Supreme Court of Ohio Clerk of Court - Filed April 23, 2015 - Case No. 2014-1933

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, *et al.*,

Plaintiffs/Appellants,

vs.

BECK ENERGY CORPORATION,

Defendant/Appellee,

and

XTO ENERGY INC.,

Appellee or Alternatively, Amicus Curiae

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

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

CASE NO. 2014-0423

Original Action in Prohibition and Mandamus

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I. INTRODUCTION

Appellants' arguments are a house of cards built by ignoring the facts, existing case law, and black letter rules of contract interpretation. The GT83 Lease is not a no-term, perpetual lease that violates public policy.

To support their position, appellants first ask the Court to ignore the fact that all of the challenged Leases are in their primary term. Second, appellants ask the Court to disregard over 100 years of its own precedent concerning the well-defined meaning of certain oil and gas terms commonly used in leases. Third, appellants suggest that the Court find "ambiguities" in the GT83 Lease's language and interpret these "ambiguities" against Beck Energy. Finally, in contravention of the basic principles of contract interpretation, appellants want this Court to apply the broadest meaning possible in order to conclude that the GT83 Lease violates public policy.

These arguments demonstrate that it is appellants' claims – not Beck Energy's Leases – that are illusory.

II. STATEMENT OF FACTS

A. Beck Energy Corporation uses the GT83 Lease form.

Beck Energy Corporation ("Beck Energy") partners with Ohio landowners to develop their oil and gas interests. In approximately 2003, Beck Energy began using an oil and gas lease form designated the "GT83." GT stands for the law firm of Geiger & Teeple,[1] a prominent oil and gas firm located in Alliance, Ohio, and "83" indicates the year the form was developed, 1983. The form is a preprinted oil and gas lease that allows the parties to complete such information as names, addresses, date of execution, description of the leasehold, delay

[1] The firm is now known as Geiger, Teeple, Robinson & McElwee, PLLC.

rental term, and delay rental payment. All of the challenged Leases in the present litigation concern the GT83 Lease form.

B. **Named appellants entered into valid and enforceable leases with Beck Energy.**

On August 14, 2008, Beck Energy used the GT83 Lease and entered into an agreement with Alonzo and Sherry Wilson ("Wilson Lease") for approximately 108 acres of their land in Monroe County. The Wilson Lease is for a primary term of 10 years and requires a delay rental payment of $108.00 to be paid every 12 months, during the primary term, to avoid termination of Beck Energy's rights under the Lease. Larry and Lori Hustack own 89.75 acres of the 108 acres subject to the Wilson Lease.

On March 12, 2006, Beck Energy used the GT83 Lease to enter into an agreement with Lawrence and Lieselotte Hubbard ("Hubbard Lease") covering 55.06 acres of their land in Monroe County. The Hubbard Lease is for a term of 10 years and requires a delay rental payment of $56.00 to be paid every 12 months, during the primary term, to avoid termination of Beck Energy's rights under the lease. Appellants, Lawrence and Michelle Hubbard, only own 46.846 acres of their original leasehold.

On October 11, 2005, Beck Energy used the GT83 Lease and entered into a lease with David Majors ("Majors Lease"). This lease covers 55 acres of land in Monroe County. The Majors Lease is for a primary term of 10 years and requires a delay rental payment of $55.00 to be paid every 12 months, during the primary term, to avoid termination of the lease. The Wilson, Hubbard, and Majors Leases, and the Civ.R. 23(B)(2) class members' Leases are referred to collectively as "Leases," and the lessors identified above are referred to as "named appellants."

C. **The GT83 Lease grants Beck Energy the right to develop the named appellants' leaseholds in exchange for royalties.**

The GT83 Lease's granting clause gives Beck Energy the right to explore for, develop, drill, produce, and operate oil and gas wells on the named appellants' acreage for a primary term of 10 years. In exchange, Beck Energy agrees to pay the named appellants a delay rental, during the primary term, and a 1/8th royalty from any eventual production. The named appellants bear no risk of capital expenditures in the development and/or exploration of their property. If a well is a dry hole or is incapable of producing in paying quantities, it is Beck Energy, not the named appellants, who incur the loss.

D. **The GT83 Lease contains a primary and a secondary term.**

The GT83 Lease contains a standard habendum clause granting Beck Energy an interest in the leased real estate. The primary term of the Lease is 10 years.[2] The secondary term of the Lease provides for it to continue "so long as oil and gas or their constituents are produced or are capable of being produced in paying quantities" or if "the premises shall be operated by [Beck Energy] in the search for oil or gas." Under the Lease, Beck Energy has up to 10 years to explore for, develop, drill, produce, and operate oil and gas wells on the named appellants' properties. If Beck Energy does not produce or operate in search of oil or gas, during the primary term, the rights to the oil and gas automatically revert back to the named appellants.

E. **The GT83 Lease allows drilling to be delayed, in the primary term, if delay rentals are paid.**

As with many oil and gas leases, to avoid an immediate obligation to commence drilling, the GT83 Lease grants Beck Energy the right to tender a delay rental to defer drilling within the primary term. Paragraph 3 of the GT83 Lease states it will terminate within 12

[2] In some instances, Beck Energy and the Landowner negotiated a term less than 10 years.

months from the date of execution unless Beck Energy commences drilling a well on the leasehold or pays a delay rental amount negotiated by the Landowners upon execution of the Lease.

However, the delay rental provision of paragraph 3 does not extend or modify the conditions of the secondary term in paragraph 2, which requires production in paying quantities or operations in search of oil and gas. No portion of paragraph 3 modifies or otherwise eliminates the 10-year primary term of the named appellants' Leases.

F. **The named appellants challenge the Leases during their primary term.**

After accepting delay rental payments under the Leases, the named appellants instituted an action for declaratory judgment and quiet title. The named appellants asked the Monroe County Court of Common Pleas to find their Leases void as no-term, perpetual leases and to forfeit the Leases due to an alleged breach of the implied covenant to develop. The named appellants subsequently filed amended class action complaints. Beck Energy moved to dismiss the lawsuit arguing the named appellants failed to comply with the 30-day notice provision allowing it to cure any alleged breaches of the Leases prior to commencing a lawsuit.

The named appellants moved for summary judgment. The trial court granted the named appellants summary judgment and denied Beck Energy's motion to dismiss. (Decision, July 12, 2012, attached as Exhibit A) The trial court concluded the GT83 Lease was a no-term, perpetual lease that violated public policy (*id.*, p. 15) and the implied covenant of reasonable development (*id.*, p. 21). The trial court forfeited the Leases. (*Id.*, p. 26)

Following the summary judgment decision, the named appellants moved to certify a class action under Civ.R. 23(B)(2) and filed a motion for leave to file a third amended complaint to include all property owners in Ohio who entered into a GT83 Lease with Beck

Energy. Beck Energy moved to stay the trial court's decision, but the court never ruled on this motion. Thereafter, the named appellants withdrew their motion to file a third amended complaint and filed an amended motion for class certification requesting certification of a class consisting of only Monroe County lessors. Beck Energy opposed class certification and asked the trial court to toll the leases between the named appellants and Beck Energy. The trial court never ruled on Beck Energy's tolling request.

Thereafter, the trial court granted class certification under Civ.R. 23(B)(2) and, following a limited remand from the court of appeals, the court issued a journal entry further defining the class. The certified class consists of all Beck Energy lessors in the State of Ohio where Beck Energy 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 (delay rental clause) of the GT83 Lease. All of the challenged Leases, including named appellants, are in their primary term.

Beck Energy repeated its request for a stay of the trial court's judgment and moved to toll the Leases of the named appellants and the Civ.R. 23(B)(2) class members (collectively, "Landowners"). Despite having certified a class action, the trial court tolled only the named appellants' Leases. The trial court subsequently granted Beck Energy's request for a stay of execution conditioned upon the posting of a $14,000,000.00 bond. Beck Energy filed a motion in the Seventh District Court of Appeals, under App.R. 7(A), and requested emergency injunctive relief by tolling the Landowners' leases. Beck Energy also asked the court of appeals to set aside the requirement of a supersedeas bond since the matter did not involve monetary damages.

The court of appeals granted Beck Energy a temporary stay of execution pending a further hearing before the court. Following the hearing, the court issued a judgment entry that:

(1) set aside the requirement that Beck Energy post a $14,000,000.00 bond; (2) applied the stay of execution to the named appellants and Civ.R. 23(B)(2) class members; and (3) tolled the Leases of the named appellants and Civ.R. 23(B)(2) class members from October 1, 2012, the date Beck Energy first moved for tolling, through the pendency of any appeals, until this Court either accepted or declined jurisdiction.

G. The Seventh District Court of Appeals found the Civ.R. 23(B)(2) class properly certified and Beck Energy's Leases with Landowners valid and enforceable.

The court of appeals affirmed the trial court's decision with respect to the Civ.R. 23(B)(2) class certification issue. It found: (1) the trial court properly certified the class action after ruling on the merits of the case; (2) class members under Civ.R. 23(B)(2) were not entitled to notice and could not opt-out of the class; (3) no hearing was required before certifying the Civ.R. 23(B)(2) class; and (4) the trial court properly defined the class more broadly than was originally requested. *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732 (7th Dist.), ¶¶ 59, 67, 76, attached as Exhibit B.

The court of appeals reversed the summary judgment decision. The court found the GT83 Lease is not a no-term, perpetual lease. *Id.* at ¶ 132. It provides for a primary term of 10 years within which to commence drilling. *Id.* at ¶ 104. A secondary term commences and continues only so long as there is an established oil or gas well that is actually producing or capable of producing in paying quantities. *Id.* The court of appeals also concluded the trial court erred when it read an implied covenant into the GT83 Lease and found that it had been violated. *Id.* at ¶ 122.

The Landowners appealed challenging the court of appeals' decision that the GT83 Lease is not a perpetual, no-term lease and that the GT83 Lease does not contain an

implied covenant of reasonable development. The Court accepted jurisdiction on Landowners' first and second propositions of law.

H. **The Court consolidated Claugus Family Farm, L.P.'s original action in prohibition and mandamus with the instant appeal.**

Prior to the court of appeals' decision, Claugus Family Farm, L.P. ("Claugus"), a member of the Civ.R. 23(B)(2) *Hupp* class action, filed an original action in prohibition and mandamus in this Court. It asserts that it is not a member of the properly certified Civ.R. 23(B)(2) class, and if found to be a member, its due process rights were violated because it did not receive notice of the court of appeals' tolling order nor provided an opportunity to opt-out of the class. The Court consolidated Claugus's original action with the instant appeal for purposes of oral argument and decision.

III. ARGUMENT

Appellants' Proposition of Law No. 1

> 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.

Appellee's Counter-Proposition of Law

> Under Ohio law, a lease is not a perpetual lease, in violation of public policy, where the habendum clause contains two clearly defined terms. The GT83 Lease contains a definite primary term within which Beck Energy must commence a well or pay a delay rental to defer drilling within the primary term. The secondary term may not be extended by the payment of a delay rental and continues only so long as the well is producing or is capable of producing in paying quantities or Beck Energy is operating the premises in search of oil or gas.

A. Introduction

Landowners' first proposition of law challenges the court of appeals' conclusion that the GT83 Lease is not a no-term, perpetual lease in violation of public policy.[3] Paragraph 2 of the GT83 Lease is the habendum clause and sets forth the Lease's term:

> 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 of oil or gas as provided in Paragraph 7 following.

Landowners claim the fixed 10-year term in the habendum clause is not a primary term because Beck Energy can extend the Lease into the secondary term without development. (Appellants' Brief, p. 14) Next, Landowners maintain the Lease does not require a well to have been drilled before the "capable of production" clause is triggered but instead, permits the indefinite extension of the Lease even when no well has been commenced. (*Id.*, p. 20) Finally, Landowners contend case law does not support the court of appeals' decision that the delay rental clause only applies during the Lease's primary term. (*Id.*, p. 22) Landowners' arguments are based on hypothetical scenarios that have not occurred and which are not supported at law. They violate the rules of contract interpretation.

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[3] Ohio Supreme Court precedent permits a perpetual, no-term oil and gas lease. *See Myers v. East Ohio Gas Co.*, 51 Ohio St.2d 121, 364 N.E.2d 1369 (1977); *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943) ; and *Cent. Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N.E. 281 (1904).

B. **The court of appeals properly applied the rules of contract interpretation when it gave meaning to the GT83 Lease terms in accordance with oil and gas industry usage and declined to apply the maxim of "construction against the drafter."**

Landowners erroneously maintain the GT83 Lease is ambiguous and, under the rules of contract interpretation, the court of appeals should have construed any ambiguities in the Lease language against Beck Energy and concluded the Lease violates public policy. The fallacy in their argument is that when applying the construction against the drafter maxim, the ambiguous language should be construed narrowly,[4] which actually supports the "traditional" interpretation Landowners acknowledge on page 10 of their brief.

As early as 1897, this Court recognized that oil and gas leases are contracts and "[t]he rights and remedies of the parties to an oil or 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. 118, 129, 48 N.E. 502 (1897). "Ohio courts assess leases through 'traditional rules of contract interpretation.' " *Popa v. CNX Gas Co., LLC*, N.D.Ohio No. 4:14cv143, 2014 WL 3749415, *3 (July 30, 2014), citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 29 (4th Dist.). "A court analyzes the terms of the lease in order 'to determine the intent of the parties.' " *Id.*, citing *Hamilton Ins. Services, Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 714 N.E.2d 898 (1999).

"The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d

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[4] *Toms v. Hartford Fire Ins. Co. of Hartford, Conn.*, 146 Ohio St. 39, 63 N.E.2d 909 (1945), paragraph one of the syllabus ("A contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the insurer, where the meaning of the language used is doubtful, uncertain or ambiguous.")

411 (1987), paragraph one of the syllabus. "[C]ourts have a duty to give effect to the unambiguously expressed intent of the parties when construing a lease. For example, although perpetual leases are not favored, the Supreme Court recognized in *Hallock* [*v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943)] that a clear intention to create a perpetuity is enforceable." *Regency Plaza, LLC v. Morantz*, 10th Dist. Franklin No. 06AP-837, 2007-Ohio-2594, ¶ 24.

"[A] contract is to be read as a whole and the intent of each party gathered from a consideration of the whole." *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 16. A court's construction should attempt to harmonize all provisions of the contract and should not dismiss any provision as inconsistent if there exists a reasonable interpretation that gives effect to both. *See Farmers' Natl. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 94 N.E. 834 (1911). When the language of a written contract is clear, a court should look only to the writing itself to find the parties' intent. *Eastham v. Chesapeake Appalachia, LLC*, 754 F.3d 356, 361 (6th Cir.2014). Courts may examine extrinsic evidence to determine the intent of the parties only if the contract is ambiguous. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).

A contract is ambiguous when it cannot be given a "definite legal meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. "An ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶ 16. As this Court has warned, rules for construing ambiguous language should be employed "only * * * when a definite meaning proves elusive." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11. "Otherwise, allegations of ambiguity become self-fulfilling." *Id.*

Landowners challenge the fact that Beck Energy did not submit any evidentiary material to indicate how the habendum clause of the GT83 Lease should be interpreted. The error with Landowners' argument is their presumption that the habendum clause is ambiguous. Because the habendum clause is not ambiguous, there was no need for extrinsic evidence to interpret its meaning. Only "[w]hen the express terms are ambiguous or do not resolve the matter, the parties should be given an opportunity to submit evidence as to their understanding of the contested terms or issues." *Goodluck v. Chagrin Valley Athletic Club*, 11th Dist. Geauga No. 98-G-2122, 1998 WL 964293, *3 (Dec. 18, 1998).

The court of appeals properly gave meaning to the unambiguous words contained in the habendum clause based on case law precedent and concluded the clause contains "two distinct terms." *Hupp*, 2014-Ohio-4255 at ¶ 90, 20 N.E.3d 732. The application of case law precedent to interpret lease language does not equate to "rewriting" or "creating" a new lease.

Additionally, Landowners maintain the court of appeals should have applied the construction against the drafter maxim. As an initial matter, this maxim is a "rule of last resort." *Goodluck* at *3.

> It should be applied only when other primary rules of contract construction fail to reveal the intentions of the parties. Generally, primary rules of contract construction require courts to look to the express terms of the contract to decipher the intent of the parties. When the express terms are ambiguous or do not resolve the matter, the parties should be given an opportunity to submit evidence as to their understanding of the contested terms or issues. It is only when that evidence again fails to resolve the matter that

> courts should apply the rule that ambiguous contract terms should be construed against the party who drafted them.

Id.

Because the habendum clause in the GT83 Lease is not ambiguous, there was no need for Beck Energy to submit evidence explaining the meaning of the clause. For this same reason, the court of appeals did not have to apply the construction rule of last resort and interpret any alleged ambiguities against Beck Energy. However, if the Court finds ambiguities, they must be construed narrowly against Beck Energy, which would support Landowners' "traditional" interpretation of the GT83 Lease.

C. The GT83 Lease's habendum clause contains a "primary term" that cannot be extended beyond 10 years without development.

Landowners claim the GT83 Lease is a no-term, perpetual lease because it does not have a "primary term" and can be extended indefinitely by Beck Energy without any drilling. Landowners support their argument not only by citing the language of the habendum clause contained in paragraph 2 of the GT83 Lease, but by also citing paragraph 3 (delay rental clause); paragraph 7 (dry hole clause); and paragraph 8 (shut-in clause). Landowners' argument does not withstand scrutiny.

In the early 1900s, the modern-day habendum clause developed with a relatively short primary term followed by an indefinite secondary term that required the lessee to perform certain activities during both the primary and secondary term to keep the lease alive. 3 Williams & Meyers, *Oil and Gas Law*, Section 601-601.5, 1-12 (2014).

> * * * [T]he habendum clause * * * is now a familiar part of every lease. This clause safeguard[s] the interest of the lessor by provid[ing] for the lease's expiration at the end of a stated term;

> and it protect[s] the lessee by providing for the continuance of the lease so long as production [i]s being obtained.

Acquisitions, Inc. v. Frontier Explorations, Inc., 432 So.2d 1095, 1098 (La.App.3d Cir.1983).

"The primary term in a habendum clause sets out the length of time that the lessee has to put the property into production. The secondary term is usually contingent on the lessee producing oil and gas during the primary term, and extends the period of time of the lease, often for as long as gas or oil is produced in paying quantities." Richardson, *Hite v. Falcon Partners: A Model Rule for Marcellus and Utica Shale States Precluding the Use of Delay Rental Payments to Extend the Primary Term in an Oil and Gas Lease*, 46 Akron L.Rev. 1133, 1139 (2013).

Landowners challenge the case law the court of appeals relied on when it concluded the GT83 Lease is not a no-term, perpetual lease and claim the cases do not apply because they contain significantly different language than what is found in GT83 Lease's habendum clause. Even a cursory review of these cases shows they support Beck Energy, not the Landowners. The court of appeals first cited the case of *Am. Energy Services v. Lekan*, 75 Ohio App.3d 205, 598 N.E.2d 1315 (5th Dist.1992) solely for the purpose of discussing the "structure" of a habendum clause. *Lekan* explained that a habendum clause is "two-tiered." *Id.* at 212. "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." *Hupp*, 2014-Ohio-4255 at ¶ 87, 20 N.E.3d 732, citing *Lekan* at 212.

Landowners next challenge the court of appeals' reliance on *Gardner v. Oxford Oil Co.*, 2013-Ohio-5885, 7 N.E.3d 510 (7th Dist.) and *Swallie v. Rousenberg*, 190 Ohio App.3d

473, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist.). Landowners erroneously assert the court of appeals should not have relied on either case because the language in the *Gardner* and *Swallie* habendum clauses differ from the language contained in the GT83 Lease's habendum clause. Although concededly the language is not identical, the court of appeals cited these cases to demonstrate how it has previously interpreted habendum clauses for purposes of identifying the "primary term" and "secondary term."

For example, in *Gardner*, the habendum clause provided "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.' " *Gardner* at ¶ 4. The court concluded the "primary term" of the lease was five years, which had expired, and the "secondary term" ran 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.

In *Swallie*, the habendum clause provided for "a term of twenty (20) years and so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon." *Swallie* at ¶¶ 5-6. Under this language, the court concluded the primary term of the lease expired after the first 20 years, in 1939. *Id.* at ¶ 63. However, the secondary term continued until the well ceased producing in paying quantities. *Id.*

The court of appeals correctly applied the habendum clause analysis from *Gardner* and *Swallie* when it concluded the GT83 Lease's habendum clause has a 10-year primary term "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].' " *Hupp*, 2014-Ohio-4255 at ¶ 90, 20 N.E.3d 732. The court of appeals did not rely on the language in the *Gardner* and *Swallie* cases to interpret the GT83 Lease's habendum clause language, but instead, used it to demonstrate the structure of a habendum clause and that it is comprised of two separate terms. Like the leases in the case law cited above, the GT83 lease has two separate terms defining the development timeline. The Lease is not a no-term, perpetual lease.

Since the court of appeals' decision in this matter, the Fourth District Court of Appels, in *Bohlen v. Anadarko E & P Onshore, LLC*, 2014-Ohio-5819, 26 N.E.3d 1176 (4th Dist.), reviewed language in a habendum clause that was almost identical to the language found in the GT83 Lease. The habendum language provided "for a term of *One (1)* years (sic) and so much longer thereafter as oil or gas of their constituents are produced or are capable of being produced on the premises in paying quantities * * *." (Emphasis sic.) *Id.* at ¶ 3. The court of appeals concluded "the parties' oil and gas lease * * * is not a no-term lease. The habendum clause of the lease contains a primary term of one year and a secondary term of indefinite duration as long as 'oil or gas * * * are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee * * *.' " *Id.* at ¶ 19.

Next, relying on the delay rental provision contained in paragraph 3 of the GT83 Lease, Landowners also contend the Lease is a no-term, perpetual lease because "[o]ther 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." (Appellants' Brief, p. 16) Landowners confuse the contractual language concerning whether a delay rental payment would be due under paragraph 3, with the habendum clause in paragraph 2. Notwithstanding

that fact, the case law is clear that the "commencement" of operations is sufficient activity to extend a lease into its secondary term.

The term "commenced" has a particular meaning as defined by oil and gas case law. For example, in *Duffield v. Russell*, 10 C.D. 472 (1899), lessee staked out a well on the leasehold and contracted to buy timber for purposes of drilling a well on the last day of the lease's term. *Id.* at 473. The court held that the driving of a stake was sufficient to commence operations and further went on to state that "[a]ny act, the performance of which has a tendency to produce the desired result, is a commencement of operations." *Id.* at 474. This Court affirmed without comment. *See Duffield v. Russell*, 65 Ohio St. 605, 63 N.E. 1127 (1902).

Similarly, in *Kaszar v. Meridian Oil & Gas Enterprises, Inc.*, 27 Ohio App.3d 6, 499 N.E.2d 3 (11th Dist.1985), the court held that the lessee commenced operations where it surveyed the drill site, staked out the well, and filed documents with the SEC prior to the expiration of the lease. *Id.* at syllabus. More recently, in *Henry v. Chesapeake Appalachia, L.L.C.*, 739 F.3d 909 (6th Cir.2014), the Sixth Circuit Court of Appeals found that lessee's filing of a declaration and notice of pooled unit constituted "operations" under the habendum clause of the lease in question and therefore, extended the lease beyond its primary term. *Id.* at 914.

The use of the term "commenced," as defined by case law, is sufficient to extend the Lease into its secondary term. "Commencement of operations" is a recognized activity, such as "actual production" or "maintenance" for purposes of extending an oil and gas lease into its secondary term. The use of the term does not make the primary term of the habendum clause illusory.

Landowners also rely on paragraphs 7 (dry hole clause) and 8 (shut-in clause) claiming these paragraphs of the GT83 Lease render the primary term of the lease illusory.

(Appellants' Brief, p. 18) This argument lacks any merit as it pertains to analyzing the primary term of the lease because these provisions apply only *after* a well has been drilled – that is, once the GT83 Lease enters its secondary term. All of the challenged Leases in the present matter remain in their primary term.

1. ***The words "primary term" and "secondary term" do not have to appear in the habendum clause to make the lease a term lease.***

Landowners also take exception with the GT83 Lease's habendum clause because it does not specifically use the words "primary term" and "secondary term." (Appellants' Brief, p. 16) The chart below demonstrates Ohio courts have routinely interpreted similar habendum clauses concluding they contain a "primary term" and "secondary term," even though the habendum clause does not specifically use these words.

Case	**Habendum Clause**
Blausey v. Stein, 61 Ohio St.2d 264, 265, 400 N.E.2d 408 (1980).	"The lease, executed by the predecessors in interest of the parties herein, provided that it would continue for a term of 'five years, or as long thereafter as oil or gas is found in paying quantities * * *.' "
Moore v. Adams, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶¶ 3, 26.	"[L]ease shall be * * * '[f]or a term of two (2) 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 certain tract of land * * *.' "
Gisinger v. Hart, 115 Ohio App. 115, 116, 184 N.E. 2d 240 (4th Dist.1961).	" 'To have and to hold unto and for the use of the lessee his heirs successors and assigns for the term of ten years from the date hereof and as much longer as oil and gas is produced in paying quantities.' "
Cameron v. Hess Corp., 974 F.Supp.2d 1042, 1045 (S.D.Ohio 2013).	"It is agreed that this lease shall remain in force for a term of five (5) year(s) from [June 14, 2007], and as long thereafter as oil or gas * * * or either of them, is produced from said land by the Lessee, its successors and assigns * * *."

Case	Habendum Clause
Bohlen v. Anadarko E & P Onshore, LLC, 2014-Ohio-5819, 26 N.E.3d 1176, ¶ 3 (4th Dist.).	"This Lease shall continue and the rights granted hereunder be quietly enjoyed by the Lessee for a term of *One (1)* years (sic) 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 sole 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." (Emphasis sic.)
Marshall v. Beekay Co., 2015-Ohio-238, 27 N.E.3d 1, ¶ 12 (4th Dist.)	"The habendum clause in the Miller lease was 'for the term of two years from the date hereof and as much longer as oil or gas is found in paying quantities[.]' The habendum clause in the Burton lease was 'for the term of one years [sic] from the date hereof and as much longer as oil or gas is found in paying quantities[.]' "

The court of appeal's conclusion that the GT83 Lease contains a "primary" and "secondary" term is consistent with the above case law interpreting similar habendum clause language. There is no requirement that the habendum clause use the words "primary term" and "secondary term" to preclude a no-term, perpetual lease, and the failure to include these words in the habendum clause does not make the Lease illusory.

D. The use of the phrase "capable of being produced on the premises in paying quantities" in the habendum clause does not transform the GT83 Lease into a perpetual, no-term lease.

1. *The phrase "capable of being produced on the premises in paying quantities" cannot extend the lease indefinitely.*

Landowners challenge language contained in the secondary term of the habendum clause that provides the lease shall continue in force as long as oil or gas or their constituents "are capable of being produced on the premises in paying quantities, in the judgment of the Lessee[.]" The court of appeals explained this language refers to whether wells are capable of producing and not whether the land is capable of producing. *Hupp*, 2014-Ohio-4255 at ¶ 100, 20

N.E.3d 732, citing *Morrison v. Petro Evaluation Services, Inc.*, 5th Dist. Morrow No. 2004 CA 0004, 2005-Ohio-5640, ¶ 39.

Landowners challenge the cases relied on by the court of appeals, *Morrison* and *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550 (Tex.S.Ct.2003), claiming they are distinguishable because: (1) the leases did not provide that the capability of production, in paying quantities, was to be based on lessee's judgment; (2) wells had been drilled, the leases were in their secondary term; and (3) the issue was whether actual production satisfied an objective standard. (Appellants' Brief, p. 21) Landowners also challenge the court of appeals' reliance on *Hunthauser Holdings, LLC v. Loesch*, Kan.Dist.No. 00-1154-MLB, 2003 WL 21981961 (June 10, 2003) and contend this case is distinguishable because it dealt with the cessation of production, during the secondary term, and not the extension of the primary term based on a lessee's subjective determination that production on the premises in paying quantities was possible. (Appellants' Brief, p. 14)

Landowners' argument misses the point because the phrase "capable of being produced on the premises in paying quantities, in the judgment of the Lessee" cannot extend a lease indefinitely, nor is it vulnerable to subjective abuse. The Court expressly acknowledged this fact in *Murdock-West Co. v. Logan*, 69 Ohio St. 514, 69 N.E. 984 (1904) holding: "A finding of indications of oil, or the existence of conditions which rendered it probable that oil in paying quantities would be found if the well were operated in a certain way, is not sufficient, of itself, to extend the term of the lease." *Id.* at paragraph one of the syllabus.

Rather, " 'capable of production' means 'capable of producing in paying quantities.' " *Morrison* at ¶ 39. Thus, "a well is capable of production if it is capable of

producing in paying quantities without additional equipment or repairs." *Id.*, citing *Anadarko,* 94 S.W.3d at 558. The Supreme Court of Texas expressed the meaning of the phrase as follows:

> We believe that the phrase "capable of production in paying quantities" means a well that will produce in paying quantities if the well is turned "on," and it begins flowing, without additional equipment or repair. Conversely, a well would not be capable of producing in paying quantities if the well switch were turned "on," and the well did not flow, because of mechanical problems or because the well needs rods, tubing, or pumping equipment.

Id. at 558-559, citing *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 433-434 (Tex.App.1993).

As to the necessity of including the phrase "capable of being produced" in a habendum clause, this Court need not look any further than its decision of *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955), as justification for its inclusion. In *Hanna*, the lessee considered the 1950 well to be producing in paying quantities due to the fact that oil and gas were brought to the surface within the primary term. *Id.* at 46. However, the Court determined that because there was no evidence of production in the secondary term of the lease, the lease expired. *Id.*, at 49. The Court held: "Allegations, that a small amount of oil was produced, that it was difficult to bring out to the road and that it did not warrant building a line, do not amount to allegations that oil, gas or their constituents were produced in paying quantities." *Id.* at paragraph two of the syllabus.

As to the term "paying quantities," this Court defined it to mean "quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though

the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss." (Citation omitted.) *Blausey*, 61 Ohio St.2d at 265-266, 400 N.E.2d 408.

In order for the GT83 Lease to be extended beyond its primary term, it is required that oil or gas be produced or capable of being produced in paying quantities or Beck Energy operates the premises in search of oil or gas. As the court of appeals correctly found, mere speculation that the land may produce oil in paying quantities is not sufficient. Regardless, no such factual scenario exists or has been asserted by Beck Energy in this case.

2. ***"Paying quantities" are properly viewed from the lessee's perspective.***

Landowners also challenge the fact that "paying quantities" are viewed from the lessee's perspective. However, viewing "paying quantities" from the lessee's perspective is consistent with Ohio law. In *Litton v. Geisler*, 80 Ohio App. 491, 496, 76 N.E.2d 741 (4th Dist.1945), the court explained:

> The prevailing rule seems to be that the phrase 'paying quantities' is to be construed from the standpoint of the lessee, and by his judgment if exercised in good faith. The burden is upon plaintiff in this case to prove that the lessee has forfeited the lease because of failure to produce gas in paying quantities; and in the absence of indication of bad faith or selfish personal motive, the experience, interest and judgment of the lessee herein, under all the surrounding circumstances, are controlling as against the claim of plaintiff.

"[A]s between the lessor and lessee, the construction of the phrase 'paying quantities' must be from the standpoint of the lessee. His 'good faith judgment' that production is in paying quantities weighs heavily in the balance." *Cotton v. The Upham Gas Co.*, 5th Dist. Knox No. 86-CA-20, 1987 WL 8741, *1 (Mar. 6, 1987). In *Smith v. North East Natural Gas Co.*, 5th Dist. Tuscarawas No. 86 AP 030016, 1986 WL 11337, *2 (Sept. 30, 1986), the court concluded "[t]he fact that it is questionable whether oil wells on land held under a lease operative only so long as oil or gas should be found in paying quantities will ever yield a reasonable profit on the investment, is not sufficient ground for vacating the lease; the lessee is the sole judge on this question, and so long as he can make a profit therefrom, he will be permitted to do so." Simply, "there can be no such production [in paying quantities] if there is no production at all." *Hanna*, 163 Ohio St. at 49, 125 N.E.2d 338. *See also Bohlen*, 2014-Ohio-5819 at ¶ 21, 26 N.E.3d 1176, where the court of appeals found inclusion of the language " 'in the sole judgment of the Lessee' in the secondary term of the habendum clause" did not give the lessee the right to unilaterally "extend the term of the lease by merely exercising its judgment, whether the premises was capable of production without actually developing the land."

Further, the inclusion of the phrase "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" does not render the habendum clause illusory. Landowners' argument that Beck Energy's GT83 Lease does not require a well to have been drilled before the "capable of production" clause is triggered demonstrates their misunderstanding of the habendum clause's language. The phrase "capable of production" does not extend the primary term, but instead extends the secondary term where a well has been drilled and is capable of producing oil or gas.

In addition to the fact that this language does not render the habendum clause illusory, all of the challenged GT83 Leases are in their primary term. Beck Energy has not drilled any wells, nor is it under any obligation to do so, unless it intends to extend the Landowners' Leases into their secondary term. The issue of whether oil and gas "are capable of being produced on the premises in paying quantities in the judgment of the Lessee" is not ripe for review.

E. **The "delay rental" provision applies only during the primary term of the Lease and does not render the GT83 Lease a no-term, perpetual lease.**

Landowners contend that the GT83 Lease allows delay rental payments to be made beyond the primary term. The challenged "delay renal" language is contained in paragraph 3 and provides:

> The lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within ____ months from 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 court of appeals cited *Northwestern Ohio Natural Gas Co. v. City of Tiffin*, 59 Ohio St. 420, 54 N.E. 77 (1899) and *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902) when it concluded "once the primary term of the Lease expires, the delay rental provision is no longer applicable." *Hupp*, 2014-Ohio-4255 at ¶ 99, 20 N.E.3d 732. The "delay rental" language in these cases provided:

Case	Delay Rental Clause
Northwestern Ohio Natural Gas Co. v. City of Tiffin, 59 Ohio St. 420, 442-443, 54 N.E. 77 (1899).	"[T]he lessee was required to complete a well on it within nine months from the date of the lease, or, on failure to do so within that time, to pay an annual rental until the well should be completed. Upon payment of the rental his right to complete the well continued for the specified term of five years, [primary term], *but no longer* * * *." (Emphasis added.)
Brown v. Fowler, 65 Ohio St. 507, 522, 63 N.E. 76 (1902).	" 'In case no well shall be drilled on said premises within twelve months from the date thereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter until a well shall be drilled.' This clause clearly means that the lease may be made to terminate in less than two years-that is, at the end of twelve months-by a failure to drill a well on the premises within the twelve months, but that the lessee may prevent such termination of the lease * * * by paying further delay * * * until a well shall be drilled * * * So that *this clause cannot have the effect, in any event, to extent (sic) the lease beyond the two years definitely and certainly fixed in the habendum clause.*" (Emphasis added.)

Ohio Supreme Court precedent does not allow Beck Energy to extend the Leases indefinitely merely by paying delay rental payments, but instead, limits such payments to the primary term of the Leases. In *Northwestern Ohio Naural. Gas Co.,* the lease was for "the term of five years * * * and so much longer as oil and gas is produced or found in paying quantities[.]" *Northwestern Natural Gas Co.* at 442. The lease also required the lessee to "complete a well * * * within nine months" or pay "for such delay a yearly rental." *Id.*, at 443. This Court limited the delay rental provision to the primary term of the lease. *Id.*

Landowners attempt to distinguish the *Northwestern Ohio Natural Gas Co.* decision from the present matter on the basis that, unlike the GT83 Lease, the lease in *Northwestern Ohio Nat. Gas Co.* did not allow for the payment of delay rentals in the event of a dry hole and there was no provision under which the lessee could extend the lease by the payment of advance royalties after shutting a producing well. (Appellants' Brief, pp. 24-25)

These provisions in the GT83 Lease are inapplicable and do not support Landowners' argument because they apply only *after* a well is drilled. The challenged Leases are in their primary term.

Several years after *Northwestern,* in *Brown*, the Court addressed this issue again where the lease had a primary term of 2 years and a 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. *Brown* at 521. The lease also contained a provision that required the lessee to drill within 12 months or pay a delay rental. *Id.* at 522. This 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.* Based on this case law, one commentator recently recognized that:

> For over a century, the law in Ohio has been that delay rental has been inadequate to extend a lease beyond a primary term. The Ohio Supreme Court has based its reasoning on the idea that the time period set out in the habendum clause sets the term of the lease, and without production at the expiration of this term, the lease terminates. The rule in Ohio is similar to the law in states with much more developed oil and gas law, such as Texas, which has the most experience with oil and gas leases of any state examined, and New Mexico.

(Emphasis added.) Richardson, Akron L.Rev. at 1137.

Most recently, in *Bohlen*, the court held that, "[u]nder established case law, once the primary term of the Lease expires, the delay rental provision is no longer applicable." (Citations omitted.) *Bohlen*, 2014-Ohio-5819 at ¶ 20, 26 N.E.3d 1176. Well-established case

law is clear that the delay rental clause only applies during the primary term of the lease. Under the GT83 Lease, for the Leases to continue into their secondary term, "oil or gas or their constituents [must be] capable of being produced on the premises in paying quantities, in the judgment of the Lessee * * *"

Landowners cite *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, N.D.Ohio No. 4:11CV02631, 2013 WL 4679950 (Aug. 30, 2013) in support of their argument that the delay rental provision under the GT83 Lease is not limited to the primary term. (Appellants' Brief, pp. 22-24) *Beaverkettle's* delay rental provision is distinguishable because it included additional language concerning the retention of undrilled acreages after a well was drilled. *Id.* at *11. *Beaverkettle* did not hold that a delay rental provision applies in the secondary term. Rather, the court found a genuine issue of fact regarding the parties' intended additional "delay rental" after a well was drilled for acreages not included in the unit. *Id.* at *15. The GT83 Lease's delay rental provision contains no such language making *Beaverkettle's* analysis inapplicable to the present matter.

In the court of appeals, Landowners also referenced the Pennsylvania case of *Hite v. Falcon Partners,* 2011 Pa.Super. 2, 13 A.3d 942 (2011). The court found the *Hite* case distinguishable from the present matter and concluded it actually supported Beck Energy's position more than the Landowners' position. The *Hite* decision is most notably distinguishable because the habendum clause expressly permitted the lease to continue in perpetuity as long as a delay rental was paid. *Hupp*, 2014-Ohio-4255 at ¶ 95, 20 N.E.3d 732.

However, the *Hite* court declined to enforce that provision and only allowed delay rentals during the primary term. *Id.* at ¶ 96, citing *Hite* at 948. Additional distinguishing factors noted by the court of appeals included the fact that the primary term had expired in *Hite*, whereas

all of the challenged GT83 Leases are still in their primary term; the GT83 delay rental provision is set forth separately from the secondary term of the habendum clause; and Beck Energy does not contend that the GT83 Lease permits it to defer drilling indefinitely. *Id.* at ¶ 97.

The court of appeals concluded *Hite* supports Beck Energy's position because "the Pennsylvania court recognized the long-standing view that delay-rental clauses – which were developed to offset the harsh requirements 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." *Id.* at ¶ 98, *Hite* at 947-948.

Landowners now argue, in this Court, that *Hite* is inapplicable and rely on two out-of-state cases interpreting *Hite*. Landowners first cite two sentences from *Smith v. Steckman Ridge, LP*, 590 Fed.Appx. 189 (3d Cir.2014), which state: "First, *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." *Id.* at 199. The court limited *Hite's* holding to the extent it did not consider the effect of a shut-in clause. Delay rental payments are permitted, under a shut-in clause, "where the lessor acts in good faith, extracts reserves during the primary term of the lease, and does not attempt to indefinitely preserve extraction rights without compensating the lessor for the dormant reserves in accord with the habendum and shut-in clauses." *Id.*

As noted above, no wells have been drilled so any issue concerning the shut-in provision, in paragraph 8, is premature. However, even if the Court considers the shut-in clause in the GT83 Lease, *Hite* holds that the payment of delay rentals, under a shut-in clause, does not

result in a no-term, perpetual lease as long as the lessor does not attempt to indefinitely preserve extraction rights without compensating the lessor for the dormant reserves in accordance with the habendum and shut-in clauses. *Id.*

Landowners also cite *Northup Properties, Inc. v. Chesapeake Appalachia, L.L.C.*, E.D.Ky. No. 07-30-ART, 2008 WL 818995 (Mar. 25, 2008), which involved lease language that expressly allowed for extensions by payment of delay rentals. *Id.* at *2. The court upheld the lease language because under Kentucky law, a lessor's interests are protected where delay rentals are permitted to be paid in the secondary term of a lease because a lessor may give the lessee notice and demand production within a reasonable time to preserve the lease rights. *Id.* at *4.

In the present matter, all of the challenged Leases are in their primary term, and their delay rental provisions have not expired. The delay rental language is not ambiguous and is comparable to the language this Court considered in the *Northwestern Ohio Natural Gas Co.* and *Brown* cases. Landowners' claim that the delay rental provision, in paragraph 3, allows the GT83 Lease to be extended beyond the primary term contradicts over 100 years of case law in Ohio. The well-established law is that a delay rental provision only applies during the primary term of the lease, and the inclusion of such language does not make the GT83 Lease a no-term, perpetual lease.

F. The GT83 Lease is not void ab initio because it is not a no-term, perpetual lease in violation of Ohio's public policy.

Landowners maintain the GT83 Lease contains only "sham references" to its duration and commencement of wells and therefore, is not distinguishable from the long-term lease that was found to violate public policy in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983). (Appellants' Brief, p. 31) Ohio's public policy encourages "oil and gas production when the extraction of those resources can be accomplished without undue threat to

the health, safety and welfare of the citizens of Ohio." *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992). To this end, political subdivisions cannot enact ordinances, rules, and requirements that are more stringent than state law. *Id.* at 392.

Landowners claim the fact that the GT83 Lease is a no-term, perpetual lease is demonstrated by Beck Energy's failure to commence drilling on their properties. This argument ignores the fact that the challenged Leases are all in their primary term. Beck Energy's timely payment of delay rentals, during the primary term of the Leases, obviates the need to commence drilling. However, if Beck Energy wants to extend the Leases into their secondary term, it will have to commence a well that produces in paying quantities or is capable of producing in paying quantities. Because the challenged Leases are in their primary term, the fact that Beck Energy has not commenced drilling any wells does not mean the GT83 Lease is a no-term, perpetual lease.

Also, Landowners' reliance on *Ionno* is misplaced. The *Ionno* lease did not contain any reference to the timeliness of development, and the habendum clause had neither a primary nor a secondary term. In contrast, the GT83 Lease's reference to development timeframes is not illusory. The GT83 Lease requires a well to be commenced annually, unless delay rental payments are made, which requirement is limited to the 10-year primary term of the Lease. The GT83 Lease also contains a secondary term that continues "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 * * *."

Also unlike the *Ionno* lease, the GT83 Lease allows for the payment of delay rentals to avoid the obligation to drill a well during the primary term of the Lease. In contrast,

the *Ionno* lease allowed for unlimited "advance royalty payments" in order to extend the lease under language that obligated lessee "to pay lessors a royalty on the product mined or $300.00 per year for the first two years and $600.00 per year thereafter as 'minimum rent or royalty' which payment would be 'credited against the amount or amounts that shall thereafter become due for or on account of the removal, mining or hauling of coal and/or clay * * *.' " *Id.* at 131.

The *Ionno* Court found the lease language did not exact "a non-refundable annual payment of rent to the lessor as separate and independent consideration." *Id.* at 133. Rather, the *Ionno* lease provided for an annual advance royalty payment which was to be set off against future production royalties. *Id.* at paragraph one of the syllabus. Such a payment did not relieve lessee of his obligation to reasonably develop. *Id.*

Under the GT83 Lease, Landowners receive an added consideration each year Beck Energy does not drill by the payment of delay rentals. Delay rentals "accrue by the mere lapse of time like any other rent" and are "not paid directly or indirectly for oil to be produced, but [are] for additional time in which to utilize the land." (Citations omitted.) *C.I.R. v. Wilson*, 76 F.2d 766, 769 (5th Cir.1935). Thus, delay rentals only buy time and are not recoupable by the lessee out of production, as are royalty payments. *McFaddin v. C.I.R.*, 2 T.C. 395, 404, 1943 WL 32 (July 9, 1943).

Based on this distinction, the court of appeals correctly concluded "the [delay] 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." *Hupp*, 2014-Ohio-4255 at ¶ 114, 20 N.E.3d 732.

Unlike the *Ionno* lease, the GT83 lease contains a habendum clause with both a primary and secondary term. The Lease cannot be maintained indefinitely, without drilling, but

by making delay rental payments, Beck Energy can extend the primary term of the Lease. However, the payment of delay rentals cannot extend the secondary term.

Appellants' Proposition of Law No. 2

> 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.

Appellee's Counter-Proposition of Law

> Ohio oil and gas law imposes no implied covenant of reasonable development where a lease expressly provides for development. Because the GT83 Lease expressly waives all implied covenants, addresses the timeliness of development in the habendum clause, allows for delay rental payments limited to the primary term, and contains no conflicting language creating ambiguities that would require the imposition of any covenants, there exists no implied covenant of reasonable development.

A. **Introduction**

Landowners' second proposition of law claims the GT83 Lease is subject to the implied covenant of reasonable development for several reasons. First, the 10-year primary term can be extended indefinitely with no development. (Appellants' Brief, p. 34) Second, the GT83 Lease's delay rental provision is equivalent to the advance royalties in *Ionno*, are no substitute for development, and do not preclude the implied covenant of development. (*Id.*) Third, paragraphs 17 and 19 of the GT83 Lease conflict thereby rendering it ambiguous and invalidating the disclaimer of implied covenants. (*Id.*, p. 35)

Landowners' arguments lack merit because the GT83 Lease's delay rental is not an "advance royalty," but rather added consideration Landowners receive each year Beck Energy does not drill a well. Also, paragraph 9 of the Lease indicates no drilling is necessary and

paragraph 19 expressly waives all implied covenants. Finally, no conflict exists between paragraphs 17 and 19 thereby giving rise to an implied covenant to develop.

B. **Beck Energy's delay rental payments are not analogous to *Ionno's* "advance royalties" thereby requiring the imposition of an implied covenant of development.**

Landowners assert there is no difference between the "advance royalties" paid in *Ionno* and the delay rentals paid them under the GT83 Lease because, as with the advance royalties in *Ionno*, the delay rental payments are merely a small fraction of the anticipated royalties. As in *Ionno*, Landowners conclude an implied covenant to develop arises under the GT83 Lease.

The *Ionno* decision is inapplicable for several reasons. First, the GT83 Lease's delay rental clause addresses the issue of development during the primary term of the Lease and supersedes any implied covenant to develop. Paragraph 3 of the Lease establishes Beck Energy has the right to forego drilling a well by tendering delay rental payments. Under this Court's decision in *Kachelmacher v. Laird*, 92 Ohio St. 324, 110 N.E. 933 (1915), no implied covenant can be read into a lease which contains a delay rental provision. *Id.* at 332. "An implied covenant can arise only when there is no expression on the subject." *Id.* The Court cited *Kachelmacher* again, for the same proposition, in *Hamilton Ins. Services, Inc.*, 86 Ohio St.3d at 274, 714 N.E.2d 898. Therefore, the delay rental provision in the GT83 Lease precludes the finding of an implied covenant to develop.

Second, unlike in *Ionno*, the delay rental payment in the GT83 Lease is not an "advance royalty" payment because it is not set off against future royalties. Rather, the Landowners received an added consideration each year Beck Energy did not drill a well. The *Ionno* Court acknowledged, "[a]n annual advance payment which is credited against future

royalties * * * does not relieve the lessee of his obligation to reasonably develop the land." *Ionno*, 2 Ohio St.3d at paragraph one of the syllabus, 443 N.E.2d 504.

Third, no implied covenant to develop exists under the GT83 Lease because paragraph 9 of the Lease expressly states that no drilling is necessary, and paragraph 19 expressly waives all implied covenants.

Paragraph 9 of the GT83 Lease provides:

> 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.

In *Holonko v. H. D. Collins,* 7th Dist. Mahoning No. 87 C.A. 120, 1988 WL 70900 (June 29, 1988), the court of appeals recognized where express language grants the lessee the right not to drill, no implied covenant can be read into the lease. The *Holonko* lease provided:

> The consideration, land rentals, well 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 or gas storage wells

> on adjacent lands or otherwise, as the Lessee may elect, regardless of the purpose for which the leased premises are used hereunder.

Id. at *2.

Because paragraph 9 clearly addresses the extent of the lessee's development obligations, no implied covenant to develop can be read into the GT83 Lease. Implied covenants arise only when the lease is silent. *Harris*, 57 Ohio St. at 128, 48 N.E. 502.

Further, paragraph 19 of the GT83 Lease provides:

> * * * 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. * * *

Ohio law enforces express provisions, in oil and gas leases, which disclaim the implied covenants. *Taylor v. MFC Drilling, Inc.*, 4th Dist. Hocking No. 94CA14, 1995 WL 89710, *2 (Feb. 27, 1995); *Bushman v. MFC Drilling Inc.*, 9th Dist. Medina No. 2403-M, 1995 WL 434409 (July 19, 1995) at *2; *Smith*, 1986 WL 11337 at *2; *Holonko* at *3. In *Bushman* and *Taylor*, the courts of appeals addressed disclaimer language *identical* to the disclaimer language contained in paragraph 19 of the GT83 Lease. In both cases, the courts, fully cognizant of this Court's decision in *Ionno*, unequivocally held that the lease language effectively disclaimed all implied covenants. *Bushman* at *2; *Taylor* at *2.

The inclusion of paragraphs 9 and 19 in the GT83 Lease, along with the allowance of delay rental payments, precludes the imposition of an implied covenant of development under the GT83 Lease.

C. **There is no conflict between paragraphs 17 and 19 of the GT83 Lease thereby giving rise to an implied covenant of development.**

Landowners claim an implied covenant to develop arises under the GT83 Lease because the provision in paragraph 17 of the Lease setting forth the procedure for a lessee to follow to remedy an alleged breach by Beck Energy of an obligation is inconsistent with the general disclaimer of implied covenants in paragraph 19.

Paragraph 17 provides:

> *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 (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. 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.

(Emphasis added.)

Landowners misconstrue this language and claim the 30-day notice provision setting forth their rights in the event Beck Energy breaches an implied condition controls over

the general disclaimer of implied covenants contained in paragraph 19. (Appellants' Brief, p. 35) However, the 30-day notice provision does not grant Landowners any rights, let alone the right to file a lawsuit for breach of an implied obligation and/or create any implied obligation. Rather, the express purpose of paragraph 17 is to provide an obligation on Landowners. In the event Landowners "consider" Beck Energy breached any express or implied obligations, they are obligated to provide notice prior to filing a lawsuit.

In an effort to avoid any question that Beck Energy's compliance with the 30-day notice provision would not be viewed as creating any implied obligations, the drafter of the Lease language also provided in paragraph 17 that, "[n]either the service of said notice nor the doing of any acts by the Lessee * * * shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder." This language makes it clear that compliance and/or resolution of the notification of breach is not to be construed as an admission or presumption of breach. Paragraph 17 is simply a notice provision. The reference to "obligations," does not create any implied covenants that are expressly waived 2 paragraphs later, in paragraph 19.

The 30-day notice provision ensures that all alleged breaches relating to the parties' obligations, whether express or implied, are presented to Beck Energy before commencement of a lawsuit. Further, as correctly noted by the court of appeals, even if it is assumed arguendo that 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 precludes the reading of any implied covenants into the Lease. *Hupp*, 2014-Ohio-4255 at ¶ 120, 20 N.E.3d 732; *see also Kachelmacher*, 92 Ohio St. at 332, 110 N.E.2d 933.

Landowners challenge the fact that the court of appeals relied on the cases of *Holonko* and *Bushman*. Landowners ask the Court to assume that these cases do not contain a procedure to be followed if the lessor believes an implied obligation has been breached. (Appellants' Brief, p. 36) Based on the language of these cases, this fact is unknown. However, what is known is that both of these cases stand for the proposition that the implied covenant of development arises only when the lease is silent as to the timeliness of development. *Holonko,* 1988 WL 70900 at *3; *Bushman,*1995 WL 434409 at *2. Neither of these cases supports Landowners' attempt to manufacture a conflict between paragraphs 17 and 19 such that an implied covenant to develop results. The fact that *Holonko* and *Bushman* do not address a notice provision like the one found in paragraph 17 does not make these cases inapplicable for the proposition that a general disclaimer of implied covenants is all that is required to waive the implied covenants under the GT83 Lease.

Paragraph 17's notice provision does not conflict with the express waiver of the implied covenants contained in paragraph 19 of the GT83 Lease thereby requiring the imposition of an implied covenant of reasonable development.

IV. CONCLUSION

Landowners have developed a number of creative arguments in support of their claim that the GT83 Lease is a perpetual, no-term lease in violation of public policy. Due to the recent Utica shale development, Landowners now regret their contractual obligation with Beck Energy and ask the courts to declare their Leases void as against public policy. No grounds exist to award Landowners their requested relief. The GT83 Lease has a defined habendum clause that cannot be extended in perpetuity by the payment of delay rentals. The Lease also clearly waives all implied covenants, including the implied covenant of development.

As explained by one court over thirty years ago:

> What this appeal boils down to is an ingenius (sic) attempt to find a way to get out from under an old oil and gas lease which in light of the changed circumstances respecting the price of oil is now economically disadvantageous to the land owner. However ingenuously this argument has been developed and how resourcefully it has been researched and how strenuously it has been urged, it is totally without support in Ohio law and this court declines to blaze the trail.

Clark v. Wolfcale, 5th Dist. Ashland No. CA-648, 1977 WL 201058, *3 (June 2, 1977).

Beck Energy asks this Court to affirm the decision of the Seventh District Court of Appeals.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was served on April 23, 2015, pursuant to Civ.R. 5(B)(2)(c), by mailing it by United States mail to:

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COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
2012 JUL 12 AM 10: 06
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

EXHIBIT A

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 Jonno 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 *Iorno 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 *Stauder 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

[Cite as *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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

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

EXHIBIT B

[Cite as *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255.]

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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.