Supreme Court of Ohio Clerk of Court - Filed February 11, 2015 - Case No. 2014-0423

**IN THE SUPREME COURT OF OHIO**

**CLYDE A. HUPP, *et al.*,**

Plaintiffs/Appellants,

vs.

**BECK ENERGY CORPORATION,**

Defendant/Appellee,

and

**STATE OF OHIO EX REL. CLAUGUS FAMILY FARM, L.P.,**

Relator,

vs.

**SEVENTH DISTRICT COURT OF APPEALS, ET AL.,**

Respondents.

CASE NO. 2014-1933

On Appeal from the Monroe County Court of Common Pleas, Seventh Appellate District

Court of Appeals Case Nos. 12 MO 6
13 MO 2
13 MO 3
13 MO 11

and

Original Action in Prohibition and Mandamus

CASE NO. 2014-423

# APPELLEE/INTERVENING RESPONDENT BECK ENERGY CORPORATION'S MOTION TO TOLL ALL TERMS OF THE OIL AND GAS LEASES

Richard V. Zurz, Jr. (0007978),
COUNSEL OF RECORD
Mark A. Ropchock (0029823), of
SLATER & ZURZ, LLP
One Cascade Plaza, Suite 2210
Akron, Ohio 44308-1135
Phone: (330) 762-0700
Fax: (330) 762-3923
rzurz@slaterzurz.com;
mropchock@slaterzurz.com

James W. Peters (0009360), of
PETERS LAW OFFICES
107 Woodsfield, Ohio 43793
Phone: (740) 472-1681
Fax: (740) 472-1718
Judgejp1@scglobal.net

ATTORNEYS FOR
PLAINTIFFS/APPELLANTS
CLYDE A. HUPP, ET AL.

Daniel H. Plunly, Esq.
COUNSEL OF RECORD
Andrew P. Lycans, Esq.
CRITCHFIELD, CRITCHFIELD &
JOHNSTON, LTD.
225 North Market Street, PO Box 599
Wooster, Ohio 44691

ATTORNEYS FOR RELATOR
CLAUGUS FAMILY FARM, L.P.

Scott M. Zurakowski (0069040),
COUNSEL OF RECORD
William G. Williams (0013107),
Gregory W. Watts (0082127),
Aletha M. Carver (0059157), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/PO Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com; bwilliams@kwgd.com;
gwatts@kwgd.com; acarver@kwgd.com

ATTORNEYS FOR
DEFENDANT/APPELLEE/INTERVENING
RESPONDENT BECK ENERGY
CORPORATION

Clair E. Dickinson, Esq.
COUNSEL OF RECORD
BROUSE MCDOWELL
388 South Main Street, Suite 500
Akron, Ohio 44311

ATTORNEYS FOR DEFENDANT/APPELLEE
XTO ENERGY INC.

Kevin C. Abbott, Esq.
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222-2716

ATTORNEYS FOR DEFENDANT/APPELLEE
XTO ENERGY INC.

Michael DeWine, Esq.
Ohio Attorney General
Sarah Pierce, Esq.
COUNSEL OF RECORD
Tiffany Carwile, Esq.
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

ATTORNEYS FOR RESPONDENTS, THE SEVENTH DISTRICT COURT OF APPEALS, JUDGE GENE DONOFRIO, JUDGE JOSEPH J. VUKOVICH, AND JUDGE MARY DEGENARO

**IN THE SUPREME COURT OF OHIO**

**CLYDE A. HUPP, *et al.*,**

Plaintiffs/Appellants,

vs.

**BECK ENERGY CORPORATION,**

Defendant/Appellee,

and

**STATE OF OHIO EX REL. CLAUGUS FAMILY FARM, L.P.,**

Relator,

vs.

**SEVENTH DISTRICT COURT OF APPEALS, ET AL.,**

Respondent.

CASE NO. 2014-1933

On Appeal from the Monroe County Court of Appeals, Seventh Appellate District

Court of Appeals Case Nos. 12 MO 6
13 MO 2
13 MO 3
13 MO 11

and

Original Action in Prohibition and Mandamus

CASE NO. 2014-423

# APPELLEE/INTERVENING RESPONDENT BECK ENERGY CORPORATION'S MOTION TO TOLL ALL TERMS OF THE OIL AND GAS LEASES

## I. Introduction

Appellee/Intervening Respondent, Beck Energy Corporation ("Beck Energy"), respectfully requests that this Court toll all of the terms of the oil and gas Leases it entered into with Appellants, Clyde A. Hupp, et al. ("Appellants"), including the Lease entered into with Relator, Claugus Family Farm, L.P. ("Claugus"). Beck Energy asks the Court to toll the Leases on two grounds:

(a) First, by not granting the Motion to Toll, the Leases could terminate during the pendency of this appeal causing unnecessary and unfair prejudice to Beck Energy if the Court determines, as did the Seventh District Court of Appeals, that Beck Energy's Leases are valid.

(b) Second, the failure to toll the Leases exposes Appellants and Claugus to future litigation by Beck Energy, for lost revenue, if the Court affirms the Seventh District Court of Appeals' decision concluding the Leases are valid and the Leases terminate during the pendency of this appeal.

## II. Facts/Procedural History

On September 26, 2013, while this matter was pending before the Seventh District Court of Appeals, the court of appeals issued a Judgment Entry tolling all terms of the oil and gas leases entered into between Appellants, including Claugus, and Beck Energy. (*See* Judgment Entry, Sept. 26, 2013, at pp. 1-2, attached as Exhibit A.) The court of appeals commenced the tolling period from October 1, 2012, the date Beck Energy first filed a motion in the Monroe County Court of Common Pleas to toll the terms of the oil and gas leases.

The court of appeals ordered tolling to continue during the pendency of all appeals and, in the event of a timely notice of appeal to the Ohio Supreme Court, until the Court accepted or declined jurisdiction. The court of appeals further ordered that at the end of the tolling period, Beck Energy, and any successors and/or assigns, would have as much time to meet any and all obligations under the oil and gas leases as it had as of October 1, 2012.

On September 26, 2014, the court of appeals issued its decision in *Hupp v. Beck Energy Corp.*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255. Following the court of appeals' decision, the parties entered into a joint stipulation tolling all of the terms of the leases between the parties, from the issuance of the court of appeals' decision on September 26, 2014, and the filing of a timely appeal in this Court or, in the event a timely appeal was not filed in this Court, until November 10, 2014, the last day upon which a timely appeal could have been filed. (*See* Joint Stipulation Regarding Tolling Agreement, attached as Exhibit B.)[1]

Upon a timely appeal, it was also stipulated that tolling would continue until this Court accepted or declined to exercise jurisdiction. Finally, the parties agreed that at the end of the tolling period, Beck Energy, and any successors and/or assigns, would have as much time to meet any and all obligations under the oil and gas lease(s) as it had as of October 1, 2012.

The Court exercised jurisdiction and accepted Appellants' appeal on January 28, 2015.[2] On this date, the stipulated tolling agreement entered into by the parties on October 10, 2014, expired. Beck Energy asks this Court for a tolling order commencing January 28, 2015, and continuing until the Court issues a decision in this matter and the time expires for the filing of a motion for reconsideration under S.Ct. Prac.R. 18.02. If the Court affirms the court of appeals' decision and denies Claugus its requested releif, Beck Energy asks that it, or its successors and/or assigns, be given as much time to meet its lease obligations as it had as of October 1, 2012.

---

[1] Despite stipulating to tolling in the past, Appellants now refuse to do so.

[2] In deciding to exercise jurisdiction in this appeal, the Court consolidated this matter with *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals*, Case No. 2014-423. *See* Entry, Jan. 28, 2015.

## III. Law and Argument

The present matter involves hundreds of Leases at issue as a result of the class action certification encompassing all landowners, in the State of Ohio, with Beck Energy G&T 83 Leases. All of the Leases have varying expiration dates. Despite these varying dates, each Lease contains essentially the same terms, including a ten-year primary term and a delay rental clause, which the class action Appellants, including Claugus, and Beck Energy paid and bargained for as part of the lease agreement. At the end of the primary term, including any extension thereof, if Beck Energy does not drill a well that produces in paying quantities, the Lease typically terminates.

The Court recently agreed to hear Appellants' appeal and consolidated it with *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals*, which involves an original action in prohibition and mandamus that raises a due process issue within the context of the Civ.R. 23(B)(2) class action certified in *Hupp*. Claugus is a member of the Civ.R. 23(B)(2) class.

Due to the complexity of the issues involved, the consolidation with *Claugus*, and the fact that the record has not yet been transmitted by the court of appeals in *Hupp*, and no briefs have been filed in *Hupp*, it is anticipated a decision will not be rendered by this Court within the next year. This places Beck Energy in a difficult position – it could eventually win the battle on appeal but lose the war because the Leases could terminate during the pendency of this appeal.

### A. Tolling is Required when the Validity of an Oil and Gas Lease is Challenged.

Tolling is required "when a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation," so that "the obligations of lessee to lessor are suspended during the time such claims of forfeiture are being asserted." *Jicarilla Apache Tribe v. Andrus*,

687 F.2d 1324, 1341 (10th Cir.1982), citing *Morrison Oil & Gas Co. v. Burger*, 423 F.2d 1178, 1182-1183 (5th Cir.1970); *Twyford v. Whitchurch*, 132 F.2d 819, 821 and n. 6 (10th Cir. 1942); *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 F.2d 19, 23-24 (10th Cir.1934), *cert. denied*, 287 U.S. 616, 53 S.Ct. 17, 77 L.Ed. 535; 2 E. Kuntz, Oil and Gas 324-326 (1964); *HNG Fossil Fuels Co. v. Roach*, 103 N.M. 793, 797, 715 P.2d 66 (1986) (reversing lower court's refusal to toll lease finding that "an extension of the [oil and gas lease] term is the appropriate remedy"); *Chesapeake Exploration, L.L.C. v. Valence Operating Co.*, S.D.Texas No. H-07-2565, 2008 WL 4240486, *7 (Sept. 10, 2008) (holding where repudiation by lessee occurred approximately six months prior to end of primary term, lease was tolled so as to put the parties back in their original position and the lessee will be given six months to meet habendum clause obligations).

Tolling prevents a lessor who wrongfully repudiates a lessee's lease from profiting from the wrong. (Citations omitted.) *BB Energy LP v. Devon Energy Production Co., LP*, N.D.Texas No. 3:07-CV-0723-O, 2008 WL 2164583 at *11 (May 23, 2008). "[R]epudiation of a lease by a lessor relieves the lessee from any obligation to conduct any operation on the land in order to maintain the lease in force pending a judicial resolution of the controversy between the lessee and lessor over the validity of the lease." (Citations omitted.) *Cheyenne Resources, Inc. v. Criswell*, 714 S.W.2d 103, 105 (Tex.App.Eastland 1986).

Further, failure to toll the Leases also exposes Appellants and Claugus to possible liability. If this Court does not toll the terms of the Leases and affirms the decision of the Seventh District Court of Appeals finding the Leases are valid, Beck Energy may seek compensation for any lost revenue it incurred as a result of the expiration of the Leases during the pendency of this appeal. The same holds true for Claugus if the Court declines to grant the

relief requested in its original action. Therefore, tolling the terms of the Leases protects both parties and maintains the status quo during the pendency of the *Hupp* appeal and Claugus's original action.

**B. <u>Tolling Prevents Mootness.</u>**

Tolling also keeps the challenged Leases from expiring thereby preventing mootness. The application of the mootness doctrine to expired leases is most commonly an issue found in landlord/tenant disputes. *See Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912 (1st Dist.), ¶10; *Haven House Manor Ltd. v. Gabel*, 6th Dist.Wood No. WD002-073, 2002-Ohio-6750, ¶19.

> The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case. Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues.

*Schwab*, *supra*, at ¶10. A lease that expires during the pendency of the appeal renders the appeal moot. Therefore, tolling the challenged Leases is necessary to prevent mootness while the Court decides the merits of the *Hupp* appeal and Claugus's original action.

**C. <u>Ohio Courts Use Tolling in Oil and Gas Disputes.</u>**

Ohio courts frequently use tolling in oil and gas lease disputes. At a minimum, Ohio courts have allowed tolling of the leases to occur, if not from the date of the commencement of the lawsuit (*see Egnot v. Triad Hunter LLC*, S.D.Ohio No. 2:12-cv-1008, 2013 WL 5487059 (Sept. 30, 2013), at least from the point at which a determination is made on the merits (*see Griffith v. Hess Corp.*, S.D.Ohio No. 2:14-CV-00337, 2014 WL 1407953 (Apr. 11, 2014); *Cameron v. Hess Corp.*, S.D.Ohio No 2:12-CV-00168, 2014 WL 1653119 (Apr. 23, 2014); *Cameron v. Hess Corp.*, S.D.Ohio No. 2:12-CV-00168, 2014 WL 366723 (Feb. 3, 2014);

*Wiley v. Triad Hunter LLC*, S.D.Ohio Case No. 2:12-CV-00605, 2013 WL 4041772 (Aug. 8, 2013).

## IV. Conclusion

Tolling is required when the validity of an oil and gas lease is challenged. "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." (Citations omitted.) *Jicarilla*, *supra*, at 241. Beck Energy respectfully requests the Court grant its motion to toll. Beck Energy proposes that the tolling period commence on January 28, 2015, the date this Court agreed to hear the *Hupp* appeal and terminate on the date on which a motion for reconsideration may be filed under S.Ct.Prac.R. 18.02. Beck Energy further proposes that at the conclusion of the tolling period, Beck Energy, and any successors and/or assigns, should be granted as much time to meet any and all obligations under the oil and gas Lease(s) as it had as of October 1, 2012. During the tolling period, Beck Energy would not drill any wells pursuant to the oil and gas Leases tolled.

Respectfully submitted,

*/s/ Scott M. Zurakowski*

Scott M. Zurakowski (0069040),
COUNSEL OF RECORD
William G. Williams (0013107),
Gregory W. Watts (0082127),
Aletha M. Carver (0059157), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/PO Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com; bwilliams@kwgd.com;
gwatts@kwgd.com; acarver@kwgd.com
COUNSEL FOR DEFENDANT/APPELLEE/
INTERVENING RESPONDENT BECK ENERGY
CORPORATION

## PROOF OF SERVICE

I hereby certify that copies of *Appellee/Intervening Respondent Beck Energy Corporation's Motion to Toll All Terms of the Oil and Gas Leases* was served by United States mail, pursuant to S.Ct.Prac.R. 3.11(B), this 11th day of February, 2015 upon:

Richard V. Zurz, Jr., Esq.
Mark A. Ropchock, Esq.
SLATER & ZURZ, LLP
One Cascade Plaza, Suite 2210
Akron, Ohio 44308-1135
*Attorneys for Plaintiffs/Appellants Clyde A. Hupp, et al.*

Clair E. Dickinson, Esq.
BROUSE MCDOWELL
388 South Main Street, Suite 500
Akron, Ohio 44311
*Attorneys for Defendant/Appellee XTO Energy Inc.*

Daniel H. Plumly, Esq.
Andrew P. Lycans, Esq.
CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD.
225 North Market Street, PO Box 599
Wooster, Ohio 44691
*Counsel for Relator Claugus Family Farm, L.P.*

James W. Peters, Esq.
PETERS LAW OFFICES
107 Woodsfield, Ohio 43793
*Attorneys for Plaintiffs/Appellants Clyde A. Hupp, et al.*

Kevin C. Abbott, Esq.
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222-2716
*Attorneys for Defendant/Appellee XTO Energy Inc.*

Michael DeWine, Esq.
Ohio Attorney General
Sarah Pierce, Esq.
Tiffany Carwile, Esq.
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Counsel for Respondents, The Seventh District Court of Appeals, Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary DeGenero

*/s/ Scott M. Zurakowski*
Scott M. Zurakowski (0069040),
COUNSEL OF RECORD
William G. Williams (0013107),
Gregory W. Watts (0082127),
Aletha M. Carver (0059157), of
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.
COUNSEL FOR DEFENDANT/APPELLEE/ INTERVENING RESPONDENT BECK ENERGY CORPORATION

FILED
SEP 26 2013
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

| | | |
|---|---|---|
| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | ) | |
| MONROE COUNTY | ) SS: | SEVENTH DISTRICT |
| CLYDE A. HUPP, et al., | ) | |
| | ) | |
| PLAINTIFFS-APPELLEES, | ) | CASE NOS. 12 MO 6, 13 MO 3 |
| | ) | 13 MO 11 |
| VS. | ) | |
| | ) | |
| BECK ENERGY CORPORATION, | ) | JUDGMENT ENTRY |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

This matter came on for hearing before this Court on September 23, 2013 on three pending motions: 1) Appellant Beck Energy Corporation's August 16, 2013 emergency motion for injunctive relief pursuant to App.R. 7; 2) Beck's August 30, 2013 emergency motion to set aside supersedeas bond; and 3) The Individual Landowners' September 12, 2013 motion to dismiss this appeal on the grounds of mootness.

On consideration of the parties' respective filings, the responses thereto and their arguments before this Court it is ORDERED:

1. The trial court's August 16, 2013 stay order is hereby modified and continued. The requirement of posting bond is hereby set aside; no bond is required. This stay of execution applies to the named plaintiffs and proposed defined class members for the following judgments: (1) the July 12, 2012 decision granting summary judgment in the Landowners' favor, including the journalization of the trial court's decision on July 31, 2012; (2) the trial court's February 8, 2013 judgment granting class certification; and (3) the trial court's June 10, 2013 judgment defining the class and finding Beck Energy's counterclaims moot and barred by res judicata.
2. The trial court's August 2, 2013, order tolling the lease terms as to the named plaintiffs only is hereby modified and continued. The lease terms are also tolled as to the proposed defined class members. The

EXHIBIT A

tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

3. The Motion to Dismiss is denied.

Consistent with this Court's September 16, 2013 order setting a briefing schedule in these consolidated appeals, oral argument on the merits is tentatively set for November 20, 2013 before this Court.

All until further order of this Court.

JUDGE GENE DONOFRIO

JUDGE JOSEPH J. VUKOVICH

JUDGE MARY DeGENARO

2014 OCT 16 AM 11:27
...TH ANN ROSE
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS**
**MONROE COUNTY, OHIO**

| | |
|---|---|
| **CLYDE A. HUPP, et al.,**<br><br>Plaintiffs,<br><br>vs.<br><br>**BECK ENERGY CORPORATION,**<br><br>Defendant. | CASE NO. 2011-345<br><br>JUDGE LANE<br>*(by assignment)* |

## JOINT STIPULATION REGARDING TOLLING AGREEMENT

On September 26, 2014, the Seventh District Court of Appeals issued its decision in *Hupp v. Beck Energy Corp.*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255. During the pendency of this appeal, the court of appeals issued a Judgment Entry on September 26, 2013, tolling the lease terms as to the class action Plaintiffs.

The court of appeals commenced the tolling period for all leases from October 1, 2012, the date Beck Energy first filed a motion to toll the leases in the trial court. The court of appeals ordered the tolling order to continue during the pendency of all appeals in the court of appeals and, in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. The court of appeals further ordered that at the expiration of the tolling period, Beck Energy, and any successors and/or assigns, shall have as



**EXHIBIT B**

much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

The class action Plaintiffs and Beck Energy Corporation hereby stipulate that the terms of the leases of the members of Plaintiff class are tolled during the period between the issuance of the Seventh District's opinion on September 26, 2014, and the filing of a timely appeal to the Ohio Supreme Court or, in the event no timely appeal is filed to the Ohio Supreme Court, until November 10, 2014, the last day upon which a timely appeal to the Ohio Supreme Court can be filed. If a timely appeal is filed with the Ohio Supreme Court, the tolling will continue until the Ohio Supreme Court accepts or declines jurisdiction, as originally ordered by the Seventh District Court of Appeals. The parties further stipulate that at the end of the tolling period, Beck Energy Corporation, and any successors and/or assigns, shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012. This stipulation shall in no way prohibit or alter the Supreme Court's ability to modify or vacate the tolling order in the within case or any other action.

*Per Telephone Approval October 10, 2014*

Mark A. Ropchock (0029823)
Slater & Zurz
One Cascade Plaza, Suite 2210
Akron, Ohio 44308-1135

Scott M. Zurakowski

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/PO Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
szurakowski@kwgd.com
ATTORNEYS FOR DEFENDANT

## PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on October 14, 2014, pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

Richard V. Zurz, Jr., Esq.
Mark A. Ropchock, Esq.
Slater & Zurz
One Cascade Plaza, Suite 2210
Akron OH 44308-1135

James W. Peters, Esq.
Peters Law Offices
107 West Court Street
Woodsfield OH 43793

William J. Taylor, Esq.
Kincaid, Taylor & Greer
50 North 4th Street
Zanesville OH 43701

Clair E. Dickinson, Esq.
Brouse McDowell
388 South Main Street, Suite 500
Akron OH 44311

Andrew J. Pollis, Esq.
1305 Yellowstone
Cleveland OH 44121

Kevin C. Abbott, Esq.
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh PA 15222-2716

Scott M. Zurakowski

Scott M. Zurakowski (0069040), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR DEFENDANT