

THE SUPREME COURT OF OHIO

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

AMICUS CURIAE XTO ENERGY INC.'S BRIEF IN SUPPORT OF
RESPONDENT SEVENTH DISTRICT COURT OF APPEALS, JUDGE
DONOFRIO, JUDGE VUKOVICH, AND JUDGE DEGENARO

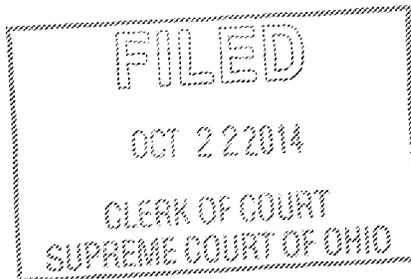
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I. XTO ENERGY INC.'S INTEREST IN THIS ORIGINAL ACTION

XTO Energy Inc.'s interest in this action derives from its purchase of certain lease rights from Intervenor Beck Energy Corporation and the significant XTO property rights that are at stake in this case. Beck has entered into hundreds of oil and gas leases with various property owners throughout the State of Ohio on a standard lease form, the Form G&T (83) Oil and Gas Lease. In 2011, XTO purchased from Beck the right to drill, develop, and explore properties covered by those leases below certain depths greater than 3860 feet. (Affidavit of Rodney Black, Intervening Respondent Beck Energy Corporation's Additional Evidence ("Black Aff.") Exhibit C, ¶ 3.)

The trial-court case underlying this original action is a certified class action in which the lessors sought to invalidate their oil and gas leases with Beck. *See Hupp v. Beck Energy Corp.*, Monroe Cty. Com. Pl. Ct., Case No. 2011-345. Relator Claugus Family Farm L.P. is one of the members of the certified class, which includes the lessors of approximately 7000 acres for which XTO purchased the deep rights. (Black Aff. Exhibit C at ¶ 7.)

In July 2012, the trial court in *Hupp* granted summary judgment to the named plaintiffs, declaring their leases void and forfeited. (Trial court entry granting summary judgment to the named plaintiffs, Stipulations Exhibit 5.) The

named plaintiffs then sought class-action certification. (Plaintiffs motion for class certification, Stipulations Exhibit 6.) XTO, in an attempt to protect its investment in the oil and gas leases, moved to intervene. (Third Party XTO Energy Inc.'s Motion to Intervene in Proceedings, Stipulations Exhibit 9.) The trial court denied XTO's motion. (Decision and Order on XTO's Motion to Intervene, Stipulations Exhibit 15.)

At the same time it denied XTO the right of intervention, the trial court certified *Hupp* as a Rule 23(B)(2) class action, extending to all Ohio lessors, including Claugus, its declaration that the Beck leases were void and forfeited. (Trial court entry granting class certification, Stipulations Exhibit 14.) In granting class-action certification, the trial court found, among other things, that the named plaintiffs and their counsel adequately represented the class members' interests in the litigation. (*Id.* at 8-10.) Beck appealed the decision on the merits to the Seventh District Court of Appeals, and XTO appealed the denial of its motion to intervene to that same court. On September 26, 2014, the Seventh District upheld the class certification, reversed the trial court's judgment on the merits, and determined that XTO's appeal was moot. *Hupp v. Beck Energy Corp.*, 7th Dist. Monroe Nos. 2012 MO 6, 2013 MO 2, 2013 MO 3, 2013 MO 11, 2014-Ohio-4255, ¶ 130.

While the appeal was pending, the Seventh District entered a tolling order, the purpose of which was to maintain the status quo until the validity of the leases was finally resolved. As is true of oil and gas leases generally, the leases at issue in *Hupp* have primary and secondary terms. Under the primary term, the lessee has a specified period within which to drill a well. The lessee bargains and pays for the primary term as part of the lease agreement. If the lessee fails to drill a well during the primary term, the lease terminates. On the other hand, if the lessee drills a productive well during the primary term, the secondary term commences. The secondary term continues so long as there is a productive well. All of the leases at issue in *Hupp* were in their primary terms when that case was filed. The tolling order was necessary because the *Hupp* case had placed a cloud on the leases, making it economically impractical to develop any of the properties covered by those leases. (Black Aff. Exhibit C at ¶ 10.) If XTO, for example, had commenced drilling operations and plaintiffs had ultimately succeeded in their attempt to invalidate the leases, XTO would not only have faced possible liability for trespass, it would also have lost a substantial financial investment in exploring and drilling for oil and gas. (*Id.*) Each day that *Hupp* is pending decreases the period Beck bargained and paid for within which to drill a well under the primary terms of the leases at issue. The tolling order preserved the benefit of the bargain by stopping the clock while the litigation played out. In the event the plaintiffs

failed on their class-wide claims to declare the leases void, Beck and XTO at that point would still have the same amount of time to develop the leases as it had when it first moved for tolling.

And, in fact, the plaintiffs did fail. The Seventh District's recent decision establishes that the lessors' challenge to the leases was unfounded. Without the tolling order, the very filing of the (unsuccessful) *Hupp* lawsuit would have destroyed XTO's interest in the leases, despite the eventual outcome. A large portion of the deep rights XTO acquired from Beck, covering approximately 5000 acres, would already have expired. (*Id.* at ¶ 13.) The rights as to an additional approximately 700 acres would expire by the end of 2014. (*Id.* at ¶ 14.) Leases covering approximately 1200 more acres would expire between January 2015 and September 2015. (*Id.* at ¶16.) In short, without the tolling order entered by the Seventh District, XTO would have lost the opportunity to develop approximately 90% of the deep rights it acquired from Beck, even though the Seventh District has now reversed the trial court's declaration that the leases are void. Thus, this Court's resolution of this original action will have a profound effect on XTO's property rights.

II. THE ISSUE PRESENTED

The mere filing of a class-action lawsuit challenging the validity of oil and gas leases has the immediate effect of interfering with the lessee's rights under those leases because the lawsuit prevents the lessee from taking steps to develop the land in question—regardless of the eventual outcome on the merits. The only way to preserve the lessee's rights is to toll the lease term for the duration of the litigation, which has less of an impact on the absent class members than the res judicata effect of the ultimate judgment that binds them. When the absent class members are adequately represented by class counsel, does a tolling order, designed to maintain the status quo, deprive those class members of property without due process?

III. STATEMENT OF FACTS

A. The *Hupp* Litigation.

The named plaintiffs in *Hupp* own real estate in Monroe County, Ohio, and leased the oil and gas rights for that real estate to Beck under a form lease known as the “Form G&T (83) Oil and Gas Lease.” (Second Amended Complaint, Stipulations Exhibit 3, ¶ 2, 3, 5, & 8.) They filed the *Hupp* case against Beck, seeking a declaratory judgment that their leases were void or forfeited and also seeking quiet-title relief. (*Id.* at ¶ 20-21.) They included class-action allegations in their Second Amended Class Action Complaint, seeking to represent other Monroe County real-estate owners having similar leases with Beck. (*Id.* at ¶ 22.)

Prior to seeking class certification, the plaintiffs moved for summary judgment on the merits of their claims. The trial court issued a decision on that

motion and several other pending motions, and, subsequently, issued a journal entry declaring plaintiffs' leases void and forfeited. (Trial court entry granting summary judgment & trial court entry journalizing summary judgment to named plaintiffs, Stipulations Exhibits 5 & 7.)

Following the trial court's summary-judgment decision, the plaintiffs moved for class-action certification under Civ.R. 23(B)(2). (Plaintiffs' motion for class action certification, Stipulations Exhibit 6.) The trial court granted plaintiffs' motion for class-action certification under Rule 23(B)(2) and, eventually, defined a state-wide class:

[A]ll persons who are lessors of property in the State of Ohio, or who are successors in interest of said lessors, under a standard form oil and gas lease with Beck Energy Corporation, known as 'G&T (83),' 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.

(Trial court entry granting class certification & trial court entry clarifying the class, Stipulations Exhibits 14 & 18.)

On October 1, 2012, between the time plaintiffs moved for certification of the *Hupp* case as a class action and the trial court's order granting that motion, Beck moved the trial court for an order tolling the named plaintiffs' leases. (Beck

Energy motion to toll the leases of named plaintiffs, Stipulations Exhibit 12.) The trial court did not immediately rule on Beck's motion to toll, and, eventually, following a remand from the Seventh District Court of Appeals, Beck moved for tolling of the leases of all the members of the certified class. (Beck Energy motion to toll the leases of all proposed class members, Stipulations Exhibit 24.) In response, the trial court entered an order tolling the leases of the named plaintiffs only. The only explanation provided by the trial court for restricting its tolling order to the named plaintiffs was that "[t]his is the relief previously requested by the Defendant and not decided by this court." (Trial court entry granting motion to toll leases of named plaintiffs, Stipulations Exhibit 27.) The trial court observed that, "[i]f the defendant desires to have this order expanded it can present that issue to the Court of Appeals." (*Id.*)

Beck responded to the trial court's observation by moving the Seventh District under App.R. 7 for an emergency injunction tolling the leases of all members of the plaintiff class. The appellate court granted Beck the relief it sought:

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.

(Seventh District Entry tolling the leases of all proposed class members, Stipulations Exhibit 33.)

On September 26, 2014, the Seventh District affirmed the trial court's certification of a state-wide class of lessors who, either themselves or through a predecessor in interest, leased oil and gas rights to Beck using a Form G&T (83) Oil and Gas Lease. *Hupp*, 2014-Ohio-4255, at ¶ 73. The appellate court also reversed the trial court's decision on the merits and held that the leases at issue are neither void nor forfeited. *Id.* at ¶ 104, 122. Plaintiffs now have the opportunity, in the normal course, to seek review in this Court on behalf of themselves and the class they represent, which includes Claugus.

B. The Claugus Lease.

The lease covering the Claugus property was entered into on February 4, 2004, by previous owners of that property, Francis and Barbara Jeffers, as lessors, and Beck, as lessee. (Affidavit of Bruce A. Claugus, Evidence of Relator Exhibit 1, ¶ 4 & Beck Energy Lease dated February 4, 2004, Evidence of Relator Exhibit 3.) That lease has a primary term of ten years and a secondary term of “so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 [the dry hole clause].” (Beck Energy Lease dated February 4, 2004, Evidence of Relator Exhibit 3.) As recognized by the Seventh District, in order to carry the lease from the primary term to the secondary term, the lessee must drill a well that begins producing oil or gas during the primary term.¹ See *Hupp* at ¶ 101.

Claugus bought the property covered by the Jeffers lease and the lessor’s interest in that lease on February 21, 2006. (Affidavit of Bruce A. Claugus, Evidence of Relator Exhibit 1, ¶ 3.) At that time, almost eight years of the primary

¹ The majority of the leases at issue in *Hupp* have primary terms of ten years, although some have different primary terms. They all have secondary terms of “so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7.”

term remained. When the named plaintiffs in *Hupp* filed their original Complaint on September 14, 2011, and when they added class-action allegations by filing their Amended Complaint on September 29, 2011, over 28 months of the primary term remained. When Beck first sought a tolling order on October 1, 2012, over 16 months of the primary term remained. It currently takes between nine and twelve months from formulation of a plan to drill an oil and gas well in Ohio until that well can be completed. (Affidavit of Rodney Black, ¶ 15, Intervening Respondent Beck Energy Corporation’s Additional Evidence Exhibit C.) But for the *Hupp* litigation, Beck, or its assignee XTO, could have included the Claugus property in a drilling unit, completed a well, and, if that well proved successful, moved from the primary term to the secondary term of the Claugus lease. In that event, that lease would continue so long as “oil or gas or their constituents are produced or are capable of being produced in paying quantities,” foreclosing Claugus from entering into a new lease with a different lessee. (See Beck Energy Lease dated February 4, 2004, Evidence of Relator Exhibit 3.)

IV. ARGUMENT

Proposition of Law

When the mere filing of a Civ.R. 23(B)(2) class action interferes with the lessee’s rights under oil and gas leases on a mass scale, a court has the power to preserve the status quo by tolling the leases as to all class members pending the resolution of the litigation without providing the absent class members with individual notice

and a right to opt out, so long as it concludes that the interests of absent class members are adequately represented.

Without a tolling order to maintain the status quo, a lessee sued by a lessor seeking a determination that an oil and gas lease is void or forfeited faces an impossible dilemma: either it can use the contested land and expose itself to potential liability for trespass (as well as possibly losing its investment in the wells it drills, which for Marcellus/Utica-shell wells can be millions of dollars per well), or it can refrain from using the land and risk losing its lease through the passage of time without being able to exercise the rights it purchased under that lease, *regardless of the eventual outcome*. That dilemma was multiplied hundreds of times in *Hupp v. Beck Energy Corp.*, Monroe Cty. Com. Pl. Ct., Case No. 2011-345, because the trial court certified a plaintiff class consisting of hundreds of lessors throughout Ohio. To eliminate the dilemma the *Hupp* case caused, the Seventh District Court of Appeals, after weighing the equities, ordered the challenged leases tolled for the period beginning October 1, 2012, the date Beck first sought tolling in the trial court, continuing during the pendency of all appeals before the Seventh District, and, in the event of an appeal to this Court, lasting until this Court either accepts or declines jurisdiction.

In this original action, Claugus, a member of the class certified by the trial court in *Hupp*, has challenged the tolling order entered by the Seventh District. According to Claugus, the tolling order deprives it of property without due process

of law by preventing it from immediately entering into a more lucrative lease with a different lessee. It has asserted that it never wanted to be part of the certified class and, if it had not been, its lease would have expired by its own terms because of Beck's failure to drill a well for a unit that included Claugus's property during the lease's primary term. What Claugus's argument fails to acknowledge, however, is that the underlying *Hupp* case (including Claugus's status as a class member) made it impossible for Beck or XTO, as Beck's assignee, to drill such a well. But for the *Hupp* case, Beck and XTO would have been free to have already included the Claugus property in a drilling unit and, if they had, Claugus would be just as effectively prevented from entering into the more lucrative lease it desires as it is by the tolling order. Thus, the tolling order does not deprive Claugus of its property. Rather, it simply suspends the running of its lease term to balance the equities on both sides; Claugus is not unfairly deprived of property rights, and Beck and XTO are also not unfairly deprived of property rights for which they bargained and paid—including delay-rental payments that Beck and XTO have continued to pay, in accordance with the lease provisions, even while the litigation has been pending.²

² A delay-rental payment is a payment the lessee makes during the primary term if it has not yet developed the land in question. Williams & Meyers, *Manual of Oil and Gas Terms* 250 (15th Ed.2012). A provision for delay-rental payments is found in paragraph 3 of the Form G&T (83) Oil and Gas Lease.

The tolling order entered by the Seventh District maintains the status quo as it existed on October 1, 2012. At the expiration of the tolling order, the class members will each have exactly what they had on that date: either land subject to an oil and gas lease that they or their predecessors freely entered into with Beck, or (if plaintiffs successfully appeal to this Court and the Beck leases are determined to be void or forfeited) land subject to no oil and gas lease. In the latter event, Claugus and the other members of the plaintiff class will be free to enter into new oil and gas leases with whomever they choose on whatever terms lessees are then willing to provide. It may well be that, at the expiration of the tolling order, the market for oil and gas leases will be even more favorable for landowners than it is now. If so, rather than losing money by being prevented from entering into the lease opportunities now available, Claugus will have gained money by having the freedom to negotiate when those market conditions further improve.

On the other hand, if this Court dissolves the tolling order as it relates to Claugus, Beck and XTO will have lost their rights under the lease with Claugus without having had a fair opportunity to exercise those rights. Such a result would be manifestly unfair, particularly in view of the fact that the Seventh District has now unanimously determined that the leases at issue, including the lease covering Claugus's property, are neither void nor forfeited. *Hupp*, 2014-Ohio-4255, at ¶ 132 (“[T]he 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. The trial court further erred in concluding the Lease was subject to implied covenants and that Beck breached the implied covenant to reasonably develop.”).

Further, although it is a general principle that a party cannot be affected by a lawsuit in which it is not a named party and has not been made a party though service of process, there are exceptions to that general principle. “In a class action, for example, a person not named as a party may be bound by a judgment on the merits of that action, if she was adequately represented by a party who actively participated in the litigation.” *Taylor v. Sturgell*, 553 U.S. 880, 884, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). Binding an absent class member to a judgment in effect deprives it of the right to pursue its own cause of action. By definition, then, being a member of a properly certified class exposes absent class members to judicial rulings that effect their property rights; that is the very nature of class actions. There can be no doubt, then, that an absent class member can be bound by an order that does nothing more than maintain the status quo while the class action is pending.

By this original action, Claugus purports to seek to vacate only the tolling order as that order effects its lease. But to do so, it also seeks in essence to vacate the class-certification order. Beck and XTO had to abide by the class-certification

order when that order served to invalidate all the class members' leases. But Claugus wants to escape the burdens of that order now that the Seventh District has declared the leases to be valid. Affording Claugus its requested relief would be a "heads I win, tails you lose" situation for Beck and XTO. It would also have broad implications for the future, providing a roadmap to lessors who seek to avoid their obligations under indisputably valid leases simply to take advantage of perceived market changes.

As XTO establishes below, the tolling order is valid for three reasons: (1) the *Hupp* case was properly certified as a class action under Civ.R. 23(B)(2); (2) that proper class certification satisfied due-process requirements, even without notice specifically directed to Claugus; and (3) the tolling order was a critical form of ancillary relief that permitted the class action to go forward without destroying the lessees' ultimate rights to develop the subject property in the event plaintiffs' claim failed on the merits. This Court should deny Claugus the relief it seeks in this original action and allow the *Hupp* litigation to continue to final resolution in the normal course.

A. Hupp is a Properly Maintained Rule 23(B)(2) Class Action.

1. The Seventh District Affirmed the Class Certification Under Civ.R. 23(B)(2).

The trial court certified *Hupp* as a class action under Civ.R. 23(B)(2). In analyzing whether the trial court did so properly, the Seventh District noted that there are seven requirements applicable to class actions generally:

(1) an identifiable and unambiguous class must exist, (2) the named representatives of the class must be class members, (3) the class must be so numerous that joinder of all members of the class is impractical, (4) there must be questions of law or fact that are common to the class, (5) the claims or defenses of the representative parties must be typical of the claims and defenses of the members of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three requirements of Civ.R. 23(B) must be satisfied.

Hupp, 2014-Ohio-4255, at ¶ 34, quoting *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 19, citing *Warner v. Waste Mgt., Inc.*, 36 Ohio St. 3d 91, 94-95, 521 N.E.2d 1091 (1988). It further noted, in regard to the seventh requirement, that certification is appropriate under Rule 23(B)(2) when “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief or corresponding declaratory relief with respect to the class as a whole.” *Id.* at ¶ 35, quoting Civ.R. 23(B) (2). Finally, it recognized that courts have held that Rule 23(B)(2) has two requirements: “(1) the class action must seek primarily injunctive relief; and (2) the class must be cohesive.” *Id.*, citing *Fowler v. Ohio Edison Co.*, 7th Dist. No. 07-JE-21, 2008-Ohio-6587, ¶ 64, quoting *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 13.

2. Claugus’s Two Challenges to Class Certification Under Civ.R. 23(B)(2) Are Unavailing.

Claugus argues that the trial court incorrectly certified *Hupp* under Rule 23(B)(2). Significantly, it has not suggested that any of the first six requirements for class certification, including that the named plaintiffs “fairly and adequately protect the interests of the class,” were not satisfied.³ Rather, it has argued that the trial court acted incorrectly for two reasons: (1) the class does not seek primarily injunctive or declaratory relief; and (2) the class is not cohesive. Both of Claugus’s arguments fail.

³ Claugus has asserted in passing, while discussing this Court having allowed Beck to intervene in this original action, that “no one represented the Claugus Family’s ‘compelling interest,’” in *Hupp*. But Claugus has not argued that the named plaintiffs were not adequate class representatives. (*See Relator’s Brief* at 2.) In fact, it has not suggested any reason why class certification was not appropriate in *Hupp*. Rather, it has argued only that class certification was not appropriate under Rule 23(B)(2) or that, if it was appropriate under that rule, notice to absent class members was nevertheless required.

a. The Underlying Action Properly Sought Only Declaratory Relief.

The plaintiffs in the underlying action sought *only* declaratory relief. Claugus cannot dispute that point, so it instead urges that the class representatives improperly ignored individual monetary claims available to the class in order to bring their proposed class within the scope of Rule 23(B)(2). It asserts that the United States Supreme Court's opinion in *Wal-Mart Stores Inc. v. Dukes*, --- U.S. ---, 131 S.Ct. 2541, --- L.Ed.2d --- (2011), established that it is inappropriate to certify a class under Rule 23(B)(2) when the named plaintiffs have failed to assert available individual monetary claims.

The plaintiffs in *Wal-Mart* were current and former female employees who sought to represent a nationwide class of 1.5 million members. They alleged that the discretion exercised by local Wal-Mart supervisors over pay and promotions violated Title VII of the Civil Rights Act by discriminating against women. They sought back pay and punitive damages, along with injunctive and declaratory relief. The trial court certified a class under Fed.R.Civ.P. 23(b)(2), and the appellate court affirmed that certification. The United States Supreme Court, however, reversed.

The Supreme Court held that certification under Rule 23(b)(2) was not appropriate because, among other things, the plaintiffs *sought an award of back pay* that was not incidental to their request for declaratory or injunctive relief:

Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L. Ed. 2d 33 (1994) (*per curiam*) expressed serious doubt about whether claims for monetary relief may be certified under [Rule 23(b)(2)]. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

Wal-Mart at 2557.

Claugus attempts to use this original action to defeat class certification by relying on *Wal-Mart*. But Claugus's argument fails for two reasons. First, the members of the class in *Hupp* had no individual monetary claims for their class representatives to ignore. Second, even if they had such individual monetary claims, *Wal-Mart* would not have foreclosed a Rule 23(B)(2) class.

i. The *Hupp* Class Had No Monetary Claims.

The members of the class in *Hupp* have no individual monetary claims for the class representatives to have ignored. Claugus has argued that, if the challenged leases are void ab initio, as claimed by the plaintiffs in *Hupp*, the filing of those leases by Beck constituted slander of title, entitling members of the class to monetary relief. (Brief of Relator at 22.) That argument is wrong.

Even if the leases were void ab initio, as the plaintiffs claimed they were, that voidness would not have been sufficient to state a claim for slander of title.

Claugus's argument fails under the very case on which it relies. *See Gibson v. Windows & Doors Showcase LLC*, 6th Dist. Fulton Nos. F-05-017, F-05-024, 2006-Ohio-2921. In *Gibson*, the court held that to establish the slander-of-title cause of action, a claimant must prove four things: "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages." *Id.* at ¶ 29. Even if a court could have found for the plaintiffs on the first, second, and fourth of these factors, it would be impossible for it also to determine that Beck had acted with malice or reckless disregard. Beck is in the business of drilling oil and gas wells on properties it leases from landowners. To be successful in that business, it must enter into enforceable oil and gas leases. It could not survive if it maliciously or recklessly entered into void leases with those landowners, and there is no hint of evidence—even from Claugus—that it has ever done so. One would have expected Claugus to have filed its own slander-of-title action in a separate proceeding if it genuinely believed it was entitled to such damages, but Claugus has filed no such lawsuit.

Even Claugus acknowledges that the Form G&T (83) Oil and Gas Lease has been in use in Ohio since 1983. (Brief of Relator at 24.) No lawsuit has ever suggested that leases utilizing that form were defective in any way until the

plaintiffs in *Hupp* filed their original complaint in that case in September 2011. It is simply absurd to suggest that any member of the plaintiff class could successfully show that Beck acted maliciously or recklessly in recording a Form G&T(83) Oil and Gas Lease that had been in use for almost 30 years by the time the plaintiffs filed their complaint in *Hupp*; after all, even “a good faith dispute regarding the interpretation of a lease provision” does not establish slander of title under Ohio law. *See Wiley v. Triad Hunter LLC*, S.D. Ohio No.1 2:12-CV-00605, 2013 WL 4041772, *5 (Aug. 8, 2013). Thus, even if Claugus’s reading of *Wal-Mart* were correct, there was no need for the trial court in this case to certify under Rule 23(B)(3), rather than Rule 23(B)(2). A Rule 23(B)(2) class does not manifestly become a Rule 23(B)(3) class merely because someone can articulate an inapposite, factually ludicrous theoretical claim.

ii. *Wal-Mart* Does Not Impose the Certification Criteria of Rule 23(B)(3) Merely Because a Class Member Can Articulate a Theoretical Monetary Claim.

Even if the class members in *Hupp* had unasserted monetary claims, the *Wal-Mart* holding would not have defeated Rule 23(B)(2) certification. To the contrary, longstanding class-certification law establishes that absent class members’ individual monetary claims can actually survive even after final judgment under the analogous federal rule, Fed.R.Civ.P. 23(b)(2).

The Court in *Wal-Mart* began its analysis of whether plaintiffs' claim for back pay could be certified under Rule 23(b)(2) by noting that the key to a (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 declared unlawful only as to all of the class members or as to none of them.” *Wal-Mart*, 131 S.Ct. at 2557, quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009). It reasoned that Rule 23(b)(2) certification is not appropriate when all members of the class would not be entitled to the same injunction or to the same monetary award:

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

(Emphasis in original.) *Id.*

The Supreme Court rejected the plaintiffs' argument that certification of such claims is proper under Rule 23(b)(2) so long as the monetary claims do not predominate over claims for injunctive and declaratory relief. *Id.* at 2559-2560. In

rejecting the plaintiffs’ proposed predominance test, the Court sought (in dictum) to avoid the “perverse incentives for class representatives to place at risk valid claims for monetary relief” by omitting them from the action. *Id.* at 2559. The Court was concerned with preventing the “the possibility” that an individual class member, once found not to have been aggrieved by discrimination in the Rule 23(b)(2) class, “*might be* collaterally estopped from independently seeking compensatory damages based on that same denial.” (Emphasis added.) *Id.*

Claugus seeks to morph this equivocal dictum into black-letter law that would unravel Rule 23(B)(2) class actions altogether whenever a clever lawyer can conjure up a putative claim for monetary relief. (See Brief of Relator at 23.) But the Court in *Wal-Mart* established no such rule. Instead, the Court reached its holding in a case in which the class members were clearly entitled to monetary damages if the request for equitable relief had merit. It did not hold that a Rule 23(b)(2) class is improper any time a disgruntled class member (or a defendant) can articulate a theoretical basis for requesting money damages.

In fact, the Court has recognized that individualized claims for monetary relief remain viable even after a Rule 23(b)(2) class proceeds to judgment. See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). In *Cooper*, the Court clarified that a final judgment determining that a class-action defendant had not engaged in a “pattern or practice

of discrimination” was not “dispositive of the individual claims” brought by absent class members. *Id.* *Cooper* reached that conclusion even in a case in which the district court had provided notice to all absent class members. *Id.* at 870. *Cooper* thus demonstrates that the usual rules of merger and issue preclusion do not apply to Rule 23(b)(2) class actions in the same way they apply to successive individual actions brought by the same party. The *Cooper* rule, then, is likely the explanation for the tentative wording of the Court’s dictum in *Wal-Mart*.

Thus, the dictum in *Wal-Mart* must be viewed as what it is—a partial explanation of the Court’s rejection of the plaintiffs’ predominance argument in that specific case, in which each individual class member had interests that were not subject to aggregate adjudication. Indeed, before even addressing the predominance issue, the Court had concluded that the named plaintiffs had offered “no convincing proof of a companywide discriminatory pay and promotion policy” and thus no “common question.” *Wal-Mart* at 2556-2557. The Court’s language must be read in light of the diversity of interests it had already found among the *Wal-Mart* class members. The dictum on which Claugus relies was not a general pronouncement regarding the preclusive effect of class actions on unasserted monetary claims, and it certainly did not establish a blanket rule that a preclusive effect would counsel against certification under Rule 23(b)(2). Whether and in

what circumstances failure to include individual claims in a class action precludes class members from later pursuing those claims remains an open question.

In short, even if members of the class in *Hupp* had individual monetary claims, it is not at all clear that allowing their joint claim for declaratory relief to proceed under Rule 23(B)(2) without inclusion of those monetary claims would have any effect on their ability to later pursue those claims in individual actions. Thus, Claugus's argument that class certification under Rule 23(B)(2) is inappropriate when the named plaintiffs have not asserted monetary claims is without merit.

The true relevance of *Wal-Mart* to this original action is in the Supreme Court's recognition in that case that certification is appropriate under Rule 23(b)(2) "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 131 S.Ct. at 2557. Each member of the class certified in *Hupp* was the lessor on an oil and gas lease with Beck that utilized the G&T (83) form. The named plaintiffs claimed that those leases were void and forfeited based on language included in the preprinted language found on that form. The declaratory judgment they sought was the same for every member of their class and, in fact, the declaratory judgment issued by the trial court, once the trial court certified the class and thereby extended its declaratory judgment to the entire class, was the same for each member. Class certification under Civ.R.

23(B)(2) was appropriate in *Hupp* because the single declaratory judgment sought and received in that case provided the same relief to every member of the class.

b. The Class Is “Cohesive.”

Claugus has also argued that certification under Rule 23(B)(2) was not appropriate because the class is not “cohesive.” It raises two arguments in this regard.

First, Claugus argues that membership in the class keeps decreasing as the primary terms of more and more of the leases expire without Beck’s or XTO’s having drilled a well. According to Claugus, “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.” (Brief of Relator at 24.) But this argument is circular. It assumes the invalidity of the tolling order, which is the very order Claugus challenges through its petition to this Court. The tolling order maintains the status quo, ensuring that all lessors who were members of the class on October 1, 2012, will remain members of the class until the issues in *Hupp* are finally resolved.

Second, Claugus argues that the class is not cohesive because, for class members like Claugus, “there was simply no need to bring a lawsuit to have the Form G&T (83) Lease declared void *ab initio*.” (*Id.* at 25.) It contrasts the

interests of the class members early in the primary term of their leases with class members, like Claugus, later in the primary term:

The Beck Energy Lease on the Claugus Family's property was already nearing the end of its 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.

(Brief of Relator at 25.) But this argument fails to recognize one of the very problems that necessitates a tolling order in a case like this. Beck and XTO have been unable to exercise their rights with respect to Claugus's property *precisely because of* the *Hupp* litigation and Claugus's inclusion in the certified class. If Beck and XTO had been able to exercise their rights as of October 1, 2012, they would have had 16 months to do so before the primary term of the Claugus lease expired. That would have been a sufficient amount of time for Beck or XTO to drill a well and move that lease from the primary term to the secondary term. So Claugus wants to exploit the existence of the very same litigation that it claims it wants nothing to do with. It cannot have it both ways.

When XTO purchased from Beck the deep rights for certain oil and gas leases, it obviously did not do so with the intention of simply watching the leases expire. The existence of the *Hupp* litigation, however, has prevented it from drilling wells under those leases. The fact that the primary terms in the class members' leases began to run, and will therefore end, on different days in no way defeats the cohesiveness of the class.

The named plaintiffs in *Hupp*, on behalf of themselves and the class they represent, sought a single declaratory judgment that would have benefited every member of the class in the same way. As implicitly recognized by Claugus, the declaratory judgment sought by the class representatives would have released all members of the class from their leases with Beck, allowing them “to obtain a large signing bonus and increase the landowner royalty they would be receiving.” (Brief of Relator at 25.) In fact, that is the very relief Claugus is seeking for itself through this original action. All of the class members had the same substantive interest in voiding the leases if plaintiffs' legal theory had succeeded, even if some of them would have been able to avoid more of their lease obligations than others. The class certified by the trial court in *Hupp* has the cohesiveness necessary for a Rule 23(B)(2) class action, and *Hupp* was properly maintained as a Rule 23(B)(2) class action.

As noted by Claugus, Beck argued on appeal to the Seventh District that the class in *Hupp* was not properly certified because the trial court decided the merits of the named plaintiffs' claims before it certified the class. (Brief of Relator at 26.) As also noted by Claugus, however, the appellate court rejected Beck's argument, determining that, "[w]hile 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." *Hupp*, 2014-Ohio-4255, at ¶ 59. Claugus has not suggested that it disagrees with the Seventh District's holding regarding the timing of the trial court's class-certification decision. The timing of the trial court's class-certification decision, therefore, is irrelevant to this original action.

B. The Absent Members of the Class in *Hupp*, Including Claugus, Have Been Afforded Due Process by Being Adequately Represented in a Properly Certified Rule 23(B)(2) Class Action.

Claugus has argued that, even if the class in *Hupp* was properly certified under Rule 23(B)(2), due process required that members of the class be given notice and a right to opt out before the Seventh District could order the leases tolled. Although it is a general principle that a party cannot be affected by a lawsuit in which it has not been made a party though service of process, there are exceptions to that general principle. In a properly certified Rule 23(B)(2) class action, in which an absent class member has been adequately represented, that

adequate representation serves as a substitute for notice and an opportunity to be heard, thereby providing the absent class member due process.

The question of whether an absent class member has been afforded due process in a class action usually arises when the class member attempts to collaterally attack the final judgment entered in the class action. As has been recognized by the United States Supreme Court, “[i]n a class action, * * *, a person not named as a party may be bound by a judgment on the merits of that action, if she was adequately represented by a party who actively participated in the litigation.” *Taylor*, 553 U.S. at 884, 128 S.Ct. 2161, 171 L.Ed.2d 155. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * * .”). “The role of class representatives and class counsel is to provide a meaningful substitute for an individual opportunity to be heard, an opportunity that is ordinarily the ‘fundamental requisite of due process of law.’” Woolley, Shutts and the Adequate Representation Requirement, 74 UMKC L. Rev. 765, 766 (2006).

Claugus has not suggested that the named plaintiffs in *Hupp* have not adequately represented it. Indeed, Claugus desires the very thing sought by the named plaintiffs in *Hupp* on behalf of all the members of the class: to be free of

the leases into which they or their predecessors in interest freely entered with Beck so they can enter into new leases on more attractive terms with other lessees.

Claugus has suggested that, “[p]erhaps the easiest way to understand the issue” of whether notice to individual class members was required “is by considering whether notice and the right to opt out would have ‘served a purpose’ in the context of the Tolling Order.” (Brief of Relator at 18.) According to Claugus, notice to the class members was necessary so those class members do not “unwittingly” breach their leases with Beck by entering into new leases and thereby creating chaos. (*Id.* at 18-19.) To the extent that is a legitimate concern, it certainly no longer applies to Claugus, and Claugus is the only relator in this original action. Claugus knows about the tolling order and, therefore, cannot unwittingly enter into a lease with a new lessee thereby creating chaos. Further, as testified to by Raymond T. Beck in his affidavit, on October 17, 2013, the Monroe Beacon, a local newspaper of general circulation in Monroe County, published notice of the tolling order, thereby providing some notice to the members of the class of the tolling order’s existence. (Affidavit of Raymond T. Beck, Intervening Respondent Beck Energy Corporation’s Evidence, Exhibit A, ¶ 31.)

Unable to articulate a practical purpose for notice that would make a difference to the outcome, Claugus cites a number of cases that purport to require notice to absent class members in the context of Rule 23(b)(2) certification. But in

most of these cases, there was an important reason for the required notice that is not present here: the plaintiffs had asserted “a claim for money damages or similar relief at law” that normally triggers the notice requirement of Fed.R.Civ.P. 23(b)(3).⁴ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985); see also *Hecht v. United Collection Bur. Inc.*, 691 F.3d 218, 225 (2d Cir.2012) (“[C]ertification of a class under (b)(2) does not excuse the due process requirement” of notice for “unnamed class members *in a class action predominantly for money damages*”) (emphasis added); *Pate v. United States*, 328 F.Supp.2d 62, 73 (D.D.C.2004) (suggesting that notice to absent Rule 23(b)(2) class members was appropriate “so that individual members could have had the opportunity *to add common law negligence claims* to the suit or to opt-out of the class to pursue their *claims for monetary relief* in a separate action”) (emphasis added). Because there was no specter of a damage claim in *Hupp*, there was no corresponding need for Rule 23(B)(3)-type notice. And in *Planned Parenthood Assn. of Cincinnati Inc. v. Project Jericho*, 1st Dist. Hamilton No. C-860550, 1989 WL 9312, at *6 (Feb. 8, 1989), affirmed in part, reversed in part, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990), the court held that class certification was not proper without notice because the class constituted “such an amorphous group

⁴In fact, the classes in Claugus’s cited cases would likely not have been certified now under Rule 23(b)(2) because, under *Wal-Mart*, the individual damage claims would have defeated that form of class certification. But there are no individual damage claims, real or theoretical, at issue here.

that individuals are not readily identifiable.” *Id.* at *6. But, as explained above, the entire class in *Hupp* is a cohesive group of landowners whose leases with Beck were all governed by the same challenged provisions.

In truth, Claugus wants to be able to opt out of the tolling order. Providing notice to individual class members would serve no purpose unless those class members had also been provided an opportunity to opt out of the class, freeing themselves from the tolling order. But one of the cases on which Claugus relies heavily, *Oneida Indian Nation of Wisconsin v. State of N.Y.*, 85 F.R.D. 701 (N.D.N.Y.1980), involved a defendant class that the court deliberately chose to certify under Fed.R.Civ.P. 23(b)(1)(B), rather than Fed.R.Civ.P. 23(b)(3), “to avoid the possibility of defendant class members opting out of the class.” *Id.* at 706. Thus, to the extent Claugus claims that the tolling order burdened its landholding interest in a fashion similar to the defendant class in *Oneida*, it must also recognize that the defendants in *Oneida* did not have an opt-out option—and neither should Claugus.

Indeed, if class members had been given that right, there would be an actual—and far more egregious—denial of due process to Beck and XTO. Each class member would have been able to take advantage of the fact that the mere existence of the *Hupp* litigation precluded Beck and XTO from drilling a well to move their lease from the primary term to the secondary term. At the same time,

each class member could have opted out of the class, freeing themselves from the tolling order, and leased their property to a different lessee. Providing class members an opportunity to opt out of tolling would, in effect, afford them *the full relief sought* in *Hupp* regardless of the result on the merits. Such an outcome would be particularly unjust in view of the fact that the Seventh District Court of Appeals has now determined that the leases at issue in *Hupp* are neither void nor forfeited.

C. Courts, Including this Court, Have Recognized the Need to Toll Oil and Gas Leases When Litigation Interferes with Them.

Tolling of oil and gas leases grows out of a recognition that it would be manifestly unfair to permit a lessor to obstruct a lessee's performance under a lease and then take advantage of the lack of performance. *See generally Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E2d 338 (1955), paragraph one of the syllabus. The Supreme Court of Arkansas recently noted that a lawsuit creates an "impossible dilemma" that demands tolling in order to avoid depriving the lessee of the benefit of its bargain merely by virtue of legal action. *See Sw. Energy Prod. Co. v. Elkins*, 2010 Ark. 481, 374 S.W.3d 678, 685 (2010).

Tolling orders spring from the hornbook-law principle that the party responsible for obstructing the lessee's access to the property should not be permitted to exploit that obstruction to run out the lease:

Under the doctrine of obstruction, the lessor cannot take advantage of a failure on the part of the lessee to drill or pay delay rentals in compliance with the provisions of the drilling clause, if such lessor has prevented performance by the lessee.

Kuntz, Law of Oil and Gas, Section 36.4 (2014).

In *Hanna*, the issue was whether an oil and gas lease had expired. The lease had a primary term of five years and a secondary term of so much longer thereafter as “oil, gas or their constituents were produced in paying quantities from the land.” *Hanna* at 48. This Court determined that the lessee would have had to prove one of three things in order to show that the lease had been extended beyond five years: (1) that there was an express agreement between the lessor and lessee extending the term; (2) that production of oil, gas, or their constituents in payable quantities had occurred during and beyond the initial five-year term; or (3) “*that [oil, gas, or their constituents] could have been produced if the acts of the lessor had not prevented or interfered with such production.*” (Emphasis added.) *Id.* at paragraph one of the syllabus. Because this Court determined that the lessee had failed to prove any of the circumstances that would have extended the lease, it reversed the appellate court’s holding that it had been extended beyond five years. This Court’s syllabus, however, stands as a recognition that a lessor’s obstruction of a lessee’s

rights under an oil and gas lease can extend the primary term of that lease so long as the obstruction continues.

At least one court, applying Ohio law, has found that a tolling order was appropriate under *Hanna*. See *Chesapeake Exploration L.L.C. v. McClain*, S.D. Ohio No. 2:13-cv-0445, 2013 U.S. Dist. LEXIS 184700, at *11 (July 30, 2013). In that case, the lessee under an oil and gas lease sought a declaratory judgment that the lessor had breached that lease by withholding consent to the location of an access road required to develop the leasehold. It also sought an order tolling the lease while the declaratory judgment was pending. The court, acknowledging that both parties before it accepted that this Court's decision in *Hanna* was controlling, granted the requested tolling order. *Id.* It entered an order tolling the lease, beginning on the date on which the lessee had filed its complaint for declaratory judgment and continuing "to the date of the Court's final judgment in this action." *Id.* at *12.

Tolling orders are well accepted in other states with large drilling industries. In *Kothman v. Boley*, 158 Tex. 56, 308 S.W.2d 1 (1957), for example, the Texas Supreme Court held that oil and gas leases were tolled by the lessor's simply having sent the lessee a letter asserting that the leases were terminated. The court determined that, at the time of that letter, eight months remained of their primary

terms. It held that the leases would remain in effect for eight months following the date of its judgment:

Lessors who thus wrongfully repudiate the lessees' title by unqualified notice that the leases are forfeited or have terminated cannot complain if the latter suspend operations under the contract pending a determination of the controversy and will not be allowed to profit by their wrong.

Id. at 60.

Of course, one of the ways in which a lessor can obstruct a lessee's performance under an oil and gas lease is by filing a lawsuit attacking the validity of the lease:

The obstruction by the lessor may take one of many forms. It may consist of physical interference with operations, or it may consist of an attack upon the lessee's title.

Kuntz, Section 26.14 (2014). And when a lessor has filed such a lawsuit, it is unreasonable to expect the lessee to drill a well:

During the existence of such an obstruction, it would be unreasonable to expect the lessee to make expenditures on a lease when to do so involves substantial risk of loss without a compensating prospect of gain. If the attack upon his title is successful, and if his expenditure

results in a dry hole, he faces the possibility of liability for substantial damages for loss of speculative value. Further, if the expenditure should result in production, he will be required to account to the successful litigant for the oil and gas which he produced, and he may also be deprived of the right to recover his costs.

Id.

Case law supports the use of tolling orders to address litigation obstruction. In *Sw. Energy*, the Arkansas Supreme Court held that, when the lessors under an oil and gas lease sued the lessee, seeking a determination that the lease had terminated, the lessee was entitled to an order tolling its obligations under the lease, beginning on the day the lessors had filed their complaint and continuing until such time as all appeals were completed or the time for appeal had expired:

Not to toll Southwestern Energy's obligation to drill as of [the date the lawsuit was filed] would create an impossible dilemma for Southwestern Energy: either use the contested lands and potentially expose itself to more liability or refrain from using the lands and lose its investment * * * .

Sw. Energy, 2010 Ark. 481, 374 S.W.3d at 685. In reaching its decision, the court in *Sw. Energy* relied upon its own earlier decision in *Winn v. Collins*, 207 Ark. 946, 183 S.W.2d 593 (1944), a case in which the lessors under a lease for the

mining of bauxite sought cancellation of the lease. The court determined in that case that, not only had the lessors not been entitled to cancellation at the time they filed suit, but also that they could not take advantage of the lessee's failure to perform under the lease during the time the case was pending: "[T]he appellants could not claim a forfeiture that occurred after the filing of this suit to cancel the lease, because the period of time that the suit was pending would not count against the appellees." *Id.* at 953. While it acknowledged that rules applicable to oil and gas cases often do not apply to cases involving solid minerals, it held that a statement found in an oil and gas treatise was applicable to the case before it:

By unjustifiably bringing suit to cancel a lease, a lessor may postpone the development of the leased premises and put himself in a position to debar his right to insist upon a forfeiture for nondevelopment of the premises within the time fixed by the lease. Even conduct denying the validity of the lease and expressing an intention to terminate it may be such as will debar [the lessor's] right to have it forfeited for failure to develop such premises on time. Such conduct will usually postpone the development so long as it is indulged. The lessee is not bound to expend money, so long as such a threat overhangs the validity of the lease, in developing it.

Id., quoting 2 Thornton's Oil and Gas Section 276, (5th Ed.).

In this case, as representatives of the class, the named plaintiffs sued Beck claiming that the oil and gas leases of every member of the class were void ab initio and terminated. The existence of that lawsuit made it impossible for Beck, or XTO as its assignee, to drill wells utilizing the property covered by those leases. Accordingly, the Seventh District Court of Appeals, after weighing the equities, entered an order tolling those leases until such time as the issues raised by the class representatives can be finally resolved. That order ensures that all parties receive due process; the members of the class by being adequately represented by the named plaintiffs, and Beck and XTO by their rights under the challenged leases not being allowed to expire through the passage of time while it has been impossible for them to exercise those rights. To the extent Beck or XTO does not develop a class member's property during the primary term as extended by the tolling order, that class member will be free to enter into a new oil and gas lease on whatever terms lessees are then offering.

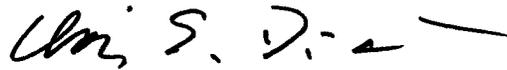
V. CONCLUSION

By asserting that the oil and gas leases freely entered into by the members of the class in *Hupp* were void and forfeited, the named plaintiffs, acting on behalf of the entire class, including Claugus, made it impossible for Beck and XTO to exercise their rights under those leases. Accordingly, the Seventh District Court of Appeals, after weighing the equities, entered a tolling order, maintaining the status

quo until the issues raised on behalf of the class can be resolved. Inasmuch as the trial court properly certified *Hupp* as a Civ.R. 23(B)(2) class action and the named plaintiffs have adequately represented the members of the class, including Claugus, due process did not require that those members receive notice of the tolling order before it was entered.

If this Court should determine that Claugus is entitled to relief, that relief should be limited to Claugus only, the only relator in this original action. Further, any relief granted Claugus should be limited to a determination that the tolling order is suspended as to it until such time as it is afforded an opportunity to provide whatever arguments it may have on the merits of why that order should not apply to it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Copies of the foregoing were served upon the following by regular first class

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