IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al. Plaintiffs-Appellants vs. BECK ENERGY CORPORATION Defendant-Appellee and XTO ENERGY, INC. Proposed Intervenor-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 Appeals Seventh Appellate District Case Nos. 12 MO 6 13 MO 2 13 MO 3 13 MO 11 CASE NO. 2014-423 Original Action in Prohibition and Mandamus

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STATEMENT OF FACTS

A. Underlying Facts and Procedural History

Appellants[1] Larry A. and Lori Hustack, Lawrence and Michelle Hubbard, and David Majors own separate parcels of real estate in Monroe County. Second Am. Complaint (hereinafter "Cplt."), trial court docket no. (hereinafter "tcd") 10, Sept. 30, 2011, ¶2-5. Between 2003 and 2008, they or their predecessors entered into oil and gas leases with Appellee Beck Energy Corporation (Beck) as lessee. *Id.*, ¶6-8, 11-18. The leases (hereinafter, "Lease(s)"), designated "G&T (83)," are virtually identical, preprinted form leases with blank lines for the lessors' names, addresses, date, description of the leasehold, the period during which a well was to be commenced unless a delay rental was paid, and the amount of the delay rental. *See* Leases, attached to Cplt., tcd 10.

Appellants instituted this action on September 14, 2011, seeking (1) a declaratory judgment (a) that the Leases are void as against public policy as perpetual leases under which no development is required, and (b) that the Leases have been forfeited as a result of Beck's breach of the implied covenant to develop the land; and (2) judgment quieting title to their land. Cplt., tcd 10, ¶20-21; Decision on Pending Motions, tcd 45, Jul. 12, 2012, at 10. On September 29 and 30, Appellants amended their original complaint to assert a class action on behalf of over 200 Monroe County landowners whose lands were subject to form G&T (83) Leases, but on which no development had taken place.[2] Am. Class

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[1]The term "Appellants" refers to the named plaintiffs in this class action lawsuit. "Lessors" and "class members" refer to both the named plaintiffs and members of the class ultimately certified by the trial court.

[2]The original lead plaintiffs, Clyde A. and Molly A. Hupp, and another named plaintiff, Donald W. Yonley, were removed as plaintiffs when the complaint was amended.

Action Cplt., tcd 9, Sept. 29, 2012; Second Am. Cplt., tcd 10, Sept. 30, 2012.

On November 30, 2011, Beck moved to dismiss on technical grounds. Mot. To Dismiss, tcd 16; Brief in Support, tcd 17; App. Op. ¶14. On December 20, 2011, Beck assigned the "deep rights," below 3,860 feet, to Exxon Mobil Corp., in care of its affiliate XTO Energy, Inc. (XTO), headquartered in Texas, for over $84,000,000.00, of which the lessors received nothing. Decision and Order on Mot. to Intervene, tcd 118, Feb. 8, 2013, at 2-3; Brief of Appellant, App. No. 12 MO 6, app. court docket no. (hereinafter "12 MO 6 acd") 19, Mar. 15, 2013, at 33; Assignment and Bill of Sale, attached as Exhibit E to Plaintiffs' Brief in Support of Motion for Summary Judgment (MSJ), tcd 26, Feb. 16, 2012, at 1. Beck retained a royalty interest in the Leases, and agreed to warrant and defend title against any claims arising "by, through, or under" Beck. Assignment and Bill of Sale at 2.

On February 16, 2012, Appellants moved for summary judgment. MSJ, tcd 25, 26. The trial court granted Appellants' motion and denied Beck's motion to dismiss on July 31, 2012. Decision (on Pending Motions), tcd 45, July 12, 2012; Journal Entry, tcd 52, July 31, 2012. Beck appealed this judgment in case no. 12 MO 6. On July 19, 2012, Appellants moved for class certification. Mot. For Class Action Cert., tcd 469.[3] The trial court certified this case as a Civ.R. 23(B)(2) class action[4] on February 8, 2013, which Beck appealed unsuccessfully in case nos. 13 MO 3 and 13 MO 11, but has not raised as an issue in this

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[3]Thereafter, XTO unsuccessfully moved to intervene. Mot. to Intervene, tcd 65, Sept. 7, 2012; Decision and Order, tcd 118, Feb. 8, 2013. XTO appealed that ruling in case no. 13 MO 2, but did not appeal after the Court of Appeals declared XTO's appeal moot.

[4]On limited remand from the Court of Appeals, the trial court further defined the class as all Ohio lessors subject to a form G&T (83) Lease on whose land no preparations for drilling had occurred. Journal Entry on Partial Remand, tcd 142, June 10, 2013. Neither class certification, nor the definition of the class, is an issue in this appeal.

Court. Decision and Order, tcd 118, Feb. 8, 2013.[5]

On October 1, 2012, Beck moved to toll Appellants' leases. Motion to Toll, tcd 89. In June, 2013, Appellants unsuccessfully moved the trial court to approve a notice to the class, and sought Beck's list of those lessors to whom it was paying delay rentals, who constituted the certified class. Motion for Approval of Notice, tcd 144, June 24, 2013; Decision and Entry, tcd 163, Aug. 8, 2013. On July 16, 2013, Beck moved the trial court to toll all class members' Leases. Mot. To Toll, tcd 155. However, the trial court tolled only Appellants' Leases. Decision and Entry, tcd 161, Aug. 2, 2013.

Beck then moved the Court of Appeals for an injunction tolling all class members' Leases. Emergency Motion, App. No. 13 MO 3, app. court docket no. (hereinafter "13 MO 3 acd") 124, Aug. 16, 2013. On September 26, 2013, over Appellants' objections, the Court of Appeals ordered that all class members' Leases be tolled *retroactively* from October 1, 2012. Judgment Entry, 13 MO 3 acd 34. Finally, on September 26, 2014, the Court of Appeals entered judgment reversing the trial court's judgment voiding the Beck Leases.

Appellants filed a notice of appeal and memorandum in support of jurisdiction in this Court on November 7, 2014. On January 28, 2015, this Court accepted the appeal on Propositions of Law I and II.

B. The Leases

The stated and only purpose of the Beck Leases is "drilling, operation for, producing

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[5]The Court of Appeals consolidated appeals 12 MO 6 (challenging July 31, 2012 entry granting summary judgment), 13 MO 2 (challenging February 8, 2013 denial of XTO's motion to intervene), 13 MO 3 (challenging February 8, 2013 order granting class certification), and 13 MO 11 (challenging June 10, 2013 order refining the definition of the certified class). See Judgment Entries in each case, filed Sept. 26, 2014.

and removing oil and gas * * *." Lease, ¶1. Beck agreed to pay its Lessors, inter alia, one-eighth of the proceeds received for gas produced from the premises, amounting to a twelve and one-half percent (12.5%) royalty. Lease, ¶1, 4(B). The Lessors were additionally entitled to gas for personal use. Lease, ¶6, 10.

Although the Court of Appeals characterized the Leases as having clearly defined primary and secondary terms, the Leases do not make that distinction. The term of the Lease in the preprinted form can continue indefinitely, in perpetuity:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee 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, or as the premises shall be operated by the Lessee in the search for oil or gas* and as provided in paragraph 7 following.
>
> 3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate 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*, payments to be made quarterly *until the commencement of a well.* A well shall be deemed commenced when preparations for drilling have been commenced.

(Emphasis added.) Lease, paragraphs 2 and 3.

In Appellants' Leases, "12" was handwritten in the space indicating the number of months within which Beck was to commence a well. The space for the amount of the delay rental was filled in with amounts ranging from one to five dollars per acre per year.

If a well is drilled but either turns out to be a dry hole or is plugged, Beck may preserve its rights by paying delay rentals or an equivalent "advance royalty":

> 7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the

> Lessee shall commence another well, *or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental* as hereinabove provided.
>
> 8. In the event a well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from a producing well drilled on the premises, or *should the Lessee desire to shut in producing wells, the Lessee agrees to pay the Lessor*, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, *an advance royalty in the amount and under the terms hereinabove provided for delay rental* until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are stated, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

(Emphasis added.) Lease, ¶7, 8.

On its face, the Lease effectively immunizes Beck against forfeiture. If Beck fails to commence a well within the number of months specified in ¶3, the Lease will remain in effect if Beck pays the nominal delay rental. Beck's failure to pay rental or royalty "on any part of this lease" will not void the lease "as to any other part." Lease, ¶13. The Lease does not define the "parts" of the Lease, or specify which "parts" will or will not become void if no wells are drilled or no payments are made.

The Lease purports to grant Beck discretion to determine whether to drill:

> 9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the *further* right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessee may elect.

(Emphasis added.) Lease, ¶9. Beck also has the right to unilaterally assign or surrender the Lease, in whole or in part, without notice. Lease, ¶13, 15.

The Lease affords the lessor a right to sue Beck for breach of any "express or

implied" obligation, and specifies a procedure for the lessor to follow before filing suit:

> 17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, *either express or implied*, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty days after receipt of said notice within which to meet or to commence to meet all or any part of the breaches alleged by Lessor.

(Emphasis added.) Lease, ¶17.

At the same time, the Lease purports to disclaim all implied obligations:

> 19. * * * It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them. * * *

Lease, ¶19.

The Lease purports to establish a timetable for development. However, under the language in the Lease, Beck has the right to control all the oil and gas in or under all Lessors' property, and to develop the land or not for any reason or no reason, for a term that may extend in perpetuity as long as Beck, in its own judgment, believes that gas or oil is capable of being produced in paying quantities, and/or as long as Beck pays nominal delay rentals. Lease, ¶2, 3.

Beck may shut in a producing well and resume paying only "advance royalties" equivalent to the nominal delay rentals, for as long as Beck elects to do so. Lease, ¶8. The same is true if a well ceases to produce or if Beck is unable to market the production from a well on the premises. *Id.* Similarly, if a well is a dry hole, Beck may pay nominal delay rentals in perpetuity with no further development. Lease, ¶7. No where in the Lease is any time limitation placed upon Beck's ability to extend the Lease without any development,

and to do so without further development or production once a dry hole is drilled, once production either ceases or is deemed unmarketable, or a producing well is shut in.

In the years since the Leases were executed, no development of any kind has occurred on Appellants' or other class members' property, and no royalties have been paid to them. Affidavits of Larry A. Hustack, Lawrence Hubbard, and David W. Majors, attached as Exhibits A, B, and D, respectively, to Plaintiffs' Brief in Support of MSJ, tcd 26, Feb. 16, 2012. Appellant Larry A. Hustak telephoned Beck's offices on three separate occasions in July, 2010, June, 2011, and July, 2011, to inquire as to whether Beck intended to drill on his land. Affidavit of Larry A. Hustak, Exhibit A to Brief in Support of MSJ, ¶6. He was told that Beck "had no intentions of drilling because there is no pipeline in that part of the county." *Id.* When Mr. Hustak asked Beck to cancel his lease, Beck refused. *Id.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I

> An oil and gas lease which can be maintained indefinitely without development is a perpetual lease that is void as against public policy. That a lease purports to establish a fixed term is of no consequence if the duration of that term can be extended without development.

A. Introduction

In *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 133, 443 N.E.2d 504 (1983), this Court examined long-term mineral leases that contained no time limitation within which mining was to be commenced, but required the lessees to pay "an annual minimum rent or royalty," to be applied against anticipated royalties from future mining operations. The lessees had made the annual payments, but had not undertaken any mining operations

for over eighteen years, since the inception of the lease.

The Court noted that "the only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving * * * royalties based upon the amount of minerals derived from the land." *Id.* n.2.

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. *To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.*

(Emphasis added.) *Id.* at 134.

In cases decided prior to *Ionno*, this Court indicated that certain perpetual, no-term leases were enforceable as long as the intent to create such a lease was clear and unambiguous. *Gas Co. v. Eckert*, 70 Ohio St. 127, 139, 71 N.E. 281 (1904) (addressing common law tenancies at will); *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943) paragraph one of the syllabus (concerning rental of a storeroom); *Myers v. East Ohio Gas Co.*, 51 Ohio St.2d 121, 127, 364 N.E.2d 1369 (1977) (addressing mutual terminability of tenancies at will in the context of a gas storage agreement supplementing a pre-existing oil and gas lease).

Historically, the duration of oil and gas leases has been the subject of tension. *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees unless production was achieved early in the term, the initial term was shortened and supplemented with (1) an "unless" drilling

clause, permitting the lessee to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which a lessee could extend the exploration period for as long as he deemed payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that conveyed the premises subject to a list of conditions, one of which was the payment of rent. *Id.*

However, courts did not favor no-term leases. *Id.* One line of cases held that, because the lease failed to establish a point beyond which the lessee could not delay development, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time or forfeit the lease. *Id. See also Northup Properties v. Chesapeake Appalachia, L.L.C.*, 567 F.3d 767, 771-772 (6th Cir. 2009).

In the instant case, the trial court found that Beck's G&T (83) form Lease is a no-term, perpetual lease that the lessee can extend indefinitely without development, in violation of public policy. Decision (on Pending Motions), tcd 45, July 12, 2012, at 15, 17. The appellate court rejected that determination and reversed. Opinion of the Court of Appeals (App. Op.), ¶85, 86, 99. Based on "years of established oil and gas jurisprudence" and cases involving other leases employing different language, the Court of Appeals opined that the Beck Lease contains both a fixed, ten-year "primary term" and an indefinite "secondary term." *Id.*, ¶85, 90.

Despite the language in the Lease providing that the lessee can unilaterally extend

the lease by paying delay rentals "until the commencement of a well," and the absence of any reference to a "primary term" anywhere in the Lease, the Court of Appeals opined that (1) the lessee's ability to extend the Lease by paying delay rentals in lieu of development is limited to the purported ten-year primary term, and that (2) extensions based on the lessee's determination that oil or gas is "capable of being produced on the premises in paying quantities" can only occur if a producing well has been completed during the primary term, thereby ensuring that the Lease cannot continue in perpetuity without development. App. Op. ¶99-101.

The Court of Appeals further held *Ionno* inapplicable, concluding that the "delay rentals" under the Beck Leases are an adequate substitute for development because unlike the minimal "advance royalties" in *Ionno*, the "delay rentals" under the Beck Leases are not to be offset against future royalties. App. Op. ¶113-114.

At its core, this is a contract construction case. The key issue is whether Beck's G&T (83) form Lease, and in particular paragraphs 2, 3, 7, and 8, should be construed to be a no-term perpetual lease which can be extended indefinitely without development, at the election of the lessee, as the trial court found, or whether the Lease should be construed as a "traditional" oil and gas lease with a fixed, ten-year primary term wherein (1) the lessee's ability to extend the lease with no development–or with no further development or production after drilling a dry hole or shutting in a producing well–is limited to that primary term notwithstanding the absence of any language to that effect anywhere in the Lease, and (2) extensions based on the lessee's subjective determination that oil or gas is "capable of being produced on the premises in paying quantities" apply only if a producing well has been completed during the primary term–again, notwithstanding the

absence of any language requiring even the commencement of a well during the purported primary term–as the Court of Appeals ruled.

If this Court adopts the trial court's construction of the Lease, the next question is whether the Lease offends public policy pursuant to *Ionno*: does *Ionno* apply notwithstanding the illusion of a fixed ten-year term in the Beck Leases, unlike any provision in the *Ionno* lease, which clearly and unequivocally allowed the lessee to defer development indefinitely? Further, is *Ionno* inapplicable, as the Court of Appeals concluded, because the minimal payments in *Ionno* were termed "advance royalties," to be offset against future royalties–even though no setoff occurred in *Ionno* because no royalties were ever earned or paid–while the minimal payments under the Beck Lease are termed "delay rentals" with no provision for setoff against any future royalties?[6]

B. Construction of Oil and Gas Leases

Appellants submit that the Court of Appeals effectively rewrote the Leases based upon usages of the oil and gas industry that are in no way expressed in the Leases.

> The rights and remedies of the parties to an oil and gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.

Harris v. Ohio Oil Co., 57 Ohio St. 118, 129, 48 N.E. 502 (1897). "[A] contract is to be read as a whole and the intent of each part gathered from a consideration of the whole."

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[6]Whether the general waiver of all implied covenants in the Beck Leases satisfies *Ionno*'s requirement of an "express disclaimer of the covenant to develop" is addressed in the discussion of Proposition of Law No. II, infra.

Saunders v. Mortensen, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶16. "If it is reasonable to do so, [courts] must give effect to each provision of the contract." *Id.*

Ambiguities in contracts setting forth the parties' rights and responsibilities are to be construed against the proponent of the instrument. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* Where a contract as a whole can reasonably be interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue and must be construed against the drafter. *Mead Corp. v. ABB Power Generation, Inc.*, 319 F.3d 790, 798 (6th Cir. 2003).

In the Court of Appeals, Beck asserted that when a contract's express terms are ambiguous, "the parties should be given an opportunity to submit evidence as to their understanding of the contested terms" before the contract may be construed against the drafter. Brief of Appellant, 12 MO 6 acd 19, at 16. However, in its response to the named plaintiffs' motion for summary judgment, Beck submitted no evidentiary materials–no affidavit from Beck's employees or agents stating how the Lease had been interpreted in the past or indicating that Beck's policy was to discontinue paying delay rentals and release the Leases at the expiration of the ten-year term if no development had occurred; no affidavit as to Beck's protocol upon determining that drilling was not practicable; and no evidentiary materials disputing the affidavit from the Lessor whose Lease was not going to be released even though Beck had no intention of developing the leasehold. A court need not consider any argument on appeal that was not first raised in the trial court. *E.g.,*

P.N. Gilcrest Ltd. Partnership v. Doylestown Family Practice, Inc., 9th Dist. Wayne No. 10CA0035, 2011-Ohio-2990, ¶10.

The appellate court erred by importing terms from case law and from other leases to render the Beck Lease a time-limited, non-perpetual lease. In effect, rather than interpreting the Lease before it and further, construing the ambiguities in it against the drafter, the appellate court created a new lease, based upon usages of the oil and gas industry that were neither expressed in the Lease at issue herein in any way, nor were those usages introduced into evidence via affidavit or other parol evidence, which ultimately resulted in the Court construing the ambiguities in the lease in *Beck's* favor.

Evidence of a custom or usage is often admitted to explain a contract, to ascertain the parties' understanding of it, or to explain words or technical terms. *Kelich v. Hess Corp.*, S.D. Ohio No. 2:13-cv-140, 2014 U.S. Dist. LEXIS 77564, *17-18 (Jan. 2, 2014). "[T]o qualify as a 'usage of trade,' the use of the disputed contractual language must occur so regularly within a vocation or trade as to justify an expectation that it will be observed with respect to a particular agreement." *Id.*, *18. However, "a contract should only be interpreted consistent with a usage of trade if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage." *Id.* at *18-19.

> [T]hat an esoteric lease term has traditionally been understood one way does not, pursuant to the law of contracts, necessarily bind every oil and gas lease to that same understanding. "[A]n oil and gas lease must be determined by the terms of the written instrument, and *the law applicable to one form of lease may not be, and generally is not, applicable to another and different form.*" *Harris v. Ohio Oil Co.*, 57 Ohio St. at 129 (emphasis added). Were the Court to accept [the oil and gas company defendant's] blanket rule, the Court would be in derogation of its duty to examine the *particular contract* before

it, and the specific language and provisions contained therein, to ascertain the intention of the parties.

(Emphasis sic.) *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, N.D. Ohio No. 4:11CV02631, 2013 U.S. Dist. LEXIS 124509, *39 (Aug. 30, 2013).

C. The Beck G&T (83) form lease is a no-term perpetual lease that the lessee can unilaterally extend in perpetuity with no development.

Ignoring longstanding rules of contract construction, the Court of Appeals failed to read the Beck Lease as a whole and construe its provisions in context, resulting in that court's improper declaration, based on other cases construing different leases, that the Lease is a ten-year primary term lease under which an extension into the indefinite secondary term cannot occur unless a producing well is drilled during the primary term.

1. Contrary to the Court of Appeals' conclusion, the purportedly fixed term in the habendum clause of the G&T (83) form lease is not a "primary term" because the lessee can extend the lease beyond that term without development.

The Court of Appeals began by presuming that the ten-year period referenced in ¶2 of the Lease is a "primary term." App. Op. ¶10. That court opened its analysis as to whether the Beck Lease is a no-term lease by applying "principles" established in other, inapplicable cases wherein courts had examined other, different leases.

The Court of Appeals first cited *Am. Energy Serv. v. Lekan*, 75 Ohio App.3d 205, 598 N.E.2d 1315 (5th Dist. 1992) for the general proposition that "the habendum clause is 'two tiered. The first tier, or primary term, is of definite duration * * *. The second tier is of indefinite duration and operates to extend the Lessee's rights under the lease so long as the conditions of the secondary term are met.'" (Ellipsis in original.) App. Op. ¶87 (quoting *Lekan* at 212). However, unlike the habendum clause in the Beck Lease, the lease in

Lekan established a definitive primary term:

> It is agreed that this lease shall remain in force for a primary term of five years from this date and if lessee shall commence to drill within said primary term or any extension thereof, the said lessee shall have the right to continue drilling to completion, with reasonable diligence and said term shall extend as long thereafter as oil and gas, or either of them, is produced by lessee from said land, or from a communitized unit as hereinafter provided.

Lekan at 212 (quoting the lease).

That the *Lekan* lease established a definitive primary term has no bearing on whether the habendum clause in the Beck Lease establishes a "primary term of definite duration." In *Lekan*, following *Ionno*, the court affirmed judgment cancelling an oil and gas lease for a seventeen-year failure to extract oil or gas from a well capable of production. *Lekan* at 217.

The appellate court next cited *Gardner v. Oxford Oil Co.*, 2013-Ohio-5885, 7 N.E.3d 510 (7th Dist.), as an example of a "two-tiered" habendum clause. App. Op. ¶88. However, the habendum clause in *Gardner* provided that the lease would run for "5 years and so much longer thereafter as oil, gas or their constituents *are produced* in paying quantities thereon, or *operations are maintained* on" the land. (Emphasis added.) *Id.*; *Gardner*, ¶4. Hence, to extend the *Gardner* lease, there had to be either production or the "maintenance" of ongoing operations. There was no loophole through which the lessee could unilaterally extend the lease while indefinitely postponing development.

Finally, in support of the asserted general proposition that the habendum clause in an oil and gas lease must be two-tiered, consisting of a definite, time-limited primary term followed by an indefinite secondary term, the appellate court cited *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist.). Like the leases in

Lekan and *Gardner*, the *Swallie* lease was for "a term of twenty (20) years and so much longer thereafter as oil, gas, or their constituents *are produced* in paying quantities thereon." (Emphasis added.) App. Op. ¶89; *Swallie*, ¶5.[7] The Court of Appeals cited no case wherein language similar to that in the Beck Leases was construed as providing for a definitive primary term that can be extended only if timely development has occurred.

The Court of Appeals then applied "these principles," based upon leases with language significantly different from that in the Beck Leases, to the form G&T (83) Leases with no discussion or analysis of the language in the Leases actually before that court. App. Op. ¶90. Not one of the cases cited by the appellate court is on point, and not one of those cases even purported to establish a general principle applicable to all oil and gas leases. "These principles" simply have no bearing on the Beck form G&T (83) Leases herein.

In the first instance, the words "primary term" and "secondary term" appear nowhere in the Beck Lease. More troubling is that there is no language limiting the lessee's "judgment" as to the production capacity of "the premises." *See* discussion as to "capable of being produced," infra. Other leases typically require the discovery of oil or gas, actual production, or at the very least, "maintenance," and not mere "commencement," of "operations" on the land. *E.g., Gardner*, 2013-Ohio-5885, ¶4; *Swallie*, ¶5; *Northwestern Ohio Natural Gas Co. v. City of Tiffin*, 59 Ohio St. 420, 424, 54 N.E. 77 (1899).

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[7]None of the leases in *Lekan*, *Gardner*, or *Swallie* addressed the issue herein. In all three cases, the issue was whether the secondary term had terminated, where wells ostensibly capable of production either had never produced or were no longer producing. *Lekan* at 212-213; *Gardner*, ¶28; *Swallie*, ¶62-63. Extension of a primary term by simply paying delay rentals, or in order to commence or continue operations prior to completion of a well, was not addressed in any of these cases.

A lessee's "operation" of the premises "in the search for oil or gas" is not contingent upon the existence of a functioning well on the premises. Known as a "continuous operations clause," a provision extending an oil and gas lease based on the lessee's ongoing operations in the search for oil and gas substitutes these operations for production and will satisfy the habendum clause so long as the operations are continued. 2 Kuntz, *A Treatise on the Law of Oil and Gas*, §26.13 (1989).

The commencement of such operations "may consist of trivial and comparatively insignificant matters." *Kaszar v. Meridian Oil & Gas Ent.*, 27 Ohio App.3d 6, 7, 499 N.E.2d 3 (11th Dist. 1985).

> Any act, the performance of which has a tendency to produce the desired result, is a "commencement" of operations; therefore, staking out the location for the well, making the contract for the lumber for a rig and cutting a portion of the timber constitutes a "commencement" of operations, if done bona fide.

Id.; *Duffield v. Russell*, 10 Ohio C.D. 472, 19 Ohio C.C. 266, 268 (7th Dist. 1899), *aff'd*, 65 Ohio St. 605, 63 N.E. 1127 (1902). *See also H.J.T. Co. v. Meridian Oil and Gas Ent.*, 11th Dist. Ashtabula No. 1010, 1980 Ohio App. LEXIS 12740, *4 (Nov. 10, 1980) (commencement of operations does not require commencement of drilling).

Not only did the Court of Appeals fail to analyze the specific language in ¶2 of the Lease, that court failed to construe the Lease as a whole. A fair consideration of the entire Lease, and in particular, paragraphs 2, 3, 7, and 8, should have led to the conclusion that the ten-year period referenced in ¶2 was not a "primary term" because it could be extended indefinitely by Beck as lessee:

(1) Under ¶2, after ten years with no development, Beck can unilaterally extend the Lease by determining, in its subjective judgment, that oil or gas is capable of being

produced on the premises in paying quantities.

(2) Under ¶2, at or near the end of the ten-year period, Beck can begin "operations" in search of oil or gas, and whether or not Beck actually drills a well, Beck can extend the Lease as long as some "operations" continue.

(3) Under ¶3, Beck can extend the Lease in perpetuity by paying delay rentals "until the commencement of a well." In that the Lease sets no time limit for commencing a well, there is no time limit upon the payment of delay rentals.

(4) Under ¶2 and ¶7, after drilling a dry hole, Beck can extend the Lease indefinitely by resuming delay rental payments beginning twelve months after the dry hole is plugged, whether the drilling and plugging occur during or after the ten-year period referenced in ¶2.

(5) Under ¶8, if a producing well is drilled but either ceases production or is shut in, because of unfavorable market conditions or simply because Beck "desires" to shut in the well, Beck can extend the Lease by paying "advance royalties" equivalent to delay rentals. As in the case of a dry hole, Beck can extend the Lease by paying advance royalties until production is marketed–subject to no time constraints–or until the well is plugged and abandoned.

Accordingly, the language in the Lease as a whole authorizes the indefinite extension of the Lease without any drilling. Contrary to the Court of Appeals' assessment, the Lease contemplates and expressly authorizes an extension of the Lease beyond ten years under conditions that do not require a well to have been drilled. Had it been Beck's intent to establish a traditional primary term of ten years' duration, Beck could have done so by including the words "primary term" in ¶2 ("for a *primary term* of ten years * * *). Beck

could have clarified that to extend the Lease beyond the 12-month period referenced in ¶3 without commencing a well, Beck could pay delay rentals during the primary term ("or unless the Lessee shall thereafter pay, *during the primary term*, a delay rental of * * *"). Similarly, in ¶7, Beck could have specified that the resumption of delay rentals after plugging a dry hole could only continue during the primary term ("after termination of said twelve month period, *and during the primary term*, resumes the payment of delay rental * * *").

Had Beck intended to establish a fixed primary term beyond which the lessee could not extend the Lease without any development, it could have done so. An example of a lease that accomplishes that objective is a form lease employed by Premiere Land Services, LLC. Exhibit 1 to Plaintiffs' Reply to Defendant's Opp. To MSJ, tcd 42, May 14, 2012.

The Premiere Lease specifies an initial five-year term with an option to extend for an additional five-year term, and explicitly designates the five-year term the "primary term." Premiere Lease, ¶2. The Premiere Lease contains no provision for the indefinite extension of the lease if oil or gas is "capable of being produced * * * in the judgment of the Lessee," but instead authorizes one five-year renewal, and a secondary term only for "as long thereafter as oil, or gas, or either of them, *is produced* from said land by the Lessee, its successors and assigns." (Emphasis added.) *Id.*

Like the Beck Lease, the Premiere Lease requires that drilling operations be commenced within twelve months unless annual delay rentals are paid. Premiere Lease, ¶4. However, unlike the Beck Lease, which authorizes the deferral of drilling by payment of delay rentals "until the commencement of a well," however, the Premiere Lease explicitly

limits the use of delay rentals to defer drilling operations to the primary term: "the commencement of drilling operations may be further deferred for periods of twelve (12) months each during the primary term." *Id.*

Unlike the Beck Lease, the Premiere Lease defines the commencement of drilling operations: "Drilling operations shall be deemed to commence when the first material is placed on the leased premises or when the first work, other than surveying or staking the location, is done thereon which is necessary for such operations." *Id.*

The Beck Lease fails to articulate the meaning that the Court of Appeals imported from judicial interpretations of other leases with dissimilar language. The trial court interpreted the Lease as drafted, while the Court of Appeals effectively rewrote the Lease to include a fixed primary term that simply is not there.

2. The Court of Appeals' determination that the phrase "capable of being produced on the premises in paying quantities, in the judgment of the Lessee" requires a producing well to have been drilled is inconsistent with the language of the Lease, as well as with Beck's own argument.

The Court of Appeals opined that the phrase "capable of being produced" within the habendum clause of an oil and gas lease–and specifically , in the Beck Lease–means that a well has been drilled and is sufficiently equipped to permit production of oil or gas in paying quantities without additional equipment or repairs, as that phrase was interpreted in *Morrison v. Petro Evaluation Services, Inc.*, 5th Dist. Morrow No. 2004 CA 0004, 2005-Ohio-5640, and *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550 (Tex. 2003). App. Op. ¶100-101; Brief of Appellant, 12 MO 6 acd 19, at 29. Neither of those cases stands for that proposition; in each, the court was construing the lease before it–not the Beck Leases.

In *Morrison*, the lease term extended "as long [after the primary term] as * * * oil or

gas is produced or is capable of being produced from the premises." *Morrison*, ¶4. The lease specifically provided for an extension for "as long as there is a well or wells on the leased premises capable of producing oil or gas." *Id.* In *Anadarko*, the lease extended for "as long thereafter as gas is or can be produced." *Id.*, ¶39. Neither lease provided that capability of production, in paying quantities or otherwise, was to be based on the lessee's "judgment."

Neither the *Morrison* court nor the *Anadarko* court addressed the duration or extension of the primary term of the respective leases. In each case, wells had been drilled and the leases had entered their secondary terms. The issue was whether the actual production satisfied an objective standard. *Morrison*, ¶28, 33, 40; *Anadarko,* 94 S.W.3d at 553.

Similarly, *Hunthauser Holdings, LLC v. Loesch*, D.Kan. No. 00-1154-MLB, 2003 U.S. Dist. LEXIS 14423 (June 10, 2003), also cited by the Court of Appeals, addressed the cessation of actual production during the secondary term–not the extension of the primary term based on a lessee's subjective "judgment" that production on "the premises" in paying quantities was possible. In *Holthauser*, the habendum clause extended the lease beyond its primary term for "as long thereafter as oil, gas * * * or any of the products covered by this lease is or can be produced." *Id.* at *3 n.1. The court observed that "the majority of courts require actual production during the primary term of the lease to extend the lease beyond its fixed term * * * unless the lease contains some additional provision indicating an intent to extend the right to produce beyond the primary term." *Id.* at *4. Thus, under *Holthauser,* as under *Harris* and *Beaverkettle Farms*, it is the language of the lease at

issue–not generalized principles derived from cases examining other, different leases–which is determinative.

Not even Beck consistently agreed with the appellate court's opinion that "capable of production" requires the existence of a producing well. In the trial court, Beck insisted that "capable of being produced on the premises" should be construed to mean that the Lease could be extended only if a *well* already drilled on the premises (and not the premises itself) is capable of producing oil or gas. Brief in Opp. To MSJ, tcd 41, Apr. 30, 2012, at 12-13. However, in the Court of Appeals, Beck asserted that "the 'capable of production' clause allows the lease to continue while the lessee completes the well." Brief of Appellant, 12 MO 6 acd 19, at 30. Moreover, referring to the boilerplate in ¶9–a provision not likely to be scrutinized or even fully understood by a lessor unsophisticated in oil and gas transactions–Beck acknowledged that under its Leases, no drilling is necessary–ever. Brief of Appellant, 12 MO 6 acd 19, at 13, 18. The Beck Leases do not require a well to have been drilled before the "capable of production" clause is triggered, but instead permit the indefinite extension of the Leases even when no well has been commenced.

3. <u>The appellate court's conclusion that delay rental clauses apply only during a lease's primary term is unsupported in law.</u>

After adopting Beck's argument that the habendum clause in every oil and gas lease includes a fixed primary term notwithstanding the actual language employed in the lease, the Court of Appeals next held that delay rentals can apply only during the primary term of an oil and gas lease–a determination that is critical to that court's conclusion that the Beck Leases are not no-term, perpetual leases.

In *Beaverkettle Farms*, the issue was whether the law imposed a specific meaning

for the term "delay rentals"–in particular, whether the obligation to pay delay rentals existed only during the primary term of an oil and gas lease, even though the lease itself did not so state. *Id.* at *38. The oil and gas company had not paid a delay rental for undeveloped acreage during the secondary term of a lease under which only part of the leasehold had been developed. Facing the termination of its rights in the undeveloped acreage, the company argued (1) that delay rentals did not apply to the secondary term because delay rentals had been traditionally understood to apply during the primary term only; and (2) that as set forth in an oil and gas expert's report, the term "delay rental" is a term of art in the oil and gas trade with a specialized meaning–that delay rental payments apply only during a lease's primary term.

The court refused to hold that as a matter of law, the term "delay rental" must be defined in accordance with the "traditional understanding" that delay rentals apply during the primary term only. *Id.* at *39. The lease at issue differed from the leases discussed in cases adhering to the traditional understanding: unlike the traditional leases, the lease at issue contained no explicit provisions limiting delay rentals to the primary term. *Id.* at *40. That lease simply required the lessee to commence drilling within twelve months (which was done), or pay delay rentals for each acre not under development. *Id.* The court concluded that "[w]ithout importing definitions into the Lease, * * * the Lease compels [the oil and gas company] to pay delay rentals for undrilled acreages, without limitation." *Id.* at *41.

The court also rejected the oil and gas company's invitation to adopt the specialized meaning of "delay rental" within the oil and gas trade set forth in the expert's report. *Id.* at

*51. While the lessee was a member of the oil and gas industry, the lessor was not. The court refused to "foist an esoteric definition of a contract term, though known to members of a trade, upon a non-member when the latter had no reason to know of that definition and when, indeed, the contract actually suggests a contrary meaning." *Id.* at *50.

The appellate court cited *Northwestern*, 59 Ohio St. 420, 54 N.E. 77, for the proposition that delay rental provisions apply only during an oil and gas lease's primary term. App. Op. ¶92. However, the issue in *Northwestern* was the effect of a recorded oil and gas lease on the rights of a subsequent purchaser of the property. *See id.* at 434, paragraph one of the syllabus. As the Court of Appeals observed, the lease was for a term of five years "and as much longer thereafter as oil or gas *is produced or found in paying quantities*." (Emphasis added.) *Id.* at 424. To "ascertain the capacity of the land," the lessee was required to "complete a well * * * within nine months" or pay "for such delay a yearly rental" until completion of the well. *Id.* at 442-443. The Court held that "[s]uch a lease * * * expires at the end of the specified term, unless within that time oil or gas is obtained from the land." *Id.* at 434, paragraph two of the syllabus.

The Court's conclusion that the lessee was required to complete the well within the fixed five-year term reflects the only logical construction of the language in that particular lease, which unequivocally predicated any extension beyond the five-year term upon the production of oil or gas.[8] There was no provision under which the lease could be extended

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[8]Although it might be argued that "finding" oil or gas is not equivalent to production, to actually "find," rather than merely surmise, oil or gas "in paying quantities," production must occur. Permitting an extension once gas is "found" in paying quantities would protect a lessee whose well produced oil or gas during the fixed term but was not yet in full production mode.

by the payment of delay rentals in the event of a dry hole, nor was there a provision under which the lessee could extend the lease by the payment of advance royalties after shutting in producing wells. The *Northwestern* lease contained no provision relieving the lessee of the obligation to drill. Finally, the *Northwestern* Court did not purport to establish a rule of law limiting the payment of delay rentals to the primary term in all cases.

Similarly, *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902), lends no support to the Court of Appeals' determination that delay rentals are limited to a lease's primary term. *See* App. Op. ¶93. As in *Northwestern*, the leases in *Brown* ran for "two years * * * and as long thereafter as oil or gas *is found in paying quantities* * * * not exceeding in the whole term of twenty-five years." (Emphasis added.) *Brown* at 507. The Court found that the leases had terminated because no oil or gas was actually found during the two-year term. *Id.* at 512. The Court observed that the payment of a delay rental could not extend the leases or the right to drill beyond the two-year term mentioned in the habendum clause "unless the parties should by a further contract extend the time." *Id.* Hence, the Court recognized that the parties could contract for an extension of the right to hold the lease through the payment of delay rentals beyond the two-year term in the habendum clause.

The Court of Appeals cited *Hite v. Falcon Partners*, 2011 Pa.Super. 2, 13 A.3d 942 (2011), in support of its conclusion that delay rentals apply during the primary term of an oil and gas lease and do not permit a lessee to defer commencement of a well beyond the primary term. App. Op. ¶98. However, in *Smith v. Steckman Ridge, LP*, 590 Fed. Appx. 189, 2014 U.S. App. LEXIS 23817, *25 (3d Cir. 2014), the court expressed a contrary view:

> * * * *Hite* does not stand for the broad proposition that delay payments may never extend a lease after the primary term. Rather, *Hite* reiterates

> Pennsylvania policy that a lessee cannot use a delay rental payment to extend the lease indefinitely for speculative purposes without production.

In *Northup Properties, Inc. v. Chesapeake Appalachia, L.L.C.*, 567 F.3d 767 (6th Cir. 2009), *aff'g* E.D. Ky. No. 07-30-ART, 2008 U.S. Dist. LEXIS 23716 (Mar. 25, 2008), a ten-year primary term lease expressly permitted indefinite extensions by the payment of delay rentals:

> It is agreed that this lease shall remain in force for the term of ten (10) years from this date and as long thereafter as the said land is operated by the Lessee in the search for or production of oil or gas, *with an extended term by payment of rentals as hereinafter set forth.*
> * * *
> *In the event that Lessee does not market the gas from said premises, Lessee is to pay delay rental until such time as the gas is marketed.*
> * * *
> Lessee shall pay the Lessor a rental at the rate of $1.00 per acre per annum payable quarterly in advance beginning three months from the date hereof, *in lieu of development of the entire leased acreage*; provided, however, that each gas well drilled by Lessee on any portion of said land, whether the same be productive or non-productive, shall liquidate and abate said delay rental with reference to 250 acres of the leased premises.

(First and second emphasis added; third emphasis sic.) *Id.* at 768-769. Unlike the Beck Lease, the *Northup* lease did not contain a typical "drilling clause," requiring the lessee to begin drilling within a specified period of time. *Id.* at 776 (White, J., concurring).

During the first ten years, the lessee drilled three wells, which yielded no oil or gas. The lessee drilled no further wells, but paid delay rentals exceeding $164,000 over the next 38 years.[9] The court rejected the lessor's argument that the lease expired by its own terms because the lease expressly allowed for extensions by payment of delay rentals. *Id.* at 771,

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[9]The district court indicated that the lessee's right to indefinite extensions based on the payment of delay rentals was conditioned on the lessee's undertaking a "search for" gas during the ten-year primary term. 2008 U.S. Dist. LEXIS 23716, *7.

772. The lease at issue was a negotiated document, not a form lease. *Id.* at 772. The parties "bargained for a contract that allowed for extension by rentals, and rejected a form contract * * * in order to include clauses that provided for such delay rentals." *Id.* at 774.

The court upheld the lease in light of Kentucky law that affords every lessor a remedy: under the "Kentucky rule," any lessor may give the lessee notice and demand production within a reasonable time thereafter to preserve its rights under the lease. *Id.*; 2008 U.S. Dist. LEXIS 23716 at *4. Hence, Kentucky law permits delay rentals to extend well into the secondary term, but affords lessors the right to demand production and terminate the lease if the lessee fails to comply.

Pursuant to *Harris* and *Beaverkettle Farms*, it was improper for the Court of Appeals to rule that the Beck Leases contain a ten-year primary term during which development must begin, based upon an "understanding" that delay rentals only apply during a primary term, as reflected in cases interpreting other leases. In light of Beck's ability to extend the lease without development, by the payment of delay rentals or otherwise, beyond the ten-year term in the habendum clause, that ten-year term cannot be deemed a "primary term." It was the appellate court's duty to interpret the Beck Leases based on the specific language therein, and not upon terms imported from other leases.

D. As a no-term, perpetual lease, the Beck G&T (83) form lease is contrary to Ohio's public policy, and is therefore void ab initio.

In *Ionno*, 2 Ohio St.3d 131,134, 443 N.E.2d 504, this Court held that long-term mineral leases under which there is no development are against public policy. Because the Beck Leases are long-term leases that can be extended in perpetuity with no development, those Leases are contrary to Ohio's public policy and are therefore void ab initio.

Public policy analysis reaches beyond the four corners of a contract and requires the Court to consider the impact of the contract at issue upon society as a whole. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. *Taylor Building Corp. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; *Polk v. Cleveland Railway Co.*, 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); *Buoscio v. Lord*, 7th Dist. Mahoning No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); *Conny Farms, Ltd. v. Ball Resources*, 7th Dist. Columbiana No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." *Eagle* at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void ab initio if it seriously offends public policy. *Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." *Newbury Township Board of Trustees*

v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Building Co. v. Board of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also State v. Baldwin Producing Corp.*, 10th Dist. Franklin No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions–entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties–are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. *Newbury Township* at 389-90; *Northampton Building Co.* at 198-99. It would be inconsistent to permit a private operator to unilaterally bar the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The trial court herein properly found that the Beck Leases "clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. Decision (on Pending Motions), tcd 45, July 12, 2012, at 15. That court accordingly found the Leases to be void ab initio on public policy grounds. *Id.* at 17, 29. *Ionno* supports that conclusion.

The mineral leases in *Ionno* contained no time limitation within which mining was to be commenced, but required the lessees to pay "an annual minimum rent or royalty," to be applied against anticipated royalties from future mining operations. 2 Ohio St.3d at 133, 443 N.E.2d 504. The lessees had made the annual payments, but had not undertaken any mining operations for over eighteen years, since the inception of the lease.

The Court noted that "the only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving * * * royalties based upon the amount of minerals derived from the land." *Id.* n.2. The Court indicated that rent or royalties are not a substitute for timely development. *Id.* at 134. Permitting a lessee to retain a long-term mineral lease without development rewards "mere speculation without development, effort, or expenditure on the part of the lessees." *Id.* In the instant case, Beck's G&T (83) form lease has paid off handsomely for Beck, which received over $84,000,000 for the sale of the deep rights in those Leases without development, effort, or expenditure (aside from the $1- to $5-per-acre delay rentals), while the Lessors' lands remain undeveloped and the Lessors themselves have received nothing but minimal rental payments.

The Beck Leases are, in effect, perpetual, no-term leases like the lease in *Ionno*: through the boilerplate embedded in the Leases, exemplified by Beck's failure to commence any drilling on the Lessors' property, Beck ostensibly has the unilateral right to indefinitely postpone development like the lessee in *Ionno.* While the *Ionno* lease failed to contain any explicit requirement of timely development, the Beck Lease purports to require the commencement of a well within twelve months while at the same time negating that requirement in fine print woven throughout the Lease–specifically, in paragraphs 2, 3, 7, 8, and 9. While the habendum clause in the *Ionno* lease had no primary term, the habendum clause in the Beck Leases contains an illusory ten-year term that Beck can extend in perpetuity.

Hence, the only distinction between the *Ionno* lease and the Beck Leases is that

while the *Ionno* lease contained no deceptive language purporting to limit its term or set a schedule for development that the lessee could easily evade, the Beck Leases set forth timetables that have been effectively nullified by the lack of any fixed parameters that are binding on Beck. The sham references to the duration of the Beck Lease and the commencement of wells are insufficient to distinguish the Beck Leases from the long-term lease in *Ionno*.

The Court of Appeals concluded that *Ionno* is inapplicable to this case because the nominal payments in that case were termed "advance royalties" while the minimal payments under the Beck Lease are referred to as "delay rentals," which the Court of Appeals opined were an adequate substitute for development. App. Op. ¶113-114. In the initial recitation of the facts in *Ionno*, these payments were termed "minimum rent or royalty." 2 Ohio St.3d at 131, 443 N.E.2d 504. The terms are often used interchangeably:

> * * * [D]elay rentals have long been used in the industry and have a settled meaning. It is customary for parties to an oil and gas lease to agree that a minimum advance royalty shall be paid for the lessee's right to forego immediate development of the leasehold for production.

Jacobs, 332 F.Supp.2d at 785. Although the "advance royalties" in *Ionno* were to be credited against future royalties when production was achieved, there was no provision for the return of the "advance royalties" if no production ever materialized.

Both the *Ionno* lease and the Beck Leases permit an indefinite postponement of development in exchange for nominal periodic payments, depriving the lessors of the benefit for which they thought they had bargained, and impeding development. Accordingly, *Ionno* should control this case, rendering the Beck G&T (83) form lease void as against public policy.

Proposition of Law No. II

> Where the express terms of an oil and gas lease effectively allow the lessee to postpone development indefinitely, and any stated time limits can be unilaterally extended by the lessee in perpetuity without any development, the lease is subject to an implied covenant of reasonable development notwithstanding a general disclaimer of all implied covenants.

Absent express provisions to the contrary, and where an oil and gas lease contains no specific reference to the timeliness of development, the law will infer a duty on the part of the lessee to operate with reasonable diligence, giving rise to an implied covenant to reasonably develop the land. *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill an initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. v. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066,

2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *Id.* at 278-279.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the subject minerals:

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does not comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. at 281.

The implied covenant to reasonably develop the leasehold protects the expectation of royalties that induced the lessor to grant the lease by promoting good faith and fair dealing.

> While the lessee desires to conduct the operation in accordance with the perceived best use of scarce economic resources, the lessor is interested in the maximum production of royalties. *The lessor normally is without the special knowledge of oil and gas exploration which would allow him to protect his interests by express agreement.* Therefore, covenants are implied to insure fair dealing between the parties.

(Emphasis added.) *Flight Concepts Ltd. Partnership v. Boeing Co.*, 819 F.Supp. 1535, 1551 (D. Kan. 1993).

In *Ionno*, this Court found the lease to be subject to the implied covenant to reasonably develop the land. *Id.* The *Ionno* lease failed to specify any time period during which the lessee was required to commence mining operations, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.*

In the instant case, the trial court found that the covenant to reasonably develop arose in the Beck Leases. Decision (on Pending Motions), tcd 45, July 12, 2012, at 22. The Court of Appeals rejected the trial court's conclusion, holding that the Beck Leases contain no implied covenant to develop because (1) the Leases contain "a specific reference to the timeliness of development," a seemingly fixed ten-year term followed by an indefinite term; (2) the delay rentals serve as a substitute for development; and (3) the Leases contain a general disclaimer of all implied covenants. App. Op., ¶114, 115.

A. Because the reference to timeliness of development in the Beck Lease is illusory, the implied covenant to develop the land is not preempted.

Although the Leases suggest development time lines, the purported ten-year "primary term" can be extended indefinitely with no development. The mere expression of a timetable for development is not the equivalent of binding time limits during which development must be undertaken or the lease forfeited. A lease in which development can be delayed in perpetuity at the option of the lessee unequivocally satisfies the *Ionno* criteria under which an implied covenant will arise.

B. In that the delay rentals in the Beck Lease are equivalent to the advance royalties in *Ionno*, the rentals are no substitute for development and do not preclude the implied covenant to develop the land.

The Court of Appeals distinguished the Beck Lease from that in *Ionno* because, in

its view, the "advance royalties" in *Ionno,* offset against future royalties, are materially different from "delay rentals," which the appellate court viewed as a substitute for development. App. Op., ¶114. However, where the fixed payments are not credited against future royalties, but are nonetheless a small fraction of anticipated royalties, that distinction is one without a difference: "the real consideration for the lease is the expected return derived from the actual mining of the land." *Ionno* at 133. *See* discussion of delay rentals and advance royalties, supra, in section D. under Proposition of Law No. I.

C. Because the provision in ¶17 of the Beck Lease setting forth a procedure for the lessor to follow to remedy the lessee's breach of an implied covenant is inconsistent with the general disclaimer of implied covenants in ¶19, the Lease is ambiguous, and must be construed against Beck, invalidating the disclaimer.

The Beck Leases appear to provide the lessor with the right to seek a remedy, including the filing of an action against the lessee, for breach of an implied obligation, and describe the procedure for doing so. Lease, ¶17. Two paragraphs later, buried in the text, the Lease purports to disclaim any implied covenants. Lease, ¶19. Establishing a procedure which the lessor must follow in order to sue for breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations. Because the Leases can reasonably be interpreted to allow or disallow a lessor to seek redress for breach of an implied obligation, the Leases are ambiguous and must be construed against Beck.

The Court of Appeals cited several cases in support of its conclusion that the covenant to develop the land cannot be read into a lease containing a general disclaimer of implied covenants. App. Op. ¶115. The appellate court's determination is problematic

for two reasons. First, none of the leases in the cited cases contains a separate provision like that in the Beck Lease setting forth a procedure to follow if the lessor believes an implied covenant has been breached. Hence, the leases addressed in the cases cited by the Court of Appeals lack the ambiguity which renders the disclaimer in the Beck Lease ineffective. Second, if the implied covenant to develop can be disclaimed by a general disclaimer buried in boilerplate like the Beck disclaimer, any oil and gas lessee can easily embed a general disclaimer in its form leases, immunizing itself against the covenant to develop, while unsuspecting lessors may find themselves bound by the disclaimer of a covenant that arose as a matter of policy to ensure that lessors' interests are protected.

The sole issue in *Holonko v. Collins*, 7th Dist. Mahoning No. 87 C.A. 120, 1988 Ohio App. LEXIS 2647 (June 29, 1988), was whether the leases contained an implied covenant to reasonably develop. *Id.* at *3. The court answered that question in the negative. *Id.* at *8. The leases contained language virtually identical to that in ¶9 and ¶19 in the Beck Lease, including a general disclaimer of implied covenants. *Id.* at *6. However, there is no suggestion that the *Holonko* lease contained a provision seemingly permitting suits for breach of an implied obligation.

While the *Holonko* court cited the rule set forth in *Beer* and *Ionno*, the opinion does not address what constitutes an "express provision to the contrary," or an "express disclaimer of the covenant to develop within a reasonable time," as opposed to a blanket disclaimer of all implied covenants. The court relied at least in part on *Linn v. Wehrle*, 35 Ohio App. 107, 109, 172 N.E. 288, 289 (5th Dist. 1928), wherein the lease contained an express disclaimer of the covenant to reasonably develop the land:

> Said [lessee] may drill a well or wells upon said premises at any time as long as this lease continues, or may decline to drill a *first or subsequent* well or wells, and instead pay the rental herein provided; *in either event there shall be no implied covenant to drill* ***.

(Emphasis added). *See Holonko* at *7. The court did not address the difference between the language in the *Holonko* disclaimer and that in *Linn.* Moreover, the court did not address public policy.

Curiously, the court did not find that the general disclaimer in the *Holonko* lease prevented implied covenants from arising. Instead, "applying contract principles," the appellate court concluded that "the imposition of implied covenants is unwarranted"–not waived or effectively disclaimed. *Holonko*, at *7-*8.

Bushman v. MFC Drilling Inc., 9th Dist. Medina No. 2403M, 1995 Ohio App. LEXIS 3061, *5 (July 19, 1995), involved a general disclaimer of implied covenants comparable to that in the Beck Lease. The *Bushman* lease did not afford the lessor an apparent right to sue for breaches of implied obligations. The lessor argued that public policy prohibits a general disclaimer of the implied covenant to develop without specific language addressing that covenant, and distinguished his lease from the *Holonko* lease because his lease did not grant the lessee the right to determine whether or not to drill.

The court opined that "[t]here is no authority * * * removing disclaimer of implied covenants in gas and oil leases from the operation of general contract law," and stated that public policy requires only a general disclaimer of implied covenants. *Id.* at *6. The court did not address either the language in *Ionno* requiring an "express disclaimer of the covenant to develop," or *Ionno*'s condemnation of long-term leases with no development. *See id. See also Taylor v. MFC Drilling, Inc.*, 4th Dist. Hocking No. 94CA14, 1995 Ohio

App. LEXIS 786 (Feb. 27, 1995) (no implied obligation to develop where the lease generally disclaimed implied covenants but afforded no remedy for breaches of implied obligations, and no mention of public policy).

The stated purpose of the Beck Leases is "drilling, operation for, producing and removing oil and gas." Lease, ¶1. The Leases contain no suggestion that either Beck or the lessor had any other objective, and no indication that Beck's intent was simply to secure control of the mineral rights for investment or other purposes, without drilling a well. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the stated purpose of the Lease, and imposes no unexpected burdens inconsistent with that purpose. To hold that a general disclaimer, imbedded in fine print, can defeat an implied covenant of which many prospective lessors are probably unaware is to eviscerate the essence of the parties' agreement as well as the policy giving rise to the implied covenant to develop the land.

The general disclaimer of implied obligations in the Beck Leases is ambiguous, contrary to the primary objective of the Leases if applied to the covenant to develop the land, and should be ineffective to disclaim that covenant.

CONCLUSION

The G&T (83) form lease is a no-term perpetual lease that can be unilaterally extended by the lessee with no development, and should be declared void as against public policy pursuant to *Ionno*. The attempt to disclaim the implied covenant to develop the land is inconsistent with this Court's pronouncements in *Beer* and *Ionno* and is thus ineffective to disclaim that covenant. Appellants respectfully request that the Court reverse

the decision of the Court of Appeals and reinstate the decision of the trial court or otherwise enter judgment voiding said Lease.

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IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al. Plaintiffs-Appellants vs. BECK ENERGY CORPORATION Defendant-Appellee and XTO ENERGY, INC. Proposed Intervenor-Appellee	)	Case No. 14-1933 On Appeal from the Monroe County Court of Appeals Seventh Appellate District Case Nos. 12 MO 6 13 MO 2 13 MO 3 13 MO 11

NOTICE OF APPEAL
OF APPELLANTS, LARRY A. AND LORI HUSTACK, LAWRENCE AND MICHELLE HUBBARD, AND DAVID MAJORS, INDIVIDUALLY AND AS CLASS REPRESENTATIVES

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NOTICE OF APPEAL OF APPELLANTS

Appellants, Larry A. and Lori Hustack, Lawrence and Michelle Hubbard, and David Majors, individually and as class representatives, hereby give notice of appeal to the Supreme Court of Ohio from the judgments of the Monroe County Court of Appeals, Seventh Appellate District, entered in Court of Appeals Case Nos. 12-MO-6, 13-MO-2, 13-MO-3 and 13-MO-13 on September 26, 2014.

This case is one of public or great general interest.

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STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO

MONROE COUNTY) SS: SEVENTH DISTRICT

FILED
SEP 26 2014
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

CLYDE HUPP, et al.,)

PLAINTIFFS-APPELLEES) CASE NO. 12 MO 6

- VS -) JUDGMENT ENTRY

BECK ENERGY CORP.,)

DEFENDANT-APPELLANT.)

For the reasons stated in the opinion rendered in the consolidated appeals, Case Nos. 12 MO 6, 13 MO 2, 13 MO 3 and 13 MO 11, Appellant's assignments of error 1, 2, 4 and 6 are meritorious, and assignments of error 3 and 5 are moot. It is the final judgment and order of this Court that the July 31, 2012 judgment of the Common Pleas Court, Monroe County, Ohio, is reversed, and the matter is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion. Costs taxed against Appellees.

Mary DeGenaro

Joseph J. Vukovich

Gene Donofrio

JUDGES.

FILED
SEP 26 2014
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CLYDE HUPP, et al.,	)	
	)	CASE NOS. 12 MO 6
PLAINTIFFS-APPELLEES,	)	13 MO 2
	)	13 MO 3
- VS -	)	13 MO 11
	)	
	)	
BECK ENERGY CORPORATION,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	
	)	
AND	)	
	)	
XTO ENERGY, INC.,	)	
	)	
PROPOSED INTERVENOR/APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeals from Monroe County Common Pleas Court, Case No. 2011-345.

JUDGMENT: Case Nos. 12MO6, 13MO3 & 13MO11 Affirmed in Part and Reversed in Part and Remanded.

Case No. 13MO2 Appeal Dismissed as Moot.

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 26, 2014

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DeGenaro, P.J.

{¶1} Defendant-Appellant, Beck Energy Corp. (Beck), appeals the July 31, 2012, February 8, 2013 and June 10, 2013 judgments of the Monroe County Court of Common Pleas. Plaintiffs-Appellees are six named Monroe County oil and gas lessors (the named plaintiffs), together with a class of similarly situated Ohio lessors. Appellees, when referred to collectively herein, will be called "the Landowners." Respectively, these three appealed judgments: (1) granted summary judgment in favor of the named plaintiffs; (2) granted the named plaintiffs' motion for class certification; and (3) more specifically defined the class, pursuant to a limited remand order from this court. These judgments generated three appeals: Case Nos. 12MO6, 13MO3 and 13MO11.

{¶2} Proposed Intervenor-Appellant, XTO Energy, Inc. (XTO), appeals the February 8, 2013 judgment of the Monroe County Court of Common Pleas, overruling its motion to intervene as a defendant, and generated a fourth appeal, Case No. 13MO2. All four appeals have been consolidated.

{¶3} In 13MO3, Beck argues that the trial court erred by certifying a class after it granted summary judgment on the merits because it violates the rule against one-way intervention, as well as by failing to hold a class certification hearing. In 13MO11, Beck asserts that the trial court abused its discretion by defining the class more broadly than that requested in the second amended class action complaint and motion for class certification. The trial court did not abuse its discretion by certifying the class after granting summary judgment on the merits because the rule against one-way intervention does not apply to Civ.R. 23(B)(2) classes. There was sufficient opportunity for factual development so as to permit a meaningful determination regarding the class action certification, thus rendering a hearing unnecessary. With regard to class definition, the trial court has discretion to modify the class, even sua sponte, and it did not abuse its discretion by defining the class as all Ohio lessors who executed a Form G&T 83 Lease with Beck, where Beck had neither drilled nor prepared to drill a well, nor included the property in a drilling unit.

{¶4} In 12MO6, Beck argues that the trial court erred by concluding that the leases at issue are void against public policy and that Beck violated the implied covenant to reasonably develop the leaseholds. The trial court misinterpreted the pertinent lease provisions and Ohio case law on the subject and erred in concluding the Lease is a no-term, perpetual lease that is void ab initio as against public policy. The Lease has a primary and secondary term, it is not perpetual. The trial court further erred in concluding the Lease was subject to implied covenants and that Beck breached the implied covenant to reasonably develop. Beck's remaining assignments of error in 12MO6 are moot.

{¶5} In Case No. 13MO2, XTO argues that the trial court abused its discretion by failing to permit it to intervene in the proceedings. However, in light of our resolution of Beck's assignments of error, XTO's appeal is moot.

{¶6} Accordingly, in Case Nos. 12MO6, 13MO3, and 13MO11, the trial court's class certification and definition judgments are affirmed, and its order granting summary judgment is reversed and remanded to the trial court for further proceedings, and Case No. 13MO2 is dismissed as moot.

Facts and Procedural History

{¶7} This case involves class action claims filed by the Landowners as oil and gas lessors, against Beck, an oil and gas lessee, seeking declaratory judgment and quiet title. On September 14, 2011, the suit began when a complaint was filed in the Monroe County Court of Common Pleas by four of the Landowners against Beck. On September 29 and 30, 2011, an amended and then a second amended class action complaint were filed. The second amended class action complaint removed the Hupps as plaintiffs, added several named plaintiffs, and asserted the claims as a class action. Further, the named plaintiffs alleged that they, along with approximately 400 additional landowners/lessors in Monroe County, executed essentially identical oil and gas leases with Beck, or are successors in interest to said lessors.

{¶8} The Landowners' Leases with Beck were form leases, known as the Form G&T 83 Lease, a preprinted oil and gas lease that left blank lines to be completed for the parties' names, addresses, date of execution, description of the

leasehold, the delay rental term, and the amount of the delay rental payment. The Leases provided for a one-eighth (12%) royalty for the Landowners should wells be drilled and gas and oil produced.

{¶9} Most pertinent to this appeal are two Lease clauses. Paragraph two contains the habendum clause, which provides that the Lease will continue "for a term of ten years and so much longer thereafter as oil and gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas * * *." Paragraph three, the delay rental clause, provides that the Lease will terminate if a well was commenced within 12 months of the date of Lease execution, unless the lessee paid a specified delay rental.

{¶10} With regard to the named plaintiffs, they all own property in Monroe County subject to Form G&T 83 leases. Larry and Lori Hustack are successors-in-interest to land encumbered by an oil and gas lease entered into with Beck on August 14, 2008, presently covering 89.75 acres, with a primary term of ten years and specifies a delay rental payment of $108.00. Lawrence and Lieselotte Hubbard entered into a lease agreement with Beck on March 2, 2006, covering 55.06 acres, with a primary term of ten years and specifies a delay rental payment of $56.00. David Majors entered into a lease with Beck on October 11, 2005, covering 55 acres, and has a primary term of ten years and specifies a $55.00 delay rental payment.

{¶11} The named plaintiffs asserted: 1) that the Leases contained terms and conditions contrary to public policy, because they were allegedly leases in perpetuity without timely development; 2) that Beck had failed to prepare to drill or to actually drill any wells on their property: and 3) that Beck had breached a number of express and implied covenants including the covenant to reasonably develop the leaseholds. They asked the trial court to invalidate and declare the Leases void, and to quiet title in the encumbered real estate. No monetary damages were sought.

{¶12} In their second amended class action complaint the named plaintiffs sought certification of the class to be defined as "all landowners/Lessors of land in Monroe County, Ohio who were lessors under, or who are successors in interest of

Lessors, under a standard form oil and gas lease with Beck Energy Corporation, where Beck Energy has neither drilled nor prepared to drill a gas/oil well, nor included the property in a drilling unit within the time period set forth in paragraph 3 of the lease or thereafter."

{¶13} On November 9, 2011, Beck entered into a Purchase and Sale Agreement with XTO Energy, Inc., to sell the deep rights in the Beck leases, which covered oil and gas deposits below 3,860 feet, and on December 20, 2011, Beck assigned those rights to XTO. Beck retained an overriding royalty interest in the Leases, and, notably, agreed "to warrant and defend the title to the Assets hereby assigned unto Assignee against the claims of any party arising by, through, or under Assignor, but not otherwise."

{¶14} On November 30, 2011, Beck filed a motion to dismiss alleging that the named plaintiffs' claims must fail because the plaintiffs failed to provide Beck with prior written notice of breach prior to commencing the lawsuit. The named plaintiffs opposed the motion, arguing, inter alia, that because the lease was allegedly void at the time they filed suit, they were not required to provide Beck with notice or an opportunity to cure prior to bringing the action.

{¶15} On February 16, 2012, the named plaintiffs filed a motion for summary judgment. Therein, they argued that the Leases were void as against public policy and that Beck had breached express and implied covenants in the Leases, including the covenant to reasonably develop. In support of their motion, they attached, inter alia, affidavits of three of the named plaintiffs, along with assignments and bills of sale for the deep drilling rights for the Hustack, Hubbard and Majors Leases from Beck to Exxon Mobil Corporation c/o its affiliate XTO Energy, Inc. Beck filed a brief in opposition to summary judgment to which the named plaintiffs replied.

{¶16} On July 12, 2012, the trial court issued a lengthy decision on the pending motions. The trial court concluded that the Leases were perpetual in nature and therefore violate public policy, and that Beck breached the implied covenant to reasonably develop the land by failing to drill any wells on leasehold properties. For these reasons, the trial court determined the named plaintiffs were entitled to summary

judgment and denied Beck's motion to dismiss. The trial court ordered counsel for the named plaintiffs to submit a proposed entry journalizing the decision.

{¶17} In the meantime, on July 19, 2012, the named plaintiffs filed a motion for class action certification pursuant to Civ.R. 23(B)(2). The motion alleged that all prerequisites for class action certification had been met. *See* Civ.R. 23(A); Civ.R. 23(B)(2). The motion continued to state:

> * * * The Beck leases are void on their face as has already been held by this Court. Accordingly, the Plaintiffs are requesting that a class be certified *of all landowners in Ohio* who executed leases with Beck where Beck did not drill a well on their property. The Plaintiffs herein request a certification from this Court to proceed as a Class Action under Civ.R. 23(B)(2). The leases of the Plaintiffs herein have already been declared void against public policy, violative of implied covenants and forfeited.

(Emphasis added.)

{¶18} The class action certification motion was accompanied by a motion for leave to file a third amended class action complaint. Therein the named plaintiffs sought to expand the class definition to include property owners in all Ohio counties.

{¶19} Beck opposed the motion for class certification, first arguing that certification would be an unnecessary expenditure of court resources because the order granting injunctive or declaratory relief would automatically accrue to similarly situated landowners. Beck further asserted that the named plaintiffs failed to establish an identifiable class and that the proposed class definition lacked the requisite specificity. Finally, Beck contended that the representative parties and their counsel will not fairly and adequately protect the interests of the class.

{¶20} The named plaintiffs subsequently withdrew their motion for leave to file a third amended complaint on September 12, 2012. They filed an amended motion for class certification that same day which sought certification of a class consisting of only Monroe County landowners. Beck opposed the amended class certification motion,

arguing that class certification would be improper because a trial court must rule on a request for class certification prior to a decision on the merits so as not to violate the rule against one-way intervention.

{¶21} On July 31, 2012, before ruling on the class issues, the trial court issued a judgment entry granting the named plaintiffs' motion for summary judgment, and denying Beck's motion to dismiss. The judgment incorporated by reference the lengthy July 12, 2012 decision. This resulted in an appeal: Case No. 12MO6.

{¶22} On September 7, 2012, ten months after entering into the Purchase and Sale agreement for the deep rights in the Beck leases, and almost two months after summary judgment was granted to the Landowners, third-party XTO filed a motion to intervene as a party defendant. The Landowners opposed the motion, and on February 8, 2013, the trial court denied intervention. This spawned an appeal: Case No. 13MO2.

{¶23} On February 8, 2013, the trial court granted the motion for class certification. The trial court concluded that all prerequisites for class action certification under Civ.R. 23(A) and (B)(2) had been met. However, the entry did not specifically define the class. Beck appealed the class action certification judgment, which was assigned Case No. 13MO3.

{¶24} Pursuant to a limited remand from this court, on June 10, 2013, the trial court issued a judgment defining the class as follows:

> "All persons who are lessors of property in the State of Ohio, or who are successors in interest of said lessors, under a standard form oil and gas lease with Beck Energy Corporation, known as (G&T (83)", [sic] where Beck Energy Corporation has neither drilled nor prepared to drill a gas/oil well, nor included the property in a drilling unit, within the time period set forth in paragraph 3 of said Lease or thereafter."

{¶25} Beck challenged the trial court's definition of the class in a fourth appeal, which was assigned Case No. 13MO11. Meanwhile, the trial court denied the named

plaintiffs' motion for approval of notice to the class and to establish a method of service.

{¶26} On September 26, 2013, we granted Beck's motion for a stay pending appeal and its motion to toll the terms of the Leases as to Beck and both the named plaintiffs and the proposed defined class members, commencing 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 in the trial court, ruling that the tolling period would 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."

{¶27} We will first address the appeals filed by Beck: the class action issues raised in 13MO3 and 13MO11, and then the issues concerning the trial court's determination that the Leases are void ab initio raised in 12MO6. Finally, we will address the denial of XTO's motion to intervene raised in 13MO2.

13MO3 – Class Certification

{¶28} There are two separate appeals concerning class action issues. In Case No. 13MO3, Beck appeals the trial court's February 8, 2013 decision and order granting class action certification. In 13MO11, Beck appeals the trial court's June 10, 2013 order defining the class. Beck assigns four errors in 13MO3, but points out in its reply brief that assignments of error two and four concern issues that will be the subject of 13MO11.

{¶29} The second and fourth assignments of error in 13MO3 state respectively:

{¶30} "The trial court abused its discretion when it granted class certification where it failed to specify the means to determine class membership as required by Civ.R. 23(C)(3)."

{¶31} "The trial court abused its discretion when it failed to consider the Amended Motion for Class Certification and instead, granted class certification on a motion that was no longer pending before the trial court."

{¶32} These assignments of error are mooted by the trial court's June 10, 2013 order defining the class and therefore will not be addressed. But before turning to the merits of the first and third assignments of error in 13MO3 and then to the sole assignment of error presented by 13MO11, a discussion of general class action law in Ohio is warranted.

General Class Action Law

{¶33} "Class certification in Ohio is based upon Civ.R. 23, which is nearly identical to Fed.R.Civ.P. 23." *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, ¶13 (7th Dist.). Accordingly, Ohio courts may look to federal court precedent concerning Fed.R.Civ.P. 23 when presented with class action issues based upon Civ.R. 23. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶18 ("federal law interpreting a federal rule, while not controlling, is persuasive in interpreting a similar Ohio rule."). It must be remembered that a class action is " 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only[.]' " *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 377, 2013-Ohio-4733, 999 N.E.2d 614, ¶11, quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The party seeking to maintain a class action bears the burden to " 'affirmatively demonstrate his compliance' with Rule 23," *Cullen* at ¶11, quoting *Comcast Corp. v. Behrend*, ------ U.S. ------, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013), quoting *Wal-Mart Stores, Inc. v. Dukes*, ------ U.S. ------, 131 S.Ct. 2541, 2551–2552, 180 L.Ed.2d 374 (2011).

{¶34} There are seven prerequisites plaintiffs must establish in order to certify a class action, and the failure to meet any one of them will defeat certification. *Stammco* at ¶19, ¶24. They are as follows:

> (1) an identifiable and unambiguous class must exist, (2) the named representatives of the class must be class members, (3) the class must be so numerous that joinder of all members of the class is impractical, (4) there must be questions of law or fact that are common to the class,

> (5) the claims or defenses of the representative parties must be typical of the claims and defenses of the members of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three requirements of Civ.R. 23(B) must be satisfied.

Stammco at ¶19, citing *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 94-96, 521 N.E.2d 1091 (1988).

{¶35} With regard to the seventh prerequisite, the named plaintiffs requested declaratory judgment and quiet title relief, but no money damages, and sought certification pursuant to subsection (2). Civ.R. 23(B)(2) provides that class actions may be brought where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Civ.R. 23(B)(2). Additionally, courts have held that subsection (B)(2) contains two requirements: " '(1) the class action must seek primarily injunctive relief; and (2) the class must be cohesive.' " *Fowler v. Ohio Edison Co.*, 7th Dist. No. 07-JE-21, 2008-Ohio-6587, ¶64, quoting *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶13.

{¶36} Class actions brought under Civ.R. 23(B)(2) differ significantly from a procedural perspective from those brought under Civ.R. 23(B)(3), which applies where the plaintiff seeks money damages and the trial court finds that class issues predominate and that a class action is the superior method for adjudicating the dispute. For example, Civ.R. 23(B)(3) class members are entitled to notice and have the opportunity to opt-out of the class, while Civ.R. 23(B)(2) class members do not enjoy those protections. *See Dukes* at 2558; Civ.R. 23(C)(2)-(3).

{¶37} To this end, the United States Supreme Court has explained:

> The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them

> unnecessary, but because it considers them unnecessary to a (b)(2) class. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. * * * Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.

Dukes, 131 S.Ct. at 2558-2559.

{¶38} With regard to the timing of a class certification ruling, Civ.R. 23(C)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." (Emphasis added.)

{¶39} Finally, regarding the standard of review, the "trial court's decision to certify a class pursuant to Civ.R. 23 is reviewed for abuse of discretion." *Lucio* at ¶13. "An abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *Downie v. Montgomery*, 7th Dist. No. 12 CO 43, 2013-Ohio-5552, ¶50. The trial court's discretion with regard to class certifications has been described as broad. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249. Further, " '[a] finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.' " *Stammco* at ¶25, quoting *Marks v. C.P. Chem. Co.* at 201, 509 N.E.2d 1249. At the same time, a trial court's discretion in certifying a class is not unfettered; it is restrained by the framework set forth in Civ.R. 23. *Lucio* at ¶14.

Timing of Class Certification

{¶40} In its first assignment of error in 13MO3, Beck asserts:

{¶41} "The trial court abused its discretion when it granted Appellees' motion for class certification where the rigorous analysis mandated by Civ.R. 23 establishes Appellees' motion and the trial court's ruling were untimely under Ohio law."

{¶42} Turning to a preliminary matter, the Landowners claim Beck waived any right it otherwise may have had to a ruling on class certification before pronouncement of judgment on the merits by filing a motion to dismiss, and by participating without objection in scheduling conferences and in the determination of the Landowners' motion for summary judgment. This argument is meritless for several reasons.

{¶43} First, the burden falls on the plaintiffs to move for class certification and thus it is baseless to fault Beck as the defendant for failing to insist on certification sooner. Second, Beck did not expressly acquiesce in the timing of class certification; in its memo in opposition to the amended motion for class certification, Beck squarely challenged the timing of class certification. Third, Beck's motion to dismiss did not call into question the merits of the case, rather it raised only the narrow procedural issue that the named plaintiffs failed to provide Beck with prior written notice of breach before commencing the lawsuit.

{¶44} Turning to Beck's numerous arguments relating to the timing of class certification, Beck first contends that the named plaintiffs' failure to move for class certification sooner demonstrates that they did not adequately represent the class. Beck has waived this argument because it failed to raise it at the trial court level. *See, e.g., Maust v. Meyers Prods., Inc.*, 64 Ohio App.3d 310, 313, 581 N.E.2d 589 (1989) (failure to raise an issue in the trial court waives a litigant's right to raise that issue on appeal). In neither Beck's brief in opposition to the first or amended motion for class certification did it assert precisely that the named plaintiffs' failure to move for class certification sooner demonstrates they were inadequate class representatives.

{¶45} Beck's chief argument on appeal with regard to timing is that the trial court's actions violate the so-called rule against one-way intervention. The origins of

this rule stem from the effects of former versions of Rule 23, as aptly explained by the Seventh Circuit:

> One of the complaints about the old Rule 23 was that it allowed courts to entertain what were called "spurious class actions"--actions for damages in which a decision for or against one member of the class did not inevitably entail the same result for all. One party could style the case a "class action", but the missing parties would not be bound. A victory by the plaintiff would be followed by an opportunity for other members of the class to intervene and claim the spoils; a loss by the plaintiff would not bind the other members of the class. (It would not be in their interest to intervene in a lost cause, and they could not be bound by a judgment to which they were not parties. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940).) So the defendant could win only against the named plaintiff and might face additional suits by other members of the class, but it could lose against all members of the class. This came to be known as "one-way intervention", which had few supporters. A principal purpose of the 1966 revision of Rule 23 was to end "one-way intervention". See the Advisory Committee's note to new Rule 23(c)(3), and, e.g., C. Wright, A. Miller & M. Kane, 7B Federal Practice and Procedure Sec. 1789 at 266-67 (2d ed. 1986). See also H. Kalven & M. Rosenfield, The Contemporary Function of the Class Suit, 8 U.Chi.L.Rev. 684 (1941).
>
> The drafters of new Rule 23 assumed that only parties could take advantage of a favorable judgment. Given that assumption, it was a simple matter to end one-way intervention. First, new Rule 23(b)(3) eliminated the "spurious" class suit and allowed the prosecution of damages actions as class suits with preclusive effects. Second, new Rule 23(c)(3) required the judgment in a Rule 23(b)(3) class action to define all members of the class. These members of the class were to be

> treated as full-fledged parties to the case, with full advantage of a favorable judgment and the full detriments of an unfavorable judgment. Third, new Rule 23(c)(1) required the district courts to decide whether a case could proceed as a class action "as soon as practicable" after it was filed. The prompt decision on certification would both fix the identities of the parties to the suit and prevent the absent class members from waiting to see how things turned out before deciding what to do. Finally, new Rule 23(c)(2) allowed members of a 23(b)(3) class action to opt out immediately after the certification in accordance with 23(c)(1). So a person's decision whether to be bound by the judgment--like the court's decision whether to certify the class--would come well in advance of the decision on the merits. Under the scheme of the revised Rule 23, a member of the class must cast his lot at the beginning of the suit and all parties are bound, for good or ill, by the results. Someone who opted out could take his chances separately, but the separate suit would proceed as if the class action had never been filed. As the Advisory Committee put it: "Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or a nonclass action, and in the former case the judgment, whether or not favorable, will include the class".

Premier Elec. Const. Co. v. National Elec. Contractors Assn., Inc., 814 F.2d 358, 362 (7th Cir.1987)

{¶46} Beck asserts that the trial court's decision to certify the class after it had granted summary judgment in favor of the Landowners violates the rule against one-way intervention. The Landowners counter that the rule against one-way intervention does not apply to Civ.R. 23(B)(2) actions because members of a Civ.R. 23(B)(2) class have no right to notice nor the ability to opt-out of the class.

{¶47} Beck relies heavily on an older case from the First District, *Bass v. Ohio Med. Indemnity Inc.,* 1st Dist. No. C-76273, 1977 WL 199736 (Aug. 3, 1977), and the

federal cases cited therein. In *Bass*, the court determined that the trial court had erred by failing to consider class certification until after a decision on the merits.[1] The plaintiff had filed a complaint on his own behalf and on behalf of others similarly situated. The defendant moved to dismiss the class-action allegations, and the trial court, following a hearing, denied that motion. It did not consider class certification again until after a trial that resulted in judgment in the plaintiff's favor. Following judgment, the plaintiff, for the first time, moved for class certification pursuant to Civ.R. 23(B)(2) (requesting only injunctive relief). The trial court denied class certification, and the plaintiff appealed.

{¶48} The First District, citing case law regarding the rule against one-way intervention, concluded that the trial court erred by failing to address class certification prior to issuing a judgment on the merits in favor of the named plaintiff: "[T]hose courts ruling on the question consistently have held that certification of a suit as a class action must precede or, at the very least, accompany the court's decision on the merits of the action." *Bass* at *2, citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974); *Larionoff v. United States*, 533 F.2d 1167 (D.C.Cir.1976); *Jiminez v. Weinberger*, 523 F.2d 689 (7th Cir.1975); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir.1974); *Katz v. Carte Blanche* Corp, 496 F.2d 747 (3d Cir.1974); *Glodgett v. Betit*, 368 F. Supp. 211 (D.Vt.1973).

{¶49} Some of the cases cited above in *Bass*, however, involve different procedural postures and/or do not squarely hold that class certification must always precede or accompany a merit decision in 23(B)(2) cases. For example, *American Pipe & Construction* discussed the rule against one-way intervention, 414 U.S. at 547, but ultimately that case dealt with the commencement of the applicable statute of limitations for asserted class members. *Id.* at 552-553 (holding that "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the

[1] Ultimately the court did not reverse the error because it found the plaintiff-appellant had either waived the issue for purposes of appeal or invited the error. *Bass* at *4.

class who make timely motions to intervene after the court has found the suit inappropriate for class action status.") Some of the cases concededly involved 23(B)(2) classes, yet the courts failed to note the distinctions between 23(B)(2) and 23(B)(3) classes.

{¶50} The Landowners contend that *Bass*, which appears to be the only Ohio case addressing the issue, and those cases upon which it relies, are no longer good law and that the rule against one-way intervention does not apply to 23(B)(2) class actions. They cite a more recent Sixth Circuit case which concluded that there is "no support for applying the prohibition on one-way intervention to Rule 23(b)(2) class certifications, in which class members may not opt out and therefore make no decision about whether to intervene." *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir.2012), citing *Paxton v. Union Natl. Bank*, 688 F.2d 552, 558–59 (8th Cir.1982).

{¶51} In *Gooch*, the trial court certified the class after granting a preliminary injunction to the plaintiffs in a 23(B)(2) suit. While Beck is correct that the *Gooch* court's conclusion that no error occurred was based in part on its determination that a decision to grant a preliminary injunction was not a decision on the merits, the court alternatively concluded that the rule against one-way intervention did not apply to Rule 23(B)(2) class certifications. *Id.*

{¶52} Other federal courts have likewise stated that the rule against one-way intervention does not apply to Civ.R. 23(B)(2) class certifications. In *Williams v. Lane*, 129 F.R.D. 636, 640-41 (N.D.Ill.1990), the court noted that where a plaintiff class seeks only declaratory or injunctive relief, certification under Rule 23(b)(2) "readily leads to binding all members of the class to both favorable and unfavorable judgments." The overriding concern over one-way intervention "legitimately arises only where monetary relief is the sole relief sought, not where * * * injunctive relief was and is so importantly at stake." *Id.* at 642.

{¶53} In *Paxton*, the Eighth Circuit refused to apply the rule against one-way intervention where the trial court withheld a decision on a 23(B)(2) class certification until after a full trial on the merits, reasoning that

> The prejudice inherent in delaying the certification determination until after trial has been thoroughly explored in the context of litigation under subdivision (3) of Rule 23(b). The courts' concern in Rule 23(b)(3) suits has been to prevent "one-way intervention[,]" i.e., to protect defendants from putative class members who can "opt-out" of an unfavorable decision rendered simultaneously with class certification but can choose to be bound by a favorable decision. Rule 23(b)(2) suits * * * from which class members cannot "opt-out," do not present the same problem.

Paxton at 558-59. *See also* Civ.R. 23(C)(2), (3) (only Civ.R. 23(B)(3) class members may request exclusion from the class).

{¶54} As an issue of first impression in this district, we are more persuaded by the *Gooch* and *Paxton* cases, and hold that the rule against one-way intervention does not apply to Civ.R. 23(B)(2) classes.

{¶55} This leaves us to consider the language of Civ.R. 23(C)(1) which provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

{¶56} The use of the term practicable leaves some discretion with the trial court. Thus, we read this rule as generally requiring class certification prior to a ruling on the merits in many, but not all circumstances, for example, not in Civ.R. 23(B)(2) classes. Although we might have managed this case differently, as borne out by the myriad of appeals and judgment entries this case management has generated, ultimately we cannot conclude the trial court abused its discretion, given the standard of review that we generally defer to the trial court's broad discretion in managing class actions. *See generally Marks, supra*, 31 Ohio St.3d at 201.

{¶57} Additionally, even though the rule against one-way intervention does not apply in 23(B)(2) classes, we recognize that determining the merits prior to certifying a 23(B)(2) class may, in some circumstances, be "inappropriate for reasons 'of judicial economy, and of fairness to both sides[.]' " *Gooch, supra* at 559, quoting *Paxton, supra*, at 558-559, quoting *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 (4th Cir.1980). However, there must be a showing of prejudice. *Paxton* at 559.

{¶58} Here, Beck has failed to demonstrate how it was prejudiced by the timing, especially in light of this court's orders granting a stay of the trial court's judgments on appeal and equitable tolling of the terms of all the Landowners' Leases. Moreover, this case is similar to *Paxton,* where no prejudice was found. There, as here, the "the defendant thereupon fully presented its defense as to all the class and individual claims [and the] plaintiffs generally proceeded on a class-wide basis as well." *Paxton* at 559. The *Paxton* court found these factors demonstrated that neither party could assert prejudice from the delay in certification. *Id.*

{¶59} While not the better practice, the trial court did not abuse its discretion in certifying a Civ.R. 23(B)(2) class after ruling on the merits. There was no prayer for monetary damages, only declaratory and quiet title relief were sought, and prospective class members under subsection (B)(2) are not entitled to notice and cannot opt-out of the class. Accordingly, Beck's first assignment of error in 13MO3 is meritless.

Failure to Conduct a Class Action Certification Hearing

{¶60} In its third assignment of error in 13MO3, Beck asserts:

{¶61} "The trial court abused its discretion when it failed to conduct an evidentiary hearing prior to granting class action certification."

{¶62} The Civil Rules themselves are silent as to whether a hearing is required prior to class certification. *See* Civ.R. 23; *Ritt v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212 (8th Dist.) Although the Ohio Supreme Court has stated in passing that "typically there is a hearing," on class certification, *Warner*, 36 Ohio St.3d at 94, the Court also recognized that a hearing is not required in all cases. *Id.* at 98. Further, this court has concluded, "in many cases, no evidentiary hearing is needed in order for a court to certify a class, and class certification may be

granted on the basis of the pleadings alone." *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, ¶15, citing *Warner* at 98; *Gottlieb v. S. Euclid*, 157 Ohio App.3d 250, 2004-Ohio-2705, 810 N.E.2d 970 (8th Dist.); *Franks v. Kroger Co.* 649 F.2d 1216 (6th Cir.1981). "An evidentiary hearing is not required in cases where the pleadings in a class action are so clear that a trial court may find by a preponderance of the evidence that certification is or is not proper." *Ritt* at ¶18. " 'As long as the trial court provides a sufficient opportunity for a factual development so as to permit a meaningful determination as to whether or not a cause of action should be certified as a class action, the trial court need not conduct a hearing on the certification question. * * *' " *Id.* at ¶19, quoting *Clark v. Pfizer, Inc.*, 6th Dist. No. S–84–7, 1984 WL 7932, *5 (July 13, 1984).

{¶63} Therefore, a trial court has discretion whether to hold a class certification hearing and "it follows that if the court had sufficient information before it to rule on certification, it did not abuse its discretion by failing to hold a hearing." *Ritt* at ¶21. *See also Lasson v. Coleman*, 2d Dist. No. 21524, 2007-Ohio-3443, ¶15-17.

{¶64} Beck asserts the record was not developed enough with regard to class certification and therefore a hearing was required. We disagree. Based upon a review of the trial court's detailed February 8, 2013 decision, which noted, inter alia, the same Form G&T 83 Lease was used between Beck and all the Landowners and no monetary damages were sought, class certification was a fairly straightforward matter. There was sufficient opportunity for factual development to permit a meaningful determination as to whether to certify a class action.

{¶65} Prior to ruling on class certification, the trial court ruled upon Beck's motion to dismiss and/or change venue and the Landowners' motion for summary judgment. The trial court had before it the Form G&T 83 Leases at issue, the purchase and sale agreement and assignment of the deep rights under the leases between Beck and XTO, Beck's motion to dismiss and the Landowners' opposition response, and the Landowners' and Beck's filings regarding the Landowner's motion for summary judgment. Further, the only relief sought was a declaration that the form lease is void and the quieting of title to lands encumbered by that particular form lease.

{¶66} Membership in the class is based upon whether an individual's land is encumbered by that form lease, and whether any drilling has been carried out on the individual's land. There are no disputes regarding the pertinent evidence, and the trial court's conclusion on each one of the class prerequisites was based upon information in the record. Moreover, neither party requested a hearing on class certification.

{¶67} Based on all of the above, the trial court did not abuse its discretion by failing to hold a hearing on class certification. Accordingly, Beck's third assignment of error in 13MO3 is meritless.

13MO11 – Class Definition

{¶68} In its sole assignment of error in 13MO11, Beck asserts:

{¶69} "The trial court abused its discretion when it adopted a class description that is inconsistent with Appellees' Second Amended Complaint and Appellees' Motion for Class Action Certification."

{¶70} Beck challenges the trial court decision to certify a class consisting of Ohio lessors instead of one comprised of Monroe County lessors as requested in the second amended class action complaint and amended motion for class action certification. In other words, Beck challenges the trial court's authority to modify the definition of the class set forth in the pending pleading and motion.

{¶71} To briefly recap the procedural history, both the first and second amended class action complaints requested that a class of Monroe County lessors be certified. The initial motion for class action certification did request a class of Ohio lessors, however, in the amended motion, they changed their request to include Monroe County lessors. Because the trial court's February 8, 2013 class action certification decision was ambiguous regarding the class definition, this court issued a limited remand for the trial court to define the class. Thereafter, the Landowners' filed a motion in aid of appeal requesting that the class include all Ohio lessors.

{¶72} A court's description of a class must be unambiguous and such that all class plaintiffs are sufficiently identifiable. *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988). A class description is sufficiently definite if it is "administratively feasible for the court to determine whether a particular individual is a

member." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71-72, 694 N.E.2d 442, 448 (1998).

{¶73} The trial court has wide discretion in defining the certified class, and has the power to sua sponte modify a class description that was proposed by a party. *Ritt, supra,* at ¶19-20 (citing *Warner* and concluding that trial court should have modified the class). *See also Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 483-484, 727 N.E.2d 1265 (2000) (where Ohio Supreme Court sua sponte modified the class description). The Sixth Circuit has noted that this broad discretion stems from the fact that "courts must be vigilant to ensure that a certified class is properly constituted." *Powers v. Hamilton Cty. Pub. Defender Comm*, 501 F.3d 592, 619 (6th Cir.2007). In *Powers*, the appellate court concluded that the trial court's multiple amendments to the class description "merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed." *Id.*, citing *Schorsch v. Hewlett–Packard Co.*, 417 F.3d 748, 750 (7th Cir.2005) (noting that "[l]itigants and judges regularly modify class definitions"); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir.2004) ("District courts are permitted to limit or modify class definitions to provide the necessary precision.").

{¶74} Resolution of this issue turns on the trial court's broad discretion to manage class actions. *See, e.g., Hamilton, supra*, 82 Ohio St.3d at 70 (emphasizing the trial court's broad discretion in class certification matters and noting that such discretion is "grounded * * * in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket."); *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249, 1252 (1987) ("[d]ue deference must be given to the trial court's decision. A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made.")

{¶75} Here, the Landowners did submit a proposed modification while the case was on remand from this court, wherein they requested a state-wide class. Second,

the class certified by the trial court is unambiguous and such that all class plaintiffs are easily identifiable. Third, the trial court cited valid reasons in support of its decision to certify a state-wide class:

> This is the class delineation that best serves the interests of finality, judicial economy and justice. Determination of the members of this class will not be difficult. This is a clear and unambiguous class definition. It will resolve these issues once and for all and prevent years of numerous and protracted litigation.

{¶76} The trial court did not abuse its discretion by defining the class more broadly than was originally requested via the pending pleading and class certification motion. Specifically, the trial court did not abuse its discretion by defining the class as all Ohio lessors who executed a Form G&T 83 Lease with Beck, where Beck had neither drilled nor prepared to drill a well, nor included the property in a drilling unit. Accordingly, Beck's sole assignment of error in 13MO11 is meritless.

12MO6 – Summary Judgment

{¶77} Beck assigns six errors, all of which challenge the trial court's decision granting summary judgment in favor of the Landowners. For ease of analysis, the assignments of error will be discussed together and/or out of order.

{¶78} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in de novo review. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App.3d 826, 829, 586 N.E.2d 1121 (9th Dist.1990). Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000). Further, "[t]he construction of written contracts and instruments of conveyance is a matter of law." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d

146 (1978), paragraph one of the syllabus, quoting *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). Thus, a de novo review applies as well.

No-term/Perpetual Leases

{¶79} In its first and fourth assignments of error in 12MO6, Beck asserts:

{¶80} "The trial court erred when it concluded the leases are subject to perpetual renewal and therefore void ab initio"

{¶81} "The trial court erred when it concluded the leases were "no-term" leases."

{¶82} Beck challenges the trial court's decision to void the Lease merely because the court deemed it to be a perpetual lease. Indeed, although perpetual leases are disfavored by the law, courts have not found them to be per se illegal or void from their inception. *See Myers v. East Ohio Gas*, 51 Ohio St.2d 121, 364 N.E.2d 1369 (1977); *Hallock v. Kintzler,* 142 Ohio St. 287, 51 N.E.2d 905 (1943); *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N.E. 281 (1904). That said, we must first determine whether the Leases are in fact perpetual.

{¶83} Beck challenges the trial court's ruling that the Leases were no-term and perpetual in nature, and therefore violative of Ohio public policy. Beck asserts the trial court misinterpreted the following Lease provisions to reach that conclusion:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and so much longer thereafter as oil and gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 [the dry hole clause].
>
> 3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within 12 months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of

_____ each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have commenced.

{¶84} The trial court concluded that these two provisions, when read together, allow Beck to extend the leases in perpetuity, in violation of Ohio public policy, "either by making nominal delay rental payments pursuant to paragraph 3 or by determining in its own judgment that the premises are capable of producing oil or gas in paying quantities pursuant to paragraph 2."

{¶85} Beck asserts that the trial court's interpretation of the Lease provisions runs counter to years of established oil and gas jurisprudence in Ohio and nationwide. We agree; the trial court's reasoning is problematic for four main reasons.

{¶86} First, the lease is not a no-term lease. The habendum clause of the Lease contains a primary and secondary term: "This lease shall continue in force * * * for a term of ten years and as 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 * * *."

{¶87} As stated in *Am. Energy Serv. v. Lekan,* 75 Ohio App.3d 205, 598 N.E.2d 1315 (5th Dist.1992), the habendum clause is "two tiered. The first tier, or primary term, is of definite duration * * *. The second tier is of indefinite duration and operates to extend the Lessee's rights under the lease so long as the conditions of the secondary term are met." *Id.* at 212 (quoting and affirming in entirety the decision of the trial court).

{¶88} For example, *Gardner v. Oxford Oil Co.*, 2013-Ohio-5885, 7 N.E.3d 510 (7th Dist.), involved a habendum clause that stated: "the lease will run for '5 years and so much longer thereafter as oil, gas or their constituents are produced in paying quantities thereon, or operations are maintained on' all or part of the land." *Id.* at ¶4. We concluded that the "primary term" of the lease was five years, which had expired, and that "[t]he habendum clause of the lease also provides for a secondary term, that the lease will run for 'and so much longer thereafter as oil, gas or their constituents are

produced in paying quantities thereon, or operations are maintained on' all or part of the land." *Id.* at ¶27.

{¶89} Likewise in *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist), the habendum clause provided that the lease had: "a term of twenty (20) years and so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon." *Id.* at ¶5-6. In interpreting this language, this court concluded that "the primary term of the [1919] lease expired" after the first twenty years, "in 1939." *Id.* at ¶63. The court then acknowledged that "[t]he lease term continued under the secondary term until the well ceased producing in paying quantities * * *." *Id.* There was no requirement in the lease that the lessee had any drilling obligations during the initial primary term. *Id.* at ¶62.

{¶90} Applying these principles to the instant case, the primary term of the Lease is ten years and the secondary term is "so much longer thereafter as oil and gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 [the dry hole clause]." The Form G&T 83 Lease is not a no-term lease; it has two distinct terms.

{¶91} Second, courts have held that delay rental provisions in oil and gas leases –also known as drilling and rental clauses– such as the one contained in paragraph 3 of the Lease, only apply during the *primary term* of the lease.

{¶92} In *Northwestern Ohio Natural Gas Co. v. City of Tiffin*, 59 Ohio St. 420, 54 N.E. 77 (1899), the lease at issue was for "the term of five years...and as much longer as oil and gas is produced or found in paying quantities," and it also required the lessee to "complete a well * * * within nine months" or pay "for such delay a yearly rental." *Id.* at 424. The Supreme Court of Ohio concluded that "such a lease * * * expires at the end of the specified term, unless within that time oil or gas is obtained from the land in the designated quantities." *Id.*, at paragraph two of the syllabus. "Upon payment of the [delay] rental, [lessee's] right to complete the well continued for the specified term of five years, *but no longer.*" (Emphasis added.) *Id.* at 442-443.

{¶93} And in *Brown v. Fowler,* 65 Ohio St. 507, 522, 63 N.E. 76 (1902), the lease had a primary term of two years and secondary term of "as long thereafter as oil or gas is found in paying quantities thereon," but not to exceed 25 years from the date of the lease agreement. *Id.* at 521. It also contained a provision that required the lessee to drill within twelve months or pay a delay rental. The Court concluded that "[t]his [delay rental] clause cannot have the effect, in any event, to extend the lease beyond the two years definitely and certainly fixed in the habendum clause." *Id.* at 523. In other words, the delay rental payment cannot extend the lease beyond the primary term.

{¶94} As a federal district court has explained much more recently, provisions in oil and gas leases "obligating the lessor to pay a rental or develop the leasehold" are "understood to be operative during the primary term." *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 786 (W.D.Pa.2004). The court elaborated on the history of the delay rental clause and how that played a role in its meaning:

> When the fixed term lease came into general use in the 1890s.* * * lessees argued that such leases could be extended beyond the fixed term by the mere payment of the fixed rental referenced in the drilling clause. * * * The courts * * * rejected such a construction as being "contrary to the intentions of the parties to so word a habendum clause that the lease must terminate within a definite time in the absence of production, and then in the next clause destroy that provision by another permitting the lease to run indefinitely [without production] by the payment of a nominal delay rental."

Id. at 790, quoting 2 Summers, *The Law of Oil and Gas*, Section 290.

{¶95} The trial court here primarily relied on *Hite v. Falcon Partners,* 13 A.3d 942, 947 (Pa.Super.2011), a Pennsylvania appellate court case, in reaching the opposite conclusion. However, *Hite* is factually distinguishable for a number of reasons. In *Hite,* the secondary term of the habendum clause expressly permitted the lease to continue in perpetuity as long as a delay rental was paid:

> 3. Term. Lessee has the right to enter upon the Property to drill for oil and gas at any time withinone [sic] (1) year from the date hereof and as long thereafter as oil or gas or either of them is produced from the Property, or as operations continue for the production of oil or gas, or as Lessee shall continue to pay Lessors two ($2.00) dollars per acre as delayed rentals, or until all oil and gas has been removed from the Property, whichever shall last occur. Id. at Paragraph 3.1.

Hite at 944.

{¶96} However, the *Hite* court declined to enforce the provision so as to permit the lessee to defer production indefinitely as long as the rental was paid. The court only allowed the delay rental provision to defer production during the primary term:

> [D]elay rentals function to relieve the lessee of the obligation to develop the leasehold during the primary term of the lease. Thus, Paragraph 3 of the leases currently at issue sets forth a primary term of one year, and requires a two dollar delay rental, paid annually. As such, a single two dollar delay rental payment relieved [the lessee] of any obligation to develop the leasehold during the one year primary term. Once that one year primary term expired, however, the mere payment of delay rentals alone did not preserve [the lessee's] drilling rights.

Id. at 948.

{¶97} Importantly, when the lessors filed suit in *Hite* the primary term of the leases at issue had long since expired, no production had occurred and the lessees contended that they were not obligated to drill so long as they paid the delay rental. *Id.* at 944-945, 948. By contrast, the Form G&T 83 Leases here were still within their primary term at the time the trial court declared them unenforceable. Secondly, unlike the leases in *Hite*, the delay rental provision here was set forth separately from the secondary term of the habendum clause. Finally, unlike the *Hite* lessees, Beck is not

contending that the Lease permits it to defer drilling indefinitely so long as it pays the delay rental in paragraph 3 of the Lease.

{¶98} *Hite* actually supports Beck's position more than the Landowners insofar as the Pennsylvania court recognized the long-standing view that delay-rental clauses—which were developed to offset the harsh requirement that development had to occur immediately upon the signing of the lease—apply only during the primary term of the lease and do not permit a lessee to defer commencement of a well beyond the primary term. *Hite* at 947-948.

{¶99} Thus, the trial court incorrectly concluded that Beck could extend the Lease in perpetuity by making a nominal delay rental payment. Under established case law, once the primary term of the Lease expires, the delay rental provision is no longer applicable. In order for the Lease to continue into the secondary term, "oil or gas or their constituents [must be] produced or [must be] capable of being produced on the premises in paying quantities, in the judgment of the Lessee * * *."

{¶100} Turning to the third issue with the trial court's decision—its interpretation of the phrase capable of production—similar language in a habendum clause has been read as referring to whether a *well* is capable of producing, *not whether the land* is capable of producing. *Morrison v. Petro Eval. Serv., Inc.*, 5th Dist. No. 2004 CA 0004, 2005-Ohio-5640, ¶34-35, 39-40 (where a lease had a definite primary term and continued "as long thereafter" as "oil or gas is produced or is capable of being produced from the premises," the court held that "a well is capable of production if it is capable of producing in paying quantities without additional repairs or equipment"), quoting *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 558 (Tex.2003); *Hunthauser Holdings, LLC v. Loesch*, D.Kan. No. 00-1154-MLB, 2003 WL 21981961 (June 10, 2003) (where lease lasted for three years and as long thereafter as oil, gas or any of the products covered by the lease is or can be produced, the court proceeded as if the clause refers to a well that has produced or is capable of producing); *Anadarko Petroleum Corp., supra* (habendum clause stating the lease lasts as long as gas is or can be produced refers to whether a well is producing or can

produce). In other words, oil and gas is not capable of being produced if no well exists.

{¶101} Here, the secondary term of the habendum clause does not allow an extension merely because the *land* is capable of production. The Landowners are incorrect that the Leases require no development activity whatsoever, ever, and may be extended indefinitely. The trial court incorrectly concluded that Beck could extend the Lease in perpetuity by interpreting the phrase "capable of production," in the secondary term of the habendum clause to mean the *land* is capable of producing. Instead, case law has interpreted the phrase as referring to whether a *well* is capable of producing. This interpretation presupposes that a well was drilled and began producing during the primary term of the lease, and continued producing into the secondary term. The secondary term would then continue until such time as the well was no longer capable of producing.

{¶102} Fourth and finally, the trial court incorrectly reasoned that the addition of the language "in the judgment of Lessee" to the secondary term of the habendum clause, permits the Lease to continue in perpetuity at Beck's sole discretion. The full portion of the habendum clause reads: "are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee." The Landowners and the trial court over-parsed the phrase. The phrase does leave it to the judgment of the Lessee to determine whether a well is in fact or capable of *producing in paying quantities*. It would be contrary to the joint economic interest of both a landowner and the lessee to continue drilling if it was no longer financially feasible. Under these conditions, the lease would end and the lessee's interest in the mineral rights would expire; it would not continue in perpetuity. Further, clauses dealing with paying quantities have not been invalidated or read as making an entire lease void ab initio. They do not necessarily allow the lessee to arbitrarily determine whether a well is capable of production.

{¶103} Rather, courts generally impose a good faith standard on the paying quantities requirement, with or without this lease language. *See, e.g., T.W. Phillips Gas and Oil Co. v. Jedlicka*, 615 Pa. 199, 216-224, 42 A.3d 261, fn. 15 (2012); *Cotton*

v. Upham Gas Co., 5th Dist. No. 86CA20, 1987 WL 8741, *1 (Mar. 6, 1987) ("As between lessor and lessee, the construction of the phrase 'paying quantities' must be from the standpoint of the lessee and his 'good faith judgment' that production is in paying quantities must prevail."); *Weisant v. Follett*, 17 Ohio App. 371 (7th Dist.1922) (reviewing cases in various states for propositions such as: "The lessee, acting in good faith and upon his honest judgment, not an arbitrary judgment * * *"; "His judgment, when bona fide, is entitled to great weight in determining whether the gas is in fact produced in paying quantities"; "the lessee is the sole judge on this question, and as long as he can make a profit therefrom, he will be permitted to do so"; and "largely left to his good judgment").

{¶104} For all of these reasons, the trial court erred in determining that the leases were no-term and perpetual in nature, and therefore void ab initio as against public policy. The Lease provided for a primary term of 10 years within which to commence drilling. Only then would a secondary term commence, and continue only so long as there is an established oil or gas well that is actually producing or capable of producing in paying quantities. Accordingly, Beck's first and fourth assignments of error in 12MO6 are meritorious.

Implied Covenants

{¶105} In its second, third and sixth assignments of error in 12MO6 Beck asserts, respectively:

{¶106} "The trial court erred when it concluded Appellant's leases were subject to implied covenants."

{¶107} "The trial court erred when it refused to enforce the 30-day notice provision."

{¶108} "The trial court erred when it found a breach of the covenant to develop."

{¶109} In addition to invalidating the Leases because it believed them to be no-term and perpetual in nature, the trial court also concluded that they were subject to the implied covenants and that Beck had breached the implied covenant to

reasonably develop. Despite finding a breach, the trial court refused to enforce a Lease clause that granted Beck 30 days to cure any alleged breach.

{¶110} First and foremost, the trial court erred in its conclusion that the Leases were subject to implied covenants, relying on the Supreme Court's decision in *Ionno, supra, 2* Ohio St.3d 131. In that case, the 1960 coal and clay lease provided for a royalty on the product or a minimum rent payment of $300 per year for the first two years and $600 per year thereafter. By 1979, there was still no mining activity, the lessors refused to accept that year's payment, and the lessors sued seeking forfeiture and cancellation of the mineral lease for reasons of nonperformance and failure of consideration. The issue before the Supreme Court was whether the lease should be forfeited for breach of an implied duty to reasonably develop the leased premises where the lease contains no time period for commencement of operations. *Id.* at 132.

{¶111} The Supreme Court reiterated the general principle that absent express provisions to the contrary, a mineral lease includes an implied covenant to reasonably develop the land. *Id.* at 132-133, citing *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227, at paragraph of syllabus (1980) and *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 127, 48 N.E. 502 (1897). "Thus, where a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* at 133.

{¶112} The Court then addressed whether the annual rental removed any duty to develop with diligence. The Court concluded that *because the rental was to be offset by any coal or clay produced,* the contract manifestly contained an implied covenant on the part of the lessees that they will work the land with ordinary diligence so that lessors may secure the actual consideration for the lease being the payment of a royalty on mined minerals. *Id.* at 133-134. The Court continued:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties are entirely separate matters. An

> annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.
>
> We therefore hold that an annual advance payment which is credited against future royalties under the terms of a mineral lease does not relieve the lessee of his obligation to reasonably develop the land. We further find that since the lessees in the present case have failed to carry on any sort of mining activity on the leased premises since the inception of the lease in 1960, that they have breached such duty.

Id. at 134.

{¶113} *Ionno* does not benefit the Landowners for several reasons. First, it is factually distinguishable. The *Ionno* Court focused on contractual language stating that the rental was *an offset* in the case of production—"an annual advance payment which is credited against future royalties"—to show that there was an implied covenant to reasonably develop. *Id.* at syllabus. The Court explained:

> Clearly, we are not dealing with a contract which exacts a non-refundable annual payment of rent to the lessor as separate and independent consideration. Rather, because the minimum royalties required under the lease at hand offset production royalties, the real consideration for the lease is the expected return derived from the actual mining of the land.

Id. at 443.

{¶114} By contrast, here the rental is *not an offset but rather a substitute for drilling.* It is a non-refundable payment of rent to the Landowners as separate and independent consideration for the right to delay drilling during the primary term of the Lease.

{¶115} In any event, the *Ionno* implied covenant to reasonably develop will only be inferred "where a lease fails to contain any specific reference to the timeliness of development." *Id.* at 133. The *Ionno* Court specified that it was dealing with a no-term lease. There was no primary term in the *Ionno* lease during which major actions such as production were required, whereas here there is a ten-year primary term during which certain development activities must occur. Further, an implied covenant can only be construed in a lease if there are no express provisions to the contrary. *Id.* at 132-133. Where the lease specifies that no implied covenant shall be read into the agreement, an implied covenant to develop under *Ionno* cannot be imposed. *Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 5th Dist. No. 12-CA-21, 2013-Ohio-2487, 993 N.E.2d 795, ¶19-21; *Bushman v. MFC Drilling, Inc.*, 9th Dist. No. 2403-M, 1995 WL 434409, *2 (July 19, 1995), *Taylor v. MFC Drilling, Inc.*, 4th Dist. No. 94CA14, 1995 WL 89710, *2 (Feb 27, 1995); *Holonko v. Collins*, 7th Dist. No. 87CA120, 1988 WL 70900, *2 (June 29, 1988), *Smith v. North East Natural Gas Co.*, 5th Dist. No. 86AP30016, 1986 WL 11337, *2-3 (Sept. 30, 1986).

{¶116} In *Holonko*, this court refused to impose an implied covenant of development into a lease, noting that the Supreme Court held the implied covenant is utilized only when the lease is silent as to timeliness of development. *Holonko*, 7th Dist. No. 87CA120 at *2, citing *Harris*, 57 Ohio St. at 129. This court pointed out that the lease mentioned the right of drilling or not drilling and the lease stated: "It is mutually agreed that this instrument contains and expresses *all* the agreements and understandings of the parties in regard to the subject matter thereof, *and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them.*" (Emphasis added.) *Holonko* at *2.

{¶117} Similarly, the Lease here contains a clause that required Beck to commence operations or make a delay rental payment, as well as a clause stating that

the rentals are "adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises * * *[;]" and a clause stating that the lease "contains and expresses all of the agreements and understandings of the parties" and that "no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them." (Lease paragraphs 3, 9, 19.)

{¶118} The trial court, however, found that paragraph 19's disclaimer of implied covenants was contradicted by paragraph 17 of the Lease which states:

> In the event the Lessor considers that Lessee has not complied with any of its obligations hereunder, *either expressed or implied*, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. * * *

(Emphasis added.)

{¶119} The trial court concluded that the reference to express or implied in paragraph 17, which it found to be a more specific provision, created an ambiguity that nullified the disclaimer of implied covenants in paragraph 19, which the trial court found to be a more general provision.

{¶120} However, the fact that paragraph 17 requires *notice* of the lessor's belief that the lessee has violated an express or implied obligation does not necessarily *create* implied obligations. The purpose of that clause is to provide notice to the lessee to ensure it has time to cure any alleged breaches. And assuming arguendo that the clause at paragraph 17 somehow supersedes the express proscription against the creation of implied covenants in paragraph 19, the fact that

there is a delay rental provision during the primary term would preclude the reading of any implied covenants into the Lease, as discussed above.

{¶121} The entire premise behind the delay rental clause is to delay drilling during the primary term. As the Supreme Court has explained:

> In the lease in this case there is an express stipulation for the payment of rental in lieu of drilling, and the option is thus given the lessee to drill or pay rental in accordance with the terms of the contract. Surely the clause making such provision, which is set out in full in the finding of facts, cannot be otherwise construed or interpreted. The rights of the parties must be determined from their own contract. Under the clearly expressed terms of the lease, if the lessee does not drill, he may still continue the lease in force by payment of the stipulated rental. Such matter being covered by the express terms of the written contract, no implication can arise in relation thereto inconsistent with, or in opposition to, such plain provision of the written contract. An implied covenant can arise only when there is no expression on the subject.

Kachelmacher v. Laird, 92 Ohio St. 324, 332, 110 N.E. 933 (1915).

{¶122} For the various reasons expressed above, there is no implied covenant of reasonable development that could apply within the ten-year primary term here, as construing the lease to include such a covenant was expressly proscribed by the lease terms. The trial court erred in reading an implied covenant into the Lease and further concluding it was violated. Accordingly, Beck's second and sixth assignments of error in 12MO6 are meritorious, and Beck's third assignment of error, that the trial court erred by failing to enforce the 30-day notice provision, is moot. App.R. 12(A)(1)(c).

{¶123} Finally, in its fifth assignment of error in 12MO6, Beck asserts:

{¶124} "The trial court erred when it invoked the equitable remedy of forfeiture."

{¶125} Here Beck contends that—setting the other issues with the trial court's decision aside— forfeiture was not the appropriate remedy. This assignment of error

is also rendered moot by the resolution of the other assignments of error above, and we decline to address it. App.R. 12(A)(1)(c).

Appeal of the Denial of Intervention is Moot

{¶126} In its sole assignment of error, XTO Energy asserts:

{¶127} "The trial court incorrectly denied XTO Energy's Motion to Intervene."

{¶128} In light of our decision in Case Nos. 12MO6, 13MO3, and 13MO11, XTO's appeal is moot.

> "As a general rule, courts will not resolve issues that are moot. See Miner v. Witt (1910), 82 Ohio St. 237, 92 N.E. 21. 'The doctrine of mootness is rooted both in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.' (Citations omitted.) James A. Keller, Inc. v. Flaherty (1991), 74 Ohio App.3d 788, 791, 600 N.E.2d 736. * * * "

In re Atty. Gen.'s Subpoena, 11th Dist. No. 2009-G-2916, 2010-Ohio-476, ¶12, quoting *Nextel West Corp. v. Franklin County Bd. Of Zoning Appeals*, 10th Dist. No. 03AP-625, 2004-Ohio-2943, ¶10.

{¶129} Within its motion to intervene, XTO alleged it had a significant interest in the Leases, which the trial court determined to be void in its July 2012 decision granting summary judgment in favor of the Landowners. Because this court has held that the Leases are valid, XTO is in the same position it held prior to the trial court's judgment. Thus, there is no need for XTO to intervene, and as such, no case or controversy for this court to decide.

{¶130} Accordingly, XTO's sole assignment of error in 13MO2 is moot.

Conclusion

{¶131} While it was not the best practice, the trial court did not abuse its discretion by certifying the class after granting summary judgment on the merits because the rule against one-way intervention does not apply to Civ.R. 23(B)(2) classes. There was sufficient opportunity for factual development so as to permit a meaningful determination regarding the class action certification, thus rendering a hearing unnecessary. Finally, the trial court has discretion to modify the class, even sua sponte, and it did not abuse its discretion by defining the class as all Ohio lessors who executed a Form G&T 83 Lease with Beck, where Beck had neither drilled nor prepared to drill a well, nor included the property in a drilling unit. Accordingly, assignments of error 1 and 3 in 13MO3 are meritless; assignments of error 2 and 4 in 13MO3 are moot; and the sole assignment of error in 13MO11 is meritless.

{¶132} Regarding the summary judgment ruling, the trial court misinterpreted the pertinent lease provisions and Ohio case law and erred in concluding the Lease is a no-term, perpetual lease that is void ab initio as against public policy. The trial court further erred in concluding the Lease was subject to implied covenants and that Beck breached the implied covenant to reasonably develop. Accordingly, in 12MO6, assignments of error 1, 2, 4 and 6 are meritorious, and assignments of error 3 and 5 are moot.

{¶133} Finally, in light of our decision in Case Nos. 12MO6, 13MO3, and 13MO11, XTO's appeal in Case No. 13MO2 is moot.

{¶134} For all the foregoing reasons, the trial court's class certification and definition judgments, dated February 8, 2013 and June 10, 2013, respectively, are affirmed, and its July 31, 2012 order granting summary judgment is reversed and remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Donofrio, J., concurs.
Vukovich, J., concurs.

APPROVED:

Mary DeGenaro

JUDGE MARY DeGENARO

COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
2012 JUL 12 AM 9:53
CLERK OF COURTS

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No. 2011-345
vs.	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION (On Pending Motions)

The above styled action is before the Court on the Complaint of the Plaintiff, Clyde A. Hupp and Molly A. Hupp, et al., for declaratory judgment and quiet title. This action was filed on September 14, 2011 and the two subsequent Complaints for Class Action and Amended Class Action were filed on September 29, 2011 and September 30, 2011, respectively. The Defendant, Beck Energy Corporation, has not filed an answer in this action, but has made an appearance. This action has not been certified as a class action as of the date of this decision. The Court is considering the pending motions prior to undertaking the required hearings in regard to class certifications. **Clyde A. and Molly Hupp are parties of record in this case and the correct style of the case is as set forth above. For some reason, unknown to this Court, the parties in this case have changed the style of this case. All future filings in this case will be correctly titled or subsequently stricken by Court order.**

The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion to

Dismiss on January 5, 2012. On the same date, the Plaintiffs also filed a response to the Defendant's Motion to change venue. On February 16, 2012 the Plaintiffs filed a Motion for Summary Judgment with a supporting brief. On March 19, 2012 Chief Justice Maureen O'Connor of The Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr., Judge of the Washington County Court of Common Pleas. On March 19, 2012 the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. Thereafter, on March 23, 2012, the Court ordered the matter set for a Status Conference. The purpose of the Status Conference was to establish a briefing schedule for all of the motions that were being filed in this action. All attorneys of record participated in the Status Conference. A Status Conference was held by means of telephone conferencing on April 20, 2012. A Journal Entry was entered on April 25, 2012 establishing a briefing schedule for the pending motions. The briefing schedule required all responses to be filed by April 30, 2012 and replies to responses by April 13, 2012. All motions and replies have been timely filed either pursuant to an extension of time granted by the Court or within the original deadlines. The Defendant filed its Brief in Opposition to the Plaintiff's Motion for Summary Judgment on April 30, 2012 and the Plaintiffs filed a reply to that Brief on May 14, 2012. The matter has been under review by the Court since that date. The Court has reviewed all of the pleadings, all of the motions, memorandums and supporting affidavits provided to this Court and filed in this action. At present there are six named individual plaintiffs in this action. One plaintiff, Donald W. Yonally, was voluntarily dismissed without prejudice on April 12, 2012.

The Court will address all of the issues presented in the parties' various motions in this decision.

FACTUAL BACKGROUND

The Plaintiffs own various tracts of land in Monroe County, Ohio. The Defendant, Beck Energy, is an Ohio oil and gas producer that develops oil and gas interests in Ohio. Beginning in 2003 the Defendant entered into a number of oil and gas leases in Monroe County, Ohio. The Plaintiffs maintain that they have a potential class of 248 lessors. The leases that are involved in this action are leases generated by the Defendant. All leases are identical except as to a few blanks on each of the form leases that were filled in by the Defendant's representatives. These variations are: the date of the lease, the names and addresses of the lessors, and a rough description of the land by township and county. All leases have written in the blank in paragraph three a twelve month primary period/term. The delayed rental payment varies per lease and the name of the lessors varies with each lease. To date, no wells have been drilled in Monroe County pursuant to any of the leases that are involved in this action.

There are certain provisions of the form lease (see Plaintiffs' Exhibit 2 as attached to Plaintiffs' Complaint) that are at issue in this case. The key paragraphs are set forth below:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as 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, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.
>
> 3. This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.
>
> * * *

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event as well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay th Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are started, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessor may elect.

***

16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches

shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

***

19. . . . no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties. . . .

MOTION TO CHANGE VENUE

At the present time, no jury demand has been filed in this action. If this matter proceeds as an action to the Court, there has been a de facto change of venue by reason of Judge Selmon recusing herself from this case and The Chief Justice of The Supreme Court of Ohio assigning this case to the undersigned. If a jury demand is timely filed in the future, the Court will revisit the issue of venue should it be brought to the Court's attention in a subsequent motion. The motion to change venue is denied without prejudice.

DEFENDANT'S MOTION TO DISMISS

On November 30, 2011 the Defendant filed a combined Motion to Dismiss and/or Change Venue. Pursuant to Oh. Civ. R. 12(B)(6) the Defendant seeks to have this Court dismiss this action pursuant to the provisions of paragraph 17 of the lease.

The Plaintiffs admit that they have not complied with paragraph 17 of the subject lease.

A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of a complaint. Dowdy v. Jones, 7th Dist. No. 10-CO-21, 2011-Ohio-3168, ¶14. For a trial court to dismiss a complaint pursuant to Civ.R.

12(B)(6), it must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to the relief sought. Ohio Bureau of Workers' Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, __ N.E.2d __, ¶12. "The allegations in the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* Moreover, a complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theories on which the plaintiffs rely. Fahnbulleh v. Strahan, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). Instead, the Court must examine the complaint to determine whether the allegations provide for any relief on any possible theory. *Id.*

Defendant's motion to dismiss herein is predicated on a single proposition: that Plaintiffs did not provide thirty days written notice to this Defendant prior to commencing this action. The Plaintiffs maintain that the Leases which form the contractual basis for these parties are void as against public policy and unenforceable, and under any reasonable construction of said Leases, were materially and substantially breached by the Defendant reducing the contractual requirement of a notice to a meaningless act from which no benefit could be derived.

Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or

indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also* State v. Baldwin Producing Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension

between lessors, lessees and the courts. Jacobs v. CNG Transmission Corp., 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions; one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

The Plaintiffs' position in this matter is that their leases with the Defendant are a no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in

paying quantities pursuant to paragraph 2.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in Ionno v. Glen-Gery Corp., 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. *Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.*

This Court must, under the current state of Ohio law, consider the allegations in the Plaintiffs' Complaint as true, and must draw any reasonable inferences from them in favor of the Plaintiffs. When doing so, this Court cannot say beyond doubt that the Plaintiffs can prove no set of facts that would entitle them to the relief sought. Therefore, for all of the reasons set forth

herein above and hereafter, the Defendant's Motion to Dismiss is not well taken and the same shall be denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs filed their Motion for Summary Judgment in this action on February 16, 2012. The Defendant filed its Brief in Opposition on April 30, 2012. The Plaintiffs further filed a reply to the Defendant's opposition on May 14, 2012 and on March 19, 2012 filed a reply brief in support of their Motion for Summary Judgment.

The Plaintiffs' Motion for Summary Judgment sets forth several distinct issues. First, the Plaintiffs maintain that their lease with the Defendant is a lease in perpetuity and as such is void and unenforceable as against the public policy of The State of Ohio. Secondly, the Plaintiffs maintain that the Defendant breached the implied covenant to reasonably develop their land and by doing so the leases are now null and void. Thirdly, the Plaintiffs maintain that the lease provisions for foregoing development by the payment of delayed rentals has expired because the Defendant failed to commence a well within the required times. The Defendant has countered the Plaintiffs' assertions by stating that it had not received the written notice required from the Plaintiffs setting forth any alleged noncompliance by the Defendant with the lease's terms. Plaintiffs maintain that they do not have to give notice because the leases were void *ab initio*. The Defendant also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease.

A Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation." Gross v. Western-Southern Life Ins. Co., 85 Ohio App.3d 662, 667, 621 N.E.2d 412 (1st Dist. 1993). A Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [civil rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Todd Development Co. v. Morgan, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, &22. *See also* Civ.R. 1(B).

Civ.R. 56(C) mandates that a court enter summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* When a motion for summary judgment has been made and properly supported, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The parties moving for summary judgment need only prove their own case: the movants do not bear the initial burden of addressing any affirmative defenses the nonmovant may assert. *Id.*, syllabus and &13.

"Summary judgment is appropriate where no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the nonmoving party's claim or defense." Gross, 85 Ohio App.3d at 667. The mere existence of a factual dispute is insufficient to preclude summary judgment only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Id.* "The construction of written contracts and instruments of conveyance is a matter of law." Alexander v. Buckeye Pipe Line Co., 553 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. This Court finds that the instant case involves the construction of written leases

and in light of the Defendant's undisputed failure to commence any development activity pursuant to those leases, the clear public policy of Ohio has been violated. There is no dispute as to any material fact; reasonable minds can reach no conclusion other than one reached herein by this Court that is adverse to the Defendant; and Plaintiffs are entitled to judgment as a matter of law on this issue.

The Plaintiffs also maintain that their leases with the Defendant are perpetual leases under which there has been no development of oil and gas and therefore the leases are void and unenforceable as against public policy. Central to the understanding of this issue are paragraphs two and three of these parties' leases. Paragraph two provides as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the lessee for a term of ten years and as 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, or as the premises shall be operated by the lessee in the search for oil and gas and as provided in paragraph 7 following."

Paragraph 7 of the parties' leases deal with the event that if a well is drilled that is a dry hole. Paragraph number 3 of the parties' lease is also central to an understanding of the issue at hand. Paragraph 3 of the parties' leases provide that:

> "This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- 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, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved

herein. If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed rental can be paid. Further, paragraph 2 provides that the leases have a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. It also leaves the determination of what paying quantities means up to the Defendant. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. There is no deadline for the completion of a well. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs.

Public policy analysis requires this Court to consider the impact of the contract at issue upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio Spp.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> "Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

> Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy."

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-321, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

The Ohio Supreme Court has clearly and unequivocally articulated the public policy of the State of Ohio in regard to the extraction of oil and gas. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also State v. Baldwin Producing

Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; Northampton Building Co at 198-99. It would be inconsistent to permit a private operator to unilaterally ban the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. The Plaintiffs are also entitled to summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs' acreage. This provision violates the implied covenant to reasonably develop.

The leases in this case are, in effect, a no-term leases: through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2 provides that the leases shall continue in force for a term of ten years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3 provides that the leases shall become null and void if a well is not commenced

within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of ____ Dollars each year, ..." but likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals. Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779 . Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The coal leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation within which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.

Id. At 134.

The "long term" lease in *Ionno* and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. Like the lease in *Ionno* under which there had been no development, the leases herein are unenforceable as against public policy.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question seriously offend public policy in that they are perpetual leases. The Plaintiffs are also entitled to Summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land and by failing to drill any wells on any of the acreage that implied covenant has been violated.

"[T]he only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving *** royalties based upon the amount of minerals derived from the land." Ionno, 2 Ohio St.3d at 133 n.2, 443 N.E.2d 504. "[W]here a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* At 133. In *Ionno,* the Ohio Supreme Court found a lease to be subject to the implied covenant to reasonably develop where it set forth

no time period in which mining operations were required to commence, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.* At 133.

The leases in this case contain neither a "specific reference to the timeliness of development" no "a time period in which mining operations were required to commence." Paragraph 3 of the lease provides that the lease shall "terminate" if a well is not commenced within the twelve-month period, the remainder of that paragraph ostensibly permits the Defendant to delay development indefinitely by paying annual delay rentals. Paragraph 2 of the lease also permits the Defendant to delay development indefinitely by determining in its judgment that oil or gas is "capable of being produced on the premises in paying quantities." A lease in which the development period can be delayed into perpetuity at the option of the lessee clearly satisfies the *Ionno* criteria under which an implied covenant will arise.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill and initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. V. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams,* 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The court saw no need to resort to the law of the state in which the case arose, stating that the covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *id.* At 278-79.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the minerals to which its lease applied.

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. At 281.

The Defendant maintains that its lease clearly disclaims all implied covenants. The lease does contain a general disclaimer of implied covenants. However, the lease also later refers to implied covenants.

In Ohio, as elsewhere, "[a]bsent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land." *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

Ambiguities in contracts are to be construed against the proponent of the instrument. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* "In determining whether contractual language is ambiguous, the contract must be construed as a whole *** so as to give reasonable effect to every provision in the agreement." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (applying Ohio law). Where a contract as a whole can be reasonably interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue, and must be construed against the drafter. *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003).

In this case, the parties' lease first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.

This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to

reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective.

Where general provisions of a contract conflict with specific provisions of the same document, the specific provisions generally control. *Edmondson v. Motorists Mutual ins. Co.*, 48 Ohio St.2d 52, 53, 356 N.E.2d 722 (1976); *Hoepker v. Zurich American Inc., Co.*, 3d Dist. No. 140318, 2003-Ohio-5138, ¶11; *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10th Dist. 1991). Paragraph 17 of the Beck Lease sets forth specific procedures to be followed in the event a lessor believes Beck to have breached either an express or implied obligation. Paragraph 19 generally disclaims all implied obligations. In that the specific provision in paragraph 17 setting forth a lessor's rights in the event Beck breaches an implied condition controls over the general disclaimer in paragraph 19, the disclaimer is ineffective.

The stated purpose of this lease is "drilling, operation for, producing and removing oil and gas and all the constituents thereof." The lease contains no suggestion that either defendant or lessor had any other objective. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the express purpose of the lease.

To give effect to the fundamental purpose of an oil and gas lease as well as to the implied covenant to reasonably develop the land, provisions in the lease bearing on the extent of development may modify or reflect the standard of reasonableness in the implied covenant.

Streck v. Reed, 9th Dist. No. 1221, 1983 WL 4132, *3 (June 8, 1983). The lease must be construed in a manner that will give effect to all the provisions in the lease, both express and implied. *Id.*

The provision in a mineral lease for annual advance payments does not relieve the lessee of its obligation to reasonably develop the land. *Ionno*, 2 Ohio St.3d at 134, 443 N.E.2d 504.

> The questions of working diligently and of paying rent or royalties are entirely separately matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum.

Paragraph 3 of this lease specifies that the Lease "shall become null and void" and the rights of the parties "shall cease and terminate" unless a well is commenced within twelve months (subject to the effect of paying delay rentals). The parties necessarily determined that twelve months was a reasonable time in which to commence a well. In construing this lease, the Court hereby finds that the implied covenant to reasonably develop the land required the Defendant to commence a well within one year. As the Defendant failed to do so, and in fact, has failed to commence a single well on any portion of any of the Plaintiffs' acreage, even though more than three years have elapsed since the lease covering the Hustacks' property was executed, almost six years have elapsed since the Hubbards executed their lease, nine years have elapsed since Donald Yonley executed his Lease, and more than six years have elapsed since David Majors executed his Lease, it has breached the implied covenant to reasonably develop Plaintiffs' Acreage.

When construing the evidence most strongly in favor of the Defendant as required by the Ohio Rules of Civil Procedure, this Court is convinced that reasonable minds can come to but one conclusion, and that conclusion is adverse to the Defendant. This Defendant's lease clearly and unequivocally breaches the implied covenant to reasonably develop the Plaintiffs' land and violates the public policy of the State of Ohio and the Plaintiffs are entitled to summary judgment on this issue. As stated herein above, the lease involved in this action is a lease in perpetuity. By paying delayed rentals, this land could potentially never be developed by the Defendant's payment of a very minimal payment to the Plaintiffs.

While not controlling, our neighboring state of Pennsylvania has decided the issues presented by this course. It is interesting because Pennsylvania has taken the same position taken by the Ohio Supreme Court on the issues presently before this Court in this matter. *Hite v. Falcon Partners*, 2011 Pa.Supr. 2, 13 A.3d 942 (2011), is in many respects similar to the instant case. The *Hite* lease and this lease are both "unusual" types of no-term leases. 13 A.3d at 947. They do not contain traditional habendum clauses which definitively designate a primary term (the time period in which the lessee has the right to develop the leased premises) and a secondary term (the period following the primary term in which the lessee can reap a long-term return on the efforts and funds expended to develop the premises.) The *Hite* lease and this lease each contain language purporting to enable the lessee to indefinitely extend the primary term at the lessee's option.

The *Hite* lease provided for a one-year primary term that the lessees could extend indefinitely either by continuing operations for production of oil or gas, or by paying annual delay rentals of two dollars per acre. 13 A.3d at 944. The lessees in *Hite* simply paid delay

rentals for years without commencing any drilling, depriving the lessors of the royalties they would have received from the production of their oil or gas.

The court noted that "[r]oyalty-based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties." *Id.* At 945. The court reviewed the history of mineral leases, noting the evolution from a definite term that left the lessee at a disadvantage if minerals were discovered near the end of the term, to a variable term expressed by a habendum clause providing for a fixed period for development, with an option to extend the lease for "as long thereafter" or "so long as" the specified minerals were produced in paying quantities, enabling the lessee to continue to reap a return for the money spent to develop the property. *Id.* At 946.

Even if a written lease did not expressly require the lessee to develop the property in a timely manner or suffer forfeiture, courts recognized an implied obligation to develop the leasehold. *Id.* As a result, leases specifying a fixed primary term with a "thereafter" clause began to incorporate "delayed rental" clauses relieving lessees of the obligation to immediately develop the property. *Id.* "[C]ourts have interpreted delay rentals to be 'limited to the initial term of the lease.'" *Id* at 947; *Jacobs*, 332 F.Supp.2d at 786.

As noted in Plaintiffs' public policy argument, section II.B., *supra*, lessees began crafting leases permitting the lessee to extend the exploration period for as long as he considered payment of the delay rental worthwhile, giving rise to the "no term lease," which courts rejected under one of two rationales. *Hite* at 947. One rationale was that because the lease did not fix a time beyond which the lessee could not delay actual development and the payment of royalties-the consideration for the lease-the lease was unfair and therefore unenforceable against the lessor. *Id.*

The other rationale was that no-term leases contained an implied condition requiring the lessee to drill within a reasonable time or forfeit the lease. *Id.*

The *Hite* court observed that to a landowner unsophisticated in the legalities of leasing minerals the terms of the lease indicated a one-year term during which the lessee was to commence development. 2011 Pa.Super.2, 13 A.3d at 948. "If the lease could be extended in perpetuity though the payment of $2.00 per acre per year, there would be little need for the parties to agree on a one-year lease term." *Id.* Rejecting the lessee's contention that the leases enabled it to maintain production rights indefinitely as long as delay rentals were paid, the court opined that delay rentals relieve the lessee of the obligation to develop the land during the primary term only. *Id.* Accordingly, a single two-dollar-per-acre delay rental relieved the lessee of any obligation to develop the leasehold during the one-year primary term. *Id.* Once that primary term expired, the mere payment of delay rentals could not preserve the lessee's drilling rights. *Id.*

Permitting the lessee to pay delay rentals indefinitely, thereby denying the lessors the financial benefits of actual production, would contravene the presumed intention of the parties in executing the leases in the first place, as well as the notion that delay rentals are intended to "spur the lessee toward development." *Id.* Moreover, construing the leases as creating an indefinite term would provide the lessee with vested property rights for the mere payment of a nominal delay rental, a concept at odds with the traditional construction of the property rights conveyed by an oil and gas lease. 13 A.3d at 949. Accordingly, the *Hite* court held that the terms of the leases being construed limited the privilege of foregoing production by paying delay rentals to

the one-year primary term; once the primary term ended and the lessee failed to commence production, the leases expired. *Id.*

Like the *Hite* lease, this lease is a no-term lease which, on its face, purports to enable the Defendant to extend the term indefinitely, without any development, by simply paying nominal delay rentals and/or determining that the leased acreage is capable of producing.

A contract is illusory when, by its terms, the promisor "retains an unlimited right to determine the nature or extent of his performance; the unlimited right in effect destroys his promise and thus makes it merely illusory." *Century 21 v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist. 1980); *Thomas v. Am. Elec. Power Co.*, 10th Dist. No. 03AP1192, 2005-Ohio-1958, ¶32. Courts generally disfavor interpretations that render contracts illusory, preferring a meaning that gives the contract vitality. *Thomas*, ¶32.

Construing this lease consistently with *Hite*, limiting the Defendant's ability to forego development to the twelve-month primary term set forth in paragraph 3, would prevent the Defendant's promise to drill from being illusory and would promote public policy and the expressed intent of the parties to develop the Acreage.

For all the reasons set forth herein above the Plaintiffs are entitled to summary judgment. The remaining issue is whether or not forfeiture is an appropriate remedy for the Plaintiffs and whether or not the Defendant is entitled to a 30 day notice of cure as provided for in the lease. For the reasons set forth herein after, this Court believes that forfeiture of these leases is the appropriate remedy because they were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice.

When causes of forfeiture are specified in an oil and gas lease, other causes cannot be implied. *Beer*, 61 Ohio St.2d at 119, 399 N.E.2d 1227, paragraph three of the syllabus. However, "[w]here legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant." *Id.*, paragraph four of the syllabus. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. *Ionno*, 2 Ohio St.3d at 135, 443 N.E.2d 504. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of an implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. *Id.*

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore*, 2008-Ohio-5953, &48. Where a lessee's failure to drill or mine within a reasonable period of time would allow the lessee to encumber the lessor's property in perpetuity, without any return of income to the lessor arising from drilling or mining operations, breach of the implied covenant to develop the land could result in forfeiture. *Id.* The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Id.*, ¶51.

In *Beer*, the court upheld a partial forfeiture (or cancellation) where the lessee had performed no work on the leased property for over a year, and had financial and operating difficulties. 61 Ohio St.2d at 121-22, 399 N.E.2d 1227. The court stated that even if the lessee had sufficient resources from which to pay damages, forfeiture of the lessee's continued interest in unexploited acreage was warranted to assure the development of the land and the protection of the lessor's interests. *Id.* at 122, 399 N.E.2d 1227. In *Lekan*, the court upheld a forfeiture where

the lessee had limited experience; had drilled but never sold gas from a well on the lessor's property, even though he had placed three wells on other lessors' property into production; and functioned as a "mom and pop" operation without employees. 75 Ohio App.3d at 216-17, 598 N.E.2d 1315.

In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate.

Plaintiffs did not provide written notice to the Defendant pursuant to paragraph 17 of the lease, "setting out specifically in what respects lessee has breached this contract," and affording the Defendant thirty days to cure any breach. However, the Defendant lacks the means to cure either the defects in or its breaches of the lease. Plaintiffs' compliance with the technical requirement of providing notice prior to commencing this action would serve no purpose.

A lessee's "midnight-hour attempts to save the lease" are insufficient to preserve the lessee's rights under an oil and gas lease that has been breached. *American Energy Services v. Lekan*, 75 Ohio App.3d 205, 214, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶50; *Gisinger v. Hart*, 115 Ohio App. 115, 184 N.E.2d 240 (4th Dist. 1961). In *Lekan*, the court found that once the conditions of the lease had ceased to

be met, the lease terminated "by the express terms of the contract *** and by operation of law and revest[ed] the leased estate in the lessor." 75 Ohio App.3d at 212, 214.

In *Gisinger*, the lessees made no effort to develop the leasehold until ten days before expiration of the primary term. Finding it improbable that gas or oil would be produced before the end of the term, the court held the effort was "too little too late," and rejected the lessees' claim for an extension of the term. 115 Ohio App. At 117.

Moreover, it is well settled that the law will not require a vain act. *E.g., State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 603, 138 N.E. 881 (1922); *Gerhold v. Papathanasion*, 130 Ohio St.342, 346, 199 N.E.353 (1936); *Coleman v. Portage County Engineer*, 191 Ohio App.3d 32, 2010-Ohio-6255, 944 N.E.2d 756, ¶38 (11th Dist.). In the instant case, the purpose of the notice requirement in paragraph 17 of the lease is to provide the Defendant with an opportunity to cure any breach. However, the lease is void as against public policy. The Defendant cannot cure its breach in a timely manner. The Plaintiffs are entitled to summary judgment as requested and to the forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties. The Defendant's rights in the subject bases are forfeited. Court costs shall be assessed against the Defendant.

ENTER AS OF DATE OF FILING:

/s/ Ed Lane

Judge Ed Lane

c: Attorney Zurz/Ropchok/Peters
Attorney Bauerle/Hirsch