

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al.)	
	)	Case No. 2014-1933
Plaintiffs-Appellants)	
)	
vs.	)	On Appeal from the Monroe County
	)	Court of Appeals
BECK ENERGY CORPORATION)	
	)	Seventh Appellate District
Defendant-Appellee)	
	)	Case Nos. 12 MO 6
and	)	13 MO 2
	)	13 MO 3
XTO ENERGY, INC.	)	13 MO 11
)	
Proposed Intervenor-Appellee)	
)	
-and-)	
)	
STATE OF OHIO EX REL. CLAUGUS	)	CASE NO. 2014-423
FAMILY FARM, L.P.)	
	)	Original Action in Prohibition
Relator	)	and Mandamus
)	
vs.)	
)	
SEVENTH DISTRICT COURT OF)	
APPEALS, et al.)	
)	
Respondents)	

**COMBINED RESPONSE OF APPELLANTS CLYDE A. HUPP, ET AL.
TO MOTIONS TO TOLL CLASS MEMBERS' LEASES FILED
BY APPELLEE/RESPONDENT BECK ENERGY CORPORATION
AND XTO ENERGY, INC.**

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I. FACTS AND PROCEDURAL BACKGROUND

Appellants Clyde A. Hupp, et al. commenced this action against Defendant-Appellee Beck Energy Corporation (Beck) on September 14, 2011 seeking, inter alia, a declaration that certain form oil and gas leases between Ohio landowners and Beck are void as perpetual leases which can be extended in perpetuity without any development of the oil and gas reserves. On September 29 and 30, 2011, Appellants filed their first and second amended class action complaints.¹ In a July 12, 2012 Decision on Pending Motions, the trial court entered summary judgment declaring Beck's "Form G&T 83" leases void ab initio.² That judgment was journalized on July 31, 2012.³

On July 19, 2012, Appellants moved for class action certification.⁴ In opposing certification, Beck observed that the trial court's summary judgment in favor of the named plaintiffs would inure to the benefit of all potential class members.⁵ On August 28, 2012, Beck filed a premature appeal from the summary judgment (case no. 12 MO 6).⁶

Not until October 1, 2012—after the leases had been declared void and an appeal was pending—did Beck file a motion to toll a single lease. Despite its awareness of the

¹ Amended class action complaint, trial court docket no. 9, Sept. 29, 2011; second amended class action complaint, trial court docket no. 10, Sept. 30, 2011.

² Decision, trial court docket no. 45, July 12, 2012.

³ Journal entry, trial court docket no. 52, Jul. 31, 2012.

⁴ Motion for Class Action Certification, trial court docket no. 46, July 19, 2012.

⁵ Memorandum in Opposition to Class Action Certification, trial court docket no. 55, filed August 2, 2012, at 3-4.

⁶ Notice of Appeal, trial court docket no. 63, Aug. 28, 2012; Journal Entry, case no. 12 MO 6, Sept. 10, 2012.

applicability of the trial court's summary judgment to potential class members' leases, Beck's motion was limited to the three leases it had entered with the five named plaintiffs.⁷

On February 8, 2013, the trial court certified this case as a Civ.R. 23(B)(2) class action.⁸ On March 7, 2013, Beck appealed from the certification decision, in case no. 13 MO 3.⁹ The next day, on March 8, 2013, Beck questioned the finality of the trial court's summary judgment and certification decisions.¹⁰ Beck made no reference to its then-pending motion to toll the named plaintiffs' leases. Moreover, Beck made no request that any class members' leases be tolled.

On April 19, 2013, the Court of Appeals remanded the case to the trial court to take action in aid of the appeal.¹¹ In a June 10, 2013 journal entry, the trial court further defined the class, and specified that its prior rulings applied to the class.¹² The trial court made no determination as to the motion to toll the named plaintiffs' leases in its June 10, 2013 entry.

Beck instituted two appeals from the trial court's June 10, 2013 judgment: case no. 13 MO 11, filed July 3, challenging the class definition, and case no. 13 MO 12, filed July 10, asserting that by rendering final judgment without ruling on Beck's 2012 motion to toll

⁷ Motion to Toll, trial court docket no. 89, filed Oct. 1, 2012.

⁸ Decision and Order on Plaintiffs' Motion for Class Action Certification, trial court docket no. 116, Feb. 8, 2013.

⁹ Notice of Appeal, trial court docket no. 126, Mar. 7, 2013.

¹⁰ Notice of Potential Non-final Appealable Orders, case no. 12 MO 6, docket no. 18, filed March 8, 2013; Beck's Reply in Support of Potential Non-final Appealable Orders, case no. 12 MO 6, docket no. 23, filed March 26, 2013.

¹¹ Judgment Entry, case no. 12 MO 6, docket no. 33, Apr. 19, 2013.

¹² Journal Entry, trial court docket no. 142, June 10, 2013.

the named plaintiffs' leases, the court had implicitly denied that motion.¹³

It was not until July 16, 2013, after appealing the trial court's failure to rule on its 2012 motion to toll the named plaintiffs' leases, that Beck finally moved the trial court to toll the class members' leases.¹⁴ On August 2, 2013, without a remand or prompting from the Court of Appeals, the trial court granted Beck's 2012 motion to toll the named plaintiffs' leases. As to Beck's July 16, 2013 request for an order tolling all class members' leases, the trial court stated that "[i]f [Beck] desires to have this order expanded it can present that issue to the Court of Appeals."¹⁵

On July 22, Appellants responded to Beck's motion to toll all class members' leases, noting that (1) Beck had not moved to toll any leases, including those of the named plaintiffs, until three months after the form lease had been declared void; (2) Beck had not requested that class members' leases be tolled until July 16, 2013, five weeks after the trial court's June 10, 2013 order defining the class, which had rendered the judgments voiding the leases and certifying the class final; and (3) Beck's appeal of the trial court's June 10, 2013 order implicitly denying the motion to toll the named plaintiffs' leases in case no. 13 MO 12 divested the trial court of jurisdiction to address tolling.¹⁶

Finally, in an "Emergency Motion for Injunctive Relief Pursuant to App.R. 7(A)," Beck

¹³ See Motion to Toll as to all class members' leases, trial court docket no. 155, filed July 16, 2013. The Court of Appeals sua sponte dismissed case no. 13 MO 12, indicating that Beck could assert its arguments in case no. 13 MO 11.

¹⁴ Motion to Toll, trial court docket no. 155, filed July 16, 2013.

¹⁵ Decision and Entry, trial court docket no. 161, Aug. 2, 2013, at 2.

¹⁶ Response to Motion to Toll, trial court docket no. 158, July 22, 2013 at 2, 3, 4.

sought an injunction from the Court of Appeals tolling all class members' leases.¹⁷ In the tolling order giving rise to *State ex rel Claugus Family Farm v. Seventh Dist. Court of Appeals, et al.*, filed on September 26, 2013 in case nos. 12 MO 6, 13 MO 3 and 13 MO 11, the Court of Appeals tolled the leases of all defined class members, retroactive to October 1, 2012, and continuing until this Court accepted or declined jurisdiction in the event of a timely appeal.¹⁸

To date, no notice of this lawsuit has been given to the class. However, in that Beck mails quarterly delay rental payments to all lessors on whose land no well has been commenced (i.e., all class members), the names and addresses of all class members should be readily ascertainable from Beck's records.¹⁹

On July 26, 2012, Appellants submitted discovery requests to Beck seeking information as to the identities of Beck's lessors who were members of the putative class, but Beck declined to provide that information.²⁰ On May 3, 2013, after the trial court had certified the class but before certification had become final, Appellants moved the trial court for an order compelling Beck to respond to those discovery requests and thereby enable class counsel and the trial court to communicate with class members.²¹ On May 20, 2013,

¹⁷ Emergency Motion, case no. 13 MO 3, docket no. 24, filed Aug. 16, 2013.

¹⁸ Judgment Entry, case no. 12 MO 6, docket no. 58; case no. 13 MO 3, docket no. 34, Sept. 26, 2013.

¹⁹ See Transcript of Motions Hearing, July 23, 2013, at 9-10, filed Aug. 29, 2013, trial court docket nos. 170, 171.

²⁰ Notice of Service, trial court docket no. 51, July 26, 2012.

²¹ Motion to Compel, trial court docket no. 131, May 3, 2012.

Beck filed a memorandum opposing the motion to compel.²² On May 22, 2013, Appellants responded to Beck's memorandum in opposition, again indicating that the requested information would enable communication with class members so that they could protect their interests.²³ However, in an order issued on May 31, 2013, the trial court denied the motion to compel.²⁴

On June 24, 2013, after the order certifying the class had been made final by the trial court's June 10, 2013 journal entry, Appellants moved the trial court to approve a proposed notice to the class and establish a process for notifying the class of this litigation.²⁵ Beck vigorously opposed that motion asserting, inter alia, that no notice is required in a Civ.R. 23(B)(2) class action, that the trial court lacked jurisdiction to address the question of notice, and that any notice would confuse class members.²⁶ Appellants responded that the absence of notice allowed Beck to deal with class members without informing class counsel or the court; that the trial court had jurisdiction to address notice; and that the purpose of the proposed notice was to protect class members by affording them an opportunity to exercise their rights.²⁷ On August 8, 2013, the trial court denied

²² Memorandum in Opposition to Motion to Compel, trial court docket no. 137, May 20, 2013.

²³ Reply to Memorandum in Opp., trial court docket no. 138, May 22, 2013.

²⁴ Decision and Entry, trial court docket no. 141, May 31, 2013.

²⁵ Motion for Approval of Notice, trial court docket no. 144, June 24, 2013.

²⁶ Memorandum in Opposition, trial court docket no. 150, July 9, 2013.

²⁷ Reply to Memorandum in Opposition, trial court docket no. 157, filed July 22, 2013.

Appellants' motion to approve notice and establish a procedure for notifying the class.²⁸

Now, after succeeding in its efforts to bar class members from receiving any notice of this action or of the impact of this litigation on their property rights and legal obligations relative to the leases at issue, Beck again seeks to toll the class members' leases until this case is concluded.

II. LAW AND ARGUMENT

A. AS XTO IS NOT A PARTY, XTO'S "MOTION FOR FURTHER TOLLING" SHOULD BE STRICKEN.

XTO Energy, Inc. (XTO) maintains that it has an interest in these proceedings because it purchased the "deep rights" in the Beck leases. Motion for Further Tolling at 9. XTO acknowledges that it attempted to intervene in the trial court proceedings. *Id.* Although XTO purchased its interest and was aware of this case before any ruling on the merits or certification had been issued, XTO made no effort to intervene until September 7, 2012—after summary judgment voiding the leases had been granted to Appellants. Motion to Intervene, trial court docket no. 65, Sept. 7, 2012; Decision and Order (on XTO's Motion to Intervene), trial court docket no. 118, Feb. 8, 2013, at 2.

XTO also acknowledges that its motion to intervene was denied. Motion for Further Tolling at 9. When XTO appealed the denial of its motion to intervene, the Court of Appeals held that in light of its reversal of the trial court's judgment voiding the leases, XTO's appeal was moot. XTO has not appealed that ruling. Hence, XTO is nothing more than an unsuccessful applicant for intervention. Because XTO is not a party, it has no standing to

²⁸ Decision and Entry, trial court docket no. 163, Aug. 8, 2013.

file motions seeking any relief herein. Accordingly, XTO's Motion for Further Tolling should be stricken.

B. BECAUSE TOLLING IS AN EQUITABLE REMEDY, BECK'S PERSISTENT FAILURE TO DILIGENTLY PURSUE THAT REMEDY MILITATES AGAINST GRANTING SAID RELIEF.

Tolling is an equitable remedy. *E.g.*, *Cardinale v. Ottawa Regional Planning Comm.*, 89 Ohio App.3d 747, 754, 627 N.E.2d 611 (6th Dist. 1993); *Byers v. Robinson*, 10th Dist. Franklin No. 08AP-204, 2008-Ohio-4833. "[W]here the rights of the parties are not clearly defined in law, broad equitable principles of fairness apply and will determine the outcome of each case individually." *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, 781 N.E.2d 1023, ¶22 (7th Dist.); *Byers*, ¶57 (quoting *McCarthy*). The time within which one must comply with contractual conditions may be tolled when doing so is equitable. *Cardinale* at 754; *Byers*, ¶52. However, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Byers*, ¶55.

In *Cardinale*, the plaintiff developer was prevented from satisfying certain project conditions by the legal intervention of third parties who filed an administrative appeal challenging the project's legitimacy. The developer argued that litigation preventing timely performance should automatically toll the time for performance until final resolution of the lawsuit. The appellate court held that although the developer's argument for automatic tolling was persuasive, "the developer's time within which to comply with the conditions should be tolled *when it is equitable* to do so." (Emphasis added.) 89 Ohio App.3d at 753-54, 627 N.E.2d 611.

In some instances, a developer might not be proceeding with due diligence, while

in other instances, an intervening change occurring over time might prejudice other parties. *Id.* at 753. See also *In re Certificate of Need Application of Holzer Consol. Health Sys. v. Ohio Dept. Of Health*, 10th Dist. Franklin No. 03AP1020, 2004-Ohio-5533, ¶16 (upholding tolling of administrative rule where diligent applicant was hindered by an affected party's objection; tolling effectuated the rule's purpose of requiring diligence and a full and fair review).

Like the developer in *Cardinale*, Beck advocates that tolling should be automatic whenever a lessor challenges an oil and gas lease. Beck overlooks the fact that traditionally, one who seeks equity must do equity. Beck's last-minute efforts to impose tolling on both the named plaintiffs and the absent class members—while obstructing Appellants' efforts to identify class members and notify them of this lawsuit—affected the lower courts' ability to fashion a just and equitable remedy for all parties, in light of all the facts and circumstances.

In the instant case, Beck's dilatory effort to toll the leases reflects its conduct throughout this litigation. The lawsuit was filed because Beck made no effort to develop Appellants' and class members' lands. After Appellants moved for summary judgment, Beck filed no response for over two months, until the court set a response deadline. See trial court docket nos. 25, Feb. 16, 2012; 40, Apr. 25, 2012; 41, Apr. 30, 2012. After Beck assigned the "deep rights" to XTO, neither Beck nor XTO took any action to add XTO as a party until after the court had declared the Leases void, at which point XTO moved to intervene and with Beck, sought to relitigate that judgment, insinuating that it was Appellants' fault that XTO had not been made a party. See discussion in section II.A., *supra*; Brief of Proposed Intervenor-Appellant XTO Energy, Inc., case no. 13 MO 2, docket

no. 21, May 1, 2013, at 9.

Had Beck timely requested that all class members' leases be tolled shortly after Appellants filed their amended class action complaint, Appellants might have adopted a different litigation strategy, possibly requesting that the trial court immediately provide notice upon certification.²⁹ Had tolling been requested before the class was certified and the trial court's certification decisions appealed by Beck, the trial court might have granted certification under Civ.R. 23(B)(3) in addition to or instead of Civ.R. 23(B)(2), thereby ensuring that notice or an option to opt out be provided. Alternatively, the trial court could have declined to certify the class, thereby avoiding the problem of tolling without notice. By waiting to request tolling of absent class members until the trial court's decisions regarding lease validity and certification were final and on appeal, Beck deprived the trial court of the ability to consider tolling and certification in conjunction, balance the interests and equities of both, and make decisions which would have avoided any subsequent inequity of tolling of absent class members without notice. The trial court recognized the inequity of tolling of a certified class of absent members leases without notice in light of Beck's litigation conduct, and declined to do so.

Had Appellants and the trial court been aware of Beck's intent to request that all the leases be tolled, provisions for notice—in particular, disclosure of the identities of class

²⁹ Although notice to members of a Civ.R. 23(B)(2) class is not expressly required, Civ.R. 23(D)(2) applies equally to Civ.R. 23(B)(3) cases and Civ.R. 23(B)(2) cases. See Civ.R. 23(C)(2); Civ.R. 23(D)(2); *Intl. Union, United Auto., Aerospace, and Agricultural Implement Workers v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007). Civ.R. 23(D)(2) expressly empowers a court to “make appropriate orders * * * requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given * * * to some or all of the members of any step in the action[.]”

members—might have been required early in the case. Even without the right to opt out, class members with notice could have presented their concerns to the court, and could have taken steps to avoid unanticipated consequences arising from a lease extending years beyond what Beck asserts is the expiration date.³⁰ To grant Beck’s motion to toll class members’ leases would work an undue hardship upon class members, and would contravene fundamental principles of fairness and equity.

C. BOTH THE TOLLING ORDER ISSUED BY THE COURT OF APPEALS AND THAT PROPOSED BY BECK HEREIN ARE FUNDAMENTALLY INEQUITABLE, AND SHOULD NOT BE IMPOSED UPON THE CLASS.

1. The tolling of class members’ leases is inherently inequitable.

In lessors’ suits against oil and gas lessees, courts have indicated that tolling is not intended to punish the lessor for bringing an action against the lessee, but instead serves to restore the parties to their previous positions. *E.g., Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir. 1982). The general rule is that when a lessor “actively asserts to a lessee that his lease is terminated or subject to cancellation,” the lessee’s obligations to the lessor are suspended while the lessor’s claims are pending. *Id.* Termination and cancellation imply that a dispute has arisen under a valid lease. In the instant case, Appellants’ claim is that the Beck leases are void.

It is disingenuous to assume, as Beck insists, that a tolling order will leave all parties

³⁰ Appellants’ challenge to the leases is based upon the perpetual character of the leases, which the lessee can extend in perpetuity with no development by the continued payment of “delay rentals,” which under the language of the lease can extend the lease until the commencement of a well—an accomplishment for which there is no set deadline. If the leases are perpetual, no tolling is necessary.

to this action in the same position that they occupied prior to the commencement of litigation. Beck is a corporation that is a party to hundreds of oil and gas leases in Ohio, while most class members are landowners with only one parcel of real estate from which oil or gas may be capable of production. Moreover, since this lawsuit was filed, Beck has already received tens of millions of dollars from the sale of the “deep rights” to XTO, while class members have received nothing beyond their one- to five-dollars-per-acre delay rentals.

Beck’s loss of time to develop its leaseholds while the validity of the leases is being litigated is less burdensome to Beck than the loss of use of one’s entire property is to one class member. If no leases are tolled, and if the Court upholds the appellate court’s determination that the leases expire after a ten-year term unless a well is commenced or completed, some Beck leases will expire before this lawsuit is resolved. However, Beck’s loss of its leases pales in comparison to an individual class member’s lost opportunity to benefit from his or her entire property— particularly if the leases are ultimately found to be void.

Individual class members’ circumstances may change, through, e.g., death or financial hardship, such that they may not benefit even if this Court reinstates the trial court’s judgment that the leases are void. Tolling without notice can only exacerbate the potential harm that may befall absent class members, who risk legal entanglements by leasing their properties to other drillers believing that their Beck leases have lapsed.

Beck now maintains that unless all the leases are tolled, it cannot develop its investment without the risk of loss should the leases be declared invalid. However, when it sought a tolling order in the trial court after the lease had been declared void, Beck

expressed a different view:

The oil and gas leases should be tolled, as against both Plaintiffs and Beck Energy as long as the [trial court's] finding that the leases are void ab initio remains the law of the case. However, if this [trial court], or the court of appeals, vacates that finding, and the leases are no longer considered void ab initio, Beck Energy should be permitted, during the pendency of the litigation, to take whatever action it deems appropriate under the oil and gas leases at issue. Such action would include the ability to drill wells, consolidate property into units, and any other action that it [sic] lawfully permitted under the terms of the leases.

Beck Energy would knowingly take such action, at its own risk, using its business judgment. Further, if prohibited from taking such action, Beck Energy may find itself in a position in which it has no ability to drill and generate revenue on these oil and gas leases * * *.

Reply to Plaintiffs' Response to Motion to Toll, trial court docket no. 108, Oct. 17, 2012, at

3. Needless to say, a class member whose lease is tolled without notice and who may believe that the Beck Lease has expired cannot use his or her "business judgment" in determining whether to lease to another driller.

Overlooked in the question of tolling is the fact that Beck selected the language in the challenged form lease. The Court of Appeals' interpretation of that lease, finding that it is not perpetual because it has a fixed ten-year primary term during which the lessee must at least commence development if not complete a producing well—based on language that appears nowhere in the lease—depends upon an understanding of "traditional oil and gas jurisprudence" with which Beck's lessors were not likely to be familiar.

Had Beck chosen language explicitly delineating the parties' rights and obligations, without the need to resort to case law construing other leases, the need for litigation would have been minimized. It is inequitable to penalize innocent lessors who question an ambiguous and poorly drafted lease while shielding the party responsible for that lease

from the consequences of its own poor choices. Class members should not be made to bear a greater burden than Beck as a result of the language Beck elected to employ.

2. In fashioning any order requiring or dispensing with the tolling of class members' leases, this Court is not bound by the September 26, 2013 tolling order issued by the Court of Appeals.

In a joint stipulation clarifying the duration of the Court of Appeals' tolling order following that court's September 26, 2014 decision on the merits, Appellants and Beck agreed that "[t]his 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." Joint Stipulation, trial court docket no. 175, filed Oct. 16, 2014, at 2. In that the stipulation applies to "any other action," its applicability is not limited to a direct appeal to this Court by Appellants herein and can be utilized in fashioning a response to the present request for tolling. Based on this authority, this court should deny Beck's motion to toll, and vacate the former order of the Court of Appeals.

This Court has the power to vacate the 7th District Order on Tolling. An appellate court cannot limit this Court's inherent power to fashion its own remedies based upon law or equity: this Court is and must be the final arbiter within this State of any controversy over which it has jurisdiction. The parties' stipulations regarding tolling reflect that reality. Should this Court elect to enter an order governing tolling, the Court is not bound to simply rubber-stamp the appellate court's order as to all leases and extend the duration and terms of the tolling period set by the Court of Appeals.

The trial court balanced the equities by declining to toll absent class members' leases after it refused to order notice of this litigation to the class. The appellate court's ruling, tolling all leases from the date on which Beck first moved to toll only the named

plaintiffs' leases, arose from Beck's independent motion for "emergency" injunctive relief—not from an appeal from the trial court's ruling. Just as the Court of Appeals issued an independent ruling as to tolling without deference to the trial court's determination or any examination of the surrounding circumstances—most notably, the lack of notice to the class and the inability of class counsel to provide such notice without disclosure of the absent class members' identities—this Court has the power to address tolling without deference to the dictates of the Court of Appeals.

It was patently inequitable for the Court of Appeals to resurrect what at the time of its tolling order were void leases, with no notice to the affected class members. For this Court to extend that tolling order would exacerbate that inequity. In fairness, this Court should correct that inequity and vacate the Court of Appeals' tolling order and deny Beck's motion to toll.

3. If this court is inclined to continue tolling the absent class members' leases said ruling should not be made until after this Court has rendered judgment on the merits.

Federal courts in Ohio have found tolling appropriate following a decision on the merits. *Feisley Farms Family, L.P. v. Hess Ohio Resources, LLC*, No. 2:14-CV-146, 2014 U.S. Dist. LEXIS 118519 (S.D. Ohio Aug. 25, 2014); *Griffith v. Hess Corp.*, No. 2:14-CV-00337, 2014 U.S. Dist. LEXIS 50468 (S.D. Ohio Apr. 11, 2014); *Cameron v. Hess Corp.*, No. 2:12-CV-00168, 2014 U.S. Dist. LEXIS 56510 (S.D. Ohio Apr. 23, 2014). See also *Yoskey v. Eric Petroleum Corp.*, 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790, ¶44 (citing case wherein tolling was found equitable after lessee prevailed on the merits). In this case, the Court of Appeals tolled the class members' leases after Appellants—not the

lessee—had prevailed on the merits, and the trial court had declared the leases void.³¹

Alternatively and in that this Court will determine the merits herein, Appellants suggest that consistent with federal case law should this court be inclined to continue tolling, the Court should at least defer that decision on tolling until the Court has reached a determination as to whether the Beck leases are valid or void.

III. CONCLUSION

It would be inequitable and unfair to reward Beck for its dilatory and haphazard efforts to toll the absent class members' leases while at the same time obstructing Appellants' attempts to notify the class members of this lawsuit and its potential effect upon their property rights and legal obligations relative to their leases. Accordingly, Appellants respectfully request that the Court vacate the Court of Appeals' tolling order and either deny Beck's Motion to Toll All Terms of the Oil and Gas Leases, or in the alternative, defer ruling on the motion until after deciding the merits herein.

³¹ At that point, there was nothing to toll. A void contract does not exist; it is as if it never existed. See *Benson v. Rosler*, 19 Ohio St.3d 41, 46, 482 N.E.2d 599 (1985) (Celebrezze, J., dissenting); *Medical Protective Co. v. Fragatos*, 190 Ohio App.3d 114, 2010-Ohio-4487, 940 N.E.2d 1011, ¶29 (8th Dist.). Tolling of a lease is contingent upon a finding that the lease is valid and enforceable. *Cameron v. Hess Corp.*, S.D. Ohio No. 2:12-CV-00168, 2014 U.S. Dist. LEXIS 13080, *15 (Feb. 3, 2014). Hence, it was inequitable both to revive void leases by ordering that they be tolled and to do so without notice to the absent class members.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Appellants to Motions to Toll Class Members' Leases was served by regular U.S. mail on this 23 day of February, 2015, to each of the following:

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