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File Name: 18a0614n.06

Case No. 18-3229

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MATT A. ROGERS, Plaintiff-Appellee, v. SWEPI LP, et al., Defendants-Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO (Filed Dec. 10, 2018)

BEFORE: SILER, MOORE, and ROGERS, Circuit Judges.

SILER, Circuit Judge. In October 2011, Matt A. Rogers and Shell[1] entered into a lease agreement governing extraction of oil and gas from Rogers's five-acre property located in Guernsey County, Ohio. Important to Rogers, the agreement provides a signing bonus of $5,000 per acre, contingent upon Shell's timely verification that Rogers possesses good title to the property. Important to Shell, the lease contains a broad arbitration clause, providing that any dispute under the lease be resolved by binding arbitration. Rogers has sued for breach of contract, individually and on behalf of other

[1] Appellants SWEPI LP and Shell Energy Holding GP LLC are referred to collectively as "Shell."

landowners having similar contracts with Shell, alleging that Shell failed to pay the signing bonuses.

Currently before the panel is the district court's denial of Shell's motion to compel arbitration. Because Rogers's argument against arbitration attacks much more than the arbitration clause itself, the district court's judgment is **REVERSED** and the case is **REMANDED** to the district court for entry of an order compelling arbitration and a decision on whether the Lease allows for class-wide arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation has not yet reached the question of whether Shell's alleged failure to pay the signing bonus constitutes a breach of the contract between itself and Rogers. This appeal asks: who decides the arbitrability of the dispute and, if it is a federal court, how should it be decided? Additionally, the parties ask the Court to determine whether the lease agreement allows for class procedures in arbitration.

According to Rogers, the lease's arbitration clause did not trigger until Shell paid the signing bonus; since Shell did not pay the bonus, he argues that the arbitration clause never became effective. Shell argues that Rogers attacks much more than the arbitration clause—he attacks nearly the entire contract. Thus, the arbitration dispute should never have been decided by the district court. And even if the district court had the power to decide the arbitration dispute, the lease's broad arbitration clause compels arbitration. The

district court agreed with Rogers, denying Shell's motion. Shell appeals.

The agreement between Rogers and Shell is memorialized in the "Oil and Gas Lease," a document having 41 numbered sections covering various aspects of the parties' relationship. The first line of the agreement defines the term "Lease" as the "Oil and Gas Lease." The parties proceed to use the term "Lease" repeatedly throughout the document.

Only a few of the Lease's provisions are relevant to this appeal. Section One of the Lease includes the granting clause, under which Rogers conveyed a leasehold interest to Shell for the purpose of oil and gas exploration and production. Section Eight provides that "[t]his Lease shall become effective on the date that this Lease is signed by the Lessor." Section Thirty-Three provides that, if the parties do not agree to nonbinding mediation, "[a]ny dispute that arises under this Lease . . . shall be resolved by binding arbitration. . . ." It is undisputed that Rogers signed the agreement in 2011.

The signing bonus clause is contained in Section Sixteen:

> Lessee agrees to pay Lessor a signing bonus of Five Thousand Dollars ($5,000.00) for each acre contained within the Leased Premises subject to Lessee's verification of Lessor's marketable title. Lessee shall have up to one hundred twenty (120) days after the Effective Date to verify Lessor's marketable title to the

> Leased Premises . . . . By Lessor's signing this Lease, Lessor promises to proceed with this Lease and be bound thereby upon Lessee's paying the full amount of the bonus payment.

Finally, Section Twenty-Five of the Lease provides that, "[u]pon this Lease taking effect (thus, upon Lessor's receipt of the bonus payment), Lessee's obligations under this Lease shall not be diminished or affected by any title encumbrance on the Leased Premises. . . ."

Before the district court, Shell focused on the language of Sections Eight and Thirty-Three as a basis for compelling arbitration—arguing that the Lease constituted a single agreement, signed and executed by Rogers, and commanded that disputes under the Lease be arbitrated. Rogers relied on the language in Section Twenty-Five and the final sentence of Section Sixteen, arguing that the lease agreement was executed in stages, with his signature allowing Shell to encumber the property and verify title, and Shell's payment of the signing bonus effectuating all remaining aspects, including the arbitration clause. The district court endorsed Rogers's view:

> Plaintiff correctly describes the Lease as follows: "while the Lease became 'effective' upon Rogers' signature for purposes of allowing [Shell] to encumber the property and verify title, the last sentence of [the bonus payment clause] shows that the parties' remaining obligations (the long-term relational aspects of the Lease) did not become effective—and

> Rogers was not 'bound thereby'—until the signing bonus was paid." This interpretation provides meaning to the bonus payment clause and harmonizes it with the rest of the Lease.

With no evidence that Shell made the bonus payment to Rogers, the district court found that the second stage of the contract, including the arbitration clause, never took effect and denied Shell's motion to compel arbitration.

The district court failed to address the threshold issue of who decides arbitrability. It assumed it did, and then denied arbitration. But because Rogers attacks more than just the arbitration clause, an arbitrator must consider the issue first. Therefore, the district court's decision must be reversed.

STANDARD OF REVIEW AND LEGAL STANDARD

"We review a district court's denial of a motion to compel arbitration *de novo*." *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 716 (6th Cir. 2012) (internal quotation marks and citation omitted). Moreover, the proper construction of a contract is an issue of law; "therefore, this court reviews questions of contract interpretation under a *de novo* standard." *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 465 (6th Cir. 2009) (citation omitted).

The parties agree that the Federal Arbitration Act ("FAA") applies to this dispute because the contract at issue involves commerce and contains an arbitration clause. Agreements to settle controversies arising out of such contracts through arbitration, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

DISCUSSION

I. Who decides arbitrability?

We must decide who—an arbitrator or a federal court—should hear Rogers's defense to the arbitration provision. The district court failed to address this threshold issue, jumping directly to the dispute itself.

Relying on *Granite Rock Co. v. International Brotherhood of Teamsters*, Rogers argues that his attack on the arbitration clause goes to its formation, and thus it was proper for the district court to decide the dispute. *See* 561 U.S. 287, 296 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." (citations omitted)). But in this case, there is no question regarding formation (whether "the parties ever agreed to the contract in the first place"). *Teamsters Local Union 480 v. United Parcel Serv., Inc.*, 748 F.3d 281, 289 (6th Cir. 2014) (citing *Granite Rock*, 561 U.S. at 296). Rogers does not dispute that he properly agreed to the Lease by signing it in 2011. His attack on the arbitration provision assumes that the

contract was formed; that it conferred obligations on the parties; and that Shell failed to perform one of its obligations, meaning the arbitration clause was never triggered.

Instead, Rogers's argument is an attack on the validity of the agreement to arbitrate—it asks whether the arbitration clause is legally binding. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). Generally, attacks on validity come in two varieties: those that specifically challenge the validity of the arbitration clause, and those that challenge the validity of the contract as a whole. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006). "[A]ttacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).

Although Rogers does not attack what he deems to be the "first stage" of the Lease, his attack goes well beyond the arbitration clause. Under Rogers's two-stage lease theory, the entire second stage of the lease never became effective—a stage that both the district court and Rogers defined as "the long-term relational aspects of the Lease." The only provisions of the Lease not implicated by Rogers's attack are the bonus payment clause and those "allowing Shell to encumber the property and verify Rogers'[s] title, . . . [whereas] the parties' remaining obligations (the long-term relational aspects of the Lease) did not become effective[.]" While Rogers may care to invalidate only the

arbitration clause, his own language makes it clear that his attack is much broader.[2] "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center, West, Inc.*, 561 U.S. at 70. The basis of the challenge must "be directed specifically to the agreement to arbitrate before the court will intervene." *Id.* at 71.

Rogers is correct that under *Granite Rock*, courts should resolve issues that call into question the "formation or applicability of the specific arbitration clause that a party seeks to have the court enforce," 561 U.S. at 297 (emphasis added), and that such issues typically concern the "enforceability" of the arbitration clause. *Id.* But as noted above, Rogers has not attacked the enforceability of the "*specific* arbitration clause."

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[2] In a later section of his brief, Rogers argues that "there are no provisions other than the arbitration clause for Rogers to challenge. The *only* substantial obligation that the Lease imposed upon Rogers after his receipt of the bonus payment was the duty to arbitrate. . . ." Thus, he argues that his attack could challenge only the arbitration clause. But this argument is belied by the contradictory language used by Rogers elsewhere in his brief and before the district court. (Appellee Br. at 6) ("If the Lease moved to the second stage . . . the rest of the Lease's terms would become binding and effective and govern the parties' long-term relationship"); (Appellee Br. at 7) ("[I]mportant for purposes of this appeal, only 'upon' payment of the signing bonus would Rogers become 'bound' to the remaining provisions of the Lease—including the arbitration clause"). The district court was correct to point out that there are numerous other long-term provisions that "govern the parties' relationship with respect to royalty payments, auditing rights, liability for the impact of SWEPI's operations to plaintiff's land, and arbitration, among other things."

Id. (emphasis added). He has argued that much of the contract, which happens to include the arbitration clause, is unenforceable. Under the principles of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* and its progeny, such attacks are for the arbitrator. *See* 388 U.S. at 403-04; *Rent-A-Center, West, Inc.*, 561 U.S. at 70-71.

Given Rogers's broad defense to arbitration, he is attacking more than just the arbitration clause. Thus, arbitrability is for the arbitrator, and the district court erred by assuming it had the power to rule on the parties' arbitration dispute.

II. Does the Lease authorize class procedures in arbitration?

Under the FAA, a party may not be compelled to submit to class arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original). The question of whether an arbitration agreement permits class-wide arbitration is a gateway matter, "which is reserved 'for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). An implicit agreement authorizing class action arbitration should not be inferred "solely from the fact of the parties' agreement to arbitrate." *Id.* at 600 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Here, the parties have not identified a provision in the contract that clearly and unmistakably gives the arbitrator power to decide this matter. And because the district court denied arbitration altogether, it did not rule on the class arbitration issue. The Court notes the importance of this issue to the case, given that the class could include hundreds of Ohio landowners. We decline to decide the issue on this appeal, and leave that determination for the district court to decide in the first instance. *See Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 672 F. App'x 553, 556 (6th Cir. 2016).

CONCLUSION

The judgment of the district court is **REVERSED**, and the matter is **REMANDED** to the district court for entry of an order compelling arbitration and a decision on whether the Lease allows for class-wide arbitration.

KAREN NELSON MOORE, Circuit Judge, dissenting in part and concurring in part. The question of "who decides" whether a dispute is arbitrable turns on the parties' consent. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 945 (1995). This is because "arbitration is a 'matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 195

(6th Cir. 2016) (quoting *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). In *First Options of Chicago*, the Supreme Court discussed the discrete question of "who decides" arbitrability. 514 U.S. at 942 ("[T]hey disagree about who should have the primary power to decide [the arbitrability of the dispute]. Does that power belong primarily to the arbitrators . . . or to the court . . . ?" (emphasis omitted)) The Court concluded that "[i]f . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently." *Id.* at 943. The Court, however, emphasized that when we are deciding "who decides" arbitrability, courts must take special care—"[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT&T Techs.*, 475 U.S. at 649) (alterations in original). It is our task to consider the contract between Shell and Rogers and determine whether it clearly and unmistakably indicates that the parties intended to have an arbitrator decide whether their dispute is arbitrable. I conclude that conflicting language in the contract and the divergence between my reading of it and the majority's demonstrate that mutual consent to arbitrate arbitrability was anything but clear and unmistakable. I therefore would hold that the district court was the proper body to decide whether the dispute should be arbitrated.

Deciding this seemingly simple preliminary question requires us to consider the contract as a whole. Under the Federal Arbitration Act ("FAA"), when a court considers a motion to compel arbitration, it "must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Richmond Health*, 811 F.3d at 195 (quoting *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003)). We "must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. . . . [T]hese issues always include whether the clause was agreed to, and may include when that agreement was formed." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296-97 (2010).

Under the FAA, state contract law is applied in determining whether a contract has been formed. *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972 (6th Cir. 2007). Under Ohio law, "[t]he cardinal principle in contract interpretation is to give effect to the intent of the parties." *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 16 N.E.3d 645, 648 (Ohio 2014). In order to give effect to that intent, we "examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract." *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 953 N.E.2d 285, 292 (Ohio 2011). We consider "the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents

of the agreement." *Transtar*, 16 N.E.3d at 648 (quoting *Sunoco*, 953 N.E.2d at 292).

The contract language here is hardly crystalline. It highlights two distinct events as critical for triggering rights and obligations between Rogers and Shell: signing of the agreement (which took place on October 22, 2011) and payment of the bonus (which never occurred). Article II, Section 8 provides that the "Lease shall become effective on the date that this Lease is signed by [Rogers]." R. 1-1 (Lease) (Page ID #18). Yet in Article IV, Section 25, the contract notes that "[u]pon this Lease taking effect (thus, upon [Rogers's] receipt of the bonus payment), [Shell's] obligations under this Lease shall not be diminished. . . ." R. 1-1 (Lease) (Page ID #22). Article II, Section 8 and Article IV, Section 25 therefore conflict in their assertions of when the Lease "become[s] effective" or "tak[es] effect."

Additionally, at signing the Lease, under Article III, Section 16, Rogers "promise[d] to proceed with this Lease and be bound thereby upon [Shell's] paying the full amount of the bonus payment." R. 1-1 (Lease) (Page ID #19). This clause distinguishes the onset of various of Rogers's obligations—although signing imposed on Rogers the duty to "proceed with [the] Lease," he would be "bound" by it only upon Shell's payment of the bonus. If Rogers is "bound" only upon payment of the bonus, what are his obligations prior to that? How do the two distinct dates of effectiveness interact with this clause? Finally, and particularly relevant to the dispute at hand, the contract notes in Article VII, Section 33 that "[a]ny dispute that arises under this Lease

. . . shall be resolved by binding arbitration" if the parties do not resolve it through mediation. R. 1-1 (Lease) (Page ID #26). The critical question is whether, in the context of the previously discussed linguistic conflicts concerning the two triggering events, i.e. the timing of effectiveness of the contract and when Rogers was "bound" by it, the arbitration clause covers disputes arising before Shell paid Rogers the bonus.[1] And our even more discrete focus is whether the evidence is clear and unmistakable that the arbitration clause commits the question of deciding arbitrability to an arbitrator.

I believe that the best reading of the contract concludes that it contemplates two distinct phases of a relationship between Rogers and Shell. In the first phase, which begins at signing, Rogers conveys the lease to Shell and Shell has 120 days to complete verification of Rogers's marketable title to the covered land. If Shell finds "to its reasonable satisfaction after its title due diligence period review that [Rogers] does not have marketable title to the Leased Premises," the lease terminates, Shell must "promptly terminate any recorded memorandum of lease it may have filed," and

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[1] Unlike some contracts, the contract at issue does not contain a discrete clause declaring specifically that an arbitrator is or is not to decide threshold questions of arbitrability. *See*, *e.g. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006) (discussing a contract that specified not only that "[a]ny claim, dispute, or controversy . . . arising from or relating to this Agreement" but also that "*the validity, enforceability, or scope of this Arbitration Provision* . . . shall be resolved . . . by binding arbitration") (emphasis added)).

"no payments [are] owed by [Shell] to [Rogers]." R. 1-1 (Lease Article III, Section 16) (Page ID #19). If, however, Shell determines that Rogers does have marketable title, Shell is "to pay [Rogers] a signing bonus of Five Thousand Dollars ($5,000.00) for each acre." *Id.* Only "upon [Shell's] paying the full amount of the bonus payment" would the second phase of the Lease become effective and would Rogers be "bound" by it. *Id.* Payment of the bonus served as a condition precedent for the parties entering the second phase of the contract. Under Ohio contract law, "[a] condition precedent is a condition that must be performed before obligations in a contract become effective." *Transtar*, 16 N.E.3d at 650 (internal quotation marks omitted). Importantly, only after payment of the bonus would the arbitration clause apply. Therefore, although the arbitration clause applies to "[a]ny dispute that arises under this Lease," (R. 1-1) (Lease) (Page ID #26), it takes effect only after Rogers is "bound [by the Lease]"—after he is paid the bonus and the second phase of the Lease commences (R. 1-1) (Lease) (Page ID #19, 26).[2]

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[2] Beyond Section 16's indication that Rogers was to be bound only "upon [Shell's] paying the full amount of the bonus payment," Section 33 provides further support for the conclusion that the arbitration clause applied only to disputes arising in the second phase of the Lease. It requires that "[e]ach arbitrator shall be an active or recently retired business person or professional with not less than ten years [sic] experience in exploration and production activities associated with the oil and gas industry. The arbitrators may engage engineers, accountants or other consultants that the arbitrator deems necessary to render a conclusion in the arbitration proceeding." R. 1-1 (Lease) (Page ID #33). The qualification requirements make sense if the arbitrators will decide disputes

Shell argues that it is for the arbitrator to decide whether the condition precedent to arbitration (here, payment of the bonus) has been fulfilled. Appellant Br. at 17-18. However, that is the case only when the condition precedent is procedural and relates to "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all." *BG Group, PLC v. Republic of Arg.*, 572 U.S. 25, 35 (2014) (emphasis in original) (determining that an arbitrator was the proper body to decide whether the procedural condition precedent, eighteen months having elapsed since the dispute was submitted to a local tribunal, was satisfied). Such procedural conditions precedent "include claims of waiver, delay, or a like defense to arbitrability" and "the satisfaction of prerequisites such as time limits, notice, laches, [and] estoppel." *Id.* (internal quotation marks omitted); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-86 (2002) (holding that compliance with a time-limit on the initiation of arbitration was not a gateway "question of arbitrability"

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arising between Rogers and Shell after Shell paid the bonus, involving the actual extraction of natural resources from the leased land such as disputes related to the parties' "mutual[] agree[ment] in writing on the location of all wells, roads, pipelines, gates, and other equipment so as to minimize disruption of [Rogers's] use of the Leased Premises," (R. 1-1 (Lease Article V, Section 28(Q)) (Page ID #25)), or whether Shell was using "reasonable care and reasonable safeguards to prevent its operation from [] causing or contributing to soil erosion" (R. 1-1 (Lease Article V, Section 28(B)(a)(i)) (Page ID #22)). Requiring arbitrators with such expertise would make little sense if they were to decide disputes about the parties' compliance with the first phase, which had little to do with the "exploration and production activities associated with the oil and gas industry."

that was reserved for the courts as it was procedural rather than substantive). In contrast, the condition precedent here, payment of the bonus, is substantive rather than procedural. It *triggers* the duty to arbitrate disputes in the future relationship between the parties, thus determining "*whether* there is a contractual duty to arbitrate at all." *BG Group*, 572 U.S. at 35. The assessment of whether a substantive condition precedent has been satisfied is the realm of the court, not the arbitrator.[3] *Id.* at 34.

The majority reads the same contract differently. It concludes that the Lease is not a phased agreement, and that the arbitration clause applies to disputes arising prior to Shell's payment of the bonus as well as after it.[4] This is an inferior reading of the contract for

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[3] Relatedly, because the bonus payment was never made and the portion of the contract that included the arbitration clause was never triggered, the "presumption of arbitrability" never came into play. *AT&T Techs.*, 475 U.S. at 650. "[W]here the contract contains an arbitration clause . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" and "[d]oubts should be resolved in favor of coverage." *Id.* (internal quotation marks omitted) (first brackets in original). But because the condition precedent was never satisfied, the arbitration clause was never part of an effective contract and therefore no presumption of arbitrability applies.

[4] The majority's conclusion that the arbitration clause was triggered at signing leads it to apply the severability doctrine. *See Buckeye*, 546 U.S. at 445-46. Under Rogers's reading of the contract, however, because Shell never paid Rogers the bonus, the second phase of the agreement, to which the arbitration clause applied, was never triggered. This is not a situation in which the Supreme Court has declared that the severability doctrine

several reasons. First, the majority agrees with Shell that "[t]he first line of the agreement *defines* the term 'Lease' as the 'Oil and Gas Lease,'" a conclusion that contributes to its refusal to read the contract to describe a phased agreement. Majority Opinion at 2 (emphasis added). In fact, it does no such thing. The preamble to Article I begins "THIS OIL AND GAS LEASE (hereinafter, 'Lease') made and entered into this 22 day of Oct[ober], 2011. . . ." R. 1-1 (Lease) (Page ID #16). The first line of the Lease merely substitutes the term "Lease" for the longer term "Oil and Gas Lease" for conciseness and ease throughout the contract, much as we often do in our opinions. In fact, there is a distinct section of Article I of the contract titled "Definitions," in which "Lease" does not appear as a term defined by the drafters.[5] R. 1-1 (Lease Article

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applies. *See id.* at 444 & n. 1 (internal citations omitted) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today . . . does not speak to the issue decided in the cases cited by respondents . . . , which hold that it is for courts to decide whether the alleged obligor ever signed the contract . . . and whether the signor lacked the mental capacity to assent.") This distinguishes the dispute at hand from the kind discussed in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, which applied the severability doctrine to "a claim of fraud in the inducement of the entire contract," which necessarily requires that the parties have entered into the contract in the first place. 388 U.S. 395, 402-04 (1967). Rather, it is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide," meaning that severability does not apply. *Granite Rock*, 561 U.S. at 296.

[5] The drafters also specifically indicated when they meant to define a term in other sections of the Lease. In Article V, Section 28(M), for example, the contract provides that "[f]or purposes

I, Section 7) (Page ID #18). The majority overstates its conclusion that Lease was a "define[d]" term and the corresponding weight that it places on the arbitration clause's applicability to "[a]ny dispute that arises under this Lease." R. 1-1 (Lease) (Page ID #26).

Second, the majority inappropriately speculates about what was "[i]mportant to" the parties: "Important to Rogers, the agreement provides a signing bonus of $5,000 per acre" and "Important to Shell, the lease contains a broad arbitration clause, providing that any dispute under the lease be resolved by binding arbitration." Majority Opinion at 1. But how does the majority know that it was not "[i]mportant to Rogers" that should Shell fail to make its promised bonus payment, he be able to contest Shell's conduct without submitting to preclusively expensive arbitration and thus insisted that he not be "bound" by the Lease until Shell had paid "the full amount of the bonus payment"?[6] R. 1-1 (Lease) (Page ID #19). We "give effect to

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hereof, 'completion of operations' shall mean the completion of drilling operations as to equipment and facilities relating to drilling, including any associated pits, tanks. . . ." R. 1-1 (Lease) (Page ID #24). The drafters also knew how to define a term by reference. In Article V, Section 28(N), the contract notes that "Lessee shall not use, dispose of or release . . . any substances . . . which are defined as 'hazardous materials', 'toxic substances' or 'solid wastes' in federal, state or local laws, statutes or ordinances." *Id.*

[6] Counsel for Shell reminded us at oral argument that we were not to be swayed by a suspicion that Shell, a corporate behemoth, had unilaterally written and imposed its contract terms on a less sophisticated Rogers because said contract contains Article VII, Section 39, which provides: "For the purpose of construction, interpretation, arbitration or adjudication, it shall be deemed

the intent of the parties," (*Transtar*, 16 N.E.3d at 648), not by speculating as to their intent and then reading the contract selectively to support our assumptions, but rather by "examin[ing] the contract as a whole and presum[ing] that the intent of the parties is reflected in the language of the contract" (*Sunoco*, 953 N.E.2d at 292). The majority's speculation into what was "[i]mportant to" each party may influence the majority to read out language to conclude that the arbitration clause applies universally.

Third, the majority ignores the contract's contradictory assertions of when the Lease becomes effective—the same contract provides both that the Lease "shall become effective" on the date that Rogers signed (October 22, 2011) and "tak[es] effect [ ] upon [Rogers's] receipt of the bonus payment," a date that never materialized. R. 1-1 (Lease) (Page ID #18, 22). The majority reads out the entire second specification for when the Lease "tak[es] effect," allowing for an interpretation completely contrary to it. *Id.* The majority's interpretation also fails to account for Article III, Section 16's language providing that Rogers was to be "bound" by the lease only "upon Shell's paying the full amount of the bonus payment." R. 1-1 (Lease) (Page ID #19). That is not the way that we read contracts. *Sunoco*, 953 N.E.2d at 295 ("In interpreting a contract, we are required, if possible, to give effect to every provision of

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that Lessee and Lessor contributed equally to the drafting of this instrument." R. 1-1 (Lease) (Page ID #28). Accordingly, we cannot read out language that is favorable to Rogers's position by assuming that including it was not his primary goal in contracting with Shell.

the contract. If one construction of a doubtful condition written in a contract would render a clause meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail." (brackets and quotation marks omitted)).

At the "who decides" stage of the analysis, however, the question that matters is not whether my interpretation of the applicability of the arbitration clause or the majority's is *correct.* It is only whether it is "*clear and unmistakable*" that "the parties agreed to arbitrate arbitrability." *First Options of Chi.*, 514 U.S. at 944 (quoting *AT&T Techs.*, 475 U.S. at 649) (brackets omitted) (emphasis added). Given the contract's conflicting language and my considerably different interpretation of the contract from that of the majority, I do not believe that it is. Therefore, the court, not the arbitrator, is the proper body to decide whether the dispute is arbitrable.

Although the district court failed to answer the preliminary question of who decides the question of arbitrability, it did answer the subsequent question of whether the dispute is arbitrable. Although my thoughts on that question are necessarily developed in the above analysis, as the majority has limited itself to the first question of who decides arbitrability, I likewise refrain from deciding it here. I otherwise concur in the majority's decision to remand to the district court for it to decide the class arbitration issue in the first instance.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Matt A. Rogers, individually and on behalf of others similarly situated,

Plaintiff,

v.

SWEPI LP and Shell Energy Holding GP, LLC,

Defendants.

Case No: 2:16-cv-999

Judge Graham

Opinion and Order

(Filed Feb. 9, 2018)

Plaintiff Matt A. Rogers brings this putative class action alleging that landowners were not paid the signing bonuses they were due under oil and gas leases they had entered into with defendants. This matter is before the court on the motion of defendants SWEPI LP and Shell Energy Holding GP, LLC to compel arbitration. For the reasons stated below, the motion is denied.

I. Background

Energy production companies have entered into leases with landowners in eastern Ohio since the discovery of significant Utica Shale oil and gas reserves in 2011. Plaintiff Rogers, an Ohio resident who owns land in Guernsey County, entered into an oil and gas

lease (the "Lease") with defendants in October 2012. Defendants have their principal place of business in Houston, Texas and are corporate affiliates of Royal Dutch Shell plc.

The Lease contained a granting clause under which Rogers, the lessor, conveyed to SWEPI, the lessee, a leasehold interest in his land for purposes of oil and gas exploration and production. Lease at ¶ 1. Another clause provided that the parties could execute a Memorandum of Lease, which would then be recorded. Id. at ¶ 15(C). The parties did so, and the recorded Memorandum of Lease gave notice of SWEPI's leasehold interest in Rogers's property. Compl., Ex. B.

The Lease also contained a bonus payment clause. It provided that SWEPI would pay Rogers a "signing bonus" of $5000 for each acre that was leased, "subject to Lessee's verification of Lessor's marketable title." Lease at ¶ 16. SWEPI had 120 days from the execution of the Lease to verify marketable title. If SWEPI determined to its "reasonable satisfaction" that Rogers did not have marketable title, then the Lease was terminated "with no payments owed by the Lessee to Lessor." Id.

Rogers alleges that SWEPI never paid the signing bonus. Instead he received a form letter in August 2012 acknowledging that "considerable time has passed since signing with Shell due to the length of time the title review process is taking for this project." Compl., Ex. C. The letter continued, "Shell is committed to continue with the leasing of your property and pay bonus

based on the acres that satisfy title research. As a solution to minimize further time passage, Shell has canceled your original lease and surrendered your Memorandum of Oil and Gas Lease." Id. On August 8, 2012, SWEPI filed and recorded a Surrender and Cancellation of Oil and Gas Lease for Rogers's land. Compl., Ex. D.

Although the letter provided a phone number for SWEPI and expressed SWEPI's desire to "initiate a new lease," Rogers alleges that his attempts to contact SWEPI by phone were unsuccessful. He contends that the phone number was out of service and that a voicemail he left at another number was not returned. Rogers never heard from SWEPI again.

The complaint alleges that many other landowners in eastern Ohio entered into the same or substantially the same Lease with SWEPI as Rogers did. The complaint further alleges that SWEPI likewise failed to conduct title research for their properties and later filed documents of Surrender and Cancellation of Oil and Gas Lease in the county recorder's office. SWEPI allegedly did not pay a signing bonus to any member of the proposed class, which allegedly consists of about 800 landowners.

The complaint asserts a single cause of action for breach of contract relating to SWEPI's alleged failure to pay the signing bonus.

Defendants have moved to compel individual arbitration under the Lease's arbitration clause.

II. Standard of Review

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When a cause of action is determined to be covered by arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

"The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

"In evaluating motions or petitions to compel arbitration, courts treat the facts as they would in ruling on a summary judgment motion, construing all facts and reasonable inferences that can be drawn

therefrom in a light most favorable to the non-moving party." Raasch v. NCR Corp., 254 F.Supp.2d 847, 851 (S.D. Ohio 2003).

III. Discussion

When considering a motion to compel arbitration under the FAA, a court first "must determine whether the parties agreed to arbitrate." Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000). "In determining whether the parties have made a valid arbitration agreement, 'state law may be applied *if* that law arose to govern issues concerning the validity, revocability,' and enforceability of contracts generally, although the FAA preempts 'state laws applicable to *only* arbitration provisions.'" Great Earth Cos. v. Simons, 288 F.3d 878, 889 (6th Cir. 2002) (emphasis in original) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996)). Thus, "[s]tate law governs 'generally applicable contract defenses [to an arbitration clause], such as fraud, duress, or unconscionability.'" Id. at 889 (quoting Casarotto, 517 U.S. at 687).

At first glance, it appears defendants have a strong argument for compelling arbitration. Plaintiff is suing for breach of contract, a legal theory that depends on the existence and enforceability of a contract. The contract here contains a broad arbitration clause which covers "[a]ny dispute that arises under this Lease." Lease at ¶ 33.

As plaintiff observes, however, the bonus payment clause of the Lease contains language that changes the

analysis. The final sentence of the clause states, "By Lessor's signing this Lease, Lessor promises to proceed with this Lease and be bound thereby upon Lessee's paying the full amount of the bonus payment." Lease at ¶ 16. The word "upon" means "on condition of." Gastineau v. Gastineau, No. 10CA16, 2011 WL 332727 at *4 (Ohio Ct. App. Jan. 28, 2011) (quoting Webster's Third New Int'l Dictionary). "Upon" thus "introduces a condition or event." Bryan A. Garner, A Dictionary of Modern Legal Usage at 904 (2d ed. 1995). The court finds that the final sentence of the bonus payment clause creates a condition precedent to plaintiff being bound to proceed with the Lease – that SWEPI pays him the bonus payment.

SWEPI responds that this reading of the bonus payment clause means that "there never was a contract," which in turn would undermine plaintiff's claim for breach of contract. (Doc. 27 at PAGEID #191). According to SWEPI, if plaintiff was not bound by the Lease until he received a bonus payment, then his promises in the Lease were illusory and the contract fails for lack of mutuality of obligation. See Trumbull v. Century Mktg. Corp., 12 F.Supp.2d 683, 686 (N.D. Ohio 1998) ("Without mutuality of obligation, a contract cannot be enforced.").

The court disagrees. Under Ohio law, "a contract must be construed in its entirety and in a manner that does not leave any phrase meaningless or surplusage." Local Mktg. Corp. v. Prudential Ins. Co., 159 Ohio App. 3d 410, 414, 824 N.E.2d 122, 125 (Ohio Ct. App. 2004) (footnote omitted). Viewing the Lease in its entirety,

the court finds that plaintiff entered into a binding agreement when he signed the Lease. The Lease provided, "This Lease shall become effective on the date this Lease is signed by the Lessor," and the Lease's five-year term commenced upon execution. Lease at ¶8. Id. The Lease contained a granting clause which stated that the Lessor "does hereby lease to the Lessee the land described below," meaning that the conveyance was effective upon execution of the Lease. Id. at ¶1. The Lease provided that the parties could file a recorded Memorandum of Lease, which they did simultaneously to executing the Lease and thereby put others on notice of the encumbrance on plaintiff's property. See O.R.C. § 5301.251 (the recording of a memorandum of lease provides constructive notice of its contents); Edward A. Kemmler Mem'l Found. v. 691/733 E. Dublin-Granville Rd. Co., 62 Ohio St. 3d 494, 499, 584 N.E.2d 695, 698 (Ohio 1992) ("[W]ritings executed as part of the same transaction should be read together."). The Lease therefore obligated plaintiff, upon execution, to convey a leasehold interest in his land to SWEPI. By doing so, plaintiff encumbered the land and could not convey the same interest to anyone else.

The Lease set forth a 120-day period after execution for SWEPI to verify title to the property. If the title were not marketable, then SWEPI would not pay the signing bonus and would terminate the lease. See Lease at ¶16. But if the title were marketable, SWEPI had to pay the signing bonus and plaintiff had to proceed with the Lease. The rest of the Lease's terms would govern the parties' relationship with respect to

royalty payments, auditing rights, liability for the impact of SWEPI's operations to plaintiff's land, and arbitration, among other things.

Plaintiff correctly describes the Lease as follows: "while the Lease became 'effective' upon Rogers' signature for purposes of allowing SWEPI to encumber the property and verify title, the last sentence of [the bonus payment clause] shows that the parties' remaining obligations (the long-term relational aspects of the Lease) did not become effective – and Rogers was not 'bound thereby' – until the signing bonus was paid." (Doc. 24 at PAGEID #156). This interpretation provides meaning to the bonus payment clause and harmonizes it with the rest of the Lease. See Ottery v. Bland, 42 Ohio App.3d 85, 87, 536 N.E.2d 651, 654 (Ohio Ct. App. 1987) (courts "should attempt to harmonize all provisions in a contract rather than produce conflict in them").

The court thus finds that the final sentence of the bonus payment clause did not negate the existence of a contract but rather provided that once plaintiff made the initial conveyance, his remaining obligations were conditioned upon SWEPI paying the signing bonus. See Chesapeake Appalachia, L.L.C. v. Hickman, 236 W. Va. 421, 443, 781 S.E.2d 198, 220 (W. Va. 2015) ("Chesapeake insists that the January 2011 arbitration clause [in an oil and gas lease] is binding and effective, but the circuit court correctly discerned it was only binding and effective if Chesapeake paid Mr. Hickman the up-front bonus due in exchange for Mr. Hickman's execution of the arbitration clause.

Chesapeake cannot have its cake and eat it too; it cannot say there is a binding arbitration contract whilst simultaneously claiming its consideration for execution of the contract was illusory and non-existent.").

Lastly, SWEPI contends that the result reached here is absurd because no dispute over the bonus payment or a title defect could be arbitrated, despite the arbitration clause's broad language. The court, however, does not find this result to be absurd. Parties are generally free to agree on which disputes they will arbitrate and which they will not.[1] See Council of Smaller Enterprises v. Gates, 80 Ohio St.3d 661, 665, 687 N.E.2d 1352, 1355 (Ohio 1998) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.") (internal quotation marks omitted); Issac v. Ebix, Inc., No. 2:11-CV-00450, 2012 WL 1020296 at *7 (S.D. Ohio Mar. 26, 2012). While the Lease contained a broad arbitration clause, the specific language of the bonus payment clause made clear that plaintiff was not agreeing to arbitration until he was paid his signing bonus. See Klausing v. Chef Sols., Inc., No. 1-07-34, 2007 WL 3342878 at *3 (Ohio Ct. App. Nov. 13, 2007) (holding that arbitration clause was not triggered because party seeking to compel arbitration had not performed a condition precedent); Issac, 2012 WL 1020296, at *7 (same).

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[1] Title disputes, it is worth noting, are not arbitrable under Ohio law. See O.R.C. § 2711.01(B)(1).

IV. Conclusion

Accordingly, defendant's motion to compel arbitration (doc. 21) is denied. Plaintiff's unopposed motion for leave to file a sur-reply brief (doc. 29) is granted. Defendant's motion for leave to file a motion to dismiss (doc. 28) – to argue that plaintiff's reliance on the final sentence of the bonus payment clause is an admission that no contract exists – is denied.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: February 9, 2018

No. 18-3229

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MATT A. ROGERS, Plaintiff-Appellee, v. SWEPI LP, ET AL., Defendants-Appellants.	)	ORDER (Filed Feb. 19, 2019

BEFORE: SILER, MOORE, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

* Judge Kethledge recused himself from participation in this ruling.

Oil and Gas Lease

THIS OIL AND GAS LEASE (hereinafter, "Lease") made and entered into this 22 day of OCT, 2011 by and between

MATT A ROGERS, single, whose address is 9776 STRAUSSER ST NW CANAL FULTON, OH 44614 (hereinafter, "**Lessor**") (collectively if there is more than one),

and

SWEPI LP, having an office at 190 THORN HILL ROAD, WARRENDALE, PENNSYLVANIA 15086 (hereinafter, "Lessee").

ARTICLE I
GRANT OF LEASE

1) Lessor, in consideration of the payments described herein and the covenants and agreements hereinafter contained, does hereby lease to the Lessee the land described below exclusively for the purpose of carrying on geophysical and other exploratory work, including core drilling, and the drilling, operating for, and producing of all the oil, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors, liquid or gaseous hydrocarbons produced in association therewith other than as reserved unto Lessor herein below (herein, "**Lease Products**"), together with the right to use or install tanks, roads, electric power and telephone facilities and to construct, operate, repair, maintain and remove pipelines with appurtenant facilities, including data

acquisition, collection facilities for use in the production and transportation of products from the leasehold only. – Lessor grants to the Lessee the right of ingress and egress over, under and through said Leased Premises to accomplish the foregoing. This Lease shall not include the right to install compressors or other cleaning, purifying or processing facilities if such are for the purpose of treating Lease Products developed off the Leased Premises or lands pooled or unitized therewith.

2) **Description of the Land Included in this Lease** The land included in this Lease, herein called the "**Leased Premises**" is identified as follows:

County	**Township**	**Sec/ Twp/ Range**	**Acreage (more or less)**	**Tax Number**
GUERNSEY	MONROE	[Illegible]/ 20/04/2	5.002	260001628014

3) **Limitations on Grant of Lease**

A) **Lessor's Reserved Rights**. Lessor reserves all rights not specifically granted to Lessee in this Lease.

B) **Lessor Structure and Improvements**. Lessor reserves the right to construct any structure or other improvements at any location selected by Lessor anywhere on the Leased Premises so long as such construction, structure or other improvement does not

interfere with the rights of Lessee pursuant to this Lease. If prior to Lessee coordinating site location for any operations of Lessee's on the Leased Premises pursuant to Article V (28)(Q) of this Lease, Lessor commences construction of a structure or other improvement on the Leased Premises, Lessee will not locate any equipment, nor conduct any operations within five hundred (500) feet of the proposed structure or improvement or within five hundred (500) feet if a habitable structure without Lessor's prior written permission.

C) **Agricultural Activities**. Lessor reserves the right to initiate or continue irrigation and agricultural activities (including timbering) on the Leased Premises so long as such irrigation and agricultural activities (including timbering) do not interfere with Lessee's rights pursuant to this Lease.

D) **Other Minerals Reserved**. This Lease does not include and there is hereby excepted and reserved unto Lessor all of the sulfur, coal, lignite, uranium, and other fissionable material, geothermal energy, base and precious metals, rock, stone, gravel, and any other mineral substances (excepting those described above in the Grant of Lease) presently owned by Lessor in, under, or upon the Leased Premises, together with rights of ingress and egress and use of the Leased Premises by Lessor or its lessees or assignees for purposes of exploration for and production and marketing of the materials and minerals reserved hereby, provided, however, any such exploration and

production of such reserved substances shall not interfere with the rights of Lessee pursuant to this Lease.

4) **Unitization – Pooled Units**. In the event Lessee desires to pool or unitize the Leased Premises with other lands and there is no spacing order previously established by a governmental or regulatory body, subject to any limitations below, Lessee is granted the right, at its option, to pool or unitize any land covered by this Lease with any other contiguous lands included with other leases as to any or all horizons of gas, oil, or other minerals described above in the Grant of Lease in this Lease so as to establish pooled units. No pooled unit for any vertical well shallower than five thousand (5,000) feet with no horizontal drilling component which includes any portion of the Leased Premises shall exceed one hundred sixty (160) acres. No pooled unit for any well, whether vertical or horizontal (other than as set forth in the immediately preceding sentence), shall exceed six hundred forty (640) acres unless Lessee drills a horizontal well in which the length of the wellbore from the horizontal position is at least five thousand (5000) feet. If the length of the horizontal wellbore is equal to or greater than five thousand (5000) feet, Lessee's unit may contain more than six hundred forty (640) acres as determined by this formula: A = [(L x 0.025) + 640], where A= unit size in acres, and L = the length of the wellbore from the horizontal position. Notwithstanding the formula listed above, no unit is to exceed one thousand (1000) acres regardless of the length of the wellbore from the horizontal position. Lessee shall furnish to Lessor prior to formation of a pool or unit

a copy of the declaration or proposed declaration of the unit of which any portion of the Leased Premises shall be a part, including a copy of all plats, maps and exhibits to such application or declaration. Lessee shall have the recurring right to revise any unit formed hereunder either before or after commencement of production. In the event this Lease is so unitized, the Lessor agrees that its royalty hereunder shall be in proportion to the acreage contributed by this Lease to the total acreage comprising the unit. Production, drilling or reworking operations anywhere on a unit which includes all or any part of the Leased Premises shall, except for the payment of royalties, be treated as if it were production, drilling or reworking operations on that part of the Leased Premises that are included in the unit.

5) **Lessor's Interest**. If Lessor owns an interest in the Leased Premises less than the entire and undivided estate herein leased, then the royalties, shut-in royalties and rentals herein provided shall be paid by Lessee only in the proportion to which Lessor's interest bears to the whole and undivided estate. If the Leased Premises shall hereafter be subdivided, the leased premises shall nevertheless be developed and operated as one lease, and all royalties accruing hereunder shall be treated as an entirety, and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each owner bears to the entire leased acreage. Notwithstanding any other actual or constructive knowledge or notice thereof to Lessee, its successors or assigns, no change or division in the ownership of the Leased Premises or of the royalties or other moneys, or the right to receive

the same, howsoever affected, shall be binding upon the then record owner of this Lease until thirty (30) days after there has been furnished to such record owner at his or its principal place of business by Lessor or Lessor's heirs, successor, or assigns, notice by certified mail of such change or division, supported by either originals or copies of the instruments which have been properly filed for record and which evidence such change or division, and of such court records and proceedings, transcripts, or other documents as shall be necessary in the opinion of such record owner to establish the validity of such change or division. If any such change in ownership occurs by reason of the death of the Lessor, Lessee may nevertheless pay or tender such royalties or other moneys, or part thereof, to Lessor. Lessee shall not be bound by any change of the address of Lessor until furnished by certified mail with such documentation from Lessor as Lessee may reasonably require.

6) **Top Lease; Right-of-First Refusal**. In the event Lessor chooses to grant any remaining rights reserved by Lessor under this Lease to any party other than Lessee, then before any such grant Lessor shall provide Lessee with a written notice by certified mail setting forth all terms and conditions of such other grant, or a true copy of any lease or other document reflecting such grant. Lessee shall be afforded a period of thirty (30) calendar days following receipt of such written notice during which time Lessee may elect to exercise a right of first refusal to assume the obligations of lessee or grantee under such other proposed grant on the same terms and conditions contained therein. Should Lessee so elect, Lessee shall notify

Lessor in writing within such thirty (30) day period and submit therewith any up-front payments or other consideration described in such proposal, along with a signed lease or grant documents accordingly.

7) **Definitions**.

A) **Operations**. "**Operations**" shall mean only *(a)* the production of oil, gas or other liquid hydrocarbons in paying quantities subsequent to drilling, or *(b)* the drilling, completing, reworking, re-completing, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production of oil or gas, conducted in good faith and with due diligence.

B) **Division Order**. Documents setting forth the proportional ownership of Lessor in Lease Products.

ARTICLE II
TERM OF LEASE

8) **Effective Date and Primary Term**. This Lease shall become effective on the date that this Lease is signed by the Lessor ("**Effective Date**"). Except as provided herein, this Lease shall remain in full force and effect for a period of five (5) years from such date (hereinafter, "**Primary Term**").

9) **Extension of Primary Term**. This Lease may be extended beyond the Primary Term only under the condition that Operations have commenced prior to the end of the Primary Term or this Lease is

otherwise maintained pursuant to the provisions of this Lease.

10) **Option to Renew/Right to First Refusal**. Lessee is hereby given the option to extend by renewal the Primary Term of this Lease for one additional five (5) year period. This option may be exercised by Lessee at any time up to one hundred eighty (180) calendar days before the expiration of the original Primary Term by notifying Lessor in writing of Lessee's intent to exercise its option and simultaneously therewith paying to Lessor at least thirty days (30) calendar days prior to termination of the Primary Term a lease bonus an amount equal to one hundred percent (100%) of the original signing bonus per acre paid to Lessor by Lessee. Such payment shall be based upon the net acres then covered by this Lease and not at such time being maintained by other provisions hereof. Should this option be exercised, it shall be considered for all purposes as though this Lease originally provided for a Primary Term of ten (10) years.

11) **Shut-in Limitation**. In the event any well drilled upon the Leased Premises is shut-in, this Lease will continue in force and effect while production is shut-in; provided, however, this Lease may not be maintained in force for any continuous period of time longer than twenty-four (24) consecutive months or sixty (60) cumulative months after the expiration of the Primary Term hereof solely by provision of the shut-in royalty clause.

12) **Pugh Clause**

A) As to any acreage of the Leased Premises which is not included within any production unit at the expiration of the Primary Term, including any extension of the Primary Term in accordance with Article II, paragraph 9 and/or paragraph 10 of this Lease, this Lease shall automatically terminate and be of no further force or effect as to any acreage not within such designated units.

B) In addition, at the end of the Primary Term or extension thereof, this Lease shall terminate as to all depths and horizons under each production unit below two hundred (200) feet below the stratigraphic equivalent of the base (bottom) of the deepest formation from which production of oil or gas in paying quantities is being maintained (or, in the case of a shut-in gas well, can be maintained) in the well on such production unit; provided, however, in the event Lessee is drilling, completing, reworking, re-completing, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production of oil or gas at the end of the Primary Term on the Leased Premises or a unit in which the Leased Premises are included, then Lessee shall have the right to complete such well provided it is acting in good faith and with due diligence to complete such well. Lessee shall, as long as this Lease is in effect, have the right-of-first refusal subsequent to such termination in the event any subsequent lease is offered by

Lessor for the depth and horizons released in accordance with this paragraph.

13) **Held by Production**. This Lease may be held in force after the termination of the Primary Term, including any extensions in accordance with Article II, paragraph 9 and/or paragraph 10 of this Lease, by production from, or Operations conducted on the Leased Premises or on any unit which the Leased Premises is included in. For the avoidance of doubt, production from, or Operations conducted on one (1) unit will not maintain this Lease in force as to any other acreage contained or described in the Leased Premises within any other unit, but such production or Operations will maintain this Lease only as to the acreage within the unit or units upon which such production or Operations are being maintained or conducted.

14) **Partial Release**. Lessee shall have the right at any time during this Lease to release from the lands covered hereby any lands subject to this Lease and thereby may be relieved of all obligations hereafter accruing as to the acreage so released, provided that *(a)* Lessee may not release any portion of this Lease included in a pooled unit so long as operations are being conducted on such unit, and *(b)* any such partial release must release all depths in and under the lands so released.

15) **Termination of Record and Memorandum of Lease.**

A) Upon termination of the Lease as to any portion of the Leased Premises, Lessee shall promptly deliver to Lessor a plat showing the designated production units around each well

and a partial release containing a description (metes and bounds and map) of the acreage and depths not retained, in form suitable for recording. In addition, Lessee shall peaceably surrender the released premises to Lessor and remove any and all facilities, equipments and machinery from the site within ninety (90) days at Lessee's expense. Further, the affected land shall be reclaimed in accordance with Article V, paragraph 28(M) of this Lease.

B) Upon termination of this Lease or any portion thereof, or upon expiration of this Lease, Lessee shall provide Lessor documentation in recordable form of such termination or expiration within thirty (30) calendar days after receipt of written notice from the Lessor.

C) This Lease shall not be recorded by either party hereto. However, if Lessee desires that notice of the existence of this Lease be given by recording, Lessor and Lessee shall execute a form of memorandum of lease for recording which shall set forth the names and addresses of the parties hereto, the description of the Leased Premises, the term of this Lease and rest of the provisions hereof shall be incorporated by reference therein, without disclosure of the terms and provisions so incorporated by reference. If Lessee determines to its reasonable satisfaction after its title due diligence review that the Lessor does not have marketable title to the Leased Premises, then Lessee shall promptly terminate any recorded memorandum of lease it may have filed and this Lease shall terminate.

ARTICLE III
PAYMENT TO LESSOR

16) **Bonus Payment**. Lessee agrees to pay Lessor a signing bonus of Five Thousand Dollars ($5,000.00) for each acre contained within the Leased Premises subject to Lessee's verification of Lessor's marketable title. Lessee shall have up to one hundred twenty (120) days after the Effective Date to verify Lessor's marketable title to the Leased Premises. Pursuant to Article II, paragraph 15C, if Lessee determines to its reasonable satisfaction after its title due diligence review that Lessor does not have marketable title to the Leased Premises, then Lessee shall promptly terminate any recorded memorandum of lease it may have filed and this Lease shall terminate with no payments owed by the Lessee to Lessor. By Lessor's signing this Lease, Lessor promises to proceed with this Lease and be bound thereby upon Lessee's paying the full amount of the bonus payment.

17) **Royalty Payment**

A) **Oil**. Lessee shall pay Lessor 20% of the gross proceeds of all oil and other liquid hydrocarbons produced from or on the Leasehold Estate and sold by Lessee in an arms' length transaction. In the event that Lessee sells all or a part of the oil production from the Leasehold Estate to an Affiliated Entity, the value thereof shall be the highest price offered to Lessee through Lessee's bidding process for the sale of such oil.

B) **Gas**. Lessee shall pay Lessor 20% of the gross proceeds received by Lessee for all gas (including

substances contained in such gas) produced from or on the Leasehold Estate and sold by Lessee in an arms' length transaction of through an Affiliated Entity and when such Affiliated Entity sells or resells such gas, the value thereof shall be the higher of (i) the sales price received by Lessee, or (ii) the sale price received on all of the Affiliated Entity's sales of the aggregated production volumes, where such aggregated production volumes include production from the Leasehold Estate, during the applicable month of sales.

C) **Products**. Lessee's right to produce substances from the Leasehold Estate is limited to substances produced from oil and/or gas wells. Lessee shall pay Lessor royalty on all marketable substances produced and sold by Lessee from the Leasehold Estate. As to any product which does not fall under the oil or gas royalty clauses above, Lessee shall pay Lessor 20% of the gross proceeds received by Lessee.

D) **Cost of Production**. Lessor's interest shall bear its proportionate share of severance taxes and other taxes assessed against its interest or its share of production, but Lessor's royalty shall not bear or be charged with, directly or indirectly, any cost or expense incurred by Lessee or Affiliated Entity, including without limitation, for exploring, drilling, testing, completing, equipping, separating, dehydrating, transporting, compressing, treating, gathering or marketing of gas, oil or any liquefiable hydrocarbons extracted therefrom.

E) **When Royalties Must Be Paid**. All royalties that may become due hereunder shall

commence to be paid on the first well completed on the Leased Premises within one hundred-twenty (120) days after the first day of the month following the month during which any well is completed and commences production into a pipeline for sale of such production. On each subsequent well, royalty payments must commence within ninety (90) days after the first day of the month following the month during which any well is completed and commences production into a pipeline for sale of such production. Thereafter, all royalties on oil shall be paid to Lessor on or before the last day of the second month following the month of production, and all royalties on gas shall be paid to Lessor on or before the last day of the third month following the month of production. Royalties not paid when due shall bear interest at the prime rate, plus five percent (5%) per annum. Lessee may withhold royalties without obligation to pay interest in the event of a bona fide dispute or a good faith question of royalty entitlement (either as to ownership or as to amount).

F) **Delinquency in Payment**. If royalty is not paid by the date due, Lessor may give Lessee written notice of nonpayment of royalty, by certified mail, return receipt requested, and if Lessor's royalty is not paid on or before expiration of forty-five (45) days from Lessee's receipt of such notice, interest shall commence accruing on the due date and be payable by Lessee to Lessor on the delinquent balance at the rate of five percent (5%) per annum above prime interest rate. However, Lessee may avoid any interest obligation if prior to the expiration of such forty-five (45) days Lessor is furnished an attorney's written opinion citing a bona

fide dispute or a good faith question of royalty entitlement (either as to ownership or as to amount), Lessee pays to Lessor the undisputed portion and Lessee pays the disputed royalty to an escrow account to be administered by a trustee agreed to by both parties or by the American Arbitration Association if such trustee cannot be found. If practical, such escrow funds shall be invested in interest-bearing accounts pending resolution of the entitlement issue, with the interest to follow the distribution of escrow.

18) **Audit Rights**. Lessee grants to Lessor or Lessor's designee the right, at Lessor's expense, to examine, audit, copy or inspect books, records, and accounts of Lessee pertinent to the audit for the purpose of verifying the accuracy of the reports and statements furnished to Lessor and for checking the amount of payments lawfully due to Lessor under the terms of this agreement. In exercising this right, Lessor shall give reasonable notice to Lessee of its intended audit and such audit shall be conducted during normal business hours at the office of Lessee at the sole cost and expense of Lessor. However, if the amount of exceptions or deficiencies in royalty payments revealed by the audit equal or exceed one hundred twenty-five percent (125%) of the costs and expense of the audit, then the Lessee shall bear the cost and expense of the audit and all monies due (audit exceptions, costs, and expenses) shall be payable within thirty (30) days of the final determination of the amounts due. All audits will take place in Houston, Texas and shall only be permitted once a calendar year.

19) **Shut-in**

A) **Payment Amount**. If there shall be a well on the Leased Premises capable of producing gas or gas and condensate, but from which neither gas nor condensate is sold or used off the Leased Premises for any reason whatsoever (which well is herein sometimes called a "**shut-in**" gas well), Lessee shall pay or tender to Lessor, as shut-in gas well royalty, for each such shut-in well, a yearly sum equal to Twenty Dollars ($20.00) multiplied by the total number of acres subject to this Lease at the time such payment is made. The first such payment of shut-in gas well royalty is to be made on or before sixty (60) days after the day on which such well was shut in. Succeeding payments may be made annually thereafter on or before the anniversary of the due date of such payment.

B) **Limited Duration**. After expiration of the Primary Term, the portion of the Leased Premises being held by the Lessee solely by the payment of shut-in royalty, shall be released after a period of twenty-four (24) consecutive months or a cumulative total of sixty (60) months, unless given written consent by the Lessor to continue to be shut-in.

20) **Site Fee**. Lessee shall make a one-time payment to Lessor the sum of Twenty Five Thousand Dollars ($25,000.00) for each well pad located on the Leased Premises, which payment shall be paid prior to commencement of drilling of each well pad. Furthermore, upon prior separate written

consent and agreement of Lessor, which consent shall not be unreasonably withheld, Lessee shall pay Lessor an amount of at least Twenty Five Thousand Dollars ($25,000.00) for each post-drilling pit, pond or other in-ground containment excavation in which fluids or liquids pertaining to and involved with operations are to be stored (other than drilling pits) located on the Leased Premises.

21) **Ad Valorem Taxes**. All taxes assessed or payable on the oil and gas including any ad valorem, production, severance, business, occupation or other excise taxes or any increase in the real estate taxes, or taxes in lieu of real estate taxes imposed because of the oil and gas operations under this Lease shall be paid by the parties hereto in proportion to their interest.

22) **Property Taxes**. In the event real property taxes pertaining to or attributable to the Leased Premises are increased in any manner by reason of the operations of Lessee on the Leased Premises, including, but not limited to any structures or improvements constructed on the Leased Premises, Lessee shall be responsible for the amount of any such tax increase attributable to such operations or improvements. Lessee shall reimburse Lessor for the amount of such increase within thirty (30) days after Lessor provides Lessee with written documentation reflecting such increase and the basis thereof.

23) **Agricultural Programs**. In the event the Leased Premises are subject to any federal, state, local and/or agricultural assistance program (CAUV,

CRP, or Forest Land Program, including any interest and penalties thereon), and any roll-back or reimbursement or recoupment or retroactive assessment is made against the Leased Premises on account of, arising out of, or relating to the operations of Lessee on the Leased Premises, Lessee shall be responsible for paying any and all of such amounts, but only insofar as such amounts imposed result from operations on the portion of the Leased Premises actually utilized in Lessee's operations.

24) **Method of Payments**. All rents and royalties (except payment by gas in kind at the election of Lessor as may be provided herein) and any and all sums due hereunder from Lessee to Lessor shall be paid by one of the following methods:

A) by check or draft tendered directly from Lessee to Lessor at Lessor's address as stated in this Lease

B) by direct deposit by depositing the payment to the credit of the Lessor in the bank and account number as provided in writing by Lessor to Lessee prior to such payment (which bank shall continue as depository for all sums payable hereunder until any subsequent written notice otherwise is provided by Lessor to Lessee). No payment not timely made or not made in the correct amount shall constitute a waiver by Lessor of any rights or remedies of Lessor under this Lease. A payment submitted electronically shall be considered timely paid if such payment is successfully transmitted to Lessor's account on or before the due

date. A payment not submitted electronically shall be considered timely paid if delivered to the Lessor on or before the applicable due date or if deposited in a postpaid, properly addressed wrapper with a post office or official depository marked as so deposited by the United States postal service before the applicable due date.

ARTICLE IV
TITLE ISSUES

25) **Lessor's Representation Regarding Title to Leased Premises**. Lessor makes no representation or warranty as to Lessor's title to the Leased Premises other than that Lessor warrants and represents that Lessor is not aware of any unrecorded encumbrances, or encroachments or conditions affecting title to the Leased Premises other than those that would be observed on a location survey. It shall be Lessee's burden and obligation to assure itself of the quality of title to the Leased Premises. Upon this Lease taking effect (thus, upon Lessor's receipt of the bonus payment), Lessee's obligations under this Lease shall not be diminished or affected by any title encumbrance on the Leased Premises, including but not limited to any mortgage or mineral lease of record that existed as of the date this Lease became effective.

26) **Lessor Encumbrances After Lease Effective**. Any mortgage, lease, easement, or other interest granted by Lessor voluntarily after this Lease becomes effective shall be subject to this Lease. In the event Lessor should become in default of any

obligation of Lessor that is secured by any lien or encumbrance on the Leased Premises during the term of this Lease, Lessee may, at its option, pay and discharge any such obligation on behalf of Lessor after Lessee gives Lessor at least thirty (30) calendar days prior written notice of such intention to pay, and if, after Lessor's receipt of such notice, Lessor makes no arrangement otherwise to address the amount in default. Should Lessee make such payment on behalf of Lessor, or by any other lawful means, Lessee shall be entitled to recover from Lessor by deduction from any future payments to Lessor, with interest at Ohio's legal rate for judgments and Lessee's actual costs incurred.

27) **Liens Against Lessee**. In the event any lien or encumbrance is filed against the Leased Premises arising out of or pertaining to the operations by Lessee, Lessee shall within forty-five (45) calendar days following the date such lien or encumbrance is recorded cause such lien or encumbrance to be released from record, and Lessee shall provide Lessor written evidence of such release. Lessee's contention that the lien or encumbrance arises from a bona fide dispute shall not be grounds for Lessee's failure or refusal to remove the lien or encumbrance as required herein.

ARTICLE V
IMPACTS AND EFFECTS

28) **Surface Issues**. The following provisions shall apply under this Lease:

A) **Compliance with Laws**. Lessee shall be responsible for any and all acts or matters arising out of or pertaining to Lessee's operations on the Leased Premises whether reasonably foreseen or unforeseen. All operations conducted by Lessee shall comply with federal, state, and local law, statute, regulation and/or order, and the terms of this Lease, whichever is stricter.

B) **Degree of Care**.

a) Lessee shall at all times use the reasonable care and reasonable safeguards to prevent its operation from

i) causing or contributing to soil erosion;

ii) polluting or contaminating any environmental medium including the surface or subterranean soils and/or waters and ambient atmosphere in, on, under or about the Leased Premises and surrounding properties;

iii) decreasing the fertility of the soil;

iv) damaging crops, native or cultivated grasses, trees or pastures;

v) harming or in any way injuring animals, whether domestic or wild on the Leased Premises;

vi) damaging buildings, roads, structures, improvements, farm implements or fences.

b) Lessee shall dispose of salt water, frac water or liquid waste oil and other waste in accordance with the rules and regulations of the Ohio Department of Natural Resources and all other applicable governmental authorities.

c) Lessee shall clean up, remove, remedy and repair any soil contamination caused by its presence or release of any contaminant in, on, under, or about the Leased Premises.

C) **Disposal**. Lessee shall not use the Leased Premises for the permanent disposal of any drill cuttings or the storage or disposal of residual wastes. No disposal wells or any other permanent devices or means of disposal of wastes or drilling liquids are permitted on the Leased Premises.

D) **No Gas Storage or Injection**. Lessee shall have no right to use the Leased Premises or any portion thereof, for underground gas, oil, or brine storage purposes.

E) **Replace Barriers and Drain Tile**. Lessee shall promptly replace any barriers, including but not limited to, fences and walls removed by Lessee during its operations on the Leased Premises. Lessee shall construct gates on all access roads upon written request from Lessor and provide an access key or double lock system allowing access by both Lessor and Lessee. Gates are to be closed and locked when Lessee personnel are not on the Leased Premises. Lessee shall promptly replace any

drain tile removed or damaged by Lessee during its operation.

F) **Timber**. Lessee shall notify Lessor in writing at least forty-five (45) calendar days prior to any removal of marketable timber (marketability to be within the discretion of Lessor). At Lessor's option, Lessor may choose to harvest timber or Lessor may require an appraisal of the timber by a qualified independent appraiser, and Lessee shall pay Lessor the appraised value for the timber identified prior to its removal by Lessee.

G) **Use of Surface of Subsurface Water**. Lessee is not permitted to use water from Lessor's wells, ponds, lakes, springs, creeks or reservoirs on the Leased Premises without prior written consent and agreement with Lessor, separate from this Lease. Lessee shall not drill or operate any water well, take water, or inject any substance into the sub-surface, or otherwise use or affect water in sub-surface water formations.

H) **Crops**. Lessee will plan its surface operations in a manner that will reduce or minimize intrusion into crop fields. In the event such an intrusion cannot be avoided, Lessee shall compensate Lessor for the damage or loss of growing crops at current market value.

I) **Fencing by Lessee**. Lessee shall:

a) fence all wells and well sites, tank batteries, pits, separators, drip stations, pump engines, and other equipment placed on

the Leased Premises with a fence capable of turning back livestock;

b) keep such fences in good repair; and

c) keep all gates and fences closed at all time, or in lieu of gates, install cattle guards.

J) **Pipelines and Excavations**.

A) The top of any pipelines shall be a minimum of forty-eight (48) inches from the surface. Lessee shall utilize a double ditch method for construction of pipelines, as well as any other excavation on the Leased Premises, in which topsoil is segregated from subsoil, and when the excavation is back-filled, the subsoil is replaced first and the topsoil is placed on the top. Lessor shall have the right to construct and lay drainage and other utility pipes, wires, and lines across or under Lessee pipelines in a manner which does not interfere with the use thereof.

B) Any pipelines constructed pursuant to the terms of this Lease shall be for transporting oil and/or gas, water or electric from a well(s) drilled on the Leased Premises or lands pooled therewith unless Lessor and Lessee enter into a separate written agreement.

K) **Roads**.

A) Roadways or drives constructed by Lessee on the Leased Premises during active drilling or development phases shall not exceed fifty (50) feet in width or a minimum width required to perform required operations. In the event of a producing well on the Leased Premises, any permanent access road for well servicing purposes shall be a maximum width of twenty (20) feet or a minimum width required to perform maintenance and other operations.

B) Lessee agrees to improve, construct or maintain all roads used by it in good repair utilizing shale, gravel, or crushed stone, culverts and supports as necessary to provide a smooth, rut-free all-weather surface, and when such roads are no longer being used, Lessee agrees, upon Lessor's request, to remove toppings and to restore the surface as nearly as possible to its former condition. Lessee shall not use shale, gravel, or crushed stone from the Leased Premises without the prior written consent of Lessor. Lessee shall prevent its employees, agents and contractors from operating vehicles in a negligent manner or at speeds in excess of twenty-five (25) miles per hour while on the Leased Premises.

L) **Utilities**. Lessee's rights hereunder may include burying or otherwise constructing

necessary phone, electric, and data collection lines on the Leased Premises in connection with production from the Leased Premises, but such rights may not be assigned to a utility company, pipeline company, or anyone else who owns no interest in the Leased Premises or is otherwise not contracted or affiliated with Lessee for the purpose of carrying out the rights and obligations under this Lease. The right to use said pipelines terminates when production from the Leased Premises ceases and all wells associated therewith are plugged and abandoned.

M) **Restoration of Leased Premises**. On completion of any operations on the Leased Premises, Lessee shall restore the Leased Premises to as nearly as practicable to – predrilling conditions and remove all debris, equipment and personal property which Lessee placed on the Leased Premises except for equipment needed for the operation of producing wells, which shall be removed with [sic] six (6) months after a well permanently ceases to produce. For purposes hereof, "**completion of operations**" shall mean the completion of drilling operations as to equipment and facilities relating to drilling, including any associated pits, tanks (or other excavations or facilities no longer needed for production), or in the event of a dry hole, all such facilities. Lessee shall keep the Leased Premises in a neat and clean condition.

N) **Hazardous Materials**. Lessee shall not use, dispose of or release on the Leased Premises

or permit to exist or to be used, disposed of or released on the Leased Premises, as result of its operations, any substances (other than those Lessee has been licensed or is otherwise permitted by applicable law to use on the Leased Premises or those substances which are commonly used in the oil and gas industry for drilling and completion operations) which are defined as "**hazardous materials**", "**toxic substances**" or "**solid wastes**" in federal, state or local laws, statutes or ordinances. Should any pollutant, hazardous material, toxic substances, contaminated waste or solid waste be accidentally released on the Leased Premises, Lessee shall notify Lessor immediately after notifying the applicable governmental body of such event

O) **Firewalling and Maintenance of Production Equipment Dikes**. Dikes, firewalls or other methods of secondary containment must be constructed and maintained at all times around all tanks, separators and receptacles so as to contain a volume of liquid equal to at least one and one-tenth (1.10) times the total volume of the largest tank tanks [sic], separators and other receptacles located within the boundaries of the firewall, or as dictated by Ohio's state rules and regulations. Lessee shall keep all tanks and other equipment at each well location painted and shall keep the well site and all roads leading thereto free of noxious weeds and debris.

P) **Pits**. Lessee shall have no right to dig any pits other than drilling and development pits (not

permanent storage pits) on the Leased Premises except with Lessor's prior written consent, which consent shall not be unreasonably withheld. Any pit so permitted shall:

a) conform to all applicable regulatory requirements (state, local and federal)

b) be planned to be deep enough to allow at least thirty-six (36) inches of back fill over the liner after grading to surrounding pre-drill contour, and

c) Lessee will comply with Ohio rules and regulations regarding drill pits. Lessee shall immediately notify Lessor and all applicable regulatory authorities, if required by law, if any pit lining is torn, punctured, or otherwise breached, allowing any fluid contained in a pit or designated to be contained in a pit to seep, leak or overflow through or around the liner.

Q) **Mutual Agreement as to Location of Operations**. Before commencing surface disturbing operations on the Leased Premises, Lessee and Lessor shall mutually agree in writing on the location of all wells, roads, pipelines, gates, and other equipment so as to minimize disruption of Lessor's use of the Leased Premises. To the degree practicable, operations shall be designed and laid out to be concentrated in a single area so as to avoid unnecessary utilization of surface areas. To the degree practicable, pipelines and roadways are to be within the same corridor. Lessor's consent shall not be unreasonably

withheld, assuming the preceding standards are followed. Without a separate written agreement between Lessor and Lessee, no pump stations, tank batteries, dryers, compressors or separators shall be located on the Leased Premises unless they are for the sole purpose of treating gas from the Leased Premises or lands pooled or unitized therewith, and those shall not be located nearer than, and no well shall be driller [sic] nearer than, five hundred (500) feet from any dwelling or residential structure or five hundred (500) feet from any barn or other non-residential structure then on the Leased Premises without the Lessor's written consent.

29) **Water Quality**. Lessee shall maintain the quality of Lessor's water supply to be measured by testing the supply prior to and at the completion of operations on the Leased Premises or on any land in the unit of which any of the Leased Premises is a part prior to and at the completion of operations. Should Lessor's water supply be polluted or reduced as a result of Lessee's operations, Lessee shall take reasonable steps to restore water quality and quantity as nearly as practicable to its pre-existing condition. During the period of remediation, Lessee shall supply Lessor with an adequate supply of adequate potable water consistent with Lessor's use of the damaged water supply prior to Lessee's operation. Testing of Lessor's water supply shall be conducted by an independent testing laboratory qualified to test water for the entire array of chemicals and agents utilized by Lessee in its operations. Lessee shall pay all costs of testing.

Lessor shall be provided complete copies of any and all testing results and data.

30) **Notice to Drill**. Lessee shall provide at least fourteen (14) calendar days prior written notice to Lessor before Lessee commences operations on the Leased Premises.

ARTICLE VI
LIABILITY ISSUES

31) **Indemnity and Remedies**.

A) Lessee agrees to defend, indemnify and hold harmless Lessor and Lessor's heirs, successors, representatives, agents and assigns ("**Indemnitees**"), from and against any and all claims, demands and causes of action for injury (including death) or damage to persons or property or fines or penalties, or environmental matters arising out of, incidental to or resulting from the operations of, or for Lessee or Lessee's servants, agents, employees, guests, licenses, invitees or independent contracts, and from and against all costs and expenses incurred by Indemnitees by reason of any such claim or claims, including attorneys' fees; and each assignee of this Lease, or an interest therein, agrees to indemnify and hold harmless Indemnitees in the same manner provided above. Such indemnity shall apply to any claims arising out of operations conducted under or pursuant to this Lease, however caused, save and except for any claims arising out of the negligence or willful misconduct of any Indemnitee.

B) The provisions of this paragraph 31 shall survive the termination of this Lease.

C) **Remedies**. Upon default by either party hereto, the non-defaulting party shall be entitled to exercise any and all remedies available at law, in equity or otherwise, each such remedy being considered cumulative. No single exercise of any remedy set forth herein shall be deemed an election to forego any other remedy.

32) **Insurance**. Prior to the commencement of any work described in this lease or addendum, Lessee shall provide to Lessor, a memorandum of insurance evidencing liability, workman's compensation and disability insurance in the amounts described herein. Lessee shall assure that Lessee and any person acting on Lessee's behalf under this Lease carry the following insurance with one or more insurance carriers at any and all times such party or person is on or about the leased premises or acting pursuant to this Lease, in such amounts as from time to time reasonably required by Lessor, indexed for inflation.

(i) Workers Compensation and Employer's Liability Insurance;

(ii) Commercial General Liability and Umbrella Liability Insurance ($5,000,000 Minimum coverage);

(iii) Business auto and Umbrella Liability Insurance ($5,000,000 Minimum coverage).

The Lessee shall cause Memorandum of Insurance evidencing the above coverage to be provided promptly upon request to Lessor. The insurance policies required under the Lease and addendum thereto, shall cover the Lessor as additional insured's with regard to the leased premises; and shall reflect that the insurer has waived any right of subrogation against the Lessor only to the extent of the liabilities, indemnities, and minimum insurance limits assumed herein.

ARTICLE VII
OTHER MATTERS

33) **Arbitration**.

Any dispute that arises under this Lease may be heard in non-binding mediation before a neutral mediator if both parties agree in writing. If the mediation is not agreed to, or does not resolve the dispute, then the dispute shall be resolved by binding arbitration by three arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association and, to the maximum extent applicable, the Federal Arbitration Act (Title 9 of the United States Code). Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. Either Lessor or Lessee may, by summary proceedings, bring an action in court to compel arbitration of a dispute.

Each arbitrator shall be an active or recently retired business person or professional with not less than ten years experience in exploration and production activities associated with the oil and gas

industry. The arbitrators may engage engineers, accountants or other consultants that the arbitrator deems necessary to render a conclusion in the arbitration proceeding, The arbitration shall be initiated by one party ("Claimant") giving notice to the other party ("Respondent") and to the Administrator of the American Arbitration Association ("Administrator") that the Claimant elects to refer the dispute to arbitration, and that the Claimant has appointed an arbitrator who shall be identified in such notice. The Respondent shall notify the Claimant and the Administrator in writing within fifteen (15) days after its receipt of the Claimant's notice, identifying the arbitrator the Respondent has selected. If the Respondent fails within the fifteen (15) day period to so notify the Claimant or to identify an arbitrator, the second arbitrator shall be appointed by the Administrator at the request of the Claimant or the Respondent within fifteen (15) days after such request is made. The two arbitrators so identified shall select a third arbitrator within fifteen (15) days after the second arbitrator has been appointed. If, however, such arbitrators shall fail to appoint such third arbitrator within such fifteen (15) day period, then the third arbitrator shall be appointed by the Administrator at the request of either the Claimant or the Respondent within fifteen (15) days after such request is received by the Administrator.

To the maximum extent practicable, an arbitration proceeding hereunder shall be concluded within one hundred eight [sic] (180) days of filing the dispute with the Administrator. Arbitration proceedings shall be conducted in Cleveland, Ohio.

Arbitrators shall be empowered to impose sanctions and to take such other actions as the arbitrators deem necessary to the same extent a judge could impose sanctions or take such other actions pursuant to the Federal Rules of Civil Procedure and applicable law. At the conclusion of any arbitration proceeding, the arbitrators shall make specific written findings of fact and conclusions of law. Each party agrees to keep all disputes and arbitration proceedings strictly confidential except for disclosure of information required by applicable law.

All fees of the arbitrators and any engineer, accountant or other consultant engaged by the arbitrators, shall be paid by the parties equally unless otherwise awarded by the arbitrators.

Notwithstanding the foregoing, any party hereto shall be entitled to seek a temporary restraining order.

34) **Force Majeure**. Should Lessee be prevented from complying with any express or implied covenant of this Lease (except payment of money), from conducting drilling or reworking operations thereon or from producing oil and gas therefrom by reason of inability to obtain or to use equipment or material, or by operation of force majeure (including but not limited to storm flood, fire, or other acts of God, war, rebellion, insurrection, riot, strikes, differences with workmen or failure of carriers to transport or furnish facilities for transportation), or due to any federal or state law or any order, rule or regulation of governmental authority ("**force majeure event**"), then, while so prevented,

Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this Lease shall be extended while and so long as Lessee is prevented by any such force majeure event from conducting drilling or reworking operations on or from producing oil or gas from the Leased Premises. The period of extension by reason of force majeure shall be limited to a cumulative total of thirty-six (36) months.

35) **Governing Law**. This Lease shall be governed in accordance with the laws of the State of Ohio.

36) **Notices**. Notices, consents or other documents required or permitted by this Lease must be given by personal delivery, reputable overnight courier (Federal Express or other), or sent by registered or certified mail, return receipt requested, and postage paid. For purposes of notice,

Lessor's information is as follows:

Name MATT A ROGERS
Address 9776 STRAUSSER ST NW
CANAL FULTON, OH 44614

Lessee's information is as follows:

Name SWEPI LP; Attn: Land Manager
Address 190 Thorn Hill Road
Warrendale, Pennsylvania 15086

Either party's notice information may be changed upon prior written notice delivered to the other party. Lessee shall designate its land department in Warrendale, PA who will be the point of contact for Lessor. Lessee shall provide Lessor such

group's name, address, telephone number, email address and facsimile number. Such group shall be knowledgeable as to this Lease and the operations on the Leased Premises and have sufficient authority from Lessee to reasonably respond and address Lessor's concerns.

37) **Reports and Documents**. Lessee shall notify Lessor of any judicial proceedings brought to the attention of Lessee affecting its possession under the Lease or the interest of Lessor in the Leased Premises.

38) **Assignment**. The rights and estate of any party hereto may be assigned from time to time in whole or in part and as to any horizon. All of the covenants, obligations, and considerations of this Lease shall extend to and be binding upon the parties hereto, their heirs, successors, assigns, and successive assigns.

39) **Authorship and Waiver**. For the purpose of construction, interpretation, arbitration or adjudication, it shall be deemed that Lessee and Lessor contributed equally to the drafting of this instrument. The failure of either party to enforce or exercise any provision of this Lease shall not constitute or be considered as a waiver of the provision in the future unless the same is expressed in writing and signed by the respective parties.

40) **Condemnation**. Any and all payments made by a Condemnor on account of a taking by eminent domain shall be the property of Lessor.

41) **Severability**. If any portion of this Lease is held invalid or unenforceable by arbitration or any

court of competent jurisdiction, the other provisions of this Lease will remain in full force and effect. Any provision of this Lease held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

THIS LEASE is executed by the parties hereto as of the dates hereinafter set forth but effective as of the date stipulated in Article II, paragraph (8) herein.

WITNESS:	LESSOR:
/s/ Debi Howard	/s/ Matt A. Rogers
Print: Debi Howard	Print: Matt A. Rogers
	Phone # (330) 936-7866
Print:	Print:
	Phone #
Print:	Print:
	Phone #
Print:	Print:
	Phone #

Standard Acknowledgement

STATE OF OHIO §
} ss:
COUNTY OF GUERNSEY §

On the 22 day of OCT in the year 2011 before me, the undersigned, a notary public in and for said state, personally appeared MATT A ROGERS, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed the instrument.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

[NOTARY SEAL] /s/ Deborah Howard
Notary Public