IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TELLUS OPERATING GROUP, LLC,
BAXTERVILLE OIL ACQUISITIONS, LLC,
MISSISSIPPI OIL ACQUISITIONS, LLC,
NOMS, LLC, SNPI, LLC, BAX, LLC,
VICKERY PROPERTIES, LLC, AND
SUTHERLAND ENERGY CORP. — APPELLANTS

v. — NO. 2009-CA-01040

TEXAS PETROLEUM INVESTMENT CO., ET AL. — APPELLEES

Consolidated with

TEXAS PETROLEUM INVESTMENT CO. — CROSS-APPELLANT

v. — NO. 2009-CA-01174

TELLUS OPERATING GROUP, LLC, et al. — CROSS-APPELLEES

Appeals from the Circuit Court of Lamar County, Mississippi

BRIEF OF APPELLEE AND CROSS-APPELLANT TEXAS PETROLEUM INVESTMENT COMPANY AND APPELLEES BRUCE SALLEE AND WILLIAM CRAWFORD

WISE CARTER CHILD & CARAWAY, P.A.
Michael B. Wallace, MSB No[redacted]
John P. Sneed, MSB No[redacted]
Rebecca Hawkins, MSB No[redacted]
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: 601.968.5500

AULTMAN TYNER & RUFFIN, LTD.
Thomas W. Tyner, MSB N[redacted]
Daphne M. Lancaster, MSB N[redacted]
Post Office Drawer 750
Hattiesburg, Mississippi 39403
Telephone: 601.583.2671

THE HOLMAN LAW FIRM, P.C.
David W. Holman
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone: 713.400.4840

THE HUDGINS LAW FIRM, P.C.
Michael D. Hudgins
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone: 713.623.2550

Counsel for Appellees and Cross-Appellant

ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TELLUS OPERATING GROUP, LLC, BAXTERVILLE OIL ACQUISITIONS, LLC, MISSISSIPPI OIL ACQUISITIONS, LLC, NOMS, LLC, SNPI, LLC, BAX, LLC, VICKERY PROPERTIES, LLC, AND SUTHERLAND ENERGY CORP.	APPELLANTS
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v.	NO. 2009-CA-01174
TELLUS OPERATING GROUP, LLC, et al.	CROSS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Tellus Operating Group, LLC, Appellant and Plaintiff;
2. Baxterville Oil Acquisitions, LLC, Appellant and Plaintiff;
3. Mississippi Oil Acquisitions, LLC, Appellant and Plaintiff;
4. NOMS, LLC, Appellant and Plaintiff;
5. SNPI, LLC, Appellant and Plaintiff;
6. BAX, LLC, Appellant and Plaintiff;
7. Vickery Properties, LLC, Appellant and Plaintiff;
8. Baxterville Properties, LLC, Appellant and Plaintiff;

9. Sutherland Energy Corp., Appellant and Plaintiff;

10. Texas Petroleum Investment Company, Appellee, Cross-Appellant and Defendant;

11. Bruce Sallee, Appellee and Defendant;

12. William Crawford, Appellee and Defendant;

13. Paul N. Davis, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, counsel for Appellants/Plaintiffs;

14. Charles Pickering, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, counsel for Appellants/Plaintiffs;

15. W. Wayne Drinkwater, Esq., Bradley Arant Boult Cummings LLP, counsel for Appellants/Plaintiffs;

16. Michael J. Bentley, Esq., Bradley Arant Boult Cummings LLP, counsel for Appellants/Plaintiffs;

17. Mark A. Nelson, Esq., Bryan Nelson, counsel for Appellants/Plaintiffs;

18. Rick Norton, Esq., Bryan Nelson, counsel for Appellants/Plaintiffs;

19. W. David Ross, Esq., Tellus Operating Group, LLC, counsel for Appellants/Plaintiffs;

20. Thomas Tyner, Esq., Aultman, Tyner & Ruffin, Ltd., counsel for Appellees/Cross-Appellant/Defendants;

21. Daphne M. Lancaster, Esq., Aultman, Tyner & Ruffin, Ltd., counsel for Appellees/Cross-Appellant/Defendants;

22. David W. Holman, Esq., The Holman Law Firm, P.C., counsel for Appellees/Cross-Appellant/Defendants;

23. Michael D. Hudgins, Esq., The Hudgins Law Firm, P.C., counsel for Appellees/Cross-Appellant/Defendants;

24. Michael B. Wallace, Esq., Wise Carter Child & Caraway, P.A., counsel for Appellees/Cross-Appellants;

25. John P. Sneed, Esq., Wise Carter Child & Caraway, P.A., counsel for Appellees/Cross-Appellants;

26. Rebecca Hawkins, Esq., Wise Carter Child & Caraway, P.A., counsel for Appellees/Cross-Appellants;

27. Charles E. Greer, Esq., The Greer Law Firm, trial counsel for Defendants;

28. Adam Schiffer, Esq., trial counsel for Defendants; and

29. Honorable Prentiss G. Harrell, trial judge.

This the 24TH day of January, 2011.

Michael B. Wallace

MICHAEL B. WALLACE

STATEMENT REGARDING ORAL ARGUMENT

Texas Petroleum Investment Company, Bruce Sallee and William Crawford suggest that oral argument is not appropriate in this appeal because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument, within the meaning of M.R.A.P. 34(a)(3). Moreover, the appeal presents no real legal issue, dispositive or otherwise, within the meaning of M.R.A.P. 34(a)(2). Rather, Appellants challenge routine applications of the Circuit Court's discretion in regulating the admission of evidence and in instructing the jury. Particularly because they admit that the record contains sufficient evidence to support the jury's verdict, Appellants fail to demonstrate that any of these discretionary decisions deprived them of any substantial right within the meaning of M.R.C.P. 61 or M.R.E. 103(a).

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STATEMENT OF THE ISSUES

1. Whether this Court should affirm the general verdict in favor of Texas Petroleum Investment Company, Bruce Sallee, and William Crawford because the evidence is sufficient to support any of the following facts: (1) there was no gas in the shallow zones under the Bilbo A-1 well during the years in question; (2) Texas Petroleum's employees took no gas; or (3) the statute of limitations expired on any takings of gas that may have occurred.

2. Whether, where the jury found no liability, the Circuit Court committed reversible error in submitting a jury instruction on commingling of the allegedly taken gas and interrogatories on the annual value of the alleged takings.

3. Whether the Circuit Court abused its discretion in admitting the expert testimony of two licensed Texas engineers although they were not yet licensed in Mississippi.

4. Whether the Circuit Court abused its discretion in admitting expert engineering testimony concerning the production of gas through an alleged obstruction in the well where Tellus neither made a timely objection nor furnished the expert's report to the Court.

5. Whether the Circuit Court abused its discretion in preventing Tellus from falsely suggesting to the jury that a witness had been convicted of a crime, while still permitting proof of supposed bias.

6. Whether, where the Circuit Court allowed Tellus to prove the value of its gas at the time of its alleged conversion, the Circuit Court abused its discretion in refusing to allow evidence of further lost profits which might have resulted from producing that gas as late as 2014.

7. In the alternative, whether the judgment in favor of Bruce Sallee and William Crawford should be affirmed for failure to prove either personal liability or personal jurisdiction.

8. **CROSS-APPEAL:** Whether the Circuit Court abused its discretion by entering a declaratory judgment in favor of Tellus on issues not requested in its complaint.

INTRODUCTION

At no point in its 50-page brief does Tellus Operating Group, LLC,[1] challenge the sufficiency of the general verdict returned by the jury, by a vote of 11-1, in favor of Texas Petroleum Investment Company, Bruce Sallee and William Crawford.[2] Nor does Tellus identify any legal error committed by the Circuit Court of Lamar County, the Honorable Prentiss Harrell presiding. Instead, Tellus argues that the Court abused its discretion in regulating the admission of evidence and in instructing the jury. To the contrary, both the Court and the jury performed admirably under difficult circumstances.

This was one of the longest trials in the history of this State, lasting from October 29 to December 19, 2008. Some 29 witnesses testified, including 12 expert witnesses—geologists, geochemists, petroleum engineers, reservoir engineers, log analysts, an economist, a gas accounting expert—and hundreds of exhibits were admitted. The transcript alone is over 5,000 pages. The Circuit Court commended the jury, before reading the verdict, for having "served admirably well" and having "deliberated long and hard." Tr. 5719.[3] Tellus's counsel also said: "[O]ne thing we all notice is how much careful attention all of you have paid. It has not gone unnoticed by the parties in the court." Tr. 5501. Tellus's counsel also told the jury in closing that he respected whatever decision they reached, and "if we can't prove it, y'all do what you think is right." Tr. 5567.

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[1] Although the true Plaintiffs are the purported owners of the shallow gas rights in the 40 acres on which the Bilbo A-1 well is located, and Tellus is but a nominal plaintiff, the Plaintiffs will be referred to collectively as "Tellus" because Tellus was the operator that brought this lawsuit.

[2] The Appellees will be referred to collectively as "Texas Petroleum" except where specifically noted.

[3] All of the citations herein are to the appeal record in case No. 2009-CA-01040. Citations to the clerk's papers therein are as follows: "R. [page(s)]." Transcript pages are cited as "Tr. [pages(s)]." The record excerpts of appellees and cross-appellant are cited as "C.R.E [page(s)]."

This extensive record provided the jury multiple reasons for rejecting Tellus's proof. The Court's decisions on evidence and instructions did not prejudice Tellus in any way. A seven-week trial is not a dress rehearsal, and Tellus is not entitled to a second chance to put on its show.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE CIRCUIT COURT

Tellus's description of the course of proceedings omits several important matters.

After Tellus's action against Texas Petroleum was removed to federal court, Tellus was granted leave to join Texas Petroleum's owners, Bruce Sallee and William Crawford, to the suit. Although everything that Tellus alleged against them was done in their corporate capacity, Tellus did not allege alter ego or any other veil piercing theory, nor did Tellus allege any individual wrongdoing. R. 1225-55, C.R.E. 12-42. Tellus's counsel admitted at trial that Tellus had never sought to pierce the corporate veil. Tr. 5417.

After remand to the Circuit Court, Tellus repeatedly accused Texas Petroleum of making false reports to the Mississippi State Oil & Gas Board, along with other regulatory violations, and it repeats those charges in its brief in this Court. Brief of Appellants at 8, 10, 13 & n.18. Relying on such cases as *Chevron U.S.A., Inc. v. Smith*, 844 So. 2d 1145 (Miss. 2002), *cert. denied*, 540 U.S. 881 (2003), and *Town of Bolton v. Chevron Oil Co.*, 919 So. 2d 1101 (Miss. App. 2005), Texas Petroleum moved on May 19, 2008, to dismiss the complaint so as to permit Tellus to exhaust its administrative remedies before the Oil & Gas Board. R. 5182. The Court erroneously overruled that motion. R. 11726. However, the jury's rejection of Tellus's claims makes it unnecessary for this Court to consider either the Circuit Court's error or Tellus's continued accusations of regulatory violations.

The Second Amended Complaint sought a declaratory judgment concerning the 1949 Joint

Operating Agreement ("JOA"), originally signed by Sun Oil Company, Gulf Refining Company, and the Texas Company. Tellus contended that the Bilbo A Lease remains subject to the 1949 JOA and that Texas Petroleum, as a successor to Texaco, owed Tellus fiduciary duties with regard to its operation of the Bilbo A-1 well. R. 1236-37, C.R.E. 23-24.

On December 19, 2008, the jury ruled for Texas Petroleum by a vote of 11-1. Tr. 5719-20. On that same morning, the Court entered a declaratory judgment, R.12612-24, which it later set aside under M.R.C.P. 60(b). R. 12793-94. However, after giving all parties an opportunity to be heard, the Court entered a new declaratory judgment on February 25, 2009. R. 12795-802, C.R.E. 1-8. That judgment granted none of the relief actually requested by the Second Amended Complaint. Instead, it ruled that three of the plaintiffs represented by Tellus owned the shallow gas under the Bilbo A Lease, and that Texas Petroleum owned only the deeper gas. After the Court, on May 21, 2009, overruled Texas Petroleum's subsequent post-judgment motion, R. 13198, C.R.E. 9, Texas Petroleum timely appealed. R. 13209.

II. STATEMENT OF FACTS

A. Texas Petroleum purchases interest in the Baxterville Field.

Texas Petroleum is a privately owned oil and gas company that purchased its interests in the Baxterville Field from FINA Oil & Chemical Company ("FINA"),[4] a successor to Texaco's interest in the Bilbo A Lease. Ex. 92. Bruce Sallee and William Crawford are equal owners of Texas Petroleum. Tr. 3629. The Bilbo A-1 well is one of approximately 60 wells obtained by Texas Petroleum in the purchase, about 30 of which were shut in. Tr. 3801.

[4] FINA later became Total Petrochemicals USA, Inc. ("Total"), which Tellus sued in a separate action, consolidated for trial with this case.

B. Texas Petroleum obtains a title opinion from Thomas Cook.

As part of its due diligence, Texas Petroleum obtained a title opinion from Thomas Cook, a local attorney. Ex. 1483(ID). Cook's certificate of title, dated April 5, 1995, included no limitations on the rights, title and interest to all oil and gas in the Bilbo A Lease.[5] After receiving the certificate, Texas Petroleum took a deed from FINA conveying its entire interest in the Bilbo A Lease, including the shallow gas, Ex. 92, an interest which FINA had earlier received from an entity called CWF. In a subsequently filed deed, outside Texas Petroleum's chain of title, CWF had purported to convey the shallow gas to Sun, Ex. 48, which later executed an assignment to entities represented by Tellus. Ex. 72.

C. Texas Petroleum owns rights to produce oil and all associated gas in all zones from the Bilbo A-1 well.

The Bilbo A-1 well was drilled in 1946 as an oil well. Although Tellus contends that the 1949 JOA, Ex. 76, R.E. 289-310, applies to the Bilbo A-1 well, the 1949 JOA only applies to gas production from a "well drilled hereunder" (the Bilbo A-1 was drilled in 1946, before the 1949 JOA, and was not drilled "hereunder") and to wells drilled in the gas horizons unitized pursuant to its pooling provisions (not to oil wells). The 1949 JOA does not have any effect on the rights to produce oil and associated gas from all zones of the Bilbo A-1 well. *See* Ex. 76, R.E. 289-310.

D. Texas Petroleum hires local field personnel.

Following the purchase of its interest in the Baxterville Field, Texas Petroleum retained a number of local field personnel, including Connie Gipson and Larry Courtney. Tr. 1436-37, C.R.E. 82-83; Tr. 3799-800. Bill Crawford testified that Texas Petroleum did not change FINA's field

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[5] Although Cook's title opinion was directly relevant to Tellus's allegations—that is, that Texas Petroleum knowingly stole Tellus's gas—the title opinion was excluded from the evidence. Tr. 5217-20.

operations and only made minor modifications to the reports that the field personnel were responsible for preparing. Tr. 3797-98. Texas Petroleum also hired Richard Walters, who was from the area. Tr. 1907, 3801.

E. Texas Petroleum begins to work over the field, one well at a time.

It was no secret that Texas Petroleum's goal when it purchased the field was to maximize production from what was considered an old field; the field was originally drilled in the 1940s. So, economics and budget drove the decisions regarding what shut-in wells to open up and whether to work them over. Tr. 3801-02. As Crawford explained, "We wanted to make a profit. We had borrowed money. We wanted to pay it back. So it was an economic consideration." Tr. 3799.

Consistent with Texas Petroleum's goal, the field personnel were under instructions to review all of the shut-in wells in the Baxterville Field and determine whether they could produce any of them without first working them over. Tr. 1168, 3633-35. This effort also involved a review of numerous well files. Forrest Bugge, an in-house engineer for Texas Petroleum at the time, was charged with the initial well-file review. Tr. 1167.

Mr. Bugge's work resulted in a memorandum dated July 11, 1995, which included brief notes for over thirty wells in the Baxterville Field. Ex. 248, R.E. 441-47. The memo was sent to both Bruce Sallee and Bill Crawford. *Id.* The exhibit included notes made by Bill Crawford in 1995, shortly after receiving the memo. Tr. 3636-37. Much was made of this memo by Tellus during trial, but at the end of the day it proved to be nothing more than a six-page overview of certain wells in the Baxterville Field, including the Bilbo A-1 well.

Although Tellus also claimed that FINA had converted gas from an unspecified casing leak in the Bilbo A-1 well, multiple witnesses confirmed that the Bilbo A-1 well was shut in when Texas Petroleum purchased its interest from FINA in 1995. Tr. 3092, 3685-86, 3802, 3826. This was

verified by field personnel, including Doug Miguez, production superintendent, and Richard Walters. *Id.* Because they were aware there was a "fish in the hole,"[6] which would require additional expense to return the well to production, they put the Bilbo A-1 well on the back burner, and they focused their attention on other wells in the field. Tr. 3802.

F. Texas Petroleum opens the A-1 well and begins reporting production.

In 1997, Texas Petroleum decided to open up the Bilbo A-1 well and see whether it would produce.[7] Prior to opening up the well, Richard Walters recommended doing some work on it; he recalled there being a fish in the hole at the time and recommended that the fish be cleaned out. Tr. 1909-10; 1929-30. Instead, a decision was made first to swab the well, following which the Bilbo A-1 well began producing oil and gas. Tr. 1934, 2122-23. Although Tellus took the position at trial that the gas came from some zone other than the Lower Tuscaloosa Oil Pool ("LTOP"), Walters testified that the oil being produced "looked like LTOP oil with the gas that was coming out of it," and he explained to the jury that LTOP oil production is "real black and it's heavy oil." Tr. 2123. The Bilbo A-1 well continued producing oil and gas until it eventually sanded up in April of 1998. Tr. 1941. All of that production was reported to the State of Mississippi. Ex 1.

G. The 1998 workover allows new production.

The purpose of the 1998 workover was to try to get the Bilbo A-1 well "back on production" from the LTOP. Tr. 2106, 2157. Mr. Walters, the production foreman, testified that he "[f]igured [they] had a casing leak, because the sand blowed in on us." Tr. 1966. They eventually recovered

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[6] A "fish in the hole" is a field term that refers to something left in the hole, which in this case was some tubing and a tubing anchor. Tr. 1195, 1910, 1924.

[7] Some time in 1996, pressure was bled off the tubing of the Bilbo A-1 well, but the well was not being produced. Tr. 3685-86. The gas bled from the well in 1996 was admittedly not reported to the State of Mississippi.

"a joint of tubing that had been blasted with sand, which indicated . . . a casing leak at that point." Tr. 1968. They ran a packer into the hole to isolate this leak from their LTOP production. Tr. 2107-13. Mr. Walters testified that the 1998 workover was successful and that the well could only produce from the LTOP as configured. Tr. 2111-13, 2157.

H. Pennzoil informs Tellus of Texas Petroleum's claim in 1998.

On June 26, 1998, Pennzoil, a successor to Gulf's interest under the 1949 JOA, sent a letter to both Tellus and Texas Petroleum, advising that the order of recordation of their respective assignments placed a "record claim on the rights to production from the shallow zones in favor of FINA." Ex. 1069(ID), C.R.E. 123-27. The letter included a title opinion that disclosed to Tellus that FINA's assignment to Texas Petroleum included the Bilbo A Lease, "without any exceptions." *Id.*; C.R.E. 126. The Circuit Court erroneously excluded this letter from evidence. Tr. 5232-37, 5254.

I. Tellus requests a quitclaim deed in 1999.

In April 1999, after receipt of the Pennzoil letter, Tellus sent a letter to Texas Petroleum requesting that Texas Petroleum execute a quitclaim deed in favor of Tellus, which Texas Petroleum chose not to do. Ex. 1078, C.R.E. 128-29; Tr. 3517. Richard Mills, the manager for Tellus, conceded there was a cloud on title "[a]nd it needed to be cleared up." Tr. 3518.

J. Tellus's first trip to the courthouse forces Devon out of Baxterville.

In 2002, Tellus became the largest operator in the Baxterville Field. As in this lawsuit, Tellus had sued Devon Energy Corporation, successor to Pennzoil, accusing it of acting tortiously with respect to its obligations. Tr. 3479-80. As a result of the settlement of that litigation, Devon sold all its wells to Tellus and left the Baxterville Field. Ex. 116, C.R.E. 119. According to Wade Gipson, Tellus's production foreman, as a result of the settlement with Devon, Tellus's well count jumped from 25 wells to almost 300 wells. Tr. 3118.

K. Tellus personnel claim to observe icing on the Bilbo A-1 well.

Tellus contends it had no reason to believe it had a claim against Texas Petroleum until 2002, when its field personnel allegedly first discovered evidence that the Bilbo A-1 well was producing gas from the shallow gas zones.

The story goes that in December 2002, as part of Tellus's acquisition of Devon's interest in Baxterville, its field personnel toured the Baxterville Field to inspect the properties being obtained as a result of the Devon settlement. *See* Tr. 3118. During those inspections, Tellus personnel claimed they had occasion to drive by the Bilbo A-1 well. Tr. 3119. As they were driving by, Wade Gipson, Tellus's production foreman, testified they noticed icing on the flow line, which he believed to be indicative of gas flow, which he thought was odd because he knew the Bilbo A-1 well to be an oil well. Tr. 3119-21.

Gipson does not believe the LTOP is capable of producing a high enough gas-oil ratio to create the pressure drop necessary for icing to occur. *See* Tr. 3121. Of course, there was nothing secret about the gas-oil ratio of the Bilbo A-1 well because its production had been regularly reported to the State of Mississippi since Texas Petroleum began producing it in 1997. Exs. 1, 113, 568; C.R.E. 116-18, 120-22. Moreover, Tellus stated in letters to Texas Petroleum prior to suit that it knew from those public production records that Texas Petroleum was producing shallow gas. Exs. 113, 568; C.R.E. 116-18, 120-22.

L. The 2005-2006 workover shows no shallow gas.

Faced with Tellus's accusations of intentional wrongdoing in the production of some 1.9 billion cubic feet of gas from an unspecified casing leak in the shallow zones of the Bilbo A-1 well, Texas Petroleum took the extraordinary step of performing a complete workover of the well, according to a protocol agreed to by engineers for both Tellus and Texas Petroleum. Ex. 1421,

C.R.E. 130-37. The workover lasted from November 2005 through March 2006; it was a very expensive workover, and Gipson did not contest that the costs could have exceeded $500,000. Tr. 3275-76, C.R.E. 102-03. Every one of the shallow zones was tested, and no gas was found in the shallow zones of the Bilbo A-1 well. Tr. 3278-80, C.R.E. 105-07. Gipson, who monitored the workover, admitted that the workover could have proven Tellus's claims—but it did not. Tr. 3288, C.R.E. 115.

SUMMARY OF THE ARGUMENT

This is an appeal from a general verdict in favor of the Defendants. Such a general verdict can be affirmed on any ground supported by the evidence. Here, there are numerous reasons supporting the verdict in favor of the Defendants. Tellus alleged that Texas Petroleum had produced some 1.9 billion cubic feet of gas from the shallow zones of the Bilbo A-1 well through an unspecified casing leak, then transported all that gas through a one-inch bypass line, and then, instead of selling the gas, used it to fuel all its equipment. The jury was instructed to find for the Defendants if they found there to have been no gas in the shallow zones during the relevant years. The jury could also have believed Texas Petroleum's field personnel who all said that they did not do what Tellus accused them of doing. Moreover, the jury could have found that Tellus knew or should have known of its causes of action more than three years before it filed suit. This Court must conclude that the jury entered the general verdict for one of those reasons, rather than because of any of the errors alleged by Tellus.

Tellus's complaints regarding jury instructions and interrogatories do not present any reversible error. The challenged instructions concern damages, and, because the jury did not find liability, any error concerning damages is harmless. Tellus cites no case from any jurisdiction granting its proposed commingling instruction, which improperly sought a windfall recovery. The

damages interrogatories, to which Tellus did not object, embodied Tellus's own improper view of the law.

Neither do Tellus's various complaints of error in the admission or exclusion of evidence present grounds for reversal. This Court has issued a number of opinions that reject Tellus's argument that a professional must be licensed in Mississippi in order to qualify to give expert testimony under M.R.E. 702. The challenged "surprise" testimony of expert Garza was fairly disclosed and properly based on testimony of other witnesses under M.R.E. 703. Tellus complains that the Circuit Court excluded evidence of bias of Brad Lowe, but the Court excluded only Tellus's insinuations that Lowe had committed a crime of which he was never convicted. The Court also properly excluded Tellus's speculative evidence of lost profits.

In the alternative, no alleged error provides any basis for vacating the judgment in favor of Sallee and Crawford, the officers and shareholders of Texas Petroleum. Tellus has admitted that it neither pled nor proved facts sufficient to pierce the corporate veil to hold them individually liable. Without any proof of their individual wrongdoing, there is no basis to force them to undergo another lengthy trial.

With regard to Texas Petroleum's cross-appeal, this Court should reverse and dismiss the claim for a declaratory judgment. Not only is the declaratory relief granted outside Tellus's pleadings, but the Court abused its discretion in adjudicating ownership of the shallow gas where the jury found no gas had been stolen.

ARGUMENT

I. THE JURY'S GENERAL VERDICT SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY SUFFICIENT EVIDENCE.

At Tellus's request, the jury was asked to return a general verdict either for Plaintiffs or for

Defendants. R. 12650-52, R.E. 81-83. In its general verdict, the jury answered: "We, the Jury, find for the Defendant, Texas Petroleum Investment Company," and "We, the Jury, find for Defendant, Bruce Sallee," and "We, the Jury, find for the Defendant, William Crawford." R. 12803-07, R.E.51-55.[8] No one will ever know why the jury reached its general verdict. As Professor Sunderland said long ago:

> No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom.

Edson R. Sunderland, *Verdicts, General and Special*, 29 Yale L. J. 253, 258 (1920). *See also* Jeffrey Jackson, 1 MISSISSIPPI CIVIL PROCEDURE § 14A:2 (West 2010) (noting that where there is a general verdict, the reviewing court cannot know why the jury reached its decision and "rough justice is smoothed over with the general verdict").

It is for that reason that this Court has long held that a general verdict will be affirmed on any ground sustainable in the evidence. *See, e.g., Mississippi Cent. R. Co. v. Aultman*, 173 Miss. 622, 160 So. 737, 739 (1935) ("The rule is that where there is a general verdict for the plaintiff under a declaration containing two counts leading to the same liability, such verdict is sufficient if sustained under either count."), *appeal dismissed*, 296 U.S. 537 (1935); *Levy v. McMullen*, 169 Miss. 659, 152 So. 899, 899 (1934) ("Within the usual rule dealing with general verdicts there is here but one cause of action; the two counts state differences in detail leading to exactly the same liability. In such cases, in the absence of any motion or request in the trial court bearing upon the point, a general verdict is sufficient if sustained under either count."). *See also* 89 C.J.S. *Trial* § 868 (2010) ("When

[8] A judgment was also entered in favor of FINA's successor, Total. R. 12806, R.E. 54. Tellus has dismissed its appeal against Total, No. 2009-TS-01041, due to settlement.

a case is submitted to the jury on several alternative grounds and a general verdict is returned, the court on appeal will affirm if the jury properly could have found for the prevailing party on any of the theories comprehended by the general verdict.").

Against this backdrop, there are a host of grounds in this record that support the jury's general verdict for the Defendants. Tellus does not even contend that there was insufficient evidence to support the verdict for the Defendants. Under the proper standard of review, this Court resolves all conflicts in the evidence in favor of the Defendants and draws all reasonable inferences in favor of the Defendants. *See Alldread v. Bailey*, 626 So. 2d 99, 101 (Miss. 1993) ("Because of the jury verdict in favor of the appellee, this Court resolves all conflicts in the evidence in his favor. This Court also draws in the appellee's favor all reasonable inferences which flow from the testimony given.").

Before addressing each of the procedural issues presented by Tellus, it is important for this Court to understand that the jury had sufficient evidence to support a general verdict for the Defendants on a number of grounds. Because Tellus has failed to show that the jury reached an improper verdict, the judgment below should be affirmed.

A. The evidence reveals that there was no gas in the shallow zones of the Bilbo A-1 well.

One of the grounds supporting the jury's general verdict for the Defendants was set forth in Instruction No. 7, which told the jury that if the Plaintiffs failed to meet their burden to prove that there was producible shallow gas in the Bilbo A Lease, the jury was to find for the Defendants. The pertinent part of that Instruction reads:

> The Court instructs you that as to their claims against Texas Petroleum, William Crawford and Bruce Sallee, the burden is on the Plaintiffs to establish by a preponderance of the evidence that there was gas present in the Shallow Zones of the Bilbo A lease which was capable of being produced between May 1995 and July

> 2004, and that Texas Petroleum took gas from the Shallow Zones during this period of time. If the Plaintiffs fail to meet this burden, your verdict shall be for Texas Petroleum, William Crawford and Bruce Sallee on all claims.

R. 12641, R.E. 72.

In other words, the Court instructed the jury that it must find in favor of the Defendants if Tellus: (1) failed to meet its burden to prove by a preponderance of the evidence that there was gas in the shallow zones of the Bilbo A Lease during 1995 to 2004; **and** (2) that Texas Petroleum produced such gas. There was substantial evidence to support the fact that there was no shallow gas in the Bilbo A Lease during 1995 to 2004 and that Texas Petroleum did not produce any shallow gas. That was all the jury was required to find in order to return a verdict in favor of the Defendants.

In this Court, Tellus challenges neither Instruction No. 7 nor the sufficiency of the evidence before the jury to satisfy its dictates. Indeed, much of the evidence of the depletion of gas before 1995 was provided by Tellus. Tellus spent weeks trying to prove to the jury that Total, the other trial Defendant, had produced shallow gas for years before conveying the Bilbo A-1 well to Texas Petroleum in 1995. The jury's exoneration of Total could be based either on rejection of Tellus's evidence or on Tellus's inexcusable delay of ten years in bringing suit. Based on Tellus's own evidence, the jury certainly could have believed that any shallow gas was gone by the time Texas Petroleum entered the field in 1995.

1. The 2005-2006 workover found no gas.

A critical piece of evidence, which is hardly mentioned in Tellus's brief, was the 2005-06 workover. Confronted with Tellus's accusations of fraud and theft, Texas Petroleum decided to conduct a workover of the well to determine if any of Tellus's accusations were true. Specifically, Texas Petroleum, at a significant cost, conducted a workover of the Bilbo A-1 well from November 2005 to March 2006, the purpose of which was to determine if there was any gas in the shallow

sands of the Bilbo A-1 well. Tr. 3275-78, C.R.E. 102-05; Ex. 538. Tellus and Texas Petroleum entered into an agreed protocol for the workover, and Tellus's production foreman, Wade Gipson, was on the site to monitor the tests of the shallow zones. Tr. 3270-74; Ex. 1421, C.R.E. 130-37. One of Gipson's instructions during this workover was to take a sample of any gas they found. Tr. 3278, C.R.E. 105. Gipson conceded at trial that they found no gas in the shallow sands of the Bilbo A-1 well. Tr. 3278-80, C.R.E. 105-07. After his testimony concerning the workover, Gipson testified as follows:

> Q. Let me ask it a different way. You're familiar with Tellus's allegations, aren't you?
>
> A. Yes.
>
> Q. And this particular workover could have confirmed Tellus's allegations, could it not?
>
> A. Yes, sir, it could.
>
> Q. And it did not, did it?
>
> A. That's correct.

Tr. 3288, C.R.E. 115. The jury was certainly free to believe Gipson's testimony.

2. Expert testimony showed that the shallow gas had been depleted by 1995.

The jury also had an enormous amount of expert testimony on which to conclude that there was no producible gas in the shallow sands of the Bilbo A-1 well from 1995 to 2004. The "shallow sands" of the Bilbo A-1 well include those zones that are above the Lower Tuscaloosa (the zone in which the well was drilled)—the Eagleford/Upper Tuscaloosa, the Selma Chalk and the Wilcox.

Rick Garza, Texas Petroleum's expert petroleum engineer, testified in great detail how the Eagleford/Upper Tuscaloosa zone had been depleted of gas prior to 1970. Tr. 4829-33. The jury

also heard from Tellus's first witness, Jim Norris, a geologist, who explained that by 1996 the Eagleford/Upper Tuscaloosa was depleted and non-productive due to high water saturation. Ex. 225(ID) at 96-97, 101, 105, 169-70, 202. Garza, Norris, and Nathan Meehan (another petroleum engineer) all testified that no gas had ever been produced from the Selma Chalk zone in the vicinity of the Bilbo A-1 well without fracture and stimulation, which was not done with the Bilbo A-1 well. Tr. 4886-89, 5094; Ex. 225(ID) at 228-29. Garza and Bob Hilty, a geologist, testified that any gas in the Wilcox zones (there is an upper Wilcox and lower Wilcox) was either depleted by 1970 or that such zones had no gas. Tr. 4752-56, 4833.

The jury was free to believe the testimony of experts that by 1995, there was no gas in the shallow sands of the Bilbo A-1 well. Based on that evidence alone, and the unchallenged Instruction No. 7, the jury's general verdict should be affirmed.

B. The evidence reveals that the people Tellus accused did not steal Tellus's gas.

Another reason that the jury's general verdict for the Defendants should be affirmed is that it is supported by the testimony of the very people whom Tellus accused of misconduct. Tellus tried to convince the jury that Texas Petroleum was involved in a scheme to produce shallow gas from an unspecified casing leak in the Bilbo A-1 well and that, rather than report that gas and try to sell it, Texas Petroleum sent it through a 1-inch bypass line to fuel all the equipment that Texas Petroleum owned in the Baxterville Field. Texas Petroleum could not have accomplished the wrongful taking of Tellus's gas unless Texas Petroleum's personnel were in on it. Yet, each person who was actually out in the field, and who would have been part of the alleged scheme to steal Tellus's shallow gas from a casing leak in the Bilbo A-1 well, testified that it did not happen.

The jury was free to believe those witnesses and disbelieve Tellus's tenuous theory of the case. *See Caldwell v. State*, 6 So. 3d 1076, 1081 (Miss. 2009) ("Matters regarding the credibility and

weight to be accorded the evidence are to be resolved by the jury . . . . The fact that the jury did not believe Caldwell's theory of the case does not render the verdict untenable.").

For example, one of the key witnesses at trial was Larry Courtney, who had worked in the Baxterville Field most of his adult life, working for FINA, then for Texas Petroleum after it acquired its interest in 1995. Tr. 1436-37, C.R.E. 82-83; Tr. 1631, C.R.E. 84. When Courtney was asked whether he had engaged in a scheme to wrongfully take gas allegedly owned by Tellus, he responded, "I know when I worked out there, it did not happen." Tr. 1633-34, C.R.E. 85-86. He also testified that in all the time he worked for Texas Petroleum, he was never asked to do anything dishonest. Tr. 1641, C.R.E. 87. When asked directly what he thought about Tellus's allegations, Courtney said, "I can't say, honestly." Tr. 1633, C.R.E. 85. When asked why he could not say, Courtney replied, "There's women in the court." *Id.*

Richard Walters, Texas Petroleum's production foreman since 1996, testified that the production from the Bilbo A-1 well came from the LTOP, not from the shallow sands. Tr. 2111-12, 2123, 2157-58, C.R.E. 88-92.

Connie Gipson, who was the last field witness to testify, had worked for Texas Petroleum since 1995, and was responsible for reporting production to the State. Tr. 3997-98, C.R.E. 98-99. Ms. Gipson flatly denied being involved in any effort to hide production from the Bilbo A-1 well. Tr. 4119, C.R.E. 100. Ms. Gipson defended herself in front of the jury, saying to Tellus's counsel that he was "trying to make me look like I'm inept, but I'm not." Tr. 4120, C.R.E. 101.

In this regard, Wade Gipson, Tellus's production foreman, and the only Tellus field witness to testify, admitted that he had no personal knowledge to support any of Tellus's allegations:

> Q: Just so the jury is clear, you're aware that Tellus has alleged that Texas Petroleum took over 2 billion cubic feet of gas from an unspecified casing leak in the shallow sands of the Bilbo A-1 well and sent it through the 1-inch

bypass line into the fuel distribution system to fuel all the equipment and all the other wells on all the other leases that Texas Petroleum owned? You're aware of those allegations?

A. Yes, sir, I'm aware of the allegations except with regard to the amount of gas.

* * *

Q: Do you have any personal knowledge to support any of those allegations?

A: No, sir.

Q: Do you know of anybody in the field who has personal knowledge to support any of those allegations?

A. No, sir.

Q. All right. Do you have any evidence that the Bilbo A-l well was supplying fuel gas to burn all the equipment that Texas Petroleum owned in the Baxterville field?

A. No, sir.

Tr. 3260-61, C.R.E. 93-94. Gipson also testified that in the thirteen years since Texas Petroleum owned the Bilbo A lease, no one from Texas Petroleum ever told him that they were producing gas from casing leaks in the Bilbo A-1 well. Tr. 3261, C.R.E. 94. Mr. Gipson testified that he had no personal knowledge about anything that Texas Petroleum had done wrong since 1995. Tr. 3261-62, C.R.E. 94-95. He admitted that Tellus's theory was just a "possibility." Tr. 3305-06, C.R.E. 96-97. "Q. And you're not testifying before this jury that this ever happened? A. No, sir." Tr. 3306, C.R.E. 97.

The jury had sufficient evidence to find against Tellus's theory and find in favor of Defendants Texas Petroleum, Sallee, and Crawford. The jury's verdict should be affirmed.

C. The jury could have found that Tellus's claims are barred by limitations.

Finally, another ground to support the jury's general verdict for the Defendants is found in

Instruction No. 8, which instructed the jury to find for Texas Petroleum regarding Tellus's claims accruing more than three years prior to August 30, 2004, and to find for Sallee and Crawford regarding claims accruing more than three years prior to August 25, 2006. R. 12642-44, R.E. 73-75. Once again, Tellus challenges neither the instruction nor the sufficiency of the evidence to allow the jury to conclude that Tellus's only possible claims accrued well prior to those dates.

The only claims that Tellus submitted to the jury were for conversion and negligence.[9] Because no separate statute of limitations applies to negligence or conversion, Mississippi's general three-year statute applies to Tellus's claims. MISS. CODE ANN. § 15-1-49 (Rev. 2003); *CitiFinancial Mortg. Co. v. Washington*, 967 So. 2d 16, 19 (Miss. 2007) (negligence); *Nygaard v. Getty Oil Co.*, 918 So. 2d 1237, 1240 (Miss. 2005) (actions for which there is no specific limitations). Thus, Tellus had three years from when its claims accrued to sue Texas Petroleum.

Tellus did not sue Texas Petroleum until 2004. Accordingly, it cannot recover for any injury suffered before 2001, because the jury could easily have found no exception to the running of the statute to apply. Tellus claimed that Texas Petroleum had been converting its shallow gas ever since Tellus first acquired an interest in the Bilbo A Lease in 1995, but that Tellus could not have learned of the supposed conversion until its employees saw ice on a line at the Bilbo A-1 well in 2002. Substantial evidence, on which the jury indisputably could have relied, undermined this story. Tellus obviously knew of Texas Petroleum's potential interest in the shallow gas when it unsuccessfully requested Texas Petroleum to execute a quitclaim deed in April 1999. Ex. 1078, C.R.E. 128-29; Tr. 3517-18.[10]

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[9] In its Second Amended Complaint, Tellus asserted 13 causes of action against Texas Petroleum, but chose to submit only conversion and negligence to the jury. R. 1225-55, C.R.E. 12-42.

[10] In fact, Tellus knew of Texas Petroleum's interest as early as June 26, 1998, when the letter from Pennzoil advised it of FINA's conveyance to Texas Petroleum of its entire interest in the Bilbo A Lease,

The Circuit Court instructed the jury on the discovery rule, R. 12642-44, R.E. 73-75, but the jury could easily have found that Tellus failed to establish its application. The discovery rule applies to toll the statute of limitations on torts in land where it is "unrealistic to expect a layman" to recognize the injury. *Jackson v. Carter*, 23 So. 3d 502, 507 (Miss. App. 2009), *cert. denied*, 22 So. 3d 1193 (Miss. 2009). Tellus, however, is not composed of laypersons. By its own admission, it discovered its injury by expert analysis of the public record. It declared in a 2003 letter to Texas Petroleum:

> An examination of the Well's production history since September 1997 demonstrates that the gas/oil ratio has been remarkably higher than other wells in Baxterville Field that have produced the Lower Tuscaloosa Oil Pool. The gas volumes report by TPIC are much too high to be casinghead gas associated with the declining oil production from the Lower Tuscaloosa Oil Pool.
>
> **TPIC appears to be producing and selling gas from a zone subject to the 1949 JOA** [*i.e.*, shallow gas].

Ex. 113, C.R.E. 117 (emphasis added). Similarly, in a December 4, 2003, letter, Tellus again asserted that a review of the Mississippi Oil & Gas Board records had revealed evidence "consistent with a breach of the casing." Ex. 568, C.R.E. 120.[11] At trial, Tellus's expert witness, Henry Coutret, stated Tellus's position that the high gas-to-oil ratios would be an indication of gas production from

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including the shallow gas. Ex. 1069(ID), C.R.E. 123-27. The Circuit Court, however, erroneously kept this letter from the jury.

[11] For purposes of the statute of limitations, a plaintiff is chargeable with knowledge of the public record, particularly when the plaintiff knows where to find the relevant information, yet fails to seek it out. *See United Klans of America v. McGovern*, 621 F.2d 152, 155 (5th Cir. 1980) (applying Alabama law). *See also Duthu v. Pena*, 228 F.3d 409, 2000 WL 1056126, at *7 (5th Cir. 2000) (applying Texas law). Here, where Tellus's entire claim to ownership of the shallow gas is based on constructive notice of the 1949 JOA in the land records, it cannot be heard to say that it lacked notice of the information in Texas Petroleum's public reports to the Board. *Cf. Quates v. Griffin*, 239 So.2d 803, 811 (Miss. 1970) (holding that the statute of limitations begins to run against a cotenant in real property where the grantee of another cotenant "records his deed in the county where the land lies").

the shallow sands under the Bilbo A-1 well. Tr. 2856-57, 2986-93.

Even if some theory of law existed under which Tellus could recover for shallow gas taken during the three years before 2004, despite all the evidence of Tellus's knowledge for many years of the facts on which it based its claim, the jury could easily have believed that no gas remained to be taken by 2001. Certainly, all of the gas was gone by the time of the workover in 2005, and, as noted above, experts testified that it was gone by the time Texas Petroleum entered the field. For all of these reasons, the evidence supports multiple theories on which the jury could have validly based its general verdict for all Defendants, and Tellus does not contend otherwise. Tellus does not begin to explain how any of the procedural errors cited in its brief could have infected that verdict. The judgment should be affirmed.

II. BECAUSE THE JURY PROPERLY FOUND NO LIABILITY, THE CIRCUIT COURT'S JURY INSTRUCTIONS AND INTERROGATORIES CONCERNING DAMAGES COULD NOT HAVE BEEN PREJUDICIAL AND, IN ANY EVENT, WERE PROPER.

In its first two issues presented, Tellus contends that the Circuit Court abused its discretion in denying Tellus's requested instruction on the burden of proof concerning commingled gas and in submitting interrogatories requiring the jury to quantify damages on an annual basis, so that the Court could award interest from the date of the alleged taking, as Tellus requested. Because the jury properly rejected all of Tellus's claims of liability, the damages instructions and interrogatories had no effect on the outcome. Moreover, Tellus cites no case in which any court in any jurisdiction has granted its all-or-nothing commingling instruction, and Tellus itself induced the Court to submit the interrogatories to accommodate Tellus's erroneous theory of damages.

A. Because the jury failed to find liability, both instructions on damages were harmless.

Both of the alleged errors in jury instructions complained of by Tellus concern instructions

on damages. With regard to Instruction No. 9, Tellus complains that the Circuit Court failed to instruct the jury that if it found that commingling occurred, the burden shifted to the plaintiff to prove its share of the commingled goods. *See* Brief of Appellants at 24-25 ("The trial court should have instructed the jury that, if it found that Texas Petroleum had wrongfully commingled Tellus's gas with its own, the burden shifted to Texas Petroleum to prove its share."). With regard to Instruction No. 12, Tellus complains that the Circuit Court erred by giving the jury "annualized damages interrogatories." *See* Brief of Appellants at 28.

As pointed out earlier, because the jury found in its general verdict that the Defendants were not liable, any alleged error in failing to instruct the jury properly on damages cannot be reversible. That point was made long ago by this Court. In *Fairfield v. Louisville & N.R. Co.*, 94 Miss. 887, 48 So. 513 (1909), the Court found that the damages instructions were erroneous but such error could not result in reversal. The Court held:

> We will add that in our judgment instructions Nos. "0" and 11 ought not to have been given; but, since they would relate to the measure of damages, we would not reverse on this account, since the jury has found no liability at all existed.

48 So. at 515. *See also Lewis v. Hiatt*, 683 So. 2d 937, 943 (Miss. 1996) (although plaintiff presented evidence that would have justified a punitive damages instruction, the jury verdict indicated that it had not agreed with that evidence, and thus, "given the verdict of the jury, any error in denying a punitive damage instruction was harmless"); *Mitchell v. Eagle Motor Lines, Inc.*, 228 Miss. 214, 230, 87 So. 2d 466, 471 (1956) (although lower court erred in failing to instruct jury with regard to factor it could consider in assessing damages, such error was harmless since the jury had found in favor of the defendants).

For that reason alone, Tellus's first two arguments on the jury instructions are without merit and should be overruled. However, there is more.

On appellate review of alleged error in jury instructions, the Court reads all the instructions "as a whole." *See Payne v. Rain Forest Indus., Inc.*, 540 So. 2d 35, 40-41 (Miss. 1989). Here, both the damages instructions, No. 9 and No. 12, were predicated on the jury's finding liability. *See* R. 12646, R.E. 76-77 ("**if** you find that one or more of the Defendants is liable to Plaintiffs and that one or more of such liable Defendants, if any, commingled gas . . .") (emphasis added); R. 12653, R.E. 84 ("**[i]f** your verdict be for the Plaintiffs against Texas Petroleum Investment Company, William Crawford and Bruce Sallee, or any of them, you shall apportion the damages for each year ...")(emphasis added).

Tellus's proposed commingling instruction also predicated the so-called "shifting of the burden" on a finding by the jury that the Defendants were liable for commingling. R. 12667.[12] That comports with Mississippi law and the cases upon which Tellus relies which also hold that the "commingling doctrine" is not triggered until the plaintiff proves that commingling occurred. *See Lackey v. Lackey*, 691 So. 2d 990, 993 (Miss. 1997) (commingling doctrine applies only "once it is shown" that commingling occurred). *See also In re Twin B Auto Parts, Inc. (Halart, L.L.C. v. Indep. Auto Warehouse, Inc.)*, 271 B.R. 71, 87 (Bankr. E.D. Va. 2001) ("**if** goods have been commingled, the burden of identifying the property belongs to the one most culpable for the commingling")

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[12] Tellus's proposed instruction reads:

> The Court instructs you that **if** you find from a preponderance of the evidence that one or more of the Defendants commingled gas produced from the 1949 JOA Gas Horizons through the Bilbo A-1 wellbore with gas from other sources owned by such Defendant without making a reasonable accurate record at that time of the amount of the commingled gas produced from the 1949 JOA Gas Horizons, **then** the burden to prove how much of the commingled gas was gas from the 1949 JOA Gas Horizons shifts to such Defendant and in that event it will be your sworn duty to find that all of the commingled gas belonged to the Plaintiffs unless such Defendant proves by a preponderance of the evidence the amount of the commingled gas which belonged to such Defendant.

R. 12667 (emphasis added).

(emphasis added); *Mooers v. Richardson Petroleum Co.*, 204 S.W.2d 606, 608 (Tex. 1947) (commingling rule "has no application at all until the facts establish that there has been a commingling"); *Troop v. St. Louis Union Trust Co.*, 166 N.E.2d 116, 123 (Ill. App. 1960) ("**when the commingling is proved,** the burden of going forward with evidence to show the correct proportions is on the party who commingled") (emphasis added); 15A C.J.S. *Confusion of Goods* § 14 ("burden of proof as to confusion of goods is on the party claiming that such confusion took place, and where a plaintiff claims a forfeiture the burden is on him to show not only a confusion of goods but also that the mixing was done willfully with a fraudulent intent"; "**[w]here the commingling is proved,** the burden of going forward with evidence to show the correct proportions is on the party who did the commingling") (footnote omitted; emphasis added).

In its brief, Tellus argues that Instruction No. 9 allowed Texas Petroleum to escape liability even if Tellus proved that commingling occurred. That is simply not so. The jury was instructed that, if they found commingling, Tellus could recover damages even if the amount of its loss could not be proved with certainty. R. 12646, R.E. 77. Of course, in order to recover anything, Tellus first had to prove that "one or more of the Defendants is liable to Plaintiffs" and "that one or more of such liable Defendants, if any, commingled gas produced from the Shallow Zones of the Bilbo A-1 well" and that the commingling was done "without making a reasonably accurate record of the amount of the commingled gas produced from the Shallow Zones." *Id.* To prove commingling, the Plaintiffs would also have to prove that gas existed in the Shallow Zones in producible quantities. *See* Instruction No. 7, R. 12641, R.E. 72. Because the jury found that the Defendants were not liable to the Plaintiff, the jury never reached the damages instructions about which Tellus complains. For that reason, Tellus cannot show that the failure to submit its damages instructions caused an improper

verdict.

Likewise, with regard to the "annualized damages interrogatories" in Instruction No. 12, the jury was instructed to answer those damages questions only if it found for the Plaintiffs. R. 12653, R.E. 84. The jury did not find for the Plaintiffs. Nothing about the damages instructions could have influenced the jury's verdict. Because Tellus cannot show that the Court's damages instructions affected the jury's finding that Texas Petroleum was not liable, there is no reversible error.

B. There was no abuse of discretion in submitting the commingling instruction.

Not only is there no reversible error, but also there was no error at all in the Circuit Court's rulings. Because Tellus's proposed instruction on commingling was an inaccurate statement of the law, the Circuit Court did not abuse its discretion in refusing the proposed instruction.

A trial court has "considerable discretion" with regard to instructing the jury. *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 474 (Miss. 2010). If the instructions, taken as a whole, adequately instruct the jury, then a party has no complaint on appeal as to an instruction that was refused. *Id.* Even if a specific instruction is defective, reversal is not required so long as all the instructions read together "fairly–although not perfectly–announce the applicable primary rules of law." *Id.* (quoting *Beverly Enters., Inc. v. Reed*, 961 So. 2d 40, 43 (Miss. 2007)). *See Splain v. Hines,* 609 So. 2d 1234, 1239 (Miss.1992) ("Defects or inadequacies in particular instructions do not trouble us, so long as the aggregate of the instructions, taken as a whole, fairly, though not necessarily perfectly, express the applicable primary rules of law.").

In this case, the Circuit Court properly instructed the jury that Tellus had the burden to prove that commingling occurred. Tellus does not appear to take issue with that instruction. Rather, as is clear from Tellus's proposed instruction, R. 12667, and its objection to the charge, Tr. 5469-70, what Tellus sought was not a burden of proof instruction, but a windfall instruction. Tellus wanted

the trial court to instruct the jury that if it found commingling, the burden shifted to the Defendant "and in that event it will be your sworn duty to find **that all of the commingled gas belonged to the Plaintiffs** unless such Defendant proves by a preponderance of the evidence the amount of the commingled gas which belonged to such Defendant." R. 12667 (emphasis added).

Significantly, Tellus's proposed instruction did not make allowance for the problems of proof that the Court's instruction properly recognized. The Court did not tell the jury that Tellus could recover nothing unless it proved the precise amount of shallow gas incorporated into the commingled mass. Instead, the Court properly advised the jury of the traditional Mississippi rule that "Plaintiffs are not precluded from recovering damages for the commingled gas merely because it is not possible to prove the amount of their loss with certainty." R. 12646, R.E. 77. Thus, the Court allowed the jury to make a reasonable estimate of the amount of Tellus's supposed damages. By contrast, Tellus's proposed instruction did not advise the jury of the propriety of a reasonable estimate. Instead, Tellus wanted to instruct the jury "that all of the commingled gas belonged to the Plaintiff" unless Texas Petroleum proved "the amount of the commingled gas which belonged to such Defendant," R. 12667, with no acknowledgment that the amount need not be proved with absolute precision.

Tellus cites no case from any jurisdiction in which an all-or-nothing jury instruction has ever been approved. Indeed, the Mississippi case on which it places principal reliance, *Lackey*, was not a damages case at all. Rather, it was an equitable action in which the beneficiary sought the imposition of a constructive trust on the proceeds of a life insurance policy which her trustee had purchased for himself with commingled funds. This Court recognized that the case law is divided, 691 So. 2d at 994, but chose to apply the remedy against a trustee who "stole massive amounts of funds from an innocent girl to whom he owed both the legal fiduciary duties of a trustee as well as

the familial duties owed to a niece." *Id.* at 995. Nevertheless, the Court warned that such a remedy should not be available in every arguably similar case:

> [I]t would also be unwise to adopt a blanket rule permitting the attachment of insurance proceeds in all cases involving breaches of fiduciary duty or fraud. In the view of this Court, a better approach is to consider the constructive trust in insurance proceeds to be an equitable remedy which should be available in appropriate cases.

Id. at 996. In allowing a Chancellor to impose such a constructive trust in some cases, this Court certainly did not authorize a jury to disregard a plaintiff's burden of proof in every ordinary tort suit for damages.[13]

Moreover, other jurisdictions have applied the doctrine of commingling in cases of fraud, like the *Lackey* case, and not in cases of ordinary negligence, such as Tellus asserts here. As the Supreme Court of Texas said, "In applying the commingling rule it is proper to hold the willful commingler to a strict showing ...." *Mooers*, 204 S.W. 2d at 608. In *Troop*, 166 N.E. 2d at 122, the Court observed that "the counter-defendant did intentionally and tortiously mix, commingle and confuse the oil from the two leases." No damages at all were awarded in *In re Twin B Auto Parts,* but the Court described the rule as applying against "one who willfully mixes his goods with those of another, so that they cannot be distinguished and separated." 271 B.R. at 86 (quoting *Edgewood Distilling Co. v. Rosser's Adm'r*, 116 Va. 624, 82 S.E. 716, 717 (1914)). The all-or-nothing jury instruction requested by Tellus did not require a finding of willfulness and cannot be supported even

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[13] The other two Mississippi cases are even less applicable here. *Miller v. Bank of Indianola*, 142 Miss. 799, 107 So. 548 (1926), was neither a common law action nor an equitable action, but a statutory action. This Court held that a statute requiring a bank to pay interest on county tax receipts imposed "the duty to ascertain what part of such funds were tax collections, and to keep them separate from other funds of the sheriff's account." 107 So. at 549. *Peterson v. Polk*, 67 Miss. 163, 6 So. 615 (1889), was a replevin action in which the sheriff levied on 4,000 staves on a barge. Defendant did not disagree that he had taken 4,000 staves from plaintiff's property, but argued "that the particular staves seized by the sheriff must be shown to have been made from timber cut on plaintiff's land." 6 So. at 615. Rejecting this argument, this Court found that it did not matter which 4,000 staves plaintiff received, so long as she got 4,000 staves. This Court certainly did not authorize the sheriff to seize the entire barge.

by the non-jury cases on which Tellus relies.

The Circuit Court may refuse a jury instruction if it is an incorrect statement of law. *See Thomas v. State*, 48 So. 3d 460, 469 (Miss. 2010). Because there is no law supporting Tellus's all-or-nothing instruction, there is no error. Moreover, because Tellus cannot show that it was harmed by the instruction, there is no reversible error.

C. Any error in the annualized damages interrogatories was waived or invited.

Tellus also complains about the "annualized damages interrogatories" in Instruction No. 12, but that issue cannot be considered because: (1) Tellus never objected to the instruction; (2) Tellus itself proposed the instruction; and (3) Tellus urged the trial court not to follow MISS. CODE ANN. § 75-17-7 (Rev. 2009).

First, Tellus cannot complain of error regarding the annualized damages interrogatories in Instruction No. 12 because Tellus never objected to those interrogatories. In Tellus's ten pages of argument in its brief, Tellus does not say that it **objected** to Instruction No. 12. It did not do so. Tellus tells this Court that it "protested [the] approach" ultimately incorporated in the verdict form, but its supposed "protest" against what was then only a discussion point occurred nearly two weeks before the jury instructions were finalized. In fact, Tellus's "protest" was nothing more than a preference stated for a different approach of getting at the interest calculation, prompted by the trial court's December 2, 2008, ruling that interest would be allowed on any damages awarded from the dates of any wrongful takings established by Tellus. *See* Tr. 4293-4310, R.E. 123-40.[14]

[14] Tellus argued at trial that the jury should be required to allocate any damages award by year. As it argues on appeal, Tellus's preference was that the jury be asked to return a verdict as to each defendant and, in the event of liability, award the total damages resulting from each defendant's wrongful conduct; then, Tellus proposed that the Court require the jury to return to the jury room to allocate any damage awards on an annual basis. Tr. 4304, 4307-08; R.E. 134, 137-38. Defense counsel reminded the Court that Tellus was already seeking bifurcation by virtue of its punitive damage claim and that Tellus's proposal could result in trifurcation of the jury's deliberations. Tr. 4308-09, R.E. 138-39.

In any event, the Circuit Court deferred any ruling on December 2 as to whether the conversion dates, if any, would be established through bifurcated deliberations or through the form of the verdict. Tr. 4309-10, R.E. 139-40. Thirteen days later, on December 15, the Court went over with counsel, on the record, the instructions it intended to give the jury, Tr. 5452-67, C.R.E. 57-72, and then subsequently accepted the parties' formal objections to specific instructions. Tr. 5467-76, C.R.E. 72-81. On neither occasion did Tellus lodge any objection to Instruction No. 12, the verdict form with "special interrogatories." *See* Tr. 5464-65, 5467-70; C.R.E. 69-70, 72-75.[15]

Tellus's failure to object to Instruction No. 12 bars its consideration on appeal. *Utz*, 32 So. 3d at 475 ("[W]here counsel fails to raise an objection to a jury instruction, the issue is procedurally barred."); *Missala Marine Servs., Inc. v. Odom*, 861 So. 2d 290, 296 (Miss. 2003) ("Failure to object to an instruction at trial bars that issue on appeal."). *See* M.R.C.P. 51(b)(3)("No party may assign as error the granting or denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury . . . [and] all objections must be stated on the record."). The same rule applies to the submission of interrogatories under M.R.C.P. 49 "[T]he appropriate method for preserving the issue for appeal is to either make a clear objection for the record, stating the basis for the objection, ... or proposing an interrogatory which included the omitted issue ...." *Jones v. Westinghouse Elec. Corp.*, 694 So. 2d 1249, 1252 (Miss. 1997), *reh'g denied*, 702 So. 2d 133 (Miss 1997). For that reason alone, Tellus's complaint about Instruction No. 12 should be overruled.

Not only did Tellus waive its complaint by failing to object, but also Tellus invited the error of which it complains. The instruction which the Circuit Court submitted was taken directly from

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[15] Ironically, Texas Petroleum did object to the yearly allocation of damages in Instruction No. 12, arguing that "because interest is controlled by Mississippi statute, and it accrues on the date that the lawsuit was filed, not when — on the date of the taking." Tr. 5473, C.R.E. 78.

Tellus's proposed Instruction P-25B. R. 12489-91. The only difference between Tellus's proposed Instruction P-25B and Instruction No. 12 is that P-25B combined the annual damage allocations for individual defendants Crawford and Sallee with those for Texas Petroleum, and asked the jury to write in the Defendant's name above the annual damages allocation. Thus, if anything, Tellus's proposed Instruction P-25B was even more cumbersome and "confusing" than Instruction No. 12.

The reason that the Circuit Court broke down the damages in the first place was in response to Tellus's argument that prejudgment interest on conversion runs from the date of the taking. Tellus's counsel argued that it would be impossible for the Court to give a separate award of interest for each taking "unless the jury gives a separate damages number for each and every month." Tr. 705, R.E. 99. Defendants argued that the Circuit Court should follow MISS. CODE ANN. § 75-17-7, which governs prejudgment interest for all cases, and provides that a party cannot have prejudgment interest preceding the date of the filing of the complaint. Tr. 712-18, 723-25; R.E. 106-12, 117-19. *See* MISS. CODE ANN. § 75-17-7 ("All other judgments or decrees [other than contract] shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint."); *In re Guardianship of Duckett*, 991 So. 2d 1165, 1181 (Miss. 2008) (holding that § 75-17-7 governs awards of prejudgment interest). Tellus's counsel argued that the statute did not apply and that it was necessary for the jury to determine the damages for each taking over a 14-year period. Tr. 710, 4294-4308; R.E. 104, 124-38. The only reason that the Circuit Court asked the jury to apportion damages for each year was to accommodate Tellus's incorrect argument that prejudgment interest should be determined from the taking, rather than from the date of the filing of the complaint, as the statute provides. Tr. 4304, R.E. 134 (COURT: "At the risk of being overruled by the Supreme Court, I'm going to allow prejudgment interest from the date of the injury."). Thus, Tellus led the Circuit Court into the

decision of which Tellus complains.

The jury's complete rejection of Tellus's claims saved the Circuit Court from reversible error. Section 75-17-7, allowing interest to run only from the filing of the complaint, contains no exception for conversion cases. Nor does Tellus cite any Mississippi decision in which any jury has ever been allowed to compute interest in a conversion case. In *Skrmetta v. Clark*, 180 Miss. 21, 177 So. 11 (1937), and *Phillips Distribs., Inc. v. Texaco, Inc.*, 190 So. 2d 840 (Miss. 1966), this Court reversed the judgments and remanded for a new trial, without any explanation of how interest would be computed and awarded. *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So. 2d 187 (Miss. 2000), was a bench trial, and *Ingram Day Lumber Co. v. Robertson*, 129 Miss. 365, 92 So. 289 (1922), was an equitable proceeding. Indeed, the lack of any precedent for jury calculation of interest stems from Mississippi's traditional reliance on the Chancery Courts to adjudicate complicated accountings. Tellus's desire to oversimplify the issues by handing the jury "a single, easy-to-understand damages figure," Brief of Appellants at 34, does not negate the Legislature's mandate that interest be computed by the Court.

Even if Tellus were correct concerning its supposed entitlement to pre-complaint interest, it utterly fails to carry its burden of demonstrating how it could have been prejudiced by the interrogatories submitted to the jury by the Court. A trial court's decision on whether or not to submit interrogatories under Rule 49(c) is "one within the sound discretion of the district court and subject to reversal only upon a clear showing of abuse." *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38, 49 (Miss. 1992), *overruled on other grounds*, 631 So. 2d 143 (Miss. 1994). In its seven full pages of complaints about the interrogatories, Brief of Appellants at 28-35, Tellus cites not a single Rule 49 case, state or federal, supporting its contention that the Circuit Court abused its discretion. No such abuse of discretion appears on this record.

Tellus cannot complain on appeal about errors which it invited or induced. *See Busick v. St. John*, 856 So. 2d 304, 314 (Miss. 2003) ("An appellant cannot complain on appeal of alleged errors which he invited or induced."). In addition, Tellus cannot complain on appeal about an instruction that it submitted. *State Highway Comm'n v. Randle*, 180 Miss. 834, 179 So. 273, 273 (1938) ("[T]he appellant cannot complain because of error in its own instruction."). Because Tellus's alleged error in Instruction No. 12 was waived or invited, the argument has no merit.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF EXPERTS GARZA AND MEEHAN.

The remainder of Tellus's challenges relate to alleged error in the admission or exclusion of evidence. This Court gives great deference to the trial court's evidentiary rulings and will only overturn if the Court's decision was "arbitrary and clearly erroneous." *Tunica County v. Matthews*, 926 So. 2d 209, 212-13 (Miss. 2006). Not only must Tellus show that the Circuit Court's decision was arbitrary and clearly erroneous, but also Tellus must show that the error resulted in harm which impaired a substantial right. *See Beverly Enters.*, 961 So. 2d at 44-45.

Tellus first asserts that the Court committed reversible error by allowing the testimony of experts Garza and Meehan, because those experts did not have a license to practice engineering in Mississippi, in alleged violation of MISS. CODE ANN. § 73-13-3 (Rev. 2008).[16] Tellus did not raise a *Daubert* challenge to their testimony or otherwise contend that either Garza or Meehan are not qualified to give expert opinions. Indeed, it is undisputed that both Garza and Meehan are eminently qualified petroleum en gineers. Tr. 4808-15 (Garza's qualifications); Tr. 5053-66 (Meehan's qualifications). The Circuit Court rejected Tellus's license argument, holding that, because the experts were qualified under Rule 702, they could proceed with their testimony. Tr. 4820.

[16] This is Tellus's assertion. Actually, § 73-13-3 is only a definition section.

This Court has resolved this argument contrary to Tellus's position in a number of analogous situations, none of which is cited by Tellus in its brief. *See Investor Resource Servs., Inc. v. Cato*, 15 So. 3d 412, 418 (Miss. 2009) (approving unlicensed accountant); *Watts v. Lawrence*, 703 So. 2d 236, 238-39 (Miss. 1997) (approving unlicensed real estate appraiser), *reh'g denied*, 703 So. 2d 864 (Miss. 1997). *See also Kilhullen v. Kansas City Southern Ry.*, 8 So. 3d 168, 173-74 (Miss. 2009) (reversing trial court and holding that engineer could testify because he was qualified under Rule 702, despite the fact that he was not certified as an accident reconstructionist); *University Med. Ctr. v. Martin*, 994 So. 2d 740, 747 (Miss. 2008) (holding that doctor was qualified to give expert testimony under Rule 702 despite not being board certified in emergency medicine or practicing emergency medicine at the time of trial); *Blake v. Clein*, 903 So. 2d 710, 727-28 (Miss. 2005) (holding that doctor was not disqualified to give expert testimony because he did not have a license in the United States, but he was disqualified otherwise: "this holding does not disqualify all doctors who are licensed and practice outside the United States"); *King v. Murphy*, 424 So. 2d 547, 550 (Miss. 1982) (although ultimately excluding the expert's testimony on other ground, states that an expert's testimony should not be excluded simply because he was not licensed to practice in Mississippi).

In *Watts*, the plaintiff contended that the chancellor erred by failing to exclude the testimony of an expert real estate appraiser because he was retired and did not have a real estate license under MISS. CODE ANN. § 73-34-5 (Rev. 2008). The Court held:

> Our Rules of Evidence require only that an expert witness be qualified by knowledge, skill, experience, training, or education. Miss. R. Evid. 702. The record is replete with evidence of Joachim's experience and knowledge in this area. He is a qualified expert under M.R.E. 702. The trial court did not err in allowing his testimony.

703 So. 2d at 238-39.

In 2009, the Court again confronted the issue. In *Investor Resource Servs.*, the trial court struck an accounting expert because her license had expired. 15 So. 3d at 418. This Court reversed and held that, because the expert was otherwise qualified to give an opinion under M.R.E. 702 by "education, business and academia," the trial court erred in striking her as an expert. *Id.* at 419. With regard to the fact that the expert did not have a license, the Court held:

> The only problem in this case was that Dr. Glover was not current in her licensure at the time of her reports and depositions. That is an issue between Dr. Glover and the Mississippi State Board of Public Accountancy, but does not concern this Court for the purposes of this appeal.

Id. at 418-19.

Recently, in November 2010, a federal district court also held that an engineer was qualified under Rule 702 to give expert testimony even though he was not licensed. *See Lobell v. Grand Casinos of Miss., Inc.*, 2010 WL 4553563, at *1 (S.D. Miss. Nov. 3, 2010). There, the Court distinguished *Bossier* and *Aiken*—the two cases on which Tellus relies—and held:

> [T]he Mississippi courts have never held that an unlicensed engineer is not competent to give expert testimony or is otherwise prohibited from giving such testimony. In fact, the Mississippi Rules of Evidence provide that every person is competent to be a witness except persons appointed by a court to make an appraisal in an eminent domain proceeding and, in certain circumstances, spouses. Miss. R. Evid. 601. Finally, it should be noted that the Mississippi courts have never held that providing expert testimony constitutes "practicing engineering."[17] The issue of whether Comer has complied with Mississippi's licensing requirements goes to the weight and credibility of his testimony, not its admissibility. As a result, the Court finds that the Motion to Strike Comer should be denied.

Id. at *2. For that reason, the Court held that the fact that the engineer was not licensed did not disqualify him as an expert under Rule 702. *Id.*

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[17] Indeed, the purpose of the Mississippi statute is to "safeguard life, health and property." *See* MISS. CODE ANN. § 73-13-1 (Rev. 2008). There is nothing about giving expert testimony in a civil trial that necessarily involves "life, health and property."

Tellus primarily relies on *Bossier v. State Farm Fire & Cas. Co.*, 2009 WL 4061501 (S.D. Miss. Nov. 20, 2009), a federal district court case decided before the more recent decision in *Lobell*. It is inapplicable for at least two reasons. From a factual standpoint, the expert at issue was not licensed in any state, but instead was only an engineer intern. By contrast, both Garza and Meehan are long-time engineers licensed in the State of Texas. From a legal standpoint, the question was whether § 73-13-1 served as a basis to exclude an expert; it did not address whether the decision to admit such evidence is an abuse of discretion or violation of Rule 702 that could serve as the basis to reverse a seven-week trial on the merits. Similarly, *Aiken v. Rimkus Consulting Group, Inc.*, 333 Fed. Appx. 806, 813 (5th Cir. 2009), is equally inapplicable in that the expert at issue was "not a licensed engineer," and the issue was only whether the exclusion of the expert's testimony was manifestly erroneous, not whether the admission of such testimony could serve as the basis for reversal.

Because Tellus's argument is contrary to Mississippi law and Rule 702, this Court should reject it.[18]

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF EXPERT GARZA ON THE "FISH."

Tellus next contends that it made a "strong case" that sand in the fish created a plug that cut off production from the LTOP and that the admission of Garza's testimony, which refuted such a claim, is reversible error. Tellus's claimed error is without merit for four reasons: (1) Garza's opinions were fairly disclosed prior to trial; (2) Garza's opinions were permitted under Rule 703; (3) Garza's opinions were cumulative of other testimony at trial; and (4) Tellus's global, non-specific

[18] Any error is harmless in any event. As soon as Tellus raised the complaint, for the first time during trial, Garza and Meehan immediately applied for, and now are, licensed in Mississippi. R. 13144.

"continuing objection" did not preserve error.

In order to understand Tellus's argument, it is helpful to view it in context. Rick Garza was Texas Petroleum's designated petroleum engineer who sat through the entire trial. During Garza's direct examination, he was asked about Tellus's position that Texas Petroleum should have done a volumetric reserve study of the LTOP. Tr. 4892, R.E. 143. Tellus's counsel objected that "it's not in his report." *Id.* The Circuit Court overruled the objection, saying "It's been brought out. I will allow it." *Id.* Garza was a asked a few more questions about the volumetric reserve study, and Tellus's counsel asked for "a continuing objection to this line of testimony." Tr. 4893, R.E. 144. A little while later, Garza was asked another question dealing with a volumetric reserve study, and Tellus's counsel said, "I assume I still have my continuing objection?" Tr. 4896, R.E. 147. Garza was then asked about testimony given at trial concerning icing of the flow line and he offered opinions about that, without objection. Tr. 4898-4902, R.E. 149-53. When he was asked for another opinion on that subject, Tellus's counsel objected that it was "way beyond his report," and the Circuit Court said, "The Court will allow it because it's come up, and he is an expert, and I believe it can aid the jury in making a determination. Besides, you will have an opportunity on cross." Tr. 4902, R.E. 153. Garza was then asked some questions about the 2005-2006 workover, and Tellus's counsel again objected, Tr. 4903-05, R.E. 154-56, and asked for a continuing objection "[t]o anything that wasn't in the report." Tr. 4905, R.E. 156. The Circuit Court said, "[T]he Court is allowing those matters because they have been addressed by the plaintiff in their case in chief." *Id.* After discussing why the results of the 2005-2006 workover fit in with his analysis, Garza was asked to explain why there was no oil in the sand when the fish was pulled out of the hole. Tr. 4906-07, R.E. 157-58. Garza's explanation took two paragraphs. Tr. 4907, R.E. 158. Tellus's counsel made no objection. Texas Petroleum's counsel tendered the witness. *Id.*

Thus, the testimony that Tellus portrays in its brief as such a prejudicial surprise that it caused an improper verdict did not even elicit a comment by Tellus's counsel. There are numerous reasons why such testimony does not constitute reversible error.

A. Garza's opinions were fairly disclosed prior to trial.

First, Garza's opinions were well known to Tellus. As stated by Tellus in its brief, Garza's opinion in his expert report was that "the gas produced by the A-1 Well came from the LTOP deep zones." *See* Brief of Appellants at 38. Tellus's position was that a "fish," or plug in the hole prevented any deep gas from coming from the LTOP. As Tellus clearly understood, Garza's opinion contradicted Tellus's position. That understanding was stated explicitly by Wade Gipson, Tellus's chief witness. Gipson conceded that if the jury believed that the gas came from the LTOP, then the fish could not have acted as a permanent plug. Tr. 3294.

An expert is not required to state in his report every opinion he will offer at trial. *See Walker v. Gann*, 955 So. 2d 920, 929 (Miss. App. 2007). Rather, Rule 26(b) only requires that the expert provide the substance of the facts and opinions with a summary. *See* M.R.C.P. 26(b)(4)(A)(I). "[D]iscovery responses regarding experts do not, indeed cannot include everything that an expert witness will state at trial. The answer does not have to be a statement essentially as long as the testimony." *Peterson v. Ladner*, 785 So. 2d 290, 295 (Miss. App. 2000). Because Tellus was well aware that Garza was of the opinion that the gas came from the LTOP, Tellus had "fair notice" that Garza did not believe Tellus's fish theory. *Id.* Had Tellus wished to probe in detail for the basis of that opinion, it had every opportunity to do so at Garza's deposition. Tellus cannot claim surprise now.

B. Garza's opinions were permitted under Rule 703.

Garza was Texas Petroleum's expert who sat through the entire trial. *See* Tr. 1002-03

(allowing experts to stay through trial). The question and answer of which Tellus now complains was Garza's opinion based on the testimony of others he heard during the trial. Tr. 4906-07, R.E. 157-58.

It has long been held in Mississippi that, under M.R.E. 703, an expert who sits through trial is permitted to base his opinion "on the trial testimony of others which the expert has heard while sitting in the courtroom." *Northup v. State*, 793 So. 2d 618, 622 (Miss. 2001); *Collins v. State*, 361 So. 2d 333, 334 (Miss. 1978) ("It is further recognized in this State that an expert witness may remain in the courtroom during the other witnesses' testimony and base his opinion upon the prior testimony of other witnesses."); *Providence Washington Ins. Co. v. Weaver*, 242 Miss. 141, 133 So. 2d 635 (1961). *See also* M.R.E. 703, cmt.

The Circuit Court did not abuse its discretion in permitting Garza to testify about issues raised by Tellus in its case in chief. Tr. 4905, R.E. 156.

C. Garza's testimony was cumulative of other witnesses.

Garza's testimony that the fish did not cut off production from the LTOP is cumulative of other witnesses, and therefore does not serve as a basis for reversal. *See Griffin v. McKenney*, 877 So. 2d 425, 441 (Miss. App. 2003) (holding that even the erroneous admission of expert testimony is not grounds for reversal where such testimony is cumulative of other witnesses), *cert. denied*, 878 So. 2d 67 (Miss. 2004). Specifically, Richard Walters—who was called adversely during Tellus's case-in-chief—provided the jury with direct evidence that sand and mud in the fish did not cut off LTOP production. This exchange, which occurred weeks before Garza took the stand, makes the point:

> Q: All right. Well, Mr. Davis asked you about the mud in those drill pipes I think maybe he might have just got tongue-tied. Is this mud or sand?

A: It's drilling mud and sand.

Q: Mud and sand?

A: Yes, sir.

Q: Okay. And gas can go through sand, can't it, or can it?

A: As far as I know it can come through there.

Tr. 2161. Wade Gipson essentially confirmed this fact, testifying that if LTOP oil was being produced, as the evidence showed, then the sand in the fish was obviously not plugging off production. Tr. 3294, 3303-04.[19] Thus, because the testimony from Garza about the fish was cumulative of other witnesses, this argument should be overruled.

D. Tellus's global, non-specific "continuing objection" did not preserve error.

Finally, it is again noted that Tellus, which claims that Garza's "surprise" two-paragraph testimony about the fish was so unduly prejudicial that it should cause a seven-week trial to be reversed, did not specifically object to that testimony at trial. Tellus might wish to rely on its "continuing objection" to "anything that wasn't in the report," but that objection is too general to preserve specific error. *See* M.R.E. 103(a)(1) (requiring a specific objection stating specific grounds); *Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 223 (Miss. 2001) ("Specific objections are required to avoid costly new trials and to allow the offering party an opportunity to obviate the objection . . . . Further, it is well known that the trial court will not be held in error unless it has had an opportunity to pass on the question."). *See Salvini v. Ski Lifts, Inc.*, 2008 WL 4616708, at *12 (Wash. App. 2008) ("In addition, Ski Lifts' nonspecific continuing objection was insufficient to

[19] Wade Gipson provided additional testimony that further cast doubt on the fish theory, admitting that he had no idea how long the fill had been in the fish, and conceding that he was talking about something that occurred in 2005-2006, a period that was long after the events made the basis of this lawsuit. *See* Tr. 5325.

preserve the issue for appellate review."), *review denied*, 210 P.3d 1018 (Wash. 2009).[20] At the very least, Tellus's failure to object to the testimony counsels against its claim that the testimony deprived it of a "substantial right," within the meaning of M.R.E. 103(a) or M.R.C.P. 61. The Circuit Court did not abuse its discretion in admitting Garza's two-paragraph "fish" testimony, and Tellus has failed to show any harmful error.

V. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF BRAD LOWE'S ALLEGED BIAS.

Tellus next contends that the judgment should be reversed because the Circuit Court excluded evidence of Brad Lowe's bias. However, that contention is misleading because the Circuit Court did let Tellus go into Brad Lowe's bias.

The issue crystalized when Tellus's counsel violated a motion in limine and asked Brad Lowe "isn't it true that you've ... stolen a fair amount of property from Texas Petroleum?" Tr. 1862, R.E. 162. The Circuit Court sent the jury out and noted that Brad Lowe had not been adjudicated of any crime. Tr. 1862-64, R.E. 162-64. The Court told Tellus's counsel that he would allow him to get into Brad Lowe's bias, but he could not use inflammatory words like "stealing" or talk about criminality for which Brad Lowe had not been adjudicated. Tr. 1864-73, R.E. 164-73.

Thereafter, Tellus's counsel did explore Brad Lowe's bias in favor of his employer, Texas Petroleum. Tellus's counsel asked Brad Lowe about his "debt of gratitude" he owed to Texas Petroleum for not punishing him for his "copper salvaging." Tr. 1883, R.E. 183. The fact that

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[20] Tellus did not preserve error on this point also because, although it contended that Garza's opinions were outside his expert report, Tellus did not present that report to the Circuit Court. Thus, the objection is waived. *See Acker v. State*, 797 So. 2d 966, 971 (Miss.2001) ("Our law is clear that an appellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved."). The Court should not allow Tellus to supplement the record with a document it never presented to the Circuit Court. *See* Response in Opposition to Motion to Supplement the Record submitted herein on October 8, 2010. For that reason, the report Tellus included as a "proposed" record excerpt, P.R.E. 474-546, Brief of Appellants at 38 n.29, should be stricken.

Tellus got nothing much out of that examination was not the result of any ruling by the trial court, but instead was due to the anticlimactic testimony of Lowe about the matter.

The Circuit Court did not abuse its discretion by excluding evidence of Brad Lowe's nonadjudication for a crime because nonadjudication is not admissible under M.R.E. 609. *See Gallion v. State*, 469 So. 2d 1247, 1249 (Miss. 1985) ("Likewise, evidence of specific conduct by an accused which has not resulted in a conviction is not admissible for purposes of impeachment.").[21] Further, the Circuit Court did not abuse its discretion in determining that the prejudicial impact of inflammatory words like "stealing" and "thefts" outweighed the probative value of the testimony, particularly when Tellus was free to explore Brad Lowe's bias—and did—without using those words. *See* M.R.E. 403. Finally, Tellus cannot use Brad Lowe's nonadjudication to show bias under M.R.E. 616. *See Ellis v. State*, 856 So. 2d 561, 565 (Miss. App. 2003), *cert. denied*, 860 So. 2d 1223 (Miss. 2003).

Tellus failed to show that the Circuit Court abused its discretion in disallowing Tellus's inflammatory words, and Tellus also failed to show how the Circuit Court's exclusion of Brad Lowe's nonadjudication adversely affected a "substantial right" of Tellus. *See Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 243 (Miss. 2009). Because there is no merit to this argument, the argument should be overruled.

VI. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TELLUS'S SPECULATIVE LOST PROFITS.

In its last argument, Tellus claims that the Circuit Court erred in excluding evidence of its "lost profits." That issue is reviewed for abuse of discretion. *See Webb v. Braswell*, 930 So. 2d 387,

[21] In fact, even if there had been a conviction, Tellus could not inquire into the details of the conviction. *See Gallion*, 469 So. 2d at 1249.

396-98 (Miss. 2006).

As with its complaints directed at the damages instructions, any error regarding exclusion of evidence of damages testimony is harmless because the jury found against Tellus on liability. *See Lewis*, 683 So. 2d at 943. In its brief, Tellus does not show how the exclusion of that testimony could have caused an improper judgment.

However, should this Court consider Tellus's argument, it will quickly see that, while Tellus's excluded theory of recovery includes a lost profits component, it is even more speculative than the ususal claim of lost profits. Indeed, as Tellus itself frames the argument in its brief, it "was denied the opportunity to present evidence of the profits that it would have earned by producing the wrongfully taken shallow gas from April 2005 **through May 2014.**" *See* Brief of Appellants at 48 (emphasis added). At bottom, the proof that Tellus sought to introduce was in reality proof of the **prospective** value of the natural gas allegedly converted, and manifestly was not evidence of "the fair market value of the property converted at the time of conversion." *Pride Oil*, 761 So. 2d at 191.

The problem with Tellus's excluded damage proof was not that it included an element of lost profits,[22] but that it ignored the historically known value of the gas on the dates of any alleged wrongful takings instead relying on speculative predictions of natural gas prices far out into the future. Tellus argued that because, as of the alleged dates of conversion (1995 through 2004), it was not itself capable of exploiting the natural gas it says was then in place, the Court should allow it to put on proof of the value of the allegedly converted gas at certain posited future dates, when Tellus says it "would have" been able to produce and sell the gas, had the alleged conversion never

[22] The "fair market value" of natural gas presumably includes an element of profit, since the phrase has been defined as "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Hartman v. McInnis*, 996 So. 2d 704, 711 (Miss. 2007). Presumably, any willing seller desires to make a profit.

occurred. Tr. 4067-69, R.E. 190-92.

Under the never-varied common law measure of conversion damages, had Tellus proven that Texas Petroleum converted X volume of Tellus's gas in 1999, Mississippi law would have allowed Tellus to recover the value of the gas wrongfully taken in 1999, based upon the actual fair market value of natural gas in 1999. However, Tellus's argument was (and is) that it would not have produced any gas until at least 2005, and it would have continued doing so into 2014. Accordingly, Tellus contends it should have been allowed to put on proof as to the value the allegedly converted gas would have had in years 2005 through 2014. To be sure, Tellus's proffered evidence of future gas values, *see* Tr. 4067-69, 4182-90, R.E. 190-92, 232-39, is necessarily speculative and hence, inadmissible, but it was also inadmissible for an even more basic reason: It was wholly contrary to the established **retrospective** measure of damages for conversion permitted under Mississippi law. *See Pride Oil,* 761 So. 2d at 191.[23]

It bears emphasis that not only was Tellus's proof of its future conduct hypothetical—that it *would have* drilled new wells and produced and sold X volume of gas in future years—it was premised in the first instance on the hypothetical, never-proven existence of gas in the shallow zones, which, hypothetically, of course, had been "stolen" by Texas Petroleum. The Circuit Court correctly rejected Tellus's attempt to stack hypothetical upon hypothetical which was far too speculative to

[23] Exclusion of evidence is the appropriate remedy where a party offers proof of damages that does not comport with Mississippi law. *See, e.g., Blanton v. Board of Supervisors*, 720 So. 2d 190, 192 (Miss. 1998) (affirming exclusion of evidence of damages that were not legally recoverable in eminent domain case); *Illinois Cent. Gulf R. Co. v. Gibbs*, 600 So. 2d 944, 946, 948 (Miss. 1992) (trial court correctly granted motion in limine to limit plaintiff's damages to those recoverable under Mississippi law); *Hancock Bank v. Ensenat*, 819 So. 2d 3, 12-13 (Miss. App. 2001) (trial court erred in denying motion *in limine* seeking exclusion of evidence of non-conversion damages where plaintiff's only cause of action was for conversion).

pass muster under *Pride Oil*.[24] Tr. 4098-99, R.E. 221-22.

Tellus's evidence of "lost profits damages" was virtually the opposite of the "reasonable certainty" required by *Pride Oil*: *If* there had been a substantial volume of natural gas in the shallow zones; *and if* the defendants had not converted the gas; *and if* Tellus were to drill two gas wells in the shallow zones in the future; *and if* those two undrilled gas wells would each produce X volume of gas in future years Y and Z; *and if* the market price for natural gas in future years Y and Z were $XX; *and if* Tellus actually were to sell the gas in future years at the predicted market price(s); *and if* a whole lot of other variables were assumed; *then* the jury could have awarded Tellus the millions of dollars in lost profits that Tellus's expert Oscar Hartman opined in a proffer had been (or would be) sustained by Tellus. Tr. 4182-89, R.E. 232-38; Exs. 405B(ID)-405F(ID).

The Circuit Court properly excluded this evidence because it did not comport with the value of the allegedly converted property at the time of the alleged wrongful taking, as Mississippi law requires, and because it was highly speculative. One must prove entitlement to lost profits with "reasonable certainty." *Lovett v. E. L. Garner, Inc.*, 511 So. 2d 1346, 1353 (Miss.1987); *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 29, 58 So. 2d 71, 76 (1952). Both the existence of lost profits damages and that lost profits were caused by the breach must be shown with reasonable certainty. *Missouri Bag Co.*, 58 So. 2d at 78. Where, as here, the evidence is purely speculative, the court does not err in excluding the evidence. *See Southeastern Med. Supply, Inc. v. Boyles, Moak & Brickell Ins., Inc.*, 822 So. 2d 323, 328 (Miss. App. 2002) ("Therefore, not only

[24] Tellus carefully cloaks its alternative damages theory under the rubric "lost profits damages" because *Pride Oil* and other Mississippi cases hold that lost profits *may* be recoverable in a conversion case under certain circumstances. However, such damages are recoverable only if they are "neither uncertain, unnatural, nor remote as to cause, nor speculative and conjectural in effect," and if the lost profits can be shown "with reasonable certainty." 761 So. 2d at 191-92. The Circuit Court did *not* exclude all evidence of lost profits, but only Tellus's speculative *future* damages proof, which Tellus called "lost profits damages" in an attempt to make this plainly inadmissible evidence more palatable.

does the evidence submitted fail to create a proximate cause linking any action or inaction taken by Boyles, Moak to the lost profits suffered by Southeastern, but this evidence is also too speculative to support any claim for lost profits."), *cert. denied*, 826 So. 2d 1293 (Miss. 2002).

Because there was no abuse of discretion in excluding evidence of Tellus's speculative lost profits, and because Tellus has shown no effect on the verdict, its argument should be rejected.

VII. ALTERNATIVELY, THE JUDGMENT SHOULD BE AFFIRMED IN FAVOR OF SALLEE AND CRAWFORD.

Throughout this lengthy litigation, there has been one strong refrain, and that is that the shareholders of Texas Petroleum should never have been dragged into this suit. It is undisputed that all the acts and omissions which Tellus alleged against Bruce Sallee and Bill Crawford were done in their capacity as officers of Texas Petroleum and that there were no allegations of individual misconduct.

Under Mississippi law, Tellus cannot hold Sallee and Crawford individually liable unless it pierces the corporate veil. *Nash Plumbing, Inc. v. Shasco Wholesale Supply, Inc.*, 875 So. 2d 1077 (Miss. 2004), illustrates that principle. In that case, the trial court held Milton Nash personally liable for egregious actions he conducted for the corporation. This Court reversed, noting that the plaintiff failed to plead or prove "sufficiently particularized allegations" to pierce the corporate veil. *Id.* at 1082. For those reasons, the Court reversed and rendered the judgment against Milton Nash, individually. *Id. See also Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 977 (Miss. 2007) ("Mississippi case law generally favors maintaining corporate entities and avoiding attempts to pierce the corporate veil.").

A case that follows this Court's opinion in *Nash* is *Tupelo Mfg. Co. v. Cope Indus., Inc.*, 2006 WL 924036 (N.D. Miss. 2006). Citing *Nash*, that Court notes that: "[a]ccording to basic

principles of corporate law, neither [individual defendant] can be personally liable absent a showing by the plaintiff that the corporate veil has been pierced." *Id.* at *3. The Court held that "the drastic nature of piercing the veil is to be reserved for the most egregious cases of fraud and wrongdoing by corporate officers and directors." *Id.* at *4. Finding no evidence of egregious fraud or wrongdoing, the Court held that it had no jurisdiction over the corporate officers. *Id.*

As Tellus candidly admitted, "Your Honor, we never have made a veil-piercing argument, never have suggested that that's part of the case." Tr. 5417. Tellus never pleaded alter ego or any other basis to pierce the corporate veil so as to hold Sallee and Crawford personally liable. R.1225-55, C.R.E. 12-42. Moreover, there was no proof presented at trial of any egregious fraud or wrongdoing by Sallee and Crawford that would justify holding them individually liable. As was pointed out in the motion for directed verdict, there was not a single lay or expert witness who testified at trial that either Sallee or Crawford did anything wrong. Tr. 5388-92.

Thus, should this Court choose to reverse and remand the judgment as to Texas Petroleum based on some error alleged by Tellus, the Court should not also remand the individual liability of Sallee and Crawford. Instead, as in *Nash Plumbing*, this Court should affirm the judgment of dismissal as to them.[25]

VIII. THE CIRCUIT COURT ERRED IN ENTERING A DECLARATORY JUDGMENT THAT TELLUS OWNED THE SHALLOW GAS.

Count I of Tellus's Second Amended Complaint asked for a declaratory judgment

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[25] Because there was no evidence that Sallee or Crawford acted other than in their corporate capacity, and because one must pierce the corporate veil in order to acquire jurisdiction over an individual corporate officer in Mississippi, Sallee and Crawford moved to dismiss this case for lack of personal jurisdiction, R. 3212-3334, C.R.E. 43-56, an argument that the Circuit Court erroneously rejected. R. 3731-32, C.R.E. 10-11. Tellus's failure to pierce the corporate veil means that the Court never properly acquired personal jurisdiction over either Sallee or Crawford. *Tupelo Mfg. Co., supra*, at *3; *North Am. Plastics, Inc. v. Inland Shoe Mfg. Co.*, 592 F. Supp. 875, 879 (N.D. Miss. 1984). Thus, this Court may also affirm the judgment for Sallee and Crawford on the alternative basis of lack of personal jurisdiction.

establishing four legal and factual issues: (1) that the 1949 JOA validly applied; (2) that the Bilbo A Lease was subject to the terms of the 1949 JOA; (3) that a co-tenancy relationship existed between Tellus and Texas Petroleum; and (4) that Texas Petroleum owed certain fiduciary duties arising out of the 1949 JOA. R. 1236-37, C.R.E. 23-24. The declaratory judgment prepared by Tellus's counsel and entered by the Court on February 25, 2009, R. 12795-802, C.R.E. 1-8, declares none of these things.

Instead, after extensive findings of fact and conclusions of law, the judgment declares that the plaintiffs represented by Tellus "own the Bilbo A lease insofar and only insofar as the lease covers all of the gas and gas rights in the 1949 JOA Gas Horizons, and Texas Petroleum does not own any interest in said gas and gas rights in the 1949 JOA Gas Horizons under the Bilbo A Lease." The Court erred in granting a declaratory judgment that Tellus never sought.[26]

"It is a well-established principle that the courts may only award that relief which is requested in the pleadings ...." *William Iselin & Co. v. Delta Auction & Real Est. Co.*, 433 So. 2d 911, 913 (Miss. 1983). While the traditional rule may have been relaxed somewhat by the adoption of the Rules of Civil Procedure, there is no reason to think that the authorization of declaratory judgments by M.R.C.P. 57 was intended to permit a plaintiff to evade the jurisdiction of the Chancery Court to confirm title and remove clouds under MISS. CODE ANN. §§ 11-17-29 and -31 (Rev. 2004). "[T]he court of chancery is now practically the exclusive forum for the settlement of dispute of land titles and of all the incidents connected with them." V. Griffith, *Mississippi Chancery Practice* §

[26] To the extent that the judgment may be read as implicitly declaring that Texas Petroleum's interest in the Bilbo A Lease is subject to the 1949 JOA, the Court erred as a matter of law. As Tellus admits in its brief, the Bilbo A-1 well was drilled in 1946. Brief of Appellants at 4. By its terms, the 1949 JOA applies to determine the rights and responsibilities regarding the production of gas from the wells to which it applies. Ex. 76, R.E. 289-310. The 1949 JOA defines "production" as "the 'Gas' produced and saved from the well drilled hereunder." Ex. 76, at ¶ 1(I), R.E. 290. Because the Bilbo A-1 well was drilled in 1946, it was not a "well drilled hereunder," and the 1949 JOA, by its plain language, does not apply.

210 (2d ed. 1950). No declaration of ownership could possibly issue without the Court's having satisfied itself that Tellus had joined the parties and presented the proof required by MISS. CODE. ANN. §§ 11-17-1 and -35 (Rev. 2004). Rule 57 does not authorize conclusive adjudication of ownership as a consolation prize to the loser of a jury trial.

It was in the context of the jury trial that Texas Petroleum agreed that the Court could instruct the jury on ownership of the shallow gas. For purposes of adjudicating Tellus's claim of tortious conversion, Texas Petroleum agreed that the Court, rather than the jury, could determine the effect of the conveyances in question. When the jury rejected all of Tellus's claims, it rendered moot the Court's erroneous determination of ownership. Certainly, Texas Petroleum never agreed that the Court could take its erroneous jury instruction and transform it into a declaratory judgment that Tellus had never requested.

In any event, the decision to grant any declaratory judgment is always discretionary. The official comment to Rule 57 declares, "The granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest." It is one thing to say that a Circuit Court may have jurisdiction to enter a declaratory judgment on an issue, ordinarily within the jurisdiction of the Chancery Court, consistent with and essential to a verdict properly rendered by a jury. It is something else altogether to grant a declaratory judgment to a litigant that has lost a general verdict. Here, the jury emphatically rejected Tellus's contention that Texas Petroleum had stolen gas; there was no need whatsoever for the Court to declare the ownership of gas that was not stolen.

If Tellus still believes, notwithstanding its failure before the jury, that it needs an adjudication of ownership, it may employ the proper procedures in Chancery Court. The Circuit Court manifestly erred in using a declaratory judgment as a substitute for those procedures. This Court should reverse the Circuit Court and deny declaratory relief to Tellus.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of dismissal in favor of all Defendants. In the alternative only, this Court should affirm the dismissal in favor of Bruce Sallee and William Crawford because the record contains no evidence sufficient to establish either their personal liability or personal jurisdiction over them. In addition, this Court should reverse the declaratory judgment entered in favor of Tellus and dismiss its claim for declaratory relief.

Respectfully submitted,

WISE CARTER CHILD & CARAWAY, P.A.

Michael B. Wallace, MSB N[redacted]
John P. Sneed, MSB N[redacted]
Rebecca Hawkins, MSB N[redacted]
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: 601.968.5500

Counsel for Appellees and Cross-Appellant

Of Counsel:

THE HOLMAN LAW FIRM, P.C.
David W. Holman
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone: 713.400.4840

THE HUDGINS LAW FIRM, P.C.
Michael D. Hudgins
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone: 713.623.2550

AULTMAN TYNER & RUFFIN, LTD.
Thomas W. Tyner, MSB No. [redacted]
Daphne M. Lancaster, MSB No. [redacted]
P.O. Drawer 750
Hattiesburg, Mississippi 39403
Telephone: 601.583.2671

CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this date caused to be mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Hon. Prentiss G. Harrell
Post Office Box 488
Purvis, MS 39475

Trial Court Judge

W. Wayne Drinkwater
Michael J. Bentley
BRADLEY ARANT BOULT CUMMINGS LLP
One Jackson Place, Suite 400
188 East Capitol Street
Jackson, MS 39201-1789

Paul N. Davis
BUTLER SNOW
Post Office Box 6010
Ridgeland, MS 39158-6010

Attorneys for Appellants/Cross-Appellees

This the 24th day of January, 2011.

Michael B. Wallace
MICHAEL B. WALLACE