ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY OF RELATOR CLAUGUS FAMILY FARM, L.P.

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I. INTRODUCTION

Apparently without realizing it, the Seventh District has conceded the primary issue in dispute. Namely, the Seventh District admits that the Tolling Order would be unenforceable and inapplicable to the Claugus Family, if due process requires notice of either the class action or the Tolling Order. (Respondent's Brief at 23.) That is precisely the argument that the Claugus Family has made all along. Thus, if the Court finds the Tolling Order to be unenforceable because it was expanded to include the absent class members in contravention of their constitutional rights, the Relator is entitled to the requested writs. As set forth below, neither the Respondents nor the amicus curiae have been able to locate a single case supporting the contention that equitable relief may be awarded **against** the absent class members in a Rule 23(B)(2) class action, where such class members have not been provided with notice.

II. THE TOLLING ORDER VIOLATES THE DUE PROCESS RIGHTS OF THE ABSENT CLASS MEMBERS

The Seventh District and Beck Energy seem to believe that the Ohio Rules of Civil Procedure trump the due process rights guaranteed by the United States and Ohio constitutions. However, the civil rules must comply with the constitutions—not vice versa. Thus, if the presumption that Civil Rule 23(B)(2) complies with the Due Process Clause (because the absent class members are only deprived of their right to pursue injunctive relief against Beck Energy—and nothing more) is wrong under the facts of this case, it is the rule's failure to require notice that must yield to the Constitution's procedural protections.

Conceptually, the Respondents do not seem to grasp that this action is not about depriving the Claugus Family of its right to sue Beck Energy based upon claims similar to that asserted in the class action. Rather, both the Seventh District and Beck Energy have admitted

that the court awarded equitable relief to the *defendant* in the underlying Rule 23(B)(2) class action. (Respondent's Brief at 1; Intervening Respondent's Brief at 26.) Thus, the cases relied upon by the Respondents are easily distinguishable, because they all relate to depriving the plaintiff class of its right to a sue defendant for injunctive relief. Based upon the Tolling Order, however, the Relator's position is equivalent to that of a defendant. In fact, Beck Energy has explicitly agreed that, given the Seventh District's decision in *Hupp,* the only relief awarded in this case will be the equitable relief awarded to Beck Energy. (Intervening Respondent's Brief at 26.) Thus, the relevant question becomes whether the courts would ever countenance an award of equitable relief against a defendant class without notice that the lawsuit had even been filed.

"[T]he very notion of a defendant class raises immediate due process concerns." *Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D.Pa.1979). "When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation." *Id.* "The most one can lose in cases where res judicata operates is the right to later bring the same cause of action." *Id.* "However, when one is an unnamed member of a defendant class, affirmative relief may be awarded against the defendant without having had the opportunity to personally defend the suit." *Id.* Thus, "due process rights of unnamed class members of a defendant class are entitled to special solicitude, and their due process interests preclude altogether a defendant class under Rule 23(b)(2)." *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 439 (7th Cir.1998).

Allowing affirmative relief to be awarded **against** absent parties in a Rule 23(B)(2) class action is "a monstrous perversion of the principles of civil procedure." *See Henson v. E. Lincoln Twp.*, 814 F.2d 410, 416 (7th Cir.1987). In such a situation, the absent parties are told they must entrust the responsibility for litigation essential to their economic future to "lawyers they may never have heard of" who were hired by someone they do not know *Id.* at 415. Neither the rules

of civil procedure nor constitutional limitations allow such lawsuits. *Id.* at 416 (Rule 23 and the Constitution must be used to prevent claims against absent parties).

Unlike the typical Rule 23(B)(2) class, the absent class members in *Hupp* had something more to lose than the right to later bring the same cause of action. Namely, Beck Energy sought equitable relief **against** the class of absent plaintiffs in order to toll their leases until the conclusion of the litigation. Relator is not arguing that the such a tolling order was in and of itself improper—only that the issuance of such an order in a Rule 23(B)(2) action without notice to the parties affected by the order was improper. While the Respondents want to focus on whether the named plaintiffs sought monetary relief, the distinguishing factor in this case was Beck Energy's request for equitable relief **against** the absent class members.

If Beck Energy wanted to obtain a tolling order against the absent class members, it was incumbent upon Beck Energy to point out the necessity of providing due process to the Seventh District. Only by providing due process could Beck Energy obtain an *enforceable* tolling order effective as against absent class members. *See Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 721 (5th Cir.1980) (court's failure to afford due process to an absent party would require that the order be set aside as to such party). While Beck Energy continues to insist that providing actual notice would be pointless, courts have recognized the value of having a seat at the table when one's economic future is at stake.[1] *See, e.g., Henson,* 814 F.2d at 416; *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 420 n.9 (5th Cir.2004) ("each Defendant has the absolute right to individually defend itself").

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[1] According to Beck Energy, notice was not provided to the absent class members because it had not yet been determined who comprised the class, even after the trial court issued an order clarifying the class. (Intervening Respondent's Brief at 4-5.) Relator does not see how any burdens could be imposed on the class when "fundamental prerequisites for a valid class action remained undecided" as of the date of the Tolling Order. (Intervening Respondent's Brief at 5.)

While Beck Energy would have this Court hold that the Claugus Family had no right to due process because Rule 23(B)(2) classes do not "generally" or "normally" require due process, Beck Energy would no doubt object if the situations were reversed, which *South Ute Indian Tribe v. Amoco Production Company*, 2 F.3d 1023 (10th Cir.1993) demonstrates could have happened. As Beck Energy admits, the lease in question "is a form lease used by not only Beck Energy, but other Ohio producers as well." (Intervening Respondent's Brief at 5.) Thus, it would have been possible for a class of plaintiffs (all lessors who signed Form G&T (83) leases) to have sued a class of defendants (all producers who use the Form G&T (83) lease).[2] Such a class of defendant *producers* was certified in the *Amoco* case.

In *Amoco,* an Indian tribe sued 100 defendants and also sought certification of a defendant class which would include more than 20,000 additional defendants with interests in the oil and gas underlying 200,000 acres. *Id.* at 1025. The tribe claimed that, because it owned the coal underlying the lands in question, it (rather than the owners of the oil and gas) owned the coal bed methane. *Id.* Amoco, which owned the oil and gas leasehold interests covering approximately 150,000 of the acres, joined the tribe in moving for certification of a defendant class under Rule 23(b)(2), and sought to represent the defendant class. *Id.* at 1025, 1030. "The Tribe recognized, however, that due process considerations had been raised in some Rule 23(b)(1) and (b)(2) cases and concluded that it would appear that a similar notice requirement may be necessary in this action." *Id.* at 1026 (quotation omitted). Thus, in the case most similar to this one, *it was the party seeking relief* that acted to ensure that due process was provided, in order to guarantee the ultimate judgment would be enforceable as to the absent parties. The

[2] The fact that this was not done refutes the notion that the lower courts acted to bring all of those affected by this action before the courts. A ruling that the Form G&T (83) lease was invalid would have clouded the title of leases held by other producers not before the court.

plaintiff took this action even though it was seeking only a declaration that the leases in question were invalid rather than a monetary judgment against the absent class members.

A hypothetical may best demonstrate the flaw in Respondents' logic that notice would have been unnecessary in the *Amoco* case, because the plaintiff in that case only was seeking declaratory relief rather than a money judgment. Suppose that class counsel had selected lessors from multiple producers (including amicus American Energy – Utica, LLC) and then brought suit on behalf of a class of plaintiffs against a class of defendants, seeking to have *all* Form G&T (83) leases invalidated. The trial court appoints the named plaintiffs to represent the plaintiff class and American Energy to represent the defendant class (after determining that American Energy would be able to "adequately and effectively" represent the interests of all producers). No notice is provided of the lawsuit to Beck Energy because "as a member of the (B)(2) class, [Beck Energy] ha[s] no right to notice or an opportunity to opt out..." of the lawsuit. (Intervening Respondent's Brief at 2.) The trial court again holds the Form G&T (83) lease void ab initio, but this time American Energy's arguments on appeal fail to persuade the Seventh District, which affirms the invalidation of all the leases regardless of the producer. After the fact, Beck Energy finds out about the lawsuit and that it has effectively been put out of business, costing it tens of millions of dollars. When Beck Energy shows up in court arguing that the trial court and Seventh District could not invalidate its leases without providing it with notice and an opportunity to personally defend against the class action, would Beck Energy be denied relief? To the Claugus Family, the loss of the $421,267.00 signing bonus and potentially millions in future royalty payments is equivalent to the loss of the tens of millions of dollars Beck Energy would lose in this hypothetical.

The Seventh District contends that the Claugus Family cannot present "any authority to support its requests for extraordinary relief" in this action, apparently contending that the Relator must locate an identical case in order to prevail. Admittedly, the Claugus Family has been unable to locate any other case where a court awarded relief **against** absent class members (be they plaintiffs or defendants) without first providing the class members notice of the case. Relator does not believe this represents a failure in its part. Rather, it appears that the constitutional violation represented by the Seventh District's Tolling Order is simply unprecedented. In fact, in every other case that the Relator was able to locate, when relief was awarded **against** a party, the Court provided notice to the absent class members, to avoid the constitutional issues raised in this case. Thus, Relator finds it more noteworthy that the Respondents have failed to locate a single case where the court awarded relief **against** absent class members in a Rule 23(B)(2) class action without voluntarily providing notice.

III. CLASS COUNSEL HAS FAILED TO ADEQUATELY REPRESENT THE RIGHTS OF ABSENT CLASS MEMBERS

Despite the unprecedented nature of their actions, Respondents seem to believe that any possible constitutional violations can be swept aside because class counsel adequately represented the interest of all the unnamed class members. To the contrary, when one's economic future is at stake, the Constitution does not require one to entrust responsibility for critical litigation to lawyers selected by others who will litigate the case without ever consulting the affected parties. *See Henson,* 814 F.2d at 415. Since Respondents have argued so fervently that the presence of competent class counsel is an adequate substitute for "a real voice in the strategy and management of the litigation," *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir.1973), it is worth examining the performance of class counsel in the underlying action.

Beck Energy's business partner XTO argues that any slander of title claim would be a "factually ludicrous theoretical claim" because no one could have predicted that a form lease in use for three decades would be declared void ab initio. (XTO Brief at 21.) Relator actually agrees that the attempt to have all the Form G&T (83) leases declared void ab initio was always quixotic and stood little to no chance of success. When class counsel is willing to tilt at windmills at the possible expense of hundreds of landowners with millions at stake (whom they did not bother to consult before filing a lawsuit which could drastically affect the rights of the affected landowners), it is hard to understand how they also can be described as adequately representing the landowners. Extending the leases of the absent parties because of a "ludicrous" lawsuit that the absent class members had no knowledge of (or control over) is not justice.

Further, class counsel's decision to seek class certification in the first place is perplexing, especially the decision to seek class certification under Rule 23(B)(2). From the perspective of the absent class members, there was little (or nothing) to be gained by taking this approach. While the Seventh District seems to think the mere issuance of a court order in the underlying case would "clear title" as to the lands of all the absent property owners, that is simply not how the world of title examination works. Even had the leases ultimately been held void ab initio, each of the absent plaintiffs would still require a court order acknowledging that their individual lease fell within the ambit of the court's order before a title examiner (who is generally not an attorney and does not offer legal opinions) would accept the invalidity of a recorded lease that appears valid on its face. Without an order identifying each lease to be invalidated, the court's order would merely establish the invalidity of the Form G&T (83) lease generally, but a later quiet title action would be necessary to actually clear title as to any particular lease. Despite seeking class certification under Rule 23(B)(2), class counsel later seemed to acknowledge the

necessity of actually locating each of affected landowners when it requested that they be identified and provided with notice of the lawsuit.

Respondents seem to simply assume that class certification was both required and inevitable, because the lawsuit placed a cloud on all Form G&T (83) leases. There was no legal requirement, however, for the underlying action to be brought as a class action—in fact, it was not originally styled as such. Without class certification, Beck Energy would not have been able to impose a tolling order on non-parties, regardless of how its rights vis-à-vis such non-parties were being affected. It is worth noting that Beck Energy actually fought class certification, despite the fact that it now claims that such certification was essential to preserving its rights.

Providing notice and a right to opt out to absent class members would have left Beck Energy in the same position it would have been in had it won its fight against certification; thus, Beck Energy's contention that allowing class members to opt out would have unfairly prejudiced it flies in the face of its arguments to the courts below. It also demonstrates that XTO's claim that the "mere filing" of the lawsuit required a tolling order against the absent class members from the beginning is baseless. It was not a certainty that the class would be certified when the lawsuit was initially filed, particularly given that the initial complaint did not assert claims on behalf of a class, and Beck Energy did not concede the class certification issue until it realized that it needed certification to bind the absent plaintiffs to the Tolling Order. Thus, the "mere filing" of the lawsuit was not the critical event establishing that a tolling order was necessary as to the class of absent class members. Why did class counsel fight for certification, when landowners would have been able to point to any eventual determination that the Form G&T (83) lease was void ab initio as a matter of law, and a separate quiet title action would be necessary

regardless of the outcome of any Rule 23(B)(2) class action which failed to individually identify each of the affected landowners?

Finally, when the issue of the Tolling Order came before the Seventh District, class counsel failed to raise the due process argument before that Court. While this is not surprising given that class counsel proposed a Rule 23(B)(2) class in the first place, it leaves Relator with the distinct impression that its interests were not adequately represented by class counsel during that proceeding. While XTO claims that the failure to grant a tolling order would present a "heads I win, tails you lose" for the absent class members, the filing of the class action lawsuit actually presented a no win situation for the Claugus Family. Even though the Claugus Family's lease was set to expire under its own terms on February 4, 2014, the best case scenario after the lawsuit was filed was years of litigation beyond the termination date concerning the initial validity of the lease, even though the Claugus Family realized (once it finally became aware of the lawsuit) that this was a doomed effort. The Claugus Family's worst case scenario is what actually came to pass—a tolling order extending the Claugus Family's lease by years because unrelated parties decided to attempt to void their leases entirely, and purported to bring the action on behalf of everyone who signed the same form lease. (Actually, the tolling order is worse than the worst case scenario that the Claugus Family could have predicted, since it retroactively applies to a period before the Claugus Family was even a constructive party to the lawsuit.)

IV. THE ISSUE IS NOT WHETHER THE SEVENTH DISTRICT COULD ISSUE A TOLLING ORDER, BUT WHETHER IT COULD DO SO WITHOUT PROVIDING DUE PROCESS TO ABSENT CLASS MEMBERS

Both Respondents and the amicus curiae devote significant portions of their briefs to the issue of whether tolling orders can generally be issued in oil and gas cases where the lessee has actively challenged the lease. The Claugus Family has not challenged the discretion of the courts

to enter tolling orders in such cases as a general matter. Rather, the question in this case is whether a court can award equitable relief against a class of absent landowners, when no effort has been made to notify them of either the action itself or the order awarding relief ***against them***.

In this case, the equitable rationale for tolling the leases of absent class members is weak to non-existent. The primary rationale for tolling such leases is to prevent a lessor from obstructing the lessee's performance under the lease, then exploiting the effects of its own obstruction.[3] A lessor who files suit contending that the lease is invalid "put[s] himself in a position to debar his right to insist upon a forfeiture for non-development of the premises within the time fixed by the lease." *Winn v. Collins*, 183 S.W.2d 593, 597 (Ark.1944) (quoting Thornton's Oil and Gas, 5th ed., Vol. 2, § 276). As Respondents repeatedly state, it is the *active assertion* that the lease is invalid which justifies the equitable remedy of tolling the lease. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir.1982).

This Court has explicitly recognized that "absent class members are passive parties to a class suit." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 76, 694 N.E.2d 442 (1998). The absent class members in this case were not informed, either by class counsel or the lower courts, that the lawsuit had been filed. Beck Energy contends that it is blameless in this action because it did not file the lawsuit and had no role in the underlying litigation. The same could be said of the absent class members, who also did not file the lawsuit. The argument that the leases of absent class members should be tolled because those class members obstructed the enforcement of their

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[3] XTO is Beck Energy's business partner and has unsuccessfully attempted to intervene at every stage of this case. While XTO claims that "the very filing of the (unsuccessful) *Hupp* lawsuit would have destroyed XTO's interest in the leases" (XTO Amicus Brief at 4) the effective date of the assignment from Beck Energy to XTO was December 20, 2011 (XTO's Motion to Intervene, Stipulations at Exhibit 9), meaning XTO acquired its interest in the leases three months *after* the class action which allegedly destroyed the value of the leases was filed. XTO also fails to mention that, in addition to the leases at issue in this case, its deal with Beck Energy included leases held by production, which were expressly excluded from the class action.

leases by "actively asserting" the leases were invalid ignores the realities of a Rule 23(B)(2) class and of this case in particular. The rationale for tolling the leases of absent class members breaks down when those class members were not even aware that a lawsuit had been filed.[4]

Further, while the Tolling Order was beneficial to Beck Energy, the notion that it was "equitable" as to the absent class members distorts the definition of equity beyond recognition. "Equitable" means that which is just, fair, and right in consideration of the facts and circumstances of the individual case. Black's Law Dictionary, 632 (4th ed. 1968). In this case, the trial court did not certify the class action until February 8, 2013. An unnamed member of a putative class does not become a party to an action in any real sense until certification, because, prior to certification, the named plaintiff has not yet established itself as a representative of the unnamed putative class members. *See Hall v. State Farm Mut. Auto. Ins. Co.*, 215 F.App'x 423, 427 (6th Cir.2007). Further, "[t]he majority rule is that while named plaintiffs are clients of class counsel precertification, absent class members are not represented parties prior to class certification."[5] *Johnson v. Bankers Life & Cas. Co.*, W.D.Wis. No. CR 13-CV-144, 2013 WL

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[4] The evidence submitted to this Court does not support Beck Energy's argument that the Claugus Family should have been aware of the lawsuit because of publicity about the case. While Beck Energy claims that a story appeared in the Jefforsonian, the evidence it relies upon to support this claim is a press release authored by class counsel—not a copy of a newspaper article. Beck Energy also claims that the Tolling Order was also published in a newspaper, but the evidence it relies upon is only a printout from an online database. When due process requires notice, "the notice provided to absent class members must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *See Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir.2012) (quotation omitted). Since it was sending delay rentals to the absent class members, Beck Energy clearly knows both the names and addresses of all the absent class members. Thus, constructive notice by newspaper article and coffee shop talk do not satisfy due process in this case. *Id.*

[5] Even after class certification, class counsel only constructively represents absent class members in something more akin to a fiduciary relationship than an attorney-client relationship. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 313 (3d Cir.2005). Even after the class is certified, absent class members are not always considered "parties." *See Day v. Persels & Associates, LLC*, 729 F.3d 1309, 1316 (11th Cir.2013).

5442374, *2 n.1 (Sept. 30, 2013) (quoting 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 11:1 (9th ed. 2012)).

On October 21, 2012, the Claugus Family was neither a party to the action nor was it represented in the action. However, this is the date selected by the Seventh District in its Tolling Order, because this was the day Beck Energy sought to toll the leases of the *named* plaintiffs. It is not "just, fair, and right" to toll the leases of the absent class members for a period when they were not even *constructive* parties to the action. In fact, Beck Energy conceded before the trial court that tolling the leases of absent class members prior to certification would be inappropriate. (Reply in Support of Motion to Toll, Stipulations at Exhibit 13.) This is not the only problem with the date selected by the Seventh District.

Ignoring the fact that the trial court refused to toll the leases of absent class members, the Respondents have argued that the class remained cohesive because the Tolling Order prevented plaintiffs from dropping out of the class as their leases expired. In fact, Beck Energy attempts to distinguish *Cullen v. State Farm Mut. Auto. Ins. Co.*, 2013-Ohio-4733, 137 Ohio St.3d 373, 999 N.E.2d 614, by arguing that "nobody" dropped out of the class during the course of the lawsuit because of the Tolling Order. The trial court, however, certified the class to include "all members of the class in existence on September 29, 2011, the date of the original class action complaint in this action." (Entry Clarifying Class, Stipulations at Exhibit 18.) There are presumably a number of people who are members of the class but to whom the Tolling Order does not apply, because there was a gap of over one year between the time the class action complaint was filed and when Beck Energy sought a tolling order as to the named plaintiffs.

Further, Beck Energy did not seek a tolling order as to the absent class members until July 16, 2013. According to XTO, it takes nine to twelve months *after XTO formulates a plan of*

development to begin drilling a well. (Black Affidavit at ¶15, Additional Evidence of Intervening Respondent Exhibit C.) Since the Claugus Family's lease with Beck Energy was set to expire on February 4, 2014, this would not have allowed sufficient time for Beck Energy and XTO to develop the Claugus Family's property after they first sought to toll the leases of absent class members. In fact, there may not have been sufficient time to develop the Claugus Family's property as of the date the class was certified on February 8, 2013, less than 12 months before the Claugus Family's lease was set to expire.

Prior to certification of the class, there was no legal impediment to Beck Energy developing the Claugus Family's property. In fact, even after the class was certified, Beck Energy took steps to drill a well on the property of an absent class member—thus establishing that it was neither "impossible" or "impractical" to make development plans despite the pending class action.[6] The contention that the Claugus Family's property was not likely to be developed regardless of whether this lawsuit was filed is not "mere speculation." Beck Energy and XTO would have had to have plans in place to drill on Relator's property even before the class was certified in order to commence operations prior to February 4, 2014.

Thus, the tolling order did not maintain the status quo of the case as of the date Beck Energy first sought to toll the leases of absent class members. Rather, it drastically altered the status quo by reaching back two years, to a point before the Claugus Family and other absent class members were even constructive parties to the case or constructively represented by class

[6] It is interesting that Beck Energy contends that it could not be expected to continue developing the properties in question because of the risk that the leases would be held void ab initio, but later contends that Relator acted during this same time period "with full knowledge that its oil and gas lease with Beck Energy was good and valid." (Intervening Defendant's Brief at 10.) Relator does not see how it could definitively know that the lease was valid, when Beck Energy was supposedly paralyzed by doubt regarding the validity of the very same lease.

counsel. While Respondents cite to *HNG Fossil Fuels Co. v. Roach,* 715 P.2d 66 (N.M.1986) for the proposition that retroactive tolling is acceptable, that case did not involve any of the due process concerns raised by the retroactive tolling order in this case. The Seventh District also relies upon "common sense" to suggest a tolling order was appropriate, but ignores that common sense also suggests that it would be best for a court to notify parties to an action (even constructive parties) that the court has issued an order meant to control that parties conduct.

V. PROHIBITION IS APPROPRIATE BECAUSE THE SEVENTH DISTRICT HAD A CLEAR LEGAL DUTY TO PROVIDE ABSENT CLASS MEMBERS WITH DUE PROCESS AND THE SEVENTH DISTRICT LACKED JURISDICTION TO ISSUE AN UNCONSITUTIONAL ORDER

Respondents argue that the Seventh District unquestionably had jurisdiction to consider whether to issue a tolling order in the underlying case. By definition, however, an unconstitutional order is issued in excess of jurisdiction. *In re Berry*, 436 P.2d 273, 280 (Cal. 1968); *see also Scott v. McCaffrey*, 172 N.Y.S.2d 954, 958 (Sup.Ct.1958) (prohibition action can be used to command that power be utilized within constitutional limits). In fact, this Court's decision in *State ex rel. News Herald v. Ottawa County Court of Common Pleas, Juv. Div.*, 77 Ohio St. 3d 40, 671 N.E.2d 5 (1996) relied upon the same principle. There was no question there that the Ottawa Juvenile Court had jurisdiction to determine whether a juvenile should face charges in the juvenile or the common pleas division. Despite the lower court's unquestioned jurisdiction over the underlying case, this Court focused on the "patently unconstitutional" nature of a gag order issued by the court. *Id.* at 45. The argument that the Seventh District has jurisdiction to exercise judicial powers beyond the limits imposed by the United States and Ohio constitutions lacks merit.

Respondents also argue a prohibition action must be brought prior to the court's exercise of jurisdiction. However, "[p]rohibition is not limited to prevention of future unauthorized

judicial or quasi-judicial actions." *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 2004-Ohio-2894, 102 Ohio St.3d 301, 809 N.E.2d 1146, ¶11. "[W]here an inferior court patently and unambiguously lacks jurisdiction over the cause, prohibition will lie both to prevent the future unauthorized exercise of jurisdiction *and to correct the results of previous jurisdictionally unauthorized actions*." *State ex rel. Rogers v. McGee Brown*, 80 Ohio St.3d 408, 410, 686 N.E.2d 1126 (1997) (quotation omitted) (emphasis in original); *see also State ex rel. Brady v. Pianka,* 2005-Ohio-4105, 106 Ohio St.3d 147, 832 N.E.2d 1202, ¶8. Thus, "prohibition is the appropriate remedy to both prevent excesses of lower tribunals and to invalidate orders already made that engage in such excesses." *News Herald,* 77 Ohio St.3d at 43 (citing *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 330, 285 N.E.2d 22 (1972)). Beyond Respondents misstatements about the law, their argument ignores that the Seventh District is continuing to exercise jurisdiction because the Tolling Order remains in effect at until at least the time passes for an appeal to this Court. *See State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 98, 671 N.E.2d 236 (1996) *superseded by statute on other grounds as recognized by State ex rel. Stern v. Mascio*, 81 Ohio St.3d 297, 299, 691 N.E.2d 253 (1998) (prohibition proper because judge intended to exercise further jurisdiction over the case).

Respondents further argue that a writ of prohibition is inappropriate because the Relator either should have appealed from the lower court judgments or Relator can still seek redress from the Monroe County Common Pleas Court. However, "[a]ppeal is immaterial where the court patently and unambiguously lacks jurisdiction to act."[7] *Rogers,* 80 Ohio St.3d at 410.

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[7] Beck Energy asserts that Relator's only recourse is an appeal of the *Hupp* decision. However, the class representatives requested class certification under Rule 23(B)(2) in the first place; they did not appeal the certification of the class. Beck Energy appealed the certification of the class, but is now using that certification as a sword against the absent class members. Thus, class certification will not be an issue on appeal.

Further, this argument is simply inconsistent with the failure to give notice and the contention that it is not necessary. How can the Claugus Family protect its constitutional rights through an appeal, when the both the trial court and the Seventh District failed to provide for notice of the lawsuit in the first place, and Relator did not find out about the offending orders until weeks, months or years after they issued? If arguments "should" be presented to the lower courts, this just proves Relator's point that due process requires notice so that such appeals *can* be presented to such courts in a timely manner.[8] While the Respondents argue that the silence of absent class members cannot be equated to an objection, in this case, silence likely indicates that the absent class members did not know about the lawsuit in the first place. Finally, the suggestion that Relator ask the Monroe County Common Pleas Court to find the order of a superior court unconstitutional seems misguided at best. A remedy based upon asking a trial court to overrule an order issued by the appellate court for that county in the same case would seem to be the epitome of an "inadequate remedy."

VI. THE SEVENTH DISTRICT DOES NOT HAVE "DISCRETION" TO ISSUE UNCONSTITUTIONAL ORDERS

Respondents argue that mandamus will not lie to control a lower court's exercise of its discretion. Judges do not have "discretion" to violate either the United States or Ohio

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[8] Relator does not concede that intervening in the court of appeals would have been an acceptable alternative to bringing this action. A motion to intervene at the appellate level differs significantly from a motion to intervene at the trial court level, because appellate courts do not have the capacity to take evidence on timeliness, the nature and sufficiency of the intervenor's interest, etc. *State ex rel. Portune v. Nat'l Football League*, 2003-Ohio-6195, 155 Ohio App.3d 314, 800 N.E.2d 1188, ¶13. Thus, rather than allowing intervention, the proper procedure is generally for the proposed intervenor to file a separate action in mandamus or prohibition. *See Davis v. Cincinnati Enquirer*, 2005-Ohio-5719, 164 Ohio App.3d 36, 840 N.E.2d 1150, ¶¶14-15 (noting in hindsight that intervention at appellate level was arguably improper and preferred course would have been a mandamus action). In fact, this Court has previously held that it need not defer to a pending case in a lower court, and that mandamus is an appropriate remedy, even if the relator is also a party in the pending action. *See State ex rel. Highlander v. Rudduck*, 2004-Ohio-4952, 103 Ohio St.3d 370, 816 N.E.2d 213, ¶18.

constitutions. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 649, 100 S.Ct. 1398 (1980) ("a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative"); *Limone v. United States*, 497 F.Supp.2d 143, 203 (D.Mass.2007) ("No government actor has 'discretion' to violate the Constitution, statutes, regulations or rules that bind them."). The argument that issuing a tolling order which violates the due process clause of the United States or Ohio constitutions is merely an exercise of a court's "discretion" therefore misses the mark and cannot be used to avoid the mandamus action.

VII. THIS ACTION IS NOT BARRED BY LACHES OR UNCLEAN HANDS

A. Laches

As to the Intervening Respondent's laches argument, since the Tolling Order remains in effect and continues to toll the Claugus Family's lease with Beck Energy, it is difficult to understand the argument that Relator unreasonably delayed in bringing this lawsuit. More importantly, "[p]rejudice is not inferred from the mere lapse of time and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *State ex rel. Mallory v. Pub. Emp. Ret. Bd.*, 82 Ohio St.3d 235, 244, 694 N.E.2d 1356 (1998). The only "prejudice" that Beck Energy has alleged is being "forced to defend itself in this original action." (Intervening Respondent's Brief at 38.) Relator fails to see how any delay in bringing this action would affect the attorney's fees incurred by Beck Energy in defending against it. Further, Beck Energy was not "forced" to defend the action at all. Relator filed its complaint against the Seventh District and the judges who issued the Tolling Order. Beck Energy actively inserted itself into this case by seeking permission to intervene, apparently (and

ironically) unwilling to rely upon third parties to "adequately and effectively" represent its interest.

Beck Energy has not been materially prejudiced by any alleged delay. If the class action failed to conform to the requirements of due process, the absent class members simply cannot be bound by the Tolling Order. *See In re Kroger Co. Shareholders Litig.*, 70 Ohio App. 3d 52, 59, 590 N.E.2d 391 (1st Dist.1990). If the absent class members are not bound by the Tolling Order because their due process rights were violated, it does not matter whether this action was brought in October of 2013, March of 2014, or years from now—especially given that the constitutional violation involves the lack of notice to those directly affected by the order, thereby hindering the ability of absent class members to bring a "timely" action.

B. Unclean Hands

As to the unclean hands argument, while Beck Energy accuses Relator of asserting facts that do not exist, relying on speculation, and ignoring certain other pertinent facts (Intervening Respondent's Brief at 1), Beck Energy's unclean hands argument paradoxically does all three. Primarily, Beck Energy's argument contends that the Claugus Family's signing of a lease with Gulfport months before the Beck Energy lease was set to expire constitutes "reprehensible conduct" because the Form G&T (83) lease includes a provision stating that "no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease." (Beck Energy Lease at ¶18, Evidence of Relator Exhibit 3.) Beck Energy contends that the Gulfport Lease became effective on September 30, 2014, four months before its own lease with the Claugus Family was set to terminate. In fact, the Gulfport Lease was not then (and is not now) effective, because Gulfport rejected the lease. (Claugus Affidavit at ¶12, Evidence of Relator Exhibit 1.) The Gulfport Lease provided Gulfport with 90 days to review title, at which

point it could accept or reject the lease. (Gulfport Lease at Exhibit A, ¶27(B), Evidence of Relator at Exhibit 4.) The Gulfport Lease also provided for a 180 cure period which would have allowed the Claugus Family to address any title defects identified by Gulfport, but went on to state: Any time utilized by Lessor during the Cure Period shall be added to the Primary Term of the Lease"—thus, making the effective date the date when any title defect (such as the existing Beck Energy Lease) was cured, which was set to occur on February 4, 2014. (Gulfport Lease at Exhibit A, ¶27(D), Evidence of Relator Exhibit 4.)

The signing of the Gulfport lease did not constitute a breach of the Beck Energy lease, and it certainly did not damage Beck Energy in any way. Even if the Court were to conclude the Claugus Family technically breached the Beck Energy lease, it is hard to see how this would constitute "reprehensible conduct," especially considering that Beck Energy claims that it was unwilling to develop the Claugus Family's property, because of its fears that the Beck Energy Lease might be invalid. The contention that the Claugus Family signed this lease to "manipulate the justice system" is not only speculation,[9] it is spurious and contradicted by the evidence in the record. The Claugus Family was unaware of the Tolling Order when it signed the Gulfport Lease. Because the constitutional violations would exist regardless of the Gulfport Lease, the Claugus Family did not need to sign another lease to "manufacture" a conflict to present to this Court. The unclean hands argument is both baseless and offensive, especially given the frequent accusations in both Respondents' briefs and the amicus briefs that it is Relator who is "speculating."

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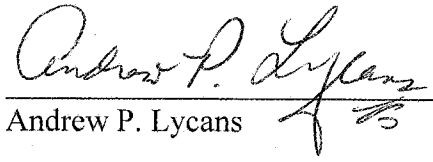
[9] This is not the only speculation in the Intervening Respondent's Brief. For instance, Beck Energy contends that no other class members unknowingly breached their Form G&T (83) leases. (Intervening Respondent's Brief at 22.) Unless Beck Energy has conducted a title examination of all of the lands covered by the 700 leases at issue, it has no way of knowing that.

VIII. CONCLUSION

While the Seventh District claims that it acted to relieve the "unenviable position" that Beck Energy found itself in, the absent class members were in an even less enviable position. They did not even know about the lawsuit and (unlike Beck Energy) had no opportunity to protect their rights. One of the respondents has previously opined that Ohio's constitution provides greater protection to property rights than the federal constitution. *See Tribett v. Shepherd*, 2014-Ohio-4320, ¶79 (7th Dist.) (DeGenaro, J., dissenting) (citing to higher "Ohio constitutional property rights standards"). That heightened protection was ignored when the Tolling Order was issued to protect Beck Energy in disregard of the absent class members' rights. Beck Energy's economic interests do not trump Relator's constitutional rights. Both Beck Energy and the absent class members could have been protected, however, if Beck Energy had advocated providing notice to the absent class members (as parties in a similar position have done in other cases) rather than fighting any attempts to identify the absent class members or provide them notice. The Court should issue a writ of prohibition and a writ of mandamus to remedy the constitutional violations created by the Tolling Order.

Respectfully submitted,

Daniel H. Plumly, Counsel of Record



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CERTIFICATE OF SERVICE

I hereby certify that I served the above *Reply of Relator Claugus Family Farm, L.P.* to the following by regular U.S. Mail this 29th day of October, 2014:

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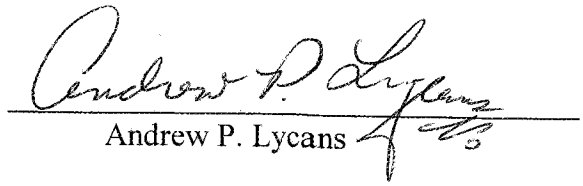

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