

IN THE SUPREME COURT OF OHIO

<b>Leland Eisenbarth, et al.,</b>	:	<b>Case No. 2014-1767</b>
	:	
<b>Appellants,</b>	:	<b>Appeal from the Monroe County</b>
	:	<b>Court of Common Appeals,</b>
<b>v.</b>	:	<b>Seventh Appellate District</b>
	:	<b>(Case No. 13MO10)</b>
<b>Dean Reusser, et al.,</b>	:	
	:	
<b>Appellees.</b>	:	

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**BRIEF OF AMICI CURIAE, VIRGIL CLAYTON FARNSWORTH, TERESA FARNSWORTH, AUGUST SCARPELLI, GARY D. SKOREPA, ANDREW D. FABRIS, DAVID L. MOUNT, MICHAEL D. MAYELL, WILLIAM E. CHAPMAN, RICHARD A. GAREAU, ROBERT W. GAREAU, PETE RAGONE, GREGORY J. CHRISTY, AND CAROL E. CHRISTY IN SUPPORT OF APPELLANTS, LELAND EISENBARTH, ET AL.**

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I.

**STATEMENT OF INTEREST OF AMICI CURIAE**

Virgil Clayton Farnsworth and Teresa Farnsworth (collectively, “Farnsworths”), August Scarpelli, Gary D. Skorepa, Andrew D. Fabris, David L. Mount, Michael D. Mayell, William E. Chapman, Richard A. Gareau, Robert W. Gareau, and Pete Ragone (collectively, “Scarpellis”), Gregory J. Christy and Carol E. Christy (collectively, “Christys”) (the Farnsworths, Scarpellis, and Christys are collectively referred to as the “Amici”) are all landowners in Summit Township, Monroe County, Ohio. Farnsworths own a 104 acre farm, Scarpellis own approximately 80 acres, and Christys own approximately 60 acres. The Farnsworths’, Scarpellis’, and Christys’ properties were all encumbered by reservations of oil and gas rights. In each case, these reservations were either made after March 22, 1969 or were subject to alleged savings events, as defined in division (B) of the Former DMA (“Savings Events”), occurring after March 22, 1969.<sup>1</sup> Amici all filed separate lawsuits in the Monroe County Court of Common Pleas to quiet title to the mineral estate and to obtain a judicial declaration that the severed mineral interests were abandoned and vested in them by operation of the Former DMA.<sup>2</sup>

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<sup>1</sup>In *Farnsworth*, the oil and gas was reserved in 1980. In *Scarpelli*, a one-half interest in the oil and gas was reserved in 1941 but was leased by some of the severed mineral interest holders in 1980. In *Christy*, the oil and gas was reserved in 1946 but the mineral interest holder filed a claim to preserve the minerals in 1977.

<sup>2</sup>The Farnsworth’s case is currently pending before the Ohio Supreme Court in Case No. 2014-1909. The Scarpelli’s case is currently stayed before the Monroe County Court of Common Pleas in Case No. 2013-419. The Christy’s case is pending before the Seventh District Court of Appeals in Case No. 14-MO-013.

In each of the Amici's cases, a central issue is the 20-year look-back period under division (B)(1) of the Former DMA. Amici and Appellants assert that it applies to any 20-year period that elapses while the Former DMA was in effect. The Seventh District Court of Appeals held, in *Eisenbarth v. Reusser*, 2014-Ohio-3792, 18 N.E.3d 477 (7<sup>th</sup> Dist.) and in *Farnsworth v. Burkhardt*, 2014-Ohio-4184, 21 N.E.3d 577 (7<sup>th</sup> Dist.), that it was limited to a fixed 20-year period preceding either the date on which the statute was enacted, or the expiration of the three-year grace period under division (B)(2). If this Court were to affirm the holding in *Eisenbarth*, Amici may be unable to obtain any relief.

Like hundreds of landowners across Southeastern Ohio, Amici have attempted to lease their properties for oil and gas development. All three of the Amici signed oil and gas leases with Antero Resources Corporation, a major Southeast Ohio oil and gas producer. At the time Amici signed the leases, Antero was offering Five Thousand Nine Hundred and No/100 Dollars (\$5,900) an acre, with royalties at or above 20% of the gross production from the wells drilled on and under their property. Because of the stale oil and gas reservations on their properties, Antero has refused to pay for the leases.

If the Seventh District's holding in *Eisenbarth* is affirmed, Amici's use and enjoyment of their properties could also be significantly damaged and the value of the properties could be significantly diminished. Under Ohio law, severed mineral holders have the right to access and use the surface of the real estate to produce the minerals. In exercising these rights, the mineral holders could place a well pad close to the Amici's

homes or other improvements. The Farnworths raise cattle. The mineral holders could allow the construction of roadways or well pads right in the middle of their pastures or hay fields. This could significantly disrupt their livestock business.

## **II.**

### **STATEMENT OF THE CASE AND FACTS**

This matter involves an ownership dispute over severed mineral rights for property in Monroe County, Ohio. The record in this case reflects the following undisputed facts: on February 3, 1954, William Eisenbarth conveyed two tracts of land totaling approximately 153 acres to Paul and Ida Eisenbarth. As part of the conveyance, William Eisenbarth reserved one-half of all of the minerals underlying the lands (the “Reserved Minerals”), but granted to Paul and Ida Eisenbarth the right to lease the Reserved Minerals. In 1954, William Eisenbarth conveyed the Reserved Minerals to his daughter, Mildred Reusser.

In 1973, Paul and Ida Eisenbarth entered into an oil and gas lease encompassing the property. The lease was recorded on January 23, 1974.

In 2002, Mildred Reusser passed away, leaving her estate to Appellees. No certificate of transfer for the Reserved Minerals was issued from Mildred Reusser’s estate. It is undisputed that Mildred Reusser and Appellees did not cause the occurrence of any Savings Events for the Reserved Minerals from 1954, when Mildred Reusser acquired the Reserved Minerals, to June 30, 2006, a period of more than 52 years.

The trial court held that the oil and gas lease recorded in 1974 from Paul and Ida Eisenbarth was a Savings Event. Even if the trial court was correct that this lease is a “title transaction” (Appellants argue it is not, but Amici take no position on this matter), no Savings Events for the Reserved Minerals occurred between January 24, 1974 and June 30, 2006, a period of more than 32 years. Thus, based on the undisputed facts, there was a period exceeding 20 years in which no Savings Events occurred.

On August 28, 2014, the Seventh District Court of Appeals affirmed the trial court’s decision, holding that: (1) an oil and gas lease is a title transaction for the purposes of the Former DMA and that the 1974 Lease preserved the Reserved Minerals in favor of appellees; (2) that the Former DMA utilized a “fixed” review period to determine if the Reserved Minerals were abandoned; and (3) that an owner of the Reserved Minerals, without the right to lease the same, is entitled to the up-front signing bonus payment associated with the lease executed by a mineral co-tenant who possesses the executive rights.

### **III.**

#### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

As stated above, Amici take no position on Appellants’ second Proposition of Law. Amici write only as to Appellants’ first Proposition of Law which, if accepted, is dispositive of the case.

**Proposition of Law No. 1.**

**The 1989 DMA was prospective in nature and operated to have a severed oil and gas interest “deemed abandoned and vested in the owner of the surface” if none of the preserving events enumerated in R.C. 5301.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 DMA was in effect.**

**A. Abandonment of property under Ohio law.**

Severed mineral interests often present an obstacle to the production of oil and gas. As the National Conference of Commissioners on Uniform State Laws explained in the Prefatory Note for its Uniform Dormant Interests Act, which the Conference approved in 1986 and the American Bar Association approved on February 16, 1987:

. . . Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record. If mineral owners are missing or unknown, it may create problems for anyone interested in exploring or mining, because it may be difficult or impossible to obtain rights to develop the minerals. An exploration or mining company may be liable to the missing or unknown owners if exploration or mining proceeds without proper leases.

Under Ohio law, any form of property will be considered “abandoned” when the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession, or enjoyment. *See Interstate Petro. Co. v. Young*, 2013-Ohio-1943, ¶ 61, 992 N.E.2d 468 (11<sup>th</sup> Dist.) (citing *Pancake v. Pancake*, 4<sup>th</sup> Dist. Lawrence No. 11CA15, 2012-Ohio-1511, ¶ 10 (Mar. 29, 2012)). Principles of common law are capable of extinguishing interests in personal property and certain incorporeal estates by abandonment. However, divestiture of vested legal title to corporeal estates by abandonment is unknown at common law. *See Tennessee Oil, Gas &*

*Mineral Co. v. Brown*, 131 F. 696 (6<sup>th</sup> Cir. 1904); *Gerhard v. Stephens*, 68 Cal. 2d 864, 882-883, 442 P.2d 692 (Cal. 1968); *Wheelock v. Heath*, 201 Neb. 835, 840 (Neb. 1978); *Town of Sedgwick v. Butler*, 1998 ME 280, P5, 722 A.2d 357 (Me. 1998); *Mathwig v. Ostrand*, 132 Minn. 346, 348, 157 N.W. 589 (Minn. 1916); *Allen v. West Lumber Co.*, 244 S.W. 499, 501 (Tex. Comm'n App. 1922). Thus, the State of Ohio addressed the need for effectively terminating stale mineral interests by enacting the Former DMA on March 22, 1989.

The notion of enacting a statute to govern the abandonment of property is not unique to mineral interests. There are multiple examples within the Ohio Revised Code where the General Assembly has enacted substantive law to more clearly define when certain types of property have been abandoned. For example, R.C. 323.65 defines “abandoned land” based on whether certain real property is tax delinquent, vacant, and unoccupied. Under R.C. 1547.303, certain vessels and outboard motors are considered abandoned, depending on where and for how long they have been left, and based on the vessel’s age, condition, value, and operability. A similar definition for “abandoned junk motor vehicle” exists under R.C. 4513.63.<sup>3</sup>

Like many of the above-listed statutes, the Former DMA defines when there has been an abandonment of a particular type of property interest. The General

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<sup>3</sup>Other examples include R.C. 1506.30, which defines “abandoned property” to include certain submerged aircraft and watercraft, and the rigging, fittings, trappings, equipment, personal property, cargo, and other materials associated therewith. There are statutes concerning the abandonment of township roads, highways, streets, and alleys (R.C. 5553.042), certain mortgaged facilities (R.C. 3752.11), and animals in the care of licensed veterinarians or registered kennel owners (R.C. 4741.30). There is even a statute that governs the abandonment of property on loan to a museum (R.C. 3385.02).

Assembly specified the conditions that cause an abandonment of severed minerals. Thus, the Former DMA creates new substantive law<sup>4</sup> regarding when previously severed mineral interests are abandoned and become vested in the current owner of the surface.

Importantly, the Former DMA does not forfeit the rights of severed mineral interest holders; rather, such rights are abandoned. This is not simply a semantic difference. Forfeiture implies the loss of a right or an interest for cause, such as for a crime or for failing to perform an obligation, whereas abandonment implies the voluntary relinquishment of such right or interest.<sup>5</sup> The Former DMA, in the words of the Legislature, defines when severed mineral interests have been “abandoned.” The holder of a severed mineral interest is not legally obligated to take any action under division (B), and the failure to do so is certainly not a crime. On the 364th day of the 19th year since the last occurrence under division (B), a surface owner has absolutely no right to compel a severed mineral interest holder to abandon or surrender his or her interest. A severed

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<sup>4</sup>A statute is “substantive” if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation[s], or liabilities as to past transactions, or creates a new right. See *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243 ¶ 15, 897 N.E.2d 1118 (emphasis added)(citing *State v. Cook*, 83 Ohio St. 3d 404, 411, 700 N.E.2d 570 (1998)).

<sup>5</sup>The term “forfeiture” has multiple definitions, including (1) “[t]he divestiture of property without compensation;” (2) “[t]he loss of a right, privilege, or property because of a crime \* \* \*;” (3) “[s]omething (especially money or property) lost or confiscated by this process; a penalty;” and (4) “[a] destruction or deprivation of some estate or right because of the failure to perform some obligation or condition contained in a contract.” *State v. Solomon*, 2012-Ohio-5755, 983 N.E.2d 872 (1st Dist.) (quoting *Black’s Law Dictionary* 1168 (8th Ed. 2004)). “Abandonment” is defined as the relinquishing of a right or interest with the intention of never claiming it again. See *Labay v. Caltrider*, 9th Dist. Summit No. 22233, 2005-Ohio-1282 (Mar. 23, 2005) (quoting *Black’s Law Dictionary* (7th Ed. 1999)).

mineral interest holder's decision to allow his or her interest to remain dormant for 20 full years is entirely within his or her control. As the United States Supreme Court has recognized in *Texaco, Inc. v. Short*, 454 U.S. 516, 525, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982),<sup>6</sup> “It is the owner’s failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . .” *Id.* at 530 (emphasis added).

So how should this Court interpret the Former DMA? Amici suggest examining the U.S. Supreme Court’s analysis in *Texaco*. The Supreme Court analyzed Indiana’s version of the dormant minerals act like an adverse possession claim. In an adverse possession claim, the property owner loses the remedy to recover property because the claim is time barred. The Supreme Court held that the practical consequences of extinguishing a right under Indiana’s act are identical to the consequences of eliminating a remedy in an adverse possession claim. *Texaco*, at 528. In quoting *Hawkins v. Barney’s Lessee*, 30 U.S. 457, 466, 8 L. Ed. 190 (1831), the Court said “what right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?” *Id.* at 466. Thus, this Court should treat abandonment under the Former DMA like an adverse possession claim, not a forfeiture.

**B. Property rights vested under R.C. 5301.56 (Former DMA) (effective March 22, 1989 to June 30, 2006 were not divested by the 2006 Amendment to R.C. 5301.56 (“Current DMA”).**

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<sup>6</sup>The Former DMA is substantively no different from the dormant minerals act at issue in *Texaco*.

The Former DMA is self-executing. Self-executing means that the statute is effective immediately without the need of any type of implementing action. *See State ex rel. Vickers v. Summit County Council*, 97 Ohio St. 3d 204, 209, 2002-Ohio-5583, 777 N.E.2d 830 (2009) (quoting *Black's Law Dictionary* (7<sup>th</sup> Ed.1999)). In *Texaco*, Indiana's mineral lapse statute was self-executing. Under the statute, a mineral interest that was not used for a period of 20 years automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner filed a statement of claim in the local county recorder's office. *Id.* at 518. The Supreme Court distinguished, however, between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did, in fact, occur. *Id.* at 533. Although notice reasonably calculated to reach all interested parties and a prior opportunity to be heard must be provided before judgment can be entered in a quiet title action, there is no requirement that any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate. *Id.* at 520, 534.

Under the Former DMA, rights to a severed mineral interest became "vested in the owner of the surface" [Emphasis added] of the property by operation of law upon the elapse of 20 years without the occurrence of a Savings Event identified in division (B)(1)(c). Vested is defined as "having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." *Black's Law Dictionary* 747 (2<sup>nd</sup> Pocket Ed., 2001) (emphasis added); see also *Wilcox v. Central Nat'l Bank*, 69 N.E.2d 527 (7<sup>th</sup> Dist. 1945). In other words, the rights vested in surface owners

under the Former DMA should not be considered “inchoate” or in any way requiring any further implementing action.

On June 30, 2006, the General Assembly amended R.C. 5301.56 by enacting the Current DMA. The amendment included two major changes: 1) making abandonment under division (B) subject to satisfaction of the requirements under division (E), including the service of notice, and 2) the addition of division (H), which introduced a convenient, non-judicial process that surface owners may utilize for abandoning severed mineral interests, similar to the process set forth in R.C. 5301.332. The new requirement to serve notice means that the Current DMA is not self-executing; rather, it requires the surface owner to take some kind of implementing action before an abandonment occurs.

Notwithstanding the enactment of the Current DMA, Ohio law supports the proposition that surface owners’ property rights, which vested prior to June 30, 2006 under the Former DMA, were not divested. Revised Code 1.58(A) states, in pertinent part, that the reenactment or amendment of a statute does not, except as provided in division (B)<sup>7</sup> of R.C. 1.58:

"1) affect the prior operation of the statute or any prior action taken thereunder; [or] 2) affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder . . ."

(emphasis added). Thus, under Ohio Law:

. . . changes in the law dealing with substantive rights do not affect such rights even though no action or proceeding has been commenced, unless the amending or repealing act expressly so provides.

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<sup>7</sup>Division (B) of R.C. 1.58 relates to a reduction in a penalty, forfeiture, or punishment for any offense imposed by statute, and is inapplicable here.

*O'Mara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 133, 215 N.E.2d 735 (C.P. 1966)  
(emphasis added).

The Current DMA does not expressly state that property rights, vested under the Former DMA, are affected by the Current DMA. If the General Assembly intended the Current DMA to affect the rights vested in surface owners prior to June 30, 2006 under the Former DMA, such intent must be expressly stated.

**C. The look-back period under the Former DMA applies to any 20-year period that elapsed while the Former DMA was still in effect.**

Although the Seventh District made clear that it was applying a “fixed” look-back period, its opinion in *Eisenbarth* is ambiguous as to the date on which the look-back period was established. The court acknowledged that the trial court had looked-back “twenty years from the date of enactment.” *Eisenbarth*, ¶36. The Seventh District also believed division (B)(2) connected “the twenty-year look-back to the date of enactment...” *Id.* ¶ 49. Overall, the Seventh District’s decision leaves the distinct impression that it believed the twenty-year period was fixed from March 22, 1989, the date the Former DMA was enacted.

If applied literally, tying the twenty-year look-back period to March 22, 1989 creates an anomaly that effectively eliminates the three-year grace period under division (B)(2) of the Former DMA. Division (B)(2) says that “A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.” Suppose that, during the three-year grace period, a severed mineral interest

owner files a claim to preserve. Under the Seventh District's interpretation, the claim to preserve would not constitute a circumstance under division (B)(1) because it is not "within the preceding twenty years" of March 22, 1989. The claim to preserve, therefore, would not prevent abandonment. Under this scenario, division (B)(2) simply delays the inevitable effect of (B)(1) by three years. In order for division (B)(2) to provide any kind of safe harbor, the circumstances described under division (B)(1) must take into consideration events occurring after March 22, 1989.

Perhaps this argument misconstrues the Seventh District's holding. Instead of applying a fixed twenty-year look-back from the date of the statute's enactment (March 22, 1989), the Seventh District perhaps could have intended to apply a fixed twenty-year look-back from the end of the three-year grace period, or March 22, 1992. In order to accept this interpretation, however, the Court would have to believe that, when the Legislature enacted the Former DMA on March 22, 1989 and referenced "the preceding twenty years" under division (B)(1), it was referring to the twenty years preceding a single date (March 22, 1992) exactly three years in the future. Under this scenario, the operation of the entire statute revolves around a single, future date, and yet this date is not specifically mentioned anywhere in the statute. It strains credulity to believe that, in the name of supposedly clarifying a statutory ambiguity, this is the most plausible interpretation.

Also, if division (B)(1) was truly intended to apply just once while looking back from a specific future date, there would have been no need to create a separate grace period under division (B)(2). Instead, division (B)(1) could have simply identified the

period “Within the twenty years preceding March 22, 1992” or “Between March 22, 1972 and March 22, 1992.” By separating the three-year grace period from the more general provisions of division (B)(1), the statute is very deliberately constructed so as to provide the necessary due process protection (the grace period) required to pass constitutional muster, but to also continue the operation of the statute into the future.

Regardless of the date used to establish the look-back, the Seventh District was erroneous in holding that the look-back period was fixed. In reviewing the language of the statute (“within the preceding twenty years...”), the court held that the Legislature did not clearly state that the statute had a rolling look-back period. *Eisenbarth v. Reusser*, ¶ 45. The court believed that the Former DMA was “ambiguous” as to whether the look-back period is anything other than fixed.

The use of the words “preceding twenty years,” without stating the preceding twenty years of what, does not create a rolling look-back period. Rather, the imposition of successive look-back periods would have required language that the mineral interest is deemed abandoned and vested if no savings events occurred within twenty years after the savings event. (*Eisenbarth*, ¶ 48).

Because of this supposed ambiguity, the court therefore held that a mineral interest could not be deemed abandoned and vested in a surface owner under the Former DMA after March 22, 1992.<sup>8</sup> The court essentially added a sunset provision to the Former DMA so that, as of March 23, 1992, it became dead letter law.

In the midst of its statutory analysis, the Seventh District invoked the well-known maxim that forfeiture is abhorred in the law. *Eisenbarth*, ¶ 49. The court seems

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<sup>8</sup>Division (B)(2) says that a “mineral interest shall not be deemed abandoned under division (B)(1) until three years from the effective date of this section.”

to have been heavily guided by this principle in resolving the alleged ambiguity it had identified in a way that severely limited the statute's effect. The court never stopped to consider whether it was operating under a proper framework of analysis. If the Seventh District properly considered the Former DMA as an abandonment statute, rather than a forfeiture statute, and, like the Supreme Court of the United States in *Texaco*, treated an abandonment like the lapse of a statute of limitations, it could have avoided the errors that it committed in this case.

The Seventh District also compared the Former DMA to Ohio's OVI statute, specifically R.C. 4511.19(G)(1)(d), which imposes a fourth degree felony on an individual who has been convicted of or pleaded guilty to certain violations "within twenty years of the offense." The court believed that, since the period of look-back is expressly set forth in the Ohio's OVI statute (unlike the Former DMA), it is a rolling period. The Seventh District ignored the fact that there are other look-back provisions under Ohio's OVI statute that are not expressly fixed from the date of the offense. For example, under R.C. 4510.31(C)(1)(c), a court should not grant limited driving privileges if a person was convicted of three or more OVIs or other offenses "within the preceding six years." According to the reasoning of the Seventh District, a court should only consider the person's driving record in the six years preceding the effective date of the statute, or September 28, 2012, to determine if driving privileges should be granted.

Many statutes use the phrase "within the preceding [period of time]." These statutes have never been interpreted to apply only to the period prior to their enactment. If this Court allows the Seventh District's holding to stand, it would

potentially have a dramatic and absurd effect on numerous other provisions within the

Revised Code:

1) a home daycare would only have to disclose to parents certain injuries if the incident occurred within the preceding 10 years from May 18, 2005, the date R.C. 2919.225 was enacted;

2) to determine if a student should be identified as exhibiting “superior cognitive ability,” a school district could only examine the 24 month period preceding September 11, 2001, the date R.C. 3324.03 was enacted, (this analysis would be particularly difficult as many students today were born after September 11, 2001);

3) hospitals would be required to offer uterine cytologic examinations for cancer to every female inpatient unless she had an examination within the year preceding August 25, 1976, the date R.C. 3701.60 was enacted;

4) to determine if an individual is chronically ill under the Viatical Settlements Model Act, one would have to examine the year preceding September 11, 2008, the date R.C. 3916.01 was enacted; and

5) to determine if a public employee retirement system can do business with a corporation owned by a board member or an officer of the public employees retirement system, one would have to examine the three years preceding August 20, 1976, the date R.C. 145.112 was enacted.

There are many other examples.

The express language of the Former DMA shows that division (B) applies to any 20-year period that elapsed while the Former DMA was in effect. The Savings Events in division (B) repeatedly use the present perfect tense “has been” rather than the past tense “was” (i.e., “The mineral interest has been the subject of a title transaction . . .”) The present perfect tense “has been” can be used to refer to action that one expects has not yet happened or for which one is still waiting for it to happen. If the Seventh

District's interpretation is correct, the Legislature should have used the simple past tense "was" instead.

The Seventh District also erred by ignoring the instruction of the Legislature in R.C. 1.48. Under R.C. 1.48 "a statute is presumed to be prospective in its operation . . . ." The Seventh District concluded that the Former DMA allowed surface owners just one opportunity on March 22, 1992 to recover title to the severed minerals under their property. *Eisenbarth*, ¶ 50. The problem with this interpretation is that there is nothing in the statutory language indicating that its prospective effect should be limited or that the law should have a sunset provision. In matters of statutory construction, a court should give effect to the words used, not to delete words used or to insert words not used. *Cleveland Elec. Illum. Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 53, 524 N.E.2d 441 (1988) (emphasis added) (citing *Columbus-Suburban Coach Lines v. Pub. Util. Comm'n.*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969)). If the General Assembly intended to limit the Former DMA's prospective effect, it should have expressly so stated.

Also, statutes must read in *pari materia*. See *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 118, 2008-Ohio-5041, 896 N.E.2d 979 (2008). In other words, provisions which relate to the same subject matter must be construed together to give them full effect. Division (D)(1) provides context that the 20-year period identified under division (B)(1)(c) is not limited to the period prior to enactment. Specifically, it states that:

A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in Division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section. [Emphasis added.].

If a single Savings Event during a fixed twenty-year period was sufficient to indefinitely preserve a severed mineral interest, there would be no need for "successive" filings of claims to preserve under division (C).

In *Eisenbarth*, the court held that the reference to successive filings under division (D)(1) "could merely be a reference to any preservations" filed prior to the enactment of the statute. *Eisenbarth*, ¶ 47. The court further explained in *Farnsworth* that "this could merely be a reference to any preservations that were filed under the OMTA [the Ohio Marketable Title Act] as it existed prior to the 1989 DMA in order to show that a new claim to preserve can still be filed if the old one was filed outside the new twenty-year look-back." *Farnsworth*, ¶ 43. Such a reference is completely unnecessary. Under division (B)(2) of the Former DMA, no mineral interests were abandoned until "three years from the effective date of this section," if "none of the circumstances described in [division (B)(1)] apply." Thus, if a holder filed a claim to preserve under division (B)(1)(c)(v) within "three years of the effective date," there was no abandonment under the statute's express terms and it is irrelevant whatever might have occurred or been filed "outside of the new twenty-year look back." Division (D)(1) cannot reasonably be interpreted as a reference to irrelevant prior filings.

In her concurring opinion, Judge DeGenaro criticized the absurdity of the majority's explanation regarding division (D)(1). She accused the majority of ignoring

the statutory language. *Eisenbarth*, ¶ 124. She believed the General Assembly clearly signaled that to preserve their interest, mineral interest holders must perform a Savings Event every 20 years. *Id.* In *Farnsworth*, Judge DeGenaro further criticized the majority's explanation regarding division (D)(1) as "disingenuous" and accused the majority of "feigning to engage in statutory construction." *Farnsworth*, ¶ 95.

Several courts throughout the State of Ohio have either expressly or impliedly held that the Former DMA applied to any 20-year period that elapsed while the statute was in effect. At least three Southeast Ohio Common Pleas Courts had previously agreed with Judge DeGenaro (Monroe, Jefferson, and Carroll County Courts of Common Pleas).<sup>9</sup> And, although the Southern District of Ohio did not explicitly rule on this issue in *Chesapeake Exploration, LLC v. Buell*, S.D. Ohio Case No. 2:12-cv-916 (Jan. 2, 2014), Ohio Supreme Ct. Case No. 2014-0067 or *Corban v. Chesapeake Exploration, LLC*, S.D. Ohio Case No. 2:13-cv-246 (May 14, 2014), Ohio Supreme Ct. Case No. 2014-0804, the Certifications in both cases impliedly held the same. In *Buell* and *Corban*, the District Court wrote that the filing of a Savings Event resets the 20-year look-back "clock." See *Corban* at p. 15, *Buell* at p. 16, attached hereto as Appendix A and B. In contrast, the Seventh District in *Eisenbarth* and *Farnsworth* held that the

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<sup>9</sup>*Farnsworth v. Burkhardt*, Monroe C.P. No. 2012-133, (July 16, 2013); *Bender v. Morgan*, Columbiana C.P. No. 2012-CV-378 (March 22, 2013); *Shannon v. Householder*, Jefferson C.P. No. 12-CV-226 (July 17, 2013); *Taylor v. Crosby*, Belmont C.P. No. 11 CV 422 (Sept. 16, 2013); *Albanese v. Batman*, Belmont C.P. No. 12 CV 0044 (Apr. 28, 2014); *Whittaker v. Northwood Energy Corporation*, Monroe C.P. No. CVH 2012-374 (June 5, 2014); *Greer v. Frye*, Belmont C.P. No. 13 CV 0244 (June 30, 2014).

twenty-year period is never restarted; once a Savings Event occurs, the mineral interest is preserved forever under the Former DMA.

Finally, the Seventh District's interpretation of the Former DMA contradicts R.C. 5301.55 of the Marketable Title Act, which states, in pertinent part, that:

Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions . . . . [Emphasis added.]

The Seventh District interpreted the Former DMA in the most restrictive possible way. The court's incorrect and restrictive interpretation leaves the Former DMA without any effect after March 22, 1992. A mineral interest that becomes stale after March 22, 1992 frustrates oil and gas development just as much as one that becomes stale before March 22, 1992. This Court should follow the General Assembly's instructions set forth in R.C. 5301.55, liberally construe the Former DMA, and hold that division (B)(1)(c) applies to any twenty-year period that elapsed while the Former DMA was in effect.

#### IV.

#### CONCLUSION

The Seventh District's failure to distinguish between the concepts of forfeiture and abandonment has poisoned its analysis of the Former DMA at every turn. The court is very well aware that forfeitures are abhorred in the law and has repeatedly invoked the concept of forfeiture in its many recent decisions interpreting the Former

DMA.<sup>10</sup> In *Eisenbarth*, the court cited the abhorrent nature of forfeiture as a reason for its decision to apply a fixed 20-year period. *Id.* at ¶ 49.

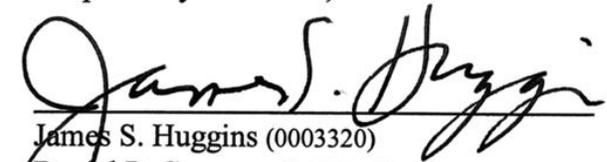
There is nothing fundamentally abhorrent about the operation of the Former DMA that justifies a rewriting of the statute to limit its effect. In fact, consistent with the General Assembly's instruction in R.C. 5301.55, the public policy in the State of Ohio supports that the Former DMA should be liberally construed so that it can accomplish the purposes for which it was enacted. The public policy of this state is to encourage oil and gas production when the extraction of these resources can be accomplished without undue threat of harm, safety, and welfare of the citizens of Ohio. See *Newbury Township Bd. Township Trustees v. Lomak Petroleum*, 62 Ohio St. 3d 387, 389, 583 N.E.2d 302 (1992). The purpose of the Former DMA, like similar statutes in

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<sup>10</sup>*Farnsworth* at ¶ 73. (“The axiom ingrained in Ohio common law that forfeiture is not favored in law or in or equity.”) (DeGenaro, concurring in judgment only); *Swartz v. Householder*, 2014-Ohio-2359, ¶ 36, 12 N.E.3d 1243 (7<sup>th</sup> Dist.) (“to some, the result reached by the trial court in *Dahlgren* may seem fair, equitable, and practical under a theory that it is the initial forfeiture that should be abhorred by the law rather than the later forfeiture of a property right obtained by forfeiture in the first place”); *Dodd v. Croskey*, 7<sup>th</sup> Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 35 (Sept. 23, 2013). (“Furthermore, the conclusion that R.C. 5301.56(H)(1)(a) allows for a mineral interest holder to take a present action by filing a claim to preserve the mineral interest after notice, even though the claim was not filed within the 20 years immediately preceding notice, is supported by the general rule that the law abhors a forfeiture. *State ex rel. Falke v. Montgomery Cnty. Residential Dev., Inc.*, 40 Ohio St. 3d 71, 73, 531 N.E.2d 688 (1988). Thus, the law requires that we favor individual property rights when interpreting forfeiture statutes. *Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992)”). See also *Carney v. Shockley*, 2014-Ohio-5830, ¶ 41, 26 N.E.3d 1217 (7<sup>th</sup> Dist.); *Lipperman v. Batman*, 7<sup>th</sup> Dist. Belmont No. 14 BE 2, 2014-Ohio-5500, ¶ 20 (Dec. 12, 2014) (citing *Eisenbarth*); *Albanese v. Batman*, 7<sup>th</sup> Dist. Belmont No. 14 BE 22, 2014-Ohio-5517, ¶ 24 (Dec. 21, 2014) (citing *Eisenbarth*); *Tribett v. Shephard*, 2014-Ohio-4320, ¶ 59, 20 N.E.3d 365 (7<sup>th</sup> Dist.) (citing *Eisenbarth*); and *Dahlgren v. Brown Farm Props. LLC*, 2014-Ohio-4001, ¶ 31, 19 N.E.3d 926 (7<sup>th</sup> Dist.).

other states, is to eliminate stale oil and gas interests, which often become highly fractionalized and scattered over time, in order to facilitate future oil and gas development. For this reason and for all the reasons set forth above, this Court should reverse the ruling by the Seventh District on Position of Law No. 1 and remand for further proceedings.

Respectfully submitted,



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**Certificate of Service**

The undersigned hereby certifies that a copy of the foregoing **Brief of Amici Curiae, Virgil Clayton Farnsworth, Teresa Farnsworth, August Scarpelli, Gary D. Skorepa, Andrew D. Fabris, David L. Mount, Michael D. Mayell, William E. Chapman, Richard A. Gareau, Robert W. Gareau, Pete Ragone, Gregory J. Christy, and Carol E. Christy in Support of Appellants, Leland Eisenbarth, et al.**, was served on the following by mailing a copy of same by ordinary, U.S. mail, postage pre-paid, on this 27<sup>th</sup> day of April, 2015:

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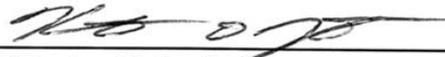
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(362269)

## APPENDIX

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

14-0804

Hans Michael Corban,

Plaintiff,

v.

Case No. 2:13-cv-246

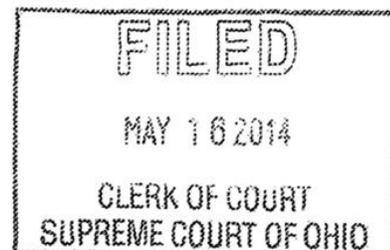
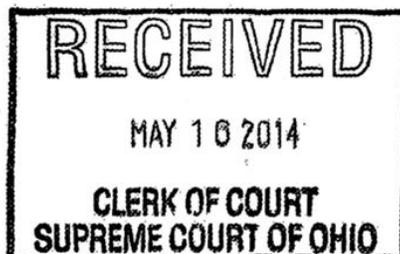
Chesapeake Exploration, L.L.C. et al.,

Judge Michael H. Watson

Defendants.

**OPINION AND ORDER**

This diversity action requires the Court to determine which parties are entitled to the oil, gas, and mineral rights that lie below about 164.5 acres of property located in Harrison County, Ohio ("the Property"). The parties have filed cross-motions for summary judgment. ECF Nos. 35, 36. In addition, Plaintiff filed a Motion for Leave to File Supplemental Authority, which Defendants do not oppose, and Defendants also move for leave to file supplemental authority. ECF Nos. 41, 43. For the following reasons, the Court **GRANTS** the parties' respective motions for leave to file supplemental authority, **DEFERS** final ruling on the summary judgment motions, **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio, and **STAYS** the proceedings pending the outcome of certification.



## **I. PROCEDURAL HISTORY**

On February 12, 2013, Plaintiff Hans Michael Corbin ("Plaintiff") filed a complaint against Defendants Chesapeake Exploration, LLC ("Chesapeake"), CHK Utica, LLC ("CHK"), Total E&P USA, Inc. ("Total"), and North American Coal Royalty Company ("North American") in the Common Pleas Court of Harrison County, Ohio, seeking a declaratory judgment, to quiet title to the oil and gas rights under his surface estate, a permanent injunction, and alleging conversion. Defendants removed the case to federal court on March 15, 2013 on the basis of diversity jurisdiction. Defendants answered with counterclaims against Plaintiff seeking declaratory judgment and to quiet title in their favor. Countercls., ECF Nos. 6, 7. Plaintiff filed an Amended Complaint on June 13, 2013, adding Dale Pennsylvania Royalty, LP ("Dale Pennsylvania"), and Larchmont Resources, LLC ("Larchmont") as defendants as well as a claim for unjust enrichment. Discovery ensued, and Cross motions for summary judgment have been filed.

## **II. FACTS**

Both Plaintiff and Defendants set forth the undisputed facts in their respective summary judgment motions. Given the facts, however, the parties dispute who is the legal owner of the oil, gas, and mineral rights beneath the Property.

In July of 1959, The North American Coal Corporation ("NACoal") conveyed the Property to Orelen H. Corban and Hans D. Corban, excepting all

oil, gas, and mineral rights (the "Mineral Rights")<sup>1</sup> to itself and its successors and assignees. The Property has been frequently transferred since 1962.

A. The Surface Rights

In 1962, Orelen Corban conveyed his interest in the Property to Carol Ann Corban by quit claim deed. Carol Corban and her husband then conveyed their interest in the Property to Hans D. Corban by quit claim deed in 1967. This transaction made Hans D. Corban the sole owner of the surface rights in the Property. In 1980, Hans D. Corban conveyed the Property to Gretchen A. Corban by quit claim deed. Gretchen Corban then conveyed the Property to Plaintiff Hans Michael Corban in 1999 via a quit claim deed that stated it was "subject to conditions, restrictions and easements if any, contained in prior instruments of record."

B. The Mineral Rights

As noted above, NACoal reserved its interest in the Mineral Rights in the 1959 transaction to Orelen and Hans D. Corban. In January 1974, NACoal entered into an oil and gas lease for a primary term of ten years with National Petroleum Corporation ("the 1974 lease"). The lease was recorded on February 6, 1974. American Exploration Company obtained a permit to drill for oil and gas on lands covered by the 1974 lease in April of 1974, and in May of 1975, National Petroleum Corporation assigned the lease to American Exploration

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<sup>1</sup> The Court refers to mineral interests generally as "mineral interests" and to the specific mineral interests at issue in this case as "Mineral Rights."

Company. American Exploration Company then assigned the 1974 lease to C.E. Beck, acting for and on behalf of RSC Energy Corporation, in 1978. There was no production under the 1974 lease, and the Mineral Rights presumably reverted back to NACoal at the end of the lease in 1984.

NACoal then entered into a second oil and gas lease for a primary term of five years with C.E. Beck, and that lease was recorded in February 1984 (the 1984 lease<sup>2</sup>). RSC Energy Corp. obtained a permit to drill for oil and gas in January of 1985.<sup>2</sup> C.E. Beck thereafter assigned the 1984 lease to Carless Resources, Inc. which assignment was recorded in May of 1985. There was no production under the 1984 lease, but C.E. Beck or Carless Resources, Inc. paid the requisite delay rentals to NACoal throughout the primary term of the 1984 lease (i.e., in 1985, 1986, 1987, 1988). Following the expiration of the 1984 lease, the ownership of the oil and gas rights reverted back to Bellaire, formerly known as NACoal, in January 1989.

Bellaire then transferred the mineral estate to North American in 2008 by quit claim deed.

In January 2009, North American leased the oil and gas rights to Mountaineer Natural Gas Company ("Mountaineer"), which lease was recorded in 2010 ("the 2009 lease"). In May 2010, Mountaineer assigned the 2009 lease to Dale Property.

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<sup>2</sup> Defendants' motion for summary judgment states the date as January 1984, a year before the lease was recorded. The Court considers this likely a typographical error, but in any event, the date the permit was obtained is not material to the case.

A well was built in 2010, completed in 2011, and began production in June 2011 pursuant to the 2009 lease.

In October 2010, Dale Property assigned its interest in the 2009 lease to Ohio Buckeye Energy, L.L.C. ("Ohio Buckeye"), reserving a royalty interest. Dale Property then assigned its royalty interest to Dale Pennsylvania in 2011.

In October 2011, Ohio Buckeye transferred a portion of its interest in the 2009 lease to Larchmont, and it assigned other portions of its interest to CHK in 2012 and 2013.

In December 2011, Ohio Buckeye merged with Chesapeake, transferring its remaining interest in the 2009 lease to Chesapeake. Chesapeake transferred a portion of its interest in the 2009 lease to Total in 2011, which assignment was recorded in May 2012.

In sum, Plaintiff is the sole owner of the surface rights to the Property, and he also claims ownership of the Mineral Rights beneath the Property. Chesapeake is the record owner of the oil and gas rights beneath the Property, and CHK, Total, Dale Pennsylvania, Larchmont, and North American are lessees of those rights.

### **III. STANDARD OF REVIEW**

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587 (1986); *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

#### IV. APPLICABLE LAW

In this diversity case, the Court must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In doing so, this Court is bound by the decisions of the state's highest court. *Pennington v. State Farm*

*Mut. Auto Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). If the state's highest court has not directly addressed the issue, however, this Court must predict how the state's highest court would resolve the matter. *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008). In that case, the decisions of the state's intermediate appellate courts are deemed authoritative, unless there is a strong showing that the state's highest court would reach a different result. *Id.*

## V. ANALYSIS

The parties agree that this case is governed by the Ohio Dormant Mineral Act ("ODMA"), Ohio Revised Code § 5301.56. The ODMA, enacted in 1989, operates to return dormant, severed mineral interests to the surface land holder ("surface land holder") by placing a twenty-year limit on dormant mineral interests. In other words, when someone other than the surface land holder obtains the sub-surface mineral interests, that mineral interest holder ("mineral interest holder") is deemed to have abandoned the mineral interests if those interests lay dormant for twenty years, at which time they revert back to the surface land holder. The Ohio General Assembly amended the statute and changed the manner in which the mineral interests return to the surface land holder effective 2006.

Under either version of the ODMA, a twenty-year clock begins to run the moment that the mineral interests are acquired by someone other than the surface land holder. If twenty years run in which the interests are dormant and

there is no "savings event" under § 5301.56(B), the mineral interests vest in the manner prescribed by the statute. A § 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

The 1989 ODMA does not specify when the preceding twenty-year period begins for purposes of calculating the abandonment clock, nor does it specify any method for vesting of the mineral interests in the surface land holder. That statute provided a three year grace period under which a mineral interest holder could maintain his interest. The three year grace period in this case expired on March 23, 1992.

In contrast, the 2006 ODMA specifically requires that notice be given by the surface land holder to the mineral interest holders of record before the mineral interests can vest in the surface land holder and states that it is the preceding twenty years from the date the surface land holder gives notice to the mineral interest holder that is at issue for abandonment. Ohio Rev. Code § 5301.56(B), (E) (2006). Once notice is given, the mineral interest holder has sixty days to either file a claim in the office of the county recorder to preserve the interest under § 5301.56(B)(3)(e) or file an affidavit identifying a savings event under § 5301.56(B)(3). If the mineral interest holder fails to file a claim to preserve the mineral interests or identify a savings event within sixty days, the mineral interests vest in the surface land holder upon memorialization of the abandonment in the county record. Ohio Rev. Code § 5301.56(H)(2).

The parties dispute both whether the 1989 or 2006 version of the ODMA governs this case and whether a savings event has occurred at all.

A. The Supreme Court of Ohio Should Determine Whether the 1989 Version or the 2006 Version of the ODMA Applies to Actions Brought After Enactment of the 2006 Amendments but Alleging that Rights Vested Prior to Enactment of the 2006 Amendments.<sup>3</sup>

Not surprisingly, the parties dispute which version of the ODMA applies to the instant case. Defendants argue the 2006 version applies because it was the law in effect at the time Plaintiff brought suit in 2013, and the Court must apply the law as it exists at the time of the claim. Because Plaintiff has not complied with the procedural requirements established in the 2006 amendments by providing the requisite notice,<sup>4</sup> Defendants argue his claim fails.

Plaintiff contends the Mineral Rights automatically vested in him in either 1992 or 2005 but in any event under the 1989 version of the ODMA. Because the Mineral Rights automatically vested in him on one of those dates, he contends the 2006 version of ODMA is inapplicable. Moreover, he argues the 2006 amendments cannot be applied retroactively to divest him of his property rights.

Defendants respond that the 2006 amendments are not retroactive because they are remedial in nature and that the legislature is free to condition

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<sup>3</sup> The Court notes that which version of the ODMA applies is also at issue in *Chesapeake v. Buell*.

<sup>4</sup> Plaintiff does not argue that he has satisfied the procedural requirements established in the 2006 amendments.

the continued retention of even vested rights on affirmative steps established in the 2006 amendments.

The Supreme Court of Ohio has not directly addressed this issue. The decisions of the common pleas courts of Ohio are split on the issue of which version of the ODMA applies to claims brought after the amendments but claiming that rights vested prior to the amendments. On the one hand, *M&H Partnership v. Hines*, Case No. CVH-2012-0059, 9 (Harrison Cnty. Common Pls. Ct. Jan. 14, 2014) and *Dahlgren v. Brown Farm Properties, L.L.C.*, Case No. 13CVH27445 (Carroll Cnty. Common Pleas Ct. Nov. 5, 2013) hold that the 2006 ODMA controls a claim of abandonment that is first made after the 2006 amendments.

*M&H Partnership* based its holding in part on the Seventh District opinion *Dodd v. Croskey*, 2013 WL 5437365 (Ohio Ct. App. 7th Dist. Sept. 23, 2013). As noted below, the Seventh District has since changed course on this issue.

The *Dahlgren* court noted that as late as November 2013, neither that court nor the parties had found “any appellate decision that decides whether or when to apply the 1989 version of [ODMA] for an abandonment claim filed after the 2006 amendment,” but it noted that the seventh district applied the 2006 version without discussion in *Dodd*.<sup>5</sup> *Dahlgren*, at 13–14. The *Dahlgren* court then discussed the history and purpose of the Ohio Marketable Title Act

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<sup>5</sup> The Supreme Court of Ohio has permitted a discretionary appeal from *Dodd v. Croskey*, 138 Ohio St. 3d 1432 (2014), but that appeal does not seem to concern the issue of which version of the ODMA applies.

("OMTA"), of which the ODMA is a part, and held that unless a surface land holder implemented or enforced a claim of abandonment prior to the effective date of the 2006 amendments, the surface land holder must comply with the 2006 procedural requirements to enforce a claim of abandonment brought after 2006. This is so even when the surface land holder claims that the abandonment occurred prior to the 2006 amendments. *Id.* at 14.

Conversely, several other common pleas court decisions applied the 1989 ODMA in cases like this one. See, e.g., *Shannon v. Householder*, Case No. 12CV226, at 6–7 (Jefferson Cnty. Common Pleas Ct. July 17, 2013); *Marty v. Winkler*, Case No. 2012-203, at 10 (Monroe Cnty. Common Pleas Ct. Apr. 11, 2013) (finding abandonment under both versions of the Act); *Walker v. Noon*, Case No. 2120098, at \*3 (Noble Cnty. Common Pleas Ct. Mar. 20, 2013) ("Any discussion of R.C. 5301.56, effective June 30, 2006 is moot, because as of June 30, 2006, any interest of Defendant in the oil and gas had been abandoned."); *Wendt v. Dickerson*, Case No. 2012 CV 0135, at 16–17 (Tuscarawas Cnty. Common Pleas Ct. Feb. 21, 2013) (applying 1989 version).

The only appellate court to face the issue is the Seventh District. In *Dodd*, the Seventh District applied the 2006 version of the ODMA without discussion. 2013 WL 5437365. Just last month, though, it expressly considered the issue of whether the 1989 version or the 2006 version of the ODMA applies to claims brought after 2006 but alleging that rights vested under the 1989 version of the Act. *Walker v. Shondrick-Nau*, 2014 WL 1407942, at \*5–6 (Ohio Ct. App. 7th

Dist. Apr. 3, 2014) (appeal from *Walker v. Noon*). The court concluded that the 2006 ODMA applies only prospectively and cannot have affected any right that was previously acquired under the 1989 ODMA. *Id.* at \*6 (citing Ohio Rev. Code §§ 1.48, 1.58(A)(1)(2)). As such, it concluded the 1989 version applied. *Id.* at \*9. Thus, the only appellate court to have considered the issue in similar circumstances decided that the 1989 version applies.

In addition to citing contrasting case law on the direct issue at hand, the parties cite Ohio statutes and cases concerning retroactivity generally. These principles, however, do not point to a clear result in this case. On the one hand, Defendants argue the 2006 ODMA is applied only prospectively because Plaintiff's suit was not filed until after the statute was amended. On the other hand, Plaintiff contends the Mineral Rights vested in him sometime prior to the amendments and that even prospective application of the amended statute would implicate retroactivity because it would divest him of his property rights. Because of that, the lack of controlling precedent from the Supreme Court of Ohio, the fact that the only Ohio appellate court to consider the issue has been internally inconsistent, and the split in common pleas court decisions, this Court finds the best course of action is to certify this important question of state law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. Which

version of the ODMA applies in this case may be determinative of the outcome of the proceeding, because Plaintiff does not argue he has met the procedural requirements contained in the 2006 amendments. Further, there is no controlling precedent in the decisions of the Supreme Court of Ohio on this issue.

**B. It is Not Necessary to Determine Whether the Assignment of an Oil and Gas Lease is a Title Transaction that Qualifies as a Savings Event under ODMA, and the Supreme Court of Ohio Should Determine Whether a Delay Rental Constitutes a Title Transaction.**

Additionally, the parties dispute whether the Mineral Rights were the subject of savings events which preclude a finding of abandonment.

The parties agree that, assuming the 1989 version of ODMA applies,<sup>6</sup> § 5301.56(B)(1)(c)(i) provides the only potential basis for a savings event. Section 5301.56(B)(1)(c)(i) requires that "the mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located" within the preceding twenty years.

The ODMA does not define the term "title transaction." Nonetheless, the OMTA defines the term "title transaction" as "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of

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<sup>6</sup> Defendants argue that savings events occurred in the twenty-year period prior to 2006, but as Plaintiff concedes he has not met the procedural requirements under the 2006 amendments, it will be unnecessary to determine if a savings event occurred during that period if the Supreme Court of Ohio determines the 2006 version of ODMA applies. The Court therefore focuses its "savings event" analysis on the 1989 version of ODMA.

any court, as well as warranty deed, quit claim deed, or mortgage.” Ohio Rev. Code § 5301.47(F). Although the OMTA definition of a title transaction is broad, for our purposes it is limited by the language of the ODMA, which requires that the mineral interest be the *subject of* a title transaction which has been filed or recorded in order for the title transaction to qualify as a “savings event.” Ohio Rev. Code § 5301.56(B)(3)(a).

The parties disagree about whether the Mineral Rights were the subject of a title transaction. Defendants argue the Mineral Rights were the subject of several title transactions that qualified as savings events and preserved Defendants’ interests. Specifically, Defendants argue that the execution of an oil and gas lease, assignment of an oil and gas lease, and unrecorded expiration of an oil and gas lease are title transactions that qualify as savings events under the ODMA. Defendants also argue that the payment of delay rentals during the primary term of an oil and gas lease is a title transaction that qualifies as a savings event.

Plaintiff argues that neither the execution of an oil and gas lease, nor the unrecorded expiration of an oil and gas lease, nor the assignment of an oil and gas lease constitute a title transaction that qualifies as a savings event. Plaintiff argues that no savings event occurred in the twenty years preceding the effective date of the ODMA, and when the grace period expired on March 22, 1992, the Mineral Rights automatically vested in him. Alternatively, Plaintiff argues that even if the recorded execution and assignment of oil and gas leases constitute

savings events, the mineral interest was leased to C.E. Beck on January 16, 1984, assigned to Carless Resources, Inc. on April 11, 1985, and the assignment was recorded on May 30, 1985. There were no further recorded leases or assignments until 2010. Plaintiff argues that even if the expiration of an oil and gas lease constitutes a title transaction, it does not constitute a savings event unless it is recorded. As the expiration of the 1984 lease in 1989 was not recorded, Plaintiff argues the expiration was not a savings event. Thus, Plaintiff argues the Mineral Rights vested in him on May 30, 2005 at the latest (twenty years from May 30, 1985).

The Court need not consider the contrasting arguments with respect to whether the assignment of an oil and gas lease constitutes a title transaction at this time, because even if the assignment of an oil and gas lease constitutes a title transaction, the Mineral Rights at issue in this case were assigned via a recorded assignment on May 30, 1985. Starting the twenty-year clock from the date of the recorded assignment would yield an abandonment date of May 30, 2005, before the amendments to the ODMA were enacted and before the Mineral Rights were next conveyed.

Accordingly, even if the recorded assignment of an oil and gas lease constitutes a title transaction which qualifies as a savings event, the May 30, 1985 recorded assignment would not preclude a finding of abandonment in this case. It is not necessary, therefore, to determine in this case whether the

recorded assignment of an oil and gas lease constitutes a title transaction which qualifies as a savings event under ODMA.

Rather, at issue is whether the payment of delay rentals during the primary term of an oil and gas lease constitutes a title transaction that qualifies as a savings event under the ODMA.

After the lease was assigned on May 30, 1985, C.E. Beck or Carless Resources, Inc. paid delay rentals in 1985, 1986, 1987, and 1988 in order to avoid early termination of the lease. The effect of those payments depends both on whether they are considered savings events and whether the recorded execution and unrecorded expiration of the 1985 lease are savings events.

If the recorded execution or subsequent assignment of the lease were savings events but neither the unrecorded expiration of the lease nor the delay rentals constitute savings events, then the abandonment clock would begin on May 30, 1985 at the latest and run on May 30, 2005, before the 2006 amendments.

On the other hand, if either the recorded execution or subsequent assignment were savings events and the delay rentals are also savings events, then the clock runs not from the recorded execution or assignment on May 30, 1985 but rather from the date of the last delay rental in 1988. Thus, even if the unrecorded expiration of the 1984 lease does not constitute a savings event, then as long as the delay rentals constitute savings events, there would be no abandonment until after the 2006 amendments were effective (i.e. any

abandonment after the 1988 delay rental would be in 2008). That means Plaintiff would have to follow the procedural requirements in the 2006 ODMA before vesting could occur. To make matters even more complicated, as the mineral estate was transferred again in 2008, there could possibly be no abandonment at all if the 2008 transfer occurred within the twenty-year clock from the date of the 1988 delay rental.

Defendants' argument that delay rentals constitute title transactions, and thus savings events, reads as follows:

Each of the annual payments from the lessee to NACoal in 1985, 1986, 1987, and 1988 operated to restart the twenty-year abandonment period by precluding reversion of the mineral estate to NACoal during the primary term of the 1984 Lease. Had those payments not been made – and nothing obligated the lessee to make them – the primary term of the 1984 Lease would have terminated early, and fee simple determinable title to the oil and gas would have transferred back to NACoal. Instead, the primary term of the Lease was maintained each year by payment of delay rentals, and each such transaction necessarily "affect[ed] title to an interest in land" under the recorded 1984 Lease. Ohio R.C. § 5301.47.

Defs.' Mot. Summ. J. 17, ECF No. 36. Defendants further argue in their response in opposition to Plaintiff's motion for partial summary judgment that during the primary term of the 1985 lease, "[f]or five years, NACoal was actively collecting rent for the oil and gas under plaintiff's property, and thus maintaining its interest. It would be nonsensical to hold that NACoal had begun to 'abandon' its interest at any time before the termination of the lease and the return to NACoal of its oil and gas rights in 1989." Defs.' Resp. 19, ECF No. 38.

Defendants provide no citation to any cases that have held that the payment of

delay rentals pursuant to an oil and gas lease constitute title transactions that qualify as savings events under ODMA. Indeed, they concede that no Ohio court has addressed the issue.

As noted, Plaintiff fails to address the argument at all.

Given the dearth of Ohio authority on this novel legal argument, the best course of action is to certify this question of Ohio law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. As discussed above, depending on the Supreme Court of Ohio's conclusions regarding the recorded execution and unrecorded expiration of oil and gas leases, the analysis of whether delay rental payments constitute title transactions that qualify as savings events may be determinative of the proceeding. In addition, there is not only a lack of controlling precedent from the Supreme Court of Ohio but also a lack of any precedent from any Ohio court on this issue. The Court will therefore certify this question of Ohio law to the Supreme Court of Ohio.

C. The Supreme Court of Ohio Has Accepted for Review the Questions of Whether the Execution of or Expiration of an Oil and Gas Lease is a Title Transaction That Qualifies as a Savings Event Under ODMA.

As noted above, Defendants argue that both the recorded execution of an oil and gas lease and the unrecorded expiration of an oil and gas lease are title transactions that qualify as savings events under the ODMA. Plaintiff argues that

the recorded execution of an oil and gas lease is not a title transaction and that even if the expiration of such a lease is a title transaction, where the expiration is not recorded, it does not comport with the requirements of § 5301.56(B)(3)(a) to qualify as a "savings event."

The Court considered similar arguments in *Chesapeake Exploration, L.L.C. v. Buell*, Case No. 2:12-cv-916. In that case, the Court concluded that the issues could not be resolved through statutory interpretation. Moreover, the Court found that Ohio law is unsettled as to whether an oil and gas lease creates a fee simple determinable and gives the lessee ownership of the oil and gas estate or is merely a license and therefore not a title transaction because it does not convey title. The Court noted that two Supreme Court of Ohio cases have taken divergent views of the nature of oil and gas leases, but neither concerns whether a lease of severed subsurface mineral rights is a title transaction under the ODMA.<sup>7</sup> Because the context of the statute is important and no Ohio court has considered the nature of an oil and gas lease under the ODMA, the Court certified the questions to the Supreme Court of Ohio. The Supreme Court of Ohio accepted certification and thus will answer the following questions:

1. Is the recorded lease of a severed subsurface mineral estate a title transaction under the ODMA, Ohio Revised Code 5301.56(B)(3)(a)?

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<sup>7</sup> See Opinion and Order 18-19, ECF No. 60, in Case No. 2:12-cv-916 (comparing *Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897) with *Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865 (Ohio 1953)).

2. Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the ODMA at the time of the reversion?

Decision, *Chesapeake Exploration, L.L.C. v. Buell*, Case No. 2014-0067 (Ohio 2014).

The answers to those questions will apply with equal force to the case *sub judice*.

## VI. CERTIFICATION REQUIREMENTS

### A. The Certified Questions

For the reasons set forth above, the undersigned certifies the following additional questions of state law to the Supreme Court of Ohio pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio:

1. Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment?

AND

2. Is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and "savings event" under the ODMA?

### B. The Information Required by Ohio State Supreme Court Rule § 9.02(A)

Because the Court is certifying two questions to the Supreme Court of Ohio, the Court provides the following information in accordance with Ohio State Supreme Court Rule § 9.02(A)–(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.

2. **Statement of facts:** Please refer to § II of this order for a full recitation of the pertinent facts.

3. **Name of each of the parties:**

a. Plaintiffs: Hans Michael Corban.

b. Defendants: Chesapeake Exploration, L.L.C.; CHK Utica, L.L.C.; Larchmont Resources, L.L.C.; Dale Pennsylvania Royalty, L.P.; North American Coal Royalty Company; and Total E&P USA, Inc..

4. **Names, Addresses, Telephone Numbers, and Attorney Registration**

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**5. Designation of Moving Party:** Because neither side has sought certification, the Undersigned designates Plaintiff as the moving party.

C. Instructions to the Clerk

In accordance with Rule 9.03(A) of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Southern District of Ohio is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

**VII. CONCLUSION**

For the foregoing reasons, the parties motions for leave to file supplemental authorities are **GRANTED**. The Court **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio in accordance with Ohio State Supreme Court Rule § 9.01. Further, this case will be **STAYED** pending the outcome of the proceedings in the Supreme Court of Ohio. The Clerk shall terminate ECF Nos. 41 & 43.

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**Chesapeake Exploration, L.L.C., et al.,**

**Plaintiffs,**

**v.**

**Case No. 2:12-cv-916**

**Kenneth Buell, et al.,**

**Judge Michael H. Watson**

**Defendants.**

**OPINION AND ORDER**

This diversity action requires the court to determine which parties are entitled to the mineral rights that lie below 90.2063 acres of property located in Harrison County, Ohio. The parties have filed cross-motions for summary judgment. ECF Nos. 38, 39. In addition, Plaintiffs filed a Motion for Leave to File a Surreply in Opposition to Defendants' Motion for Summary Judgment, ECF No. 50, which Defendants oppose, ECF No. 51. For the following reasons, the Court defers ruling on the summary judgment motions, **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio, and **STAYS** the proceedings pending the outcome of certification.

**I. PROCEDURAL HISTORY**

On October 4, 2012, Plaintiffs Chesapeake Exploration, L.L.C. ("Chesapeake"), CHK Utica, L.L.C. ("CHK Utica"), Larchmont Resources, L.L.C. ("Larchmont"), and Dale Pennsylvania Royalty, L.P. ("Dale"), filed a complaint

against Defendants Kenneth Buell, Arieh Ordronneau, Sunni Ordronneau, Jeffrey Elias, Janice Elias, Dennis Elias, and Margaret Elias (collectively "Defendants") as well as North American Coal Royalty Company ("North American") and Total E&P USA, Inc. ("Total E&P"), seeking to quiet title to the oil and gas rights under Defendants' surface estates. Plaintiffs included North American and Total E&P as defendants due to their interests in the oil and gas rights. Compl., ECF No. 1. Defendants answered with a third party complaint against Dale Property Services and counterclaims and cross claims against North American and Total E&P to quiet title. Countercl., ECF No. 12. Defendants also allege slander of title and unjust enrichment and seek declaratory and injunctive relief. *Id.*

Chesapeake, CHK Utica, Larchmont, and Dale voluntarily dismissed Kenneth Buell on November 14, 2012. ECF No. 11. North American and Total E&P were realigned as Plaintiffs on January 7, 2013, and February 22, 2013, respectively. ECF Nos. 17, 30. Chesapeake, CHK, Larchmont, Dale, Total E&P, and North American will be collectively referred to as "Plaintiffs."

## II. FACTS

Both Plaintiffs and Defendants set forth the undisputed facts in their respective summary judgment motions. Given the facts, however, the parties dispute who is the legal owner of the mineral rights beneath 90.2063 acres of land ("the "Property") located in Harrison County, Ohio. The Property has been frequently transferred since 1958.

In October of 1958, Powhatan Mining Company ("Powhatan") transferred the surface rights of the Property to Clarence and Anna Bell Sedoris, excepting all oil, gas, coal, or other mineral rights (the "Mineral Rights") to itself and its successors. Powhatan transferred the Mineral Rights to the North American Coal Company ("NA Coal") (a separate entity from Plaintiff North American) when the two companies merged in 1959.

A. The Surface Rights

In 1968, Clarence and Anna Bell Sedoris transferred the Property to Jerry and Janice Torok. The Toroks transferred the Property to Levi and Naomi Miller in 1983. The Millers conveyed the Property in September of 1984 to Dennis and Linda Elias. That deed contained a clause (the "Reservation Clause") excepting and reserving the Mineral Rights originally reserved in the Powhatan to Sedoris deed. Linda Elias conveyed her portion of the Property to Dennis Elias ("Dennis") on December 4, 1989 via a quitclaim deed which included the Reservation Clause.

Dennis then began to break up the property. Dennis transferred 10.37 acres of the Property to Jeffrey Elias and Janice Elias in April of 1995. That deed did not contain the Reservation Clause. Dennis next transferred 20.17 acres of the Property to John and Marilyn Jackson on October 21, 1996. That deed also did not contain the Reservation Clause. After the above conveyances, Dennis retained approximately 59.66 acres of the Property.

The Jacksons then transferred their claim in the Property to Benjamin Wiker who transferred the same to the Ordronneaus on July 27, 2011. The Jackson to Wiker deed was given subject to "all restrictions and reservations of record," and the Wiker to Ordronneau deed contained the Reservation Clause.

B. The Mineral Rights

In 1973, NA Coal leased the Mineral Rights to National Petroleum Corporation for a term of ten years, recorded in Harrison County on February 6, 1974. National Petroleum Corporation assigned its interest to American Exploration Company by a recorded assignment on May 12, 1975. At the expiration of the lease term, the Mineral Rights reverted back to NA Coal.

NA Coal next leased the Mineral rights to C.E. Beck, recorded on February 6, 1984 ("1984 Lease"). C.E. Beck assigned its interest to Carless Resources on May 30, 1985, and Carless recorded the assignment the same day. In January of 1989, the lease expired, and the rights reverted to NA Coal by the terms of the 1984 Lease. NA Coal changed its name to Bellaire on July 7, 1992, and later transferred the Mineral Rights to North American via quitclaim deed, recorded in Harrison County on December 16, 2008.

On January 28, 2009, North American leased the Mineral Rights ("2009 Lease") to Mountaineer, who assigned its interest to Dale Property on May 6, 2010. Dale Property assigned its interest under the 2009 Lease to Ohio Buckeye Energy, L.L.C., reserving a 1.25% royalty interest. Dale Property assigned its royalty interest to Plaintiff Dale Pennsylvania on June 28, 2012.

On October 5, 2011, Ohio Buckeye Energy assigned a portion of its interest to Larchmont, which interest was recorded. On November 1, 2011, another portion of Ohio Buckeye Energy's interest was assigned to CHK Utica. Ohio Buckeye Energy merged with Chesapeake on December 22, 2011, merging the remainder of Ohio Buckeye's interest in the 2009 Lease into Chesapeake. Chesapeake transferred a portion of its interest in the 2009 Lease to Total E&P on December 30, 2011.

Currently, North American is the record owner of the Mineral Rights. Larchmont and CHK Utica are leasing a portion of the Mineral Rights from North American by assignment. Chesapeake is the lessee of the remainder of the lease interest, although Dale Pennsylvania has a 1.25% royalty interest in the lease. Dennis Elias owns 59.66 acres of the Property. Jeffrey and Janice Elias own 10.37 acres of the Property, and the Ordronneaus own 20.17 acres of the Property.

### **III. STANDARD OF REVIEW**

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587 (1986); *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). Summary judgment will not lie if the dispute about a material fact is genuine, “that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

#### IV. ANALYSIS

The parties agree that this case directly concerns the Ohio Dormant Mineral Act (“ODMA”). Ohio Revised Code § 5301.56, *et seq.* The ODMA, enacted in 1989, operates to return dormant, severed mineral rights to the surface land holder by placing a twenty-year limit on dormant mineral rights. In other words, when someone other than the surface land holder (“land holder”) obtains the sub-surface mineral rights, that mineral rights holder (“mineral rights

holder”) is deemed to have abandoned the mineral rights if those rights lay dormant for twenty years, at which time they revert back to the land holder. The manner in which the mineral rights return to the land owner changed between the 1989 version of the statute and the 2006 version due to an amendment in the statute.

Under either version of the ODMA, a twenty-year clock begins to run the moment that the mineral rights are acquired by someone other than the land holder. If twenty years run in which the rights are dormant and there is no “savings event” under § 5301.56(B), the mineral rights vest in the manner prescribed by the statute. A § 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

The 1989 ODMA does not specify any method for vesting of the mineral rights in the land owner, and thus, if no savings event occurs, the interest in the mineral rights held is deemed abandoned and vests automatically in the land owner upon the twentieth year. That statute requires no further action by the land owner, but it did provide a three year grace period under which a mineral rights holder could maintain his interest. The three year grace period expired on March 23, 1992.

The 2006 ODMA requires that notice be given by the land holder to the mineral rights holder of record before the mineral rights can vest in the land

holder. Ohio Rev. Code § 5301.56(B) (2006).<sup>1</sup> Once notice is given, the mineral rights holder has sixty days to either file a claim to preserve the interest under § 5301.56(B)(3)(e) or file an affidavit identifying a savings event under § 5301.56(B)(3). If the mineral rights holder fails to file a claim to preserve the mineral rights or identify a savings event within sixty days, the mineral rights vest upon memorialization of the abandonment in the county record. Ohio Rev. Code § 5301.56(H)(2).

The parties agree that the only possible savings event that has occurred in this case arises under § 5301.56(B)(3)(a), which requires that “the mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located” within the preceding twenty years.<sup>2</sup> For example, if the mineral rights were the subject of a title transaction in 1984, then the twenty-year clock restarts in 1984, and the mineral rights could not vest in the land holder until 2004. However, the parties dispute both whether the 1989 or 2006 version of the ODMA governs this dispute and whether a savings event has occurred at all. Plaintiffs argue the 2006 version of the ODMA applies because the expiration of a lease is a savings event and therefore the twenty year clock began in 1989, at the expiration of the

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<sup>1</sup> Defendants make no argument that they gave notice to Plaintiffs or any party.

<sup>2</sup> The 2006 ODMA notes that it is the preceding twenty years from the date the land holder gives notice to the mineral rights holder. The 1989 ODMA is silent as to when the preceding twenty-year period begins.

1984 Lease. Defendants argue that the 1989 version applies and the twenty year clock began in 1959, when Powhatan merged with NA Coal.

Plaintiffs contend that any savings event occurring after 1986 restarted the twenty-year clock, meaning the twenty-year period would not fully run until after the 2006 amendments. As the 2006 version would be applicable upon expiration of twenty years, Plaintiffs contend that Defendants had to give notice before the Mineral Rights could vest.

Plaintiffs allege that at least three distinct types of title transactions took place that amount to savings events. First, Plaintiffs posit any conveyance evidenced by a deed that included the Reservation Clause is a title transaction. Such a deed was conveyed in 1984, 1989, and 2011. Second, Plaintiffs argue that an executed and recorded oil and gas lease is a title transaction. Third, Plaintiffs argue a title transaction occurs when a lease expires and the oil and gas interest reverts to the lessor. Plaintiffs conclude that because multiple title transactions took place after 1986, notice was required but not given, and thus, the Mineral Rights have not been abandoned.

Defendants argue that the last savings event occurred when Powhatan merged with NA Coal in 1959, and when the grace period expired in 1992, no title transaction had taken place in the last twenty years. Thus, they conclude the Mineral Rights automatically vested to Dennis Elias in 1992. Defendants contend that none of the title transactions alleged by Plaintiffs constitutes a recorded title transaction under either version of the ODMA. Alternatively,

Defendants argue that even if the 1984 Lease is a title transaction, the date of the recording in 1984, not the expiration, is the start of the twenty-year clock, which automatically fully vested the Mineral Rights to the Defendants in 2004, before the 2006 amendments.

In this diversity case, the Court must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In doing so, this Court is bound by the decisions of the state's highest court. *Pennington v. State Farm Mut. Auto Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). If the state's highest court has not directly addressed the issue, however, this Court must predict how the state's highest court would resolve the matter. *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008). In that case, the decisions of the state's intermediate appellate courts are deemed authoritative, unless there is a strong showing that the state's highest court would reach a different result. *Id.*

The ODMA does not define the term "title transaction." Nonetheless, the Ohio Marketable Title Act ("OMTA") defines the term "title transaction" as "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." Ohio Rev. Code § 5301.47(F). Although the OMTA definition of a title transaction is broad, for our purposes it is limited by the language of the ODMA, which requires that the mineral interest be the

*subject of* the title transaction in order for the title transaction to qualify as a savings event. Ohio Rev. Code § 5301.56(B)(3)(a). Neither version of the ODMA specifically states whether any title transaction alleged by Plaintiffs qualifies as a savings event. The Court addresses each in turn.

A. A Reservation Clause in a Surface Land Deed is not a Title Transaction Because the Mineral Interest is not the Subject of the Title Transaction.

Plaintiffs rely heavily on a Harrison County Common Pleas Court's decision for the proposition that a reservation clause in a deed to a surface estate is a title transaction under the ODMA. *Dodd v. Croskey*, No. CVH-2011-0019, (Harrison C.P. Oct. 29, 2012) (unreported, cited by Plaintiffs at ECF No. 39-5). However, since the parties have briefed the issue, the Seventh District Court of Appeals has overruled the *Dodd* decision. *Dodd v. Croskey*, 2013-Ohio-4257, 2013 WL 5437365, at \*9 (Ohio Ct. App. 7th Dist. Sept. 23, 2013).<sup>3</sup> In discussing what constitutes the "subject of a title transaction," the Seventh District found that there is no statutory definition of what the legislature meant by "subject of" and thus afforded the words their ordinary meaning. *Id.*

"The common definition of the word "subject" is[:] topic of interest, primary theme or basis for action. Webster's II New Riverside University Dictionary 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights. In order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying that interest or retaining that interest. Here, the mineral interest was not being

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<sup>3</sup> Both Plaintiffs and Defendants have notified the Court of the 7th District's decision in a notice of supplemental authority.

conveyed or retained by . . . the party that sold the property to appellants.

Therefore, we disagree with the trial court's conclusion that oil and gas interests were the "subject of" the 2009 title transaction. Instead we specifically find that they were not the "subject of" the 2009 title transaction."

*Id.*

Although the Court is only bound by decisions of the Ohio Supreme Court, *Dodd* is nearly identical to the dispute *sub judice* and is the only statement from any Ohio appeals court on this specific issue. Moreover, its reasoning is sound. Thus, this decision, from the same county as the present dispute, is highly persuasive, and it warrants the same result in this case.

The subject of the deeds which contained the Reservation Clause was the surface land, not the mineral rights. In those deeds, the Reservation Clause operated to limit the portions of the property that could be expected to be included in the transfer. When read in this manner, it is clear that the Reservation Clause sought to exclude the Mineral Rights from being a subject of the deed transaction.

Accordingly, the conveyances of deeds including the Reservation Clause were not title transactions that restarted the twenty-year clock under either the 1989 ODMA or the 2006 ODMA.

B. Whether an Oil and Gas Lease is a Title Transaction is a Question for the Supreme Court of Ohio.

Plaintiffs contend that the 1984 Lease was a title transaction that was properly recorded. Plaintiffs further contend that the *expiration* of the 1984 Lease in 1989 also operated as a title transaction, making the "date of record of the title transaction" 1989. If the expiration of the 1984 Lease in 1989 was a title transaction, then the clock restarted in 1989, and Defendants' interest in the mineral rights could not have vested until 2009, after the 2006 ODMA took effect. Plaintiffs therefore argue that at the earliest, the twenty-year clock would run in 2009, and because Defendants did not give notice, as required by the 2006 ODMA, the Mineral Rights could not have vested in Defendants.

Defendants contend that a lease is not a title transaction because it is omitted from the OMTA's list of enumerated title transactions and because it would cause redundancies in the ODMA. Defendants also argue that even if the expiration of a lease is a title transaction, the expiration is not a sufficient title transaction under the ODMA to constitute a savings event because the expiration was not recorded.

Both Plaintiffs and Defendants argue that Supreme Court of Ohio decisions support their position.

1. Statutory Interpretation Does Not Resolve the Question

Defendants argue that the language of the OMTA indicates that a lease is not a title transaction because it is not included in the list of what the statute defines as a title transaction.

Plaintiffs retort that the language of the OMTA “does not purport to give a complete or exclusive list of every possible type of title transaction.” P. Resp. 7, ECF No. 46. The Court agrees.

Defendants argue that “had the Ohio Legislature intended for an oil and gas lease to qualify as a ‘title transaction’ for purposes of the 1989 Act, it knew how to do so—by incorporating such language into the statute.” D. Reply 11, ECF No. 48. While this may be true, the legislature also knew how to explicitly exclude all other transactions from the definition and chose not to do so. The definition of a title transaction in § 5301.47(F) provides a non-exhaustive list of what is considered a title transaction. The word “including” means it is not exclusive, and other unlisted transactions may qualify as title transactions. This definition is also broad, involving “*any* transaction affecting title to *any* interest in land.” Ohio Rev. Code § 5301.47(F) (emphasis added). Defendants’ argument would require the Court to render the word “including” superfluous in the OMTA.<sup>4</sup> The list in the OMTA is non-exhaustive. Thus, failure to include an oil and gas

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<sup>4</sup> “Courts may not delete words used or insert words not used,” when interpreting a statute. *Cline v. Ohio Bureau Motor Vehicles*, 573 N.E.2d 77, 80 (Ohio 1991).

lease in the list does not mean an oil and gas lease is not a title transaction under the OMTA.

Defendants next argue that the language of the ODMA requires a finding that an oil and gas lease is not a title transaction under the ODMA. Defendants rely on § 5301.56(B)(3)(b), which states that a mineral interest fails to vest to the surface owner if, within the last twenty years, one or more of the following has occurred: "there has been actual production or withdrawal of minerals by the holder from the lands, *from lands covered by a lease to which the mineral interest is subject*, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations . . . ." Ohio Rev. Code § 5301.56(B)(3)(b) (emphasis added).

Defendants contend that if an oil and gas lease is itself a title transaction, the twenty-year clock would already be stayed without actual production under the lease. In other words, the clause "from lands covered by a lease to which the mineral interest is subject" would be rendered superfluous because whether there is production under the lease or not, the twenty-year clock would already be reset merely by executing the oil and gas lease.

Plaintiffs argue that both production under a lease and the recordation of the lease as a title transaction can separately, and at different times, operate to restart the twenty-year clock. For example, recording a lease in 1985 would start the twenty-year clock in 1985, but production under that lease in 1989 would restart the twenty-year clock in 1989. Therefore, Plaintiffs contend, no part of the

statute is superfluous if a lease is a title transaction. Plaintiffs further posit that under Defendants' reading, a drilling permit would not be a savings event because it would make actual production under the permit irrelevant. But receiving a drilling permit is a savings event under § 5301.56(B)(3)(d), therefore Defendants' argument is flawed. Plaintiffs argue the same reasoning also applies to conveyances, if a conveyance of the minerals is a title transaction which prevents vesting in the surface owner, then actual production by the mineral holder would be "irrelevant," so the conveyance must not be a savings event. P. Opp. 9, ECF No. 46. A conveyance is a title transaction under § 5301.56(B)(3)(a).

No part of the statute would be rendered superfluous by finding that an oil and gas lease is a title transaction. The ODMA states that "one or more of the following," savings events restarts the twenty-year clock. Ohio Rev. Code § 5301.56(B)(3) (emphasis added). This necessarily means that the Ohio Legislature contemplated that those events could happen simultaneously or in succession and made clear that the combination of, or occurrence of individual events would each reset the twenty-year clock. For example, a 25 year oil and gas lease could be recorded in 1985. That could start the clock if plaintiffs are right, and it would run in 2005. If there is production in 1995, the twenty-year clock would restart and run in 2015.

Further, although an application for a drilling permit is a savings event under § 5301.56(B)(3)(d), that does not render the "actual production" clause in

§ 5301.56(B)(3)(b) superfluous even though a permit is required before actual production may take place under Ohio Revised Code § 1509.05. Because the clause in Ohio Revised Code § 5301.56(B)(3) would not be made superfluous, Defendants' statutory construction argument fails.

2. Supreme Court of Ohio Case Law Focuses on the Nature of the Statute and the Lessee's Interest in Determining the Character of the Oil and Gas agreement.

As noted above, the definition in the OMTA for a title transaction is broad and includes "any transaction affecting title to any interest in land." Ohio Rev. Code § 5301.47(F) (emphasis added). Both Plaintiffs and Defendants cite to Supreme Court of Ohio decisions to support whether the execution or expiration of an oil and gas lease constitute a title transaction. Plaintiffs argue that an oil and gas lease creates a fee simple determinable and gives the lessee ownership of the oil and gas estate. Defendants argue that an oil and gas lease is merely a license and not a fee simple conveyance, and therefore is not a title transaction because it does not convey title.

The nature of an oil and gas agreement in Ohio is unsettled. "[O]il and gas agreements have been characterized as leases, licenses, corporeal hereditaments, rights, easements, and/or interests in real estate." *Rayl v. E. Ohio Gas Co.*, 348 N.E.2d 385, 389 (Ohio Ct. App. 9th Dist. 1973) (overruled on other grounds). "Cases which discuss the character of the lessee's interest often do so in the context of determining the impact of a statute upon the oil and gas

lease.” *In re Frederick Petroleum Corp.*, 98 B.R. 762, 763 (S.D. Ohio 1989).<sup>5</sup>

Two Supreme Court of Ohio cases take divergent views of the nature of oil and gas leases but neither concerns whether a lease of severed subsurface mineral rights is a title transaction under the ODMA.

In *Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897), the court noted in dicta that an oil and gas lease conveyed a fee estate. A landowner leased the oil and gas rights to Harris who assigned his interest to the Ohio Oil Company. Harris then purchased the lands from the original landowner and thus became the lessor. The Supreme Court of Ohio noted in dicta that an oil and gas lease conveys more than a mere license because it is the land that is granted, demised, and let and that the lessee has a limited, vested estate in the lands for the purposes named in the lease. *Id.* The ultimate issue in *Harris* was whether there was an implied covenant to reasonably develop and protect oil and gas lines. The conclusion that a lease equated to a fee estate meant that such an implied covenant did exist, but a breach of said covenant did not forfeit the lease.

Plaintiffs rely on the Ninth District’s reading of *Harris* in *Kramer v. PAC Drilling Oil and Gas, L.L.C.*, for the proposition that an oil and gas lease conveys ownership of the oil and gas estate. 968 N.E.2d 64, 67 (Ohio Ct. App. 9th Dist. App. 2011). Thus, Plaintiffs posit that a recorded conveyance of a fee estate, i.e.

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<sup>5</sup> The court in *Frederick* found that for the purpose of determining whether an oil and gas lease was a lease of real property under 11 U.S.C. § 365(d)(4), Ohio would rule similarly to Oklahoma courts and find that oil and gas leases are licenses. 98 B.R. at 766.

the oil and gas estate, is necessarily a “transaction affecting title to any interest in land.” Ohio Rev. Code § 5301.47(F). Because the minerals rights are the subject to such a transaction, Plaintiffs argue that the lease is necessarily a savings event.

Conversely, in *Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865 (Ohio 1953), the court found that an oil and gas lease was a license. *Back* involved an instrument conveying oil and gas rights in the form of a deed recorded in the lease records. The holder of the rights admitted the deed was not a lease because it granted rights in perpetuity. *Id.* at 867. The Court held that the deed was a license in practice, although not in form, because “[p]ossession of oil and gas, having as they do a migratory character, can be acquired only by severing them from the land under which they lie, and in effect the instrument of conveyance in the instant case is no more than a license to effect such a severance.” *Id.*<sup>6</sup>

Neither of these cases addresses the nature of the transaction at issue in this case. In the instant case, unlike either Ohio Supreme Court case, the mineral rights have already been severed from the land holder and are being leased to a third party.<sup>7</sup> Further, as the court in *Frederick* noted, the context of the statute has always been a key factor in how to consider the nature of the

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<sup>6</sup> At least one court of appeals concluded that the finding of the oil and gas lease as a license was not binding because it was not in the syllabus. *Bath Twp. v. Raymond C. Firestone, Co.*, 747 N.E.2d 262, 266 (Ohio Ct. App. 9th Dist. 2000).

<sup>7</sup> For a further discussion of the Ohio case law on this subject, see *Frederick*, 98 B.R. at 763–66.

lease. The ODMA was not enacted at the time either *Harris* or *Back* were decided. Because the context of the statute is extremely important, and no Ohio court has considered the nature of an oil and gas lease under the ODMA, the Court declines to answer the question of whether the execution of a lease of severed subsurface mineral rights constitutes a title transaction under the ODMA.

C. Whether a Lease Expiration is a Recorded Title Transaction is also a Question for the Supreme Court of Ohio.

Even if this Court were able to determine how the Supreme Court of Ohio would rule concerning whether the execution of oil and gas lease is a title transaction under the ODMA, the parties dispute whether the proper date from which the twenty-year clock begins is the date the lease was recorded or the date the lease expired. Plaintiffs posit that it would be nonsensical for an abandonment clock to begin while a mineral rights holder is actively renting and collecting rental payments under a lease, and therefore the expiration of the lease restarts the clock. P.'s Opp. 11, ECF 46.

Defendants argue that a lease expiration is not a title transaction, and also that even if it is, the expiration is not recorded and thus does not comport with the requirements of § 5301.56(B)(3)(a) to qualify as a savings event.

The Supreme Court of Ohio has not considered this issue, but in *Energetics, Ltd. v. Whitmill*, 442 Mich. 38 (1993), the Michigan Supreme Court decided that under the Michigan Dormant Minerals Act ("MDMA"), the reversion of rights under a recorded lease is a savings event that restarts the twenty-year

clock at the time of the reversion. The MDMA prevents vesting when the mineral interest has been "sold, leased, mortgaged, or transferred by instrument recorded," in the last twenty years. Mich. Comp. Laws § 554.291 (2006).

Although the MDMA expressly considers the execution of a lease a savings event, the Michigan Supreme Court found that the lease in that case was a recorded instrument transfer and thus the twenty-year clock restarted from the day the rights under the lease reverted to the lessor (the expiration of the lease). *Energetics*, 442 Mich. at 47. This is because that day, the rights transferred from the lessee to the lessor "by instrument recorded," i.e. the lease. *Id.* Although the Michigan Supreme Court's analysis is instructive, it is by no means binding as the ODMA and the MDMA differ in their definition of a savings event.

Given the dearth of Ohio authority, the best course of action is to certify these important questions of Ohio law to the Supreme Court of Ohio. Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio Law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent.

Certification helps to conserve resources, avoid "friction generating error," and acknowledge the state court's status as the final arbiter on state law matters when a federal court is construing a state statute in the absence of controlling state law. *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)). Because federal courts act as outsiders, there is a "responsibility

to make sure that questions of state law are 'settled right,' not that they are just 'settled.'" *Rutherford v. Columbia Gas*, 575 F.3d 616, 627 (6th Cir. 2009) (Clay, J., concurring). "This rationale is all the more compelling where, as here, the state's highest court has yet to address an issue directly and thus the federal courts are called upon to 'predict' what that court would do." *Id.* The Court may *sua sponte* certify a question to the Supreme Court of Ohio. *Planned Parenthood*, 531 F.3d at 408 (citing *Elkins v. Moreno*, 435 U.S. 647, 662 (1978)).

## V. CERTIFICATION REQUIREMENTS

### A. The Certified Questions

For the reasons set forth above, the undersigned certifies the following questions of state law to the Supreme Court of Ohio pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio:

- 1) Is the recorded lease of a severed subsurface mineral estate a title transaction under the ODMA, Ohio Revised Code § 5301.56(B)(3)(a)?

AND

- 2) Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the ODMA at the time of the reversion?

### B. The Information Required by Ohio State Supreme Court Rule § 9.02(A)

Because the Court is certifying two questions to the Supreme Court of Ohio, the Court provides the following information in accordance with Ohio State Supreme Court Rule § 9.02(A)–(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.

2. **Statement of facts:** Please refer to § II of this order for a full recitation of the pertinent facts.

3. **Name of each of the parties:**

- a. Plaintiffs: Chesapeake Exploration, L.L.C.; CHK Utica, L.L.C.; Larchmont Resources, L.L.C.; Dale Pennsylvania Royalty, L.P.; North American Coal Royalty Company; and Total E&P USA, Inc.
- b. Defendants: Arieh Ordronneau, Sunni Ordronneau; Jeffrey Elias; Janice Elias; Dennis Elias; and Margaret Elias.

4. **Names, Addresses, Telephone Numbers, and Attorney Registration**

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5. **Designation of Moving Party:** Because neither side has sought certification, the Undersigned designates Plaintiffs as the moving parties.

C. Instructions to the Clerk

In accordance with Rule 9.03(A) of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Southern District of Ohio is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

**VI. CONCLUSION**

For the foregoing reasons, the Court **CERTIFIES** two questions of Ohio law to the Supreme Court of Ohio in accordance with Ohio State Supreme Court

Rule § 9.01. Further, this case will be **STAYED** pending the outcome of the proceedings in the Supreme Court of Ohio.

**IT IS SO ORDERED.**

  
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**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**