

CAUSE NO. \_\_\_\_\_

JOHN JOSEPH FOSTER,	§	IN THE DISTRICT COURT OF
INDIVIDUALLY; AND KELLY RUTH	§	
HAILEY FOSTER, INDIVIDUALLY	§	
AND AS SUCCESSOR TRUSTEE IN THE	§	
IRA HAILEY AND MARY RUTH	§	
HAILEY TRUST	§	
	§	
Plaintiffs,	§	
	§	
V.	§	KARNES COUNTY, TEXAS
	§	
MARATHON OIL COMPANY; AND	§	
MARATHON OIL CORPORATION,	§	
	§	
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW JOHN JOSEPH FOSTER, INDIVIDUALLY; AND KELLY RUTH HAILEY FOSTER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE IN THE IRA HAILEY AND MARY RUTH HAILEY TRUST (hereinafter, collectively, "Plaintiffs") and file this petition complaining of MARATHON OIL COMPANY and MARATHON OIL CORPORATION, (hereinafter "Defendants" or "Marathon"), and for cause of action would respectfully show this Court as follows:

**PARTIES**

Plaintiff JOHN JOSEPH FOSTER is a resident of Karnes County, Texas.

Plaintiff KELLY RUTH HAILEY FOSTER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE IN THE IRA HAILEY AND MARY RUTH HAILEY TRUST, is a resident of Karnes County, Texas.

Defendant, Marathon Oil Company, is an Ohio-registered corporation, partnership, sole proprietorship, or other form of business association, doing business in the State of Texas, with its principal office in Houston, Harris County, Texas, and citation may be served on its registered agent for service as follows: CT CORPORATION SYSTEM, 1999 BRYAN STREET, SUITE 900, DALLAS, TEXAS 75201-3136.

Defendant, Marathon Oil Corporation, is a Delaware-registered corporation, partnership, sole proprietorship, or other form of business association, doing business in the State of Texas, with its principal office in Houston, Harris County, Texas, and citation may be served on its registered agent for service as follows: CT CORPORATION SYSTEM, 1999 BRYAN STREET, SUITE 900, DALLAS, TEXAS 75201-3136.

### **FACTS**

Plaintiffs JOHN JOSEPH FOSTER, INDIVIDUALLY, and KELLY RUTH HAILEY FOSTER, INDIVIDUALLY, are the Lessors in an Oil and Gas Mineral Lease, namely:

### **THE FOSTER 130.3 ACRE LEASE**

an “Oil and Gas Mineral Lease – Paid Up” dated November 6, 2006, entered into between Kelly Ruth Hailey Foster as Lessors and Crasheil Resources, Inc. as Lessee, originally covering 130.3 acres, being the same 130.3 acres described in metes and bounds in that certain Gift Deed dated January 2, 2002, from Ira Hailey and wife, Mary Ruth Hailey, both Individually and as Co-Trustees of the Ira Hailey and Mary Ruth Hailey Trust to Kelly Ruth Hailey Foster and husband, John Joseph Foster, as recorded in Volume 767, Page 531 of the Official Records

of Karnes County, Texas, and which Lease is currently being operated by Marathon (the “Foster 130.3 Acre Lease”); and

Hereinafter, the lease described above shall be referred to collectively as the “Foster Lease.”

Plaintiff KELLY RUTH HAILEY FOSTER, AS SUCCESSOR TRUSTEE IN THE IRA HAILEY AND MARY RUTH HAILEY TRUST, is the Lessor in an Oil and Gas Mineral Lease, namely:

**THE 483.253 ACRE HAILEY TRUST LEASE**

- (1) an “Oil and Gas Mineral Lease – Paid Up” dated November 6, 2006, entered into between the predecessor-trustee, namely: Ira Hailey Individually and as Trustee for the Ira Hailey and Mary Ruth Hailey Trust as Lessor and Crasheil Resources, Inc. as Lessee, originally covering 483.253 acres, consisting of:

First Tract: 480.0 acres of land, more or less, being out of the B. H. Duvall Survey, Abstract No. 97, and the Carlos Martinez Grant, Abstract No. 6, Karnes County, Texas; and being the same land described in metes and bounds in that certain Warranty Deed dated March 19, 1992, from Ira Hailey and wife, Mary Ruth Hailey to Ira Hailey and wife, Mary Ruth Hailey, as Trustees of the Ira Hailey and wife, Mary Ruth Hailey Trust, as recorded In Volume 628, Page 763 of the Official Records of Karnes County, Texas.

Second Tract: 3.253 acres of land, more or less, being out of the B. H. Duvall Survey, Abstract No. 97, Karnes County, Texas; and being the same land described in metes and bounds in that certain Warranty Deed dated March 19, 1992, from Ira Hailey and wife, Mary Ruth Hailey to Ira Hailey and wife, Mary Ruth Hailey, as Trustees of the Ira Hailey and wife, Mary Ruth Hailey Trust, as recorded in Volume 628, Page 767 of the Official Records of Karnes County, Texas.

This Lease is currently being operated by Marathon, and will hereinafter be referred to as the “Hailey Trust Lease.”

The pertinent royalty provisions of the Foster Lease and Hailey Trust Lease are quoted herein. There is a justiciable controversy with regards to whether or not the Defendants have properly calculated and paid royalty to the Plaintiffs and Plaintiff Trust herein with respect to the Foster Lease and Hailey Trust Lease.

**Royalty Provisions of the Foster 130.3 Acre Lease and the 483.253 Acre Hailey Trust Lease**

The Foster 130.3 Acre Lease and Hailey Trust Lease were entered into on the same day, November 6, 2006, and contain identical royalty provisions, which stipulate and provide how production royalties are to be accurately measured, calculated and paid.

In particular, Paragraph 3 provides, in pertinent part, as follows:

3. As royalty, lessee covenants and agrees: (a) to deliver to the credit of lessor, in the pipe line to which lessee may connect its wells, the equal **Twenty percent (20%)** part of all oil produced and saved by lessee from said land, or from time to time, at the option of lessee, to pay lessor the average posted market price of such **Twenty percent (20%)** part of such oil at the wells as of the day it is run to the pipe line or storage tanks, lessor’s interest, in either case, to bear **Twenty percent (20%)** of the cost of treating oil to render it marketable pipe line oil; (b) to pay lessor on gas and casinghead gas produced from said land (1) when sold by lessee, **Twenty percent (20%)** of the amount realized by lessee, computed at the mouth of the well, or (2) when used by lessee off said land or in the manufacture of gasoline or other products, the market value, at the mouth of the well, of **Twenty percent (20%)** of such gas and casinghead gas . . .

This paragraph, however, is modified by an Addendum to the Foster 130.3 Acre Lease and Hailey Trust Lease, each Addendum containing identical royalty provisions that modify Paragraph 3, which state:

22. **ROYALTY:** Lessor's royalty on oil, gas and associated Hydrocarbons shall never bear or be charged with, either directly or indirectly, any portion of (a) the costs or expenses to save, store, gather, dehydrate, compress, pipe, truck, transport, treat, separate, process, refine, manufacture or market oil, gas and/or associated hydrocarbons on or from the lands covered by this lease or lands pooled therewith, (b) the costs or expenses (including depreciation) to construct, repair, renovate or operate any plant or other facilities or equipment used in connection with the treating, separation, extraction, processing, refining, manufacture or marketing of oil, gas and/or associated hydrocarbons produced from the lands covered by the lease or lands pooled therewith, or (c) any other costs or expenses whatsoever, except any severance, excise, windfall or like and similar tax imposed on such oil, gas and associated hydrocarbons, or on the value thereof, that is allocable or attributable to Lessor's royalty on such oil, gas and associated hydrocarbons. All such costs and expenses shall be borne entirely by Lessee, and Lessee shall have no right to recoup from Lessor (or to deduct from Lessor's royalty) any such costs or expenses allocable or attributable to Lessor's royalty on oil, gas and associated hydrocarbons.

The above referenced royalty clauses, when read together, are very specific and require that, with respect to oil, the Plaintiffs were to receive 1/5 part of all oil produced and saved by lessee from the land or, at the option of lessee, the average posted *market price* of such 1/5 part as of the day it is run to the pipe line or storage tanks (but to bear 1/5 of the cost of treating oil to render it marketable pipeline oil). With respect to gas and casinghead gas produced from the land, Plaintiffs are to receive 1/5 of the amount realized by lessee at the mouth of the well or, when used by lessee off the land, or in the manufacture of gasoline or other products, the *market value*, at the mouth of the well, of 1/5 of such gas and casinghead gas.

Paragraph 22 of the Addendum further defines this provision by specifically excluding costs and expenses to: (a) save, store, gather, dehydrate, compress, pipe, truck, transport, treat, separate, process, refine, manufacture or market oil, gas and/or associated hydrocarbons; (b) construct, repair, renovate or operate any plant or other facilities or

equipment used in connection with the treating, separation, extraction, processing, refining, manufacture or marketing of oil, gas and/or associated hydrocarbons; and (c) any other costs or expenses whatsoever, except any severance, excise, windfall or like and similar tax imposed on such oil, gas and associated hydrocarbons, or on the value thereof, that is allocable or attributable to Lessor's royalty on such oil, gas and associated hydrocarbons. Paragraph 22 of the Addendum further specifies that all such costs are to be borne entirely by the Lessee, with no right to recoup same from Lessor or deduct same from Lessor's royalty.

### **Justiciable Controversy**

Plaintiffs are uncertain as to whether the Defendants have properly calculated and paid royalty to the Plaintiffs in accordance with the above terms, stipulations and conditions and as further set out in the Foster Lease and Hailey Trust Lease between the parties, and have brought this suit for an accounting and to make such determination. As such, there is a justiciable controversy between Plaintiffs and Defendants which warrants the filing of this Petition for Declaratory Judgment under the Declaratory Judgment Act of the State of Texas. This suit is being brought for an accounting and resolution of whether production has been properly measured, whether royalties have been properly calculated and paid to the Plaintiffs.

Among other things, the above-referenced Foster Lease and Hailey Trust Lease require the accurate payment of royalty based on the volumes of gas or products produced and the contract delivery prices, and intrinsic with that obligation is Defendants' legal responsibility to properly and accurately measure the production from

the subject oil, gas and other mineral estate so that accurate royalty amounts are paid to the Plaintiffs.

### **JURISDICTION AND VENUE**

Jurisdiction is proper in this Court because this suit is brought under the Declaratory Judgment Act of the State of Texas and Plaintiffs seek an accounting and damages that exceed the minimum jurisdictional limits of this Court, and under the authority of Article V, Section 8 of the Texas Constitution, and Section 24.007 of the Texas Government Code. Additionally, this case was filed and the Plaintiffs have invoked the jurisdiction of this court in Karnes County, Texas, where venue is mandatory since the real estate and oil, gas and other mineral estate, the subject of this suit is wholly situated in Karnes County, Texas. This case should proceed as a Level III case.

Marathon regularly conducts and transacts business in Karnes County, Texas, including the business and oil and gas activities which give rise to this lawsuit.

All or a substantial part of the events or omissions giving rise to the claims in this case occurred in Karnes County, including contracts that name Karnes County as the county in which pertinent obligations are or were to be performed and Marathon's acts and omissions in Karnes County that gave rise to those claims. Additionally, the oil, gas and other mineral estate and the real estate whereupon Defendants conducts their operations are all situated in Karnes County, Texas. Venue is thus proper and mandatory in Karnes County as to all parties and claims under the Texas Civil Practice & Remedies Code.

At all times relevant to this case, Defendants have owned or had an interest in, and operated, the Leases and units at issue in this case. Marathon has been obligated to

perform all of the terms, conditions, and covenants imposed on the lessee under the Lease, including all express and implied covenants. These covenants include the lessee's duties under the Lease to protect from drainage, to reasonably develop the leased premises, to properly manage and administer the lease, and to properly and accurately measure and account for production.

### **RELIEF SOUGHT**

Plaintiffs request that the Court declare their rights with respect to Defendants' ongoing obligations under the Leases. In particular, but without limitation, Plaintiffs request that the Court declare that Marathon:

- (1) Is obligated to provide such necessary metering equipment, and install appropriate equipment and facilities, and adopt such procedures as are necessary to comply with Defendants' duties to accurately determine volumes of production so as to accurately calculate and pay royalty;
- (2) Should employ and initiate timely testing of the wells and maintain the metering and measuring equipment in a good state of repair so as to accurately calculate and pay royalty;
- (3) Accurately measure the gas produced from the Leases to accurately calculate and pay royalty as required by law, and not commingle gas with other third party production before separating liquids in the gas stream so as to not be able to determine volumes and production with reasonably certainty, pursuant to Marathon's implied duty to properly manage and administer the Leases and units;



- (4) Take whatever actions are necessary to accurately calculate and pay royalty to Plaintiffs including, but not limited to, the frequent calibration of meters, accurate and frequent testing of well production to determine the BTU content of Plaintiffs' gas, proper separation of liquids, and such other measures as are necessary to assure that the Plaintiffs' gas is accurately measured as required by law for accurate royalty payment;
- (5) Implement such procedures, testing and technology as will allow the Plaintiffs to verify the gas meter readings to accurately determine the daily volumes of dry gas produced from the Leases for royalty payment purposes; and
- (6) Provide an accounting of the contract prices received by it for all gaseous oil and any other hydrocarbons, gaseous or liquid substances produced from Plaintiff's leased premises and an accounting of any and all deductions or expenses which Defendants deducted from the gross value or amount of money received from any purchaser of said hydrocarbons, including an accounting of both pre-production and post-production costs.
- (7) Provide a detailed accounting on a month to month basis and detailed methodology used by Defendants in calculating and paying royalty on gas, oil and other hydrocarbons produced from the subject Leases.

In addition and in the alternative, Plaintiffs also seek permanent injunctive relief and ask the Court to enjoin and compel Defendants in the future to measure gas and oil produced from the Leases in a manner that insures accurate gas oil and other hydrocarbon volume measurement and actual gas volumes and not just "estimated" or "allocated" oil, gas and other hydrocarbon volumes, that Defendants separate liquids from the gas on the

leased premises and prior to commingling with third party gas and use dry gas production volumes for royalty payment purposes. Additionally, Defendants are to provide such facilities and adopt such procedures and technology as are necessary to comply with Defendants' duties under the law and its Oil and Gas Leases with Plaintiffs. Plaintiffs request permanent injunctive relief to keep Defendants from not accurately measuring production, from commingling Plaintiffs' gas with third party production before separating liquids and to order Defendants to take whatever action is necessary to assure that the Plaintiffs' gas is accurately measured as required by law and thereby eliminate Defendants' current "estimated" method of allocating gas volumes to Plaintiffs for royalty calculation purposes. Finally, Defendants should be required to submit to an accounting specifically detailing the contract delivered prices received by Marathon for the gaseous substances produced from the Leases.

By bringing this Declaratory Judgment action, Plaintiffs do **not** seek a termination of the Foster Lease or the Hailey Trust Lease.

### **CONDITIONS PRECEDENT**

All conditions precedent have been performed or have occurred pursuant to Texas Rule of Civil Procedure 54. By service of this Original Petition on Defendants, Plaintiffs provide Marathon in writing their notice that Marathon may not have complied with the terms of the Leases and may have breached the contract. Plaintiffs will agree to a sixty (60) day abatement of this action if requested by Marathon.

### **JURY DEMAND**

Plaintiffs demand a jury in this case and request that this case be placed upon the Court's jury docket.

## **REQUEST FOR DISCLOSURE**

Plaintiffs herein request that Defendants disclose within 50 days of the service of this petition, the information or material required under Rule 194 of the Texas Rules of Civil Procedure.

## **PRAYER**

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs respectfully request that the Defendants be cited to appear and answer and, on final trial, the Plaintiffs be awarded all the relief prayed for in this Petition, including but not limited to judgment granting the Plaintiffs the following:

- Declaratory and injunctive relief as requested herein; and
- Such other and further relief, in law and equity, to which Plaintiffs are entitled.

Respectfully submitted,

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