Supreme Court of Ohio Clerk of Court - Filed April 27, 2015 - Case No. 2015-0545

Case No. 2015-0545

In The

Supreme Court of Ohio

REGIS F. LUTZ, *et al.*,

Plaintiffs-Respondents,

v.

CHESAPEAKE APPALACHIA, LLC,

Defendant-Petitioner.

On Certification of Question of State Law From the United States District Court for the Northern District of Ohio Eastern Division in Case No. 4:09-CV-2256

RESPONDENTS' PRELIMINARY MEMORANDUM ON CERTIFIED QUESTION

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Respondents respectfully submit their Preliminary Memorandum on Certified Question. The certified question is:

> Does Ohio follow the "at the well" rule (which permits the deduction of post-production costs) or does it follow some version of the "marketable product" rule (which limits the deduction of post-production costs under certain circumstances)?

INTRODUCTION

This Court should decline to answer the certified question for three reasons.

First, the certified question is not determinative of the outcome of this case. The original lessees took no deductions and that course of conduct is dispositive regardless of which rule Ohio recognizes. *See Schmidt v. Texas Meridian Resources, Ltd.*, 4th Dist. Washington No. 94CA12, 1994 WL 728059 at *5-6 (Dec. 30, 1994) (holding that it did not matter whether Ohio recognized the "at the well rule" or the "marketable product rule" because the course of performance was dispositive regardless of which rule applied).

Second, existing Ohio case law implicitly answers the question. In *Busbey v. Russell*, 10 Ohio C.D. 23 (Cir. Ct. Ohio), 1898 WL 1419 (Ohio Cir. Ct. Nov. 9, 1898), this Court rejected a gas producer's argument that it could deduct transportation costs from gas royalties, holding that a royalty of 1/8 of "income dollars" was 1/8 of the *gross* receipts, with no deductions for any "expenses of running the business." Post production costs are clearly an "expense of running the business." Moreover, Ohio recognizes the "implied covenant to market." *Yoder v. Artex Oil Co.*, 5th Dist. Guernsey No. 14CA4, 2014 Ohio 5130 ¶ 45, 2014 WL 6467477 at *7. This covenant necessarily includes the cost of performance. Further, it was not industry custom to deduct post production costs when these leases were executed in 1970 and 1971, and industry custom at the time of contract formation controls. *Dana Partners, LLC v. Koivisto Constructors and Erectors, Inc.*, 11th Dist. Trumbull No. 2011-T-0029, 2012 Ohio 6294 ¶ 26, 2012 WL 6783637 at *5.

Third, the certified question has little current relevance. Modern leases, including those prepared by all of the major shale gas producers in Ohio, expressly authorize the lessee to deduct post production costs.

If, despite these points, this Court chooses to answer the certified question, it should hold that Ohio recognizes the "marketable product rule." This holding would be consistent with the case law just summarized and also would reflect the national trend.

While the "at the well rule" was once the "majority rule," that is no longer the case. *See* McArthur, OIL AND GAS IMPLIED COVENANTS FOR THE TWENTY-FIRST CENTURY, Juris Publishing, Inc. (2014) at 265 ("a marketable-condition rule applies in a majority of producing states and to a considerable majority of production in the United States"); Keeling & Gillespie, *The First Marketable Product Doctrine*, 37 St. Mary's L.J. 1, 5 (2005) (the tide is turning against the "at the well rule"); Kirk, *Variations in the Marketable-Product Rule from State to State*, 60 Okla. L. Rev. 769, 773 (2007) (while some jurisdictions have adopted the at-the-well rule, "more states have recently adopted some variation of the marketable product rule").

Even lawyers who defend gas royalty cases acknowledge this trend. In mid-2012, lawyers at Steptoe & Johnson LLC wrote:

> It seems courts are *trending toward the marketable product rule* when assessing the validity of royalty calculations, so the prudent lessee in a shale region should assume it will be held responsible for post production costs. Contractual language to the contrary may help share the burden with lessors in some states. However the fact that *covenants to market are being more readily implied* demonstrates that royalty calculation decisions *are trending in favor of lessors*.

Kahle & Strich, *supra*, at 710-711 (emphasis added). On the same theme, a now-retired royalty litigator at Vorys, Slater Seymour and Pease LLP wrote in 2004 that "the covenant to market has found *increasing favor* with courts" in royalty disputes. Hardymon, *Adrift on the Implied Covenant to Market*, 24 Energy & Min. L. Inst., Ch. 8 (2004) at 234 (emphasis added).

PROCEDURAL BACKGROUND OF THIS AND RELATED CASES

This is the last of five class actions in the Appalachian region bringing the same royalty claims against the same gas producer for the same conduct. All five cases concern gas leases that were previously held by Columbia Natural Resources, Inc. ("CNR") and later acquired by Chesapeake Appalachia, LLC ("Chesapeake"). In all five cases the plaintiffs alleged that CNR underpaid their gas royalties by, among other things, deducting post production costs beginning in 1993.

The first of the cases was *Estate of Tawney v. Chesapeake Appalachia, LLC,* No. 03-C-10E (Cir. Ct. for Roane Co., W. Va.). In *Tawney*, the Supreme Court of West Virginia held, in answering a certified question, that post production costs are not deductible under "at the well" language or any other language that does not expressly grant the right to deduct costs. *Estate of Tawney v. Columbia Natural Resources, LLC*, 633 S.E.2d at 22, 27-28 (W.Va. 2006). The case proceeded to trial and the jury returned a verdict of $134M in compensatory damages.

The next two cases, both filed by Kentucky royalty owners, were *Thacker v. Chesapeake Appalachia, LLC*, No. 7:07-cv-00026 (E.D. Ky.) and *Poplar Creek v. Chesapeake Appalachia, LLC*, No. 7:07-cv-00026 (E.D. Ky.) Chesapeake settled *Thacker* for $28.7M. In *Poplar Creek*, the district court dismissed the case on the ground that Kentucky recognizes the "at the well rule" and the Sixth Circuit affirmed. *Polar Creek*, 636 F.3d 235, 244 (6th Cir. 2011).

The last case, filed by Virginia royalty owners, was *Healy v. Chesapeake Appalachia, LLC*, Case No. 1:10-cv-23 (W.D.Va.). The court in that case held, in denying a motion to dismiss, that "Virginia courts would recognize an implied duty on the part of oil and gas lessees to operate diligently and prudently, including a duty to market the gas produced." *Healy*, 2011 WL 24261 at *16 (W.D. Va. Jan. 5, 2011). Chesapeake subsequently settled for $3.4M.

The complaint in the instant case, like the others, included a breach of contract count and various non-contract counts. The district court dismissed the non-contract counts on the ground that parties to a contract are limited to contract remedies and dismissed the breach of contract count as time barred. The plaintiffs appealed the dismissal of the contract count and the Sixth Circuit reversed. *See Lutz v. Chesapeake Appalachia, LLC*, 717 F.3d 459 (6th Cir. 2013). After remand the parties filed cross motions for summary judgment. The district court then certified the instant question.

FACTUAL BACKGROUND

A. The Leases

The leases in this case, executed by Murphy Oil Company in 1970 and 1971, have been held by five different lessees over the years. This includes Chesapeake, which held the leases from 2005 until it assigned them a few years later.

The leases have three variant gas royalty clauses, as follows:

> The royalties to be paid by Lessee are…. (b) on gas, including casinghead gas or other gaseous substance, produced and sold or used off the premises or for the extraction of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale.
>
> Lessee to receive the field market price per thousand cubic feet for one-eighth (1/8) of all gas marketed from the premises.
>
> Lessee covenants and agrees to deliver to the credit of the Lessor, as royalty, free of cost, in the pipeline to which the wells drilled by the Lessee may be connected the equal one-eighth part of all Oil and/or Gas produced and saved from said leased premises.

B. The Cross Motions for Summary Judgment

Chesapeake has moved for summary judgment, but only as to the first of the three royalty clauses. It argues that the "at the well" language in that clause requires it to pay a royalty only on

the value of the gas at the well and that, as a result, it should be permitted to deduct post production costs from the sales price when it sells the gas downstream. This approach to royalty calculation is sometimes referred to as the "at the well rule."[1]

Plaintiffs have moved for summary judgment on all three royalty clauses. They argue that none of the three leases contain an express grant of the right to deduct post production costs, including the "at the well" royalty clause on which Chesapeake seeks summary judgment, and that Chesapeake must pay all post production costs under the implied covenant to market.

C. Gas Royalty Jurisprudence

Michigan, Nevada, Wyoming and the federal government have codified the "marketable product rule." Under common law, nine states follow the "at the well rule" and seven follow "the marketable product rule."[2]

The states following the "at the well rule" under common law are Pennsylvania, Kentucky, Mississippi, Louisiana, Texas, California, North Dakota, Montana and Michigan (the last by common law before Michigan codified the marketable product rule). The states that either expressly or implicitly follow some variation of the "marketable product rule" are West Virginia, Virginia, Colorado, Kansas, Arkansas, Oklahoma and New Mexico.

Pennsylvania (listed above as an "at the well rule" state) and New Mexico (listed above as a "marketable product rule" state) require further explanation because neither falls squarely in either camp. It is an open question whether Pennsylvania would allow the deduction of post

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[1] Plaintiffs in royalty cases disfavor the term "at the well rule" because it incorrectly suggests that "at the well" lease language necessarily triggers the "at the well rule," when it does not.

[2] Thus, if one counts both statutory and common law states, the "marketable product rule" is the majority rule. Certainly it is the majority rule in terms of gas volumes, given that all royalties paid to the federal government are paid under a codified "marketable product rule."

production costs under "at the well" language. In *Kilmer v. Elexco Land Services, Inc*., 990 A.2d 1147 (Pa. 2010), the state supreme court ruled that the minimum 1/8 royalty required by the state's Guaranteed Minimum Royalty Act is 1/8 of the net proceeds, not 1/8 of the gross. *Id.* at 1157. The court held, therefore, that post production costs could be deducted from the royalties under the lease in that case, which expressly permitted the deduction of a list of post production costs, without violating the statute. *Id. Kilmer* did not address, nor decide, whether "at the well" royalty language allows for the deduction of post production costs, leading the defense bar to caution gas producers that "at the well" language might not suffice. *See* Gladden and Maxwell, K&L Gates -- Oil and Gas Alert, *Drafting Lease Royalty Clauses in the Appalachian Basin after Kilmer*, April 27, 2010 (www.klgates.com) at 2 (stating that *Kilmer* leaves unanswered whether "at the well" language allows for expense deductions and advising gas producers to use express language).

New Mexico, sometimes included as a state following the "at the well rule," is more likely a marketable product jurisdiction. Although the Tenth Circuit predicted in *Elliott Industries, Ltd. v. BP America Prod. Co.*, 407 F.3d 1091, 1113-14 (10th Cir. 2005), that New Mexico would follow the "at the well rule," two post-*Elliott* rulings of the New Mexico Supreme Court have caused the U.S. District Court for the District of New Mexico to predict that the state supreme court will "find that the [marketable product] rule is included in oil and gas contracts as part of the implied duty to market." *The Anderson Living Trust v. WPX Energy Production, LLC*, 2015 WL 1321479 (D. N.M. March 19, 2015) at *105, ¶ 60.

Of the seven marketable product jurisdictions listed above, four have had occasion to consider whether "at the well" language allows for the deduction of post production costs. *All four* have held that it does not. These states are West Virginia, Colorado, Kansas and Virginia.

In *Tawney, supra,* the Supreme Court of West Virginia held that the insertion of "at the well" language into a royalty clause did not amount to a grant of the right to deduct post production costs:

> [I]n light of our traditional rule that lessors are to receive a royalty of the sale price of gas, the general lease language at issue simply is inadequate to indicate an intent of the parties to agree to a contrary rule – that the lessors are not to receive 1/8 of the sale price but rather 1/8 of the sale price less a proportionate share of deductions for transporting and processing the gas.

Id. at 28.

In *Rogers v. Westerman Farm Co.,* 29 P.3d 887 (Colo. 2001) (*en banc*), the Colorado Supreme Court considered four variants of "at the well" royalty clauses and held all were silent as to the costs necessary "to place the gas in a condition acceptable for market" and that the lessee was therefore obligated to pay these costs under the marketable product rule. *Id.* at 902.

In *Gilmore v. Superior Oil Co*., 388 P.2d 602 (Kan. 1964), the Kansas Supreme Court held that a lease providing for a royalty on "proceeds at the mouth of the well" did not allow the lessee to deduct compression costs because compression is necessary to make the gas marketable. *Id.* at 605-607. In the subsequent case of *Sternberger v. Marathon Oil Co*., 894 P.2d 788 (Kan. 1995), the same court held that a lease providing for a royalty of 1/8 of the "market price at the well" was silent as to post production costs and that, as a result, "the lessee alone bears the expense in making the product marketable." *Id.* at 796-800.

In *Legard v. EQT Prod. Co.,* 2011 WL 86598 at *10 (W.D. Va. Jan. 11, 2011) (Rep. and Rec., adopted in 2011 WL4527784 at *1), the U.S. District Court for the Western District of Virginia rejected the defendant's argument that "at the well" royalty language allows for the deduction of post production costs:

> I reject EQT's argument that "at the well" language, as a matter of law, allows it to share all post production costs with the royalty owners. Instead I hold that Virginia

> courts would follow the "first marketable product" rule, and hold the lessee solely responsible for all costs incurred in making the gas produced from the well marketable, unless, as is the case in the November 27, 1990 lease, the parties specifically agree otherwise."

Id. at *11.

Chesapeake has argued that *Tawney* stands alone as an outlier jurisdiction in holding that "at the well" language is insufficient to allow the deduction of post production costs. That simply is not the case. As just demonstrated, four of the seven marketable product jurisdictions have reached that conclusion, and the other three can be expected do so when presented with the issue.

Nor is there such a thing as a "*Tawney* rule," as Chesapeake has argued. *Tawney* simply applied West Virginia's equivalent of the marketable product rule, which it described as "our traditional rule that lessors are to receive a royalty of the sale price of gas," and declined to follow what it described as the "contrary rule – that the lessors are not to receive 1/8 of the sale price but rather 1/8 of the sale price less a proportionate share of deductions for transporting and processing the gas." *Tawney*, 633 S.E.2d at 28. *Tawney* is a straightforward application of the marketable product rule, albeit without that nomenclature.

Chesapeake's core argument is that these cases fail to give any meaning to the words "at the well" in contravention of the rule of contract interpretation that all words in a contract have a purpose and must be given meaning. Chesapeake is incorrect. Marketable product jurisdictions do not ignore the words "at the well." They contend, rather, that the term "at the well" must be read in the context of the *entire phrase in which it appears*, usually (as in this litigation) "*market value at the well*."

"Market value at the well" has meaning only if there *is* a market at the well. This point is explained by one legal scholar as follows:

> [F]or there to be a real market price or market value, there must be a market, a marketable product, a ready and willing seller, and a ready and willing buyer. Courts ignore these realities in gas royalty cases when they permit a lessee to work back to the wellhead by deducting post-wellhead costs. In so doing, they allow the lessee to work back to a point where only an unmarketable raw material may exist, and they essentially create a fictional seller, a fictional buyer, a fictional market, a fictional marketable product, and a fictional market price.

Anderson, *Royalty Valuation*, Part II, 37 Nat. Res. J. 611, 638-639 (1997).

Thus, the term "market value at the well" only has a meaning and application when there is one. When there is not, the implied duty to market requires the lessee to market the gas downstream and pay the attendant costs.

ARGUMENT

I. THE CERTIFIED QUESTION IS NOT DETERMINATIVE OF THE OUTCOME OF THIS CASE

This Court need not answer the certified question because it is not determinative of the outcome of this case. The original lessee, Murphy Oil Co. ("Murphy Oil"), took no deductions because gas was not sold downstream when it held the leases. Murphy Oil subsequently assigned the leases to CNR. CNR took no deductions until 1993, when it began to take them with no notice to the lessors and with no disclosure on the royalty check stubs.

The pre-1993 course of performance of Murphy and CNR controls in this case regardless of whether Ohio recognizes the "at the well rule" or the "marketable product rule." On point is *Schmidt v. Texas Meridian Resources, Ltd.*, 4th Dist. Washington No. 94CA12, 1994 WL 728059 (Dec. 30, 1994) at *5-6. In *Schmidt*, the plaintiffs alleged that the defendant breached an oil and gas lease by deducting the costs of transporting the gas to a downstream market. Two of the lease forms in that case had "at the well" royalty language ("proceeds of the sale of the gas at the mouth of the well" and "market price at the well"). *Id.* at *2-3. The trial court entered judgment against the gas producer and the gas producer appealed. The Ohio Court of Appeals affirmed, holding that

it made *no difference* which rule Ohio followed because, regardless, the course of performance of the original lessee in taking no deductions controlled. The court explained:

> Even assuming *arguendo* that the royalty provisions, as written herein, allowed for the deduction of transportation costs, it is evident that subsequent events altered that arrangement. Oil and gas leases, as discussed previously, are contracts and are subject to certain fundamental contract principals. It is well settled that a party may waive the terms of a written contract by words or conduct. *White Co. v. Canton Transportation Co.* (1936), 131 Ohio St. 190 at paragraph two of syllabus. Such conduct would amount to an estoppel on the parties so acting. *Id*. at paragraph two of syllabus; *also see Angola Dev. Co. v. Lion Dry Goods Co.* (Jul. 21, 1989), Lucas App. No. l-88-380, unreported. The subsequent acts of parties may also modify the terms of a contract between them. *Software Clearing House, Inc. v. Intrack, Inc.* (1990), 66 OhioApp.3d 163, 172; *Huntington National Bank v. Am. National Bank* (June 17, 1993), Cuyahoga App. Nos. 62680 & 62893, unreported. A continued, different, "course of performance" between parties manifests a modification of the original agreement. Calamari & Perillo, Contracts (2d ed. 1970) 130, Section 3-15. It make no difference what name is applied to that theory whether it be waiver, estoppel, novation or what have you; the theory is simply that the parties showed that they did not intend a particular provision of the contract to be strictly observed. *Id.* at fn 89 citing Willey v. Terry & Wright, Inc. (Ky. 1967), 421 S.W.2d 362, 363.
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> **********
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> [T]he court below found a course of performance between the parties which modified the lease agreement *even if the royalty provisions therein were construed to allow for deduction of transportation costs*. There is ample evidence in the record to support such a finding. The trial court found that Republic Mineral [the original lessee] had never charged any natural gas transportation costs against lessors the entire time it held the leasehold estates. **** The lower court could reasonably find from this evidence that the parties behaved in such a manner as *to modify whatever provision of the royalty clause which would have permitted deduction of these costs*. Indeed, the court could conclude from the action of the parties that such deduction of costs *was not even contemplated* in their agreement.

Id. at *5-6 (emphasis added). *See also City of St. Mary's v. Auglaize Co. Bd. of Commrs*., 115 Ohio St.3d 387, ¶ 39, 2006-Ohio-1033, 875 N.E.2d 561, 567 ("parties may implicitly modify an agreement by their actions").

Chesapeake has conceded that "[t]he apportionment of post-production costs is a relatively recent development and stems from the deregulation of the gas industry in the early 1990s." Def.'s Mem. in Supp. of S. J. [ECF 114-1] at 3. It explains that "in the 1950s through early 1990s, natural

gas producers primarily sold gas at the wellhead." *Id.* at 5. Added to this, the evidence in this case confirms that no deductions were taken under the leases in this case until 1993.[3]

The result in *Schmidt* has been reached in every gas royalty case with a *Schmidt* fact pattern. *See, e.g., Tawney*, 633 S.E.2d at 28 (post production costs not deductible because lessee did not deduct them until 1993, long after leases were executed); *Hanna Oil & Gas Co. v. Taylor*, 759 S.W.2d 563, 564-565 (Ark. 1988) (disallowing deduction of compression costs because the lessee did not deduct them during the first two years they were incurred); *Skaggs v. Heard*, 172 F. Supp. 813, 817 (S.D. Tex. 1959) (compression costs not deductible because none were deducted until two years after compressor was installed).

There is no need to answer the certified question because the pre-1993 course of performance is dispositive regardless of which rule is recognized in Ohio.

II. EXISTING OHIO CASE LAW IMPLICITLY ANSWERS THE QUESTION

There is also no need for the Court to answer the certified question because the answer is readily ascertainable from existing Ohio case law, as set forth below.

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[3] CNR issued the same form of check stub to its royalty owners in all Appalachian states, including Ohio. *See* Ohio Check Stubs (ECF 114-18 through 114-22); West Virginia Check Stubs (ECF 118-3); and Kentucky Check Stubs (ECF 118-4). The expenses were reported on the check stubs under the column "Your Share Prod. Charges." *Tawney*, Findings of Fact and Conclusions of Law, 2007 WL 5539870 (W.Va.Cir.Ct. Jun. 27, 2007) (ECF 118-2) at 26-27. Prior to 1993, CNR did not deduct any post production costs and correctly reported "$0.00" under "Your Share Prod. Charges" on the check stubs. *Id.* Beginning in 1993, CNR began to covertly deduct post production costs without notice to its lessors, all the while continuing to report "$0.00" on the check stubs under "Your Share Prod. Charges." *Id.* CNR's method of miscalculating and underpaying the royalties was uniform among all of its Appalachian royalty owners. *Id.* at 59 ("CNR treated each and every royalty owner (except on flat rate leases) exactly the same, regardless of the type of lease involved. The same rate for the sale of gas, the same deductions, including volume deductions, and the same expenses for gathering, processing and marketing.").

A. Under *Busbey*, an Oil and Gas Lessee in Ohio Must Pay All Costs of "Running the Business"

In Ohio, an oil and gas lessee must pay all costs of running the business. *Busbey v. Russell*, 10 Ohio C.D. 23 (Cir. Ct. Ohio), 1898 WL 1419 (Ohio Cir. Ct. Nov. 9, 1898) at *25-26 (oil and gas lease providing for a royalty of "one-eighth of income dollars" requires payment of 1/8 of the gross amount received for gas, with no deductions for the "expenses of running the business."). Post production costs are, unquestionably, an expense of running a gas production and sales business. Although *Busbey* is an early case, its holding is contemporary. *See, e.g., Hockett v. Trees Oil*, 251 P.3d 65, 72 (Kan. 2011) (no deductions from royalties because "proceeds" means "gross sales price.").

B. Ohio Recognizes the Implied Duty to Market and This Duty Includes the Costs of Performing the Duty

Ohio recognizes that an oil and gas lessee has an implied duty to market. *See, e.g., Yoder v. Artex Oil Co.*, 2014 WL 6467477 at *7 (Ohio App. Nov. 13, 2014); *Mauger v. Positron Resources, Inc.*, 5th Dist. Morgan No. 14AP0001, 2014-Ohio-4613 ¶ 60, 2014 WL 5306930 at *11 (Ohio App. Oct. 6, 2014). It is hornbook contract law that a party with a duty must bear the costs performing the duty. *See, e.g.,* E. Allan Farnsworth, CONTRACTS § 9.6 (2D ED. 1990); 18 Walter H.E. Jaeger, WILLISTON ON CONTRACTS §1963 (3d ed. 1978). This principle is widely recognized with respect to the implied covenant to market. *See* Anderson, *Royalty Valuation*, Part 1, 37 Nat. Resources J. 547, 604 (1997) ("If a party to a contract owes a duty of performance, such as the lessee's duty to market the gas product, then that party unquestionably has the obligation to absorb the costs of performance in absence of an expressed agreement to the contrary."); Merrill, THE LAW RELATING TO COVENANTS IMPLIED IN OIL AND GAS LEASES at 214-215 ("If it is the lessee's obligation to market the product, it seems to necessarily follow that his task is also to prepare it for market" and "no part of the costs of marketing of or preparation for the sale is chargeable to

the lessor"); Kahle & Stritch, *supra*, at 724 (wherein gas royalty defense lawyers write that "as long as the implied covenant to market is applicable, lessees will be required to pay royalties without deductions").

C. Ohio Looks to Industry Custom Existing at the Time of the Contract

In Ohio, "[e]vidence of custom or usage *existing at the time of the contract* is frequently admitted for the purpose of explaining the contract or ascertaining the understanding of the parties to it, interpreting the otherwise indeterminate intention and acts of the parties, explaining words or technical terms, or showing that the mode in which the contract has been performed is the one customarily followed by others engaged in the same calling or trade." *Dana Partners, L.L.C. v. Koivisto Constructors & Erectors, Inc.*, 11th Dist. Trumbull, No. 2011-T-0029, 2012 Ohio 6294 ¶ 26, 2012 WL 6783637 (court's emphasis), quoting *Marisay v. Perrysburg Mach. & Tool, Inc.*, 37 Ohio App.3d 35, 38, 523 N.E.2d 329, 331 (6th Dist. 1987), (quoting in turn, 54 Ohio Jurisprudence 2d, Usages and Customs, Section 14, at 453-455 (1962)).

III. THE CERTIFIED QUESTION HAS LITTLE RELEVANCE BECAUSE MODERN OIL AND GAS LEASES EXPRESSLY AUTHORIZE THE LESSEE TO DEDUCT POST PRODUCTION COSTS

The certified question need not be answered because it has limited import, affecting only old leases used principally to produce gas from conventional wells. Modern leases, including those prepared and used by the major shale gas producers in Ohio, grant the lessee the right to deduct post production costs.[4]

[4] The Ohio Department of Natural Resources reports online the volumes of shale gas produced by each gas producer. *See* Ohionr.gov. Chesapeake, Gulfport Energy and Antero Resources produce approximately 75% of the shale gas. The leases prepared by these three producers, and by those producing the balance of the shale gas, all contain royalty clauses that expressly grant the lessee the right to deduct post production costs. The leases are public records on file with the Recorder of Deeds in the county in which the leased property is located and, in some counties, can be accessed electronically.

CONCLUSION

For the foregoing reasons, this Court should decline to answer the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, a copy of the foregoing was filed electronically on the Court's E-Filng Portal, causing notice of this filing to be sent to all parties who have appeared in this action, and that copies of the foregoing were served by regular U.S. Mail, postage pre-paid, on the counsel for the Petitioner listed below:

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