

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0147p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 18-3233

[Filed July 10, 2019]

RICHARD BAATZ, et al.,)
<i>Plaintiffs-Appellants,</i>)
)
v.)
)
COLUMBIA GAS TRANSMISSION, LLC,)
<i>Defendant-Appellee.</i>)
)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

No. 1:14-cv-00505—Thomas M. Parker,
Magistrate Judge.

Argued: November 27, 2018

Decided and Filed: July 10, 2019

Before: THAPAR, BUSH, and NALBANDIAN,
Circuit Judges.

COUNSEL

ARGUED: Rick L. Ferrara, THE LINDNER LAW FIRM, LLP, Cleveland, Ohio, for Appellants. Paul K. Stockman, KAZMAREK MOWREY CLOUD LASETER LLP, Pittsburgh, Pennsylvania, for Appellee. **ON BRIEF:** Rick L. Ferrara, Daniel F. Lindner, THE LINDNER LAW FIRM, LLP, Cleveland, Ohio, for Appellants. Paul K. Stockman, KAZMAREK MOWREY CLOUD LASETER LLP, Pittsburgh, Pennsylvania, Alexander M. Madrid, MCGUIRE WOODS LLP, Pittsburgh, Pennsylvania, Jodie Hermann Lawson, MCGUIRE WOODS LLP, Charlotte, North Carolina, for Appellee.

OPINION

JOHN K. BUSH, Circuit Judge. Richard Baatz and fifty other landowners in Medina, Ohio (“Landowners”) appeal the district court’s grant of summary judgment to Columbia Gas Transmission, LLC (“Columbia Gas”) on Landowners’ state-law trespass and unjust enrichment claims involving underground storage of natural gas. Among other things, this case concerns an unusual situation in which, as to one of the claims on which appellee Columbia Gas was found liable (unjust enrichment), it is content to pay the damages awarded even though its position is that no liability should have been imposed at all. A question arises, therefore, as to whether Columbia Gas needed to file a cross-appeal in order to defend the damages award based on an argument that it had no liability on the underlying claim. For the reasons explained below, we hold that no

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such cross-appeal on liability was necessary, and we **AFFIRM** the judgment of the district court in all respects.

I.

This dispute concerns a natural gas storage area known as the Medina Storage Field, located within the Clinton sandstone formation and approximately 3,000 feet underground in Medina, Ohio.¹ Columbia Gas injects natural gas into the Medina Storage Field (and other storage fields) during the summer months when gas demand is low and withdraws the stored gas during the winter months when demand is high. Landowners own property either directly above or near the boundary of the Medina Storage Field. Although Columbia Gas or its predecessor in interest has been storing gas in the Medina Storage Field since 1959, the earliest that any Landowner purchased any property at issue was September of 1990. Landowners argue that Columbia Gas intentionally invaded the subsurface of their properties to store natural gas without their permission and unjustly enriched itself by using their land without paying fair market rental value for the easement they claim is needed to use the subsurface.

Columbia Gas is subject to the Natural Gas Act (“NGA”) and is regulated by the Federal Energy Regulatory Commission (“FERC”). Under the NGA, FERC may issue certificates of public convenience and

¹ In reviewing the grant of Columbia Gas’s summary judgment motion, we consider the facts in the light most favorable to Landowners, the parties who lost the motion. *See B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 593 (6th Cir. 2001).

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necessity to authorize the construction and maintenance of facilities related to the natural gas industry. 15 U.S.C. § 717f(c). The NGA also authorizes the FERC certificate holder (e.g., Columbia Gas) to obtain the necessary property by eminent domain if the certificate holder “cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid.” *Id.* § 717f(h). The NGA does not require the certificate holder to acquire the property it uses for its natural gas storage; the statute merely authorizes acquisition. *See id.*

Columbia Gas or its predecessor in interest has been a certificate holder of the Medina Storage Field since 1958, but Columbia Gas did not attempt to obtain any easement rights for the Medina Storage Field until September 2013. At that time, Columbia Gas wrote letters to Landowners offering to purchase a subsurface easement under each of their properties. Landowners rejected Columbia Gas’s offer and filed suit soon thereafter, asserting claims for (1) Trespass, (2) Unjust Enrichment-Use of Property for Storage, (3) Mandamus-Inverse Condemnation, (4) Declaratory Judgment, and (5) Permanent Injunction. These claims were similar to those in a different class action, *Wilson v. Columbia Gas Transmission, LLC*, No. 2:12-cv-01203 (S.D. Ohio 2012). *Wilson* involved Columbia Gas but did not include the Landowners. Soon after Landowners filed suit, Columbia Gas filed an amended counterclaim in *Wilson*, adding Landowners as defendants in that case. As part of this filing in *Wilson*, Columbia Gas sought condemnation to establish easements in the subsurface of Landowners’ properties. Columbia Gas then moved to dismiss the present case,

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arguing that *Wilson* had “first to file” priority. The district court granted the motion, but this court reversed. *See Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 787–88 (6th Cir. 2016).

On remand, Columbia Gas and Landowners jointly requested to sever their claims in *Wilson* and to transfer that case to the United States District Court for the Northern District of Ohio. This request was granted, and *Wilson* was transferred and re-captioned as *Columbia Gas Transmission, LLC v. Booth*, 1:16-cv-01418 (N.D. Ohio 2016).

In *Booth* the district court decided that Columbia Gas had a right to obtain Landowners’ property by eminent domain and could take possession of the land after it paid just compensation. After that decision, the *Booth* court empaneled a three-commissioner panel to determine the appropriate award for just compensation. No party objected to the commissioners’ final report.

After the transfer to the Northern District of Ohio, Columbia Gas moved to dismiss the complaint in the present case. Because Landowners conceded that the condemnation action in *Booth* “moots their claims for mandamus/inverse condemnation, declaratory judgment, and injunctive relief,” the district court dismissed all of Landowners’ claims except their trespass and unjust enrichment claims. R. 58, PageID 1032. After discovery, the parties cross-moved for summary judgment.

The district court granted Columbia Gas’s motion for summary judgment on Landowners’ trespass

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claims, holding that *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996) “requires the conclusion that Columbia [Gas’s] injection of its natural gas into [the Clinton sandstone] formation was not trespass because the Landowners had no right to exclude Columbia from using that stratum.” R. 118-1, PageID 3668. The district court deferred ruling on the unjust enrichment claims until the parties calculated pre-judgment interest from the *Booth* condemnation award to satisfy Landowners’ damages relating to their unjust enrichment claims. After the parties calculated the pre-judgment interest award, the district court granted summary judgment in Landowners’ favor on unjust enrichment. The district court held that each Landowner was entitled to damages starting from the date that landowner purchased his or her property because Columbia Gas had failed to compensate Landowners for using their subsurface to store natural gas. The district court reasoned that “payment of just compensation in *Booth* will fully compensate the Landowners for any unjust enrichment they may have conferred upon Columbia [Gas]” and thus Columbia Gas “should be required to pay [interest] on the just compensation amount for the period [from] March 5, 2008 through the date just compensation is paid,” (the relevant statute of limitations period). *Id.* at 3683.

Landowners timely appealed, challenging the district court’s grant of summary judgment with respect to both their trespass claims and unjust enrichment claims. Columbia Gas did not file a cross appeal.

II.

We review a district court’s decision to grant summary judgment de novo. *Simpson v. Ernst & Young*, 100 F.3d 436, 440 (6th Cir. 1996). A party is entitled to summary judgment when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact.” *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “Once the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact.” *Id.* at 448–89 (citing Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1985)).

A. Trespass Claims

Under Ohio law, which the parties do not dispute applies here, “[t]respass is an unlawful entry upon the property of another.” *Chance*, 670 N.E.2d at 991 (citation omitted). To prove a trespass claim, plaintiffs must demonstrate that (1) they had a possessory interest in the property, and (2) the offending party entered the property without consent or prior authorization or authority. *See Keeseker v. G.M. McKelvey Co.*, 47 N.E.2d 211, 214 (Ohio 1943). The district court granted summary judgment to Columbia Gas on the ground that Landowners could not prove

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that they had the requisite possessory interest based on *Chance*.

One of the issues in *Chance* was whether BP Chemicals had trespassed by injecting hazardous waste into the subsurface at a remote location which later migrated to the subsurface beneath the plaintiffs' land. As part of its reasoning, the Ohio Supreme Court addressed the property owners' argument that BP Chemicals was liable for trespass because "the owner of land has absolute ownership of all the subsurface property." *Chance*, 670 N.E.2d at 991 (alternation omitted). The implication of that proposition, the Ohio Supreme Court noted, was that "as one of the incidents of absolute ownership, appellants have the right to exclude others." *Id.*

Before *Chance*, the Ohio Supreme Court had characterized a property owner's subsurface ownership as absolute: "The word *land* includes not only the face of the earth, but everything under it or over it. He who owns a piece of land, therefore, is the owner of everything underneath in a direct line to the center of the earth and everything above to the heavens." *Winton v. Cornish*, 5 Ohio 477, 478 (1832). The *Chance* court, however, rejected this traditional rule, concluding that it "has no place in the modern world." 670 N.E.2d at 991 (quoting *Vill. of Willoughby Hills v. Corrigan*, 278 N.E.2d 658, 664 (Ohio 1972)). "Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property," the Ohio Supreme Court found "that there are also limitations on property owners' subsurface rights." *Id.* at 992. *Chance* thus "extend[ed] the reasoning of

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[*Village of Willoughby Hills v. Corrigan*], that absolute ownership of air rights is a doctrine which ‘has no place in the modern world,’ to apply as well to ownership of subsurface rights.” *Id.* Based on the “unique facts” of the case, the Ohio Supreme Court concluded “that [property owners’] subsurface rights in their properties include the right to exclude invasions of the subsurface property” only if the property owners prove that the invasion “actually interfere[d] with [their] reasonable and foreseeable use of the subsurface.” *Id.*

Applying the new rule, *Chance* held that the property owners “did not, as a matter of law, establish an unlawful entry on their properties by [BP Chemicals].” *Id.* at 993. Stated differently, BP Chemicals did not interfere with the property owners’ possessory interest in the subsurface. To interfere with that possessory interest, the defendant must interfere “with the reasonable and foreseeable use of the[ir] properties.” *Id.*

Landowners insist that the *Chance* reasoning concerned an indirect trespass and does not apply to direct trespass claims, which they contend they are asserting.² We are not persuaded. In holding that BP

² A direct trespass includes those actions traditionally within the scope of common law trespass—for example, when a defendant takes an action that immediately results in an invasion of the plaintiff’s property. *See Williams v. Oeder*, 659 N.E.2d 379, 382–83 (Ohio Ct. App. 1995); *Brown v. Cty. Comm’rs of Scioto Cty.*, 622 N.E.2d 1153, 1161–62 (Ohio Ct. App. 1993). An indirect trespass, by contrast, occurs when a defendant discharges a foreign object that, after being released on property not owned by the plaintiff,

Chemicals did not trespass in *Chance*, the Ohio Supreme Court necessarily decided the scope of the plaintiffs' possessory interest in their subsurface for both direct and indirect trespass. There is nothing in the Ohio Supreme Court's rejection of the proposition that a property owner has absolute rights in the subsurface indicating a different definition of possessory interest for direct versus indirect trespass. *See Chance*, 670 N.E.2d at 992. Instead, possessory interest is based on the reasonable and foreseeable use of the property owner's subsurface, regardless of how the trespass occurred. Landowners have offered no persuasive reason why the Ohio Supreme Court would vary this understanding of possessory interest depending on whether the alleged trespass is direct or indirect.

Landowners also attempt to distinguish *Chance* because "the Ohio Supreme Court explicitly limited its ruling by stating that oil and gas extraction was 'fundamentally dissimilar to the unique situation' that it faced, declining to apply such law." Appellants Br. at 18 (quoting *Chance*, 670 N.E.2d at 991). Landowners, however, take the quoted language from *Chance* out of context. The Ohio Supreme Court's remark related to whether the negative rule of capture from oil and gas cases would apply to the facts in *Chance*. *See* 670 N.E.2d at 990–91. The Ohio Supreme Court's statement did not mean that the *Chance* definition of possessory interest would not apply to oil and gas cases. Indeed, the Ohio Court of Appeals later applied

migrates to the plaintiff's property. *See Williams*, 659 N.E.2d at 382–83; *Brown*, 622 N.E.2d at 1161–62.

the *Chance* rule to a trespass claim involving gas migration. *See Lueke v. Union Oil Co. of Cal.*, No. OT-00-008, 2000 WL 1545077, at *6–7 (Ohio Ct. App. Oct. 20, 2000). This court also has held that *Chance* applies in contexts other than the specific setting presented in that case. *See Baker v. Chevron U.S.A., Inc.* 533 F. App’x 509, 523 (6th Cir. 2013).

Landowners further argue that instead of applying *Chance*, we should follow *Bowman v. Columbia Gas Transmission Corp.*, 850 F.2d 692, 1988 WL 68890 (6th Cir. 1988) (unpublished table opinion) (per curiam) and *Beck v. Northern Natural Gas Co.*, 170 F.3d 1018 (10th Cir. 1999) to rule in their favor. In *Bowman*, however, this court did not consider whether the alleged trespasser’s conduct constituted a trespass because the issue was not preserved for appeal. *Bowman*, 1988 WL 68890, at *2. And *Beck* involved Kansas law, so it has minimal, if any, value in predicting Ohio law. 170 F.3d at 1021–22.

Thus, under Ohio law, to survive summary judgment on the trespass claim (whether direct or indirect), Landowners must show that Columbia Gas interfered with the possessory interest in their subsurface (i.e., interference with a reasonable or foreseeable use of the subsurface). *Chance*, 670 N.E.2d at 991–92. Landowners cannot do that here: indeed, each Landowner in this case has admitted that they have not used and do not intend to use their subsurface. We therefore **AFFIRM** the district court’s grant of summary judgment to Columbia Gas with respect to Landowners’ trespass claims.

B. Unjust Enrichment Claims

The court believed that “Columbia [Gas] has been unjustly enriched by storing natural gas beneath [Landowners’ properties ‘since 1959’ without having to pay storage fees or even paying just compensation for the taking.” R. 118-1, PageID 3679. But it disagreed that Columbia Gas had been unjustly enriched at Landowners’ expense for that entire time. This was because “the earliest any of the Landowners’ acquired their property was 1990.” *Id.* at PageID 3678. To the extent that Landowners “may have conferred upon Columbia,” *id.* at PageID 3683, an unjust enrichment *after* acquiring their properties, the court held that Landowners would be compensated for that after receiving just compensation in *Booth*.

Having held Columbia Gas liable for unjust enrichment, the district court ordered that Columbia Gas pay Landowners additional damages in the form of pre-judgment interest on the *Booth* award. The district court limited the Landowners’ damages in this regard from “March 5, 2008 through the date of the judgment rendered herein,” *id.* at PageID 3682, reasoning that Landowners’ unjust enrichment claims were governed by the six-year statute under Ohio Revised Code (“O.R.C.”) § 2305.07.

Columbia Gas had argued, among other things, that Landowners “had no ownership right in the stratum,” and that “if [Landowners] have no rights in that formation, then they cannot have conferred a benefit upon Columbia by ‘allowing’ its storage of natural gas there.” R. 118-1, PageID 3679. In rejecting that argument, the district court concluded that the Ohio

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Supreme Court’s “use of the terms ‘limited’ and ‘not absolute’ in *Chance* signifies that some residual rights in the subsurface strata belong to the surface landowner[s],” and thus Columbia Gas is liable to the Landowners for unjust enrichment. *Id.*

On appeal, Columbia Gas does not challenge the district court’s holding that it is liable for unjust enrichment. Instead, Columbia Gas asserts that Landowners’ claims for additional unjust enrichment damages claims are “precluded on another ground,” because in view of *Chance*, “where a landowner does not use the subsurface, the landowner has no benefit to confer (or at least no benefit that it would be inequitable for an alleged occupier to retain) and an unjust enrichment claim is thus unavailable as a matter of law.” Appellee Br. at 44. For the reasons explained below, Columbia Gas’s position has merit. However, before we address the merits of this substantive argument, we must address the significant procedural issue noted earlier: did Columbia Gas need to file a cross-appeal in order to preserve its argument to affirm the damages judgment on the ground that Columbia Gas has no underlying liability?

1.

“[F]rom its earliest years,” the Supreme Court “has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee.” *Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008). The appellee who does not file a cross-appeal “may not ‘attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.’” *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015)

(quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)); *see also United States v. Burch*, 781 F.3d 342, 344 (6th Cir. 2015). However, should an appellee elect not to file a cross-appeal, the appellee may “urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.” *Am. Ry. Express Co.*, 265 U.S. at 435.

Applying these principles in *Burch*, we refused to entertain the argument that the district court had abused its discretion by extending the appellant’s time to file a notice of appeal. Because the government in that case had not filed a cross-appeal, entertaining its arguments would have been an impermissible attack on, and infringement of, the appellant’s right to appeal. *See Burch*, 781 F.3d at 344–45. Columbia Gas, by contrast, does not attack the underlying damages award to the Landowners for their unjust enrichment claims. Columbia Gas, instead, argues an alternative basis for affirmance by attacking the reasoning of the district court’s judgment. This is a distinction with a difference. By arguing in support of the district court’s judgment on an alternative basis, instead of arguing for the reversal of the judgment, we may consider Columbia Gas’s alternative argument for affirmance *sans* cross-appeal.

As described by Wright & Miller, “[i]t is proper to hold that the award already made cannot be reversed without cross-appeal. The argument that no award was proper, however, should be accepted to the extent that it simply defeats an increase that otherwise might

seem appropriate.” Wright & Miller, *Federal Practice and Procedure* § 3904 (2d ed.). The cross-appeal doctrine, by its nature, is designed “to foster repose, providing early notice to the parties of the extent to which a judgment will be challenged by appeal.” *Id.* Indeed, it is important that the appellant have fair notice regarding the grounds on which the appellee intends to defend the judgment. Assuming the appellant has fair notice of appellee’s arguments, the cross-appeal doctrine should be flexibly administered in the instances where there is a “blurring of the line between support and modification of a judgment that occurs when arguments are made that can be limited to support of the judgment but that logically would require modification.” *Id.*

The Seventh Circuit’s opinion in *In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992) (per curiam) illustrates these principles. In *In re Oil Spill*, the defendant-appellee argued that the plaintiffs-appellants should not be awarded additional prejudgment interest because they should not have been awarded prejudgment interest in the first instance. *Id.* at 1333–35. The defendant-appellee did not try to defend the district court’s award of prejudgment interest and argued that “the French plaintiffs should count themselves lucky. Because the district court could (and in [the defendant’s] view should) have declined to award any prejudgment interest, [the defendant] insist[ed] that the French plaintiffs were not entitled to an increase.” *Id.* at 1333. The plaintiffs-appellants countered that this argument was not preserved because the defendant-appellee did not file a cross-

appeal. The Seventh Circuit disagreed, reasoning that although the defendant “[could not] obtain a favorable alteration in the judgment without a cross-appeal, [] it may urge in defense of the judgment any argument preserved below—even an argument the logical implications of which would call for a different judgment,” and thus proceeded to consider the argument. *Id.* (citation omitted); *see also Baca v. Ladd*, 77 F.3d 480, 1996 WL 46567, at *4 (5th Cir. 1996) (unpublished table opinion) (holding that the court could consider appellee’s argument absent a cross-appeal that appellant was not the prevailing party because appellant would “not be entitled to increase the amount of attorneys’ fees awarded to him”).

Columbia Gas’s argument is similar to the appellee’s argument in *In re Oil Spill* and *Baca*. In making the argument that Landowners’ unjust enrichment claims are “precluded on another ground,” Columbia Gas does not ask us to reverse the district court’s judgment. Absent a cross-appeal, that argument would be improper for us to consider. Instead, Columbia Gas makes this argument as an alternative basis for affirming the district court’s damages award by tacitly arguing that Landowners should not have been awarded damages in the first instance. Moreover, there is no indication that Landowners have been caught off guard by Appellee’s argument on appeal. Indeed, Appellants argued in their opening brief that they may pursue their unjust enrichment claims independent of their trespass claims and rebutted Columbia Gas’s alternative argument in their reply brief. Thus, the “flexible” administration of the cross-appeal doctrine is justified in this circumstance, as

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Landowners were given fair notice of Columbia Gas's position.

In considering Columbia Gas's alternative argument, we are aware that it requires us to conclude that even though the district court found Columbia Gas liable to Landowners for their unjust enrichment claims and subsequently awarded them damages, no further damages should be allowed because no damages should have been awarded at all. However, because Columbia Gas's alternative argument accepts that it must pay the damages that were awarded, it does not run afoul of the cross-appeal doctrine. It seeks no change in the district court's judgment, which, as explained by Wright & Miller, is a key consideration for whether an appellee's argument requires a cross-appeal:

The abstract incongruity of affirming on grounds that logically dictate reversal should not stand in the way. It is enough that the arguments are properly presented in the district court and the court of appeals. The uncertain virtues of cross-appeal requirements should not be pressed to the point of preserving a pleasing symmetry of opinion. The appellant's interest in repose is sufficient served by preserving its judgment.

Wright & Miller, *supra*, § 3904.

Given these considerations, and the fact that there was no unfair surprise to Landowners from Columbia Gas's alternative argument, no cross-appeal was required for Columbia Gas to argue for affirmance on this ground.

2.

We now turn to the merits of the alternative argument. Under Ohio law, “[u]njust enrichment occurs when a person ‘has and retains money or benefits which in justice and equity belong to another, while restitution is the common-law remedy designed to prevent one from retaining property to which he is not justly entitled.’” *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005) (citation and internal quotation marks omitted). To establish an unjust enrichment claim, the plaintiff must demonstrate: “(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment.” *Id.* (quoting *Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio 1984)).

According to Landowners, Columbia Gas unjustly enriched itself by using the Landowners’ subsurface to store its gas without paying fair rental rates for that storage. As the record confirms, and as discussed above, the Landowners do not have a “reasonable and foreseeable use” of their subsurface. As such, the Landowners do not have a present possessory interest in their subsurface and by extension, lack the present ability to exclude Columbia Gas from its subsurface. *See Chance*, 670 N.E.2d at 922. Just as this fact was fatal to Landowners’ indirect trespass claim, it is also fatal to Landowners’ unjust enrichment claims. *Cf. Sandy v. Rataiczak*, No. 08 NO 347, 2008 WL 5059371, at *5 (Ohio Ct. App. Nov. 25, 2008) (holding that because defendants’ actions could not constitute a

trespass, plaintiff was not entitled to unjust enrichment damages).

Absent the “absolute right to admit or exclude persons,” a landowner does not have a possessory interest in that property. *See Martin v. Lambert*, 8 N.E.3d 1024, 1033 (Ohio Ct. App. 2014) (citations omitted). And under Ohio law, a property owner cannot transfer an interest in her or his property greater than the one she or he currently has. *Cf. Cooper v. Roose*, 85 N.E.2d 545, 547 (Ohio 1949) (explaining that when a landlord issues a rental argument with tenant, “the power and the right to admit . . . and to exclude” is generally transferred to the tenant). Thus, because Landowners did not have a possessory interest in their subsurface, they were not able to transfer that interest to Columbia Gas. And because Landowners could not transfer that possessory interest in their subsurface, it follows that the possessory interest in the subsurface could not have been a benefit conferred by the Landowners upon Columbia Gas. Therefore, Landowners’ unjust enrichment claims fail because Landowners could not show, as they must, that they conferred a benefit upon the defendant. We therefore **AFFIRM** the district court’s grant of summary judgment to Columbia Gas with respect to Landowners’ unjust enrichment claims.

III.

For the reasons explained above, we **AFFIRM** the district court’s judgment.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Case No. 1:14-cv-505

**MAGISTRATE JUDGE
THOMAS M. PARKER**

[Filed February 26, 2018]

RICHARD BAATZ, et. al.,)
)
Plaintiffs,)
)
v.)
)
COLUMBIA GAS)
TRANSMISSION, LLC,)
)
Defendant.)
)

**ORDER ON LANDOWNERS' UNJUST
ENRICHMENT CLAIM**

Defendant Columbia Gas Transmission, LLC (“Columbia”) moved for summary judgment on plaintiffs’ (“Landowners”) remaining claims for trespass and unjust enrichment. ECF Doc. 89. The court previously granted Columbia’s motion for summary judgment on the Landowners’ trespass claim

but deferred judgment on the Landowners' unjust enrichment claim. ECF Doc. 118. The court ordered the parties to submit an agreed calculation of the amount of prejudgment interest that would be due on the just compensation amounts determined by the *Booth* Commission from May 5, 2008 through the date of the payment of the just compensation amounts. On February 26, 2018, the parties filed a joint response to the court's order. ECF Doc. 120. The court now GRANTS Columbia's motion for summary judgment on the Landowners' remaining, Count Two unjust enrichment claim.

In their joint response to the court's memorandum of opinion and order, the parties agreed to an interest calculation on each of the just compensation payments and further stipulated that the total of the just compensation amounts and prejudgment interest should be entered as a final judgment in *Columbia Gas Transmission, LLC v. Booth, et al.*, Case No. 1:16-cv-1418. As explained in the court's memorandum of opinion and order, an award of just compensation and prejudgment interest in *Booth* necessarily means that there would be no further damages to be awarded on the Landowners' unjust enrichment claim in this action. ECF Doc. 118, Page ID# 3653. The payment of just compensation, including prejudgment interest from May 5, 2008, in *Booth* will fully compensate the Landowners for any unjust enrichment they may have conferred upon Columbia.

In accordance with the court's previous memorandum of opinion and order (ECF Doc. 118) and the parties' joint response thereto (ECF Doc. 120), the

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court GRANTS Columbia's motion for summary judgment on the Landowners' unjust enrichment claim (Count Two).

IT IS SO ORDERED.

Dated: February 26, 2018

/s/Thomas M. Parker
Thomas M. Parker
United States Magistrate Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Case No. 1:14-cv-505

**MAGISTRATE JUDGE
THOMAS M. PARKER**

[Filed February 26, 2018]

RICHARD BAATZ, et. al.,)
)
Plaintiffs,)
)
v.)
)
COLUMBIA GAS)
TRANSMISSION, LLC,)
)
Defendant.)
)

FINAL JUDGMENT ENTRY

Defendant Columbia Gas Transmission, LLC (“Columbia”) is granted summary judgment on Counts One (Trespass) and Two (Unjust Enrichment) of plaintiffs’ (“Landowners”) second amended complaint. ECF Doc. 46. The court previously dismissed Counts Three (Mandamus – Inverse Condemnation), Four (Declaratory Judgment), and Five (Permanent

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Injunction) pursuant to Fed. R. Civ. P. 12(b)(6). ECF Doc. 58.

Judgment is rendered in favor of defendant, Columbia Gas Transmission, LLC, pursuant to Rule 58, Fed. R. Civ. P., on all claims asserted in the Landowners' Second Amended Complaint. Costs shall be taxed to Defendant Columbia Gas Transmission, LLC.

IT IS SO ORDERED.

Dated: February 26, 2018

/s/Thomas M. Parker
Thomas M. Parker
United States Magistrate Judge

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Case No. 1:14-cv-505

**MAGISTRATE JUDGE
THOMAS M. PARKER**

[Filed February 14, 2018]

RICHARD BAATZ, et. al.,)
)
Plaintiffs,)
)
v.)
)
COLUMBIA GAS)
TRANSMISSION, LLC,)
)
Defendant.)
)

**AMENDED MEMORANDUM OF OPINION
AND ORDER**

I. Introduction

Plaintiffs in this action are the owners of residential lots in Medina County, Ohio (“Landowners”). Defendant Columbia Gas Transmission, LLC (“Columbia”) is a wholesale producer and distributor of

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natural gas which established a 10,000 acre underground natural gas storage facility in the Clinton sandstone formation in Medina County (the “Medina Storage Field”). Columbia was authorized – and required – to construct and operate the Medina Storage Field by the former Federal Power Commission in 1958, and it has stored natural gas in that facility since 1959. Federal law authorizes natural gas facility operators to take property by eminent domain to accomplish the purposes set forth in certificates of public convenience and necessity under the Natural Gas Act. Despite receiving a certificate in 1958 and operating the Medina Storage Field since 1959, Columbia did not seek to acquire underground gas storage easements under the Landowners’ properties until 2014. The Landowners sued for trespass and unjust enrichment damages. Columbia has moved for summary judgment on the Landowners claims. ECF Doc. 89. The Landowners have also moved for partial summary judgment, seeking a liability determination that Columbia has trespassed on each of the Landowners’ properties since 1959 and a declaration that the trespass was malicious. EFC Doc. 86. Because the Landowners have no evidence that Columbia’s conduct has caused actual damage to Landowners’ properties or has in any way interfered with Landowners’ use or anticipated use of their properties, and because Columbia’s construction and operation of the Medina Storage Field was mandated by federal agency action, Columbia cannot be liable to the Landowners for trespass. In addition, because Landowners will receive just compensation for Columbia’s taking in a companion action, Columbia’s only potential liability on an unjust enrichment claim

is for interest on the just compensation amount it is required to pay. The court will direct the parties to submit an agreed calculation of the prejudgment interest amount. As a result, Columbia's motion for summary judgment will be GRANTED in PART and DEFERRED in PART and Landowners' motion for partial summary judgment will be DENIED.

II. Procedural Background and Claims Asserted

The Landowners instituted this action on March 5, 2014. Doc. 1. They asserted claims similar to those alleged in an earlier-filed putative class action case in the Southern District of Ohio, *Wilson et al v. Columbia Gas Transmission, LLC*, Case No. 2:12cv01203 (S.D. Ohio 2012). None of the plaintiffs in this case was an original party in *Wilson*; but Columbia is the defendant in both cases. On April 22, 2014, Columbia filed an amended counterclaim in *Wilson* joining the Medina Landowners as counterclaim defendants. The next day, Columbia moved to dismiss the instant case, asserting that *Wilson*, the first filed case, had priority. On March 5, 2015, Judge Wells granted Columbia's motion to dismiss. ECF Doc. Nos. 18, 19. On February 24, 2016, the Sixth Circuit reversed the dismissal and remanded the case. ECF Doc. No. 22. Taking a suggestion by the court of appeals, Columbia moved to stay this case. ECF Doc. No. 27. On May 4, 2016, Judge Gwin¹ denied defendant's motion to stay due, in part, to delays in

¹ The action was reassigned to Judge James S. Gwin after the retirement of Judge Wells.

Wilson and the appropriateness of venue in the Northern District of Ohio.

On May 26, 2016, Columbia and the Medina Landowners jointly requested that their claims in *Wilson* be severed and transferred to the Northern District of Ohio. That request was granted, and on June 10, 2016, the case was transferred to the Northern District of Ohio and recaptioned *Columbia Gas Transmission, LLC v. Booth, et al.*, 1:16cv01418 (“*Booth*.”) Shortly thereafter, Columbia filed an Amended Complaint in condemnation against the Landowners in *Booth*.²

On May 27, 2016, one day after the parties’ joint request to sever and transfer their claims in *Wilson*, Columbia moved to dismiss the instant case, arguing that its assertion of a condemnation claim in *Booth* mooted certain claims in this case. ECF Doc. Nos. 32, 33. Columbia contended that all of the Landowners’ other claims were preempted by the NGA.

On December 22, 2016, the court granted, in part, Columbia’s motion to dismiss. ECF No. 58. Plaintiffs’ claims for mandamus/inverse condemnation (Count Three), declaratory judgment (Count Four), and permanent injunction (Count Five) were dismissed. The court declined to dismiss the claims for trespass (Count One) and unjust enrichment (Count Two).

² On December 5-8, 2017, a hearing took place in *Booth* before a Commission appointed to determine just compensation for the taking of plaintiffs’ subsurface property rights. On January 12, 2018, the Commission issued a report recommending the amount of just compensation to be awarded to the landowners.

The Landowners premise their trespass and unjust enrichment claims on the contention that Columbia had no right to store natural gas beneath their properties prior to the acquisition of property rights by eminent domain. In Count One, the Landowners claim that Columbia maliciously trespassed and should be liable for nominal, compensatory, and punitive damages and for attorney fees. Count Two asserts that Columbia has been unjustly enriched by being able to store natural gas beneath their properties without cost since 1959. The Landowners claim Columbia should be required to disgorge what it would have paid for such gas storage, or the net profit it earned from storing natural gas beneath their properties. They also impliedly claim Columbia was unjustly enriched by retaining the money it would have paid as just compensation for its taking of their properties.

III. Factual and Regulatory Background

The following facts are undisputed and/or established by the Rule 56 evidence. Columbia is an interstate natural gas company as defined by Section 2(a) of the Natural Gas Act (“NGA”). ECF Docs. 46, 66. Columbia operates an extensive interstate natural gas transportation and storage system that includes one of North America’s largest underground natural gas storage systems (37 storage fields in four states with nearly 600 billion cubic feet in total capacity). *Id.* The Medina Storage Field is one of those facilities. *Id.* The Medina Storage Field exists within the Clinton sandstone formation located approximately 3,000 feet beneath the surface of the land. *Id.* Columbia injects natural gas into these storage fields during the

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summer months when gas demand is low and withdraws the storage gas during the winter months when demand is high, in order to stabilize the supply and, as a result, the price of natural gas. *Id.*

The Natural Gas Act (“NGA”), 15 U.S.C. § 717 *et seq.* regulates Columbia’s interstate natural gas operations. *Id.* The NGA authorizes the Federal Energy Regulatory Commission (“FERC”) to issue certificates of public convenience and necessity to undertake the construction and maintenance of facilities for the transportation, distribution and sale of natural gas. 15 U.S.C. § 717f(c). Pursuant to the NGA, Columbia’s predecessor, the Ohio Fuel Gas Company, obtained a certificate of public convenience and necessity (“1958 Certificate”) from the Federal Power Commission – FERC’s predecessor – (ECF Doc. 55-1, Page ID# 831-834)³ for the “conversion of Applicant’s depleted Clinton Sand of the Medina gas producing field in Medina County, Ohio, into a gas storage field” on July 21, 1958. *Id.* at Page ID# 832. Ohio Fuel Gas submitted application G-14269 for the certificate on January 6, 1958; the Federal Power Commission granted “[t]emporary authority to construct and operate” the proposed facilities on May 27, 1958, two months prior to the issuance of the certificate. *Id.*

³ Columbia Gas Transmission Corporation merged with The Ohio Fuel Gas Company and others on December 14, 1971. (ECF Doc. 55-2, Page ID# 837, et. seq.) Columbia Gas Transmission Corporation changed its name to Columbia Gas Transmission, LLC on December 9, 2008. (ECF Doc. 55-4, Page ID# 910-913.) For ease of reference, the court will refer to the actions of Ohio Fuel Gas Company as if they had been taken by Columbia.

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On April 10, 1987, Columbia filed an application with the Federal Energy Regulatory Commission (“FERC”) for a certificate of public convenience and necessity “authorizing the continued operation of five of its existing storage fields...as currently constituted and operated; namely... [the] Medina Storage Field in Medina County, Ohio.” (ECF Doc. 55-3, Page ID# 907-908) FERC issued the Certificate on November 2, 1987 (the “1987 Certificate”). Id.

Once FERC issues a certificate of public convenience and necessity, a certificate holder does not have the right to “abandon all or any portion of its facilities, subject to the jurisdiction of the Commission, or any service rendered by means of such facilities without the permission and approval of the Commission . . .” 15 U.S.C. § 717f(b).

The NGA grants the right of eminent domain to FERC certificate holders as follows:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, *it may* acquire the same by the exercise of the right of eminent domain in the district court of the United States

for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

15 U.S.C. §717f(h)(emphasis added). None of the Landowners owned their property as of the date of the issuance of either the 1958 or the 1987 Certificates. The earliest any of them acquired their property was 1991. (ECF Doc. 93-1, Page ID# 3116.) In 2013, Columbia offered each of the Medina Landowners \$250.00 per lot in return for the grant of an easement permitting underground gas storage beneath their properties.⁴ None of the Medina Landowners accepted this offer. ECF Docs. 46, 66.

IV. Standard of Review

Under Fed. R. Civ. P. 56(a), summary judgment must be granted if “the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” A dispute of fact is “genuine” if “the [record] evidence is

⁴ In ¶¶ 3-31 of the Second Amended Complaint (Doc. 46), plaintiffs allege that their respective properties are within the “certificated boundaries” of the Medina Storage Field. Defendant admitted these allegations as to some of the defendants. (Doc. 66, ¶3-31)

such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.2505, 91 L.Ed.2d 202 (1986). As a result, “[c]onclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact.” *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998) (citation omitted); *see also* Fed. R. Civ. P. 56 (e)(2). As the Supreme Court has explained, “[the non-moving party] must do more than simply show that there is metaphysical doubt as to the material facts.” *Matsushita Elec., Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As for the materiality requirement, a dispute of fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. “Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.*

In determining whether genuine issues of material fact exist, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson*, 477 U.S. at 255. In addition, “[the moving party] bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of any genuine issue of material fact.” *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also* Fed. R. Civ. P. 56(c), (e). However, when the moving party has met this initial burden of establishing the absence of any genuine issue of material fact, the nonmoving party must come forward with specific facts showing a genuine dispute of material fact for trial. Fed R. Civ. P. 56(c), (e).

V. Law and Analysis

The Landowners trespass and unjust enrichment claims are premised on the belief that Columbia's *right to store* natural gas in the Medina Storage Field was conditioned upon its acquisition of property rights – gas storage easements – from the Landowners. ECF Doc. 100, Page ID#3471-3472 ("Columbia is now seeking to condemn the properties for their use through the *Booth* case despite having the authority *and obligation* to do so at the earliest since 1958." (Emphasis added)). The 1958 and 1987 Certificates and the applicable statute and regulations indicate otherwise.

The 1958 Certificate authorized the construction and operation of the Medina Storage Field "upon the terms and conditions of this order." ECF Doc. 55-1, Page ID# 833. The terms and conditions included the obligation to comply with specified subsections of "Section 157.20 of the Commission's Regulations under the Natural Gas Act."⁵ None of the requirements of that regulation mandated the completion of the eminent domain process established in 15 U.S.C. § 717f(h), and none of the express conditions of the 1958 Certificate did either. Moreover, the 1958 Certificate expressly acknowledged that the Federal Power Commission had granted Columbia temporary authority to construct and operate the facilities that had been proposed as of May 27, 1958, two months before the 1958 Certificate was issued. ECF Doc. 55-1, Page ID# 832. Thus, Columbia was authorized to store gas in the Clinton sandstone formation constituting the

⁵ This regulation is now codified at 18 C.F.R. § 157.20.

Medina Storage Field before obtaining gas storage easements from the surface land owners.

The 1987 Certificate similarly imposed a requirement that Columbia comply with “all applicable Commission Regulations under the Natural Gas Act and particularly the general terms and conditions set forth in...Section 157.20 of such Regulations.” ECF Doc. 55-3, Page ID#907-908. None of those regulations mandated the immediate completion of eminent domain actions. Nothing in 15 U.S.C. §717 et. seq. conditions the validity of a certificate of public convenience and necessity upon the completion of eminent domain easement acquisitions. Indeed, § 717f(h) expressly indicates that eminent domain *may* be used to acquire rights of way “or other property, in addition to right-of-way” needed to construct and operate the natural gas facility.

To say it another way, the Landowners have cited no law – and the court has found none – standing for the proposition that a certificate of public convenience and necessity for the underground storage of natural gas is automatically invalidated because a certificate holder fails to pursue eminent domain acquisition of gas storage easements at or about the time it begins to store natural gas. The necessary conclusion from this analysis is that Columbia, while it undoubtedly should have completed the acquisition of storage easements, had the right – and indeed was obligated – to store natural gas in the Medina Storage Field not later than three years after the 1958 Certificate was issued. ECF Doc. 55-1, Page ID# 833, ¶ (C).

The question this case presents is whether Columbia's storage of natural gas in the Medina Storage Field without having condemned gas storage easements by eminent domain constitutes trespass. Also, the court must determine whether such conduct has unjustly enriched Columbia.

A. Trespass Claim

The Landowners all own residential lots in Medina County. Collectively, the Landowners' properties make up a little more than five acres of the approximate ten thousand acres of Columbia's Medina Storage Field.⁶ They contend Columbia "is storing and has stored natural gas" beneath their properties without their permission and before completing eminent domain proceedings." ECF Doc. 46, Page ID# 48. Plaintiffs do not allege Columbia ever trespassed on the surface of their properties in order to construct or operate the Medina Storage Field. Instead, they allege Columbia's stored natural gas indirectly entered the Clinton sandstone formation under their lands from remote injection sites. The Landowners assert that the "nearest wellheads are 800 feet from [their properties]." ECF Doc. 100, Page ID# 3473.

The court must apply Ohio law regarding trespass and unjust enrichment claims. *See Baker v. Chevron USA, Inc.*, 533 Fed. Appx. 509 (6th Cir., Aug. 2, 2013).

⁶ Columbia has pointed out that not all of the plaintiffs actually own land above the Medina Storage Field. For purposes of this order, the court will refer to all of the plaintiffs as "Landowners," but it will distinguish among the plaintiffs in its final disposition of the action.

And, because the Ohio Supreme Court decision in *Chance v. BP Chemicals, Inc.*, 77 Ohio St.3d 17 (1996) first recognized and defined an Ohio cause of action for subsurface trespass, the court must determine its applicability here. Columbia argues that *Chance* is fatal to the Landowners trespass and unjust enrichment claims as a matter of law under the undisputed facts. The Landowners contend that the Ohio Supreme Court expressly ruled that *Chance* is inapplicable to cases involving “oil and gas issues.” ECF Doc. 100, Page ID# 3476.

In *Chance*, the Ohio Supreme Court confronted a claim that BP Chemicals had trespassed upon plaintiff’s land by injecting hazardous wastes into a subsurface stratum at a remote location which eventually migrated to areas beneath plaintiff’s land. The Court began its analysis of the plaintiff’s trespass claim by defining their property rights. The Court rejected the ancient maxim that a property owner owns everything above and below the land to an indefinite extent, finding it incompatible with a modern understanding of land use and property ownership. The Court observed, “[O]wnership rights in today’s world are not so clear-cut as they were before the advent of... injection wells.” 77 Ohio St.3d at 23. The Court had earlier limited the air rights of landowners. In *Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39, 50 278 N.E. 2d 658, 664 (1972), the Supreme Court ruled: “We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above

him as he uses, but only so long as he uses it.” Id. (quoting *Hinman v. Pacific Air Transp.* 84 F.2d 755, 758 (9th Cir. 1936)).

Chance extended *Willoughby Hills* by concluding that a property owners’ subsurface rights also are not absolute: “[W]e find that there are also limitations on property owners’ subsurface rights. We therefore extend the reasoning of *Willoughby Hills*, that absolute ownership of air rights is a doctrine which ‘has no place in the modern world,’ to apply as well to ownership of subsurface rights.” 77 Ohio St.3d at 23. *Chance* held that the landowners in that action did “not enjoy absolute ownership of the waters of the state below their properties, and therefore... their subsurface ownership rights are limited.” *Id.* *Chance* plainly stands for the proposition that property owners in the current age do not enjoy “absolute ownership” of the subsurface strata beneath their properties.

Chance further held, under the “unique facts” involved there, the landowners’ “subsurface rights in their properties include[d] the right to exclude invasions of the subsurface property that actually interfere[d] with [the owners’] reasonable and foreseeable use of the subsurface.” *Id.* at 23-24. If a landowner’s right to exclude a subsurface invader is limited to those portions of the subsurface the landowner actually uses or foreseeably may use, then *Chance* should also stand for the converse proposition that one has no right to exclude a subsurface “invader” from portions of the subsurface that one does not use. An invader’s use of subsurface strata not used by the surface owners would not be unlawful. That is precisely

how *Chance* was characterized in the district court's summary judgment ruling in *Baker v. Chevron USA Inc.*, 2009 U.S. Dist. LEXIS 110524 (S.D. Ohio, Nov. 4, 2009), *aff'd*. 533 Fed. Appx. 509 (6th Cir., Aug. 2, 2013): "In the end, the *Chance* court held that plaintiff's had not demonstrated an *unlawful* entry on their properties by BP." *Id.* at *27 (emphasis added).

Here, the facts are undisputed that the Landowners have never used and had no plans to use the Clinton sandstone formation beneath their properties. Applying *Chance* requires the conclusion that Columbia's injection of its natural gas into that formation was not trespass because the Landowners had no right to exclude Columbia from using that stratum. Moreover, Columbia's possession of the 1958 and 1987 Certificates – which both authorized and required it to store natural gas in the Medina Storage Field – buttresses that conclusion. Much like BP Chemicals in *Chance*, Columbia received governmental permission to engage in the very activities about which the Landowners now complain.

Chance also recognized a trespass claim when the surface landowner could demonstrate that the subsurface invasion had caused actual physical damage to the property. Speculative stigma damages to real estate values allegedly arising from the presence of the subsurface hazardous waste injectate, however, were found insufficient to establish the actual damages needed to support a trespass claim. Because the plaintiffs in *Chance* failed to show actual physical damages to their properties or actual interference with the reasonable and foreseeable use thereof, they failed,

as a matter of law, to establish an unlawful entry onto – or trespass upon – their properties. The Supreme Court concluded the trial court should have entered a directed verdict in favor of BP. *Chance*, 77 Ohio St.3d at 27-28.

Chance has been applied to other state and federal indirect trespass claims. In *Lueke v. Union Oil Co. of Cal.*, 2000 Ohio App. LEXIS 4845 (6th Dist.), the Ohio Court of Appeals affirmed summary judgment against a landowner who alleged gasoline contamination of a groundwater well from a nearby leaking underground storage tank, holding:

In cases of indirect trespass, damages are not presumed, and actual damages in the form of “physical damages or interference with use” must be shown before the person suing for trespass can prevail. [*Chance*] at 26-28. Furthermore, the damages must be “substantial.” *Williams v. Oeder* (1995), 103 Ohio App.3d 333, 339; and *Brown v. County Commissioners of Scioto County* (1993), 87 Ohio App.3d 704, 717. See, also, *Prosser, Law of Torts* (5 Ed.1984) 67-69, and 82-83, Section 13.

Id. at *7. Summary judgment was affirmed because Lueke had not suffered a substantial or unreasonable interference with her use and enjoyment of the property. *Id.* at *8.

In *Baker v. Chevron USA Inc.*, 533 Fed. Appx. 509 (6th Cir., Aug. 2, 2013), the Sixth Circuit applied *Chance* to an indirect trespass claim involving a subsurface liquid waste plume from a petroleum

refinery that migrated to within fifty to seventy feet of the surface of plaintiffs' properties. The Sixth Circuit upheld the district court's application of *Chance* to the facts of *Baker* and affirmed the grant of summary judgment against the property owners:

We agree with Chevron that plaintiffs have to show something more than the "mere detection" of soil vapors on their properties to establish the physical damage prong of an indirect trespass claim. Under *Chance*, plaintiffs must produce evidence showing that (1) the plume or its soil vapors have invaded their property, and (2) that invasion has caused either substantial physical damage to the land or substantial interference with their reasonable and foreseeable use of the land. These elements are plainly apparent in *Chance* because, as the court explained, even if it assumed that BP's injectate invaded the plaintiffs' properties, the plaintiffs were still required to show that the invasion physically damaged the property or interfered with their use and enjoyment of the property. *Chance*, 670 N.E.2d at 993; see also *Rini v. Dyer*, No. 07CA3180, 2008 Ohio 4172, 2008 WL 3824790, *5 (2008) (unpublished) ("[W]here property owners are relying on a theory of "indirect" trespass, there is no presumption of damages.") (quoting 88 Ohio Jur. 3d *Trespass* § 19); *Ramirez v. Akzo Nobel Coatings, Inc.*, 153 Ohio App.3d 115, 2003 Ohio 2859, 791 N.E.2d 1031, 1034 n.2 (Ohio Ct. App. 2003).

Id. at 522-523.

Here, the Landowners rely on *Chance* to argue that “Ohio recognizes underground trespass as a distinct tort with distinct mechanics to award damages,” but then insist that the court must not actually apply *Chance*. ECF Doc. 100, Page ID# 3478. The Landowners assert that they have cited *Chance* “for its dicta definition of trespass, but not its applicability to the case at bar.” Id. at Page ID# 3477, n.3. Instead, the Landowners argue the court should use the definition of trespass found in *Apel v. Katz*, 83 Ohio St.3d 11, 19, 697 N.E.2d 600 (1998). But the Landowners’ brief neglected to point out that *Apel* relied in part on *Chance* for the elements of a trespass claim.

The Landowners assert that different legal tests should determine subsurface trespasses claims arising from the lateral migration of injected wastes or chemicals as compared to trespass claims resulting from injected natural gas. This court concludes that such a distinction does not exist. Trespass is, by definition, an unapproved entry upon the land of another. And the Ohio Supreme Court has made it clear that subsurface trespasses are not actionable unless the invaded landowner can prove actual damage to the property or actual interference with the actual or foreseeable use of the land.

In recognition of their lack of actual damage evidence, the Landowners invoke *Pearl v. Pic Walsh Freight Co.*, 112 Ohio App.11, 12, 168 N.E.2d 571, 572 (1960) for the proposition that Columbia’s alleged trespass at least warrants nominal damages. The hope is that nominal damages would provide a foothold for a jury’s consideration of punitive damages. However, in

Pearl nominal damages were presumed and awarded against a defendant who stored trucks and trailers on plaintiff's property without permission and despite plaintiff's demands. The presumption of nominal damages for a *surface* trespass is not the issue presented in this case. And, as the Sixth Circuit recognized in *Baker v. Chevron USA Inc.*, "where property owners are relying on a theory of 'indirect' trespass, there is no presumption of damages." 533 Fed. Appx. at 523. As a result, nominal damages cannot be presumed here. Further, this court cannot find that the appeals court decision in *Pearl* – which predated *Chance* by thirty years – somehow takes precedence over *Chance*. *Pearl*, decided long before a cause of action for subsurface had been recognized in Ohio, is simply not pertinent here.

The Landowners also rely on *Bowman v. Columbia Gas Transmission*, 850 F.2d 692, 1988 U.S. App. LEXIS 9229 (6th Cir., July 6, 1988), in which an indirect gas-storage trespass claim was permitted to go to trial, resulting in an award of \$8,300 in compensatory damages and \$30,000 in punitive damages. However, *Bowman* provides little guidance on the validity of the Landowners' trespass claim. First, the Sixth Circuit expressly stated that it could not consider Columbia's argument that its conduct did not constitute a trespass under Ohio law because Columbia had not preserved the issue for appeal. *Id.* at *5. . Moreover, because *Bowman* was decided before *Chance*, neither the district court nor the Sixth Circuit had the opportunity to consider the landowner's trespass claim in light of *Chance*. Finally, *Bowman* can also be distinguished because the Bowmans proved

that Columbia's storage of gas interfered with their intended use of their land; they had contracted with a third party for the drilling of a well on their property. In contrast, the undisputed Rule 56 evidence in this case demonstrates that none of the Landowners had ever attempted or intended to use the subsurface areas of their property where Columbia stored gas. *See* ECF Docs. 91 & 93.

In short, the court concludes that the holding of *Chance v. BP Chemicals, Inc.* and its progeny apply to the facts of this case.⁷ Thus, to recover on their indirect subsurface trespass claims, the Landowners are required to prove that their properties suffered actual physical damages or that Columbia interfered with the Landowners' actual or reasonably foreseeable uses of their properties. *Chance*, 77 Ohio St.3d at *27-28. It is undisputed that the Landowners cannot meet this evidentiary burden.

When asked to describe any damages to their properties, the Landowners have responded with speculations regarding possible stigma to their properties. For example, in responding to a discovery request concerning damages they had suffered due to

⁷ Columbia alternatively argues that, if the court does not apply the *Chance* holding, it should apply the negative rule of capture referenced in *Chance* and announced in *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 568 (Tex. 1968). Because the court has determined that the *Chance* holding does apply here, it is unnecessary for the court to consider whether the negative rule of capture announced in a non-controlling Texas case should apply to the facts of this case. The court declines to consider Columbia's alternative argument regarding the negative rule of capture.

Columbia's gas storage, Laurie and Richard Baatz stated:

OBJECTION: * * * Without waiving my objection, Columbia has been wrongfully storing natural gas beneath our property since 1958 without any notice or compensation being paid. Now that we know of the storage, we are required to disclose it on the Ohio Residential Property Disclosure form if we attempt to sell our home. The loss of value of our home will be detailed by an appraiser at the appropriate time in this case.

Further, there is a smell of gas when you enter our subdivision, which has been present for quite a while. This is particularly scary given that gas storage fields like ours have been known to erupt, just like the eruption in California in 2015. ECF Doc. 91-3 Page ID# 2461.

The Baatzes' response to a question regarding any alleged interference with their property is nearly identical. *Id.* The other Landowners' responses to these questions are similar or identical. ECF Doc. 91-3. But *Chance* expressly held that speculative stigma damages purportedly affecting property values are not recoverable on indirect trespass claims absent actual physical damage or actual interference with use. *Chance*, 77 Ohio St.3d at 27. In *Baker*, the Sixth Circuit upheld the district court's rejection of similar damage claims based on the odor of gasoline. The Sixth Circuit held that such an interference was either *de minimis* or irrational and, therefore, not compensable.

Baker 533 Fed. App'x. at 524, citing *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210 (2010). The Landowners have offered no evidence that any of them has suffered actual physical damages to their properties or any evidence that Columbia actually interfered with their use of their properties. This evidentiary void is fatal to their trespass claims.

It is worth noting that the Landowners sought just compensation for the same claims of stigma damage to their property values in the *Booth* condemnation case, relying upon expert testimony on property values. Because the claim of stigma damages is necessarily forward looking, to the extent the Landowners receive compensation for such damages in as a result of *Booth*, they would be foreclosed from seeking the same damages here.⁸

The Landowners also argue that they are entitled to storage fees for the time that Columbia stored gas under their properties for fifty-nine years. ECF Doc. 100, Page ID# 3485-3486. Plaintiffs cite *Beck v. N. Natural Gas Co.*, 170 F.3d 1018, a case from the Tenth Circuit which limited a landowners' damages to the fair rental value of the property⁹ for the period in question and later awarded attorney fees, expenses and costs pursuant to a Kansas statute. *Beck*, 170 F.3d at 1021.

⁸ In Ohio, an injured party is entitled to only one satisfaction for his injuries. See *Seifert v. Burroughs*, 38 Ohio St. 3d 108, 110 (1988).

⁹ *Beck* resulted in an award of \$100.00 per acre as the fair rental value for the period in question. Attorneys' fees, costs and expenses were later assessed pursuant to Kan. Stat. Ann. § 55-1210(c)(3).

Beck is inapplicable here. Even if the court were determining just compensation for a property taking in this case (rather than in *Booth*),¹⁰ it would be required to apply Ohio law. *See Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992). Because *Beck* applied Kansas law and awarded damages, in part, based on a Kansas statute, it cannot govern trespass damages in this case.

The undisputed Rule 56 evidence is that each of the Landowners acquired their property after Columbia began storing gas in the Medina Storage Field. See ECF Doc. 93-1, Page ID# 3116.¹¹ It is also undisputed that none of the Landowners knew of Columbia's gas storage operations until September 2013 when Columbia sent them letters offering to acquire easements by contract prior to commencing condemnation proceedings. It is undisputed that none of the Landowners has used the subsurface formation in which the gas is stored. The Landowners invoke *U.S. v. Jordan*, 186 F.2d 803, 808 (6th Cir. 1951) for the proposition that they acquired a right to sue for trespass from their predecessors in interest. *Jordan* does not resolve the fundamental problem with the Landowners' trespass claims. Even if the principles of *Jordan* were applicable, that case decides an issue that the court need not reach here. *Jordan* involved a

¹⁰ As already explained, just compensation for Columbia's taking will be determined in the *Booth* case.

¹¹ The earliest purchase of the relevant land occurred in 1991, long after Columbia allegedly began storing gas in 1959.

landowner's claim for physical damages to timber on leased property and after an express assignment of rights by a previous owner. *Jordan* does nothing to undercut the *Chance* requirement that there must be actual physical damage or actual interference with use before a subsurface trespass claim can be actionable. Further, *Jordan* did not involve an allegation of subsurface trespass. Here, there is no evidence that any predecessor owner had suffered any actual damages or experienced such interference. As a result, there is no basis for concluding the Landowners acquired any actionable trespass claim upon the acquisition of their properties.

The application of *Chance* and its progeny leads to the inescapable conclusion that Columbia is entitled to summary judgment as a matter of law on the Landowners' trespass claims because they have failed to show any physical damage or interference with the use of their properties and because Columbia was required to operate the Medina Storage Field under federal law.

B. Unjust Enrichment Claim

The Landowners' Count Two unjust enrichment claim is the only other cause of action remaining. See ECF Docs. 46, Page ID#749 and 58. The unjust enrichment claim appears to rest on two theories: (1) that it was unjust for Columbia to *use* the Clinton sandstone formation beneath the Landowners' properties without having first obtained gas storage easements from those who owned the surface lots above; and (2) that Columbia has been unjustly enriched by being able to keep money it would have

paid as just compensation after acquiring easements by eminent domain. Under the first theory, the Landowners reason that Columbia should be required to disgorge the profits earned on the gas it stored before it had the right to do so. Alternatively, they argue Columbia should be required to pay the Landowners what Columbia would have paid in storage fees from 1959 to the date it pays just compensation. ECF Doc. 100, Page ID# 3486. The second theory involves the implicit contention that Columbia should be required to provide restitution for the unpaid just compensation amounts plus interest from the time the property was first taken by physical occupation in 1959.

The parties do not agree on when Columbia's "taking" of the Clinton sandstone formation for the Medina Storage Field occurred. The court must determine this predicate issue because Ohio law requires the person seeking unjust enrichment recovery to prove that he or she conferred a benefit upon the party from whom relief is sought. In *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278 (2005), the Ohio Supreme Court defined unjust enrichment and the restitution-based remedy that may be sought from one who has been unjustly enriched:

Unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another," *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 11 O.O. 221, 14 N.E.2d 923, while restitution is the "common-law remedy designed to prevent one from retaining property to which he is not justly

entitled,” *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 256, 2 O.O.2d 85, 141 N.E.2d 465.

To establish a claim for restitution, therefore, a party must demonstrate “(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (“unjust enrichment”).” *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 12 OBR 246, 465 N.E.2d 1298.

As this court has stated, the purpose of such claims “is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant.” *Hughes v. Oberholtzer* (1954), 162 Ohio St. 330, 335, 55 O.O. 199, 123 N.E.2d 393.

Id. at 286. *See also Arcelor Mittal Cleveland, Inc. v. Jewell Coke Co., L.P.*, 750 F. Supp. 2d 839, 849 (N.D. Oh. 2010)(“To succeed on a claim for unjust enrichment, a plaintiff must prove (1) that a benefit was conferred by the plaintiff on the defendant; (2) the defendant’s knowledge of the benefit; and (3) the improper retention of the benefit.”) Thus, in order to sue for unjust enrichment, the claimant must have been the one who conferred the benefit. *Hull v. Hartley*, 2009-Ohio-88, at ¶ 13 (3rd Dist. App.)

The NGA authorizes the use of the right of eminent domain to acquire rights in properties when necessary

to accomplish the activities authorized in certificates of public convenience and necessity. Columbia argues that its “taking was effected as of the date it filed its condemnation” action in *Booth*. ECF Doc. 90, Page ID# 2433. But Columbia has undisputedly stored natural gas in the Medina Storage Field “since 1959.” ECF Doc. 100, Page ID# 3463, 3484. Thus, a “taking” to operate as required by the 1958 Certificate occurred then. *United States v. Dow*, 357 U.S. 17, 22, 2 L.Ed.2d 1109, 78 S.Ct. 1039 (1958). The court has already concluded that Columbia had a right – and indeed was obligated – to construct and operate the Medina Storage Field within three years of the issuance of the 1958 Certificate. Page 8, *supra*. The court further concludes that Columbia’s taking occurred when it occupied the Clinton sandstone formation for the Medina Storage Field in 1959.

Columbia’s government-sanctioned taking of the Clinton sandstone formation for the Medina Storage Field gave rise to an obligation to pay just compensation in 1959. “The owner at the time the Government takes possession ‘rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.’” *Dow*, 357 U.S. at 22, citing *23 Tracts of Land v. United States*, 177 F.2d 967, 970 (6th Cir. 1949). Despite taking the Clinton sandstone formation beneath the Landowners’ properties in 1959, Columbia never paid the then-owners just compensation. And the former owners, being unaware of the taking, never commenced inverse condemnation actions. Those who owned the Landowners’ properties in 1959 had claims to recover just compensation. The

Landowners, having no interest in the property at the time of the taking, did not. *Dow*, 357 U.S. at 22.

Because Columbia never instituted condemnation proceedings until it asserted the counterclaim in *Booth*, it never acquired title to gas storage easements, despite its physical occupation of the Clinton sandstone formation in 1959. *Dow*, 357 U.S. at 21-22 (citing *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, 43 S.Ct. 442, 67 L.Ed. 809 (1923)). However, title for the easements will pass upon completion of the eminent domain process in *Booth*. Columbia will be required to pay just compensation in order to acquire the gas storage easements. Columbia acknowledges that it must obtain the easements – legal title – to the Clinton sandstone formation in order to have the authority to prevent others from interfering with its stored natural gas. ECF Doc. 90, Page ID#2429, n.4.

Given the foregoing, the necessary question presented is whether the Landowners have standing to assert an unjust enrichment claim arising from Columbia's 1959 taking. To do so, *they* must have conferred a benefit upon Columbia. They assert that the benefit they conferred was permitting Columbia to use the Clinton sandstone formation beneath their properties for natural gas storage. This is a doubtful proposition inasmuch as Columbia's taking occurred in 1959 and the earliest any of the Landowners' acquired their property was 1990. Columbia challenges the Landowners' contention that they conferred a benefit upon Columbia, not based on their lack of ownership in 1959 when Columbia's taking occurred, but upon its argument that the Landowners do not own the Clinton

sandstone formation because they did not use it.¹² ECF Doc. 90, Page ID# 2427, 2429. However, by instituting *Booth*, Columbia has effectively conceded the issue of whether the Landowners have *some* interest in the Clinton sandstone formation, notwithstanding its attempt to argue that it has made no such concession. Id. Page ID# 2429, n.4.

Most of Columbia's motion for summary judgment and reply memorandum deals with the Landowners' trespass claim; Columbia barely mentions the unjust enrichment claim, often conflating the trespass and unjust enrichment claims as "tort claims." But "it is well-settled that claims for unjust enrichment sound in contract rather than tort." *See Dodson v. Maines*, 2012-Ohio-2548, ¶¶ 37-38, citing *Complete Gen. Constr. Co. v. Koker Drilling Co.*, 10th Dist. No. 02AP-63, 2002 Ohio 4778, ¶ 28, n.1. Columbia urges the court to extend the holding of *Chance v. BP Chemicals* to not only preclude the Landowners' trespass claim but also their unjust enrichment claim. ECF Doc. 90, Page ID# 2428-2429. Columbia reasons that, because the Landowners have never used the Clinton sandstone formation, they had no ownership right in that stratum at all. And if they have no rights in that formation, then they cannot have conferred a benefit upon Columbia by "allowing" its storage of natural gas there.

As discussed above, *Chance* plainly held that a landowner's rights in the subsurface strata beneath his property are not "absolute." The landowner has no

¹² As is more fully discussed above in connection with Columbia's trespass argument.

right to exclude another from subsurface areas the landowner does not use. But *Chance* never held that a surface owner has *no* rights in the subsurface strata. Indeed, the fee simple owner of land owns all of the legal title to the property. The Supreme Court's use of the terms "limited" and "not absolute" in *Chance* signifies that some residual rights in the subsurface strata belong to the surface landowner. Columbia's effort to acquire gas storage easements constitute an admission of this conclusion.

Here, the Landowners argue that Columbia has been unjustly enriched by storing natural gas beneath their properties "since 1959" without having to pay storage fees or even paying just compensation for the taking. The Landowners seek an order requiring Columbia to disgorge the profits it earned on the gas stored beneath their properties. Alternatively, they seek an order requiring Columbia to pay to them what it would have been required to pay for gas storage fees since 1959.

Columbia argues that the Landowners, on the basis of an unjust enrichment claim, are not entitled to disgorgement of Columbia's gross revenues for the gas that was stored on their properties. Relying on *Beck v. N. Nat. Gas Co.*, 170 F.3d 1018, 1024 (10th Cir. 1999), Columbia argues that the Landowners did not confer upon Columbia the fees Columbia collected for natural gas storage because under no circumstances would the Landowners have been entitled to such fees, even if they had granted storage easement rights to Columbia. Columbia argues that, at most, the only economic benefit that it allegedly retained that arguably

belonged to the Landowners was the amount that it could have been required to pay for gas storage easements.¹³ ECF Doc. 90, Page ID# 2434-2435.

In addition to its conclusion that the Landowners conferred no benefit during times their properties were owned by predecessors, the court also concludes that the Landowners are not entitled to Columbia's gross revenues or profits realized from storing gas in the Clinton sandstone formation under their properties even for the periods the Landowners have owned their properties. In *Beck*, case law cited by the Landowners, the court recognized that the landowners had "offered nothing to show that the profits earned by [defendant] could reasonably be considered a benefit conferred upon [defendant] by them." Thus, they were not entitled to defendant's profits on their unjust enrichment claim. Rather, the court held that the proper measure of damages was the fair rental value of the property. *Beck* 170 F.3d at 1024. Similarly, the Landowners here cannot show that Columbia's natural gas storage revenues were derived from any benefit the Landowners conferred; the Landowners have no claim to such revenues or profits.

A recovery for unjust enrichment, or quasi-contract, requires a plaintiff to prove by a preponderance of the evidence that "(1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust for him

¹³ Columbia points out that not all of the plaintiffs are actually landowners above the Medina Storage Field.

to retain that benefit without payment.” *Ross-Co Red Mix Co., Inc. v. Steveco, Inc.*, 4th Dist. No. 95CA3, 1996 Ohio App. LEXIS 437, 1996 WL 54174, *3 (Feb. 6, 1996), citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298 (1984).

The Landowners’ alternative argument is that Columbia benefitted by an amount equal to what the Landowners would have received in rental storage fees for fifty-nine years. ECF Doc. 100, Page ID# 3485-3486. Columbia disagrees for two reasons. First, it contends that damages on an unjust enrichment claim are limited by the six year statute of limitations in Ohio Rev. Code § 2305.07. Columbia argues that the Landowners’ damages are limited to the recovery of any benefits the Landowners conferred and Columbia unjustly retained during the six-year period prior to the filing of this action on March 5, 2014. And Columbia argues that the filing of the condemnation claim in *Booth* cuts off any claim for unjust enrichment damages allegedly accruing after that date, April 22, 2014. Second, Columbia argues that the award of just compensation in *Booth* will represent “the actual market value of the storage right” ECF Doc. 90, Page ID#2434, n.9; ECF Doc. 105, Page ID# 3547, n.7. Columbia contends that, at most, the Landowners could have a right to make an unjust enrichment claim for interest on the funds Columbia held rather than paying to the Landowners as just compensation for storage easements. Id.

For the reasons already expressed, the Landowners have no claim to recover gas storage fees for periods before the Landowners acquired their properties. Any

benefit conferred upon Columbia for gas storage during those years did not belong to the Landowners, and the Landowners have not cited any authority holding otherwise.¹⁴ In addition, the court concludes that the Landowners' claim is governed by the six-year statute of limitations in O.R.C. § 2305.07. At most, the Landowners can seek unjust enrichment damages for the period from March 5, 2008 through the date of the judgment rendered herein.

The court agrees with Columbia that when the Landowners receive just compensation as a result of *Booth*, they will have been compensated for the storage rights Columbia has utilized since the Landowners acquired their properties. In addition, the just compensation award will compensate them for the transfer of legal title to the gas storage easements Columbia is taking by eminent domain pursuant to the NGA.

The court also notes that the *Booth* Commission has recommended that Columbia pay \$250 per lot or \$450 per double lot for permanent easements on the Landowners' properties. The Landowners have not filed any objection to the commission chairman's report. The

¹⁴ The Landowners invoke *State v. Jordan*, 186 F.2d 803, 808 (6th Cir. 1951), a case the court has distinguished above. The Landowners also cite R.C. § 5302.04 which states that a conveyance of property includes all rights, easements, privileges and appurtenances, unless stated otherwise. They cite O.R.C. § 5301.56 concerning the abandonment and preservation of mineral interests, also inapplicable here. The Landowners cite no authority showing they can assert an unjust enrichment claims related to property that they did not own.

just compensation for these permanent easements necessarily encompasses all rental fee obligations Columbia arguably could have owed the Landowners on an unjust enrichment basis. However, nothing in the Commission's recommendation has captured the time value of these funds dating back to March 5, 2008, the date six years prior to the filing of the instant action.

Because the court does not believe there will be any genuine dispute of material facts concerning the time value of the per-lot just compensation payments, the court will order the Landowners and Columbia to confer and submit an agreed calculation of interest due on said payments. For reference, the parties should review and consider the potential application of the interest calculation model adopted by the court in *Hardy Storage Company, LLC v. Property Interests Necessary to Conduct Gas Storage Operations, etc.*, No. 2:07CV5, 2009 WL 689054 (N.D. WV, March 9, 2009). Upon submission of an agreed interest calculation, the court will entertain a motion to: (i) either apply said interest to the judgment to be rendered in *Booth* (which would necessarily mean that there were no further damages to be awarded on the Landowners' unjust enrichment claim in this action, resulting in summary judgment for Columbia on said claim) or (ii) to render summary judgment in favor of the Landowners on their unjust enrichment claim in this action for the amount of interest due.

In summary, the court concludes that the Landowners have no standing to obtain unjust enrichment damages for benefits allegedly retained by

Columbia during times before the Landowners acquired their properties. The court further concludes that the payment of just compensation in *Booth* will fully compensate the Landowners for any unjust enrichment they may have conferred upon Columbia. And the court will direct the parties to agree on an amount of prejudgment interest that Columbia should be required to pay on the just compensation amount for the period March 5, 2008 through the date just compensation is paid.

C. Punitive Damages

Columbia contends that it is entitled to summary judgment on the Landowners' demand for punitive damages. Columbia argues that punitive damages are only available with tort claims and that there is no evidence of actual malice in this case. The Landowners argue that punitive damages are permitted if even nominal damages are awarded on a trespass claim. ECF 100, Page ID# 3488. The Landowners also cite *Bowman*, in which the Sixth Circuit affirmed an award of punitive damages associated with a trespass similar to this case.

Under Ohio law, the general rule is that punitive damages may only be recovered in actions involving intentional torts. See *Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 2005 Ohio 5619, 844 N.E.2d 858, ¶ 18 (3d Dist.) ("[P]unitive damages are generally not recoverable in an action for breach of contract."), citing *Digital & Analog Design Corp. v. N. Supply Co.*, 44 Ohio St.3d 36, 45-46, 540 N.E.2d 1358 (1989). However, where the breach of contract action is accompanied by a connected tort that is fraudulent, wanton, reckless,

malicious, or oppressive, punitive damages may be appropriate. *Zlotnik* at ¶ 19. *See also Hofner v. Davis*, 111 Ohio App.3d 255, 259, 675 N.E.2d 1339 (6th Dist. 1996), and *Burns v. Prudential Sec., Inc.*, 167 Ohio App. 3d 809, 2006 Ohio 3550, 857 N.E.2d 621 (3rd Dist.).

In this case, the Landowners have failed to show physical damages or interference with their properties, and the court has concluded that Columbia is entitled to summary judgment on the Landowners' trespass claim. Accordingly, because the Landowners' only remaining claim is for unjust enrichment, they are not entitled to punitive damages. See *Nelson v. Motorists Mut. Ins. Co.*, 1st Dist. No. C-850841, 1986 Ohio App. LEXIS 8207, 1986 WL 9782, *1 (Sept. 10, 1986). “[I]t is well-settled that claims for unjust enrichment sound in contract rather than tort.” See *Dodson v. Maines*, 2012-Ohio-2548, ¶¶ 37-38, citing *Complete Gen. Constr. Co. v. Koker Drilling Co.*, 10th Dist. No. 02AP-63, 2002 Ohio 4778, ¶ 28, n.1.

Bowman does not compel a different result. As discussed above, *Bowman* was decided before *Chance*. The Sixth Circuit did not consider whether plaintiffs had asserted a valid claim for trespass under Ohio law because that issue had not been preserved for appeal. *Bowman*, 1988 U.S. App. LEXIS at *4. Moreover, application of *Bowman* is inapposite because it involved evidence that the storage of gas actually interfered with the use of plaintiff's land. Here, plaintiffs have shown no such interference. And finally, the district judge who presided over *Bowman* later determined that he had erred in that decision. *See*

Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, etc., 747 F. Supp. 401, 404 (N.D. Oh. 1990). Consequently, because the Landowners have not asserted a valid tort claim, punitive damages are unavailable in this case.

D. Preemption

Finally, the court declines Columbia's invitation to revisit its ruling on the issue of preemption. The question of preemption was fully considered and addressed in this court's order on Columbia's motion to dismiss. ECF Doc. 58. Columbia has not identified any conflict between the NGA and Ohio law that makes it impossible for Columbia to comply with both under the facts of this case. It is not necessary to reconsider preemption at this time.

VI. Conclusion

The court makes the following orders:

1. Columbia's motion for summary judgment on Count One of plaintiffs' second amended complaint is GRANTED.
2. The Landowners' motion for partial summary judgment on Count One of their complaint and on their request for a determination that Columbia's trespass was malicious is DENIED.
3. On or before 4:00 p.m. on February 26, 2018, the parties shall submit an agreed calculation of the amount of prejudgment interest that would be due on the just compensation amounts determined by the

Booth Commission from May 5, 2008 through the date of payment of the just compensation amounts.¹⁵

4. On or before 4:00 p.m. on February 26, 2018, the parties shall file a joint listing of the plaintiffs in this action who own properties located above the Certificated Medina Storage Field established by the 1987 Certificate. Said filing shall also separately list those plaintiffs who do not own property above the Medina Storage Field.

5. On or before 4:00 p.m. on February 26, 2018, the parties shall file either a joint position statement or separate position statements on whether the interest amount agreed to as required in paragraph 3 above shall be added to the judgment to be entered in *Booth* or shall be awarded as damages on plaintiffs' Count Two unjust enrichment claim in this action. Should the latter approach be taken, the court will enter summary judgment on the unjust enrichment claim in favor of those plaintiffs identified in the list submitted pursuant to paragraph 4 above who own land above the Medina Storage Field.

6. The court DEFERS ruling on Columbia's motion for summary judgment on the Count Two unjust enrichment claim until the foregoing requirements are accomplished.

¹⁵ By submitting an agreed calculation, the parties will not waive any rights to appeal they would otherwise have.

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IT IS SO ORDERED.

Dated: February 14, 2018

/s/Thomas M. Parker
Thomas M. Parker
United States Magistrate Judge