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. — 2009-TS-01040

TEXAS PETROLEUM INVESTMENT CO., ET AL. — APPELLEES

Consolidated with: 2009-TS-01174

TEXAS PETROLEUM INVESTMENT CO.

V.

TELLUS OPERATING GROUP, LLC

APPEAL FROM THE CIRCUIT COURT OF
LAMAR COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS/CROSS APPELLEES 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.

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Tellus Operating Group, LLC respectfully requests oral argument and believes that the Court would benefit from argument on the issues raised in this appeal.

First, the trial court's erroneous burden of proof instruction presents a significant, and dispositive, question of law. The trial court refused to instruct the jury that *Texas Petroleum bore the burden* to prove its share of the commingled gas or forfeit the whole, improperly placing the burden – and the risk of loss – on Tellus. Tellus argues that this was fatal error that prevented a plaintiff's verdict and requires reversal. Texas Petroleum says the erroneous burden of proof instruction could have been harmless. The Court may have questions concerning the prejudice caused by the trial court's failure to correctly instruct the jury on the legal consequences of Texas Petroleum's commingling of Tellus's natural gas.

Second, while the trial court's evidentiary errors are plain, Texas Petroleum suggests that those errors were harmless. Tellus disagrees and has explained how the errors irreparably harmed its case. The Court may have questions concerning the prejudicial impact of the erroneous admission of Texas Petroleum's surprise expert testimony by an unlicensed engineer and the improper exclusion of material evidence that Texas Petroleum's key witness was biased.

Third, the parties disagree over the availability of lost profits in a case where one party has converted another's natural gas. Tellus argues that lost profit damages should be available in a conversion case such as this, where a party demonstrates that it planned to produce and sell the converted gas at a future date. Texas Petroleum asks this Court to limit damages to the time of conversion, even though Tellus would not have produced the gas at that time. The Court may have questions about the application of lost profits damages under the unique circumstances of this oil and gas case.

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INTRODUCTION

The parties agree on two critical points. *First*, the general verdict is inscrutable. Neither this Court, nor the parties, can say why the jury returned a verdict for Texas Petroleum. *Second*, although the evidence was disputed at trial, there was sufficient evidence to support either a plaintiffs' or a defense verdict. Tellus's brief chronicles the evidence that Texas Petroleum converted or negligently produced and commingled over $16,000,000 worth of Tellus's shallow gas. Blue Br. 4-17. Texas Petroleum does not dispute this evidence; it simply counters with evidence that could support a defense verdict. Red Br. 11-21. In such a closely-contested case, any one of the trial court's errors could have unfairly tipped the scales against Tellus.

The first error alone requires reversal. The trial court's failure to shift the burden of proof to Texas Petroleum after commingling had been shown was an extremely prejudicial misapplication of commingling law. The trial court's critical evidentiary errors independently warrant reversal. In particular, the admission of Rick Garza's surprise *expert theory* that the "fish" did not plug the wellbore unfairly toppled the overwhelming *lay testimony* that the fish prevented deep zone oil or gas production. And the withholding of evidence that Texas Petroleum's key fact witness, Brad Lowe, was strongly biased against Tellus and in favor of Texas Petroleum prevented the jury from fairly assessing the favorable testimony that he gave Texas Petroleum. Each of these errors prejudiced Tellus; any one of them could have unfairly changed the outcome in this case. They may not be discounted as harmless.

REPLY ARGUMENT

I. The erroneous commingling instruction renders the jury's verdict invalid.

Texas Petroleum first invokes the rule that a general verdict may be sustained on any ground supported by the evidence. It then suggests several grounds on which the jury could have based a defense verdict: some experts testified that there was no gas in the shallow zones, Texas

Petroleum's employees testified that they did not "steal" gas, and the jury could have accepted Texas Petroleum's statute of limitations defense. Red Br. 11-21.[1] But the rule cited by Texas Petroleum applies only to cases in which multiple theories of liability were submitted to the jury *and* the jury was properly instructed on each theory. *See Miss. Cent. R. Co. v. Aultman*, 160 So. 737, 739 (Miss. 1935); *Levy v. McMullen*, 152 So. 899, 899 (Miss. 1934). In those cases, where there is *no error* in the jury instructions, a lack of proof for one theory will not prevent affirmance under another theory when the jury returns a general verdict. *See id.*

A much different rule applies here. Tellus challenges an erroneous burden of proof instruction that prevented the jury from correctly applying the law to the evidence of commingling under *all theories* submitted to the jury – conversion and negligence. The trial court commits reversible error when its instructions misstate the law in a manner that prevents the jury from returning a verdict in the plaintiff's favor. *Savory v. First Union Nat'l Bank of Del.*, 954 So. 2d 930, 935 (Miss. 2007); *Day v. Morrison*, 657 So. 2d 808, 815 (Miss. 1995); *Tharp v. Bunge Corp.*, 641 So. 2d 20, 27 (Miss. 1994); *Koger v. Adcock*, 25 So. 3d 1105, 1110-11 (Miss. Ct. App. 2010). This rule applies even where multiple theories of liability are submitted to the jury. When a general verdict could rest on any of several theories, one of which is invalid, the verdict must be reversed because this Court cannot know whether the jury based its decision on a valid theory or an invalid one. *See First Nat'l Bank of Jackson v. Olive*, 330 So. 2d 568, 573 (Miss. 1976) (trial court's erroneous punitive damages instruction required reversal because "there is no way for this Court to know what part of the jury verdict is for punitive

[1] Texas Petroleum also suggests that Tellus was required to exhaust administrative remedies before pursuing its tort claims. After extensive briefing, the trial court denied Texas Petroleum's exhaustion argument. R. 11726-27. The Mississippi Oil and Gas Board does not have jurisdiction over common law tort claims, such as "negligence, nuisance, trespass, breach of contract, strict liability, and outrageous conduct claims." *Howard v. TotalFina E & P USA, Inc.*, 899 So. 2d 882, 888 (Miss. 2005). Moreover, Tellus is not required to exhaust administrative remedies in this case because no adequate administrative remedy exists for tort claims seeking monetary damages. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 176 (Miss. 1999).

damages"); *Gay v. Lemle*, 32 Miss. 309 (Miss. 1856); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30 (1962). This principal governs here. If the commingling instruction was erroneous – as it was –, this Court must reverse because it cannot know whether the jury verdict was based on a valid theory or the invalid commingling instruction.

II. The commingling instruction misstated the burden of proof and prevented the jury from returning a verdict on liability for Tellus.

At trial, Texas Petroleum opposed any application of the commingling doctrine and the burden-shifting instruction. Tr. 5472. On appeal, Texas Petroleum does not defend the commingling instruction that was given as a correct statement of the law. Rather, it argues that the erroneous burden of proof instruction was harmless or, alternatively, that the trial court was not required to properly instruct the jury because Tellus proposed a commingling instruction that was itself legally incorrect. Neither argument has merit.

A. The commingling doctrine imposes *liability* on the wrongful actor.

Texas Petroleum incorrectly argues that commingling is a "damages" doctrine and, therefore, the erroneous burden of proof instruction was harmless because the jury returned a defense verdict. Texas Petroleum's premise is wrong: the commingling doctrine imposes *liability* on a wrongdoer. *Humble Oil and Ref. Co. v. West*, 508 S.W.2d 812, 818 (Tex. 1974). It provides for the forfeiture of property, not merely for the apportionment of damages. *Id.*; *Hall v. Shaffer*, 289 P. 442, 443-44 (Kan. 1930). "[T]he doctrine provides that one who wrongfully intermixes his goods with the goods of another so that the goods are indistinguishable *forfeits the entire mixture* to the wronged party." *Basin Elec. Power Coop. v. ANR Western Coal Dev. Co.*, 105 F.3d 417, 422-23 (8th Cir. 1997) (emphasis added).

In a jury trial, the doctrine can be given effect only through an instruction that requires the commingling party to bear the burden of separating the commingled goods or requires that

party to forfeit all of the commingled goods. *See Humble Oil*, 508 S.W.2d at 818. As the Texas Supreme Court has explained:

> [T]he burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division according to the pre-existing rights of the parties, *the loss must fall on the one who occasioned the mixture.*

Id. (emphasis added);[2] *see Troop v. St. Louis Union Trust Co.*, 166 N.E.2d 116, 123 (Ill. Ct. App. 1960) ("[W]hen the commingling is proved, the burden of going forward with evidence to show the correct proportions is on the party who commingled. In the absence of such proof he bears the whole loss."). The doctrine's purpose is to prevent the wrongdoer from escaping *liability* because the nature of his wrongful conduct prevents the victim from proving the amount of property that he has lost. Where an erroneous instruction frustrates that purpose, the result is not a mere reduction in damages; the result is a verdict for the wrongfully commingling party.

Therefore, Texas Petroleum's assertion that the trial court's failure to give a proper, burden-shifting commingling instruction was harmless is incorrect. And Texas Petroleum's suggestion that the jury never reached the erroneous commingling instruction – the point at which the burden should have shifted – is pure speculation. As explained below, there are two paths the jury could have taken to reach a defense verdict – one valid and one invalid.

Before considering the two paths, it is important to recognize that the jury could not return molecules of converted gas to Tellus; it could only award Tellus the monetary value of that gas. For this reason, the jury was instructed that "damages" was an essential element of both Tellus's negligence and conversion claims. *See* R.E. 64-71 (Instruction Nos. 4-6). Another instruction explained "that 'damages' is the term which expresses in dollars and cents the injury

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[2] The Texas Supreme Court's application of the commingling doctrine, including its burden-shifting consequence, is persuasive because this Court "has usually patterned its oil and gas rulings on sound Texas precedent." *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260, 263 (Miss. 1999). Further, Texas Petroleum should be familiar with the oil and gas law of its home state.

sustained by the plaintiff" and that the Tellus plaintiffs were "required to prove their damages as a matter of just and reasonable inference, although the result be only approximate." R.E. 76-77 (Instruction No. 9).[3] Thus, Tellus was required to prove its damages in "dollars and cents" in order to prevail on its claims. Under the law of commingling, Tellus should have been permitted to satisfy this burden by proving the combined value of all of the commingled gas; Texas Petroleum would then bear the burden to prove its share of the gas or forfeit all of the commingled gas. But the trial court refused to give the commingling doctrine's required burden-shifting instruction. Without that critical instruction, Tellus could only prove its damages by first proving its share of the commingled gas – the very burden that the commingling doctrine is designed to remove. If Tellus could not satisfy this burden, the jury instructions necessarily yielded a verdict of *no liability* for Texas Petroleum.

As noted above, there are two paths that could yield a defense verdict under these erroneous instructions – one valid and one invalid. First, as Texas Petroleum posits, the jury *might* have found that there was no gas in the shallow sands and, therefore, not reached the point at which the commingling doctrine applies to shift the burden of proof. In that case, the verdict would be valid and the erroneous instruction would be harmless. However, the jurors could well have found that Texas Petroleum produced and commingled Tellus's shallow gas, but could not agree on how much of the commingled gas belonged to Tellus. Under the law of commingling, these two jury findings (production and commingling) should have been sufficient to *impose liability* on Texas Petroleum; if jurors could not agree on Tellus's share of the commingled gas, all of the gas should have been forfeited to Tellus. But under the erroneous instructions, the

[3] As Texas Petroleum notes, Instruction No. 9 informed jurors that Tellus was "not precluded from recovering damages for the commingled gas merely because it was not possible to prove the amount of their loss with certainty." R.E. 76-77. This instruction simply restated the general law of damages, which permits proof to a *reasonable* degree of certainty. The instruction does not undo the prejudicial effect of failing to shift the burden under the commingling doctrine; it reinforces it. *See* Blue Br. 25.

jurors' inability to agree on Tellus's share of the commingled gas had the opposite – and legally incorrect – effect of *mandating* a verdict for Texas Petroleum. In this case, the erroneous commingling instruction would be prejudicial and the jury verdict would be invalid. Because the Court cannot know which path the jury took, it must reverse.

The commingling doctrine recognizes that it is often impossible for the victim of commingling to prove its share of the commingled goods and, appropriately, shifts that burden to the wrongdoer. In this case, the trial court's refusal to shift the burden made it impossible for Tellus to prevail unless it proved its share of the commingled gas. This prejudicial error requires reversal of the general verdict.

B. Tellus's proposed commingling instruction correctly stated the law.

Alternatively, Texas Petroleum argues that the failure to give a proper commingling instruction is not error because Tellus proposed an "all-or-nothing" commingling instruction that would have given Tellus a windfall judgment. Texas Petroleum did not object to the specific language of Tellus's commingling instruction at trial. Instead, it argued flatly that "commingling is a theory that is not accepted in Mississippi law." Tr. 5472. This position is so untenable, *see* Blue Br. 22-24, that Texas Petroleum has abandoned it on appeal. Texas Petroleum may not escape the legal error that it induced by complaining, for the first time on appeal, about the specific language of Tellus's jury instruction. *Cf. Young v. Robinson*, 538 So. 2d 781, 783 (Miss. 1989) ("[O]n appeal a party may not argue that an instruction was erroneous for a reason other than the reason assigned on objection to the instruction at trial.").

More importantly, Tellus's proposed commingling instruction, set forth below, is a correct statement of the law:

> The Court instructs you that if you find from a preponderance of evidence that one or more of the Defendants commingled gas produced from the 1949 JOA Gas Horizons through the Bilbo A-1 wellbore without making a reasonably accurate

> record at the time of the amount of 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 evidence the amount of the commingled gas which belonged to such Defendant.

R. 12667. The instruction correctly provides that the jury must first find that Texas Petroleum produced and commingled Tellus's shallow gas. *Id.* Upon such a finding, the jury is instructed to award the full value of the commingled gas to Tellus *unless* Texas Petroleum proves its rightful share. *Id.* This is exactly how the doctrine should be applied – *after* a finding of commingling, the burden of proof shifts to the commingling party. *See* Blue Br. 22-24; *Humble Oil*, 508 S.W.2d at 818; *Troop*, 166 N.E.2d at 122-23.

Further, Tellus did not propose an "all-or-nothing" instruction even though such an instruction would be permissible under the law. Courts have applied the commingling doctrine to forfeit the entire commingled mass of goods to the victim under similar circumstances. *See Troop*, 166 N.E.2d at 122-23 (defendant that wrongfully commingled oil from several wells was required to pay plaintiff his lawful share of the commingled mass produced by all wells, as opposed to only his lawful share of the production attributable to plaintiff's well); *Mooers v. Richardson Petroleum Co.*, 204 S.W.2d 606, 607-08 (Tex. 1947) (same); *Stone v. Marshall Oil Co.*, 57 A. 183, 186-88 (Pa. 1904) (same); *Shaffer*, 289 P. at 442-44 (defendant that failed to separately account for wells commingled at a single meter forfeited all of the gas produced through the meter). The forfeiture doctrine reinforces sound business practices. Well operators like Texas Petroleum can take simple measures to account for gas produced in their fields, by installing meters or employing accurate metering methods. When an operator fails to take these simple steps, it bears the risk that commingling may occur and, under established law, that it will forfeit the gas that it knowingly or carelessly commingled.

Far from seeking a windfall, Tellus's instruction made forfeiture a last resort. The instruction's burden-shifting language permits Texas Petroleum to mitigate its liability by proving its share of the commingled gas. Surprisingly, Texas Petroleum complains that Tellus's instruction "did not make allowance for problems of proof" in a commingling case. Red Br. 26. Of course, Texas Petroleum is the party that refused to repair known casing leaks in the A-1 Well, failed to separately meter the gas from the A-1 Well, and permitted gas to be diverted from the well into its unmetered fuel gas system. *See* Blue Br. 4-17, 21. If there are proof problems in this case, Texas Petroleum created them. And the commingling doctrine is intended to resolve "all doubts" as to proof of ownership against Texas Petroleum, the party responsible for the commingling. *Belmont v. Umpqua Sand & Gravel, Inc.*, 542 P.2d 884, 891 (Or. 1975).[4]

Finally, Texas Petroleum suggests that the commingling doctrine applies only in cases of fraud, not "ordinary negligence, such as Tellus asserts here." Red Br. 27. This argument is flawed for two reasons. First, the doctrine shifts the risk of loss (and the burden of proof) to the party "most culpable for the commingling," as between the two parties before the court. *See In re Twin B. Auto Parts, Inc.*, 271 B.R. 71, 87 (Bankr. E.D. Va. 2001); *Humble Oil*, 508 S.W.2d at 818 (party "responsible for" and "possessed with peculiar knowledge of" the commingling bears the burden of proof). The doctrine is not limited to fraud cases; it applies in any case where one party has *wrongfully* commingled fungible goods, whether intentionally, recklessly, or negligently. *See Humble Oil*, 508 S.W.2d at 817-81 (applying doctrine where commingling party acted "intentionally," but not fraudulently); *Belmont*, 552 P.2d at 891 (applying the doctrine where commingling party acted in "reckless disregard" of another party's possessory

[4] Even if this Court assumes *arguendo* that the forfeiture aspect of Tellus's instruction was incorrect, the trial court's failure to correctly instruct the jury on the commingling doctrine's essential burden-shifting aspect is still reversible error. The trial court is ultimately responsible for properly instructing the jury and, if a legal doctrine applies but the proposed instruction is inadequate in form, the court must correct the instruction or direct counsel to do so. *Byrd v. McGill*, 478 So. 2d 302, 305 (Miss. 1985). The court may not ignore applicable law simply because a party has proposed a deficient instruction. *See id.*

rights); *Vest v. Bond Bros.*, 137 So. 392, 393 (Ala. 1931) (doctrine applies where "owner of goods, intentionally or negligently so mingles them with another that they become inseparable"); *see also Troop*, 166 N.E.2d at 146 (sustaining application of commingling doctrine upon general finding that oil was "tortiously commingled").[5]

Second, Texas Petroleum ignores the fact that Tellus's conversion claim was submitted to the jury. Conversion requires intentional conduct and there was ample evidence to support a finding of intent in this case. The commingling doctrine indisputably applies in conversion cases. *Dorchester Gas Producing Co. v. Harlow*, 743 S.W.2d 243, 256 (Tex. App. 1987).

III. Tellus neither waived its objections to the legally improper interrogatories, nor invited their use.

Having embraced the use of annualized damage interrogatories at trial, Tr. 4309, Texas Petroleum refuses to defend them on appeal. Texas Petroleum does not dispute that the trial court's interrogatories violated Rule 49 and were misleading. Instead, it argues that Tellus waived its objections to the interrogatories or invited their use. Red Br. 28-32. These avoidance arguments lack merit.

A. Tellus preserved its objections by submitting its preferred general verdict form and making its opposition to the use of interrogatories clear on the record.

Texas Petroleum argues that Tellus waived its right to challenge the trial court's special interrogatories by failing to make a formal objection at the final charge conference. The waiver doctrine applies if a contemporaneous objection was necessary to alert the trial judge to an erroneous instruction and permit him to correct the error by submitting a proper instruction to the

[5] Texas Petroleum incorrectly states that Tellus places "principal reliance" for its commingling instruction on *Lackey v. Lackey*, 691 So. 2d 990 (Miss. 1997). Tellus relies principally on the unanimity of caselaw and commentary from across the country that supports the application of the commingling doctrine to this oil and gas case. Blue Br. 22-26. The Mississippi cases cited by Tellus demonstrate that this Court has applied the commingling doctrine in a variety of circumstances. *Lackey*, 691 So. 2d at 993 (commingled trust account); *Miller v. Bank of Indianola*, 107 So. 548, 549-50 (Miss. 1926) (commingled tax collections); *Peterson v. Polk*, 6 So. 615, 615 (Miss. 1889) (commingled wood staves). They rebut Texas Petroleum's now-abandoned argument that the commingling doctrine does not apply in Mississippi.

jury. *Trustmark Nat'l Bank v. Jeff Anderson Reg'l Med. Ctr.*, 792 So. 2d 267, 278 (Miss. Ct. App. 2000). This error was not waived for two reasons: (1) Tellus preserved its objections by submitting its preferred general verdict form with no interrogatories and (2) an additional, formal objection was not necessary to alert the trial judge to Tellus's opposition to the interrogatories.

First, a party may preserve objections to special interrogatories by making an objection on the record *or* proposing its preferred instruction on the matter; both steps are not required. *Jones v. Westinghouse Elec. Corp.*, 694 So. 2d 1249, 1252 (Miss. 1997). Tellus twice submitted its preferred general verdict form with no interrogatories. Prior to trial, Tellus submitted only a general verdict form. R. 12217-18. Even after the trial court *sua sponte* requested that the jury verdict form include annualized damage interrogatories, Tellus again submitted a general verdict form with no interrogatories. R. 12492-93 (Instruction No. P25-A). The trial court refused Tellus's general verdict form. R. 12671-72. Under *Jones*, this was sufficient to preserve Tellus's objections to the special interrogatories. 694 So. 2d at 1252.

Second, there is no confusion in the record regarding Tellus's opposition to the special interrogatories. When the trial court proposed the use of annualized damage interrogatories, Tellus objected that the interrogatories would be "very confusing" and urged the trial court to submit a general verdict form. Tr. 4306-09. Texas Petroleum does not argue otherwise. Instead, it chides Tellus for failing to restate its clear opposition in a final, "formal" objection to the interrogatories *after* the trial court had made up its mind to use them. At that point, no further objections were required to call the trial court's attention to its own error. After the informal charge conference, the trial court was aware of the parties' positions on the jury instructions and the parties were aware of the trial court's position; further objections were futile. Tr. 5451.[6]

[6] The trial judge made clear that further objections would be futile after the informal charge conference, at which the parties would "pare these [proposed instructions] down" and the trial court would "say what [it]

B. Tellus did not invite error by obliging the trial court's request for a verdict form that included special interrogatories.

Texas Petroleum next claims that Tellus invited error by submitting the trial court's preferred verdict form, which included annualized damage interrogatories. R.12489-91 (No. P25-B). Under the invited error doctrine, a party may not challenge "an instruction *given at his request.*" *Warwick v. Matheney*, 603 So. 2d 330, 339 (Miss. 1992) (emphasis added). But "where a party requests a correct instruction only to have it refused by the trial judge, that party does not, by requesting another instruction bowing to the trial judge's ruling, waive the right to assign as error on appeal the refusal of the correct instruction." *Stong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 711 (Miss. 1984). This Court will not "imply a waiver from the subsequent conduct which does nothing more than show the lawyer's obligatory respect for the trial judge while at the same time continuing as best can be done the advancement of his client's cause." *Id.*

Tellus submitted the trial court's preferred instruction (No. P25-B) under protest and only after the trial court made clear that it would refuse a general verdict form. Tr. 4306-07. After the trial court made clear its preference for annualized damage interrogatories, Tellus's counsel was put to a choice: obstinately ignore the trial court's requested verdict form or respect the trial court's directive. Tellus's counsel did the most sensible thing under the circumstances – he again submitted Tellus's preferred general verdict form *with no interrogatories* (No. P25-A) and also submitted the trial court's preferred verdict form with interrogatories (No. P25-B). *See Stong*, 456 So. 2d at 711. After repeatedly advocating for a general verdict form, proposing a general verdict form, and opposing the annualized damage interrogatories, Tellus submitted Instruction P25-B out of "obligatory respect" for the trial court's demands; it never *requested*

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will and will not accept informally." Tr. 5451. After that, the parties would be allowed to object to each instruction as a formality, as the trial judge explained, "knowing in advance it's probably going to be refused." Tr. 5451. The trial court refused every objection at the charge conference. Tr. 5452-78.

that the trial court's instruction be given. The error was the trial court's own, it was prejudicial, and Tellus did nothing to invite it.

In any event, this Court is not helpless to correct the trial court's plainly erroneous and prejudicial violation of Rule 49. The trial court kept all evidence of interest damages from the jury because, in its opinion, such matters were purely legal and for the court to decide. Then, after the proof was closed, it did an about face and submitted to the jury complex and irrelevant annualized damage interrogatories for the sole purpose of aiding the trial court in its *post-verdict* interest calculations. This violated Rule 49's plain language and likely confused and misled the jury. Blue Br. 29-31. Although a trial court is not itself required to propose jury instructions, it has a responsibility to propose correct instructions when it does so. *See Byrd v. McGill*, 478 So. 2d 302, 305 (Miss. 1985). The trial court's failure to fulfill that responsibility is plain and reversible error. *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 872-73 (Miss. 1994).

IV. Mississippi Rule of Evidence 702 does not authorize an unlicensed engineer to offer expert testimony in direct violation of Mississippi criminal law.

By its plain terms, the Mississippi Engineering Practices Act (the "Act" or "MEPA") prohibits any person from practicing engineering – which includes giving "expert technical testimony" – unless he is licensed by the State of Mississippi. Miss. Code §§ 73-13-1, 73-13-3. The Act was adopted pursuant to the legislature's power "to safeguard life, health, and property, and to promote the public welfare . . . ." § 73-13-1. Violating it is a crime. § 73-13-39.

Texas Petroleum does not dispute that this substantive criminal statute applies to its witnesses.[7] It argues that the statute has no application in a courtroom because it is overridden by Rule 702 of the Mississippi Rules of Evidence, which governs expert testimony. Thus, Texas

[7] Texas Petroleum suggests that its two engineering experts, Garza and Meehan, became licensed at some point after the trial. If so, this fact is not disclosed in the record. Texas Petroleum's citation for this point (R. 13144) leads to an unsupported assertion in its own post-trial brief that these engineers received a temporary license after trial.

Petroleum challenges the Act as an unconstitutional encroachment on the judiciary's authority to promulgate procedural rules. *See Claypool v. Mladineo*, 724 So. 2d 373, 377-81 (Miss. 1998). Texas Petroleum bears a heavy burden in seeking to have this Court declare a criminal statute unconstitutional. "The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect." *Id.* at 381 (quoting *Marshall v. State*, 662 So. 2d 566, 572 (Miss. 1995)). This constitutional challenge should be rejected for two reasons.[8]

First, MEPA is a unique legislative act. It explicitly defines the "practice of engineering" to include "expert technical testimony." Miss. Code § 73-13-3. Tellus is aware of no other legislative enactment that criminalizes unlicensed expert testimony. Texas Petroleum's cases hold only that an expert's lack of a license does not by itself render his testimony unreliable under Rule 702. Red Br. 33.[9] None of those cases support a direct violation of Mississippi's substantive criminal law. This Court's seminal case on the issue, *Watts v. Lawrence*, 703 So. 2d 236 (Miss. 1997), held that a retired real estate appraiser was qualified to testify under Rule 702 despite not having a license. *Id.* at 238-39. The applicable Real Estate Appraiser Licensing and Certification Act did not define "real estate appraisal activity" to include the giving of expert testimony and, therefore, did not directly prohibit the appraiser's conduct as a matter of

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[8] Texas Petroleum's constitutional challenge is also procedurally barred because Texas Petroleum failed to challenge MEPA's constitutionality in the trial court and failed to notify the Attorney General of its constitutional challenge. *See Pickens v. Donaldson*, 748 So. 2d 684, 691-92 (Miss. 1999).

[9] *Investor Res. Servs. v. Cato*, 15 So. 3d 412, 417-19 (Miss. 2009) (CPA's lack of a license did not render her testimony unreliable under Rule 702; no statute prohibited her testimony); *Kilhullen v. K.C. S. Ry.*, 8 So. 3d 168, 172-74 (Miss. 2009) (engineer was qualified as expert despite not being certified as accident reconstruction; no statute prohibited his testimony); *Univ. Med. Ctr. v. Martin*, 994 So. 2d 740, 746-47 (Miss. 2008) (doctor permitted to testify regarding standard of care for emergency medicine despite fact that he did not practice in the field; no statute prohibited his testimony); *Blake v. Clein*, 903 So. 2d 710, 727-28 (Miss. 2005) (statute governing expert testimony in medical malpractice cases *included* certain physicians, but excluded none, and, therefore, did not conflict with rules of evidence); *Watts v. Lawrence*, 703 So. 2d 236, 238-39 (Miss. 1997) (real estate appraiser qualified as expert despite lack of license; no statute prohibited his testimony); *King v. Murphy*, 424 So. 2d 547, 550 (Miss. 1982) (foreign doctor may give expert testimony if he satisfies the "similar locality rule;" no statute prohibited doctor's testimony).

substantive law. *See id.*; Miss. Code §§ 73-34-3, 73-34-5. Similarly, this Court recently held that an accountant satisfied Rule 702's standards for expert testimony despite having allowed her license to lapse. *Investor Res. Servs. v. Cato*, 15 So. 3d 412, 417-19 (Miss. 2009). But the applicable statutes did not define the "practice of public accounting" to include expert testimony. Miss. Code § 73-33-2. The legislative enactments in those cases are not analogous to MEPA.

Second, this Court harmonizes legislative enactments with evidentiary rules where possible, particularly when the legislature acts pursuant to its police powers. *See Claypool*, 724 So. 2d at 378. In *Claypool*, this Court confronted a statute that declared an entire category of testimony and evidence (related to medical peer review proceedings) inadmissible in court. *Id.* at 377-78 (citing Miss. Code §§ 41-63-9, 41-63-23). Despite its direct impact on evidentiary rules, the Court held the law constitutional for two reasons: (1) the legislature "specifically labeled these statutes as substantive rather than procedural," demonstrating its intent not to abrogate court rules, and (2) the law's purpose was predominately substantive because it promoted quality health care by encouraging self-policing in the medical profession. *Id.* at 381.

The same is true of MEPA, a substantive law that was enacted pursuant to the legislature's police power to "safeguard life, health and property, and to promote the public welfare." Miss. Code § 73-13-1. The legislature has determined that permitting an unlicensed engineer to offer technical engineering testimony in a court is equally as harmful to the public as permitting that unlicensed engineer to consult on a project in the community. § 73-13-3.[10] In prohibiting both types of unlicensed engineering work, the legislature acts pursuant to its police

[10] Texas Petroleum cavalierly suggests that "[t]here is nothing about giving expert testimony in a civil trial that necessarily involves 'life, health and property.'" Red Br. 34 n.17. This Court has recognized that allowing testimony or evidence in a civil trial can be detrimental to the public welfare. *Claypool*, 724 So. 2d at 377-81. Here, Texas Petroleum's unlicensed expert testimony directly impacted Tellus's property by providing the jury with opinion evidence that Tellus had no property at all (*i.e.*, there was no gas in the shallow zones). The introduction of unlicensed expert testimony may negatively impact the public because, over time, unlicensed foreign engineers will set standards of civil liability for domestic ones. In any event, this fact-finding determination is entrusted to the legislature and entitled to deference.

power to protect the life and property of Mississippi citizens. *Claypool*, 724 So. 2d at 377-81. This Court should reject Texas Petroleum's constitutional challenge and reverse the trial court's refusal to apply MEPA to unlicensed engineering testimony.

V. Texas Petroleum did not disclose Rick Garza's opinion that the fish was not a plug and Tellus preserved its objections to the erroneous admission of that opinion.

Tellus's case was irreparably prejudiced when Rick Garza testified that the "fish" in the A-1 Well was not a plug and, therefore, did not prevent deep zone gas production. Indeed, Texas Petroleum asserts that Garza's testimony "refuted" Tellus's evidence that the fish plugged the wellbore. Red Br. 35. Therefore, this Court need only decide if allowing Garza's testimony was error; if so, the judgment must be reversed. *Canadian Nat'l/Illinois Cent. R. Co. v. Hall*, 953 So. 2d 1084, 1097 (Miss. 2007). Texas Petroleum argues that allowing Garza's "fish" theory was not error for four reasons: (1) the theory was "fairly disclosed" in Garza's pretrial report; (2) disclosure of Garza's theory was not necessary because it was based on other witnesses' trial testimony; (3) Garza's expert testimony was cumulative of lay witness testimony; and (4) Tellus's continuing objection to Garza's testimony was not specific enough to preserve error. Red Br. 35-39. These arguments are addressed in turn.

A. Garza's detailed pretrial report did not disclose his "fish" opinion.

First, Texas Petroleum claims that it "fairly disclosed" Garza's fish theory by disclosing his ultimate opinion that the A-1 Well only produced gas from the LTOP deep zones. Red Br. 37. Rule 26 requires that a party disclose more than ultimate opinions: an expert's pretrial report must "state the substance of the facts and opinions to which the expert is expected to testify *and a summary of the grounds for each opinion.*" Miss. R. Civ. P. 26(b)(4)(A)(i) (emphasis added). Determining whether Texas Petroleum complied with this rule requires a

"fact-intensive comparison between the subject matter contained in discovery responses and the subject matter of the testimony given by the expert at trial." *Hall*, 953 So. 2d at 1097.

In this case, Garza did provide both his ultimate opinion (that any gas came from the deep zones) and the grounds for his opinion. Garza's opinion, so far as his report discloses, was grounded in a *historical analysis* of Baxterville Field's gas reserves. As Garza explained in his pretrial report, he was hired to "conduct a petroleum engineering study of Baxterville field and to review various documents relating to [this lawsuit]." R. 6124-35. According to Garza, his work was akin to writing a "biography of what had gone on in that field from its onset in 1994 to the current date." Tr. 4812. To write this field biography, Garza assembled data, researched articles from oil and gas journals, read "old textbooks" on oil and gas production, and reviewed the discovery materials from this case. Tr. 4812-14. Garza's pretrial report focuses on the field generally, its subsurface geological zones, and the gas reservoirs beneath the Bilbo A Lease. The detailed, eleven-page report makes no mention of the fish in the A-1 Well. R. 6124-35. And it does not disclose any opinion as to whether, or how, the 200-foot fish in the wellbore would impact production from the deep zones. *See id.* The report is silent on the fish.

Naturally, Garza surprised Tellus when he opined at trial that the 200-foot fish did not plug the well because it was "very porous, very permeable." Tr. 4907. It was even more surprising when he told jurors that there would be no physical evidence of deep zone production because hot water would clean the black oil staining off of the fish "in the same manner that your steam cleaner cleans oil off a driveway." Tr. 4907. Garza's new trial theories were based on a *mechanical analysis* of the A-1 Well specifically; they bore no relation to his historical analysis of Baxterville Field or the various zones beneath the Bilbo A Lease. This classic "ambush" violated the rules and prejudiced Tellus. *See Coltharp v. Carnesale*, 733 So. 2d 780, 786 (Miss.

1999) (reversing medical malpractice defense verdict because expert offered new theory at trial, even though the new theory merely provided an alternative basis for expert's ultimate opinion).

B. Rule 703 does not authorize Garza to offer undisclosed theories at trial.

Alternatively, Texas Petroleum argues that Garza may offer a new theory at trial under Mississippi Rule of Evidence 703, which permits an expert to base his opinion on the testimony of "foundation witnesses" at trial. *See Northrup v. State*, 793 So. 2d 618, 622 (Miss. 2001); *Collins v. State*, 361 So. 2d 333, 334 (Miss. 1978). The cases relied on by Texas Petroleum hold only that an expert who intends to base his opinion on trial testimony may remain in the courtroom during the trial. *Id.* They do not permit an expert to offer entirely new, never-before-disclosed opinions based on trial testimony. Rule 26 requires pretrial disclosure of both an expert's opinions and the grounds for those opinions; Rule 703 permits an expert to base his *previously disclosed* opinions on testimony that is elicited at trial. Texas Petroleum may not use Rule 703 to sidestep Rule 26's pretrial disclosure requirements.

In any event, Garza did not base his "fish" opinion on trial testimony. As explained above, he based this new opinion on his supposed scientific knowledge regarding the porosity of the plug's components and a mechanical analysis of the A-1 Well. Garza's opinion did not rely on trial testimony, it directly contradicted that testimony. Moreover, Garza was well-aware that the presence of the fish in the wellbore would be a key issue at trial.[11] If Garza intended to express an opinion regarding the fish's plugging properties, Texas Petroleum was required to disclose that opinion before trial. *Carnesale*, 733 So. 2d at 786.

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[11] The significance of the fish's impact on deep zone production was disclosed to Garza before trial. As just two examples, Garza reviewed the deposition testimony of Texas Petroleum's in-house geologist, Jim Norris. In his deposition, Norris explained that the fish would prevent the production of oil or gas from the deep zones. *See* Blue Br. 8 & Ex. 225. Garza also reviewed the report of Tellus's expert, Richard Schroeder. Mr. Schroeder's report explains that the presence and condition of the fish "supports [his] earlier conclusion, that the DEEPER ZONES could not have contributed much, if any, of the production . . . ." R. 6798 (report begins at R. 6758).

C. Garza's expert testimony was not cumulative of lay testimony.

Texas Petroleum also argues that Garza's expert testimony was harmless because it was cumulative of lay witness testimony. This argument should be rejected for two reasons: (1) Garza's testimony regarding the porosity of the fish and "steam cleaning" effect of deep zone production was not "cumulative" of Richard Walters's statement that gas could pass through sand and (2) Garza's surprise expert testimony was prejudicial even if it overlapped to some extent with Walters's lay testimony. Testimony is not "cumulative" if it is different. *Knotts by Knotts v. Hassell*, 659 So. 2d 886, 891 (Miss. 1995). And an expert's testimony is not cumulative if his "credentials and approach to the issues" are different from the witness to which he is being compared. *Webb v. Bouton*, 85 S.W.3d 885, 889 (Ark. 2002).

First, Garza's testimony was not cumulative of Walters's testimony. On direct examination, Walters testified that he believed gas could "go through sand." Tr. 2161. But Walters contradicted himself on cross examination, admitting that the fish was "an effective type of plug" in the wellbore as early as 1998, Tr. 1959, and that the wellbore remained "plugged solid full of the scale and mud" in 2005, Tr. 2146. Unlike Walters, Garza testified *unequivocally* that the fish was "very porous, very permeable," permitting the production of deep zone gas. Tr. 4907. And while Walters testified that the fish should have been "stained black with oil" if the A-1 Well produced deep zone oil and gas, Tr. 2146, Garza told jurors that the fish would not be stained black because all of the oil would be "steam cleaned" out of the fish. Tr. 4907. Such dissimilar testimony is not cumulative.[12]

[12] Texas Petroleum suggests that Garza's testimony was also cumulative of Wade Gipson's lay testimony. But Texas Petroleum relies only on Gipson's responses to hypothetical questions posed by its counsel on cross-examination. Red Br. 39 (citing Tr. 3294, 3303-04). In both instances, Gipson obligingly agreed that "if the jury believes" certain facts, then the fish would not be a plug under those hypothetical circumstances. On direct examination, Gipson was adamant that *the fish was in fact a plug* – stating that it "will just effectively close your well off, nothing will pass through." Tr. 5320.

Second, an *expert's technical testimony* cannot be deemed harmless when it overlaps with a lay witness's observations. By its very nature, expert testimony is not "cumulative" of lay witness testimony: an expert's testimony is backed by credentials and based on scientific knowledge that lay witnesses do not possess. Miss. R. Evid. 702; *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 147 (Miss. 2008) ("juries usually place greater weight on the testimony of an expert witness than that of a lay witness"). In the lone case cited by Texas Petroleum, the court found that a doctor's erroneously-admitted expert testimony did not warrant reversal because it was cumulative of two other *expert* witnesses. *See Griffin v. McKenney*, 877 So. 2d 425, 441 (Miss. Ct. App. 2003). In that case, the erroneous expert testimony "presented no new information" and, therefore, the court recognized that it would not have altered the plaintiff's trial strategy even if it had been disclosed. *Id.* But in this case, if Texas Petroleum had properly disclosed Garza's opinion before trial, Tellus would have taken steps to prepare for and counter that opinion, including obtaining a rebuttal expert and preparing to effectively cross-examine Garza regarding his "fish" theory. *See* Blue Br. 41.

D. Tellus preserved this error by obtaining a specific, continuing objection to all matters beyond Garza's pretrial report.

Finally, Texas Petroleum argues that Tellus's continuing objection to any matter not disclosed in Garza's report was "too general" to preserve error. An objection is sufficient to preserve error if a specific ground for the objection is stated or the ground is apparent from the context of the objection. Miss. R. Evid. 103(a); *Murphy v. State*, 453 So. 2d 1290, 1293 (Miss. 1984). A party may preserve a challenge to the admissibility of expert testimony by obtaining a continuing objection from the trial court. *Miss. Transp. Comm'n v. Nat'l Bank of Commerce*, 708 So. 2d 1, 2 (Miss. 1997).

At the outset of Garza's new opinion testimony, Tellus specifically objected that the new opinions were not disclosed in Garza's pretrial report. Tr. 4892. After overruling multiple objections on this basis, and to avoid further interruption, the trial court granted Tellus a continuing objection to Garza's new testimony. Tr. 4893. Tellus confirmed its continuing objection a few minutes later, Tr. 4896, and, after Tellus objected again that Garza's testimony was "way beyond his report," the trial court convened a bench conference, Tr. 4902. During the conference, Tellus reiterated its objection to all opinions not disclosed in Garza's pretrial report; the trial court overruled Tellus's objection, but instructed the court reporter to "[p]ut a continuing objection by the plaintiff to anything that hadn't been in the expert report." Tr. 4905.

Immediately after this bench conference Texas Petroleum's counsel elicited Garza's new opinion regarding the fish. Tr. 4906-07. Tellus did not interrupt Garza again because, moments earlier, the trial court had dictated into the record Tellus's continuing objection to any matter not disclosed in the expert report for the sole purpose of preserving appellate error on that ground. Tellus now challenges Garza's "fish" opinion on the well-preserved ground that it was not disclosed in his report. This Court should reverse the erroneous admission of that opinion.

VI. The trial court abused its discretion by preventing Tellus from exposing Brad Lowe's significant bias for Texas Petroleum and against Tellus.

Texas Petroleum's response to the erroneous exclusion of Brad Lowe's bias is notable for what it does *not* argue. Texas Petroleum does not deny that Lowe gave favorable testimony regarding the A-1 Well's gas production or that Lowe's testimony factored prominently in its defense. And Texas Petroleum does not dispute that Lowe was a biased witness. Instead, Texas Petroleum argues that the bias evidence may be excluded for two reasons: (1) the evidence was inadmissible under Rule 609 of the Mississippi Rules of Evidence or, alternatively, (2) its exclusion was harmless because Tellus was permitted to ask Lowe if he favored his employer.

A. The trial court abused its discretion by refusing to apply Rule 616.

First, the trial court abused its discretion by applying the wrong rule – Rule 609 – to exclude evidence of Lowe's party-specific bias. Rule 609 governs a party's use of prior, unrelated criminal convictions to launch a *general* attack on a witness's credibility. Miss. R. Evid. 609(a)(1); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Rule 616 governs the introduction of evidence, in whatever form, tending to show that a witness harbors a *party-specific* bias. Miss. R. Evid. 616. Specific bias is always relevant and admissible, and may be proven by extrinsic evidence. *Id.*; *Cantrell v. State*, 507 So. 2d 325, 330 (Miss. 1987). When the two rules appear to be in "conflict" because the specific bias evidence also happens to be evidence of criminal conduct, a court must apply Rule 616 and permit the party to demonstrate the witness's bias. *Zoerner v. State*, 725 So. 2d 811, 813-14 (Miss. 1998); *see Davis*, 415 U.S. at 316-17.

Rule 616 applies here. Tellus attempted to present evidence that Lowe held a specific bias in favor of Texas Petroleum and against Tellus. The fact that Lowe's bias was evidenced by his guilty plea and non-adjudication of theft against Tellus does not remove this issue from Rule 616's purview. In *Zoerner*, the Court dealt with this very situation. The trial court excluded a witness's prior burglary convictions under Rule 609 even though the convictions revealed his motive for testifying. 725 So. 2d at 814. This Court reversed, finding that the prior convictions were admissible under Rule 616 because they "were highly probative of [the witness's] bias or motive to testify in favor of the state." *Id.*; *see Bevill v. State*, 556 So. 2d 699, 713-14 (Miss. 1990) (explaining that evidence which may be inadmissible under Rule 609 is admissible if it tends to show the witness's motive or reason for giving favorable testimony). The trial court made the same error here – it applied Rule 609 to prevent Tellus from developing evidence that was highly probative of Lowe's bias in favor Texas Petroleum and against Tellus. This evidence of party-specific bias was admissible under Rule 616. Because the trial court misapplied the

rules of evidence, it necessarily abused its discretion. *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1014 (Miss. 2006).

B. Tellus's case was prejudiced by the erroneous exclusion of bias evidence.

The trial court's exclusion of Lowe's bias prejudiced Tellus's case. Assessing a witness's credibility and deciding what weight to give his testimony are at the heart of the jury's function. If evidence of a witness's bias and motive is excluded, the jury cannot fairly perform this function. *See Davis*, 415 U.S. at 316-17. That is why bias evidence is "always material" and excluding it is reversible error. *McLemore v. State*, 669 So. 2d 19, 25 (Miss. 1996).

Texas Petroleum suggests that reversal is not necessary because Tellus was permitted to inquire into Lowe's "debt of gratitude" to his employer. But Texas Petroleum acknowledges that Tellus "got nothing much" from this line of questioning. Red Br. 41. In fact, Tellus got nothing at all: Lowe *denied* favoring his employer and *denied* that he owed any debt to Texas Petroleum. Blue Br. 45-46. Lowe was able to deny his bias with impunity because the trial court excluded all evidence (1) that Lowe had stolen property from both Tellus and Texas Petroleum and (2) that, while Tellus assisted in Lowe's prosecution and was awarded restitution payments, Texas Petroleum *refused to prosecute Lowe* and kept the confessed thief on the company payroll. *Id.* It is one thing to demonstrate that an employee favors his employer simply as a function of the employment relationship. It is quite another – and far more damning – to demonstrate that an employee favors his employer because the employer pardoned him for stealing $2,400 worth of company property and kept him on the payroll despite his admitted thefts. This evidence is particularly important because Texas Petroleum's benevolent response to Lowe's thefts occurred in the midst of this litigation, at a time when Texas Petroleum knew that Lowe's testimony was key to its defense. Ex. 227. But Tellus was not permitted to offer this critical evidence of bias.

As the Supreme Court has explained, limiting the cross-examination of a biased witness prevents a party from "mak[ing] a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Davis*, 415 U.S. at 318. Indeed, the erroneous exclusion of bias evidence may actually bolster the biased witness by creating the appearance that opposing counsel "was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness . . . ." *Id.* Lowe was hardly blameless, and his credibility was at the same time key to Texas Petroleum's case and highly suspect. The trial court prevented Tellus from giving the jury evidence of Lowe's thefts against the parties in this case and the parties' divergent responses. As a result, the jury was prevented from fairly performing its fact-finding role and Tellus's case was prejudiced.

VII. Tellus should be permitted to recover lost profits in this case.

Upon remand for a new trial, this Court should instruct the trial court to permit Tellus to present evidence of its lost profits, which exceed $16,000,000. Texas Petroleum argues that Tellus may not recover lost profits for two reasons: (1) conversion damages are "retrospective" only and (2) Tellus's proffered evidence does not provide a reasonably certain link between Texas Petroleum's conduct and Tellus's lost profits. Texas Petroleum's attempt to "lock in" Tellus's damages at the time most favorable for Texas Petroleum should be rejected.

First, Texas Petroleum argues that conversion damages are "retrospective" only, limited to the property's fair market value at the time it was converted. Red Br. 43 (citing *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So. 2d 187 (Miss. 2000)). This is incorrect. *Pride Oil* did not hold that conversion damages were limited to the property's value at the time of the taking *in every case*; the Court held that, in the *specific case* before it, there was no evidence tending to show that the plaintiff had "an opportunity or expectation" to use the converted property to derive a future profit. *Id.* at 192. *Pride Oil* reaffirmed this Court's adherence to the "majority

viewpoint" that a party whose property is converted may "recover damages *beyond the fair market value* of the converted property." *Id.* at 191 (emphasis added). This includes lost profits in cases where the injured party can prove that it would have used the converted property to derive future profits. *Id.* at 191-92; *Cmty. Bank, Ellisville, Miss. v. Courtney*, 884 So. 2d 767, 775 (Miss. 2004); *Georgia-Pacific Corp. v. Blakeney*, 353 So. 2d 769, 773 (Miss. 1978).

Second, Texas Petroleum argues that Tellus's claim for lost profits rests on a "stack" of hypotheticals that render causation speculative. This is not so. Tellus proffered clear evidence that Texas Petroleum's conversion of shallow gas (from 1995 to 2004) was the direct cause of Tellus's lost profits beginning in early 2006. Prior to January 2003, Tellus was not permitted to drill for shallow gas on the Bilbo A Lease. After it acquired drilling rights, it drilled the Bilbo 7-15 (adjacent to the A-1 Well) in order to produce and sell shallow gas. Tellus had both an "opportunity and expectation" to use the shallow gas reserves to derive future profits. However, upon drilling the Bilbo 7-15 Well, Tellus discovered that the shallow gas reserves had been depleted. *See* Blue Br. 48-49; R.E. 185-239. The only question is what caused the depletion. If a jury finds that Texas Petroleum depleted the shallow zones, there is nothing hypothetical about the fact that Texas Petroleum's conversion of the gas (from 1995 to 2004) caused Tellus's injury in 2006 and the years following – but for Texas Petroleum's unlawful depletion of the shallow zones, Tellus would have struck gas in the depleted zones when it drilled the Bilbo 7-15 Well.

Finally, the New York Mercantile Exchange futures index ("NYMEX") is not a speculative basis for calculating lost gas sales profits. Texas Petroleum never suggests that a gas producer's reliance on NYMEX would be unreasonable according to industry norms. Oil and gas producers like Tellus and, presumably, Texas Petroleum routinely rely on the NYMEX to hedge against price fluctuations when negotiating sales contracts. *See* Tr. 4071-87 (R.E. 194-210); *BP North Am. Petroleum v. SOLAR ST*, 250 F.3d 307, 311 (5th Cir. 2001).

VIII. This Court should reverse the judgment as to all defendants, including Bruce Sallee and William Crawford.

The individual defendants, Bruce Sallee and William Crawford, urge this Court to release them from liability even if it reverses the judgment as to Texas Petroleum. According to Sallee and Crawford, they may *only* be held liable for their personal participation in tortious conduct if Tellus pleads and proves an alter ego or veil piercing theory. This is not the law. "[T]he general rule is well established that when a corporate officer directly participates in or authorizes the commission of a tort, even on behalf of the corporation, he may be held personally liable." *Miss. Printing Co. v. Maris, West & Baker, Inc.*, 492 So. 2d 977, 978 (Miss. 1986); *see Turner v. Wilson*, 620 So. 2d 545, 548-59 (Miss. 1993).

Tellus alleged tort claims against Sallee and Crawford individually, R. 1225-55, and offered evidence at trial that they personally participated in the commission of torts against Tellus, *see* Blue Br. 7-11. The issue of Sallee and Crawford's personal liability was briefed extensively before trial and the trial court denied their motion for summary judgment as to their individual liability. R. 11732-33. After hearing Tellus's case in chief, the trial court denied Sallee and Crawford's motion for a directed verdict as to their individual liability. Tr. 4282-83. In other words, there was sufficient evidence to support a verdict against Sallee and Crawford individually and, therefore, the errors raised by Tellus on appeal apply equally to them. This Court should reverse the judgment as to all defendants.[13]

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[13] Sallee and Crawford also invite this Court to affirm the trial court's judgment on the alternative basis that the court lacked personal jurisdiction over them. Red Br. 46 n.25. They did not cross-appeal the court's denial of their motion to dismiss based on the lack of personal jurisdiction and, therefore, did not preserve this alleged error for review. *See Morrow v. Morrow*, 591 So. 2d 829, 832 (Miss. 1991). Further, Sallee and Crawford's footnote argument does not provide an adequate reason to overturn the trial court's decision that their personal contacts with Mississippi and their direct participation in tortious conduct related to the A-1 Well provide a sufficient basis to exercise personal jurisdiction over them.

RESPONSE TO CROSS-APPEAL

On cross-appeal, Texas Petroleum seeks to have the trial court's declaratory judgment set aside on procedural grounds. Red Br. 46-48. The judgment declares that, as between Tellus and Texas Petroleum, Tellus owns the shallow gas rights under the Bilbo A Lease and Texas Petroleum owns the oil rights and the deep zone gas rights. R. 12795-802. Texas Petroleum argues that the trial court erred in granting declaratory relief for three reasons: (1) the relief granted was not requested in Tellus's complaint and evades the chancery court's jurisdiction; (2) a trial court has no discretion to grant declaratory relief that is inconsistent with a general verdict; and (3) the issues resolved by the declaratory judgment were moot. The decision to grant or deny declaratory relief is reviewed for an abuse of discretion. Miss. R. Civ. P. 57(a); *Riley v. Moreland*, 537 So. 2d 1348, 1353 (Miss. 1989).

I. Tellus sought a declaration of ownership rights under the Bilbo A Lease and Texas Petroleum agreed that the trial court should decide the ownership issue.

Texas Petroleum first argues that the trial court erred by declaring ownership interests under the Bilbo A Lease because Tellus did not seek this relief in its complaint. This is not correct. Tellus's complaint specifically alleged Tellus's and Texas Petroleum's ownership interests under the Bilbo A Lease, R. 1227 (¶¶ 13-14), and sought a declaration that Tellus and Texas Petroleum "were legal co-tenants of the leasehold estate in the Bilbo A Lease," R. 1236 (¶ 28(c)). In keeping with the relief requested, the trial court declared that Tellus and Texas Petroleum each own mineral interests under the Bilbo A Lease and defined the parties' ownership interests. R. 12795-802. That is, the court declared that Tellus and Texas Petroleum are co-tenants under the lease.

Even if Tellus's complaint had not included this request for a declaration of ownership, the trial court did not abuse its discretion by granting declaratory relief in this case. A trial

court's authority to grant relief is not "limited in kind or amount by the demand but may include relief not requested in the complaint." *Pilgrim Rest Missionary Baptist Church v. Wallace*, 835 So. 2d 67, 75 (Miss. 2003); *see Bluewater Logistics, LLC v. Williford*, 2011 WL 240731, *8 (Miss. Jan. 27, 2011) (slip op.) ("A trial judge may award a party any relief to which he is entitled, even if the party fails to make a specific demand for such."); Miss. R. Civ. P. 54 cmt. Tellus requested "[a]ny and all general or specific relief, whether in law or in equity, to which the Plaintiffs may be entitled in the premises." R. 1253. Tellus also entered into evidence, without objection, all of the title documents necessary to determine the parties' ownership interests under the Bilbo A Lease. Tr. 3429-30; Exs. 32, 33, 34, 35, 36, 74, 109 & 110.

Moreover, Texas Petroleum's counsel agreed that the trial court should "decide the ownership issue" as a matter of law and identified the documents that Texas Petroleum believed were relevant to the trial court's ownership decision. Tr. 5216-17. At the close of its defense, Texas Petroleum's counsel provided a packet of documents to the trial court and stated:

> The rest of the list here are documents that are relevant to the ownership issue that Your Honor has – we have decided, the parties have decided that Your Honor is going to decide the ownership issue. And so these documents that we've identified, starting from 1167 on down, are all documents that we believe are relevant to your ownership decision.

Tr. 5216-17. During directed verdict arguments, Texas Petroleum's counsel again acknowledged that the trial court should decide the title issues as a matter of law:

> And the third [subject for directed verdict] is title issues. And in that regard, let me just say that the parties have agreed that it is up to the Court to make the legal determination, based upon the evidence presented, on who the proper owner is of the shallow sands of the Bilbo A-1 Well during the time period that Texas Petroleum was the owner of – or in possession of the well from 1995 until present.

Tr. 5380. In sum, the trial court had all of the evidence it needed to render a decision on the ownership issue and the parties agreed that the trial court should decide that issue as a matter of

law. Under these circumstances, the trial court acted well within its discretion by declaring the ownership rights under the Bilbo A Lease. *Wallace*, 835 So. 2d at 75; Miss. R. Civ. P. 54 cmt.

Further, the circuit court's declaratory judgment does not "evade" the chancery court's jurisdiction to hear quiet title proceedings. The Mississippi Constitution does not vest chancery courts with *exclusive* jurisdiction to try title; the circuit and the chancery courts have concurrent jurisdiction over title matters. *McDonald's Corp. v. Robinson Indus.*, 592 So. 2d 927, 933-34 (Miss. 1991). "Historically, this Court has allowed courts other than chancery to try title where that issue is incidental to the main action." *Id.* at 934. A circuit court may declare the rights of interested parties under a deed when, as here, that declaration is incidental to another dispute within its subject matter jurisdiction. *Id.*; Miss. R. Civ. P. 57(b)(1). In any event, the declaratory judgment does not "quiet title" under the Bilbo A Lease because it does not purport to bind "all parties" interested in the property. It declares the rights and interests under the Bilbo A Lease as between only those parties before the court – Tellus and Texas Petroleum. R. 12801.

The circuit court had jurisdiction to grant the declaratory judgment and it did not abuse its discretion by doing so.

II. The declaratory judgment is not "inconsistent" with the jury verdict.

Texas Petroleum's second argument on cross-appeal is that a trial court has no discretion to grant declaratory relief that is "inconsistent" with a jury verdict. This argument ignores the plain language of Rule 57(a), which provides that a trial court "may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed." As the drafters of Rule 57 explained, "[a] plaintiff may ask for a declaratory judgment either as his sole relief or in addition or auxiliary to other relief . . . ." Miss. R. Civ. P. 57 cmt. Nothing in the rule prevents a trial court from declaring the rights of the parties pursuant to unambiguous legal documents, while submitting other counts to the jury for resolution. That is exactly what the trial

court did here, deciding the title issues as a matter of law and presenting the disputed conversion and negligence issues to the jury.

Further, the court's declaratory judgment and the jury's general verdict (if that verdict is permitted to stand) are not inconsistent. The trial court resolved the Bilbo A Lease ownership issues on December 12, 2008, *before* the remaining issues were submitted to the jury on December 15. Tr. 5433-34 (ordering that "the title be vested in the shallow zone with Tellus . . . and that the deep zone will be vested with TPIC" and directing Tellus's counsel to prepare a written order to that effect). The jury's verdict on the issues of whether Texas Petroleum negligently produced or converted gas from the shallow zones is completely separate from, and by no means inconsistent with, the trial court's declaration as to which parties owned the legal rights to extract gas from the shallow zones.

III. The declaratory judgment resolved a live dispute between Tellus and Texas Petroleum.

Finally, contrary to Texas Petroleum's argument, the ownership issues were not "moot" when the trial court entered its declaratory judgment. "For mootness to extinguish an action, there must be circumstances so that a judgment upon the merits, if rendered, would be of no practical benefit to the plaintiff or detriment to the defendant." *C & D Inv. Co. v. Gulf Transport Co.*, 526 So.2d 526, 528 (Miss. 1988) (internal quotation marks omitted). The trial court's declaratory judgment is of practical benefit to Tellus for at least two reasons. First, as noted above, the trial court announced its judgment on the ownership issues *before* the case was submitted to the jury, at a time when the issue was very much alive and disputed by the parties. Tr. 5433-34. Second, Texas Petroleum filed a separate lawsuit, just prior to the trial of this one, naming the same parties and seeking to litigate the same ownership issues that were resolved by

the declaratory judgment; that separate lawsuit remains pending. *See* R. 11089, 11259-284.[14] The declaratory judgment entered in this case definitively resolves the ownership interests under the Bilbo A Lease, as between Tellus and Texas Petroleum. Therefore, it relieves Tellus of the expense and burden of having to re-litigate those issues in Texas Petroleum's subsequent lawsuit or any other lawsuit. Because the declaratory judgment resolved a live dispute between the parties, the mootness doctrine does not apply.

CONCLUSION

On Tellus's appeal, this Court should reverse the trial court's judgment and remand for a new trial. On Texas Petroleum's cross-appeal, this Court should affirm the trial court's judgment declaring the parties' rights and interests under the Bilbo A Lease.

RESPECTFULLY SUBMITTED, this the 30th day of March, 2011.

TELLUS OPERATING GROUP, LLC, et al.
Appellants

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[14] The record in this case includes a notice of filing of Texas Petroleum's separate action, Civil Action No. 2008-246 in the Circuit Court of Lamar County.

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for Appellants, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by sending the same by United States Mail with postage fully prepaid to the following:

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Hon. Prentiss G. Harrell
Lamar County Circuit Court Judge
P.O. Box 488
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This, the 30th day of March, 2011.

Michael J. Bentley