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## INTRODUCTION

Ohio courts have broad discretion to manage their dockets, and class actions are no exception. Relator challenges a tolling order that was implemented by the Seventh District in the midst of a class action suit related to oil and gas leases. Tolling orders are an equitable remedy designed to preserve the status quo during the pendency of a legal action. These orders are particularly important in cases involving leases because the parties have ongoing legal obligations that could disrupt the deliberative judicial process. In this case, the Seventh District implemented such a tolling order to preserve the status quo while the fundamental validity of the challenged oil and gas leases were decided. This order fell squarely within the Seventh District's authority to fashion equitable relief.

The Seventh District's authority to issue the tolling order was not disrupted by the fact that the underlying case was a class action. Relator attempts to complicate this analysis by essentially challenging the certification of the class by the trial court. But Relator does not (and indeed could not) assert that the trial court did not have the authority to define and certify the class as it saw fit. Relator does not (and could not) argue that a (B)(2) class requires the court to provide notice and an opportunity to opt out to the putative class members. Even more, Relator cannot argue that it was incumbent upon the Seventh District, reviewing the certification of the class, to require notice and an opportunity to opt out for the absent class members.

Relator, in essence, takes issue with the fact that the tolling order applied to its lease with the defendant energy company in the class action. But when a (B)(2) class is appropriately certified, and an appropriate motion is made for equitable relief to preserve the status quo, there is no legal support for the proposition that the tolling order is invalid as applied to absent class members. Relator presents no authority otherwise. Thus, Relator is not entitled to the extraordinary relief of either a writ of prohibition or a writ of mandamus.

## STATEMENT OF FACTS

### A. The Underlying Action.

Underlying this lawsuit is an ongoing oil and gas lease dispute between several named plaintiffs, a plaintiff class of similarly situated Ohio lessors, and Beck Energy Company. On September 14, 2011, the initial suit was filed against Beck Energy in the Monroe County Court of Common Pleas, seeking declaratory and injunctive relief. Relator's Cmplt., ¶ 9; *see also* Stipulations, Ex. 1, *Hupp v. Beck Energy Company*, Case No. 2011-345. Relator is not a named party to that lawsuit. Relator's Cmplt., ¶ 42.

The complaint alleged that certain boilerplate lease forms, signed by plaintiffs and Beck Energy, were invalid as against public policy. Stipulations, Ex. 3, ¶ 20. The leases in question were identical "Form G&T (83)" leases, pre-printed oil and gas leases with blank lines to be completed for the parties' names, addresses, date of execution, description of the leasehold, and certain other lease terms. Stipulations, Ex. 5, at p. 3.

The named plaintiffs asserted: 1) that the leases contained terms and conditions contrary to public policy because they constituted leases in perpetuity; 2) that Beck Energy had failed to prepare to drill or to actually drill any wells on their property; and 3) that Beck Energy had breached a number of express and implied covenants. Stipulations, Ex. 3, ¶ 20. The plaintiffs asked the trial court to invalidate and declare the leases void, and to issue injunctive relief to quiet title in the encumbered real estate. Stipulations, Ex. 3, ¶ 21. No monetary damages were sought. Stipulations, Ex. 3, Prayer for Relief.

On July 12, 2012, the trial court granted summary judgment for the named plaintiffs, holding that the Form G&T (83) leases constituted unlawful leases in perpetuity. Stipulations, Ex. 5, at p. 29. The trial court therefore held these leases to be void as against public policy. *Id.*

**B. Class Certification.**

On July 19, 2012, after the trial court awarded plaintiffs summary judgment in their favor, the named plaintiffs filed a motion for class certification pursuant to Ohio Civil Rule 23(B)(2). Stipulations, Ex. 6. The motion alleged that all prerequisites for class action certification had been met, and requested a class of all landowners in Ohio who executed the form lease with Beck Energy and Beck Energy did not drill a well on the property. Stipulations, Ex. 6. Beck Energy opposed the motion for class certification. *See* Stipulations, Ex. 11.

On February 8, 2013, the trial court granted the motion for class certification, concluding that all prerequisites for class action certification under Ohio Civil Rule 23(A) and (B)(2) had been met. Stipulations, Ex. 14. The entry, however, did not specifically define the class. Beck Energy appealed the certification order to the Seventh District, Stipulations, Ex. 16, which remanded the case to the trial court to clarify the definition of the class. Stipulations, Ex. 17.

On June 10, 2013, the trial court issued a judgment defining the class as follows:

[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)", [sic] where Beck Energy Corporation has neither drilled nor prepared to drill a gas/oil well, nor included the property in a drilling unit, within the time period set forth in paragraph 3 of said Lease or thereafter.

Stipulations, Ex. 18. In other words, the trial court defined the class as all lessors in Ohio who signed form leases identical to the original named plaintiffs. The trial court further ordered that its entry granting summary judgment to the named plaintiffs would apply to all members of the certified plaintiff class. Stipulations, Ex. 18, at p. 4.

**C. Tolling of the Affected Leases.**

On July 16, 2013, Beck Energy moved to toll the leases of all the class members. Stipulations, Ex. 24. On August 2, 2013, the trial court issued a tolling order of the disputed

leases that Beck Energy signed with the named plaintiffs only, pending Beck Energy's appeal of one of the trial court's earlier orders. Stipulations, Ex. 27.

On September 26, 2013, in response to several motions filed in the Seventh District—an emergency motion for injunctive relief, an emergency motion to set aside *supersedeas* bond, and the plaintiffs' motion to dismiss an appeal—the Seventh District modified the trial court's August 2, 2013 tolling order. Relator's Complt., ¶ 6; Stipulations, Ex. 33. The Seventh District's September 26, 2013 tolling order ("Tolling Order") is the primary subject of this original action.

The Tolling Order specifically tolled the leases of the "proposed defined class members" and set the tolling start date at October 1, 2012, the date Beck Energy originally moved the common pleas court to toll the leases. Relator's Complt., ¶¶ 15, 25; Stipulations, Ex. 33. The Tolling Order remained in effect "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." Stipulations, Ex. 33. After the tolling period expired, "Beck Energy, and any such successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012." Stipulations, Ex. 33.

**D. The Present Action for Extraordinary Relief.**

On March 18, 2014, Relator filed the present action seeking writs of prohibition and mandamus. Specifically, Relator requested a writ of prohibition "permanently enjoining Respondents from enforcing [the Tolling Order], to the extent it applies to [Relator]." Relator's Complt. at Prayer. Relator also requested a writ of mandamus "directing Respondents to vacate the Tolling Order to the extent it applies to [Relator]." *Id.* On April 11, 2014, the Seventh

District filed a motion to dismiss this action. On September 3, 2014, this Court issued an alternative writ setting a briefing schedule and granting Beck Energy's motion to intervene.

**E. The Seventh District's Recent Decision Affirming the Class Certification.**

On September 26, 2014, the Seventh District issued its decision in the underlying case. *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255 (7th Dist.). The Seventh District affirmed the trial court's class certification under Ohio Civil Rule 23(B)(2), but reversed and remanded the trial court's grant of summary judgment for the named plaintiffs and plaintiff class. *Id.* at ¶ 6. The Seventh District noted that the Tolling Order remains in effect during the pendency of any appeals of its decision to this Court. *Id.* at ¶ 26.

The deadline for the parties to file an appeal of the decision in this Court is November 10, 2014. As of the filing of this brief, to the Seventh District's knowledge, no party has sought review of the September 26, 2014 decision with this Court. In the event an appeal is filed, the Tolling Order expires once this Court decides whether to accept jurisdiction.

**LAW AND ARGUMENT**

**Proposition of Law No. 1:**

*Relator is not entitled to the extraordinary remedy of either a writ of prohibition or mandamus to control the discretion of an appellate court in crafting an equitable remedy to preserve the parties' rights pending outcome of an appeal or in certifying a class.*

Class actions are a unique judicial procedure. Due process, of course, generally requires an individual who might have an interest affected by the outcome of litigation be before the court hearing that action. *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 456 (S.D. Fla. 1988). Class actions permit affected individuals to be "before the court" as a member of a class (instead of a named party), thereby according them due process. *Id.*; *see also Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 21. Courts must exercise their discretion in crafting the class to ensure that all affected individuals are included in

the class and are therefore afforded their due process rights. *Hastings-Murtagh*, 119 F.R.D. at 456.

This is precisely what happened here. The trial court, hearing plaintiffs' claims and their motion for class certification, brought all potentially affected individuals before the court as members of the plaintiff class. Stipulations, Exs. 14, 18. Relator was one such potentially affected individual. As of July 19, 2012, when the trial court invalidated the form leases as against public policy, Relator's identical lease was still in effect. Relator's Brief at 5 (noting Relator's lease would have expired February 3, 2014). Therefore, Relator was still an individual potentially affected by the outcome of the litigation.

As of June 10, 2013, when the trial court clarified the scope of the class, Relator's lease was also still in effect. On that date, Relator's lease was *invalidated* by the trial court—Relator's title was no longer encumbered by its lease with Beck Energy. Stipulations, Ex. 18, at p. 4. Of course, Beck Energy appealed the trial court's determination on the merits, and was ultimately successful. *See Hupp*, 2014-Ohio-4255. Pending that appeal, however, Beck Energy filed for equitable relief to preserve the status quo while the merits issues were in dispute. Stipulations, Ex. 24. The Seventh District issued the Tolling Order, preserving the status quo as to the entire plaintiff class. Stipulations, Ex. 33. Tolling only the named plaintiffs' leases while an entire class of identical leases was before the court certainly would not have provided complete equitable relief in this context. *See* Relator's Brief at 17 (arguing that the trial court's tolling order limited to the named plaintiffs was appropriate relief).

Neither a writ of prohibition nor mandamus is appropriate in this case. The core of Relator's arguments appears to be this: because the certification of the class was inappropriate, the Seventh District's Tolling Order should not apply to Relator. In pursuit of this theory,

Relator devotes much of its briefing to challenging the certification of the (B)(2) class in the underlying proceedings. This collateral attack on the determination of the trial court (not a party to this action) and, presumably, the Seventh District's affirmation of the class certification on appeal, is inappropriate in an original action. Neither mandamus nor prohibition lies to control judicial discretion. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 12 ("Mandamus will not lie to control judicial discretion, even if that discretion is abused."); *DuBose v. Ct. Com. Pl. of Trumbull Cty.*, 64 Ohio St.2d 169, 171, 413 N.E.2d 1205 (1980) (same for prohibition).

While this case involves a complicated interplay of procedure and multiple parties' rights, Relator fails to present any authority to support its requests for extraordinary relief, as outlined below. To the extent Relator argues that the class certification was improperly decided, that is an issue for an appeal (which may soon be before this Court). Similarly, to the extent Relator argues that the Seventh District improperly formulated the Tolling Order, again, this original action is inappropriate to control judicial discretion. Though not appropriate in this original action, the Seventh District also directly addresses Relator's arguments concerning the propriety of the (B)(2) class certification and Tolling Order, *infra*.

**A. Relator is not entitled to a writ of prohibition.**

As to prohibition, the Seventh District clearly had jurisdiction to both affirm the certification of the plaintiff class and to fashion an equitable remedy to preserve the status quo during the pendency of that litigation. Relator asserts that "[a] long line of cases holds that an action seeking a writ of prohibition is the proper vehicle to challenge the constitutionality of a lower court's order by non-parties affected by that order." Relator's Merit Brief, at 31. However, the single case Relator cites for that proposition is not so broad, and limits itself to challenges of orders which close court proceedings to the public. *See State ex rel. News Herald*

*v. Ottawa Cty. Ct. Com. Pl., Juv. Div.*, 77 Ohio St.3d 40, 671 N.E.2d 5 (1996) (relying primarily on First Amendment cases).

Prohibition is an extraordinary writ, and is not granted routinely or easily. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Ct. Com. Pl.*, 74 Ohio St.3d 536, 540, 660 N.E.2d 458 (1996). “The purpose of a writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998). To be entitled to the requested writ, Relator must establish that the Seventh District is about to exercise judicial or quasi-judicial power and that the exercise of that power is unauthorized by law. *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Ct. Com. Pl.*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 18.

Here, Relator requests a writ of prohibition “permanently enjoining Respondents from enforcing [the Tolling Order], to the extent it applies to [Relator].” Relator’s Compl., at Prayer. The Seventh District’s ability to decide an appeal of a class certification and fashion equitable relief is clearly within its jurisdiction. Relator was properly before the trial court and the Seventh District as a member of the (B)(2) class certified on June 10, 2013. In an effort to preserve the status quo during the pendency of that class action, the Seventh District issued the Tolling Order applicable to all of the class members. Relator presents no authority to indicate that the Seventh District exceeded its jurisdiction in 1) issuing the Tolling Order, or 2) extending the Tolling Order to all class members. Relator is therefore not entitled to the requested writ of prohibition.

**B. Relator is not entitled to a writ of mandamus.**

Similarly, Relator is not entitled to a writ of mandamus “directing Respondents to vacate the Tolling Order to the extent it applies to [Relator].” Relator’s Compl., at Prayer. Mandamus will only issue when the relator has both a clear legal right to the requested relief and the

respondent has a clear legal duty to perform the requested relief. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. Relator must prove these requirements by clear and convincing evidence. *State ex rel. Orange Twp. Bd. of Trs. v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14. Furthermore, “[m]andamus and prohibition are extraordinary remedies, to be issued with great caution and discretion and only when the way is clear.” *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 166 (1977).

Relator cites no legal authority indicating that it has a clear legal right (or that the Seventh District has a clear legal duty) to this relief. Issuing the Tolling Order in this case was well within the Seventh District’s discretion. *See infra* at 18-24. Affirming certification of the (B)(2) class was also well within the Seventh District’s discretion. *See infra* at 11-16. “Mandamus cannot be used to control judicial discretion.” *State ex rel. Avery v. Union Cty. Ct. Com. Pl.*, 125 Ohio St.3d 35, 2010-Ohio-1427, 925 N.E.2d 969, ¶ 1, quoting *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 12; R.C. 2731.03. Relator is therefore not entitled to the requested writ of mandamus.

**C. Relator has an adequate remedy at law, precluding relief in both prohibition and mandamus.**

Relator also had an adequate remedy at law, which precludes relief in mandamus and prohibition.<sup>1</sup> *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 21. Relator makes numerous arguments regarding the propriety of class certification in the underlying litigation. But Relator’s petition does not seek any direct relief from the trial court’s class certification order; instead, it seeks relief relating only to the Tolling Order. But

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<sup>1</sup> On April 11, 2014, the Seventh District filed a motion to dismiss this action, which has not yet been ruled upon. For all the reasons more fully set forth in that motion to dismiss, which is incorporated herein by reference, Respondents also contend that this action should be dismissed.

Relator devotes most of its briefing to challenging the certification of the (B)(2) class. Relator's arguments regarding class certification should have been raised before the Seventh District during the pendency of the subject appeal and Relator should not be permitted to circumvent the appellate process through the use of an extraordinary writ.

Relator could have raised its objections to certification in the underlying litigation. Relator plainly knew of the Tolling Order within a month of its issuance, but presented no objections to either the trial court or the Seventh District. Relator's Brief at 13. Instead, without explanation, Relator waited until March 18, 2014 to file this action seeking extraordinary relief. Courts will decertify a class where putative class members demonstrate that the class is not cohesive. For example, the First District reversed a trial court's decision to certify a class after absent members of the class appealed the certification order arguing, among other things, that their interests conflicted with class representatives. *In re Kroger Co. Shareholders Litig.*, 70 Ohio App.3d 52, 65, 590 N.E.2d 391 (1st Dist. 1990). Relator has offered no explanation for its failure to bring its objections regarding class certification or the Tolling Order before the Seventh District (or the trial court) when it was admittedly aware of them in plenty of time to do so. Relator complains that its rights got lost in the shuffle, Relator's Brief at 11, but its failure to bring these issues to courts' attention prevented any consideration of them. For this Relator has no one to blame but itself. Accordingly, Relator is not entitled to extraordinary relief in either mandamus or prohibition.

**Proposition of Law No. 2:**

*Certification of a (B)(2) class is appropriate where the class seeks only injunctive or declaratory relief.*

Relator's arguments that the (B)(2) class was not appropriately certified are substantively incorrect. As an initial matter, the propriety of the class certification is an appropriate issue for

appeal, but not a collateral attack via original action. The trial court's discretion to decide class certifications is broad. *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). An appellate court reviews that decision for abuse of discretion, and such a finding "should be made cautiously." *Id.* To the extent the Relator challenges the class certification via this action for a writ of prohibition or mandamus, that request is inappropriate. *State ex rel. Dreamer*, 115 Ohio St.3d at ¶ 12 (mandamus); *DuBose*, 64 Ohio St.2d at 171 (prohibition).

Relator's arguments also lack substantive merit. Ohio Civil Rule 23(B)(2) provides that a class may be certified 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." That is, "the relief sought must affect the entire class at once" such that a (B)(2) class may be certified "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Cullen*, 137 Ohio St.3d at ¶ 21, quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011). Thus, certification of a (B)(2) class "depends on what type of relief is primarily sought, so where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Id.* at ¶ 22 (quotations omitted).

**A. The primary relief sought by the class was declaratory and injunctive, and did not depend on individualized damages determinations.**

Relator argues that the certified class required some kind of individual determination such that a (B)(2) class was inappropriate. *See* Relator's Brief at 17, 22. But the claims brought by the plaintiff class clearly do not require any individualized claims for damages or other relief.

In *Cullen*, the proposed class sought both a declaration that State Farm's practices were illegal and a determination of the damages due to the plaintiff class. 137 Ohio St.3d at ¶ 24. At heart, the *Cullen* plaintiffs sought monetary recovery for past harms, disguised as prospective

relief. For this reason, this Court found that not all of the class members stood to gain from declaratory relief. *Id.* at ¶ 25. Some members of the class were no longer State Farm policyholders, and thus could not suffer any future harm. *Id.* at ¶ 24. Even the current policyholders would have to suffer some harm in the future, in order to receive the benefit of the requested declaratory relief. *Id.* In short, “the class would not be able to recover for *ongoing* injuries caused to each class member by *continuing* practices.” *Id.* This Court therefore determined that monetary damages were in fact the primary relief requested, and certification as a (B)(2) class was inappropriate. *Id.* at ¶ 27.

The *Wal-Mart* case, extensively cited by Relator, raises similar facts. *See generally Wal-Mart Stores, Inc.*, 131 S.Ct. 2541. In *Wal-Mart*, the U.S. Supreme Court examined the certification of a plaintiff class that included requests for backpay, highly individualized monetary damages, in conjunction with requests for declaratory and injunctive relief. The plaintiff class argued that their backpay claims were appropriately certified in the (b)(2) class action because those claims did not “predominate” over the requests for injunctive and declaratory relief. *Id.* at 2559. The Supreme Court found that the proposed “predominance” test was not supported by the text of Federal Civil Rule 23(b)(2). *Id.* More importantly, as a factual matter, those employees who left Wal-Mart would become ineligible for classwide injunctive or declaratory relief, if awarded. *Id.* at 2560. Those former employees, however, might still be eligible for backpay, and would risk those claims by being members of the (b)(2) class. In addition, from the defendant’s perspective, Wal-Mart was entitled to individualized determinations of each employee’s eligibility for backpay. *Id.* at 2560-61. Therefore, the Supreme Court concluded that backpay claims should not be certified under Rule 23(b)(2)

because they were highly individualized determinations for monetary damages. *Id.* at 2557, 2561.

In this case there are no individual monetary determinations to be made. The plaintiffs here “requested declaratory judgment and quiet title relief, but no money damages.” *Hupp*, 2014-Ohio-4255, ¶ 35. Under the class certified in this matter, a favorable declaratory judgment for the plaintiffs would render the leases void, and the injunctive relief would clear title. The members of the plaintiff class are not requesting individual monetary determinations—if they are successful, the leases will be declared void *ab initio* and will be cleared from the chain of title. If unsuccessful, the leases will stand on their own terms and will expire pursuant to those terms. All of the affected leases contain the same challenged terms, and all of the leases will be equally affected by the determination of the courts on the merits of those claims. No further individual action would be necessary to pursue any of the class members’ rights. In short, an award of declaratory and injunctive relief would apply, indivisibly, to the class as a whole.

Relator attempts to argue that the class members potentially have claims for damages under a slander of title theory if the leases are found to be void *ab initio*. Relator fails to explain, however, how such a class determination would give rise to a slander of title action. “To establish a slander of title claim, the claimant must prove that (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 for its falsity; and (4) the statement cause action or special damages.” *Wiley v. Triad Hunter, LLC*, Case No. 2:12-cv-00605, 2013 WL 4041772, \*4 (S.D. Ohio August 3, 2013) (quotation omitted). A court decision declaring the leases void *ab initio* would not satisfy the elements of a slander of title claim.

Even if there were the potential for a slander of title claim, that would not mean that (B)(2) class certification was inappropriate. *See Stewart v. Cheek & Zeehandelaar, LLP*, 252 F.R.D. 387, 396 (S.D. Ohio 2008) (certifying (b)(2) class where class members might later pursue individual damages on the bases of classwide relief), citing *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (stating that a “class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims by class members, even if it is based on the same events”). As such, Relator’s arguments that the existence of potential monetary claims renders class certification under Rule 23(B)(2) improper has no merit.

**B. The certified class is also sufficiently cohesive.**

Relator also argues that this class should not have been certified because it is not cohesive. Relator’s Brief at 24. It argues that the different circumstances of the various landowners who form the class cause them to have different interests. Relator argues that some property owners may want their leases invalidated and others may not. But, this is nothing more than an assertion of intraclass antagonism, which is relevant to whether the Civil Rule 23(A)(3) and (4) prerequisites to class certification have been met. *In re Kroger Co. S’holders Litig.*, 70 Ohio App.3d 52, 61, 590 N.E.2d 391 (1st Dist. 1990) (“Intraclass antagonism may be analyzed under Civ. R. 23(A)(3) or 23(A)(4).”). Civil Rule 23(A)(3) and (4) require that the claims or defenses of the class representatives must be typical of the class and that the class representatives fairly and adequately protect the interests of the class.

These are arguments that should have been presented to the courts in the underlying litigation. Had Relator voiced its objection to certification in that litigation, the decision to certify the class may have been different. *See id.* at 65 (noting the “silence of absent class members cannot be taken as a sign of disapproval” of class representation but that a “different situation is presented when absent class members inform the court of their displeasure with the

representation offered by the representative party”), citing *Shulman v. Ritzenberg*, 47 F.R.D. 202 (D.C.D.C. 1996) (representation was inadequate and class action could not be maintained when absent class members informed the court by affidavit that they considered the representative party’s interests antagonistic to their interests and his representation inadequate). Here, the particular facts of each individual lease—acreage, expiration date, subsequent assignment – does not disrupt the cohesiveness of the class as a whole. *See id.* at 66-67 (holding that the existence of intraclass antagonism is not necessarily fatal to class certification). Relator’s argument that the class was not sufficiently cohesive therefore fails.

**Proposition of Law No. 3:**

*Due process does not require notice or the opportunity to opt out to absent (B)(2) class members as absent (B)(2) class members may not opt out of such a class.*

Relator asserts that, even if the class was properly certified under Ohio Civ. R. 23(B)(2), due process required the Respondents to provide the Relators with notice and an opportunity to opt out of the class. (Relator’s Brief at 15). With regard to notice, Rule 23 provides:

In any class action maintained under *subdivision (B)(3)*, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Ohio Civ. R. 23(C)(2) (emphasis added).

Class actions brought under Civ.R. 23(B)(2) differ significantly from those brought under Civ.R. 23(B)(3), which applies where class issues predominate over individual issues and a class action is the superior method for adjudicating the dispute. Importantly, members of a (B)(3) class are entitled to notice and have the opportunity to opt-out of the class, while Civ.R. 23(B)(2)

class members are not. *See Wal-Mart*, 131 S.Ct. at 2558 (noting that “the (b)(3) class is not mandatory; class members are entitled to receive the best notice that is practicable under the circumstances and to withdraw from the class” (quotation omitted)); *see also* Civ.R. 23(C)(2)-(3). A class certified under (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.” *Wal-Mart*, 131 S.Ct. at 2558–59. As seen from the language of the Rule, notice and opt-out rights apply only to classes certified under Rule 23(B)(3), and as discussed above, the Respondents appropriately upheld the class certification under Rule 23(B)(2).

Despite the fact that the notice provisions do not apply to their class, Relator maintains that federal courts have required notice to classes certified under Fed. R. Civ. P. 23(b)(2). However, all of the cases cited by Relator involve claims for injunctive and monetary relief. (*See* Relator’s Brief at 15-22). For example, Relator cites to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that due process requires notice to Rule 23(b)(2) classes in certain circumstances. (*Id.* at 20-21). However, the Court specifically stated that its holding was “limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.” *Phillips Petroleum Co.*, 472 U.S. at 811 n.3.

The other cases cited by Relator likewise dealt with cases involving monetary judgments. *See Hect v. United Collections Bur. Inc.*, 691 F.3d 218, 221 (2d Cir. 2012); *Lemon v. Internatl. Union of Operating Eng’rs, Local No. 139, AFL-CIO*, 216 F.3d 577 (7th Cir. 2000); *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1145 (11th Cir. 1983); *Johnson v. Gen. Motors Corp.*, 598 F.2d

432 (5th Cir. 1979). The case the Relator spends the most focus, *Oneida Indian Nation of Wis. V. State of New York*, 85 F.R.D. 701 (N.D.N.Y. 1980), also involved an award of monetary damages. 85 F.R.D. at 703.

However, Relator fails to acknowledge that the underlying case does not involve an award of monetary damages or even a request for monetary relief. (See Stipulations, Ex. 3). For the cases cited by Relator, the underlying reason for requiring notice and an opportunity to opt out was the monetary relief. See *Phillips Petroleum Co.*, 472 U.S. at 811 n.3. Without the monetary component, there is no indication that these courts would have required notice to the class members. Accordingly, these cases do not support Relator's request for writs of prohibition and mandamus. The cases neither demonstrate that the Seventh District unambiguously lacked jurisdiction nor that the Seventh District had a clear duty to provide notice to Relator.

Indeed, federal case law indicates that ability to opt of a (b)(2) class may never be permissible. See *Holmes* 706 F.2d at 1153. Importantly, the Sixth Circuit specifically held that, for a Rule 23(b)(2) class, "the failure to notify the class members of the right to opt out of the class is not a violation of due process." *Laskey v. Internatl. Union*, 638 F.2d 954, 956-57 (6th Cir. 1981); see also *Kellogg v. Shoemaker*, 187 F.3d 636 (6th Cir. 1999). Under the Sixth Circuit holdings, because the class was properly certified under Rule 23(B)(2), the Respondents did not violate Relators due process rights in not providing notice. Accordingly, because Relator cannot support its claims that the Respondents did not have jurisdiction and that Respondents had a clear duty to provide them with notice, this Court should deny its requested relief.

**Proposition of Law No. 4:**

*An appellate court may issue an order that applies to absent class members preserving the status quo during the pendency of appeal.*

**A. The Tolling Order was appropriately issued to preserve the status quo as to the entire certified class.**

The Seventh District appropriately exercised its equitable powers to fashion a remedy to preserve the status quo during the pendency of the underlying litigation: the Tolling Order. The tolling of the operation of leases, particularly in the oil and gas context, finds support in both Ohio and federal case law. *See Yoskey v. Eric Petroleum Corp.*, Case No. 13 CO 42, Slip Op. 2014-Ohio-3790, ¶¶ 43-52 (7th Dist. Aug. 29, 2014) (and cases therein). For example, the Monroe County Court of Common Pleas has specifically found that tolling the term of a lease is equitable where the plaintiff brought an ultimately unsuccessful action to invalidate a lease due to insufficient notarization. *Three Waters, LLC v. Northwood Energy Corp.*, Monroe C.P. 2012-042 (J.E. June 12, 2012) (finding the challenged lease valid). In finding that tolling the lease was an appropriate equitable remedy, the court noted that “each day the lawsuit pends decreases the period of time the Lessee has paid and bargained for in which to choose to drill.” *Id.*

Similarly, in *HNG Fossil Fuels Co. v. Roach*, 103 N.M. 793, 715 P.2d 66 (1986), the New Mexico Supreme Court found that fashioning an equitable tolling order was a matter of “[c]ommon sense.” 103 N.M. at 796. In that case, the New Mexico Supreme Court had previously held certain challenged oil and gas leases valid and enforceable. *Id.* Before the high court issued that ultimate conclusion, however, the leases in question were allowed to expire because no tolling order had been issued. *Id.* at 794. Because the leases were not tolled, the lessee had continued to tender rental payments until the leases expired. *Id.* After the lawsuit ended and the leases expired, the landowners sought to recover those rental funds, but the lessee

objected, arguing that the landowners' original lawsuit so undermined title that the leases were worthless. *Id.* To solve this problem, the New Mexico Supreme Court “balance[d] the equities in light of all the pertinent facts and circumstances.” *Id.* at 796. The Court ultimately concluded “that the delay in resolving the legal issues was the fault of neither party.” *Id.* at 796-97. The court therefore *retroactively* tolled the leases during the resolution of the underlying action. *Id.*

Federal case law agrees with this approach. In *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), the trial court tolled the terms of oil and gas leases on Native American lands, which are controlled by federal law. 687 F.2d at 1341. On appeal, the plaintiff argued that the tolling was ordered in error because the tolling order operated to extend the leases beyond their maximum term, set by federal statute. The Tenth Circuit disagreed, noting that the controlling statute “was not intended to exclude the equitable application of the tolling doctrine.” *Id.* at 1341. Further, the Tenth Circuit confirmed that equitable tolling is not premised on any “wrongful” conduct by the party bringing suit, but is instead designed to restore the parties to the position they previously occupied. *Id.* The general rule, therefore, is that “[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.” *Id.*, citing *Morrison Oil and Gas Co. v. Burger*, 423 F.2d 1178, 1182-83 (5th Cir. 1970).

Recent federal case law in Ohio cites *Jicarilla* with approval, and indicates that a tolling order is appropriate following a merits determination. See *Feisley Farms Family, L.P. v. Hess Ohio Res., LLC*, Case No. 2:14-CV-146, 2014 WL 4206487 (S.D. Ohio Aug. 25, 2014) (following the reasoning of *Wiley v. Triad Hunter*, Case No. 2:12-CV-00605 (S.D. Ohio June 2, 2013)). In *Wiley*, the court determined that at the motion to dismiss stage of litigation, the award of an equitable tolling order was not appropriate. See *id.* at \*4-5. The *Wiley* court suggested,

however, that equitable tolling was an appropriate consideration after a merits determination. *Id.* at \*4.

In equitable matters, courts have broad discretion “in attempting to fashion a fair and just remedy” and have “the power to fashion any remedy necessary and appropriate to do justice in a particular case.” *McDonald & Co. Sec., Inc., Gradison Div. v. Alzheimer’s Disease & Related Disorders Assn., Inc.*, 140 Ohio App.3d 358, 366, 747 N.E.2d 843 (1st Dist. 2000), quoting *Winchell v. Burch*, 116 Ohio App.3d 555, 561, 688 N.E.2d 1053 (11th Dist. 1996). “An appeal to the equity jurisdiction of [a court], such as the suit here to cancel leases, is an appeal to the sound discretion which guides the determinations of courts of equity.” *Jicarilla Apache Tribe*, 687 F.2d at 1341, citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Seventh District used its equitable powers to fashion a tolling order that would leave all parties, including the members of the certified class, in the position previously occupied before the lawsuit commenced. That is, the Seventh District preserved the status quo of the leases, up to and including the acceptance of the underlying action by this Court, effectively avoiding the post-decision “housekeeping” and balancing of “scattered equities” that became necessary in *HNG Fossil Fuels Co. v. HNG Fossil Fuels Co.*, 103 N.M. at 796.

Without the Tolling Order, Beck Energy would have been left in an unenviable position. The trial court’s summary judgment entry effectively invalidated Beck Energy’s leases with the named plaintiffs. Following the trial court’s ruling on class certification, all of Beck Energy’s leases with its Ohio lessors were invalidated. Without the Tolling Order, Beck Energy could have proceeded with developing the land it leased from the class members to preserve its rights under the lease, only at the risk of a later court determination that such lease was void *ab initio*. Presumably, if the lease was void *ab initio*, Beck would then lose its investment. Regardless of

whether it was a party to any such determination, under Ohio *res judicata* jurisprudence,<sup>2</sup> Relator, or anyone who entered into the same form lease, could have asserted such a determination against Beck Energy resulting in it losing any investment it made in land development. Beck Energy could avoid such risk only by not making the necessary investment to preserve its lease rights at the risk of its leases otherwise expiring during this period of uncertainty. The Tolling Order equitably preserved the parties' rights while the validity of the lease itself was being litigated. The Tolling Order was well within the Seventh District's jurisdiction, and Relator can show no clear legal right to have it vacated.

Relator argues that the Tolling Order was inappropriately applied to the members of the (B)(2) class. Relator's Brief at 17-18. The cases Relator cites in support of that contention, however, are inapposite. For example, in *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90 (E.D.N.Y. 2012), the court certified a (b)(2) class while preserving the subsequent right of class members to pursue damages claims. 279 F.R.D. at 115 (holding "that membership in this Rule 23(b)(2) class does not bar the indirect purchasers' subsequent claims for damages"). The defendants argued that the (b)(2) class "split" certain class members' claims because it failed to pursue damages to which they may be entitled. *Id.* at 114. The court concluded, however, that the (b)(2) class without the opportunity to opt out was appropriate, noting that any other result was "unacceptable." *Id.* at 115 n.6. In other words, contrary to Relator's class certification

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<sup>2</sup> Ohio case law has applied collateral estoppel, or issue preclusion, against a party who has had the opportunity to fully litigate an issue in a subsequent suit against a stranger to the prior action. *See, e.g., Mitchell v. Internatl. Flavors & Fragrances*, 179 Ohio App.3d 365, 2008-Ohio-3697, 902 N.E.2d 37, ¶27 (1st Dist. 2008) ("The party seeking to apply the doctrine [of collateral estoppel] need show only that the party against whom the doctrine is asserted previously had his day in court and was permitted to fully litigate the specific issue sought to be raised in the later action." (quotation omitted)).

arguments here, allowing plaintiffs to opt out of (B)(2) classes often hurts them—they may be precluded from the classwide prospective relief and forced to pursue an individual judgment. *Id.*

Relator's characterization of *Marcera v. Chinlund*, 91 F.R.D. 579 (W.D.N.Y. 1981) is also incorrect. Relator's Brief at 18. In that case, the court ordered the certification of a (b)(2) class. *Marcera*, 91 F.R.D. at 585. The court then addressed the notice to be provided to the defendant class members but specifically noted that notice is not mandated in a (b)(2) action and therefore "any notice problems which may arise cannot foreclose class certification in this case." *Id.* Still, to "obviate" any lingering concerns regarding "fairness and, *perhaps*, due process" the court ordered notice to be provided to the defendant class. *Id.* (emphasis added).

And in *Feisley Farms*, of course, the court simply declined to issue a tolling order at the motion to dismiss stage of litigation. *See Feisley Farms Family, L.P.*, 2014 WL 4206487, \*4-5. This approach makes sense, because tolling challenged leases before a determination on the merits has the potential to provide some party with a windfall. *Id.* at \*4 (noting it appears "that courts have considered the issue of tolling either in conjunction with or after resolving the underlying merits"); see also *Jicarilla Apache Tribe*, 687 F.2d at 1341 (noting that the "purpose of tolling is not to punish the lessor for asserting his claim but to restore the parties to the position they occupied originally").

None of these cases supports Relator's contention that the Seventh District either did not have jurisdiction to issue the Tolling Order, or that it has a legal duty to vacate the Tolling Order as against Relator. Case law supports the equitable remedy the Seventh District crafted. The Tolling Order was extended to cover all of the leases affected by the litigation (that is, extended to all the members of the plaintiff class), and was issued after the trial court's merits

determination. Relator's request for extraordinary relief based on the issuance of the Tolling Order must fail.

**B. To the extent the Tolling Order violated Relator's due process rights, it is a nullity.**

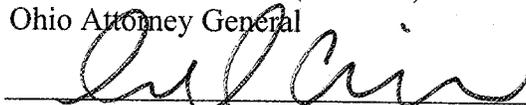
In any event, even Relators state: "The Tolling Order is a nullity if the affected mineral owners are not eventually notified of this lawsuit and the tolling of their leases." Relator's Brief at 19; *see also Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2nd Cir. 2012) (class action judgment not preclusive of subsequent claim brought by a class member who received constitutionally inadequate notice of the prior class certification and settlement). Thus, if Relator is correct in its assertions that due process required notice of either the class action or the Tolling Order, the failure to provide notice renders the tolling order unenforceable and inapplicable to it. Thus, if its due process arguments are correct, Relator's remedy is to pursue Gulfport Energy Corporation for improperly concluding that the expired Beck Energy lease constitutes a title defect relieving it of its payment obligations to Relator.

## CONCLUSION

For the reasons argued above, Respondents respectfully ask that this Court deny Relator's request for relief.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing *Respondents' Merit Brief* was served by regular U.S. mail and electronic mail, postage prepaid, on October 23, 2014 upon the following:

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