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MAY 23 2014

MARICELA G. GONZALEZ  
District Clerk, Dimmit County, Texas  
By *[Signature]* Deputy

NO. 14-01-12158-DCV

KENNETH BIRKNER

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IN THE DISTRICT COURT

V.

OF DIMMIT COUNTY, TEXAS

CHESAPEAKE OPERATING, INC.  
AND RICHARD BARTOSH

293<sup>rd</sup> JUDICIAL DISTRICT

**PLAINTIFF'S SECOND AMENDED PETITION**

COMES NOW KENNETH BIRKNER, Plaintiff, and files this his Second Amended Petition in the instant case against Defendants, Chesapeake Operating, Inc. ("Chesapeake") and Richard Bartosh ("Bartosh"). In support of this pleading, Plaintiff would respectfully show the Court as follows:

**I. DISCOVERY CONTROL PLAN AND CLAIM FOR RELIEF**

Pursuant to Rule 190 of the Texas Rules of Civil Procedure, Plaintiff intends to conduct discovery in this matter under Level 2. Plaintiff seeks monetary relief over \$1,000,000.

**II. PARTIES**

Plaintiff, Kenneth Birkner, is an individual who resides in Bexar County, Texas.

Defendant, Chesapeake Energy Marketing, Inc. is an Oklahoma corporation that conducts business in the State of Texas and pursuant to a Rule 11 Agreement may be served through its attorney, Mr. Karl Koen, Gauntt, Earl Binney & Koen, LLP, 14643 Dallas Parkway, Suite 500, Dallas, Texas 75254.

A True Copy of the original, I Certify,  
the 23<sup>rd</sup> day of May 2014  
MARICELA G. GONZALEZ  
Clerk of the District Court  
Dimmit County, Texas  
By *[Signature]* Deputy

TAB 7

Defendant Richard Bartosh is an individual who resides in Guadalupe County, Texas. Defendant may be served at his residence: 1232 Jerad, New Braunfels, Texas 78130, or wherever he may be found.

### III. VENUE

Venue is proper in Dimmit County, Texas pursuant to section 15.002 of the Texas Civil Practice and Remedies Code in that all or a substantial portion of the causes of action alleged herein occurred in whole or in part within this county and Defendants conducted business in this county at the time the cause of action accrued. All conditions precedent to Plaintiff's claim for relief have been performed or occurred.

### IV. FACTUAL BACKGROUND

On May 13, 2010, Plaintiff and Defendant Chesapeake entered into an agreement to lease mineral rights to Plaintiff's land located at Lot 2, Block 13 of the Carrizo Park Subdivision "C", Abstract 38 according to the amended map and plat thereof recorded in Volume 2, Page 24, Map Records, Dimmit County, Texas, containing 40 acres of land, more or less ("The Property") to Defendant Chesapeake and/or its subsidiary, Chesapeake Operating, Inc for a primary term of three years. A copy of said contract is attached as Exhibit A and incorporated herein by reference. In 2012, Defendant Chesapeake sought to enter into a Surface Damage, Right of Way and Subsurface Easement Agreement with Plaintiff. A copy of said proposed contract is attached as Exhibit B and incorporated herein by reference. As a result, Plaintiff granted Defendant Chesapeake and its employees, including but not limited to Defendant Bartosh, access to the land in order to facilitate the proposed drilling contract. Defendant Bartosh, an employee of Defendant Chesapeake and/or one or more of its corporate subsidiaries, was the primary contact who came said property to discuss said drilling contract with Plaintiff during the year 2012.

The property has only one entrance/exit with a cattle guard and is surrounded by an eight foot high game fence. On said property lived one exceptional male white-tailed deer. Plaintiff had watched said deer grow-up on his property for the past five to seven years and it is believed that said deer never left the property for that entire time period.

Sometime in late October or early November, 2012 Defendant Bartosh entered onto the property to hunt the deer. Defendant Bartosh killed the deer and removed it from the property. But for the special relationship that existed between Defendant Chesapeake and Plaintiff, Defendant Bartosh would not have had access to the property. After said incident was reported to Defendant Chesapeake's officers by Plaintiff, Defendant Chesapeake suddenly terminated negotiations on the drilling contract, pulled up its stakes on the property and stopped all communications with Plaintiff.

## V. CAUSES OF ACTION

Plaintiff re-alleges and incorporates by reference herein and in each paragraph that follows the allegations contained in sections I – IV above as is fully copied and set forth at length herein and in each paragraph below, and for recovery of damages against Defendants asserts the following complaints.

### Negligence – Defendant Chesapeake

Defendant Chesapeake is charged with a duty to exercise ordinary care in sending its employees onto land belonging to Plaintiff and others situated. Defendant Chesapeake had a further duty to ensure its employees were properly supervised and trained in such standards and procedures. Defendant Chesapeake breached that duty by allowing its employee, Defendant Bartosh, to enter onto Plaintiff's land for purposes other than the facilitation of the contract and/or by failing to properly train and/or supervise Defendant Bartosh.

In the alternative, Defendant Chesapeake had a duty to exercise ordinary care in conducting background checks on its employees that Defendant Chesapeake knows will be traveling onto land belonging to Plaintiff and others similarly situated. Defendant Chesapeake breached that duty by allowing Defendant Bartosh to come onto Plaintiff's land for purposes not related to the facilitation of the contract when it knew or reasonably should have known that Defendant Bartosh was likely to commit the acts complained of herein.

Plaintiff also asserts negligence under the doctrine of *res ipsa loquitur*, in that the nature of the occurrence giving rise to Plaintiff's claim (i.e., for the deer to go missing on a small, enclosed piece of land after never leaving for its entire life while Defendant Chesapeake's employees were the only persons with access to the land other than Plaintiff) is such that it could not have happened in the absence of the conduct complained of herein. Further, the instrumentalities giving rise to the harm (the procedures and safeguards designed to prevent such an occurrence from taking place) were within the exclusive control of Defendant Chesapeake at the time the negligence occurred.

Respondeat Superior – Defendant Chesapeake

Plaintiff also asserts liability under the doctrine of *respondeat superior* in that Plaintiff was injured as the result of Defendant Chesapeake's employees' acts or omissions. Additionally, at the time of said acts or omissions, the aforementioned employees were acting in the course and scope of their employment with Defendant and in furtherance of Defendant's business. Further, said employees would not have had access to Plaintiff's land had it not been for the special relationship that existed between Plaintiff and Defendant Chesapeake. Accordingly, Defendant Chesapeake is liable for the aforementioned acts or omissions.

Breach of Contract – Defendant Chesapeake

Defendant Chesapeake breached the contract attached as Exhibit A by allowing its employee, Defendant Bartosh to enter onto Plaintiff's land and shoot the deer as more particularly described above. Said contract, which was prepared by Defendant's employees and/or agents provides in part at paragraph 15:

“Notwithstanding any other provisions herein contrary, Lessor hereby excepts and reserves from this Lease all coal and lignite and it is specifically understood and agreed that this lease covers only oil, gas, sulphur and associated liquid or liquefiable hydrocarbons.”

Said contract did not give Defendant Chesapeake or its employees any hunting rights to Plaintiff's land. As a result of the breach of this and other paragraphs of the contract, Plaintiff sustained damages as set forth in this pleading and his answers to discovery thus far in this case.

All conditions precedent to Plaintiff's claim for relief have been performed or have occurred.

Trespass and Conversion – Defendant Bartosh

Pleading in the alternative, the acts of Defendant Bartosh complained of herein also constitute conversion and trespass to land and chattels. Defendant Bartosh wrongfully entered onto land belonging to Plaintiff for the purpose of hunting the deer. Defendant Bartosh killed Plaintiff's deer and removed it from the property without Plaintiff's permission. Accordingly, Defendant Bartosh is liable to Plaintiff for the aforementioned acts.

Tortious Interference With an Existing Contract – Defendant Bartosh

Pleading in the alternative, the acts of Defendant Bartosh constitute Tortious Interference With an Existing Contract. Plaintiff and Defendant Chesapeake had a contract that was subject to interference. Defendant Bartosh committed a willful and intentional act of interference which was a proximate cause of damages to Plaintiff.

Tortious Interference With a Prospective Contract

Pleading in the alternative, the acts of Defendant Bartosh also constitute Tortious Interference With a Prospective Contract. There was a reasonable probability that Plaintiff and Defendant Chesapeake would have entered into the prospective contract. Defendant Bartosh's tortious and wrongful act prevented the relationship from occurring. Further, Defendant Bartosh knew that the interference was certain or substantially certain to occur as a result of his conduct. Plaintiff sustained damages as a result of Defendant Bartosh's interference.

**VI. REQUEST FOR DISCLOSURE TO DEFENDANT BARTOSH**

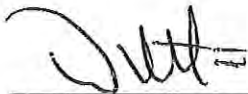
Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Defendant Bartosh is hereby requested to disclose, within 50 days of service of this request, the information or material as set forth in TRCP 194.2.

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer, and that on final trial Plaintiff have:

- (a) Judgment against Defendants for actual damages in a sum within the jurisdictional limits of this Court;
- (b) All statutory damages as allowed by law;
- (c) Prejudgment interest as allowed by law;
- (d) Postjudgment interest as provided for by law from the date of the judgment until paid;
- (e) Exemplary damages;
- (f) Attorney's fees;
- (g) Costs of suit; and
- (h) Such other and further relief, legal or equitable, to which Plaintiff may be justly entitled.

Respectfully submitted

**THE NEBLETT LAW FIRM**



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Duncan Neblett III  
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Carrizo Springs, Texas 78834  
Tel: 830-876-2888  
Fax: 830-876-2889  
ATTORNEY FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the foregoing document to all counsel of record on this the 23<sup>RD</sup> day of May, 2014 as follows:

Mr. Karl Koen, Attorney at Law  
Gauntt, Earl, Binney & Koen, LLP  
14643 Dallas Parkway, Suite 500  
Dallas, Texas 75254

*Via Email: Karl.Koen@gebklawyers.com*



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Duncan Neblett III