

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE AMERICAN ENERGY – UTICA, LLC
IN SUPPORT OF RESPONDENT BECK ENERGY CORPORATION**

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STATEMENT OF INTEREST OF AMICUS CURIAE

American Energy – Utica, LLC (herein “AEU”), by and through its undersigned counsel, respectfully files this Brief of Amicus Curiae in Support of Respondent Beck Energy Corporation. AEU is a foreign limited liability company, with its principal place of business in Oklahoma City, Oklahoma. AEU, among several other similar oil and gas exploration and production companies, is heavily involved in the development of the Utica shale formation underlying several counties in Ohio, including the counties covered by the Seventh Appellate District. Ancillary to AEU’s production of oil and gas are several other supporting industries, including drillers, operators, contractors, midstream companies, and professional services, such as accounting, actuarial, and legal. AEU’s involvement in the development of the Utica began with an initial investment of millions of dollars in its acquisition of nearly 80,000 leasehold acres, including assignments of hundreds of existing oil and gas leases, and AEU continues to invest substantial sums of money in Ohio as it acquires and develops additional thousands of leasehold acres.

Certain of the oil and gas leases that AEU has acquired include habendum clauses and/or primary terms with language similar to that in dispute. Moreover, AEU believes that where the validity of a lease is challenged by the lessor, a tolling order is necessary to preserve the status quo and to avoid expiration of the lease during the pendency of the litigation. To the extent that a class action is pending, a tolling order preserving the status quo is necessary as to all class members.

ARGUMENT

Relator, the Claugus Family Farm, L.P. (the “Clausus Family”), sets forth three Propositions of Law in its brief. Each of those Propositions of Law presents the same basic

argument, however: whether its constitutional right to due process was violated by the order of the Seventh Appellate District Court of Appeals (the “Seventh District”) tolling the leases of all class members in the case of *Hupp v. Beck Energy Corporation* (the “Hupp Case”). For the reasons set forth below, the Seventh District’s order tolling those leases (the “Tolling Order”) is not assailable as set forth by the Claugus Family in their Complaint in Prohibition and Mandamus or as argued in their Brief of Relator Claugus Family Farm, L.P. on the Merits (the “Claugus Family Brief”).

I. Proposition of Law No. 1: Where a class is certified pursuant to Ohio Civil Rule 23(B)(2), due process does not require that class members receive notice of the action or an opportunity to opt out.

In the Hupp Case, the trial court certified the class pursuant to Ohio Civil Rule 23(B)(2), which provides that a class action is maintainable, if the prerequisites of subdivision (A) are satisfied, and “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.” Civ. R. 23(B)(2). Unlike a class action certified under Ohio Civil Rule 23(B)(3), notice and opt-out provisions are not mandatory under subsection 23(B)(2). “No rule requirement of individual notice exists as to other class certifications [than subsection 23(B)(3)] because of the probability under that rule criteria as to such classes that the interests of the absent members will be fairly and adequately represented. Ordinarily, therefore, due process does not require individual notice to absent class members in classes certified under subdivisions other than Civ. R. 23(B)(3).” *Clifton Care Center, Inc. v. McKenna*, 10th Dist. Franklin No. 80AP-149, 1980 Ohio App. LEXIS 13458, *9-10 (Dec. 4, 1980) (holding that no constitutional violation occurred where notice of a hearing was sent but

not received by a class member, because no notice was required) (citations omitted). *See also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011).

Nonetheless, the Claugus Family argues that “the courts have generally determined that, where a Rule 23(B)(2) suit seeks something beyond equitable relief against the defendant, notice and an opportunity to opt out are necessary to satisfy due process and to preserve the constitutionality of the proceedings.” Claugus Family Brief at 16-17. In cases cited by the Claugus Family in its Brief, the plaintiffs sought monetary damages primarily, in addition to injunctive relief, with the result that either certification under Rule 23(B)(3) was required or the damage claims were not precluded by the class action. In the Hupp Case, the plaintiffs do not seek any monetary damages. The suggestion by the Claugus Family that they and other class members may have potential slander of title claims (if the leases are held to be void *ab initio*) that were purposely not brought by the named plaintiffs so that they could obtain a “quick and easy” class certification (Clausus Family Brief at 23) is not supported by the record. The Claugus Family does not explain why the named plaintiffs would forego claims for monetary damages merely to obtain a “quick and easy” class certification, nor does the record supply an explanation as to what motive would be behind choosing a “quick and easy” class certification over claims for monetary damages, if any such claims existed.¹ Declaratory or injunctive relief was not only the primary relief sought in the Hupp Case, but is the only relief sought.

¹ Moreover, Ohio case law indicates that certification can be granted under both subsection (B)(2) and subsection (B)(3) where the requirements of both subsections are satisfied. *See, e.g., Maas v. Penn Cent. Corp.*, 11th Dist. Trumbull No. 2006-T-0067, 2007-Ohio-2055. “The fact that money damages are also sought in addition to injunctive relief does not defeat certification under Civ.R. 23(B)(2).” *Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 67, 86-87, 694 N.E.2d 442 (1998). As explained by this Honorable Court in *Hamilton*:

Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be

Further, the Tolling Order is not a substantive remedy entered in this case. To the contrary, the Tolling Order is a mechanism designed to preserve the status quo pending litigation. As discussed below in the context of Propositions of Law Nos. 2 and 3, orders tolling the term of oil and gas leases pending the outcome of litigation challenging the validity of those leases is a recognized means of preserving the status quo. Otherwise, the term of a lease could well expire during the pendency of trial court and appellate court proceedings, thus rendering the litigation moot and depriving the lessee of the benefit of his contract with the lessor. The foundation for the Claugus Family's position in this action appears to be that substantive relief has been entered against it; however, the Tolling Order merely preserves the status quo pending the outcome of the Hupp Case so that the passage of time in and of itself does not decide the outcome of the case and so that the parties receive the benefit of their bargain.

II. Proposition of Law Nos. 2 and 3: The issuance of a writ of prohibition is not appropriate to bar enforcement of a court order that is not constitutionally defective. The challenged order is not arbitrary, unreasonable or unlawful; accordingly, mandamus is not warranted.

In its second and third arguments, Claugus contends that a writ of prohibition is an appropriate remedy to bar enforcement of a court order which is unconstitutional as applied to unnamed class members and that mandamus is an appropriate remedy to require a court to vacate

avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23(b)(1) or Rule 23(b)(3) and may be heard on a class basis under one of those subdivisions. Even when this is not the case, the action should not be dismissed. The court has the power under subdivision (c)(4)(A), which permits an action to be brought under Rule 23 'with respect to particular issues,' to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damage issues to be tried separately.

Id. at 87-88 (citing Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2d Ed. 1986) 470, Section 1775).

an arbitrary, unreasonable and unlawful order. However, Claugus merely reiterates its prior arguments regarding lack of notice of the class action and the tolling order and lack of an opportunity to opt out. Claugus does not otherwise argue that the tolling order is, in substance, arbitrary, unreasonable or unlawful. Claugus has sought the opportunity to challenge the tolling order but does not challenge the terms of the tolling order, only its applicability to unnamed class members.

Moreover, any argument that the tolling order was improperly issued would be futile. Numerous courts have upheld tolling orders to protect the parties' rights during the pendency of litigation. For example, in *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), the Tenth Circuit Court of Appeals affirmed the trial court's decision to toll oil and gas leases from the date each lessee was served with process, despite that each lease was limited to a ten-year primary term by statute. Significantly, the Court held that "[t]he purpose of tolling is not to punish the lessor for asserting his claim but to restore the parties to the position they occupied originally." *Id.* at 1341. Thus, the Claugus Family is not being "punished" for being an unnamed member of the class. To the contrary, the status quo of the leases is being preserved during the pendency of litigation challenging the validity of those leases.

In *Yoskey v. Eric Petroleum Corp.*, 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790, the Seventh District Court of Appeals discussed the validity of the trial court's decision to toll a lease from the date the plaintiff filed suit until the conclusion of any appeal. Although the Court eventually held that the parties' substantive arguments on the tolling issue were moot due to its ruling on an attendant issue, the Seventh District offered an interesting look into the policies behind tolling. Specifically, the Court took note of the lessee's argument that "the roots of tolling in Ohio can be traced to an obstruction doctrine set forth in *Hanna v. Shorts*, 163 Ohio St.

44, 125 N.E.2d 338 (1955) (holding that a lessee can request that a lease be extended beyond the end of its term if the acts of the lessor prevented or interfered with production).” *Id.* at ¶ 49.

After re-stating many of the rules established in *Jicarilla*, the Seventh District eventually overruled the trial court’s grant of summary judgment in favor of the defendants and remanded the case, thereby rendering the trial court’s tolling order moot. *Id.* at ¶ 51. However, the Seventh District did note that the trial court specifically stated that its decision to toll the leases was an attempt to “balance the equities” in accordance with established tolling rules because “each day the lawsuit pends decreases the period of time the Lessee has paid and bargained for in which to choose to drill.” *Id.* at ¶¶ 44, 51 (citation omitted).

The Court in *Yoskey* cited the decision of the Court of Common Pleas of Monroe County in *Three Waters, LLC v. Northwood Energy Corp.*, Monroe C.P. No. 2012-042 (June 12, 2012). In that case, the Court tolled the term of the lease from the date of service of the plaintiff’s complaint until final disposition of the case, explaining:

Plaintiff’s filing of this lawsuit has a direct impact on Defendant’s ability to exercise its rights under these Leases during the initial five-year term. Under the initial terms of the Leases, Defendant is granted a specified time period in which to drill on the property – a length of time that the Lessee pays and bargains for as part of the Lease Agreement. Therefore, each day that this action pends decreases the period of time that Lessee has paid and bargained for in which to choose to drill.

Id. at ¶ 18.

The Court in *HNG Fossil Fuels Co. v. Roach*, 103 N.M. 793, 715 P.2d 66 (1986), also held that it must “balance the equities in light of all pertinent facts and circumstances” in determining whether tolling a lease was warranted. *Id.* at 796. The Court concluded that, because the delay in resolving the legal issues was the fault of neither party, common sense required the equitable tolling of the term of the leases. *Id.* at 796-797.

These opinions demonstrate that a tolling order is appropriate at any time during the pendency of the action as a method of ensuring that the equities of both parties remain balanced. In fact, where litigation is filed challenging the validity of an operator's leases, the lack of a tolling order would create a windfall for lessors. Given the uncertainty caused by pending litigation, an operator would not be in a position to develop the leaseholds by drilling wells on the land covered by the challenged leases. If an operator did drill its wells and the lessors were to prevail, the investment in those wells would be lost. However, absent a tolling order, the primary terms of the leases would continue to run, and, in many cases, expire, during the pendency of the litigation. In that situation, regardless of whether the lessors prevail in the litigation, each lessor nonetheless "wins" because the term of his lease has expired and he can re-lease his land to a new operator, obtaining a new bonus and perhaps a higher royalty. Conversely, the operator, who may have prevailed in the litigation, loses the benefit of leases recognized as valid by a court.

These cases also illustrate the invalidity of the Claugus Family's complaint that the Seventh District should not have modified the Tolling Order to make it effective as of the date that Beck Energy Corporation ("Beck Energy") filed its motion to toll the leases as to the named plaintiffs. The Seventh District would have been justified in tolling the leases as to the date that the plaintiffs filed their complaint. Thus, the Seventh District did not err in making the Tolling Order effective as of the date that Beck Energy initially filed its motion seeking a tolling order.

The Claugus Family makes much of the proposition that the Tolling Order would not be found in a title search of the unnamed class member's property and that a Beck Energy lessor could unknowingly breach a warranty of title by entering into a new lease. However, the Beck Energy lease would be found in such a title search, and it is unlikely that an operator conducting

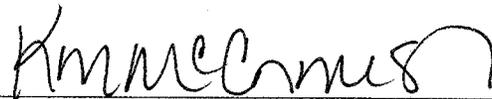
oil and gas operations in Ohio would be unaware of litigation affecting hundreds of leases that very well may contain terms that are identical or similar to terms included in that operator's leases. The presence of a Beck Energy lease in a proposed lessor's chain of title would alert another operator seeking to lease the same land that the lease could be impacted by the Hupp Case, and such operator would likely discuss that impact with the proposed lessor. Those who engage in a particular industry are generally cognizant of significant litigation affecting that industry.

The Claugus Family asserts that they have suffered a significant financial loss as a result of the Tolling Order – the bonus payment from a new lease as well as additional royalty above that provided in its lease with Beck Energy. The Tolling Order has not caused such alleged losses, however. To the contrary, the Claugus Family is bound by the terms of the lease with Beck Energy, which precludes it from entering into a new lease with another operator. An underlying assumption of the Claugus Family's arguments in this case is that if it were notified of the Hupp Case and the Tolling Order, it would have opted out of the Hupp Case, its lease with Beck Energy would have expired and it would have been free to execute a new lease with a different operator. However, that assumption ignores another possible outcome – namely, that Beck Energy or its successor in interest would have commenced operations under the Beck Energy lease before expiration of the primary term. A critical reading of the Claugus Family Brief suggests that its dissatisfaction is based more on the fact that the Beck Energy lease, as long as it is in effect, precludes the Claugus Family from re-leasing its land and receiving a bonus payment and a higher royalty. *See* Claugus Family Brief at 12, 13, 14 and 32. The assertion that a landowner can obtain more favorable lease terms in 2014 than it could in 2004 is not a basis to disregard older, yet still effective, leases.

CONCLUSION

Contrary to the arguments set forth by the Claugus Family, its due process rights have not been violated by entry of the Tolling Order. The Claugus Family was not entitled to prior notice and an opportunity to opt out of the class where the class was certified under Rule 23(B)(2). A tolling order is a recognized mechanism to preserve the status quo where, as here, lessors challenge the validity of their leases and seek to hold them void *ab initio*. Otherwise, Beck Energy would suffer fundamental unfairness in losing the benefit of the bargain of such leases due to the passage of time while litigation challenging those leases was pending. The Tolling Order appropriately balances the equities of the parties until the substantive issues can be finally resolved.

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