (*Id.*)

D. Impact of the *Hupp* litigation

The *Hupp* litigation has been devastating to Beck Energy's business and severely limited its continued exploration, production, and drilling for oil and gas by placing a cloud on its lease rights. (Beck Affidavit, Exhibit A, ¶¶23, 24) Since the commencement of the *Hupp* litigation, if Beck Energy drilled a well, it risked losing the financial investment involved with the exploration and drilling for oil and gas, as well as the cost and production, if the court of appeals affirmed the trial court's decision finding the GT83 Lease void. (*Id.*, Exhibit A, ¶25)

This inability to drill diminishes the time period Beck Energy has to develop the class action leases. (*Id.*) The one and only time Beck Energy attempted to drill a well on a GT83 Lease subject to the *Hupp* litigation, it was met with a Complaint and Motion for Temporary Restraining Order filed by counsel representing the *Hupp* class action Plaintiffs. (*Id.*, Exhibit A, ¶27) The Monroe County Common Pleas Court, in *Donald J. Pniaczek v. Beck Energy Corp.*, Monroe C.P. No. 2012-274, restrained Beck Energy from drilling on the Pniaczeks' property. (*Id.*, Exhibit A, ¶26; Exhibit A(2))

Faced with this dilemma, upon motion of Beck Energy, the court of appeals issued a tolling order commencing on October 1, 2012, and continuing during the pendency of all appeals, until the Ohio Supreme Court accepts or declines jurisdiction. (*Id.*, Exhibit A, ¶27) According to the tolling order, at its expiration, if the GT83 Lease is found to be valid, Beck Energy will have as much time to meet any and all of its obligations under the GT83 Lease as it had as of October 1, 2012. (*Id.*) To date, without the tolling order, a total of 84 GT83 Leases covering approximately 5,000 acres of land would have expired during the pendency of the *Hupp* litigation. (*Id.*, Exhibit A, ¶28)

E. The *Hupp* litigation is public knowledge.

The publicity and knowledge of the *Hupp* decision and subsequent orders, including the tolling order, are well known by citizens, and oil and gas attorneys, in northeastern and southeastern Ohio. (*Id.*, Exhibit A, ¶29) On July 2, 2013, Attorney James W. Slater, a partner in the law firm of Slater & Zurz and co-counsel for the *Hupp* class action Plaintiffs, authored an article titled, *Ohio Attorneys Get Court to Rule Certain Inactive Oil and Gas Leases are Void*. (*Id.*, Exhibit A, ¶30, attached as Exhibit A(3)) The article, published in the Daily Jeffersonian, a local newspaper of general circulation in southeastern Ohio, including Monroe County, discussed the trial court's grant of summary judgment finding Beck Energy's GT83 Lease void ab initio. (*Id.*)

On October 17, 2013, the Monroe Beacon, a local newspaper of general circulation in the county, published a notice of the tolling order. (*Id.*, Exhibit A, ¶31, attached as Exhibit A(4)) Finally, Relator's counsel admits that he became aware of the tolling order in October 2013, during general discussions with *Hupp's* class counsel regarding oil and gas litigation in Ohio. (Relator's Merit Brief, p. 13, fn. 7) However, despite this knowledge, Relator never filed a motion to intervene, in the *Hupp* litigation, in either the Monroe County Court of Common Pleas or the Seventh District Court of Appeals. (Beck Affidavit, Exhibit A, ¶44)

F. Relator breached its lease with Beck Energy.

Paragraph 18 of Relator's GT83 Lease provides:

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.

Absent the tolling order, the primary term of Relator's lease would have expired on February 3, 2014. (*Id.*, Exhibit A, ¶34) However, in breach of Paragraph 18, Relator entered into an oil and gas lease with Gulfport on September 30, 2013. (*Id.*, Exhibit A, ¶¶33, 34) Relator characterizes its lease with Gulfport as a "top" lease. However, this is incorrect because the lease contains no "top" lease provision and therefore, was effective on the date it was signed. (*Id.*, Exhibit A(5)) Relator, with full knowledge that its oil and gas lease with Beck Energy was good and valid, with five months remaining on its primary term, entered into a new lease with Gulfport thereby creating the dispute as hand.

G. The Seventh District Court of Appeals' Decision in *Hupp*

Following this Court's grant of Relator's alternative writ, the Seventh District Court of Appeals issued its decision in the *Hupp* case. For purposes of this matter, the court of appeals made the following pertinent findings. First, it found the *Hupp* Plaintiffs did not request monetary damages and instead, asked the trial court to invalidate and declare the GT83 Lease void and to quiet title in the encumbered real estate. (Intervening Respondent's Supplemental Evidence, Exhibit B(24), ¶11) The court of appeals further explained, "[t]here was no prayer for monetary damages, only declaratory and quiet title relief were sought, and prospective class members under subsection (B)(2) are not entitled to notice and cannot opt-out of the class." (*Id.*, ¶59)

Second, the court of appeals determined the trial court did not abuse its discretion when it certified a Civ.R. 23(B)(2) class after ruling on the merits. (*Id.*) Third, the court of appeals affirmed the class definition to include all Ohio lessors who executed a Form GT83

Lease with Beck Energy, where Beck Energy had neither drilled nor prepared to drill a well, nor included the property in a drilling unit. (*Id.*, ¶76) Finally, the court of appeals found “the trial court misinterpreted the pertinent lease provisions and Ohio case law and erred in concluding the Lease is a no-term, perpetual lease that is void ab initio as against public policy.” (*Id.*, ¶132)

According to the court of appeals’ decision, Relator is a member of a valid Civ.R. 23(B)(2) class that has only requested declaratory/quiet title relief and no monetary damages. The only question presented for this Court to decide is whether Relator’s due process rights were violated when it was not provided notice of the tolling order and an opportunity to opt out of the properly certified (B)(2) class.

III. LAW AND ARGUMENT

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

1. *Relator’s arguments concerning the Civ.R. 23(B)(2) class are moot.*

Relator’s arguments challenging the class action are moot based on the Seventh District Court of Appeals’ recent decision in *Hupp*. Ignoring this, Relator makes the following arguments in support of its contention that the trial court did not properly certify this matter as a Civ.R. 23(B)(2) class: (1) if the GT83 Lease is void ab initio, each individual class member has a potential slander of title claim (Relator’s Merit Brief, p. 23); class members are not similarly situated because the primary term of their leases expire at varying times (*Id.*, p. 24); class certification violated the rule against one-way intervention because the trial court certified the class after it decided the merits of the *Hupp* litigation. (*Id.*, p. 26)

The Court may easily reject all of these arguments for two reasons. First, the issue of whether the trial court properly certified this matter as a class action is not before this

Court for determination. Second, this issue was recently answered by the court of appeals and therefore, is moot because the court of appeals determined the trial court properly certified the matter as a (B)(2) class. Specifically, the court of appeals found the class properly certified concluding:

(1) “While not the better practice, the trial court did not abuse its discretion in certifying a Civ.R. 23(B)(2) class after ruling on the merits. There was no prayer for monetary damages, only declaratory and quiet title relief were sought, and prospective class members under subsection (B)(2) are not entitled to notice and cannot opt-out of the class. *Hupp, supra*, at ¶59.

(2) “[T]he trial court did not abuse its discretion by failing to hold a hearing on class certification.” *Id.* at ¶67.

(3) “[T]he trial court did not abuse its discretion by defining the class as all Ohio lessors who executed a Form G&T 83 Lease with Beck, where Beck had neither drilled nor prepared to drill a well, nor included the property in a drilling unit.” *Id.* at ¶76.

The Seventh District Court of Appeals’ decision renders moot Relator’s arguments regarding whether the trial court properly certified this matter as a class action. This Court explained in *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910) that:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which

cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.”

Id. at 238-239.

Thus, “[w]hen the issues in an action become moot, the court does not refuse to hear the issues in the case because it has lost its right or jurisdiction to do so, but because, as stated in *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed.2d 293 (1895), which is cited in the opinion in *Miner v. Witts*, supra, court’s ‘decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions.’” *Wick v. Youngstown Sheet & Tube Co.*, 46 Ohio App. 253, 257, 188 N.E. 514 (7th Dist.1932).

Accordingly, Relator’s due process arguments are moot to the extent they challenge the trial court’s certification of a Civ.R. 23(B)(2) class. The Court should deny any relief requested in Relator’s Complaint that is based on this moot issue.

2. *The purpose of the Civ.R. 23(B)(2) class*

Beck Energy will proceed to address Realtor’s class action arguments in case the Court declines to apply the mootness doctrine. The type of class certification depends on the type of relief that is primarily sought. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶22. “[W]hen Civ.R. 23(A) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to

proceed pursuant to subdivision (B)(2) * * *” *Id.* at ¶23, citing *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 87, 1998-Ohio-365, 694 N.E.2d 442 (1998). In turn, it follows generally that the type of class certified dictates the notice required to satisfy due process requirements. *Shipp v. Memphis Area Office, Tennessee Dept. of Emp. Sec.*, 581 F.2d 1167, 1171 (6th Cir., 1978).

A class is properly certified under Civ.R. 23(B)(2) where “a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2557, 180 L.Ed.2d 374 (2011). *See also Cullen* at ¶21. “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’ Nagareda, 84 N.Y.U.L.Rev., at 143” *Id.* Class certification, under (b)(2), is not authorized when each individual class member would be entitled to a different injunction, declaratory judgment or an individualized award of monetary damages. *Id.*

Thus, “the relief sought must perforce affect the entire class at once * * *” *Id.* at 2558. For that reason, a (b)(2) class is a mandatory class, with no opportunity to opt-out nor does it require a court to afford (b)(2) class members notice of the action. *Id.* Therefore, “(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.* at 2559.

3. ***Ohio law recognizes Civ.R. 23(B)(2) class members are not entitled to notice and an opportunity to opt out.***

Ohio law recognizes Civ.R. 23(B)(2) class members do not have notice or opt-out due process rights. For example, in *McDonald v. Med. Mut. of Cleveland, Inc.*, 41 Ohio Misc.

158, 324 N.E.2d 785 (1974), in the context of a due process challenge, the court concluded Rule 23(B)(2) class members were not entitled to notice of a settlement. The court explained:

Individual notice is not required to be given to members of a Rule 23(B)(2) class. Final judgment in such action binds the class whether favorable or unfavorable to it even absent individual notice. * * * If individual notice is not necessary to bind Rule 23(B)(2) class members to a final judgment, no individual notice is necessary for approval of this settlement. Moreover, other courts have held that an essential requisite of due process as to absent members of a class is adequacy of representation of their interest by the named parties. See *Northern Natural Gas Co. v. Grounds* (D.Kan.1968), 292 F.Supp. 619, 636, affirmed in part and reversed in part on other grounds, 441 F.2d 704 (10th Cir.1971, certiorari denied 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267 (1971)); *Dolgow v. Anderson* (E.D.N.Y.1968), 43 F.R.D. 472.

(Emphasis added.) *Id.* at 792.

The court of appeals reached a similar conclusion in *Clifton Care Ctr., Inc., v. McKenna*, 10th Dist. Franklin No. 80AP-149, 1980 WL 353818 (Dec. 4, 1980), concerning a class member's right to notice of a 60(B) motion for relief from judgment. In *Clifton Care Center*, plaintiff, a member of a Civ.R. 23(B)(2) class, argued he was denied due process because he did not receive any notices in the class action proceeding, particularly as to the hearing for a motion for relief from judgment. *Id.* at *2.

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

(Emphasis added.) *Id.* at *4.

Relator ignores Ohio case law and attempts to create additional due process protections for itself by citing cases, on pages 16 and 17 of its Merits Brief, wherein Civ.R. 23(b)(2) class members were provided the added due process protections of notice and opt-out rights. *See Hecht v. United Collection Bur., Inc.*, 691 F.3d 218, 225 (2nd Cir.2012); *Pate v.*

United States, 328 F.Supp.2d 62, 73 (D.D.C.2004); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir.1979); *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 440 (N.D.Ill.2003); *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir.2003); *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 605 (E.D.Mich.1996). As explained by Relator, these cases stand for the general proposition that where a Civ.R. 23(b)(2) suit seeks something beyond equitable relief (i.e., relief specific as to each class member), notice and an opportunity to opt out are necessary to satisfy due process and to preserve the constitutionality of the proceedings. (Relator's Merit Brief, p. 16)

The flaw in Relator's argument and reliance on the above federal case law is that the *Hupp* Plaintiffs only ever sought a single declaratory judgment and quiet title relief that would benefit the entire class as a whole. Specific relief was never requested as to each class member. The reason the *Hupp* Plaintiffs never requested monetary damages was because their ultimate goal in filing suit, as is Relator's goal herein, was to have the trial court declare the GT83 Lease void so they could enter into new, more lucrative lease deals. This is easily proven by the *Hupp* Plaintiffs' Complaint where they allege: "Plaintiffs are entitled to a declaratory judgment that the Hupp/Hustack Lease[s] [are] forfeited, cancelled, unenforceable, voided and held for naught, * * *" (Zurakowski Affidavit, Exhibit B(1), ¶¶5, 12)

Even though the *Hupp* class action only requested declaratory/quiet title relief that could have been granted or denied to the class as a whole, Relator alleges notice and an opportunity to opt out was required because the tolling order was a form of equitable relief granted against the class. (Relator's Merit Brief, p. 18) In support of this argument, Relator references the recent decision of *Feisley Farms Family, L.P. v. Hess Ohio Res., LLC*, S.D.Ohio Case No. 2:14-CV-146, 2014 WL 4206487 (Aug. 25, 2014). The *Feisley* decision lends

absolutely no support to Relator's argument because it does not involve a class action nor does it concern a due process analysis. It simply references the timing of when a tolling order should be issued in oil and gas lease disputes. *Id.* at *4.

Because of the nature of a Civ.R. 23(B)(2) class, there are no constitutional implications resulting from the court of appeals' extension of the tolling order to all of the (B)(2) class members, without notice and an opportunity to opt out. Although an abundance of authority does not exist, Ohio courts faced with similar due process arguments, in (B)(2) class actions, have declined to find due process violations to class members where the members did not receive notice of a settlement (*McDonald, supra*) or notice of a Civ.R. 60(B) motion hearing (*Clifton Care Center, Inc., supra*).

Likewise, in the present matter, the court of appeals' class-wide tolling order did not violate the Civ.R. 23(B)(2) class members' due process rights. Arguably, the entry of the tolling order had even less of an impact on the (B)(2) class members than the actions taken in the *McDonald* and *Clifton Care Center, Inc.* cases because it did not impact the final judgment in the *Hupp* litigation as does a settlement or motion for relief from judgment. That is, the tolling order did not affect the decision concerning whether the GT83 Lease was void and did not deny Relator the right to intervene and participate in the litigation. Rather, the tolling order was an administrative act taken to maintain the status quo of the class until the court of appeals could decide whether the (B)(2) class members were entitled to the requested declaratory/quiet title relief.

4. ***The tolling order maintained class membership.***

In support of its argument that the *Hupp* litigation is not a properly certified Civ.R. 23(B)(2) class, Relator raises the concern that the trial court would need to continually

reassess the eligibility of class members for declaratory relief because the class members have varying primary terms under their individual leases and some of the leases have expired during the pendency of this litigation. (Relator's Merit Brief, pp. 23-24) Relator's argument actually supports the issuance of a tolling order in a class action.

The tolling order suspends the running of the Civ.R. 23(B)(2) class members' primary term, under their respective GT83 Lease, thereby maintaining the viability of the class members' leases. The tolling order prevented the trial court and the court of appeals from having to continually reassess class membership. Without the tolling order, to date, 84 leases would have expired. (Beck Affidavit, Exhibit A, ¶16) As recently explained by the Seventh District Court of Appeals in *Yoskey v. Eric Petroleum, Inc.*, 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790, "[W]hen a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation, the obligations of the lessee to lessor are suspended during the time such claims of forfeiture are being asserted." * * * citing *Morrison Oil and Gas Co. v. Burger*, 423 F.2d 1178, 1182-83 (5th Cir.1970) and 2 E. Kuntz, *Oil and Gas* 324-26 (1964)." *Id.* at ¶46.

In addition to maintaining the status quo, another purpose of the tolling order is to prevent mootness. The application of the mootness doctrine to expired leases is most commonly an issue found in landlord/tenant disputes. See *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912 (1st Dist.); *Haven House Manor Ltd. v. Gabel*, 6th Dist. Wood No. WD002-073, 2002-Ohio-6750, ¶19.

The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case. Thus, when

circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues.

Schwab, supra, at ¶10. A lease that expires during the pendency of the appeal renders the appeal moot. Therefore, to maintain class membership and to prevent the validity of the GT83 Lease from becoming a moot issue for many of the class members, tolling of the Civ.R. 23(B)(2) class members' leases is necessary.

Even in those limited cases in Ohio where the courts have considered the use of tolling orders in oil and gas lease disputes, the courts, at a minimum, have allowed tolling of the leases to occur, if not from the date of the commencement of the lawsuit (*see Egnot v. Triad Hunter LLC*, S.D. Ohio No. 2:12-cv-1008, 2013 WL 5487059 (Sept. 30, 2013), at least from the point at which a determination is made on the merits (*see Griffith v. Hess Corp.*, S.D. Ohio No. 2:14-CV-00337, 2014 WL 1407953 (Apr. 11, 2014); *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, 2014 WL 1653119 (Apr. 23, 2014); *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, 2014 WL 366723 (Feb. 3, 2014); *Wiley v. Triad Hunter LLC*, S.D. Ohio Case No. 2:12-CV-00605, 2013 WL 4041772 (Aug. 8, 2013).

In the present matter, Beck Energy requested the tolling order after the trial court determined the merits of the case. The trial court ruled on the validity of the GT83 Lease on July 31, 2012, when it journalized its decision granting the *Hupp* Plaintiffs' Motion for Summary Judgment. (Zurakowski Affidavit, Exhibit B(4)) Beck Energy filed its initial request to toll the *Hupp* Plaintiffs' leases on October 1, 2012, before the trial court certified this lawsuit as a class action. (*Id.*, Exhibit B (9)) After the trial court further defined the Civ.R. 23(B)(2) class in a Judgment Entry issued on June 10, 2013, following a limited remand from the court of appeals,

Beck Energy moved on July 16, 2013, to toll the class action members' leases. (*Id.*, Exhibit B(16)) The court of appeals extended the tolling order to the class action members on September 26, 2013, making the tolling order effective as of October 1, 2012. All of this occurred after the trial court found the GT83 Lease void.

Therefore, in issuing the tolling order, the court of appeals followed the most conservative court precedent finding tolling orders should be issued only after the lease's validity is determined. A tolling order is necessary, especially in a class action, to maintain class membership and prevent mootness. Beck Energy should not be penalized for the fact that the trial court certified a class action after it decided the merits of the case.

5. *Notice and an opportunity to opt out would have served no purpose.*

In considering its alleged due process violation, Relator asks the Court to determine what purpose notice of the tolling order and the right to opt out would have served. (Relator's Merit Brief, p. 18) Relator expresses a concern that absent notice of the tolling order, *Hupp* class members may unwittingly breach their lease which, on its face, has expired. (*Id.* at pp. 18-19) Interestingly, even if we assume the tolling order should not apply to Realtor's GT83 Lease with Beck Energy, Relator intentionally breached its lease by entering into a lease with Gulfport on September 30, 2013, almost five months prior to the expiration of its GT83 Lease. (Beck Affidavit, Exhibit A, ¶33, attached as Exhibit A(5)) Further, Gulfport's lease contained no "top" lease provision and therefore, was effective as of September 30, 2013, the date Relator signed it.

Raymond T. Beck averred, in his affidavit, that the publicity and knowledge of the *Hupp* decision and subsequent orders, including the tolling order, were well known by citizens and oil and gas attorneys in northeastern and southeastern Ohio. (*Id.*, Exhibit A, ¶29)

Counsel representing the class also published information regarding the *Hupp* decision in the Daily Jeffersonian, a local newspaper of general circulation in southeastern Ohio, including Monroe County. (*Id.*, Exhibit A, ¶30) The article, titled, *Ohio Attorneys Get Court to Rule Certain Inactive Oil and Gas Leases are Void*, discussed the trial court's grant of summary judgment against Beck Energy. (*Id.*, Exhibit A, attached at Exhibit 3) Finally, on October 17, 2013, The Beacon, a local newspaper of general circulation in Monroe County, published a notice of the tolling order. (*Id.*, attached as Exhibit 4)

Due to the well-known nature of the *Hupp* litigation, Relator's alleged concerns have never materialized concerning other class members unknowingly breaching their GT83 Lease and in fact, based on the evidence before the Court, Relator is the only party that breached its GT83 Lease with Beck Energy. Further, Relator's breach occurred not because it did not have notice of the tolling order but because it purposely entered into a new lease with Gulfport Energy Corporation almost five months before the alleged February 3, 2014, expiration date of its GT83 Lease. Therefore, as to Relator, notice would have served no purpose because Relator intentionally breached its lease with Beck Energy prior to the GT83 lease's alleged expiration on February 3, 2014. Further, there is no need to consider what notice may have provided to the Civ.R. 23(B)(2) class as a whole since Relator did not file this original action on behalf of the Civ.R. 23(B)(2) class.

6. ***Notice and an opportunity to opt out is only required in Civ.R. 23(B)(2) classes where the predominant relief sought is monetary damages.***

Relator attempts to compare the facts of the present case to those Civ.R. 23(b)(2) cases where the courts have found it necessary to provide notice and an opportunity to opt out to class members. Relator's reliance on these cases is misplaced because these additional

protections are provided to class members only where their request for injunctive or declaratory relief is incidental to a request for monetary relief.

For example, in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000), the Ninth Circuit Court of Appeals recognized protections entailed by Civ.R. 23(b)(3) certification should be extended to classes certified under Rule (b)(2) when plaintiffs seek significant monetary as well as equitable relief. *Id.* at 860. However, the court declined to find a due process violation because the parties supposedly suffering such violation never alleged this fact in the class action. *Id.* at 861.

The following cases also cited by Relator reached similar conclusions: *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1145 (11th Cir.1983) (“[B]ecause the merits of many monetary damages and back pay claims in this case are uniquely individual to particular class members, the right to opt out of the class, normally accorded only in classes certified under Federal Rule of Civil Procedure 23(b)(3), must be extended to members of the (b)(2) monetary relief class.”); *Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650, 657-658 (U.S. Dist. Ct. E.D. La. 1975) (Due to the discretionary nature of Civ.R. 23(d)(2) and relying on the fact that notice is discretionary to (b)(2) class members, the court found it appropriate to give notice to class members in a suit brought under Civil Rights Act of 1964 due to the possibility of money damages, but declined to give class members the right to opt out.); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 471-472 (5th Cir.2011) (Class required to proceed under Rule 23(b)(3) and not (b)(2) because predominant relief sought was an award of monetary damages); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (Court held “that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which

would support personal jurisdiction over a defendant” where minimal procedural due process protection is provided. The Court specifically refused to comment on other types of class actions, such as those seeking equitable relief. *Id.* at 812, fn. 3); *Planned Parenthood Assn. of Cincinnati v. Project Jericho*, 1st Dist. Hamilton Nos. C-860550, C-860659, C-870015, C-860580, C-860577, C-860878, C-860829, C-870086, C-870150, C-870757, 1989 WL 9312, *9 (Feb. 8, 1989), *aff’d in part, rev’d in part*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990) (Inapplicable to support Relator’s argument because the court held the class was improperly certified because the requirements for certification were not met.); *Lemon v. Internatl. Union of Operating Engineers Loc. No. 139, AFL-CIO*, 216 F.3d 577, 582 (7th Cir.2000) (Court found the plaintiffs’ requested monetary damages for alleged Title VII violations were not incidental to their requested relief so court vacated class certification under Rule 23(b)(2) and remanded the matter to consider alternative class certification options.); *Oneida Indian Nation v. State of New York*, 85 F.R.D. 701, 707, fn. 9 (U.S.Dist.Ct.NY 1980) (The court certified a (b)(1)(B) defendant class action and concluded due process involving defendants’ property rights mandated some type of individual notice to class members.)

The case law relied on by Relator does not support the conclusion that the *Hupp* Plaintiffs, as Civ.R. 23(B)(2) class members, were entitled to notice and the right to opt out simply because no monetary damages were ever sought by the class. Further, there is not even the possibility of monetary damages, in the future, because the court of appeals found the GT83 Lease to be valid defeating any possible basis for slander of title claims by the *Hupp* Plaintiffs.

7. ***The trial court properly conducted the Civ.R. 23(B)(2) class action.***

Relator contends the class has not been properly conducted due to the misapplication of Civ.R. 23(B)(2) and the failure to apply Civ.R. 23(D)(2). (Relator’s Merit

Brief, p. 27) As explained above, since the *Hupp* Plaintiffs only ever sought declaratory/quiet title relief, the trial court properly certified the class under Rule 23(B)(2). Relator cites *Smith v. Bayer Co.*, ____ U.S. ____, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011) and *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546 (7th Cir.2012) for the purpose of demonstrating when absent class members may not be bound by class action proceedings.

Neither factual situation found in *Smith* nor *Thorogood* applies herein. The *Smith* court concluded that where a federal court ultimately refused to certify a class, issue preclusion could not be used to bar the unnamed plaintiff's state court action. *Smith, supra*, at 2380. The *Thorogood* decision recognized that absent class members never became parties to the lawsuit where the class was initially certified and later decertified. *Thorogood, supra*, at 551.

In the present matter, the court of appeals determined the class action was properly conducted as it pertains to the timing of certification, the failure to conduct a hearing prior to certification and class definition. A determination having been made, by the court of appeals, that the trial court properly certified this matter as a Civ.R. 23(B)(2) class, makes Relator's argument moot that the trial court erroneously certified the class or that it is not a member of the class. Therefore, Relator, like all other *Hupp* class members, is bound by the court of appeals' decision.

8. *Article 1, § 16 of the Ohio Constitution does not mandate notice and an opportunity to opt out of the Civ.R. 23(B)(2) class action.*

Relator alleges the Ohio Constitution mandates notice and the opportunity to opt out under Article 1, §16 and references this Court's recent decision in *Cullen, supra*. Relator asserts the *Cullen* decision demonstrates why the trial court should not have certified this matter as a Civ.R. 23(B)(2) class. (Relator's Merit Brief, p. 29)

The *Cullen* decision is inapplicable for two reasons. First, the *Hupp* Plaintiffs do not seek any monetary damages, let alone incidental monetary damages that were discussed in the context of a (B)(2) class in *Cullen*. Second, unlike in *Cullen*, due to the tolling order, class membership remains consistent, with nobody dropping out of the class during the course of the lawsuit.

Further, Relator's allegation that the court of appeals extended the *Hupp* Plaintiffs' lease by years, thereby granting Beck Energy equitable relief "without any compensation," is misleading. Beck Energy has been making timely delay rental payments on all of the GT83 Leases that are part of the *Hupp* class action, including those delay rental payments due under Relator' lease. (Beck Affidavit, Exhibit A, ¶16)

However, Relator is correct on the point that absent a successful appeal to this Court, the court of appeals' determination that the GT83 Lease is valid means this will be the only relief awarded in the case. Beck Energy is entitled to this equitable relief because it could not drill any wells while the *Hupp* litigation was pending and risked losing the financial investment involved with the exploration and drilling for an oil and gas well if it did. (*Id.*, ¶25)

This does not create a due process violation for the *Hupp* Plaintiffs. In fact, all of the courts in Ohio that have addressed the issue of tolling orders, in the context of oil and gas disputes, have never found a tolling order violates a lessor's due process rights. The only concern addressed by the courts has been the timing of the issuance of the tolling order (i.e., whether it should issue before or after a determination on the merits.) Further, the use of a tolling order is especially appropriate, in a class action, to maintain class membership during the course of the litigation.

Finally, Relator raises a speculative argument concerning whether, on appeal to this Court, the Civ.R. 23(B)(2) class will be decertified. (Relator's Merit Brief, pp. 29-30) There is no chance of decertification occurring because Beck Energy does not intend to appeal the court of appeals' decision, to the Ohio Supreme Court; and if the *Hupp* Plaintiffs appeal, it is unlikely they will argue the trial court abused its discretion when it certified the class action since they specifically requested the (B)(2) class. For all of these reasons, Relator, as a member of a properly certified (B)(2) class, had no notice or opt-out due process rights that were violated when the Seventh District Court of Appeals extended the tolling order to include the (B)(2) class.

B. RESPONSE TO PROPOSITION OF LAW NO. 2: Relator is not entitled to a writ of prohibition because it cannot satisfy the necessary elements entitling it to such relief.

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

In order to be entitled to a writ of prohibition, Relator must demonstrate, "(1) that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying a writ will result in injury for which no other adequate remedy exists in the ordinary course of law." *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 234-235, 638 N.E.2d 541, citing *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 592, 629 N.E.2d 446 (1994). Because of its extraordinary

nature, the Court will not grant a writ of prohibition “routinely or easily.” *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 540, 1996-Ohio-286, 660 N.E.2d 458 (1996).

Rather, the right to prohibition “must be clear, and in a doubtful or borderline case its issuance should be refused.” *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.*, 137 Ohio St. 273, 277, 28 N.E.2d 641 (1940). Thus, “[w]hen a court has at least basic statutory jurisdiction to act and an appeal is available in the ordinary course of law, a writ of prohibition will not lie.” *State ex rel. Aycock v. Mowrey*, 45 Ohio St.3d 347, 352, 544 N.E.2d 657 (1989).

1. *The Seventh District Court of Appeals is not “about to exercise judicial or quasi-judicial power.”*

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

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

A writ of prohibition may be awarded only to prevent the unlawful usurpation of jurisdiction and *does not lie to prevent the enforcement of a claimed erroneous judgment previously entered or the administrative acts following the rendition of a judgment * * **. It may be invoked only to prevent proceeding in a

matter in which there is an absence of jurisdiction and *not to review the regularity of an act already performed.*

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

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

Relator claims prohibition is the appropriate remedy, for non-parties, to challenge excesses of lower tribunals and to invalidate orders already issued that exhibit such excesses. (Relator’s Merit Brief, p. 31) Relator relies on the case of *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juvenile Div.*, 77 Ohio St.3d 40, 671, 1996-Ohio-354, 671 N.E.2d 5, alleging its position is directly analogous to that of non-parties in the *News Herald* case. (*Id.*)

Relator’s reliance on this case is misplaced because it has absolutely no application to the facts presented herein. The *News Herald* case held that a writ of prohibition was the appropriate remedy to challenge the constitutionality of a gag order preventing non-party newspapers from publishing certain information lawfully gathered by them in judicial proceedings that were open to the public. *Id.* at 44. The Court based its reasoning on the fact that “historically, it has been held that prohibition is the *only remedy* available to nonparties who

wish to challenge an order which restricts the rights of free speech and press of such nonparties.”
(Emphasis added.) *Id.* at 43.

Thus, the Court’s focus in such cases is not whether the party filing the writ is a non-party, but whether any other remedy exists that would afford the non-party the relief it seeks. Because Relator is admittedly a member of the Civ.R. 23(B)(2) class, and the underlying litigation has been remanded to the Monroe County Court of Common Pleas for further proceedings, Relator has an adequate remedy by way of intervention under Civ.R. 23(D)(2). The grant of an extraordinary writ of prohibition is not required. Because prohibition is a preventative and not a corrective remedy, it cannot be used to circumvent the fact that presently this matter is properly pending before the trial court for proceedings in accordance with the Seventh District Court of Appeals’ decision. *See State ex rel. Celebrezze v. Butler Cty. Common Pleas Court*, 60 Ohio St.2d 188, 190, 398 N.E.2d (1979), wherein this Court explained:

“Prohibition is a preventative writ rather than a corrective remedy and is designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine. * * * It cannot be used to review the regularity of an act already performed.”
State ex rel. Stefanick v. Municipal Court (1970), 21 Ohio St.2d 102, 104, 255 N.E.2d 634, 635. Thus, prohibition cannot lie here to correct any errors made by a respondent court. * * * We express no view in the correctness in respondent court’s determinations. Our only concern is the correctness in granting a writ. If there were errors or defects by respondent court, there is a suitable remedy by way of appeal. It is well-settled that

prohibition does not function as a substitute for an appeal. *State ex rel. Rhodes v. Solether* (1955), 162 Ohio St. 559, 124 N.E.2d 411.

The *News Herald* case is also inapplicable because Relator has no basis to claim that it is a “non-party” to this action since the court of appeals determined, in the *Hupp* decision, that the trial court properly certified a Civ.R. 23(B)(2) class and also approved the class definition. *Hupp, supra*, at ¶¶59, 76. Relator satisfies the (B)(2) class definition and has conceded that it is a member of the class. (See Relator’s Complaint in Prohibition and Mandamus, ¶6, ¶22; Memorandum in Support of Complaint in Prohibition and Mandamus, pp. 2-3, 8; Relator’s Evidence, Claugus’s Affidavit, ¶14; Relator’s Merit Brief, p. 33.)

Relator also claims it is entitled to a writ in prohibition because the court of appeals awarded equitable relief against the Civ.R. 23(B)(2) class members depriving them of their property rights effectively ceding their property rights to Beck Energy without the payment of any consideration. (Relator’s Merit Brief, p. 32) This argument again supports the conclusion that Relator is not challenging the exercise of judicial authority that is “about to” occur. Instead, Relator challenges authority exercised by the Seventh District Court of Appeals on September 26, 2013, when it issued the revised tolling order extending it to all (B)(2) class members.

Relator’s argument also ignores the fact that Beck Energy continues to make delay rental payments to the Civ.R. 23(B)(2) class members based on the extension of the primary terms of each of the class members’ leases subject to the tolling order. (Beck Affidavit, Exhibit A, ¶16) Therefore, class members continue to receive consideration for the extension of their leases. Further, Beck Energy has received no “windfall” as a result of the tolling order. As explained previously, Beck Energy cannot explore or drill for oil and gas on any of the leases

subject to the tolling order. Further, Beck Energy is making additional delay rental payments for leases that it may have allowed to expire during its ordinary course of business had it not been subjected to the *Hupp* litigation.

Finally, Relator argues the tolling order is retroactive and tolls leases that expired up to a year prior to the issuance of the order. (Relator's Merit Brief, p. 33) Relator's argument implies that when the court of appeals issued its tolling order, extending it to the Civ.R. 23(B)(2) class members, it revived class members' leases that had expired. There is absolutely no evidence presented to this Court that supports Relator's argument that the tolling order revived expired GT83 Leases. Further, this original action concerns only Relator's GT83 Lease, and at the time the court of appeals issued its tolling order on September 26, 2013, Relator's lease had not expired.

2. *Relator may not challenge the Seventh District Court of Appeals' administrative act of extending the tolling order to the Civ.R. 23(B)(2) class.*

As the Court explained in the *State ex rel. Moss v. Clair* decision, *supra*, a writ of prohibition may not be awarded to prevent administrative acts following the rendition of a judgment. The Monroe County Court of Common Pleas journalized its judgment on July 31, 2012, granting summary judgment in favor of the named Plaintiffs finding the GT83 Lease void ab initio. (Zurakowski Affidavit, Exhibit B(4)) After its decision on the merits, the trial court certified a Civ.R. 23(B)(2) class. Beck Energy filed two motions to toll, first seeking to toll the leases of the named Plaintiffs and, once the trial court certified the class action, a second motion seeking to toll the leases of the class members.

The tolling order is necessary to maintain the viability of the class members' leases during the appellate process. Based on the recent decision from the court of appeals, Beck

Energy has “won the battle” but, without the tolling order in place, to date would have lost 84 leases in the process and possibly more if this Court decides to exercise jurisdiction in the proposed *Hupp* appeal. Therefore, Relator’s writ in prohibition merely seeks to challenge an administrative act of issuing a tolling order that is necessary to maintain the status quo of the *Hupp* litigation. Relator cannot use a writ of prohibition to challenge such an act.

3. *The Seventh District Court of Appeals did not lack jurisdiction when it extended the tolling order to the Civ.R. 23(B)(2) class members.*

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

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

4. *Relator does not lack adequate remedies at law.*

Finally, Relator is not entitled to a writ of prohibition because it has adequate legal remedies. “Prohibition will not lie to prevent an anticipated erroneous judgment.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 74, 701 N.E.2d 1002 (1998). Nor is prohibition a

substitute for an appeal. *State ex rel. Ragozine v. Shaker*, 96 Ohio St.2d 201, 2002-Ohio-3992, 772 N.E.2d 1192, ¶7. See also *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, ¶28 (“Prohibition will not issue as a substitute for appeal to review mere errors in judgment”); *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 578, 757 N.E.2d 357 (2001) (appeal of an order denying intervention after a final judgment is an adequate remedy in the ordinary course of law that bars a writ of mandamus); *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶28 (motion to intervene and appeal from any adverse judgment constituted an adequate remedy in the ordinary course of law that precludes a writ of mandamus); *McClellan v. Mack*, 129 Ohio St.3d 504, 2011-Ohio-4216, 954 N.E.2d 123, ¶2 (res judicata is not an appropriate basis for extraordinary relief because it does not divest a trial court of jurisdiction to decide its applicability, and the denial of the defense of res judicata by the trial court can be adequately challenged by post-judgment appeal).

Following remand by the Seventh District Court of Appeals, Relator continues to have available to it adequate remedies at law. Namely, under Civ.R. 23(D)(2), Relator may intervene and participate in this case on remand. The language of the Seventh District Court of Appeals’ tolling order is clear that once this Court determines whether to exercise jurisdiction, the tolling order expires. (Zurakowski Affidavit, Exhibit B(21)) At that point, Beck Energy will again be required to move for tolling and Relator may challenge the tolling issue directly, in both the trial court and court of appeals, if necessary. For these reasons, Relator is unable to satisfy any of the necessary elements entitling it to the relief it requests in its Writ of Prohibition.

C. **PROPOSITION OF LAW NO. 3: Relator cannot satisfy the necessary elements entitling it to a writ of mandamus and the requested relief violates R.C. 2731.03.**

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

Relator sets forth the same arguments raised in its Propositions of Law Nos. 1 and 2, namely: (1) it has no adequate remedy at law; and (2) the court of appeals' issuance of the tolling order was a gross abuse of discretion, arbitrary and unconscionable allegedly because it denied Relator its due process notice and opt-out rights. (Relator's Merit Brief, p. 34) Beck Energy addressed all of these arguments in its responses to Propositions of Law Nos. 1 and 2 and will not reiterate the reasons why Relator's arguments lack merit.

1. *A writ of mandamus may not control judicial discretion.*

R.C. 2731.03 supports the denial of Relator's writ of mandamus. This statute provides, "[t]he writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion." (Emphasis added.) It is undeniable that Relator's mandamus action seeks to control the Seventh District Court of Appeals' discretionary power to toll the Civ.R. 23(B)(2) class members' leases.

A writ of mandamus will not issue for such a purpose. *See State ex rel. Ford Motor Co. v. Corrigan*, 8th Dist. Cuyahoga No. 96287, 2011-Ohio-354, ¶7, wherein the court held an automobile manufacturer was not entitled to a writ of mandamus to compel the trial judge to vacate his order adjudicating liability in a class action because the mandamus action was merely an effort to control judicial discretion on how to manage the underlying case, and mandamus would not issue to control judicial discretion.

Similarly, in the present matter, Relator asks for a writ of mandamus to control the court of appeals' discretionary power exercised by its issuance of the tolling order in an attempt to manage the underlying class action litigation. Relator may not use a writ of mandamus in such a manner to obtain its requested relief. *See also State ex rel. Carroll v. Corrigan*, 91 Ohio St.3d 331, 2001-Ohio-54, 744 N.E.2d 771, where this Court explained a writ of mandamus will not issue to control judicial discretion, even if that discretion is abused.

Relator cannot satisfy the necessary elements required to entitle it to relief under its Writ of Mandamus. For these reasons, Beck Energy requests that the Court deny the relief requested in Relator's Writ of Mandamus.

IV. EQUITY REQUIRES DISMISSAL OF RELATOR'S COMPLAINT IN PROHIBITION AND MANDAMUS.

A. The doctrine of laches and unclean hands bar Relator's requested relief in its Complaint in Prohibition and Mandamus.

1. The doctrine of laches

Relator is not entitled to the extraordinary relief requested in its original action because of laches. "The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Meyers v. Columbus*

(1995), 71 Ohio St.3d 603, 605, 646 N.E.2d 173, 174. Prejudice is not inferred from a mere lapse of time. *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 35, 641 N.E.2d 188, 196.” *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 1995-Ohio-269, 656 N.E.2d 1277. The facts of this case satisfy the required elements for laches to apply.

Relator waited an unreasonable amount of time to file its original action. Based on the publicity this case received in Monroe County and surrounding counties, it is likely Relator knew about the *Hupp* litigation for a significant amount of time before it filed this original action. This knowledge may be inferred from the fact that Relator took certain actions to “position” itself to make the due process arguments it now presents for the Court’s consideration.

However, even if the Court declines to accept this argument, Relator admits on page 13, fn. 7 of its Merit Brief that it “became aware of the Tolling Order in October of 2013 during general discussions with counsel for Hupp regarding oil and gas litigation in Ohio.” Despite having knowledge about the pending *Hupp* litigation, Relator took no action to seek any kind of relief, either in the trial court or Seventh District Court of Appeals, until approximately five months later when it filed this original action on March 18, 2014. Relator’s delay of approximately five months in waiting to file its original action is unreasonable, and Relator has not provided any excuse for this delay.

Further, the prejudice caused Beck Energy is not based solely on the delay in bringing this original action. Rather, it is based on the fact that Relator admittedly is a member of the Civ.R. 23(B)(2) class and could have requested, and still can request, leave to intervene in the class action under Civ.R. 23(D)(2). However, instead of seeking intervention, Relator

purposely chose to act outside of the class in its attempt to obtain the relief it requests. This has prejudiced Beck Energy because it has been forced to defend itself in this original action, even though the relief Relator requests could have been pursued through the class action.

2. *The doctrine of unclean hands.*

Because Relator intentionally breached its GT83 Lease with Beck Energy when it entered the lease with Gulfport, in order to position itself to make its due process argument, Relator should be barred from obtaining the relief it requests in its Complaint in Prohibition and Mandamus. As this Court explained in *Kinner v. Lake Shore & Michigan Southern Ry. Co.*, 69 Ohio St. 339, 69 N.E. 614 (1904), “ ‘The maxim, ‘He who comes into equity must come with clean hands,’ requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit.’ ” *Id.* at 85.

The record supports the conclusion that Relator came into Court, with unclean hands, because it intentionally breached its lease with Beck Energy by entering into the lease with Gulfport. Relator should not be permitted to commit reprehensible conduct by intentionally breaching its GT83 Lease with Beck Energy and manipulating the justice system in such a way as to support its claim for relief based on an alleged due process violation. For these reasons, the equitable doctrines of laches and unclean hands apply to bar Relator’s requested relief in its Complaint in Prohibition and Mandamus.

V. CONCLUSION

Relator is a member of a properly certified Civ.R. 23(B)(2) class. Its membership in this class affords it no due process notice or opt-out rights, which would also include notice of the court of appeals’ tolling order because notice would serve no purpose. Relator’s interests are currently adequately and effectively represented by the *Hupp* Plaintiffs’ class counsel, which

also represented Relator's interests at the time the court of appeals issued the tolling order in this matter. Because Relator has an adequate remedy at law, by way of intervention under Civ.R. 23(D)(2), the Court must deny Relator's requested relief in its Complaint in Prohibition and Mandamus.

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PROOF OF SERVICE

I hereby certify that copies of Intervening Respondent Beck Energy Corporation's Brief on the Merits were served by United States mail, pursuant to S.Ct.Prac.R. 3.11(B), this 22nd day of October 2014 upon:

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