

ORIGINAL

IN THE SUPREME COURT OF OHIO

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|-------------------------------|---|-------------------------------------|
| CLYDE A. HUPP, et al., |) | |
| |) | Case Number 14-1933 |
| Plaintiffs-Appellants, |) | |
| |) | |
| v. |) | On Appeal from the Monroe County |
| |) | Court of Appeals, Seventh Appellate |
| BECK ENERGY CORPORATION, |) | District |
| |) | |
| Defendant-Appellee, |) | Court of Appeals Case Numbers |
| |) | |
| and |) | 12 MO 6 |
| |) | 13 MO 2 |
| XTO ENERGY INC., |) | 13 MO 3 |
| |) | 13 MO 11 |
| Proposed Intervenor-Appellee. |) | |

**APPELLEE XTO ENERGY INC.'S MEMORANDUM
IN OPPOSITION TO JURISDICTION**

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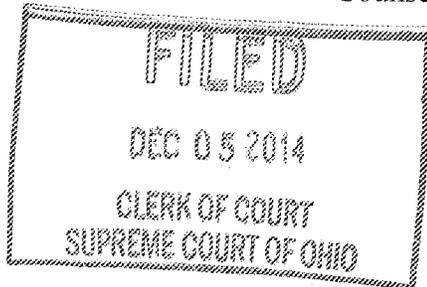
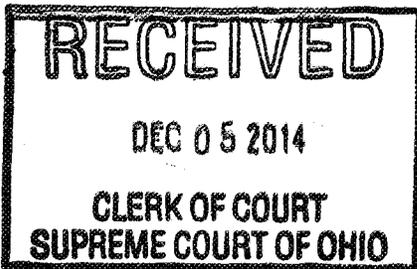
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The Seventh District's unanimous decision below, applying well-settled principles of contract law, corrected the trial court's erroneous invalidation of a form oil and gas lease across a certified class of Ohio landowners. *See Hupp v. Beck Energy Corp.*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255, ¶¶ 77-125. There was nothing remarkable about the Seventh District's holding; the appellate court merely reversed a trial-court decision that had misread the lease language and disregarded the applicable law. The Seventh District's decision is not novel and signals no doctrinal shift. It simply leaves intact the settled expectations of both oil and gas companies and landowners about how courts will uphold their contracts. There is therefore no issue of public or great general interest for this Court to review.

A. The Law That Applies to Habendum Clauses in Oil and Gas Leases Is Already Well Settled.

Oil and gas leases are the subject of more than 100 years of well-developed law. Lessors (the owners of mineral estate) and lessees (exploration and production companies) alike have relied on this body of law to order their affairs. One area of that law that has matured over the years focuses on the term provision, known as the "habendum clause." The habendum clause historically gave rise to disputes because of the underlying tension in the lessor-lessee relationship; the individual lessor wants immediate drilling to accelerate royalty income, but the lessee must prioritize its drilling activities because of the significant cost of drilling across many properties. *See Kuntz, Law of Oil and Gas*, Section 26.1 (2014).

After decades of legal development, these competing interests resulted in the law's recognition and enforcement of contracts that include a two-tier term. *See, e.g., Brown v. Fowler*, 65 Ohio St. 507, 521, 63 N.E. 76 (1902). The "primary term" is a fixed number of years in which the lessee has the exclusive right to drill for oil and gas. *E.g., Mauger v. Positron*

Energy Resources, Inc., 5th Dist. Morgan No. 14AP0001, 2014-Ohio-4613, ¶ 33. During that primary term, the lessor typically receives an annual “delay rental” that provides income to the lessor from the outset of the lease and relieves the lessee of any obligation to drill a well immediately. *E.g.*, *E. Ohio Gas v. Duncan*, 63 Ohio App.2d 163, 166, 410 N.E.2d 769 (9th Dist.1978). If the lessee fails to develop the property by the end of the primary term, the lease ends. *E.g.*, *Am. Energy Serv. V. Lekan*, 75 Ohio App.3d 201, 212, 598 N.E.2d 1315 (5th Dist.1992). If, however, the lessee drills a well, pools the lease with others in a production unit, or conducts other operations specified in the lease before the end of the primary term, the lease continues into a “secondary term” of indefinite duration that usually continues so long as the well produces oil or gas in “paying quantities.” *Cf. Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955). This type of term provision balances the lessor’s legitimate interest in receiving royalties and the lessee’s legitimate interest in protecting its investment. Nothing in the Seventh District’s decision—or, for that matter, in Plaintiffs’ memorandum in support of jurisdiction—suggests that the law in this area is muddled or in need of clarification.

B. The Seventh District Conducted a Straightforward Application of Settled Law to the Lease Language at Issue in this Case.

The Seventh District did no more than apply settled law to the clear contractual language at issue in this case. There is no public or great general interest in its ordinary resolution of a straightforward contract dispute.

The leases at issue in this case were memorialized on the Form G&T (83) Oil and Gas Lease, widely used in Ohio without controversy since 1983. Appellee Beck Energy Corporation used this form in negotiating leases with numerous Ohio landowners; Appellee XTO Energy Inc. is a partial assignee of Beck’s interests in many of those leases. The trial court, ignoring the plain language of the lease and over 100 years of applicable law, declared that Beck’s Form

G&T (83) leases with Ohio landowners were void and forfeited if Beck had neither drilled nor prepared to drill an oil or gas well. The trial court's holding was grounded in several erroneous conclusions that the appellate court simply corrected. Plaintiffs refer to two of those conclusions in their jurisdictional memorandum.

First, the trial court mistakenly read the leases as permitting Beck to hold the leases in perpetuity without developing them by simply paying delay rentals indefinitely. But the appellate court parsed the lease language, identified distinct primary and secondary terms, and held that the delay-rental provision applies only "during the *primary term* of the lease." (Emphasis in original.) *Hupp*, 2014-Ohio-4255, at ¶ 83-99. Because the delay-rental option is available to the lessee only during the primary term, "the trial court incorrectly concluded that Beck could extend the Lease[s] in perpetuity by making a nominal delay rental payment." *Id.* at ¶ 99. The appellate court's holding that delay rentals are only effective during the primary term correctly states the law of Ohio and all other oil and gas states.

Second, the trial court erroneously imposed an implied covenant to develop property even though the leases specifically disclaimed it. But the Seventh District properly enforced the contractual "disclaimer of implied covenants," highlighting the parties' agreement "that 'no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them.'" *Id.* at ¶ 117-118, quoting Form G&T (83) Oil and Gas Lease paragraph 19. As the Seventh District explained, "construing the lease[s] to include such a covenant was expressly proscribed by the lease terms." *Id.* at ¶ 122. The Seventh District also noted that courts uniformly enforce these contractual disclaimers of implied covenants when, as here, the lease in question contains a primary and secondary term. *Id.* at ¶ 115-116. Indeed, the imposition of an implied covenant is appropriate only when the lease otherwise contains " 'no

expression on the subject' ” of timing requirements, as the habendum clause does in this case. *Id.* at 121, quoting *Kachelmacher v. Laird*, 92 Ohio St. 324, 332, 110 N.E. 933 (1915).

By reversing the trial court's judgment, the appellate court did no more than bring this case back in line with applicable law. There is no holding of public or great general interest for this Court to review.

C. Plaintiffs Have Failed to Identify an Issue of Public or Great General Interest.

Plaintiffs' own arguments fail to establish an issue of public or great general interest. Their petition boils down to four arguments, none of which justifies this Court's intervention.

First, they point to the expanding oil and gas industry in Ohio. But the growth of drilling operations in the State is not, in and of itself, an indication that *this case* presents an issue of public or great general interest. Plaintiffs fail to establish any ambiguity in the law that creates confusion for that industry or for landowners who lease their land for development. Their transparent goal to renegotiate their leases at today's higher market prices does not transform this case into one of public or great general interest.

Second, Plaintiffs baldly suggest that Beck used the Form G&T (83) lease form to "hoodwink landowners." (Plaintiffs' Mem. at 4.) But there is absolutely no evidence in the record to support that speculative accusation. Plaintiffs point to no evidence to suggest that a single lessor did not understand the bargain or did not wish to receive delay-rental payments. Their complaint raised no claims of fraud or duress; raising these issues now only obfuscates the actual legal issues in this ordinary contract dispute.

Third, Plaintiffs fault the appellate court for supposedly applying inapposite law and disregarding the actual language of the leases in question. Of course, that assertion is case-specific and would have no importance beyond the limited contours of this case. More importantly, the Seventh District *studiously examined* the contract language in reaching its

decision. *See* Hupp, 2014-Ohio-4255, at ¶ 83, 86, 90-91, 117-120, 122. And, beyond their criticism of the Seventh District's process, Plaintiffs demonstrate no plausible alternative reading of the contract language.

Fourth, Plaintiffs claim that the Seventh District erred by tolling the leases after the trial court had voided them. But Plaintiffs fail to explain how that issue raises an issue of public or great general interest—especially considering that the trial court's declaration of voidness was ultimately reversed. In the end, the leases were tolled by the court that upheld them, as is typically the case.

ARGUMENT

FIRST PROPOSITION OF LAW

An oil and gas lease that includes a primary term of a stated number of years cannot be maintained past the primary term without development and, therefore, is not a perpetual, no-term lease.

Plaintiffs' first urge the Court to hold that perpetual, no-term leases are unenforceable. The wrinkle in their argument is that the leases in this case do not fit that bill. The Seventh District correctly held that the plain words of the leases give the lessee a fixed period to explore for and produce oil or gas, and the leases can be extended beyond that primary fixed term if oil or gas is produced or a well capable of producing in paying quantities is drilled. *See Hupp*, 2014-Ohio-4255, at ¶ 83-99. Thus, whatever merit there may be to Plaintiff's first proposition of law, it has no application here.

Plaintiffs' argument that the language of the leases in this case contains no primary term is flawed in many respects. As a threshold matter, it contravenes two canons of contract construction. First, the law favors upholding contracts, not nullifying them. *See State ex rel. Gordon v. Taylor*, 149 Ohio St. 427, 437, 79 N.E.2d 127 (1948). Second, the law eschews a construction that finds a contract perpetual unless there is no other possible interpretation.

Hallock v. Kintzler, 142 Ohio St. 287, 51 N.E.2d 905 (1943); *Wilgus v. Horvath*, 162 Ohio St. 75, 120 N.E.2d 583 (1954); *Regency Plaza, LLC v. Morantz*, 10th Dist. Franklin No. 06AP-837, 2007-Ohio-2594, ¶ 18.

Plaintiffs attempt to circumvent these principles by chastising the appellate court for focusing on legal principles rather than the language agreed to by the parties. But the appellate court began its analysis by focusing on the term provision set forth at paragraph 2. *See Hupp* at ¶ 83, 86. That paragraph provides:

2. This lease shall continue in force * * * for a term of ten years and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee.¹

This is a traditional habendum clause, common to nearly all modern oil and gas leases. Its purpose is to establish the term or duration of the lease. *See Williams & Meyers, Manual of Oil and Gas Terms* 461 (15th Ed.2012) (defining the habendum clause as “[t]he clause in a deed or lease setting forth the duration of the grantee’s or lessee’s interest in the premise.”).

As the appellate court correctly recognized, this habendum clause is two-tiered. *See Hupp* at ¶ 86. The language “this lease shall continue in force for a term of ten years” is the “primary term.” *See Williams & Meyers, Manual of Oil and Gas Terms* at 807 (defining “primary term” as “[t]he period of time during which a lease may be kept alive by a lessee even though there is no production in paying quantities.”). The language “and so much longer thereafter as oil or gas or their constituents are produced or capable of being produced on the

¹ The majority of the leases at issue have primary terms of ten years, although some have different primary terms. For ease of discussion, ten years is used to refer to the primary terms throughout this brief.

premises in paying quantities” is the “secondary term.” *See id.* at 949 (defining “secondary term” as “[t]he period subsequent to the expiration of the primary term during which the lease or deed is continued in force by operation of the THEREAFTER CLAUSE of the lease or deed”). The appellate court’s construction of the habendum clause is supported by a long line of Ohio cases adopting the same reading of similarly structured oil and gas leases, which recognizes the two-tiered nature of this clause. *See Brown*, 65 Ohio St. at 521-522, 63 N.E. 76; *Mauger*, 2014-Ohio-4613, at ¶ 33; *Gardner v. Oxford Oil Co.*, 7th Dist. Monroe No. 12 MO 7, 2013-Ohio-5885, ¶ 27; *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109, ¶ 63 (7th Dist.); *Am. Energy Serv.*, 75 Ohio App.3d at 212, 598 N.E.2d 1315.

The leases at issue also contain delay-rental clauses at paragraph 3, which the appellate court also considered. *See Hupp* at ¶ 83, 91. That paragraph provides:

3. This lease, however, shall be null and void * * * unless within ___ months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of ___ Dollars each year * * * until commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

Paragraph 3 provides an extra measure of protection for the lessor, because under it, the lease will terminate even before the end of the primary term if the lessee fails to pay an annual delay rental.

A “delay rental” is defined as “[a] sum of money payable to the lessor by the lessee for the privilege of deferring the commencement of drilling operations or the commencement or production *during the primary term of the lease*,” and a “delay rentals clause” is “[t]he lease clause providing for the payment of delay rentals to keep a lease alive *during the primary term*

despite failure to obtain production or to commence drilling operations.” (Emphasis added.) Williams & Meyers, *Manual of Oil and Gas Terms* at 250-251. As the appellate court correctly explained, delay-rental clauses were developed to “offset the harsh requirement that development had to occur immediately upon the signing of the lease.” See *Hupp* at ¶ 98. Under the plain language of paragraph 3 and consistent with the plain and ordinary meaning of “delay rental,” the payment of a delay rental defers the lessee’s obligation *during the primary term* of the leases to commence drilling a well.

Plaintiffs argue that the appellate court erred in interpreting the leases to contain a fixed primary term and an indefinite secondary term. They argue that the leases do not expressly label the initial fixed term as a “primary term.” This argument is backwards; the ten-year fixed term is a “primary term” because of how it functions, not how it is labeled. The label “primary term” is an industry term of art used to describe the fixed period of time during which the lessee may hold the property without development. Because development is not required to maintain the leases for the first ten years of the term, the first ten years of the Form G&T (83) lease meets the definition of a “primary term,” and the appellate court properly analyzed it as such. The explicit use in the lease of the words “primary term” is unnecessary to support that construction. See, e.g. *Brown*, 65 Ohio St. 507, 63 N.E. 76, paragraph two of the syllabus (recognizing functional distinction between initial two-year lease term and 25-year subsequent term without using “primary” and “secondary” labels); *Swallie*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109, at ¶ 5, 63 (20-year period during which oil and gas lease could be maintained without production in paying quantities was the “primary term,” even though the phrase “primary term” was not used).

Plaintiffs argue that by labeling this ten-year fixed period as a “primary term,” the

appellate court strayed from the plain meaning of the language of the leases and impermissibly imported industry custom and practice evidence to change the leases from unenforceable no-term leases to something enforceable. But Plaintiffs offer no other plausible explanation for the ten-year term language; instead, their argument would simply render that language meaningless, in contravention of canons of contract construction. The appellate court did not change the lease provisions by importing industry custom, practice, or trade usage; it simply acknowledged that the ten-year provision meets the definition of “primary term” in the oil and gas industry and under Ohio law.

Plaintiffs next argue that the appellate court erred in determining that the delay-rental provision of paragraph 3 applies only to the primary term. According to plaintiffs, the language of paragraph 3 permits the lessee to make delay-rental payments, and keep the lease alive, past the primary term and in perpetuity, thus overriding the explicit time limitations set forth in paragraph 2. But they point to no language in the leases that supports that argument, and the appellate court properly “harmonize[d]” the two paragraphs “rather than [find] conflict in them.” See *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Found., L.L.C.*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Farmers Natl. Bank v. Del. Ins. Co.*, 83 Ohio St. 309, 337, 94 N.E. 834 (1911). Plaintiffs also fail to explain why the appellate court should have ignored the plain, ordinary, and common meaning of “delay rental” and “delay rentals clause” in interpreting the leases. Ohio law requires courts to construe contracts according to the plain meaning of the words used, and the plain and ordinary meaning of “delay rental” has no purpose outside *the primary term* of an oil and gas lease. The appellate court, therefore, correctly rejected Plaintiffs’ argument that the delay-rental provision of paragraph 3 created a perpetual lease. Nor was there any reason for the lease to say so explicitly; including an express

limitation in paragraph 3 that a delay rental can defer commencement of a well only during the primary term would have been superfluous, because that is exactly what the phrase “delay rental” already means.²

The appellate court correctly gave effect to the plain meaning of the words in the leases at issue, resulting in enforceable oil and gas leases with the traditional two-tiered habendum clause and a delay-rental clause that permits the lessee to defer commencement of a well during the *primary term*. After that, development would be necessary to hold the leases.

SECOND PROPOSITION OF LAW

There is no implied covenant to develop within a reasonable time under leases that include both an express disclaimer of all implied covenants and a fixed primary term during which the lessee may defer development by paying delay rental.

Plaintiffs’ second proposed proposition of law would impose on the Form G&T (83) leases an implied covenant reasonably to develop the land. The immediate answer to that lease-specific argument is in the lease form itself: it contains a clear and unambiguous disclaimer of all implied covenants. *See Hupp*, 2014-Ohio-4255, at ¶ 117-118. Plaintiffs suggest that *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), “appears to require an ‘express disclaimer of the covenant to develop,’ ” (Plaintiffs’ Mem. at 13, quoting *Ionno* at 131), but they

² Plaintiffs’ reliance on *Beaverkettle Farms Ltd. v. Chesapeake Appalachia LLC*, N.D. Ohio No. 4:11CV02631, 2013 U.S. Dist. LEXIS 124509 (Aug. 30, 2013), is misplaced. That non-binding opinion involved a lease that contained important additional language not present here: “Once a well is drilled on the Lease, said Lease shall be held by production and Lessee shall be entitled to maintain all undrilled acreage under this Lease by paying delay rentals as provided above.” *Id.* at *36. The court determined that this language, in the context of the lease before it, could mean that the lessee had to pay delay rentals for undrilled acreage beyond the primary term. It also determined, however, that it was possible that both the lessee and lessor understood that delay rentals under this language would apply only during the lease’s primary term. The court determined that this ambiguity presented an issue of fact for trial and denied both parties’ motions for summary judgment on the meaning of that language. *See id.* at *51.

have not explained why paragraph 19 of the Form G&T (83) lease does not satisfy that requirement. A disclaimer of implied covenants encompasses all implied covenants, including the covenant to reasonably develop.

Imposition of an implied covenant also makes no sense because, as the appellate court correctly reasoned, the leases at issue in this case contain express requirements to develop; that is the function of the habendum clause. If production in paying quantities does not occur or a well is not drilled that is capable of production in paying quantities during the primary term, the leases simply expire. As development is necessary in order to obtain production in paying quantities, paragraph 2 of the leases sets an explicit timeline for development in order for the lease to be maintained into the secondary term. The delay-rental clause in paragraph 3 also sets an express timeline for development. As the appellate court recognized, these two provisions show that the parties expressly bargained for and agreed to a specific time for development: a well had to be commenced within one year of signing the leases unless a delay rental was paid, and—even if a delay rental was paid—development had to occur within the ten-year primary term or the leases would expire. This Court has recognized that such a timing obligation specified in “the express terms of the written contract,” defeats any argument of an implied covenant. *Kachelmacher*, 92 Ohio St. at 332, 110 N.E. 933. “An implied covenant can arise only when there is no expression on the subject.” *Id.* There can be no implied covenant here.

Ultimately, then, Plaintiffs’ argument for imposing an implied covenant to develop rests on their position that the leases have no term. They brush away the 10-year primary term provision, arguing that this language only “suggest[s]” a time frame for development that is not binding on the lessee. (Plaintiffs’ Mem. 12.) Building on this incorrect premise, they urge that the leases at issue in this case are the same as the no-term lease this Court had before it in *Ionno*.

In that case, this Court determined that payment of an advanced royalty did not displace an implied covenant to reasonably develop under a lease that had no express term. But the leases at issue in this case have a primary term, during which development must occur in order to carry them into their secondary term. For that reason, *Ionno* has no application here. Plaintiffs also attempt to liken delay rentals—which are paid to delay commencement of a well during the primary term—to the royalty advances paid by the lessee in *Ionno*, which permitted the lessee to delay development indefinitely. But that analogy is not persuasive. Delay rentals do not displace the requirement that development is necessary in order to maintain a lease after expiration of the primary term.

THIRD PROPOSITION OF LAW

When lessors interfere with a lessee’s exercise of its rights under oil and gas leases by instituting a class action challenging the validity of those leases, it is appropriate for a court to equitably toll the running of the primary terms of the leases for the period between when the class action is filed and its final disposition on appeal.

Plaintiffs final challenge is to the appellate court’s entry of an order tolling the leases in order to preserve the status quo. Again, their argument has no merit.

Tolling of oil and gas leases grows out of recognition that it would be manifestly unfair to permit a lessor to obstruct a lessee’s performance under a lease and then take advantage of the lack of performance. *See generally Hanna*, 163 Ohio St. 44, 125 N.E.2d 338, paragraph one of the syllabus. The Supreme Court of Arkansas recently noted that a lawsuit creates an “impossible dilemma” that demands tolling in order to avoid depriving the lessee of the benefit of its bargain merely by virtue of legal action. *See Sw. Energy Prod. Co. v. Elkins*, 2010 Ark. 481, 374 S.W.3d 678, 685 (2010).

As discussed above, under the primary term of an oil and gas lease, the lessee has a

limited amount of time within which to develop the lease to its secondary term. Tolling orders spring from the hornbook-law principle that a party responsible for obstructing the lessee's access to the property should not be permitted to exploit that obstruction to run out the lease:

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

Kuntz, *Law of Oil and Gas* at Section 36.4. In the absence of a tolling order, a lessor can file a lawsuit challenging the validity of its lease, making it impossible for the lessee to drill a well. The lawsuit itself runs out the clock on the primary term, achieving the lessor's goal of being free of the lease into which it voluntarily entered—regardless of the merits of the lawsuit.

Plaintiffs do not quarrel with the principle that a tolling order is a proper remedy to preserve the lessee's rights when a lessor files a lawsuit challenging the validity of an oil and gas lease. Rather, their challenge is based solely on the timing of the tolling order in this case: “[T]his appeal addresses the propriety of tolling a lease after it has been declared void, and equitable issues arising from the lessee's lack of diligence in seeking to toll the leases.” (Plaintiffs' Mem. at 4.)

According to Plaintiffs, the appellate court's order tolling the leases was invalid because Beck moved for tolling after the trial court had declared the leases void: “[W]hen Beck moved to toll Appellants' Leases and later, to toll the absent class members' Leases, the status quo was that the leases were void.” (*Id.* at 15.) They find fault with a tolling order entered at a time when “there was nothing to toll.” (*Id.*) They assert that Beck lost the opportunity to seek tolling of the leases at issue because it did not move for tolling until after the trial court's decision on the

merits.

But there is no requirement that a lessee move for a tolling order at the outset of litigation. In fact, there is authority that deems it “premature” until the matter is resolved in the lessee’s favor:

[A]ny decision as to tolling would be premature at this time. Plaintiffs’ action challenges the validity of certain leases as well as the leases’ assignment to Defendant. The underlying merits of Plaintiffs’ claims—and thus the status of the relevant leases—are still unresolved. Any tolling of the lease periods, however, would be contingent on a finding that the leases are valid and enforceable. Under such circumstances, the Court will not speculate at the present time as to what relief Defendant will be entitled to if it ultimately succeeds on the merits.

Wiley v. Triad Hunter LLC, S.D. Ohio No. 2:12-CV-00605, 2013 U.S. Dist. LEXIS 187326, at *5 (June 5, 2013). The court in *Wiley* denied the defendant’s motion for tolling without prejudice:

Of course, as tolling remains unresolved in this case, the current denial is without prejudice. If Defendant prevails in this action, the Court will determine whether Defendant is entitled to the equitable relief it seeks.

Id. at *6. See also *Feisley Farms Family L.P. v. Hess Ohio Res. LLC*, S.D. Ohio No. 2:14-cv-146, 2014 U.S. Dist. LEXIS 116519, at *10-*11 (Aug. 25, 2014); *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, U.S. Dist. LEXIS 13080, at *15 (Feb. 3, 2014). Under the rationale of these cases, rather than having been too late, Beck’s motion to toll would have been premature, coming as it did before the appellate court reversed the trial court’s judgment declaring the leases void and forfeited.

Plaintiffs cite no case supporting their argument that an appellate court may not enter a tolling order after a trial court has declared leases void and forfeited but before that declaration has been reversed on appeal. Any tolling order, regardless of when it is entered, will by necessity be contingent on the leases at issue ultimately being determined to have been valid. Regardless of the status of the lessors' challenge in the trial court when the tolling order is entered or the ultimate outcome in the trial court, if the challenged leases are determined on appeal to have been void or forfeited based on something other than expiration of their primary terms during the time the lawsuit challenging their validity was pending, an order tolling those primary terms will prove to have been a nullity. On the other hand, if the leases are determined on appeal to be valid, the tolling order is effective to ensure that the lessee gets the benefit of the full primary term for which it paid and to which the lessor freely agreed.

In this case, if the appellate court had affirmed the trial court's determination that the challenged leases were void and forfeited, its order tolling the primary terms of those leases would be without effect. That order truly became effective only when the appellate court reversed the judgment of the trial court, and its continued effectiveness is contingent on this Court's either declining jurisdiction or, alternatively, affirming the appellate court's decision on the merits. Plaintiffs' challenge to the timing of the tolling order in this case presents no question of public or great general interest. The effectiveness of a tolling order depends on the ultimate outcome on the merits, not on the timing of a motion in the trial court.

CONCLUSION

None of Plaintiffs' proposed propositions of law presents a question of public or great general interest. This Court should decline jurisdiction over their attempted appeal.

Respectfully submitted,



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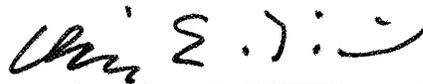
I hereby certify that copies of the foregoing Memorandum in Opposition to Jurisdiction were served via ordinary U.S. mail this 4th day of December 2014, to the following:

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