

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

JUN 09 2011

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

JAMES W. McCORMACK, CLERK  
By: *K. Sparks* DEP CLERK

**STEPHEN HEARN, on behalf of himself  
and all others similarly situated**

**PLAINTIFF**

**v.**

**Case No. 4 • 11 - CV - 0 474 JLH**

**BHP BILLITON PETROLEUM  
(ARKANSAS) INC.; BHP BILLITON  
PETROLEUM (FAYETTEVILLE) LLC;  
CHESAPEAKE OPERATING, INC.; and  
CLARITA OPERATING, LLC**

This case assigned to District Judge *Holmes*  
and to Magistrate Judge *Rearney*

**DEFENDANTS**

**NOTICE OF REMOVAL**

To the honorable judges of the United States District Court for the Eastern District of Arkansas in the Western Division, Defendants BHP Billiton Petroleum (Arkansas) Inc. ("BHP Arkansas"), BHP Billiton Petroleum (Fayetteville) LLC ("BHP Fayetteville"), Clarita Operating, LLC ("Clarita Operating") and Chesapeake Operating, Inc. ("Chesapeake Operating") (collectively the "Removing Parties" or "Defendants"), hereby remove this action from the Circuit Court of Faulkner County, Arkansas, 2nd Division, to this Court pursuant to 28 U.S.C. §§ 1332(a), 1441, and 1446, on the following grounds:

**The Complaint**

1. On May 24, 2011, the above-styled class action complaint was filed, commencing an action in the Circuit Court of Faulkner County, Arkansas (Case No. 23CV-11-488). Pursuant to 28 U.S.C. § 1446(a), a copy of the Class Action Complaint is attached hereto as Exhibit 1 ("Complaint").

2. The first date upon which Defendant Clarita Operating received a copy of the Complaint was May 25, 2011, when Clarita Operating was served with the Complaint and a summons from the State Court. A copy of the summons is attached hereto as Exhibit 2. Clarita has filed an answer and a copy of that answer is attached hereto as Exhibit 3.

3. The first date upon which Defendant Chesapeake Operating received a copy of the Complaint was May 26, 2011, when Chesapeake Operating was served with the Complaint and a summons from the State Court. A copy of the summons is attached hereto as Exhibit 4. At this time, Chesapeake Operating has not filed an answer.

4. The first date upon which Defendant BHP Arkansas received a copy of the Complaint was May 26, 2011, when BHP Arkansas was served with the Complaint and a summons from the State Court. A copy of the summons is attached hereto as Exhibit 5. At this time, BHP Arkansas has not filed an answer.

5. The first date upon which Defendant BHP Fayetteville received a copy of the Complaint was May 26, 2011, when BHP Fayetteville was served with the Complaint and a summons from the State Court. A copy of the summons is attached hereto as Exhibit 6. At this time, BHP Fayetteville has not filed an answer.

6. The Complaint alleges five claims against the four named defendants: public nuisance; private nuisance; absolute liability; negligence; and trespass.

7. Plaintiff brings this action as a purported class action, seeking to represent themselves and the following class:

All residents of the Counties Conway, Van Buren, Faulkner, Cleburne, Perry, and White Counties within the period of time which Defendants have owned and operated the Chesapeake Well and the Clarit[]a Well. Excluded from the Class are Defendants' directors, officers, employees and agents, as well as the judicial officer presiding over this case and his immediate family members.

Complaint, ¶ 24. Plaintiff does not allege a class size, except alleging that 2010 census records "show that Faulkner County alone has a total population of over 100,000 people and the United States census showed that there were 31,882 households and 22,444 families residing in Faulkner County." Complaint, ¶ 27.

8. The Complaint's prayer for relief seeks damages jointly and severally against the Defendants "in an amount exceeding the minimum amount required for federal court in diversity of citizenship cases," punitive damages, litigation costs, attorney fees, prejudgment interest, "appropriate injunctive relief restraining Defendants from engaging in further conduct" and to "remediate the damages it has already caused . . . ."

### **Jurisdiction**

9. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332)(a):

The district courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between –

(A) citizens of different States;

. . . .

28 U.S.C. § 1332(a)(1). Pursuant to Plaintiff's allegations these requirements are satisfied because, as discussed further below, the matter in controversy in this civil action exceeds the sum or value of \$75,000 (considering all damages and equitable relief sought, exclusive of interest and costs), and there is diversity within the meaning of 28 U.S.C. § 1332(a)(1).

**Parties and Diversity**

10. This action involves complete diversity of citizenship in that, at the time of commencement of this action in Arkansas and at the time of removal:

a. Plaintiff Stephen Hearn was and still is a citizen of Faulkner County, State of Arkansas (see Complaint at ¶ 12);

b. Chesapeake Operating was and still is a citizen of the State of Oklahoma, as an Oklahoma corporation with its principal place of business in Oklahoma;

c. Clarita Operating was and still is a citizen of the States of Oklahoma and Texas and a citizen of Canada, as an Arkansas limited liability company (LLC). As an LLC, Clarita Operating's citizenship is determined by that of its members, not its state of organization. See *One Point Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007). At the time of commencement of this action and time of removal, its members were and still are:

i. True Energy Services, LLC, an Oklahoma LLC whose members at time of commencement of this action and time of removal were and still are:

1. Kevin Cantrell, a citizen of Oklahoma;

2. Michael Feezel, a citizen of Oklahoma;
  3. Michael Thompson, a citizen of Oklahoma; and
  4. Robert Feezel, a citizen of Oklahoma;
- ii. Liddell Clarita Operating, LLC, an Oklahoma LLC whose sole member at time of commencement of this action and time of removal was and still is:
1. Mike Liddell, a citizen of Oklahoma;
- iii. Michael Cross, a citizen of Oklahoma;
- iv. Tomahawk Services, LLC, an Oklahoma LLC whose sole member at time of commencement of this action and time of removal was and still is:
1. Reese Travis, a citizen of Oklahoma;
- v. Scipio Investment I, LLC, an Oklahoma LLC whose sole member at time of commencement of this action and time of removal was and still is:
1. Cale Coulter, a citizen of Oklahoma;
- vi. Bob Hartsock, a citizen of Oklahoma;
- vii. Judi Hartsock, a citizen of Oklahoma;
- viii. Jake Hartsock, a citizen of Oklahoma;
- ix. Kourtney Hartsock, a citizen of Oklahoma;
- x. Brian Hartsock, a citizen of Oklahoma;
- xi. Sarah Hartsock, a citizen of Oklahoma;
- xii. Blake Hartsock, a citizen of Oklahoma;

xiii. Marci Hartsock, a citizen of Oklahoma;

xiv. Mark Weems, a citizen of Oklahoma who was and is d/b/a Live Oak Energy, LLC which was at the time of commencement of this action and time of removal a cancelled LLC whose sole member was Mark Weems;

xv. Petra Solidus, LLC, a Texas LLC whose sole member at the time of commencement of this action and time of removal was and is:

1. Larry Keller, a citizen of Texas;

xvi. Chicota Energy, LLC, a Texas LLC whose sole member at the time of commencement of this action and time of removal was and is:

1. John Chadwick, a citizen of Texas

xvii. KMR Energy Corporation, a Canada corporation whose principal place of business was and is British Columbia, and has no business in the United States;

xviii. David House, a citizen of Oklahoma;

xix. Victor W. Pryor, Jr., a citizen of Oklahoma; and

xx. Pogue Family Revocable Trust, an Oklahoma trust whose:

1. Trustees at time of commencement of this action and time of removal are Randal and Shirley Pogue and are citizens of Oklahoma;

2. Grantor at time of commencement of this action and time of removal are Randal and Shirley Pogue and are citizens of Oklahoma;

3. Beneficiaries at time of commencement of this action and time of removal were:

- a. Todd Kemp Pogue, a citizen of Iowa;
- b. Rene Bailey, a citizen of Texas;
- c. Dawna Sherrel, a citizen of Oklahoma;
- d. Rina Elmburg, a citizen of Oklahoma;
- e. Harold Kent Pogue, a citizen of Oklahoma;
- and
- f. Bodie Marion, a citizen of Oklahoma.

d. BHP Fayetteville, was and still is a citizen of the States of Delaware and Texas. As a Delaware limited liability company (LLC), BHP Fayetteville's citizenship is determined by that of its members, not its state of organization. *See One Point Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007). At the time of commencement of this action and time of removal, its members were and still are:

- i. BHP Billiton Petroleum (Arkansas Holdings) Inc. a Delaware corporation with its principle place of business in Texas.

11. BHP Arkansas was and still is a citizen of the State of Arkansas as an Arkansas corporation with its principle place of business in Arkansas.

12. Stephen Hearn does not share the same state of citizenship of any of the named defendants except for BHP Arkansas. Although BHP Arkansas's presence as a defendant would otherwise defeat removal for diversity jurisdiction under 28 U.S.C. § 1332(a)(1), the named defendants specifically allege that it has been fraudulently joined for the sole purpose of defeating diversity jurisdiction; its citizenship does not defeat the complete diversity of citizenship between the other named defendants and the plaintiff. The diversity requirements of 28 U.S.C. § 1332(a)(1) are met.

**Fraudulent Joinder of BHP Arkansas**

13. Defendant BHP Arkansas was fraudulently joined. Its citizenship should not defeat the complete diversity that otherwise exists and satisfies 28 U.S.C. § 1332(a)(1) for the sole purpose of preventing removal to this court.

14. Plaintiff's claims against BHP Arkansas lack any basis—and certainly no reasonable basis—in law or fact.

15. The only factual allegation that BHP Arkansas had any involvement in this case comes at Paragraph 14 of the Complaint. There Plaintiff alleges that the "BHP entities," collectively meaning BHP Arkansas and BHP Fayetteville, "recently purchased all of Chesapeake's assets and interests in the Fayetteville Shale . . . ." See Complaint, ¶ 14. Every allegation after that generically refers to "defendants."

16. Each claim necessarily requires a showing that BHP Arkansas had some ownership interest or operational involvement in one of the two wells at issue in this lawsuit. Each legal claim rests on the factual allegation that



“Defendants” have, through “drilling operations,” caused earthquakes. *See, e.g.,* Complaint, ¶¶ 30, 31.

17. In reality, BHP Arkansas has never owned nor had any involvement in operating either the Clarita Well or the Chesapeake Well, neither when this action was commenced, when removed, nor at any other time. *See* Affidavit of Rod Skaufel, attached hereto as Exhibit 7. Thus, there is no basis in law or fact for any of Plaintiff’s claims against BHP Arkansas.

18. Nor does the Complaint show any real intent by the Plaintiff to seek judgment against BHP Arkansas or prosecute the claims against it. Instead, it is evident that Plaintiff simply added BHP Arkansas to the Complaint because its name is similar to BHP Fayetteville.

19. Other than at paragraph 13 of their Complaint where the Plaintiff specifically alleges BHP Arkansas’s citizenship and paragraph 14 where Plaintiff alleges that the BHP entities “recently purchased Chesapeake’s assets and interests in the Fayetteville Shale,” the Complaint says nothing about BHP Arkansas.

20. The Complaint’s allegations, other than the addition of paragraphs 13 and 14, adding the BHP entities in an attempt to destroy diversity, and switching out Plaintiff Hearn for Plaintiff Sheatsley at paragraph 12, and a few other adjustments, match verbatim those of a class action filed in Perry County that was removed and is now pending in this division and this district. *See Jacob Sheatsley v. Chesapeake Operating, Inc. and Clarita Operating, LLC*, Case No. 4:11-cv-00353-JLH. Even the typos are the same.

21. All factual allegations in the Complaint otherwise refer to “Defendants” generically, and this creates internal inaccuracies and inconsistencies showing that Plaintiff has either surmised incorrectly that BHP Arkansas had some role in this case or knew there was no basis and added it solely to prevent removal to federal court.

22. For example, at paragraph 8 the Complaint incorrectly alleges that the Arkansas Oil & Gas Commission entered an order on March 4, 2011 “requiring Defendants to ‘immediately cease all injection operations’” at the Clarita and Chesapeake Wells. In reality, that Order names only Chesapeake Operating and Clarita Operating. A later order by the AOGC specifically names BHP Fayetteville (*see* Exhibit 8, attached hereto) but not BHP Arkansas.

23. BHP Arkansas has thus been fraudulently joined and its citizenship does not defeat complete diversity that otherwise exists between the Plaintiff and Defendants BHP Fayetteville, Clarita Operating, and Chesapeake Operating for original jurisdiction under 28 U.S.C. § 1332(a)(1).

### **The Amount in Controversy**

24. In his Complaint, Plaintiff seeks an unspecified amount for general and special compensatory damages, stating only “an amount exceeding the minimum amount required for federal court in diversity of citizenship cases.” Complaint, Prayer for Relief at ¶ B.

25. For every resident of six Arkansas counties, which Plaintiff alleges include more than 100,000 in just one county, the Complaint seeks compensation for earthquake-related damage to the property of every resident,

as well as “annoyance, discomfort, and inconvenience,” lost peace of mind, business interruptions, and similar injuries.

26. Plaintiff further seeks punitive damages.

27. Plaintiff further seeks injunctive relief that stops Defendants from operating their injection wells and compels them to “remediate the damages it has already caused in favor of Plaintiff and the Class.” Complaint, Prayer for Relief.

28. The Plaintiff controls the amount in controversy. *Erwin v. Allied Van Lines, Inc.* 239 F.Supp 144 (W.D. Ark. 1965) citing 1 Moore’s Federal Practice, 2d Ed., p. 827, Sec. 0.91(a). In addition, in this class action, the Court may exercise subject matter jurisdiction over this matter as long as one named plaintiff satisfies the amount in controversy requirement. *See, e.g., Toller v. Sagamore Ins. Co.*, 558 F. Supp. 2d 924 (E.D. Ark. 2008) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) and discussing supplemental jurisdiction pursuant to 28 U.S.C. § 1367). In this case, the Plaintiff has alleged damage to personal and real property and economic loss from business interruption. See Complaint, Count IV Negligence ¶¶ 53(a) and (d). Additionally Plaintiff seeks punitive damages (See Complaint, ¶¶ 56) and injunctive relief to include “affirmative steps to remediate the damages it has already caused”. (See Complaint, Prayer for Relief at ¶ D). In this case, Plaintiff specifically seeks “an amount exceeding the minimum amount required for federal court in diversity of citizenship cases.” Complaint, Prayer

for Relief, at ¶ B. That prayer, in excess of the federal diversity amount of \$75,000, should determine the amount in controversy for removal.

29. The amount in controversy between Defendants and Plaintiff, exclusive of interest and costs, exceeds \$75,000. See Complaint, Prayer for Relief.

30. Because the Defendants BHP Fayetteville, Clarita Operating, and Chesapeake Operating are not citizens or residents of the State of Arkansas, either when this action was commenced or at the time of removal, and because Defendant BHP Arkansas has been fraudulently joined, removal to this Court is proper pursuant to 28 U.S.C. § 1441(a).

#### **Venue and Division Assignment**

31. Because the Complaint was filed and is currently pending in the Circuit Court of Faulkner County, Arkansas, this District is the proper venue for this action upon removal pursuant to 28 U.S.C. §§ 1441(a) and 1446(a). The Western Division is the proper division assignment for this action upon removal.

#### **Removal Procedure**

32. This Notice is timely filed pursuant to 28 U.S.C. §§ 1446(b).

33. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders are attached hereto. The following exhibits are attached hereto:

Ex. 1 – Complaint

Ex. 2 – Summons to Clarita Operating

Ex. 3 – Answer of Clarita Operating

Ex. 4 – Summons to Chesapeake Operating

Ex. 5 – Summons to BHP Arkansas

Ex. 6 – Summons to BHP Fayetteville

Ex. 7 – Affidavit of Rod Skaufel

Ex. 8 – AOGC Order

Ex. 9 – Motion for Consolidation and Appointment of Lead Counsel

Ex. 10 – Brief in Support of Motion

Ex. 11 – Civil Cover Sheet

Ex. 12 – Transfer Order from 2<sup>nd</sup> to 3<sup>rd</sup> Division

No other pleadings have yet been filed in the Circuit Court.

34. Defendants will serve written notice of the removal of this action upon all adverse parties promptly and will file such notice with the Clerk for the Circuit Court of Faulkner County, as required by 28 U.S.C. § 1446(d).

**Non-Waiver of Defenses**

35. Defendants expressly reserve all of their defenses and deny any liability to the Plaintiff, any resident, or any member of the potential class. Removing this action is not a concession that Plaintiff or the potential class has standing to assert any of the claims alleged, has adequately pled any claim, has prayed for any proper damages, or that a class action is a proper mechanism to litigate these claims.


WHEREFORE, Defendant Clarita Operating, LLC, Defendant Chesapeake Operating Inc., Defendant BHP Billiton (Fayetteville) LLC, and Defendant BHP Billiton (Arkansas) Inc. pray that this action be removed from the Circuit Court

of Faulkner County, Arkansas, to the United States District Court for the Eastern District of Arkansas, Western Division, and for all other just and proper relief to which it may be entitled.

Respectfully submitted,

Attorneys for Separate Defendant  
Clarita Operating, LLC

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AND

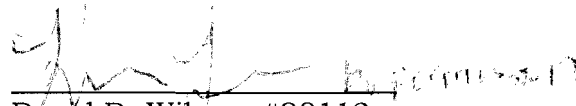
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Attorneys for Separate Defendants  
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BHP Billiton Petroleum (Arkansas) Inc.

A handwritten signature in black ink, appearing to read "David D. Wilson", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Kimberly D. Logue, hereby certify that a true and correct copy of the foregoing Notice of Removal was sent by first-class U.S. Mail, postage pre-paid on this 9th day of June 2011, to the following:

**EMERSON POYNTER, LLP**

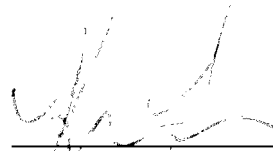
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IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS  
2ND DIVISION

2011 MAY 24 PM 2 09

STEPHEN HEARN, *on behalf of himself and  
all others similarly situated,*

RHONDA WHARTON, CLERK

BY Qlm PLAINTIFF DC

v.

CASE NO. 23 U-11-492

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE) LLC,  
CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

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CLASS ACTION COMPLAINT

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COME NOW the Plaintiff, Stephen Hearn ("Plaintiff"), on behalf of himself and on behalf of similarly situated persons, and for their complaint against BHP Billiton Petroleum (Arkansas) Inc., BHP Billiton Petroleum (Fayetteville) LLC, Chesapeake Operating, Inc., and Clarita Operating, LLC (sometimes collectively referred to as "Defendants")<sup>1</sup> states and affirmatively alleges as follows:

**NATURE OF THE ACTION**

1. This is a class action complaint brought on behalf of the Plaintiff and other similarly situated residents of central Arkansas that have experienced the recent earthquakes in

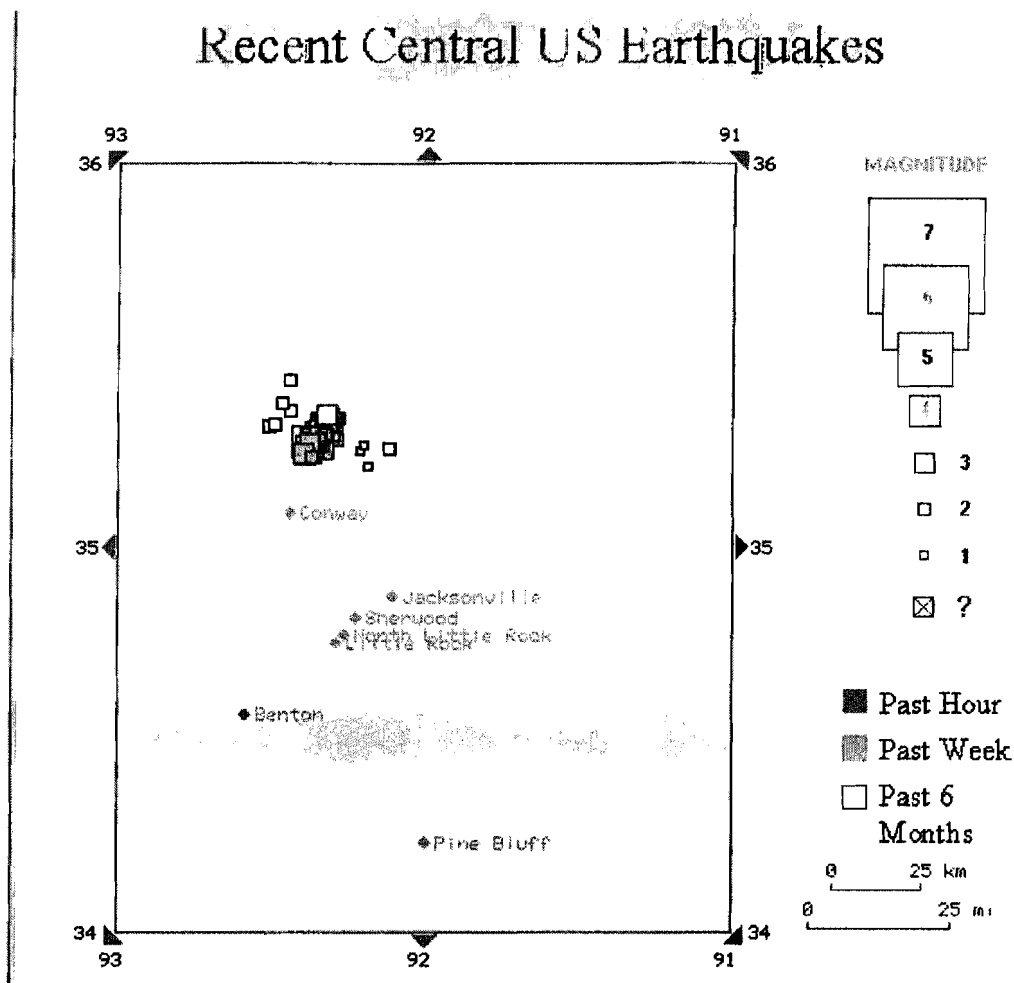
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<sup>1</sup> Separately, BHP Billiton Petroleum (Arkansas) Inc., BHP Billiton Petroleum (Fayetteville) LLC will sometimes be referred to collectively as "BHP;" Chesapeake Operating, Inc. as "Chesapeake;" Clarita Operating, LLC as "Clarita."



Arkansas, and which are related to, and caused by, the oil and gas drilling operations conducted by Defendants.

2. Recently, Central Arkansas has seen an unprecedented increase in seismic activity, occurring in the vicinity of Defendants' injection wells, near Greenbrier and Guy, Arkansas. Indeed, according to the Arkansas Geological Survey ("AGS"), there have been 599 "events" in Guy, Arkansas, alone since September 10, 2010.



3. On Sunday, February 28, 2011, Arkansas had the largest earthquake in 35 years. Centered just north of Greenbrier, residents reported "waking up last night to the sound of my

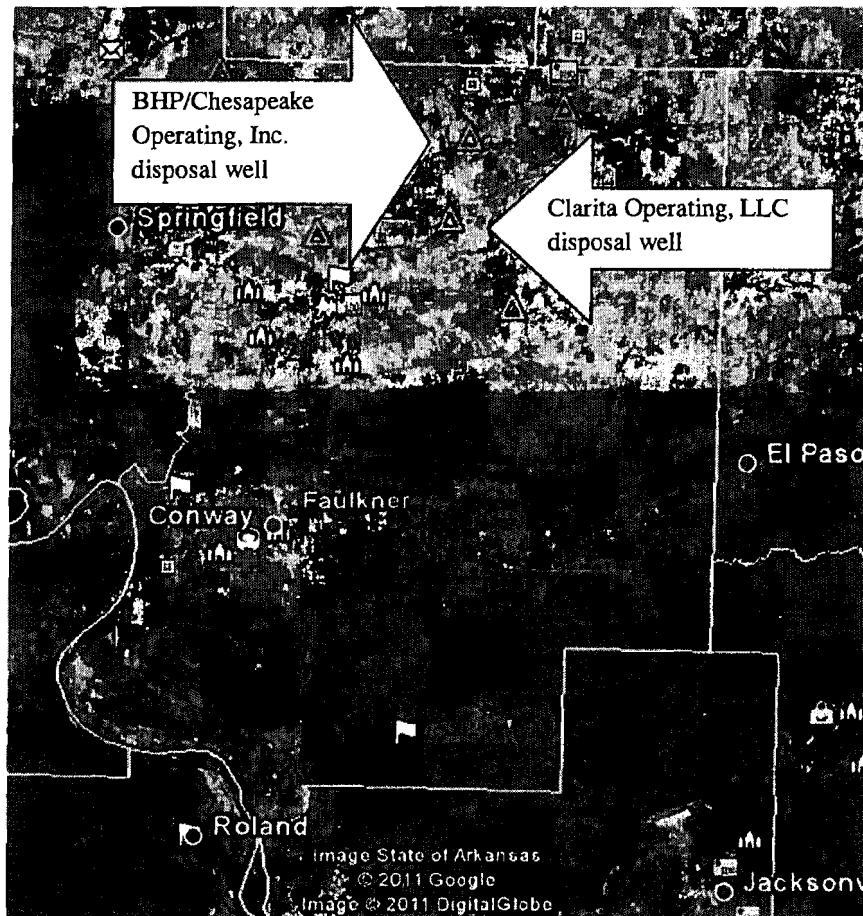
house shaking” and some residents have reported seeing gradual damage to their homes and cracks in their driveways and walls.

4. The February 28, 2011 earthquake occurred just after 11:00 pm CST, centered near Greenbrier and Guy, Arkansas, and measured at 4.7 in magnitude. On that same day, the United States Geological Survey (“USGS”) recorded as many as 29 earthquakes around Greenbrier and Guy, Arkansas, and ranged in magnitude from 1.7 to 4.7 in magnitude.

5. A major source of the natural gas in Arkansas comes from places in Faulkner County, and its surrounding counties as well, from what is called the Fayetteville Shale.

6. The process of extracting natural gas from the Fayetteville Shale involves hydraulic fracturing or “fracking.” This process requires drillers to inject pressurized water, sand and other chemicals to create fractures deep into the ground.

7. The fracking process results in water that has to be disposed of, primarily because it is contaminated with salt and other materials. Although some of this water is recycled and reused, some water is shipped by trucks to injection wells, where it is injected back into the earth. Defendants operate two wastewater disposal injection wells in Faulkner County, Arkansas to accomplish this end.



8. Recently, in connection with the increased seismic activity in the Central Arkansas area, the Staff of the Arkansas Oil and Gas Commission has requested a Commission Order requiring Defendants to “immediately cease all injection operations in its SRE 8-12, 1-17 SWD Well in Sec. 17-T8N-R12W, and Clarita Operating, LLC to immediately cease all injection operations in its Walyne L. Edgemon No. 1 SWD Well in Sec. 6-T7N-R12W, both in Faulkner County, through the last day of the regularly scheduled AOGC Hearing in March.” The order was entered on March 4, 2011.

9. This seismic activity is directly linked and contributed to by Defendants’ operations and injection wells, and substantially and unreasonably interferes with the Plaintiff

and the Class' use and enjoyment of their property and causes reasonable fear of the safety of the Class.

10. Defendants' activities are also ultrahazardous and subject them to strict liability for all damages caused.

11. Furthermore, Defendants' actions have caused the price and deductibles for earthquake insurance in the Central Arkansas area to skyrocket as well as detrimentally impacted property values.

### **PARTIES**

12. Plaintiff Stephen Hearn is an Arkansas citizen and resides in Faulkner County, Arkansas.

13. Defendant BHP Billiton (Arkansas) Inc. is an Arkansas Corporation doing business in the State of Arkansas and its registered agent is The Corporation Company, 124 West Capitol Avenue, Suite 1900, Little Rock, AR 72201.

14. Defendant BHP Billiton (Fayetteville) LLC is a Delaware LLC doing business in the State of Arkansas and its registered agent is The Corporation Company, 124 West Capitol Avenue, Suite 1900, Little Rock, AR 72201. The BHP entities recently purchased all of Chesapeake's assets and interests in the Fayetteville Shale for approximately \$4.75 billion.

15. Defendant Chesapeake Operating, Inc., is an Oklahoma Corporation doing business in the State of Arkansas and its registered agent is The Corporation Company, 124 West Capitol Avenue, Suite 1900, Little Rock, AR 72201. Defendant Chesapeake Operating, Inc., owned and operated the injection well located in SRE 8-12 1-17 SWD Well in Sec. 17-T8N-R12W in Faulkner County, Arkansas (the "Chesapeake Well") described herein. The well is now owned and operated by BHP.

16. Defendant Clartia Operating, LLC, is an Arkansas LLC doing business in Arkansas and its registered agent is Perkins & Trotter, PLLC, John Peiserich, 101 Morgan Keegan Drive, Suite A, Little Rock, AR 72202. Defendant Clarita Operating, LLC, owned and operated the injection well known as the Wayne L. Edgemon No. 1 SWD Well in Sec. 6-T7N-R12W in Faulkner County, Arkansas (the “Clartia Well”) at all times relevant as described herein.

### **JURISDICTION AND VENUE**

17. Jurisdiction in this Circuit Court is proper, under Ark. Const. Amend. 80, § 6(A) and Ark. Code. Ann. § 16-13-201. Defendants are subject to personal jurisdiction in this Court because they transact business in this State, have engaged in actionable conduct within this State, and their acts and omissions giving rise to Plaintiff’ and the class claims occurred in this State and caused damages in this State.

18. Venue is proper in this Court as Faulkner County is the county in which a substantial part of the events or omissions giving rise to Plaintiff’ claims occurred.

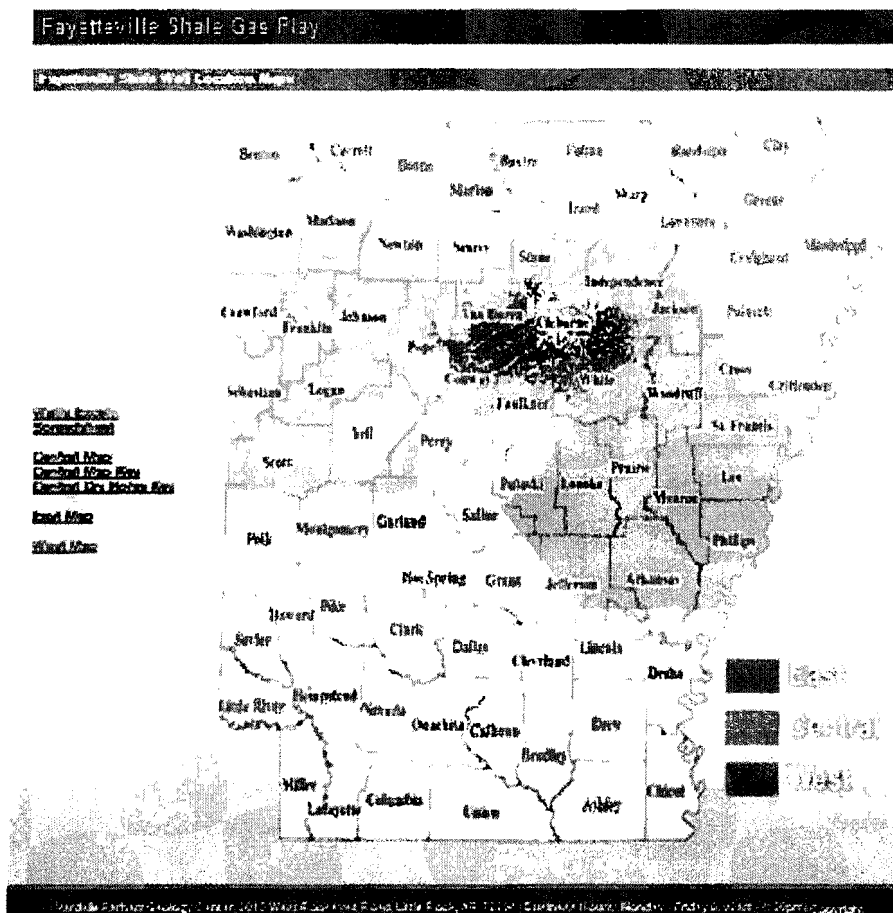
### **FACTUAL BACKGROUND**

19. The Fayetteville Shale is “an unconventional gas reservoir located on the Arkansas side of the Arkhoma Basis, ranging in thickness from 50 to 325 feet and ranging in depth from 1,500 to 6,500 feet . . . it is aerially extensive and may be present across numerous counties in central and eastern Arkansas, including the counties of Cleburne, Conway, Faulkner, Independence, Johnson, St. Francis, Prairie, Van Buren, White and Woodruff.” *Projecting the Economic Impact of the Fayetteville Shale Play for 2005-2008*, Sponsored by SEECO, Inc.,

University of Arkansas Center for Business and Economic Research (May 2006), *available online at <http://cber.uark.edu/FayettevilleShaleEconomicImpactStudy.pdf>.*

20. Beginning around 2004, because of primarily higher natural gas prices and more economically efficient oilfield service and drilling techniques, companies began to invest “capital in leasing land and mineral rights, drilling, completion and production activities . . . and the potential for installation of major gas gathering and transportation systems.” *Id.*

21. Although the Fayetteville shale extends across the state of Arkansas, the majority of the drilling and production activities are centered in Conway, Van Buren, Faulkner, Cleburne and White Counties, Arkansas:



[http://www.geology.ar.gov/home/fayetteville\\_play.htm](http://www.geology.ar.gov/home/fayetteville_play.htm).

22. According to records available from the Arkansas Oil and Gas Commission, Defendants own and operate numerous natural gas production wells in Conway, Van Buren, Faulkner, Cleburne and White County.

23. Upon information and belief, the Chesapeake Well was completed in mid-2008 and began operations in early 2009.

24. Upon information and belief, the Clartia Well was completed in July 2008 and began operations in early 2009.

### **CLASS ALLEGATIONS**

25. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs, as if fully set forth herein, word-for-word.

26. Certification of this case is appropriate under Rule 23 of the Arkansas Rules of Civil Procedure for the following Class:

All residents of the Counties Conway, Van Buren, Faulkner, Cleburne, Perry and White Counties within the period of time which Defendants have owned and operated the Chesapeake Well and the Claritia Well. Excluded from the Class are Defendants' directors, officers, employees and agents, as well as the judicial officer presiding over this case and his immediate family members.

#### **A. NUMEROSITY**

27. Records from the United States 2010 Census show that Faulkner county alone has a total population of over 100,000 people and the United States 2000 census showed that there were 31,882 households and 22,444 families residing in Faulkner County.

28. The members of the class are so numerous and scattered throughout the counties that joinder of all members is impracticable.



**B. TYPICALITY**

29. The Plaintiff's claims described herein are typical between the members of the Class and Defendants.

30. The Defendants' drilling operations have caused earthquakes, which have been a private and public nuisance, pose a significant danger, and have caused damages to Plaintiff and the Class in a similar manner.

**C. COMMONALITY**

31. Plaintiff's claims raise issues of fact or law which are common to the members of the putative class. These common questions include, but are not limited to the following:

- (a) whether the Defendants' drilling operations caused earthquakes in central Arkansas;
- (b) whether Defendants' drilling operations amount to a nuisance;
- (c) whether Defendants' drilling operations are an ultrahazardous activity;
- (d) whether Defendants' drilling operations were negligently performed;
- (e) whether Defendants' intentionally caused a trespass; and
- (f) whether Plaintiff and the Class members have suffered damages proximately caused by Defendants' operations.

32. These issues are common among all putative class members, are superior and predominate over any issues affecting individual members of the putative class.

**D. SUPERIORITY**

33. The predicate issues relate to the Defendants' drilling operations, their actions and activities, and whether such activities pose a nuisance, are an ultra-hazardous activity, were negligently performed, or caused trespasses. As such, the focus of this action will be on the common and uniform conduct of the Defendants in conducting their drilling operations.

34. In the absence of class-action relief, the putative class members would be forced to prosecute thousands of similar claims in different jurisdictions and venues around the state of Arkansas. Such an event would cause tremendous amounts of waste, but the prosecution of these claims as a class action will promote judicial economy.

**E. ADEQUACY**

35. Plaintiff is interested in the outcome of this litigation and understands the importance of adequately representing the Class.

36. Plaintiff will fairly and adequately protect the interests of the Class sought to be certified in this case.

37. Counsel for Plaintiff and the Class are experienced in class-action and complex consumer litigation and are qualified to adequately represent the Class.

**CAUSES OF ACTION**

**COUNT I: PUBLIC NUISANCE**

38. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs as if fully set forth herein, word-for-word.

39. The Defendants' conduct herein constitutes a substantial and unreasonable interference with the rights common to the general public.

40. This unreasonable interference is imposed on the community at large and on a considerable diverse number of persons and entities. It arises from Defendants' drilling operations (a) without adequate precautions to prevent earthquakes; and/or (b) with the knowledge that there was a substantial risk of seismic problems in the State of Arkansas.

41. Plaintiff and the Class have suffered harm as a result of Defendants' creation of a public nuisance.

42. Plaintiff and the Class are also entitled to injunctive relief.

**COUNT II: PRIVATE NUISANCE**

43. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs as if fully set forth herein, word-for-word.

44. The Defendants' conduct herein constitutes a private nuisance.

45. Plaintiff and the Class have property rights and are privileged in respect to the use and enjoyment of their homes and land. Defendants' actions and operations as described above have unlawfully and unreasonably interfered with those rights and privileges.

46. Plaintiff and the Class have suffered harm as a result of Defendants' creation of a public nuisance.

47. Plaintiff and the Class are also entitled to injunctive relief.

**COUNT III: ABSOLUTE LIABILITY**

48. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs as if fully set forth herein, word-for-word.

49. Defendants' drilling operations and actions described above are ultra-hazardous activities that necessarily involve a risk of serious harm to a person or the chattels of others that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

50. As a direct and proximate result of Defendants' ultra-hazardous activities, the Plaintiff and the Class have sustained damage, which are the direct and proximate result of Defendants' ultrahazardous or abnormally dangerous activities, to which Defendants are strictly liable.

#### **COUNT IV: NEGLIGENCE**

51. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs, as if fully set forth herein, word-for-word.

52. The Defendants owed a duty to Plaintiff and the Class to use ordinary care and not to operate or maintain their injection wells in such a way as to cause or contribute to seismic activity. Defendants, experienced in these operations, were well aware of the connection between injection wells and seismic activity, and acted in disregard of these facts.

53. As a direct and proximate result of these facts, omissions, and fault of the Defendants, the Plaintiff and the Class have suffered damages and injuries reasonably foreseeable to the Defendants, including:

- a. Damages to the Plaintiff's personal and real property;
- b. Annoyance, discomfort and inconvenience occasioned by the nuisance created by the defendants on their property;
- c. The loss of peace of mind; and
- d. Economic loss from business interruption.

#### **COUNT V: TRESPASS**

54. Plaintiff hereby re-alleges and incorporates the foregoing Paragraphs, as if fully set forth herein, word-for-word.

55. The Defendants, without the Plaintiff's consent and without legal right, intentionally engaged in activities that resulted in concussions or vibrations to enter Plaintiff's property. Such unauthorized invasion of the Plaintiff's property interests by concussions or vibrations by Defendants constitutes a trespass. *See Smith v. Lockheed Propulsion Co.*, 247 Cal.

App. 2d 774 (1967) (actionable trespass may be committed indirectly through concussions or vibrations activated by defendant's conduct).

### **PUNITIVE DAMAGES**

56. The Defendants' actions, in knowingly causing seismic activity as a result of its Injection Wells operations, constitutes wanton or reckless disregard for public safety and is subject to a claim for punitive damages, for which Plaintiff seek in an amount sufficient to punish the Defendants and to deter them and others similarly situated from such conduct in the future.

### **REQUEST FOR JURY TRIAL**

57. Plaintiff respectfully demands a trial by jury.

### **PRAYER FOR RELIEF**

Plaintiff respectfully requests the following relief:

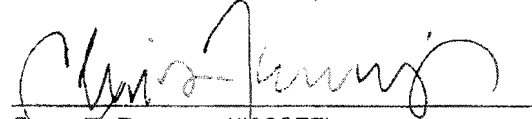
- A. Certifying the Class as requested herein;
- B. A joint and several judgment against Defendants for all general and special compensatory damages caused by the conduct of the Defendants in an amount exceeding the minimum amount required for federal court in diversity of citizenship cases;
- C. Costs of litigating this case;
- D. Appropriate injunctive relief restraining Defendants from engaging in further conduct that is substantially likely to lead to further seismic activity and to take affirmative steps to remediate the damages it has already caused in favor of Plaintiff and the Class;
- E. Punitive damages;
- F. Attorney's fees;

- G. Prejudgment interest;
- H. All other relief to which Plaintiff is entitled or that the Court deems just and proper.

DATED: May 24, 2011

Respectfully Submitted,

EMERSON POYNTER, LLP



Scott E. Poynter (#90077)

Christopher D. Jennings (#06306)

William T. Crowder (#03138)

EMERSON POYNTER, LLP

500 President Clinton Ave., Ste. 305

Little Rock, AR 72201

Tel: (501) 907-2555

Fax: (501) 907-2556

John G. Emerson (#08012)

EMERSON POYNTER, LLP

830 Apollo Lane

Houston, TX 77058

Tel: (281) 488-8854

Fax: (281) 488-8867

Attorneys for Plaintiff

James C. Wyly

Sean F. Rommel

WYLY-ROMMEL, PLLC

2311 Moores Lane

Texarkana, TX 75503

Tel: (903) 334-8646

Fax: (903) 334-7007

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS  
SUMMONS **2ND DIVISION**

Plaintiff:

STEPHEN HEARN, *on behalf of themselves and  
all others similarly situated,*

Court Division \_\_\_\_\_

vs.

Defendant:

*2301-11-492*  
Case Number:

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE) LLC,  
CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

Plaintiff's attorney:

Scott E. Poynter  
EMERSON POYNTER, LLP  
500 President Clinton Ave., Suite 305  
Little Rock, AR 72201  
501-907-2555

THE STATE OF ARKANSAS TO DEFENDANT:

Clarita Operating, LLC  
c/o Perkins & Trotter, PLLC  
John Peiserich  
101 Morgan Keegan Drive., Ste A.  
Little Rock, AR 72202

NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.

2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.

B. It must be filed in the court clerk's office within 20 days from the day you were served with this summons.



3. If you desire to be represented by an attorney you should immediately contact your attorney so that an answer can be filed for you within the time allowed.

4. Additional notices:

Witness my hand and the seal of the court this 5-24-2011  
(date)

Address of Clerk's Office:

\_\_\_\_\_  
[SEAL]

Rhonda W. Wharton  
Clerk By: Rhonda W. Wharton

NOTICE AND ACKNOWLEDGEMENT  
FOR SERVICE BY MAIL

NOTICE

To: Clarita Operating, LLC, c/o Perkins & Trotter, PLLC, John Peiserich, 101 Morgan Keegan Drive., Ste A., Little Rock, AR 72202.

The enclosed summons and complaint are served pursuant to Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

\_\_\_\_\_  
\_\_\_\_\_  
Signature \_\_\_\_\_



\_\_\_\_\_  
Date of Signature \_\_\_\_\_  
**ACKNOWLEDGMENT OF RECEIPT  
OF SUMMONS AND COMPLAINT**

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

\_\_\_\_\_  
\_\_\_\_\_

Signature \_\_\_\_\_  
Relationship to Entity/ \_\_\_\_\_  
Authority to Receive Service \_\_\_\_\_  
of Process \_\_\_\_\_  
Date of Signature \_\_\_\_\_

**IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS  
2<sup>ND</sup> DIVISION**

**STEPHEN HEARN, on behalf of himself  
and all others similarly situated**

**v.**

**Case No. 23 CV-11-492**

**BHP BILLITON PETROLEUM  
(ARKANSAS) INC.; BHP BILLITON  
PETROLEUM (FAYETTEVILLE) LLC;  
CHESAPEAKE OPERATING, INC.; and  
CLARITA OPERATING, LLC**

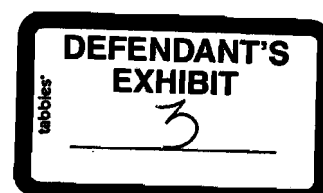
**DEFENDANTS**

**ANSWER OF CLARITA OPERATING, LLC TO CLASS ACTION COMPLAINT**

Defendant Clarita Operating, LLC ("Clarita Operating" or "Defendant"), by and through its undersigned counsel, Perkins & Trotter, PLLC, states its Answer to the Class Action Complaint ("Complaint") as follows:

1. Defendant denies the allegations in paragraph 1.
2. Defendant affirmatively states that the Arkansas Geological Survey speaks for itself, and otherwise denies the allegations in paragraph 2.
3. Defendant lacks sufficient knowledge or information to either admit or deny the allegations in paragraph 3 and therefore denies them.
4. Defendant affirmatively states that the United States Geological Survey speaks for itself, and that Defendant otherwise lacks sufficient knowledge or information to either admit or deny the allegations in paragraph 4 and, therefore, denies them.
5. Defendant admits that natural gas is produced from a geological formation commonly referred to as the Fayetteville Shale, including from some lands in Faulkner County, Arkansas, and some lands in nearby counties, but otherwise

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RHONDA WHARTON, CLERK  
BY                      PLAINTIFF



lacks sufficient knowledge or information to admit or deny the remaining allegations in paragraph 5 and therefore denies them.

6. Defendant admits that the hydraulic fracturing process is used in the development of natural gas wells in the Fayetteville Shale, but otherwise denies the allegations in paragraph 6.

7. Defendant admits that it owns an injection well located in Faulkner County, but otherwise denies the allegations in paragraph 7.

8. The actions of the Arkansas Oil & Gas Commission speak for themselves, Defendant otherwise denies the allegations in paragraph 8.

9. Defendant denies the allegations in paragraph 9.

10. Defendant denies the allegations in paragraph 10.

11. Defendant denies the allegations in paragraph 11.

12. Defendant lacks sufficient information to either admit or deny the allegations in paragraph 12 and, therefore, denies them.

13. Defendant lacks sufficient knowledge or information to admit or deny the allegations in paragraph 13 and, therefore, denies them.

14. Defendant lacks sufficient knowledge or information to admit or deny the allegations in paragraph 14 and, therefore, denies them.

15. Defendant lacks sufficient knowledge or information to admit or deny the allegations in paragraph 15 and, therefore, denies them.

16. Defendant denies that it is currently operating an injection well known as the Wayne L. Edgmon No. 1 SWD Well in Sect. 6-T7N-R12W in Faulkner County, Arkansas (the "Clarita Well") but otherwise admits the allegations in paragraph 16.

17. Defendant affirmatively asserts that the Plaintiff lacks standing to bring the claim of public nuisance and so denies the allegation that this court has subject

matter jurisdiction of that claim. Defendant reserves the right to challenge this court's exercise of subject matter jurisdiction over the remaining claims. Defendant denies the remaining allegations in paragraph 17.

18. Defendant believes that venue may be proper in Faulkner County, however, the Complaint alleges injury to a potential class in six counties, but fails to allege with sufficient specificity damages, of any kind, in Faulkner County, meaning that a substantial part of the alleged events or omissions on which the Complaint is based did not actually occur in Faulkner County other than the location of the injection wells.

19. Defendant is without sufficient knowledge or information to either admit or deny the allegations in paragraph 19 and, therefore, denies them.

20. Defendant is without sufficient knowledge or information to either admit or deny the allegations in paragraph 20 and, therefore, denies them.

21. Defendant is without sufficient knowledge or information to either admit or deny the allegations in paragraph 21 and, therefore, denies them.

22. Defendant is without sufficient knowledge or information to either admit or deny the allegations in paragraph 22 and, therefore, denies them.

23. Defendant is without sufficient knowledge or information to either admit or deny the allegations in paragraph 23 and, therefore, denies them.

24. Defendant denies the allegations in paragraph 24.

25. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 24, as if fully set forth herein word for word.

26. Defendant denies the allegations in paragraph 26.

27. Defendant is without sufficient knowledge or information to admit or deny the allegations in paragraph 27 and, therefore, denies them.

28. Defendant denies the allegations in paragraph 28.

29. Defendant denies the allegations in paragraph 29.

30. Defendant denies the allegations in paragraph 30.

31. Defendant denies the allegations in paragraph 31 and each of its subparagraphs (a) through (f).

32. Defendant denies the allegations in paragraph 32.

33. Defendant denies the allegations in paragraph 33.

34. Defendant denies the allegations in paragraph 34.

35. Defendant is without knowledge or information to admit or deny the allegations in paragraph 35 and, therefore, denies them.

36. Defendant is without knowledge or information to admit or deny the allegations in paragraph 36 and, therefore, denies them.

37. Defendant is without knowledge or information to admit or deny the allegations in paragraph 37 and, therefore, denies them.

38. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 37, as if fully set forth herein word for word.

39. Defendant denies the allegations in paragraph 39.

40. Defendant denies the allegations in paragraph 40 and each of its subparagraphs (a) and (b).

41. Defendant denies the allegations in paragraph 41.

42. Defendant denies the allegations in paragraph 42.

43. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 42, as if fully set forth herein word for word.

44. Defendant denies the allegations in paragraph 44.

45. Defendant denies the allegations in paragraph 45.

46. Defendant denies the allegations in paragraph 46.

47. Defendant denies the allegations in paragraph 47.

48. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 47, as if fully set forth herein word for word.

49. Defendant denies the allegations in paragraph 49.

50. Defendant denies the allegations in paragraph 50.

51. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 50, as if fully set forth herein word for word.

52. Defendant denies the allegations in paragraph 52.

53. Defendant denies the allegations in paragraph 53 and each of its subparagraphs a through d.

54. Defendant restates and incorporates its responses to the allegations in paragraphs 1 through 53, as if fully set forth herein word for word.

55. Defendant denies the allegations in paragraph 55.

56. Defendant denies the allegations in paragraph 56 and denies that Plaintiff is entitled to the relief sought therein.

57. Defendant respectfully requests a jury trial.

58. Defendant denies the allegations in Plaintiff's Prayer for Relief, including subparagraphs A through H, and denies that Plaintiff is entitled to the relief sought therein.

59. Defendant denies each and every allegation not specifically admitted herein. Defendant also denies that the Plaintiff is entitled to any relief as against this Defendant. The Complaint of the plaintiff should each be dismissed at plaintiff's cost and Defendant should be granted such other and further relief to which it may be entitled.

60. Defendant asserts the common defense doctrine.

61. Defendant affirmatively pleads the applicable statute(s) of limitations as a bar to recovery in this matter.

62. Defendant pleads insufficient process and insufficient service of process.

63. Defendant pleads that any injuries sustained by the plaintiff is the result of his own negligence or wrongful conduct, or the negligence or wrongful conduct of parties not legally under the control of, or otherwise responsible to, this defendant.

64. Defendant pleads the Uniform Contribution Among Tortfeasors Act.

65. Upon completion of further investigation and discovery, Defendant expressly reserves the right to plead further including the reservation of all affirmative defenses required to be pled in its initial pleadings, including counter-claims, cross-claims, and third-party complaints.

66. Defendant affirmatively pleads, pursuant to Ark. R. Civ. P. 12(b)(6), that Plaintiff has failed to state facts on which relief can be granted.

67. Defendant affirmatively pleads, pursuant to Ark. R. Civ. P. 8(c), all affirmative defenses available to it including but not limited to comparative fault, contributory negligence, and failure to mitigate damages.

68. Defendant affirmatively pleads, pursuant to Ark. R. Civ. P. 23, that class certification should be denied.

69. Defendant affirmative pleads compliance with its Arkansas Oil & Gas Commission and Arkansas Department of Environmental Quality issued permits and the obligations there under.

70. Defendant, pursuant to Ark. R. Civ. P. 9(g) affirmatively pleads that Plaintiff fails to specifically plead special damages and, therefore, they should be denied.

71. Defendant affirmatively pleads that it is entitled to indemnity, contribution, or both, against a co-defendant with which it is adjudged to be a joint tortfeasor.

72. Plaintiff is not entitled to recover punitive damages, because an award of compensatory damages would fully compensate plaintiff and plaintiff has no standing to recover funds assessed against these defendants as punishment or as an example to others.

73. Plaintiff's claim for punitive damages asserts a liability which is criminal in nature, entitling these defendants to the protections of the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States of America. Specifically, for these defendants to receive due process on such claim, plaintiff's proof must be beyond a reasonable doubt, and these defendants' liability must be tried by a unanimous jury. As to any punitive damages sought by Plaintiff, these defendants are entitled to (1) a trial bifurcating the issues of liability from punitive damages; (2) a clear and convincing burden of proof; and (3) effective limit on jury discretion as to the amount of punitive damages.

74. Plaintiff cannot recover punitive damages, because the relative position of the parties may be considered in such an award, which constitutes an impermissible punishment of status.

75. Plaintiff cannot recover punitive damages, because present Arkansas law under which such damages are sought is impermissibly vague, imprecise, and inconsistent, and is in violation of the due process clause of the United States Constitution and, therefore, the Fifth and Fourteenth Amendments.

76. Plaintiff cannot recover punitive damages against these defendants because of the likelihood of confusion of submission of cases of punitive damages



against various defendants with differing circumstances.

77. This defendant affirmatively pleads that if the plaintiff was injured or damaged then such injuries and damages were caused in whole or in part by the acts, wrong doing, omissions, or negligence of others for whose acts this defendant is not responsible and which acts constitute an intervening and superseding proximate cause so as to relieve this defendant of any liability herein.

78. This defendant affirmatively pleads that, at all relevant times, this defendant complied with the rules, regulations and specification of the government of the United States.

79. Subject to the objections of Defendant to the subject matter jurisdiction of the Court and personal jurisdiction over Defendant, Defendant further responding states that the Complaint of the Plaintiff fails to state facts upon which relief can be granted against Defendant and should be dismissed pursuant to Rule 12(b)(6) and Rule 8 of the Arkansas Rules of Civil Procedure and otherwise.

80. If the Plaintiff was injured and damaged as alleged in his Complaint, alternatively, any such injury or damage was occasioned by the Plaintiff's own assumption of the risk and such assumption of the risk was present to such a degree so as to constitute a complete bar of the right of any recovery by the Plaintiff.

81. The Defendant asserts that Plaintiff has failed to mitigate his damages.

82. Defendant further pleads and claims the benefits as applicable derived from Act 649 of the Acts of Arkansas of 2003 which became effective March 25, 2003.

83. Plaintiff's claims, both individually and in his capacity as class representative, must fail to the extent Plaintiff lacks standing to pursue such claims.

84. Plaintiff and his claims fail to meet the necessary prerequisites and requirements for the maintenance of a class action.

85. Defendant asserts that Plaintiff is not similarly situated to others of the alleged class for purposes of serving as a class representative.

86. Plaintiff has interests that conflict with those of the putative class.

87. Plaintiff lacks standing to assert some or all of their claims against Defendants and to represent any putative class.

88. Class certification is inappropriate in this action under Ark. R. Civ. Pro 23(a)(1) because the alleged class members are not too numerous to join as parties and joinder is practicable as a matter of law.

89. Plaintiff cannot maintain this action as a class action under Ark. R. Civ. Pro 23(a)(2) because there are not questions of law or fact common to the purported class.

90. Plaintiff cannot maintain this action as a class action under Ark. R. Civ. Pro 23(a)(3) because Plaintiff's claims cannot be typical of any claims of other persons would be involved. Further under Ark. R. Civ. Pro 23(a)(3) a class is inappropriate because real property is regarded as unique by the law. See Shelton v. Keller, 24 Ark. App. 68, 748 S.W.2d 153 (1988).

91. Pursuant to Ark. R. Civ. Pro. 23(a)(4), Plaintiff cannot maintain this action as a class action because Plaintiff is not a proper representative of the alleged class, and the alleged class does not have adequate representation.

92. Class certification is inappropriate because common questions of law or fact do not predominate over questions affecting only individual members.

93. Class certification is inappropriate because Plaintiff cannot demonstrate that class litigation is superior to other available means of adjudication.

94. The Answer of Defendant is being filed prior to any discovery and prior to the completion of investigation and, therefore, Defendant reserves the right to amend

its Answer, to plead further by way of Counterclaim, Cross-Complaint, Third Party Complaint, or otherwise, as investigation and discovery may reveal are appropriate.

WHEREFORE, Separate Defendant Clarita Operating, LLC respectfully requests that this Court dismiss the plaintiff's Complaint and award it its costs, fees, and all other legal and equitable relief to which it is entitled.

Respectfully submitted,

Attorneys for Separate Defendant  
Clarita Operating, LLC

PERKINS & TROTTER, P.L.L.C.  
P. O. Box 251618  
Little Rock, AR 72225-1618  
Phone: (501) 603-9000  
Facsimile: (501) 603-0556

A handwritten signature in black ink, appearing to read 'JLR' with a stylized flourish at the end.

---

JOHN F. PEISERICH, #2002009

And

Darrell W. Downs, #2010283  
TAYLOR, BURRAGE, FOSTER, MALLET, MALLETT,  
DOWNS, RAMSEY & RUSSELL, P.C.  
P.O. Box 309  
Claremore, OK 74018

**CERTIFICATE OF SERVICE**

I, John F. Peiserich, do hereby certify that a true and correct copy of the foregoing Answer was sent by first-class U.S. Mail, postage prepaid, on this 8<sup>th</sup> day of June 2011, to the following:

**EMERSON POYNTER, LLP**

Scott E. Poynter  
Christopher D. Jennings  
William T. Crowder  
500 President Clinton Ave.  
Suite 305  
Little Rock, AR 72201

John G. Emerson  
830 Apollo Lane  
Houston, TX 77058

**WYLY-ROMMEL, PLLC**

James C. Wyly  
Sean F. Rommel  
2311 Moores Lane  
Texarkana, TX 75503

A handwritten signature in black ink, appearing to read 'JL R...'. The signature is written in a cursive, stylized font.

---

JOHN F. PEISERICH

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

SUMMONS 2ND DIVISION

Plaintiff:

STEPHEN HEARN, *on behalf of themselves and  
all others similarly situated,*

Court Division \_\_\_\_\_

vs.

Defendant:

*23 CV-2011-492*  
Case Number:

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE) LLC,  
CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

Plaintiff's attorney:

Scott E. Poynter  
EMERSON POYNTER, LLP  
500 President Clinton Ave., Suite 305  
Little Rock, AR 72201  
501-907-2555

THE STATE OF ARKANSAS TO DEFENDANT:

Chesapeake Operating, Inc.  
c/o The Corporation Company  
124 West Capitol Avenue, Ste. 1900  
Little Rock, AR 72201

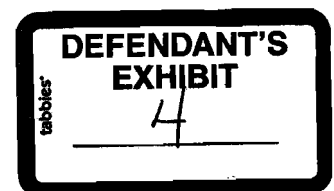
NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.

2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.

B. It must be filed in the court clerk's office within 30 days from the day you were served with this summons.



3. If you desire to be represented by an attorney you should immediately contact your attorney so that an answer can be filed for you within the time allowed.

4. Additional notices:

Witness my hand and the seal of the court this 5-24-2011  
(date)

Address of Clerk's Office:

\_\_\_\_\_  
[SEAL]

Rhonda Wharton  
Clerk By Rhonda O.C.

NOTICE AND ACKNOWLEDGEMENT  
FOR SERVICE BY MAIL

NOTICE

To: Chesapeake Operating, Inc., c/o The Corporation Company, 124 West Capitol Ave., Ste 1900, Little Rock, AR 72201.

The enclosed summons and complaint are served pursuant to Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

\_\_\_\_\_  
\_\_\_\_\_

Signature \_\_\_\_\_

Date of Signature \_\_\_\_\_

**ACKNOWLEDGMENT OF RECEIPT  
OF SUMMONS AND COMPLAINT**

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

\_\_\_\_\_  
\_\_\_\_\_

Signature \_\_\_\_\_

Relationship to Entity/ \_\_\_\_\_

Authority to Receive Service \_\_\_\_\_

of Process \_\_\_\_\_

Date of Signature \_\_\_\_\_

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS  
SUMMONS **2ND DIVISION**

Plaintiff:

Court Division \_\_\_\_\_

STEPHEN HEARN, *on behalf of themselves and  
all others similarly situated,*

vs.

Defendant:

*23 CV-2011-492*  
Case Number:

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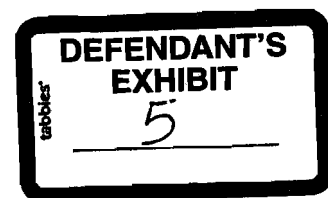
Plaintiff's attorney:

Scott E. Poynter  
EMERSON POYNTER, LLP  
500 President Clinton Ave., Suite 305  
Little Rock, AR 72201  
501-907-2555

THE STATE OF ARKANSAS TO DEFENDANT: BHP Billiton Petroleum (Arkansas) Inc.  
c/o The Corporation Company  
124 West Capitol Avenue, Ste. 1900  
Little Rock, AR 72201

NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.
2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:
  - A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.
  - B. It must be filed in the court clerk's office within 20 days from the day you were served with this summons.
3. If you desire to be represented by an attorney you should immediately contact





your attorney so that an answer can be filed for you within the time allowed.

4. Additional notices:

Witness my hand and the seal of the court this 5-24-2011  
(date)

Address of Clerk's Office:

[SEAL]

Clerk

NOTICE AND ACKNOWLEDGEMENT  
FOR SERVICE BY MAIL

NOTICE

To: BHP Billiton Petroleum (Arkansas) Inc., c/o The Corporation Company, 124 West Capitol Avenue, Ste. 1900, Little Rock, AR 72201.

The enclosed summons and complaint are served pursuant to Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

Signature \_\_\_\_\_

Date of Signature \_\_\_\_\_  
ACKNOWLEDGMENT OF RECEIPT  
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint  
in the above-captioned matter at (insert address).

\_\_\_\_\_  
\_\_\_\_\_

Signature \_\_\_\_\_  
Relationship to Entity/ \_\_\_\_\_  
Authority to Receive Service \_\_\_\_\_  
of Process \_\_\_\_\_  
Date of Signature \_\_\_\_\_

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS  
SUMMONS  
2ND DIVISION

Plaintiff:

Court Division \_\_\_\_\_

STEPHEN HEARN, *on behalf of themselves and  
all others similarly situated,*

vs.

Defendant:

23CV-2011-492  
Case Number:

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE) LLC,  
CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

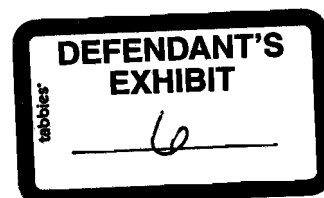
Plaintiff's attorney:

Scott E. Poynter  
EMERSON POYNTER, LLP  
500 President Clinton Ave., Suite 305  
Little Rock, AR 72201  
501-907-2555

THE STATE OF ARKANSAS TO DEFENDANT: BHP Billiton Petroleum (Fayetteville) Inc.  
c/o The Corporation Company  
124 West Capitol Avenue, Ste. 1900  
Little Rock, AR 72201

NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.
2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:
  - A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.
  - B. It must be filed in the court clerk's office within **30** days from the day you were served with this summons.
3. If you desire to be represented by an attorney you should immediately contact



your attorney so that an answer can be filed for you within the time allowed.

4. Additional notices:

Witness my hand and the seal of the court this 5-24-2011  
(date)

Address of Clerk's Office:

[SEAL]

*Rhonda W. Harton*  
Clerk *By D. L. Martin D.C.*

NOTICE AND ACKNOWLEDGEMENT  
FOR SERVICE BY MAIL

NOTICE

To: BHP Billiton Petroleum (Fayetteville) Inc., c/o The Corporation Company, 124 West Capitol Avenue, Ste. 1900, Little Rock, AR 72201.

The enclosed summons and complaint are served pursuant to Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

Signature \_\_\_\_\_

Date of Signature \_\_\_\_\_  
ACKNOWLEDGMENT OF RECEIPT  
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint  
in the above-captioned matter at (insert address).

\_\_\_\_\_  
\_\_\_\_\_

Signature \_\_\_\_\_  
Relationship to Entity/ \_\_\_\_\_  
Authority to Receive Service \_\_\_\_\_  
of Process \_\_\_\_\_  
Date of Signature \_\_\_\_\_

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**STEPHEN HEARN, on behalf of himself  
and all others similarly situated**

**PLAINTIFFS**

**VS. NO. \_\_\_\_\_**

**BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC. AND  
CLARITA OPERATING, LLC**

**DEFENDANTS**

**AFFIDAVIT**

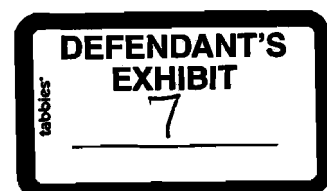
Comes now Rod Skaufel and having been duly sworn, states:

1. My name is Rod Skaufel, I am the Vice President of BHP Billiton Petroleum (Arkansas) Inc. ("BHP Arkansas").

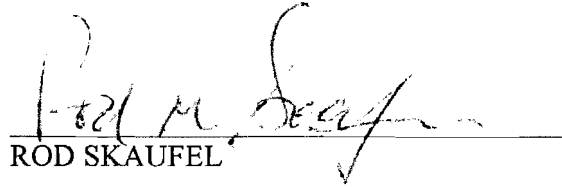
2. BHP Arkansas was incorporated February 15, 2011 as an Arkansas corporation. On March 31, 2011, BHP Arkansas acquired a gathering pipeline system and related infrastructure from Arkansas Midstream Gas Services Corp.

3. BHP Arkansas did not, and has not, purchased any oil and gas well or disposal well assets or interests from Chesapeake Operating, Inc. or any of its affiliated entities. BHP Arkansas does not, and has never, engaged in "drilling operations." BHP Arkansas does not, and has never, operated, controlled or had ownership interest in the "Chesapeake Well" or the "Clarita Well," as those wells are defined in the Complaint in this case.

4. The above and foregoing statements are true and correct to the best of my knowledge, information and belief.



WITNESS my hand this 8<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
ROD SKAUFEL

STATE OF TEXAS            )  
  ) ss.  
COUNTY OF HARRIS        )

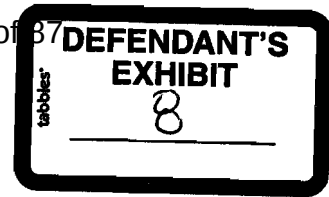
SUBSCRIBED and SWORN to before me, a Notary Public, on this 8<sup>th</sup> day of June, 2011.



My Commission Expires.

  
\_\_\_\_\_  
NOTARY PUBLIC

24 November 2014



**ARKANSAS OIL AND GAS COMMISSION  
301 NATURAL RESOURCES DRIVE  
SUITE 102  
LITTLE ROCK, ARKANSAS 72205**

**ORDER NO. 085A-3-2011-03**

**MAY 27, 2011**

**GENERAL RULE B-43 WELL SPACING AREA  
*Faulkner County, Arkansas***

**CESSATION ORDER - CONSENT**

After a hearing convened in Little Rock, Arkansas, on May 24, 2011, the Arkansas Oil and Gas Commission has found the following facts and issued the following Order.

**FINDINGS OF FACT**

From the evidence introduced at said hearing, the Commission finds:

**Staff of the Arkansas Oil and Gas Commission** (the "Applicant") requests an order of the Commission requiring Chesapeake Operating, Inc. ("Chesapeake"), and BHP Billiton Petroleum (Fayetteville) LLC ("BHP"), to continue the cessation of all injection operations in its SRE 8-12 1-17 SWD Well in Sec. 17-T8N-R12W, and Clarita Operating LLC ("Clarita") to continue the cessation of all injection operations in its Wayne L. Edgmon No. 1 SWD Well in Sec. 6-T7N-R12W, both in Faulkner County, for a period of an additional sixty (60) days.

1. That, this Commission previously entered an emergency order, Order No. 051A-2011-02, requested by the Applicant, and agreed to by Chesapeake and Clarita, which required both Chesapeake and Clarita to cease all injection operations in both disposal wells identified in Finding No. 1 above, until the regularly scheduled AOGC hearing beginning on March, 29, 2011. This Commission also previously entered Order Nos. 085A-2011-03, and 085A-2-2011-03 requested by the Applicant, and agreed to by Chesapeake and Clarita, which required both Chesapeake and Clarita to continue to cease all injection operations in both disposal wells identified in Finding No. 1 above, through the end of the regularly scheduled AOGC hearing beginning on May 24, 2011.
2. That as Order No. 085A-2-2011-03 will automatically expire at the conclusion of the regularly scheduled AOGC hearing beginning on May 24, 2011, the Applicant requested a continued period of cessation of injection operations for both disposal wells identified Finding No. 1 above for a period of an additional sixty (60) days.
3. That BHP and Clarita notified the Applicant of their voluntary agreement to the Applicant's request for a continued period of cessation of injection operations for both disposal wells identified Finding No. 1 above until the end of the regularly scheduled AOGC hearing beginning on July 26, 2011.
4. That the agreement by BHP and Clarita to the Applicant's request is of no detriment to the Applicant, as the purpose of the Applicant's request is to establish a period of time in which no injection operations occur in order to further study the potential correlation between injection operations in one, or both, of the disposal wells identified in Finding No. 1 above and the seismic activity in the area.
5. That the Applicant, Chesapeake and Clarita understand that this Order is valid until the end of the regularly scheduled AOGC hearing beginning on July 26, 2011, at which time the Applicant will seek further relief from the Commission.

**CONCLUSIONS OF LAW**

1. That due notice of public hearing was given as required by law and that this Commission has jurisdiction over said parties and the matter herein considered.
2. That this Commission has authority to grant said petition under the provisions of Acts 1939, No. 105, as amended.

**ORDER**

It is, therefore, ordered by the Commission:

1. Both disposal wells identified in Finding No. 1 above shall remain shut-in, and no injection operations are authorized



ORDER NO. 085A-3-2011-03

May 27, 2011

PAGE 2

in either of the disposal wells identified in Finding No. 1, pending a hearing at the regularly scheduled AOGC hearing beginning on July 26, 2011; and

2. Unless otherwise agreed to by the Applicant, BHP and Clarita, the parties shall schedule and attend a pre-hearing conference as contemplated in AOGC General Rule A-2 in order to: simplify the factual and legal issues that will be presented; receive stipulations, admissions of fact and the contents and authenticity of documents; exchange lists of witnesses the parties intend to have testify and present copies of all documents the parties intend to introduce into evidence at the hearing; and discuss and resolve such other matters as may tend to expedite the disposition of the hearing request.

This order shall be effective from and after May 27, 2011; and the Commission shall have continuing jurisdiction for the purposes of enforcement, and/or modifications of amendments to the provisions of this Order. This Order shall automatically terminate at the conclusion of the next regularly scheduled hearing scheduled to begin on July 26, 2011..

ARKANSAS OIL AND GAS COMMISSION

Lawrence E. Bengal,  
Director

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

JESSE and SUSAN FREY, *on behalf of themselves*  
*and all others similarly situated,*

PLAINTIFFS

v.

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

2011 MAY 26 PM 1 46

RHONDA GANTON, CLERK

BY  Case No. 23CV-11-488

2<sup>nd</sup> Division

STEPHEN HEARN, *on behalf of himself*  
*and all others similarly situated,*

PLAINTIFF

v.

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

Case No. 23CV-11-492

2<sup>nd</sup> Division ✓

SAM and APRIL LANE, *on behalf of themselves*  
*and all others similarly situated,*

PLAINTIFFS

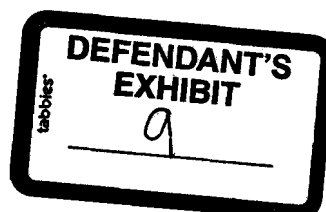
v.

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

Case No. 23CV-11-482

3<sup>rd</sup> Division



23CV-11-492 231-23100000680-053  
STEPHEN HEARN ETAL V BHP BIL 5 Pages

RANDY and JOYCE PALMER, *on behalf of*  
*themselves and all others similarly situated,*

PLAINTIFFS

v.

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

Case No. 23CV-11-491

3rd Division

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**PLAINTIFFS' MOTION FOR  
CONSOLIDATION AND APPOINTMENT OF LEAD COUNSEL**

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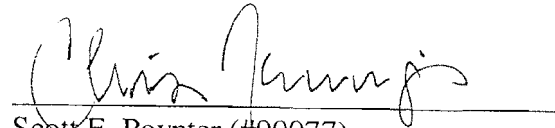
Come now Plaintiffs Jesse Frey, Susan Frey, Stephen Hearn, Sam Lane, April Lane, Randy Palmer, and Joyce Palmer in the above-captioned cases, and move for an order consolidating the cases under one caption and one case number, and to be assigned to one judge. For their motion, Plaintiffs state:

1. On May 20, 2011, *Lane v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-482 was filed in this Court and assigned to the Third Division, Honorable Judge Charles E. Clawson.
2. On May 23, 2011, *Frey v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-488 was filed in this Court and assigned to the Second Division, Honorable Judge Michael A. Maggio.

DATED: May 26, 2011

Respectfully Submitted,

EMERSON POYNTER, LLP

A handwritten signature in black ink, appearing to read "Scott E. Poynter", is written over a horizontal line.

Scott E. Poynter (#90077)

Christopher D. Jennings (#06306)

William T. Crowder (#03138)

EMERSON POYNTER, LLP

500 President Clinton Ave., Ste. 305

Little Rock, AR 72201

Tel: (501) 907-2555

Fax: (501) 907-2556

John G. Emerson (#08012)

EMERSON POYNTER, LLP

830 Apollo Lane

Houston, TX 77058

Tel: (281) 488-8854

Fax: (281) 488-8867

Attorneys for Plaintiffs

James C. Wyly

Sean F. Rommel

WYLY-ROMMEL, PLLC

2311 Moores Lane

Texarkana, TX 75503

Tel: (903) 334-8646

Fax: (903) 334-7007

**CERTIFICATE OF SERVICE**

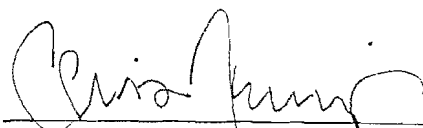
I, Scott E. Poynter, attorney for the Plaintiff, do hereby certify that a copy of the above was served via Certified U.S. Mail to the following counsel on this 26th day of May 2011.

Clarita Operating, Inc.  
c/o Perkins & Trotter, PLLC  
John Peiserich  
101 Morgan Keegan Drive., Suite A  
Little Rock, AR 72202

Chesapeake Operating, Inc.  
c/o The Corporation Company  
124 West Capitol Ave., Suite 1900  
Little Rock, AR 72201

BHP Billiton Petroleum (Fayetteville) Inc.  
c/o The Corporation Company  
124 W. Capitol Ave., Ste. 1900  
Little Rock, AR 72201

BHP Billiton Petroleum (Arkansas) Inc.  
c/o The Corporation Company  
124 W. Capitol Ave., Ste. 1900  
Little Rock, AR 72201

  
\_\_\_\_\_  
Christopher D. Jennings

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

JESSE and SUSAN FREY, *on behalf of themselves*  
*and all others similarly situated,*

2011 MAY 26 PM 1 45

RHONDA WARD, CLERK

PLAINTIFFS

BY



Case No. 23CV-11-488

v.

2<sup>nd</sup> Division

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

STEPHEN HEARN, *on behalf of himself*  
*and all others similarly situated,*

PLAINTIFF

v.

Case No. 23CV-11-492

2<sup>nd</sup> Division

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

SAM and APRIL LANE, *on behalf of themselves*  
*and all others similarly situated,*

PLAINTIFFS

v.

Case No. 23CV-11-482

3<sup>rd</sup> Division

BHP BILLITON PETROLEUM (ARKANSAS) INC.,  
BHP BILLITON PETROLEUM (FAYETTEVILLE)  
LLC, CHESAPEAKE OPERATING, INC., and  
CLARITA OPERATING, LLC

DEFENDANTS

DEFENDANT'S  
EXHIBIT

10



23CV-11-488 231-23100000680-052  
JESSE & SUSAN FREY V BHP BI 24 Pages  
FAULKNER CO 05/26/2011 01:45 PM  
CIRCUIT COURT F1700

**RANDY and JOYCE PALMER, *on behalf of***  
*themselves and all others similarly situated,*

**PLAINTIFFS**

**v.**

**BHP BILLITON PETROLEUM (ARKANSAS) INC.,**  
**BHP BILLITON PETROLEUM (FAYETTEVILLE)**  
**LLC, CHESAPEAKE OPERATING, INC., and**  
**CLARITA OPERATING, LLC**

**DEFENDANTS**

**Case No. 23CV-11-491**

**3rd Division**

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**MEMORANDUM OF LAW IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR CONSOLIDATION AND  
 APPOINTMENT OF LEAD COUNSEL**

---

Movants Jesse Frey, Susan Frey, Stephen Hearn, Sam Lane, April Lane, Randy Palmer, and Joyce Palmer ("Movants"), plaintiffs in four related putative class actions, *Frey v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-488, *Hearn v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-492, *Lane v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-482, *Palmer v. BHP Billiton Petroleum Arkansas Inc.*, et al., Case No. 23CV-11-491, filed against BHP Billiton Petroleum (Arkansas) Inc., BHP Billiton Petroleum (Fayetteville) LLC, Chesapeake Operating, Inc., and Clarita Operating, LLC (collectively "Defendants"), submit this legal memorandum in support of their motion for an Order consolidating the four related class actions, and to appoint Jesse Frey, Susan Frey, Stephen Hearn, Sam Lane, April Lane, Randy Palmer, and Joyce Palmer and their attorneys at Emerson Poynter LLP as Lead Plaintiffs and Lead Counsel (the "Motion").

## **INTRODUCTION**

Presently pending before various Faulkner County divisional courts are four almost identical actions brought against the Defendants. All of the actions generally allege that the Defendants operated certain injection wells in their gas-drilling operations within the County that caused earthquakes and resulting damages to Plaintiffs and the purported class. The pending cases are as follows:

<b><u>Abbreviated Case Name</u></b>	<b><u>Case No.</u></b>
<i>Frey, et al. v. BHP Billiton Petroleum Arkansas Inc., et al.,</i>	Case No. 23CV-11-488
<i>Hearn v. BHP Billiton Petroleum Arkansas Inc., et al.,</i>	Case No. 23CV-11-492
<i>Lane, et al. v. BHP Billiton Petroleum Arkansas Inc., et al.,</i>	Case No. 23CV-11-482
<i>Palmer, et al. v. BHP Billiton Petroleum Arkansas Inc., et al.,</i>	Case No. 23CV-11-491

Because all of these pending actions are substantially similar, Movants seek to consolidate the actions pursuant to Arkansas Rule of Civil Procedure (“Ark. R. Civ. P.”) 42(a). All of these actions are based upon similar factual allegations and raise similar issues of fact and law. All are pled as class actions asserting the same theory for recovery and request similar forms of relief. As such, the cases are clearly related to one another and should be consolidated under one caption and presided over by one judge to conserve judicial resources and to provide consistency in court rulings.

Further, the Motion seeks appointment of Jesse Frey, Susan Frey, Stephen Hearn, Sam Lane, April Lane, Randy Palmer, and Joyce Palmer, as Lead Plaintiffs and their attorneys at Emerson Poynter LLP as Lead Counsel. The consolidation of these actions and appointment of Lead Plaintiff and Lead Counsel will promote efficiency and will advance judicial economy.



## ARGUMENT

### **A. Consolidation of the Almost Identical Actions Is Appropriate.**

This Court has broad discretion under Ark. R. Civ. P. 42(a) to consolidate cases pending before it. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983); *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984) (overruled on other grounds by *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993)).

Under Arkansas law, consolidation pursuant to Ark. R. Civ. P. 42(a) is proper when actions involve common questions of law and fact:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any and all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

Ark. R. Civ. P. 42(a).

The purpose of Ark. R. Civ. P. 42 is to further convenience, avoid delay and prejudice, and serve the needs of justice. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981). The primary concern of Rule 42 is efficient judicial administration rather than the wishes of the parties, as long as no party suffers prejudice by the bifurcation. *Id.*; *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996) (holding that the primary purpose of [Rule 42] is to advance judicial economy as long as the parties are not prejudiced.).

Here, consolidation is appropriate because the related cases described herein involve common questions of law and fact, and thus satisfy the plain language requirements outlined in Ark. R. Civ. P. 42(a). As discussed above, the related actions pending before the Faulkner County divisional courts present virtually identical factual and legal issues. All of the actions involve the same course of misconduct, occurrences and subject-matter. Each action asserts the same theories for recovery and requests similar forms of relief. In addition, each action is pled

as a class action and each names the same primary defendants. Also, because these actions are based on the same facts and involve the same subject matter, the same discovery will be relevant to all of the lawsuits. Moreover, consolidation is appropriate here because it would act in accordance with the purpose of Ark. R. Civ. P. 42 as the consolidation of these related actions would further convenience, avoid delay and prejudice, and serve the needs of justice. Accordingly, the above-captions cases should be consolidated.

**B. Appointment of Lead Plaintiff And Lead Counsel Is Appropriate.**

The Arkansas Rules of Civil Procedure do not specifically address the appointment of lead plaintiffs and lead counsel in class action litigation, and any issue related thereto has not received detailed analysis at the appellate level as reflected in Arkansas case law. However, Arkansas Rule of Civil Procedure 23 provides Arkansas trial courts with inherent authority to manage class actions. *See, e.g., Teris, LLC v. Chandler*, 375 Ark. 70, 86, 289 S.W.3d 63, 74 (2008) (“We have no hesitancy in placing the management of this class action in the trial court. That is what the rule contemplates...”); *see also Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (recognizing that the courts possess the broad inherent authority “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). Rule 23(d) reflects this inherent authority by detailing the trial court’s discretionary power to issue various procedural orders to assist in the management of a putative class action. Arkansas courts have operated under these auspices in consolidating substantially similar cases and appointing lead counsel in complex class litigation. *See, e.g., In re Alltel Corp. Shareholders Litig.*, Lead Case No. 07-6406, Pulaski County Cir. Ct., 2d Div. (J. Piazza) (June 20, 2007) (Order consolidating similar class action cases and appointing lead counsel).

As the United States Congress has recognized, the appointment of interim class counsel aids in the successful management of a class action in that, based on the circumstances, it effectively deters uncertainty and rivalry and creates real efficiency by alleviating confusion and the waste of judicial resources given the practical situation that some discovery, as well as some motions and settlement discussion may occur prior to certification. Fed. R. Civ. P. 23 Advisory Comm. Notes (2003). Plaintiff's motion here is proffered in recognition of these findings and in an effort to create real efficiency through the appointment of his counsel as interim class counsel in this action.

Further federal guidance, the Manual for Complex Litigation, Fourth (the "Manual"), provides helpful analyses and recommendations regarding, *inter alia*, the appointment of leadership in complex cases such as this one and the responsibilities and duties of counsel so appointed.<sup>1</sup> The Manual acknowledges the importance of the appointment of what it refers to as "designated" counsel<sup>2</sup> and discusses organizational structures.<sup>3</sup> The Manual suggests a variety of factors for the Court to consider in its decision regarding the appointment of lead counsel.<sup>4</sup> These factors are similar to the criteria in the new Federal Rule of Civil Procedure regarding the appointment of class counsel under Rule 23(g)(1) discussed above. Of course, consistent with the Manual and Federal Rule of Civil Procedure 23(g)(1), Arkansas law requires that class representatives must "fairly and adequately represent the interests of the class" through counsel that is "qualified, experienced and generally able to conduct the litigation." *BPS, Inc. v.*

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<sup>1</sup> The Manual for Complex Litigation, Fourth §10.2, §10.21, §10.22, §10.221, §10.224.

<sup>2</sup> *Id.* at §10.224.

<sup>3</sup> *Id.* at §10.221. Similarly, Rule 23(g) of the Federal Rules of Civil Procedure, as well as the Manual, provides guidelines for appointment of "interim class counsel" in putative class actions.

<sup>4</sup> See *Manual, Fourth* at §10.224.

*Richardson*, 341 Ark. 834, 844, 20 S.W.3d 403, 407 (2000). But generally, courts consider the following factors in appointing class counsel:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, and
- the resources counsel will commit to representing the class.

A review of these factors supports the appointment of the named plaintiffs as Lead Plaintiffs and Emerson Poynter LLP as Lead Counsel.

**a. Emerson Poynter LLP Has Performed Substantial Work Identifying and Investigating Claims and Potential Claims in This Action**

Emerson Poynter has taken on this case, already having committed substantial resources to its investigation and prosecution, willing to commit the appropriate resources in representing the proposed class and vigorously protecting the interests of the proposed class members. Indeed, Emerson Poynter has been investigating and pursuing the claims of these actions for many months now and will continue to vigorously prosecute those claims to their conclusion.

**b. Emerson Poynter LLP Has Substantial Experience in Litigating Complex Litigation**

Emerson Poynter LLP is a national law firm with offices in Houston and Little Rock, whose lawyers have specialized in complex litigation for well over eighteen years. The firm's founding partners, John G. Emerson and Scott E. Poynter, have extensive experience prosecuting complex cases, and class action cases similar to these. Emerson Poynter has represented, and is currently representing, individuals, large companies, and employees in major class actions, and derivative cases throughout the United States, and has recovered hundreds of millions of dollars

and other significant relief for the parties they have represented. These cases involve violations of the environmental, consumer protection, securities, antitrust, and ERISA laws.

Scott E. Poynter will be leading the prosecution of these cases for his firm. Mr. Poynter has been involved in complex class action litigation for more than 15 years, and a member of the Arkansas bar since 1990, having previously served as a Judge Advocate in the United States Air Force. As referenced above, Mr. Poynter has served as plaintiffs' counsel in multiple class action cases.

Mr. Poynter currently serves as Co-Chairman of the Plaintiffs' Counsel Executive Committee representing rice farmers damaged by genetically modified rice contamination, which obviously hit Arkansas rice farmers very hard as the largest suppliers of rice in the United States. This Multi-District Litigation is presided over by Judge Catherine Perry of the Eastern District of Missouri – St. Louis Division, and Mr. Poynter's appointment was made by Judge Perry in 2007 after a hotly contested battle for counsel leadership. *In re Genetically Modified Rice Litigation*, MDL No. 1811 (E.D. Mo.). Additionally, Mr. Poynter's experience in complex litigation has been demonstrated through his service as Plaintiffs' Co-Lead Counsel in another Multi-District Litigation litigated in the Western District of Oklahoma on behalf of millions of present and former customers of Farmers Insurance for violations of the Fair Credit Reporting Act. *In re Farmers Ins. Co., Inc. FCRA Litig.*, MDL No. 1564 (W.D. Okla.). In addition to these examples, Mr. Poynter has worked in many other complex class action cases, and several cases involving allegations similar to the cases at issue, as summarized in the attached firm resume of Emerson Poynter LLP. *See*, Exhibit A.

John Emerson, Mr. Poynter's co-founding partner of the firm, will also participate in this litigation given his extensive experience in complex litigation. Mr. Emerson has represented

plaintiffs against many of the country's largest Fortune 500 companies. He was co-lead counsel in mass tort litigation in which he represented numerous plaintiffs who had been diagnosed with radiogenic cancers alleged to have been caused by exposure to radioactive materials associated with the mining and milling of uranium and the disposal and supposed storage of radioactive wastes and toxic chemicals. These cases involved the operations of Exxon, Conoco, U.S. Steel, Chevron, and others. Further details of Mr. Emerson's experience and proven ability to prosecute such actions, including its appointments to leadership roles by many courts, are more fully demonstrated in Emerson Poynter's firm resume attached as Exhibit A to this memorandum.

**c. Emerson Poynter LLP Has More Than Adequate Resources**

Emerson Poynter LLP has the resources necessary to prosecute this litigation. As demonstrated in its resume, Emerson Poynter LLP has demonstrated its adequacy of resources through the successful litigation of many class action cases, which have resulted in the recovery of millions of dollars for their clients and the classes that they represented. In addition to economic and personal resources of Emerson Poynter LLP, the law firm of Wyly-Rommel, PLLC has agreed to work as co-counsel with Emerson Poynter LLP.

Wyly-Rommel brings its wealth of resources and experience to this case as more fully demonstrated in its firm resume attached to this memorandum as Exhibit B. Lead attorneys for Wyly-Rommel will be attorneys Sean Rommel and Jim Wyly. Mr. Rommel and Mr. Wyly have worked successfully in complex class action litigation and are highly skilled and experienced attorneys. Together with Wyly-Rommel, Emerson Poynter LLP will undoubtedly serve the best interests of Movants and the class they seek to represent.

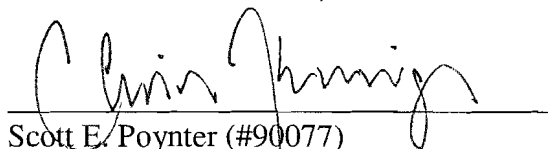
**CONCLUSION**

WHEREFORE, for these reasons, Movants respectfully request the Court to consolidate the related actions identified herein, and appoint Jesse Frey, Susan Frey, Stephen Hearn, Sam Lane, April Lane, Randy Palmer, and Joyce Palmer as Lead Plaintiffs and Emerson Poynter LLP as Lead Counsel.

DATED: May 26, 2011

Respectfully Submitted,

EMERSON POYNTER, LLP



Scott E. Poynter (#90077)

Christopher D. Jennings (#06306)

William T. Crowder (#03138)

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**CERTIFICATE OF SERVICE**

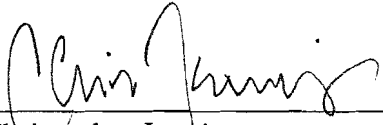
I, Scott E. Poynter, attorney for the Plaintiff, do hereby certify that a copy of the above was served via Certified U.S. Mail to the following counsel on this 26<sup>th</sup> day of May 2011.

Clarita Operating, Inc.  
c/o Perkins & Trotter, PLLC  
John Peiserich  
101 Morgan Keegan Drive., Suite A  
Little Rock, AR 72202

Chesapeake Operating, Inc.  
c/o The Corporation Company  
124 West Capitol Ave., Suite 1900  
Little Rock, AR 72201

BHP Billiton Petroleum (Fayetteville) Inc.  
c/o The Corporation Company  
124 W. Capitol Ave., Ste. 1900  
Little Rock, AR 72201

BHP Billiton Petroleum (Arkansas) Inc.  
c/o The Corporation Company  
124 W. Capitol Ave., Ste. 1900  
Little Rock, AR 72201

  
\_\_\_\_\_  
Christopher Jennings



# EXHIBIT

## A



Emerson Poynter LLP

Attorneys at Law

Little Rock

Houston

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Class Action Litigation  
Securities Litigation  
Antitrust Litigation  
ERISA Litigation  
Consumer Litigation  
Trials and Appeals  
Product Liability and Tort Law Litigation  
Securities Arbitration  
Martindale-Hubble AV Rated

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#### Our Firm

Emerson Poynter LLP has a national class action legal practice with offices in Houston, Texas, and Little Rock, Arkansas.

Emerson Poynter, and its team of experienced Attorneys and Paralegals, handles complex commercial litigation with a concentration in those cases that involve violations of federal and state securities or antitrust laws, consumer protection laws, and violations of the Employee Retirement Income Security Act of 1974 ("ERISA"). Our law firm has handled numerous securities and shareholder derivative cases representing investors. Emerson Poynter and its predecessor firms have also been active in many mass tort, class action, and individual cases of note. In the class action litigation area, Emerson Poynter has represented and currently represents plaintiffs in well over 100 class action cases, some of which are being prosecuted with other leading national firms.

Emerson Poynter currently serves as Co-Lead Counsel in several Multidistrict Litigation ("MDL") cases involving product liability and consumer protection issues. In 2004, Emerson Poynter was appointed by the Honorable Stephen P. Friot as Plaintiffs' Co-Lead Counsel in *In re Farmers Insurance Co., Inc. FCRA Litigation* which is currently pending in the Western District of Oklahoma. This case is being litigated on behalf of a certified class of Farmers' current and past customers who were charged more than the lowest premium for insurance based upon information in a consumer report, and received certain "adverse action" notices that willfully

failed to conform to the Fair Credit Reporting Act. We also represent numerous long-grain rice farmers in Arkansas and other states, and serve as Co-Chairman of Plaintiffs' Executive Committee in the MDL action *In re Genetically Modified Rice Litigation* (the "*Rice MDL Action*") having been appointed to such position by the Honorable Catherine D. Perry of the Eastern District of Missouri in April 2007. The *Rice MDL Action* seeks damages for long-grain rice producers in Arkansas, Missouri, Mississippi, Louisiana, and Texas for defendants' contamination of the United States' rice supply with genetically modified rice as revealed by Bayer and the USDA in August 2006. Emerson Poynter additionally serves as Co-Lead Plaintiffs' Counsel in an MDL case transferred to the Honorable Richard D. Bennett of the District of Maryland captioned *In Re; Tyson Foods, Inc. Chicken Raised Without Antibiotics Consumer Litigation*. This case involves false advertising claims associated with the sale of Tyson Foods' chicken as being raised without antibiotics, when in fact the chicken was raised with antibiotics.

In the consumer protection litigation area, Emerson Poynter is a leader in fighting for the rights of consumers. Besides the aforementioned *Tyson RWA Chicken MDL Action*, Emerson Poynter is also a leader in the MDL action captioned *In Re; Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation* pending in the United States District Court for the Western District of Missouri. Emerson Poynter is Co-Lead Counsel in the *Webb et al. v. Carters Inc. et al.* litigation currently pending in the United States District Court for the Central District of California concerning Carter's line of tagless baby clothing; in the *Montanez et al. v. Gerber Childrenswear, Inc., et al.* litigation currently pending in the United States District Court for the Central District of California concerning Gerber's line of tagless baby clothing; in the *Horne et al. v. The Dannon Company Inc.* litigation currently pending in the United States District Court for the Eastern District of Arkansas concerning Dannon's line of yogurt products; and, in the *Herrington, et al. v. Johnson and Johnson Consumer Companies, Inc. et al.* litigation currently pending in the United States District Court for the Northern District of California concerning numerous baby products.

In the retirement plan/pension area, Emerson Poynter served as Co-Lead Counsel in the Winn-Dixie Stores, Inc. ERISA Litigation that settled in the Middle District of Florida in 2008, and served as Co-Lead Counsel in the ADC Telecommunications ERISA litigation that settled in the District of Minnesota in 2006. Emerson Poynter served on the Enron ERISA Litigation Plaintiffs' Counsel Steering Committee. This case settled in the United States District Court, Southern District of Texas, Houston Division in 2005.

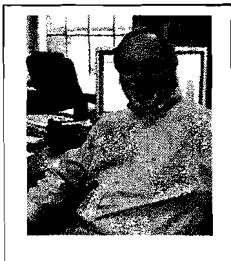
Emerson Poynter is also active in cases seeking to improve corporate governance in public companies through its involvement in shareholder derivative litigation. Most notably, Emerson Poynter served as Co-Lead Counsel in cases resulting in significant and far-reaching corporate governance and compliance improvements within companies such as AOL/Time Warner, Computer Associates, Nicor, Cryolife, Inc., and Crompton (Chemtura).

## Our Attorneys



John G. Emerson

Partner



**Mr. Emerson** is a founding partner of the Firm. He was born in Little Rock, Arkansas, and was raised there and in Houston, Texas. He is a member of the state bars of Texas, Washington and Arkansas. Mr. Emerson obtained his Bachelor of Arts from the University of Texas at Austin. He then earned his Juris Doctorate from South Texas College of Law.

Mr. Emerson has represented numerous stockholders in shareholder derivative lawsuits brought against corporate boards. These suits sought to impose corporate governance reforms aimed at protecting shareholders and eliminating corporate waste and abuse. For example, Mr. Emerson served as one of the Lead Derivative Counsel in the *Federman v. Artz* derivative action brought on behalf of Computer Associates in the Federal District Court for the Eastern District of New York. This action was brought against the Computer Associates board of directors and led to the resignation of the Company's CFO, the resignation of two other senior financial officers, and the adoption of certain corporate governance measures that Computer Associates has represented as the "gold standard" of governance reform. Mr. Emerson was Co-Lead Counsel in the *In Re Nicor, Inc. Shareholder Derivative Litigation* in the Circuit Court of Cook County, Illinois County Department, Chancery Division. This action was brought against Nicor's board of directors and its settlement resulted in significant corporate governance improvements at Nicor. In 2005, Mr. Emerson was Co-Lead Counsel in the *In Re Cryolife Derivative Litigation* pending in the Superior Court of Fulton County, Georgia. The settlement of this action in 2005 resulted in wide-sweeping and significant corporate governance improvements at Cryolife. Mr. Emerson was also Co-Lead Counsel in the *AOL Time Warner Shareholder Derivative Litigation* which was settled in the Federal District Court for the Southern District of New York in 2006. This settlement resulted in wide ranging corporate governance and compliance changes and was a

substantial factor in Time Warner's ability to obtain \$200 million from its Directors and Officers (D&O) insurance carriers. Mr. Emerson was Lead Counsel in the *Crompton* (now known as Chemtura) *Shareholder Derivative Litigation* which settled in the Bankruptcy Court for the Southern District of New York in 2009. This settlement resulted in significant corporate governance improvements that will be in place as the Company is reorganized and exits bankruptcy.

In the tort area, Mr. Emerson, has represented plaintiffs against many of the country's largest Fortune 500 companies. He was a co-lead counsel in mass tort litigation in which he represented numerous plaintiffs who had been diagnosed with radiogenic cancers alleged to have been caused by exposure to radioactive materials associated with the mining and milling of uranium and the disposal and supposed storage of radioactive wastes and toxic chemicals. These cases involved the operations of Exxon, Conoco, U.S. Steel, Chevron, and others. These mass tort cases were settled under a confidential agreement. Mr. Emerson currently serves as Chairman of the Expert Witness Committee in the MDL Action *In Re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation* on file in the United States District Court for the Western District of Missouri. Mr. Emerson has extensive jury trial experience over the past 30 years.

In the consumer class action area, Mr. Emerson represented one of the Lead Plaintiffs in the AOL Version 5.0 software litigation. He is also Co-Lead Counsel in litigation for consumers against the Farmers Insurance Group of Companies involving alleged violations of the Fair Credit Reporting Act.

In the antitrust area, Mr. Emerson has represented plaintiffs in the Compact Disc Antitrust Litigation filed against the music industry in the United States, and has represented plaintiffs in the High Pressure Laminates Antitrust Litigation in both the direct and indirect purchaser cases. Currently, Mr. Emerson is involved in the following Antitrust cases: CRT (Cathode Ray Tube) Antitrust Litigation; Flash Memory Antitrust Litigation; GPU (Graphics Processing Units) Antitrust Litigation; Packaged Ice Antitrust Litigation; Ocean Shipping Antitrust Litigation; SRAM (Static Random Access Memory) Antitrust Litigation; TFT-LCD (Flat Panel) Antitrust Litigation; and Trans-Pacific Airline Surcharge Litigation.

Mr. Emerson was also a consultant to Canadian plaintiffs' counsel in the Canadian Medtronic Pacemaker Pacing Lead Product Liability Litigation that was certified and settled in British Columbia as a Canadian national class action. He has also been a consultant to Canadian counsel in the Canadian compact disc antitrust litigation, the Canadian Publishers Clearing

House litigation, and the Canadian AOL 5.0 Software Litigation, which were of course companion cases to those discussed above.

Mr. Emerson is committed to representing employees or former employees who participated in their public company's retirement plans and sustained significant losses in these plans due to corporate malfeasance. In this regard, he was appointed to the Plaintiffs' Counsel Steering Committee by Judge Melinda Harmon in the consolidated Enron ERISA Litigation, *Pamela M. Tittle v. Enron Corp.*, et al.

Mr. Emerson was admitted to the Texas Bar in 1980. He is admitted to practice before the U.S. Supreme Court; U.S. Court of Appeals, 5th Circuit; U.S. Court of Appeals, 8<sup>th</sup> Circuit; U.S. District Courts for the Southern, Northern, Western and Eastern Districts of Texas; Western and Eastern Districts of Arkansas; Western District of Washington; District of Colorado; and all Texas, Washington and Arkansas state courts.

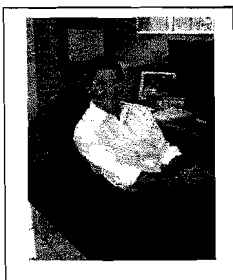
Mr. Emerson was affiliated with the fraternity Delta Theta Phi. He is a member of the American Bar Association (Tort and Insurance Practice Section, Legal Economics Section); American Association for Justice (AAJ); AAJ Class Action Litigation Group; Texas Trial Lawyers Association; State Bar of Texas (Grievance Committee 4-D, Houston, 7/91 through 7/94; Membership Services Committee, 91-92); Sustaining Life Fellow Texas Bar Foundation; Bar Association for the United States District Court for the Eastern District of Texas; Houston Bar Association; Fellow of the Houston Bar Foundation; Washington State Bar; King County Bar Association; Pulaski County Bar Association; and, the Arkansas Bar Association.

Mr. Emerson's email address is jemerson@emersonpoynter.com.



Scott E. Poynter

Partner



**Mr. Scott Poynter** is also a founding partner of the Firm. He was born in Fayetteville, Arkansas and was raised in Mountain Home. Mr. Poynter earned his Bachelor of Science Degree in Accounting from Arkansas Tech University. He then earned his Juris Doctorate from the University of Arkansas in 1989. While in law school, Mr. Poynter was active in Phi Alpha Delta legal fraternity and was awarded a leadership scholarship from the school. After completing law school, Mr. Poynter joined the Judge Advocate Department of the United States Air Force and

served six years of active duty as a Judge Advocate and litigated more than fifty jury trials. In 1995, then Captain Poynter was selected by the Air Force for its Advanced Trial Advocacy Course, a course reserved for the military's finest litigators. After leaving active duty, Mr. Poynter was a partner at a national class action law firm, which focused its work on the representation of investors. He also continued his military career in the Arkansas Air National Guard and attained the rank of Major.

Currently, Mr. Poynter commits substantial portions of his practice to his service in two extremely large and complex MDL actions pending in Oklahoma and Missouri. As Plaintiffs' Co-Lead Counsel in the *Farmers MDL Action*, Mr. Poynter is devoted to recovering statutory damages in a certified class action brought on behalf of Farmers' customers who paid higher insurance premiums based upon credit information without their knowledge due to faulty FCRA notices prepared by Farmers. In another MDL action, *In Re Genetically Modified Rice Litigation*, Mr. Poynter serves as Co-Chair of Plaintiffs' Executive Committee on behalf of long-grain rice farmers who experienced a deflated rice market after America's rice supply was contaminated by Bayer's genetically modified rice in 2006 and markets in Europe and Asia were lost. Additionally, Mr. Poynter is Co-Lead Plaintiffs' Counsel in the *Tyson RWA Chicken MDL Action* before Judge Bennett in the District of Maryland.

Mr. Poynter is also an experienced ERISA litigator, having served as Co-Lead Plaintiffs' Counsel for retirement plan participants involving retirement plans at ADC Telecommunications, Inc. and Winn Dixie Stores, Inc. Due to Mr. Poynter's efforts, millions of dollars were recovered in those retirement plans in settlements approved by judges in the District of Minnesota in 2006 and the Middle District of Florida in 2008. Mr. Poynter was also instrumentally involved in ERISA Actions involving Enron, Reliant Energy, and he currently represents numerous Goodyear Tire & Rubber Company employees in an ERISA action brought in Ohio.

As an active participant in the representation of investors whose shares are acquired through leveraged buyouts, mergers, tender offers, and other "change of control" transactions, Mr. Poynter has challenged the fairness of such transactions, the adequacy of disclosures made in connection with the transactions, and the price offered to shareholders for their equity. These types of cases have resulted in the restructuring of scores of corporate transactions and the recovery of hundreds of millions of dollars in additional compensation for shareholders. Most recently, Mr. Poynter was a lead counsel in such litigation and represented Alltel shareholders in a case assigned to Pulaski Circuit Judge Chris Piazza. *In re Alltel Corp. Shareholders Litigation*, Circuit Court of Pulaski County, Arkansas, Case No. 07-6406. This case was settled in late August 2008.

Mr. Poynter also devotes a significant amount of his law practice to representing investors seeking financial recovery for losses suffered as a result of securities fraud. Additionally, Mr. Poynter has represented stockholders in shareholder derivative lawsuits brought against corporate boards, seeking to impose corporate governance reforms aimed at protecting shareholders and eliminating corporate waste and abuse. For example, Mr. Poynter served as one of the counsel in *Perkins v. Sortwell, et al.*, brought on behalf of Aurora Foods, Inc. In this derivative action, certain corporate insiders were forced to relinquish more than 3.6 million of their personal shares to Aurora Foods representing nearly a \$15 million benefit to the Company. Additionally, significant corporate governance safeguards were implemented to significantly reduce the risk of accounting malfeasance. Mr. Poynter's experience in this action contributed significantly to the settlement achieved in a derivative action brought on behalf of Computer Associates, which led to the resignation of the Company's CFO and two other senior financial officers. Moreover, Mr. Poynter was one of the lead counsel in derivative litigation in Georgia involving Cryolife that led to the denial of the Cryolife's Board of Directors' motion to dismiss based upon the investigation and report of a special litigation committee. Through his effort in building Plaintiffs' case in discovery, the motion to dismiss was denied very quickly and a favorable settlement for Cryolife and its shareholders followed. Mr. Poynter has also led other derivative actions involving Nicor, AOL Time Warner, and Crompton Corporation.

Mr. Poynter has also been extensively involved in many telecommunications class action cases brought under consumer protection statutes, and recently appeared on the nationally syndicated television show *The Morning Show with Mike and Juliet* as an expert on the cell phone industry's early termination fees. Mr. Poynter provided viewers of this show with legal information regarding the response of consumers to such fees, and the Federal Communications Commission's recent hearings on the subject. In litigation in this area, Mr. Poynter recently settled a national class case against major cellular telephone carrier Alltel that resulted in over \$44 million of relief for class members. Presently, Mr. Poynter represents consumers against Apple bringing false advertising claims associated with the iPhone 3G, and is being proffered as a member of Plaintiffs' Executive Committee in the Northern District of California.

Mr. Poynter is admitted to practice before: U.S. Court of Appeals for the Armed Forces; U.S. District Courts for the Western and Eastern Districts of Arkansas; 8<sup>th</sup> Circuit Court of Appeals; and all Arkansas State Courts.

Mr. Poynter's e-mail address is [scott@emersonpoynter.com](mailto:scott@emersonpoynter.com).





Terry M. Poynter

Of Counsel

**Mr. Terry Poynter** was born in Springfield, Missouri, and grew up in Mountain Home, Arkansas. He earned his Bachelor of Science Degree in Business Administration at the University of Arkansas in Fayetteville, Arkansas in 1962, and earned his Juris Doctorate from the same institution in January, 1965. Mr. Poynter was a part-time sports journalist during his undergraduate and law school days. He worked for the Arkansas Democrat, Arkansas Gazette, was an assistant to the sports information director, and, finally, in 1964, was the sports editor of the Northwest Arkansas Times in Fayetteville. During law school, he was Co-Editor-in-Chief of the Arkansas Law Review and Bar Journal.

During his distinguished legal career, Mr. Poynter served two terms as prosecuting attorney for the 16<sup>th</sup> Judicial District. He has, at one time or another, been primary counsel for six different financial institutions, in addition to serving on the Arkansas Supreme Court's Board of Legal Specialization from 1998 through 2002; the Arkansas Supreme Court Board of Bar Examiners from 1999 through 2003; and the Arkansas Bar Association's Board of Governors.

Mr. Poynter was appointed as Special Chief Justice of the Arkansas Supreme Court by Governor Bill Clinton in 1990, to sit for Mr. Jack Holt Jr., who had recused in a case.

Mr. Poynter devotes a substantial portion of his practice to litigation in the personal injury real estate and commercial areas along with representing creditors in bankruptcy proceedings.

Mr. Poynter has recently become involved in class action litigation in the areas of consumer fraud and insurance fraud. Mr. Poynter is admitted to the U.S. Court of Appeals for the 8th Circuit; U.S. District Court for the Eastern and Western Districts of Arkansas, and all Arkansas State Courts. He is a member of the American Association for Justice, the Arkansas Bar Association and the Baxter County Bar Association.



Robert Jigarjian

Of Counsel

**Mr. Jigarjian** received his Bachelor of Arts degree from Hamilton College in 1981, his Masters of Business Administration from Tulane University in 1985 and his Juris Doctorate from Golden Gate University in 1993. Prior to law school, Mr. Jigarjian worked as an institutional

sales trader with Keefe Bruyette & Woods, Inc., where he specialized in sales and trading of equity securities in the bank and savings and loan sectors.

Mr. Jigarjian was a founding member of Green & Jigarjian LLP. He joined Emerson Poynter in 2007. Prior to founding Green & Jigarjian, Mr. Jigarjian was employed at Girard & Green LLP.

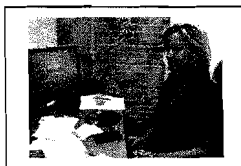
Mr. Jigarjian has substantial experience in the representation of individual and institutional investors in class action and derivative litigation. He represented one of the lead plaintiffs in the class action captioned *In re Prison Realty Securities Litigation*, Case No. 3:99-0452 (M.D. Tenn.) which resulted in a settlement that created a fund for the class valued at approximately \$105 million. He also represented one of the lead plaintiffs in the consolidated class and derivative action captioned *In re Digex, Inc. Shareholders Litigation*, C.A. No. 18336 NC (Del. Ch.), which resulted in a settlement that created a fund for the class valued at approximately \$180 million and provided for other non-cash benefits valued at approximately \$450 million. Mr. Jigarjian currently represents the derivative plaintiffs in *Saito, et al. v. McCall, et al.*, C.A. No. 17132-NC (Del. Ch.). The Delaware Chancery Court recently approved a settlement in the Saito litigation that provided for payment by directors and officers liability insurers to McKesson Corporation of \$30 million and certain corporate governance improvements. Mr. Jigarjian also represents the lead class plaintiffs in *In Re: Salomon Analyst XO Litigation*, 02-CV-8114 (GEL) (S.D.N.Y.).

Mr. Jigarjian is a member of the State Bar of California and is admitted to the United States District Courts for the Northern, Southern, Eastern and Central Districts of California and to the Ninth Circuit Court of Appeals.



Christa S. Clark

Of Counsel



**Ms. Clark** is "Of Counsel" to the Firm. She received her degree in Political Science and Business Administration from Baylor University in 1997 and her Juris Doctor from the UALR Bowen School of Law in 2000 where she served as the Associate Editor in Chief of the UALR Law Review. From 2001-2005, Ms. Clark was an associate attorney at Dover Dixon Horne PLLC in Little Rock, Arkansas, where she practiced in the areas of corporate, real estate, and business law and advised clients regarding ERISA and other regulatory compliance matters.

Prior to her affiliation with Emerson Poynter, Ms. Clark served for five years as the Chief Legal Counsel of the Arkansas Teacher Retirement System. In this position, she advised the billion dollar pension fund regarding all legal matters related to the fund's fiduciary duty, prudent investing, and compliance with ERISA and federal law regulations. As Chief Counsel, Ms. Clark oversaw all of the retirement plan's securities litigation which involved both derivative cases and serving as Lead Plaintiff in class action cases, allowing the fund to recover millions of dollars for itself and other shareholders due to securities fraud. Ms. Clark has substantial experience in the legal issues effecting institutional investors including investment advisor act requirements, prudent investor considerations, and corporate governance.

Ms. Clark is admitted to practice in Arkansas including all Arkansas federal, bankruptcy, and state courts and is a member of the American Bar Association, Arkansas Bar Association, National Association of Public Pension Plan Attorneys (2005-2009) and the American Society of Pension Professionals.

Ms. Clark's email addresses are cclark@emersonpoynter.com.



Christopher J. Jennings

Associate



**Mr. Jennings** is an associate with the firm. His practice concentrates on complex litigation and representing consumers, businesses, and governmental entities in individual and class action antitrust, consumer protection, derivative, products liability, and federal securities cases. Mr. Jennings has assisted in prosecuting numerous individual, mass tort, and class cases in state and federal courts throughout the nation.

Currently, Mr. Jennings is assisting in litigating several antitrust cases including *In re CRT (Cathode Ray Tube) Antitrust Litigation*, MDL 1917 (N.D. Cal.); *In re Flat Glass Antitrust Litigation (II)*, MDL 1942 (W.D. Pa.); *In re Packaged Ice Antitrust Litigation*, MDL 1952 (E.D. Mich.); *In re SRAM (Static Random Access Memory) Antitrust Litigation*, MDL 1819 (N.D. Cal.); and *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL 1827 (N.D. Cal.).

Mr. Jennings is also involved in several consumer protection and products liability cases, including multiple telecommunications class action cases brought under various state consumer protection statutes. Two such class cases he has recently assisted in litigating have resulted in

settlements where approximately \$61 million in total relief was made available to class members. Most recently, Mr. Jennings successfully argued to the Arkansas Supreme Court the reversal of an order denying class certification in a case involving Alltel Communications, Inc. *Rosenow v. Alltel Corp.*, 2010 Ark. 26 (2010).

Mr. Jennings also has experience in representing consumers and businesses in consolidated multidistrict litigation. For example, in *In re Tyson Consumer Litigation*, MDL 1982 (D. Md. 2008), Mr. Jennings assisted in successfully arguing complex procedural and jurisdictional issues and developing novel discovery techniques on behalf of his clients. He has also worked extensively on behalf of Arkansas rice farmers in *In re: Genetically Modified Rice Litigation*, MDL 1811 (E.D. Mo. 2006), most notably where his team successfully opposed German holding company Bayer AG's jurisdictional challenges. *In re Genetically Modified Rice Litigation*, 576 F.Supp.2d 1063 (E.D. Mo. 2008).

Mr. Jennings is a native of Little Rock. In 2001, Mr. Jennings obtained his Bachelor of Arts Degree in Political Science from the University of Arkansas with a minor in History. In 2005, he earned a Masters in Public Administration (MPA) degree from the University of Arkansas. His area of emphasis while obtaining his Masters focused on state level corporate and non-profit lobbying strategy and development. In 2006, Mr. Jennings earned his Juris Doctorate from the William H. Bowen School of Law at the University of Arkansas – Little Rock.

Mr. Jennings is admitted to practice in Arkansas state courts, the Eastern and Western Districts of Arkansas and the 8th Circuit Court of Appeals. He has also been admitted to practice in numerous federal district courts throughout the country.

Mr. Jennings is a member of the American Bar Association, American Association for Justice; Arkansas Bar Association; Pulaski County Bar Association; and the Arkansas Young Lawyers Section.

Mr. Jennings was recently named a *Mid-South Super Lawyers* Rising Star in 2010.



Will T. Crowder

Associate

Mr. Crowder is an associate with the firm. He was born and raised in Camden, Arkansas. In 2000, Mr. Crowder earned a Bachelor of Arts Degree in Political Science from the University of Arkansas. In 2003, Mr. Crowder earned his Juris Doctorate from the William H. Bowen School of Law at the University of Arkansas at Little Rock. Mr. Crowder is a member of the

Arkansas Bar and admitted to the United States District Courts for the Eastern and Western Districts of Arkansas and the U.S. Court of Appeals, 8th Circuit.


From 2004 until 2006, Mr. Crowder was a judicial clerk for U.S. District Judge Harry F. Barnes in El Dorado, Arkansas. Following his clerkship, Mr. Crowder has been employed by the Little Rock law firms of Jack, Lyon & Jones, P.A. (where he focused on defense work) and McMath Woods, P.A. (where he began his representation of the injured). Mr. Crowder is a member of the American Bar Association, the Arkansas Bar Association, the Pulaski County Bar Association, the Arkansas Trial Lawyers Association and the American Association for Justice.

In 2009, Mr. Crowder was selected as a *Mid-South Super Lawyer* Rising Star.

Mr. Crowder's email is [wcrowder@emersonpoynter.com](mailto:wcrowder@emersonpoynter.com)

Multiple claims. If a complaint asserts multiple claims which involve different subject matter divisions of the circuit court, the cover sheet for that division which is most definitive of the nature of the case should be selected and completed.

**COVER SHEET  
STATE OF ARKANSAS  
CIRCUIT COURT: CIVIL**

 To Save a copy of this form to your computer, please click the disk icon on the toolbar above.

The civil reporting form and the information contained herein shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or Supreme Court Rule. This form is required pursuant to Administrative Order Number 8. Instructions are located on the back of the form.

County: Faulkner FILING INFORMATION District: 23 Docket Number: CV-2011-492  
Judge: Maggio 2ND DIVISION Filing Date: 5-24-11  
Plaintiff: Stephen Hearn Defendant: BHP Billiton Petroleum (Arkansas) Inc., et al  
Attorney Providing Information: Chris Jennings 500 President Clinton Ave., Ste. 305, Little Rock, AR 72201  
☒ Plaintiff ☐ Defendant ☐ Intervenor Address

Litigant, if Pro Se: \_\_\_\_\_ Address \_\_\_\_\_  
Related Case(s): Judge \_\_\_\_\_ Case Number(s) \_\_\_\_\_

Type of Case:

Torts

- ☐ (NM) Negligence: Motor Vehicle  
☐ (NO) Negligence: Other  
☐ (BF) Bad Faith  
☐ (FR) Fraud  
☐ (MP) Malpractice  
☐ (PL) Product Liability  
☒ (OD) Other Nuisance, Trespass

Contracts

- ☐ (IS) Insurance  
☐ (DO) Debt: Open Account  
☐ (PN) Debt: Promissory Note  
☐ (EM) Employment  
☐ (OC) Other \_\_\_\_\_

Equity

- ☐ (FC) Foreclosure  
☐ (QT) Quiet Title  
☐ (IJ) Injunction  
☐ (PT) Partition  
☐ (OT) Other \_\_\_\_\_

Miscellaneous

- ☐ (CD) Condemnation  
☐ (RE) Replevin  
☐ (DJ) Declaratory Judgment  
☐ (UD) Unlawful Detainer  
☐ (IN) Incorporation  
☐ (EL) Election  
☐ (FJ) Foreign Judgment  
☐ (WT) Writs  
☐ (AA) Administrative Appeal  
☐ (CF) Property Forfeiture  
☐ (RD) Remove Disabilities  
☐ (NC) Name Change  
☐ (OM) Other \_\_\_\_\_

Jury Trial Requested: ☒ Yes ☐ No

Manner of Filing: ☒ Original ☐ Re-open ☐ Transfer  
☐ Return from Federal/Bankruptcy Court

**DISPOSITION INFORMATION**

Disposition Date: \_\_\_\_\_ ☐ Bench Trial ☐ Non-Trial ☐ Jury Trial

Judgment Type:

- ☐ (DJ) Default Judgment  
☐ (SJ) Summary Judgment  
☐ (CJ) Consent Judgment  
☐ (TJ) Trial Judgment  
☐ (OJ) Other Judgment  
☐ (PG) Petition Granted  
☐ (PD) Petition Denied  
☐ (DF) Decree of Foreclosure

Dismissal Type:

- ☐ (DW) Dismissed with Prejudice  
☐ (DN) Dismissed without Prejudice

Other:

- ☐ (TR) Transferred to Another Jurisdiction  
☐ (RB) Removed to Bankruptcy Court  
☐ (RF) Removed to Federal Court  
☐ (AR) Arbitration

Judgment For:

☐ Plaintiff ☐ Defendant ☐ Both

Judgment Amount: \$ \_\_\_\_\_

Clerk's Signature

AOC 23 10-01  
626 Marshall Street  
Little Rock, AR 72201

Effective 1-1-2002

Date



23CV-11-492 231-23100000671-007  
STEPHEN HEARN ETAL V BHP BILL 1 Page  
FAULKNER CO 05/24/2011 02:09 PM  
CIRCUIT COURT MFO

Send 1 paper or electronic copy to AOC upon filing.  
Send 1 paper or electronic copy to AOC upon disposition.  
Keep original in court file.

**DEFENDANT'S  
EXHIBIT**

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IN THE CIRCUIT COURT OF Faulkner COUNTY, ARKANSAS

2

DIVISION

2011 JUN 3 AM 9 53

RHONDA WHARTON CLERK

BY

PLAINTIFF

VS.

Hearn  
CV 11-492  
BHP

DEFENDANT

TRANSFER ORDER

The above styled matter has been transferred from 2 Division  
to 3 Division due to to run with  
CV 11-482

IT IS SO ORDERED.

Michael Almy  
SENDING JUDGE

DATED: 6/2/11

Almy  
RECEIVING JUDGE

DATED: 6/2/11



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STEPHEN HEARN ETAL V BHP BILL 1 Page  
FAULKNER CO 06/03/2011 09:53 AM  
CIRCUIT COURT ORC3



DEFENDANT'S  
EXHIBIT

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