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).[1] 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.[2] 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

[1] Defendants make no argument that they gave notice to Plaintiffs or any party.
[2] 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).[3] 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

[3] 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.[4] The list in the OMTA is non-exhaustive. Thus, failure to include an oil and gas

[4] "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).[5] 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.

[5] 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.*[6]

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.[7] 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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[6] 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).

[7] 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 Numbers of Counsel for Each Party:**

   a. Plaintiffs' Counsel:

Michael R Traven: Reg. 0081158
Roetzel & Andress LPA
155 E Broad Street, Suite 1200
Columbus, OH 43215
614-723-2071
mtraven@ralaw.com

Nicolle Snyder Bagnell: Pro Hac Vice
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-7112
nbagnell@reedsmith.com

Dean C Williams: Reg. 0079785
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
216-586-3939
dcwilliams@jonesday.com

Robert B Graziano: Reg. 0051855
Roetzel & Andress LPA
155 E Broad Street, 12th Floor
Columbus, OH 43215
614-463-9770
rgraziano@ralaw.com

Kevin C Abbott: PHV: 3205-2013
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3804
kabbott@reedsmith.com

Stacey L Jarrell: PHV 3831-2013
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3863
sjarrell@reedsmith.com

Jeffrey D Ubersax: Reg. 0039474
Jones Day

901 Lakeside Avenue
Cleveland, OH 44114
216-586-3939
jdubersax@jonesday.com

b. Defendants' Counsel:

Gary A Corroto: Reg. 0055270
Tzangas Plakas & Mannos Ltd.
220 Market Avenue
Canton, OH 44702
330-455-6112
gcorroto@lawlion.com

Lee E Plakas: Reg. 0008628
Tzangas, Plakas & Mannos, Ltd.
220 Market Ave. S. 8th Floor
Canton, OH 44702
330-455-6112
lplakas@lawlion.com

Edmond J. Mack: Reg. 0082906
Tzangas, Plakas & Mannos, Ltd.
220 Market Ave. S. 8th Floor
Canton, OH 44702
330-455-6112
emack@lawlion.com

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.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT