COMMON PLEAS COURT
WASHINGTON COUNTY, OHIO

Christopher Strahler, et al.	:	
Plaintiffs	:	Case No. 13 OT 174
vs.	:	Judge Ed Lane
Alliance Petroleum Corporation, et al.	:	
Defendants	:	DECISION
	:	(On Plaintiff's Motion for Summary Judgment and Defendant's Motion Summary Judgment)

The Plaintiffs filed a Motion for Summary Judgment in this action on June 13, 2014 to which the Defendants, Alliance Petroleum Corporation and Anadarko E&P Onshore LLC, filed a Memorandum in Opposition on July 11, 2014. These Defendants filed their Motion for Summary Judgment on July 15, 2014 and the Plaintiffs filed a combined reply in support of their motion and in opposition to the Defendants' motion on July 25, 2014. The matter was initially noticed for a non-oral hearing on August 1, 2014. However, the parties stipulated to Filings beyond that date. The matter is now properly before the Court as all issues have been briefed by both sides. Both parties' motions present the same issues.

The Plaintiffs own 200 acres that is a part of the two leases covering 400 acres. The ultimate issue for this Court is whether or not these leases remain in full force and effect legally. There are several sub issues that this Court will deal with in this decision.

The property subject, to the oil and gas leases in dispute, is comprised of 404 acres of land, more or less, located in Waterford Township, Washington County, Ohio (the "Premises"). Prior to the time the Plaintiffs gained ownership of their portion of the land under these two leasees, the entire premises were owned by Bernard Strahler and his wife, Joanne Strahler—the original lessors of the two oil and gas leases that they are the subject of this litigation. Bernard Strahler died in 1988. He was preceded in death by his wife, Joanne. Since that time, the premises has been broken up into smaller portions and have come to be owned by several different individuals.

Bernard and Joanne Strahler had ten children. Six of those ten children are joined as Plaintiffs in this litigation by virtue of their current ownership in the Premises. Prior to his death in 1998, Bernard Strahler conveyed portions of the Premises to (1) Plaintiffs Steve and Marjorie Heiss; (2) his daughter, Plaintiff Alecia Fouss, and her husband, Plaintiff Christopher Fouss; (3) his daughter, Plaintiff Dawn McCutcheon, and her husband, Plaintiff Kevin McCutcheon; (4) his son, Plaintiff Cris Strahler; and (5) his son, Brian Strahler, who is not a plaintiff in this litigation.

Upon his death, Bernard Strahler transferred by will a 100-acre tract of the subject premises to eight of his ten children. (*Id.*) Also upon his death, Bernard Strahler transferred by will a portion of the premises to his son, the Plaintiff, Jeremy Strahler and to his daughter, the co-plaintiff Valerie Strahler. In the years following Bernard Strahler's death, Plaintiff Cris Strahler obtained sole ownership of a 100-acre tract that was devised to eight of Bernard Strahler's children, and, a portion of the premises were transferred to Plaintiff Jeremy Strahler and Brian Strahler. Brian Strahler conveyed the rest his portion of the Premises to Defendant Larry Lang d/b/a Lang Oil & Gas, Bernard Strahler's daughter, Plaintiff Rachelle Sury also obtained a small

portion of these premises.

The individuals joined as Plaintiffs in this action own approximately 216 acres of the original 404 acres owned by Bernard Strahler. Larry Lang owns the remainder of the premises.

On May 11, 1978, Bernard Strahler, and his wife, Joanne, executed an oil and gas lease with L&M Associates, Inc., recorded at Volume 218 Page 452 of the records of the Washington County Recorder. Pursuant to the terms of the 1978 Lease, Bernard and Joanne Strahler granted, demised, and leased to L&M "the following described tract of land, for the purpose and with the exclusive right to operate and drill for and produce oil, and gas and gasoline thereon and therefrom." The "described tract of land" is defined in Paragraph 2 of the 1978 Lease as:

> All of that tract of land, situate in the Township of Waterford County of Washington, and State of Ohio, and unbounded and described as follows, to-wit:
>
> North by lands of Joe Heiss, Edward Barnes, Cecil Offenberger
> East by lands of Vernon Augenstein, Albert Bosner
> South by lands of Carl Hoffman, Clarence Strahler
> West by lands of James Heiner, Louise Offenberger, Edward Barnes

Paragraph 3 of the 1978 Lease contains a habendum clause, which provides:

> TO HAVE AND TO HOLD Unto and for the exclusive use of the lessee for the term of one years from the date hereof, and so much longer as oil, gas or gasoline can be produced in paying quantity, or the rental paid thereon, paying for or yielding to the lessor the one-eighth part of all oil produced and saved from the premises, delivered free of expenses into tank or pipe lines to the lessor's credit....

Pursuant to the terms of the habendum clause, the one-year primary term of the lease began May 11, 1978, and ended May 11, 1979.

The 1978 Lease contained a limitation, which provided that all wells drilled on the property were "limited to 3000' depth." (1978 Lease, ¶5). This depth limitation was deleted

pursuant to the September 26, 1979, Affidavit of Ratification and Lease, recorded in The Washington County Recorder's Office at Volume 219 Page 541. Accordingly, as of the date of the Affidavit and Ratification, the 1978 Lease extended to the entirety of the subsurface rights.

On May 15, 1984, Bernard and Joanne Strahler entered into a second lease with Ohio L&M covering the same 404 acres of land in Waterford Township, Washington County, Ohio as the 1978 Lease.

Section 1 of the 1984 Lease granted to Ohio L&M:

> All of the oil and gas and all of the constituents of either in and under the land hereinafter described, together with the exclusive right to drill for, produce and market oil and gas and their constituents and of storing gas of any kind and in any formation underlying the land...

The "land hereinafter described" is identical to the description in the 1978 Lease and is defined as:

> Said land being situate in Waterford Township, County of Washington, State of Ohio and described as follows to-wit: bounded on the
> North by lands of Joe Heiss, Edward Barnes, Cecil Offenberger
> East by lands of Vernon Augenstein, Albert Bosner
> South by lands of Carl Hoffman, Clarence Strahler
> West by lands of James Heiner, Louise Offenberger, Edward Barnes
>
> (1984 Lease, Section 1).

The habendum clause in Section 2 of the 1984 Lease provides:

> It is agreed that this lease shall remain in force for a primary term of three (3) years from this date and as long thereafter as operations for oil or gas are being conducted on the premises, or oil or gas is found in paying quantities thereon, or any formation underlying the herein leased land is used for storage of gas as provided under paragraph 7 hereof.

According to the terms of the habendum clause of the second lease, the three-year primary term began May 15, 1984, and ended May 15, 1987.

Defendant Alliance Petroleum Corporation ("Alliance") is a successor in interest to the 1978 Lease and the 1984 Lease. On September 28, 2011, Alliance assigned part of its rights under the 1978 Lease and the 1984 Lease to Defendant Anadarko E&P Onshore LLC ("Anadarko").

A total of twelve (12) wells have been drilled throughout the 404 acres of the premises. Sixteen (16) wells, including the twelve drilled wells, have been permitted. Some of these twelve (12) wells were drilled between May 11, 1978, and May 11, 1978—the primary term of the 1978 Lease:

Well Name	Date Commenced	Date Completed
Bernard Strahler #1 (API #3417241700000)	September 22, 1978	September 24, 1978
Bernard Strahler #3	November 5, 1978	November 9, 1978
Bernard Strahler #4	November 1, 1978	November 4, 1978
Bernard Strahler #5	November 15, 1978	November 20, 1978
Bernard Strahler #6	November 10, 1978	November 16, 1978
Bernard Strahler #8	January 17, 1979	January 21, 1979
Bernard Strahler #9	January 25, 1979	January 29, 1979

The remaining wells were drilled during the secondary term of the 1978 Lease:

Well Name	Date Commenced	Date Completed
Bernard Strahler #2	November 5, 1979	November 9, 1979
Bernard Strahler #7	February 8, 1979	May 30, 1979
Bernard Strahler #10	May 15, 1979	June 6, 1979
Bernard Strahler #1 (API # 34167280330000)	March 30, 1985	April 11, 1985
Bernard Strahler #12	January 26, 1985	February 6, 1985

Each of the twelve Bernard Strahler wells, at some point in time, has produced oil or gas:

Well Name	Production Years
Bernard Strahler #1 (API # 34167241700000)	1979-2003
Bernard Strahler #2	1979-2004, July 2013-present
Bernard Strahler #3	1979-1999
Bernard Strahler #4	1979-1999
Bernard Strahler #5	1979-2009
Bernard Strahler #6	1979-2009, June 2013-present
Bernard Strahler #7	1979-2007, 2009, March 2013-present
Bernard Strahler #8	1979-2007, 2009, June 2013-present
Bernard Strahler #9	1979-2007, 2009, June 2013-present
Bernard Strahler #10	1979-2000
Bernard Strahler #12	1985-present
Bernard Strahler #1 (API # 34167280330000)	1985-1999

The foregoing tables demonstrate that one or more of the wells on the Premises has produced oil and gas in paying quantities from 1979 to the present. The production from Bernard Strahler #12 has been sufficient to yield profits to Alliance on an annual basis for the period from 1997 to the present.

Pursuant to Civ. R. 56(C), summary judgment is granted if: (1) there is no genuine issue of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence or stipulation only that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, the conclusion is adverse to that party. *Ohio Pub. Emp. Ret. Sys. v. Akron Gen. Med. Ctr.*, 10th Dist. Franklin No. 11-AP-993, 2013-Ohio-944, ¶ 13 (citing *Temple v. Wean United, Inc.*, 50 Ohio St.3d 317, 327 (1977)). The moving party meets its initial burden by pointing to portions of evidence in the record that is of the type listed in Civ. R. 56(C) that demonstrates an absence of a

general issue of material fact in relation to the essential elements of the non-moving party's claims. *Id.* As the Supreme Court stated in *Dresher v. Burt*, 75 Ohio St. 3d 280, 288, 662 N.E.2d 264 (1996):

> In our view, the plain language of Rule 56(C) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who 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. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. * * *

One of the main points of contention in this case is whether the 1984 lease is "a top lease" or a "novation." The Defendants contend that it is a top lease. The Plaintiff's contention is that it is a novation. No Ohio Court has directly recognized the concept of "top lease" and "bottom lease." Ohio Courts have recognized novations.

The Ohio Supreme Court stated: "A contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration." *Williams v. Ormsby,* 131 Ohio St. 3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶18; *Gardner v. The Oxford Oil Co.,* 2013-Ohio-5885, 7 N.E.3d 510, ¶22; *see also Popa v. Cnx Gas Co.,* N.D. Ohio Case No. 4:14cv143, 2014 U.S. Dist. LEXIS 103968 at *14. But, "[a] novation can never be presumed but must be evidenced by a clear and definite intent on the part of all the parties to the original contract to completely negate the original contract and enter into the second." *Id.* Further, in order for the 1984 Lease to be a novation, it must meet all the elements of a contract,

including being supported by consideration, and a manifestation of mutual assent and legality of object and of consideration. *Gardner* at ¶23 (citing *Ormsby* at ¶19; *Kostelnik v. Helper,* 96 Ohio St. 3d 1, 2002-Ohio-2985, 770 N.E.2d 58).

Under well-established Ohio law, a valid contract may be terminated by novation. "A contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by the substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration...The discharge of the existing obligation by a party to a contract is sufficient consideration for a contract of novation."[1] Like in the present case, "a novation occurs where the principal parties to a contract enter into a new contract covering the same subject matter of the original contract."[1] "The effect of a novation is to discharge the obligations of the parties under the original contract."[2]

In *RMI Titanium Co., et al. v. Occidental Chem. Corp.*, the Eighth District relied upon three facts to support its decision that a novation occurred: (1) the prior contract and the subsequent contract were virtually identical except for the scope of work and number of potentially responsible parties; (2) the language of the subsequent contract did not mention, let alone preserve, the prior contract; and (3) the subsequent contract contained an integration clause stating that it "constitutes the *entire* understanding of the Members with respect to its subject matter."[3]

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[1] *Snell v. Salem Avenue Assoc., et al.* (1996), 111 Ohio App.3d 23, 32, 675 N.E.2d 555, 561 citing *McGlothin v. Huffman* (1994), 94 Ohio App.3d 240, 244, 640 N.E.2d 598, 601.
[1] *Hunter v. BPS Guard Services, Inc.* (1995), 100 Ohio App.3d 532, 542, 654 N.E.2d 405 citing *Ridenour v. Haynes* (App.1931), 11 Ohio Law Abs. 131.
[2] *Union Cent. Life Ins. Co. v. Hoyer* (1902), 66 Ohio St. 344, 64 N.E. 435.

[3] *RMI Titanium Co., et al. v. Occidental Chem. Corp, et al.* 8th Dist. Nos. 71471, 71486, 71487, 1997 WL 565975, *5 (Sept. 11, 1997).

This Court has difficulty conceiving as to why these parties need a lease to change the original lease which was still in full force and effect when the second lease was signed. There was no discharge of the obligations of the parties or obligations in the first lease contained in their second lease. There is no clear and definite intent expressed in the 1984 lease nor does that lease satisfy any of the requirements for a novation. The Court must also note the law on top leasing. Both parties argue strenuously that the intent of the parties to these leases support their view of whether the 1984 lease was a top lease or a novation.

According to the authoritative treatise on oil and gas law in the United States, a "top lease" is a lease granted by a landowner during the existence of a recorded mineral lease that becomes effective if and when the existing lease expires or is terminated. Williams & Meyers, *Oil and Gas Law, Manual of Terms* (citations omitted). The existing lease is generally referred to as a "bottom lease." Williams & Meyers goes on to state, "[a]s a legal right, the top lease exists at its inception as a mere hope or expectancy in the extinction of existing superior leasehold rights, which extinction will confer upon the top lease owner the essence of a mineral lease, *i.e.*, the right to explore for and produce minerals." *Id.* (citing *Pilkinton v. Ashley Ann Energy, L.L.C.*, 77 So. 3d 465, 470 (La. App. 2 Cir. 2011), writ denied, 80 So. 3d 484 (La. 2012).

While no Ohio court has specifically adopted the definition of "top lease" as is set forth in Williams & Meyers, numerous other courts in the United States have quoted the Williams & Meyers definition of "top lease". *See, e.g.*, *Burk v. Nance Petroleum Corp.*, 10 F.3d 539, 540 (8th Cir. 1993); *Williamson v. Elf Aquitaine, Inc.*, 925 F. Supp. 1163, 1166 (N.D. Miss. 1996); *Davis v. Ross Production Co.*, 322 Ark. 532, 541, 910 S.W.2d 209(1995); *Crystal Oil Co. v. Warmack*, 313 Ark. 381, 383, 855 S.W.2d 299 (1993); *Reynolds-Rexwinkle Oil, Inc. v. Petex,*

Inc., 268 Kan. 840, 845, 1 P.3d 909 (Kan. 2000); *Harding & Shelton, Inc. v. Prospective Investment & Trading Co.*, 123 P.3d 56, 59 n.2; *Norman Jessen & Associates v. Amoco Production Co.*, 305 N.W.2d 648, 651, 69 O.&G.R. 478 (N.D. 1981); *Nantt v. Puckett Energy Co.*, 382 N.W.2d 655, 657, n.1, 89 O.&G.R. 122 (N.D. 1986) (quoting *Norman Jessen*); *Macquarie Bank Ltd. v. Knickel*, 723 F. Supp. 2d 1161, 1173, n.1 (D.N.D. 2010) (quoting *Nantt*); *Sandvick v. LaCrosse*, 2008 ND 77, ¶ 4, 747 N.W.2d 519.

Further, while the exact definition of a "top lease" has not been stated in Ohio courts, the Fifth District Court of Appeals did address the operation of the rights possessed in a top lease in its decision in *Pure Oil Co. v. Sturm,* 43 Ohio App. 105, 182 N.E. 875 (5th Dist. 1930).

In this regard the Plaintiffs also assert that the Defendants have admitted in their pleadings that the Strahler #12 well was drilled pursuant to the 1984 lease by their failure to deny that this assertion in their answer filed herein. This is not a motion for judgment on the pleadings. In point of fact pleadings can be amended at any stage of the proceedings to conform to the evidence. Civ.R. 15(B).

This Court believes that the better view in this case is that the 1984 lease is a top lease and not a novation. This is how these transactions (i.e. multiple leases for the same property) are understood in the oil and gas industry. This matter is squarely within the dictates of *Pure Oil Co. v. Sturm*, 43 Ohio App. 105, 182 N.E. 875 (5th Dist. 1930).

When this Court views the record of production, it is clear there has been continuous production on the subject premises. Well #12 is, of course, central to this finding because it is the only well still in production. In fact the bottom lease, the 1978 Lease, that is still in effect

only required that at least two wells be drilled. This is clearly a situation where there is a top lease and a bottom lease. The 1978 lease is a bottom lease that is still in full force and effect.

The remaining issue for this Court to decide is whether well #12 holds the whole lease or only the 40 acres set forth in the drilling permit issued by the State of Ohio. The State of Ohio is not, never was, and never will be a party to these leases. It's power is to regulate the drilling process. It has legitimate interests in the drilling and production processes to protect the workers, the public, the environment, and see that the development of natural resources is maximized in an orderly manner. The lease is held by production. The lease determines what land is held by production. The parties, through their lease, enter into a contract to develop the subject premises as they desire, subject to the state's regulations.

The habendum clause is the provision in a contract that makes definite the length of time for which a grant is made. *Brown v. Fowler*, 65 Ohio St. 507, 521, 63 N.E. 76 (1902). "The modern habendum clause . . . is designed to measure the duration of the oil and gas lease by its primary objective, the production of oil or gas." Williams & Meyers, *Oil and Gas Law*, §604. In an oil and gas lease, the habendum clause in term deeds usually specifies: 1) the "primary term" (a duration of a fixed term of years); and 2) the "secondary term" (the period subsequent to the expiration of the primary term that is allowed after the 'thereafter' clause or similar language). *Id.* at §333.

Paragraph 2 of the 1978 Lease contains a habendum clause, which provides that the primary term lasted "for the term of one years from the date hereof". The 1978 Lease was executed on May 11, 1978; thus, the primary term of the 1978 Lease was from May 11, 1978 until May 11, 1979.

During the primary term, several wells were drilled and completed on the Premises. According to the habendum clause in the 1978 Lease, the secondary term lasted "so much longer as oil, gas or gasoline can be produced in paying quantity, or the rental paid thereon." (1978 Lease, ¶2). Each of these wells drilled during the primary term began producing in paying quantities before the end of the primary term. Accordingly, by 1979, the secondary term of the 1978 Lease had begun. Wells were also drilled during secondary term of which Well #12 is one.

According to the well production reports provided by Alliance in discovery, Bernard Strahler Well Nos. 1, 3, 4, 5, 6, 8, and 9 all began producing prior to the time Bernard Strahler #12 well was drilled and continued to produce *up until and after* the Bernard Strahler #12 well was drilled. Because there were wells on the Premises that continually produced oil or gas in paying quantities after the end of the primary term of the 1978 Lease and up until the Bernard Strahler #12 well was drilled, the 1978 Lease was *still in effect* at the time Bernard Strahler #12 was drilled. Because the Bernard Strahler #12 well was producing before any older well ceased production and the Bernard Strahler #12 well has had continual, sustained production in paying quantities, the 1978 Lease has not expired by its own terms and continues to be in effect to date.[1]

In conclusion, this Court finds that the 1978 is a bottom lease that is still in full force and effect. The wells that have been drilled and the production records clearly establish that oil and/or gas have continuously been produced in paying quantities. The current production is sufficient to hold the entire premises of this lease. For all of the reasons set forth herein above the Plaintiff's Motion for Summary Judgment shall be denied and the Defendant's Motion for

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[1] A lease terminates by its own terms if, after the expiration of the primary term, production ceased and the requirements of the secondary term are not continuing to be met. *Moore v. Adams,* Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶27 (citing *American Energy Services, Inc. v. Lekan,* 75 Ohio App.3d 205, 598 N.E.2d 1315 (5th Dist. 1992)).

Summary Judgment shall be granted. All court costs herein shall be assessed against the Plaintiffs.

_____
Judge Ed Lane

DATE:_____

c: Attorney Vessels/Walker
Attorney Brody/Kimbrough
Attorney Eickelberger/Taylor/tarbert/Linn