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

BRIEF OF APPELLANTS 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

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,
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants/Plaintiffs 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 may evaluate possible disqualifications or recusal:

1. Tellus Operating Group, LLC, Appellant and Plaintiff in the trial court proceeding;
2. Baxterville Oil Acquisitions, LLC, Appellant and Plaintiff in the trial court proceeding;
3. Mississippi Oil Acquisitions, LLC, Appellant and Plaintiff in the trial court proceeding;
4. NOMS, LLC, Appellant and Plaintiff in the trial court proceeding;
5. SNPI, LLC, Appellant and Plaintiff in the trial court proceeding;
6. BAX, LLC, Appellant and Plaintiff in the trial court proceeding;
7. Vickery Properties, LLC, Appellant and Plaintiff in the trial court proceeding;
8. Baxterville Properties, LLC, Appellant and Plaintiff in the trial court proceeding;
9. Sutherland Energy Corp., Appellant and Plaintiff in the trial court proceeding;

10. Texas Petroleum Investment Company, Appellee and Defendant in the trial court proceeding;

11. Bruce Sallee, Appellee and Defendant in the trial court proceeding;

12. William Crawford, Appellee and Defendant in the trial court proceeding;

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, Bell & Swetman, Ltd, counsel for Appellees/Defendants;

21. Daphne M. Lancaster, Esq., Aultman, Tyner, Ruffin, Bell & Swetman, Ltd., counsel for Appellees/Defendants;

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

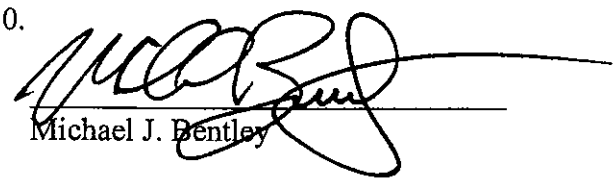
23. Michael D. Hudgins, Esq., The Hudgins Law Firm, Counsel for Appellees/Defendants;

24. Charles E. Greer, Esq., The Greer Law Firm, Counsel for Appellees/Defendants;

25. Adam Schiffer, Esq., Counsel for Appellees/Defendants;

26. Honorable Prentiss G. Harrell, trial judge.

So certified, this the 17th day of September, 2010.



Michael J. Bentley

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STATEMENT OF THE ISSUES

I. Whether the trial court erred by misstating the burden of proof under the law of commingled goods and refusing to instruct the jury that Texas Petroleum must prove its share of the natural gas that it wrongfully commingled.

II. Whether the trial court erred by refusing the general verdict form requested by Tellus and by submitting instead complex and misleading special interrogatories, which bore no relation to the material facts or legal issues presented to the jury.

III. Whether the trial court erred by allowing unlicensed engineers to give expert technical testimony in violation of Mississippi criminal law.

IV. Whether the trial court erred by permitting Texas Petroleum's expert engineering witness to surprise Tellus at trial with a previously undisclosed opinion that the Bilbo A-1 Well could produce gas from the deep zones even though the wellbore was plugged.

V. Whether the trial court erred by excluding evidence that Texas Petroleum's most critical fact witness was biased against Tellus and biased in favor of Texas Petroleum.

VI. Whether the trial court erred by excluding Tellus's evidence of lost profits.

INTRODUCTION

This complex case involves the appropriation of natural gas from a well in Lamar County, Mississippi. The well is situated on a tract of land known as the Bilbo A Lease. Two companies own mineral rights under the lease. Since 1995, Plaintiffs/Appellants Tellus Operating Group and related entities have owned the "shallow gas" rights from the earth's surface to a depth of 8,000 feet; Defendant/Appellee Texas Petroleum Investment Company has owned the "deep zone" oil rights and associated gas below 8,000 feet.

At trial, Tellus offered substantial evidence that, from April 1995 to July 2004, Texas Petroleum secretly produced and depleted Tellus's shallow gas under the Bilbo A Lease. Texas

Petroleum falsely reported this production from its Bilbo A-1 Well as deep zone gas, falsely allocated some of the production to another well on the Bilbo A Lease property, and wrongfully commingled the rest with gas from Texas Petroleum's other wells in the field without metering or reporting it.

Numerous legal errors prevented the jury from fairly considering the evidence. Chief among these errors, the trial court improperly placed on Tellus the burden to prove the amount of shallow gas that Texas Petroleum had commingled. Under settled law, if Texas Petroleum is shown to have wrongfully commingled fungible goods, such as gas from the Bilbo A Lease, Texas Petroleum must prove its share of the commingled goods. The trial court refused to shift this burden to Texas Petroleum. This error was compounded by a misleading verdict form that prevented the jury from returning a verdict for Tellus unless the jury allocated Tellus's damages by year, a burden that the trial court first imposed on Tellus after all the proof was in. Still other evidentiary errors defeated a fair trial, including the admission of expert technical testimony by unlicensed engineers in violation of Mississippi criminal law, the admission of previously undisclosed expert testimony regarding the A-1 Well's production capabilities, and the exclusion of material evidence that Texas Petroleum's key fact witness was biased against Tellus and in favor of Texas Petroleum.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Trial Court

In August 2004, Tellus Operating Group, LLC and related entities (collectively "Tellus"),[1] sued Texas Petroleum Investment Company ("Texas Petroleum") in the Circuit Court of Lamar County. R. 28-87 (Trial Court No. 2004-307). Tellus asserted that, from 1995 to 2004,

[1] Tellus Operating Group, LLC is the operating company for the oil and gas interests owned by the other named plaintiffs. Tr. 3386-87.

Texas Petroleum had unlawfully produced and commingled natural gas from the shallow zones of the Mrs. George W. Bilbo A Lease (the "Bilbo A Lease") in Lamar County, Mississippi. *Id.*; R. 1225. Texas Petroleum removed the case to federal court. R. 95.[2] Tellus then sued Total Petrochemicals USA ("Total"), Texas Petroleum's predecessor under the Bilbo A Lease.[3] In January 2007, the Texas Petroleum suit was remanded to state court and the Total suit was dismissed for lack of jurisdiction. R. 98.[4]

On remand, Tellus amended its complaint to add Texas Petroleum's owners, Bruce Sallee and William H. Crawford, as defendants. R. 1225. Tellus re-filed the Total suit, R. 8 (Trial Ct. No. 2007-3), and the cases were consolidated for trial in Lamar County Circuit Court (Harrell, J.). R. 1164. Trial began October 30, 2008, Tr. 1001, and the case went to the jury on December 16, 2008 on Tellus's claims for negligence and conversion, Tr. 5718. After deliberating for four days, the jury returned a divided verdict against Tellus. Tr. 5719-20. The trial court entered judgment on the verdict, R. 12803-07, and entered a separate judgment declaring that certain Tellus plaintiffs owned the shallow gas rights and Texas Petroleum owned the deep zone oil and any associated gas under the Bilbo A Lease, R. 12795-802.

Tellus timely appealed the judgments in both cases. R. 13199-206 (Trial Ct. No. 2004-307); R. 494 (Trial Ct. No. 2007-3). Total cross-appealed. R. 511 (Trial Ct. No. 2007-3). Texas Petroleum appealed the declaratory judgment. R. 13209 (Trial Ct. No. 2004-307). Total has now settled its dispute with Tellus and the Total appeals have been dismissed. This Court consolidated the Texas Petroleum appeals.

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[2] *Tellus Operating et al. v. Texas Petroleum Inv. Co. et al.*, Civil Action No. 2:04-cv-327 (S.D. Miss.).

[3] *Tellus Operating et al. v. Total Petrochemicals USA, Inc.*, Civil Action No. 2:05-cv-2176 (S.D. Miss.).

[4] Citations to the record are identified as "R. __." Citations to the trial transcript are identified as "Tr. __." Citations to trial exhibits are identified as "Ex. __." Record excerpts are identified as "R.E. __."

II. Statement of Facts

Tellus is an independent Mississippi oil and gas operating company that obtained its first oil and gas interest in Baxterville Field in 1995. Tr. 3382-88. Texas Petroleum is a privately held Texas company that began operating in Baxterville Field in 1995. Ex. 92. Baxterville Field, in Lamar and Marion Counties, is a prolific oil and gas field. Tr. 1905 & Ex. 246. This case concerns a 319-acre portion of Baxterville Field, the East Half of Section 7, Township One North, Range 16 West in Lamar County (the "East Half of Section 7"). R. 1225. The 40-acre Bilbo A Lease lies in this half section. Ex. 76. Over time, three deep oil wells were drilled on the Bilbo A Lease. Tr. 1531. The A-1 Well was the first, drilled in 1946. Tr. 2177.

A. Tellus acquires the shallow gas rights in the East Half of Section 7 but later finds that the shallow gas reserves are depleted.

In 1949, the leaseholders in the East Half of Section 7 – the Texas Company ("Texaco"), Gulf Refining Company ("Gulf Oil") and Sun Oil Company ("Sun Oil") – entered into a joint operating agreement governing shallow gas production in the half section (the "1949 JOA"). Ex. 76. The 1949 JOA, as amended, pooled the leaseholders' gas rights into a unitized production zone for the gas horizons extending from the surface of the earth to a depth of approximately 8,000 feet. Tr. 3440-42; Exs. 76-80 (R.E. 289-332). These gas horizons are generally referred to as Tellus's "shallow zones" or "shallow sands." Tr. 2394-95. Below 8,000 feet is the Lower Tuscaloosa Oil Pool ("LTOP") and Lower Tuscaloosa Massive Oil Pool ("LTOP Massive"), which is generally referred to as the "deep zones" or "deep sands." *Id.* The 1949 JOA did not affect rights to extract oil or associated gas from the deep zones. Exs. 76-80.

There was evidence that most of the shallow sands beneath the Bilbo A Lease were saturated with gas when the A-1 Well was drilled in 1946. Tr. 2239. A 1990 report prepared for CWF Associates Ltd., one of Tellus's predecessors to the shallow gas rights, concluded that much of these gas reserves then remained. Ex. 246 (R.E. 424-40). A 1996 analysis of the

neighboring A-9 well showed that, despite some depletion, some of Tellus's shallow sands under the Bilbo A Lease were still gas-rich. Tr. 2241-45.

In March 1995, Tellus purchased Sun Oil and Texaco's gas rights in the shallow zones, which included the rights to shallow gas under the Bilbo A Lease. Ex. 72. However, under the 1949 JOA, Gulf Oil's successors controlled drilling and operations in the East Half of Section 7. Ex. 76. Thus, Tellus could not drill gas wells on the Bilbo A Lease at that time. Tr. 3388-91.

In January 2003, Tellus purchased Gulf Oil's rights in the East Half of Section 7. Tr. 3390-91 & Ex 35. After these acquisitions, Tellus owned all shallow gas rights in the half section and held the right to drill new wells. *Id.*; Tr. 3398-99. Tellus drilled its first shallow well on the Bilbo A Lease (the 7-15 well) approximately 300 feet from Texas Petroleum's A-1 Well. Tr. 2880, 3399-400. Completion of the 7-15 well in August 2006 revealed that all of the shallow gas reservoirs beneath the Bilbo A Lease had been depleted even though there were no other shallow wells in the area. Tr. 3040, 3399-402, 3520. Depletion of the shallow zones cost Tellus as much as $16,000,000 or more in lost profits. Tr. 4182-87 & Ex. 405-D. The cause of and legal responsibility for this depletion are central issues in this litigation.

B. Texas Petroleum acquires the right to produce deep zone oil and associated gas under the Bilbo A Lease and begins producing the A-1 Well.

In 1995, eleven years before Tellus drilled the Bilbo 7-15 well, Texas Petroleum acquired an interest in Baxterville Field, including the right to produce deep zone oil and any associated gas under the Bilbo A Lease and operating rights for the three deep oil wells on the lease. Ex. 92. At the time of Texas Petroleum's acquisition, two of the Bilbo A Lease wells, the A-9 and A-13, had been completed in the deep zones and were pumping oil from those zones. Tr. 1199;

Exs. 1 & 22.[5] The third well, the A-1 Well, had also been completed in the same deep zones as the A-13 well. *Id.* However, official reports declared that the A-1 Well was "shut in," meaning it should not have been producing any oil or gas. Tr. 1200; Ex. 1.

Although the A-1 Well was reportedly "shut in," substantial evidence at trial showed that Texas Petroleum had opened the well and produced gas from it as early as 1995 and continued producing the well until it was depleted in 2004. Immediately after Texas Petroleum acquired its interest in 1995, its co-owner, William Crawford, instructed his production foreman to open all the wells in Baxterville and determine if they could be produced. Tr. 3633-35. Texas Petroleum's goal was to bring existing wells back into production, particularly if a well would produce oil or gas without costly repairs. Tr. 1168. One of those wells was the A-1 Well. *Id.*

The A-1 Well had a history of "casing leaks," unintended breaches in the well's outer casing through which gas, oil, and other material can enter the wellbore and be produced by the well. Tr. 1968-71, 2033-35, 3149. Exhibit 440 is a depiction of the A-1 Well. R.E. 467.[6] If a casing leak is not repaired, the leak can deplete nearby zones of oil and natural gas. Ex. 225 (R.E. 385-86).[7] Depending on the depth of the casing leak, oil or gas depletion may occur at zones shallower than the zones from which the well was intended to produce hydrocarbons. *Id.*

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[5] Trial Exhibit 1 is a compilation of "Producer's Monthly Reports" filed by Texas Petroleum with the Mississippi State Oil and Gas Board. Tr. 1199-1200. The reports span the relevant period of Texas Petroleum's ownership in the Bilbo A Lease, from May 1995 to December 2004. *Id.* The May 1995 report, which is the first report filed by Texas Petroleum, is located at Pages T0001/0145-51 of Exhibit 1.

[6] An oil well is completed by drilling the well, running steel "casing" down the wellbore, and then cementing the casing in place. Tr. 2216-17. "Tubing" is then run inside the casing down to the zones where perforations have been intentionally made so that oil may be produced. *Id.* A "casing leak" is an unintended breach in the casing through which gas, oil, and other material may enter the casing "annulus," the space between the tubing and casing. Tr. 1941-42, 3153-54. Once it enters the annulus, the gas, oil or other material can be produced by the well as if it had risen through the tubing. Tr. 1941.

[7] Several witnesses testified by video deposition. Exhibit 225 is a transcription of that video testimony.

In 2006, a "workover"[8] of the then sixty-year-old A-1 Well confirmed five casing leaks, all adjacent to Tellus's shallow sands at depths of 3,000, 3,427, 6,570, 6,874, and 7,440 feet. Tr. 2033-35. Texas Petroleum's in-house engineer, Forrest Bugge, testified that this did not surprise him as the Bilbo A-1 was an "old well" that "could definitely have casing issues." Tr. 1244. Total discovered the first shallow zone casing leak in May 1991. Tr. 1219-20, 3155. The leak was documented in a report and wellbore sketch that were placed in the A-1 Well file. Tr. 1224-25, Exs. 4 (R.E. 260) & 28 (R.E. 285).

Bugge learned of the casing leak when he reviewed the A-1 Well file shortly after Texas Petroleum purchased the Bilbo A Lease in May 1995. Tr. 1166-68, 1224-25. On July 11, 1995, he wrote a memo to Texas Petroleum's owners warning them that the A-1 Well had at least one casing leak in the shallow sands. Tr. 1193-96 & Ex. 248 (R.E. 441-47). Bugge's memo also disclosed the presence of a "fish,"[9] or obstruction, in the well. *Id.*

Texas Petroleum's co-owner, Crawford, made his own notes on Bugge's memo, writing that the A-1 was "very gaseous" – meaning that it produced natural gas. Tr. 1197 & Ex. 248 (R.E. 442-43). Although Bugge's memo recited that the well was designated as "shut in," Crawford wrote that the "casing [is] open now." *Id.*; Tr. 1198. Crawford's handwritten notes revealed that the A-1 Well's casing valve[10] had to be left open to keep pressure from building up on the wellhead. Tr. 1198-99. One week later, on July 18, 1995, Crawford enthusiastically noted that the well "makes gas!" on his copy of the A-1 Well's daily production reports. Tr. 3681 & Ex. 367 (R.E. 447-A).

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[8] A "workover" is a significant maintenance or repair operation, typically undertaken to re-establish or increase production from a well. Tr. 2106.

[9] "Fish" is a term for something that is left in the wellbore, such as drilling or production equipment. Tr. 3155. In this case, the fish consisted of a tubing anchor, pump and 200 feet of tubing covered with debris. Tr. 1195, 1220. The fish's effect on the well's deep zone production was a crucial issue at trial.

[10] The "casing valve" is the valve that, when opened, releases gas from the casing annulus. Tr. 2144.

According to Brad Lowe, Texas Petroleum's full-time "pumper"[11] for Baxterville Field, the A-1 Well's casing valve was left open with gas flowing off the casing from at least January 1996 until June 2004. Tr. 1809-11. Texas Petroleum never reported this production from the casing. Tr. 1814-15. For a three-week period in April and May 1996, Texas Petroleum connected the A-1 Well's casing to the gas sales line for the Bilbo A Lease. Tr. 1229-30. The well produced a steady flow of gas without any decline for the entire three week period, sometimes topping 400 Mcf per day.[12] Tr. 1231-33. Texas Petroleum never reported this gas production either, even though it was required to do so under state law. Tr. 1233-35.

In July 1996, Texas Petroleum asked its geologist, Jim Norris, to analyze the source of the A-1 Well's unreported gas. Tr. 1235-36; Ex. 225 (R.E. 360).[13] Norris initially concluded that the gas was not coming from the deep zones and informed Texas Petroleum's owners that the gas production "may have been extraneous due to mechanical problems." Tr. 1235-37 & Ex. 22 (R.E. 270). Norris believed the well was producing shallow gas for several reasons: (1) regular pressure build-ups on the A-1 Well indicated shallow zone gas production, (2) gas from the deep zones is always associated with oil production, but the A-1 Well was making significant gas without any associated oil production, (3) the neighboring Bilbo A-13 well's gas production did not match the A-1 Well's production even though both wells were drilled into the same deep zone reservoir, and (4) the presence of the "fish," or plug, at a depth of 7,600 feet would prevent oil or gas from flowing up from the deep zones. Ex. 225 (R.E. 353-55, 360-62).

Later testing by Texas Petroleum confirmed that the A-1 Well was producing shallow gas. Ex. 225 (R.E. 357-59, 363-65). Norris told Bugge of his test results; Bugge did not

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[11] As a full-time pumper, Lowe maintained, gauged, and metered all of Texas Petroleum's wells in Baxterville Field. Tr. 1777-78. He visited each well at least once every other day. Tr. 1777-81.

[12] Mcf is a unit of measurement meaning 1,000 cubic feet of gas.

[13] Jim Norris testified at trial by video deposition.

disagree. *Id.* (R.E. 358). In fact, no one at Texas Petroleum, including owners Sallee and Crawford, ever disagreed with Norris's findings. Tr. 3077-78, 3696-98. However, Texas Petroleum did nothing to remedy this unlawful production. Tr. 3091-92.

In May 1997, Texas Petroleum's production foreman, Richard Walters, recommended a workover of the A-1 Well to remove the fish and repair the well. Tr. 1255-56, 1909-10 & Ex. 206 (R.E. 469). Walters believed the workover was necessary to produce oil and any associated gas from the deep zones. Tr. 2138-40. Crawford rejected the proposal as "uneconomical." Tr. 3700.

In September 1997, after rejecting Walters' workover proposal, Crawford and Sallee approved his request to "swab" the A-1 Well in "an attempt to recover any gas" from the well. Tr. 1267-68, 3703-04; Ex. 4 (R.E. 251). "Swabbing" is an inexpensive method of improving or reestablishing gas production by sucking fluids out of the wellbore, which permits gas to enter and be produced. Tr. 1269-72. Texas Petroleum made no attempt to repair the casing leaks or remove the fish in the well at 7600 feet; it simply swabbed the well and continued producing gas. Tr. 1932-34.

After the swabbing, the A-1 Well began making more gas. Tr. 1934-35. At this point, Texas Petroleum began reporting some, but not all, of the production from the A-1 Well. Tr. 1272-73. However, Texas Petroleum did not separately meter gas from the A-1 Well; instead, gas from the A-1 Well was combined with gas from the A-13 well and sent through a single sales gas meter on the Bilbo A Lease. Tr. 1892. Thus, it was impossible to determine how much of the metered gas came from each well without conducting "well tests." Tr. 1789-90. Lowe, the A Lease pumper, admitted that Texas Petroleum did not give him the equipment needed to conduct such tests. Tr. 1790-93. Therefore, Lowe simply "split" the commingled production between the A-1 and A-13 wells without testing, giving about half to each well. Tr. 1795-96.

Lowe followed this arbitrary allocation method from September 1997 until sometime in 2000. Tr. 1795-96; Ex. 56. This arbitrary method of assigning sales gas short-changed the A-1 Well.[14] Lowe conceded that he allocated gas to the A-13 well even when it could not have contributed any gas to the Bilbo A Lease meter; on these occasions, all of the sales gas should have been allocated to the A-1 Well. Tr. 1787-97. After reviewing Lowe's allocations for the months of September 1997 to April 1998, Bugge agreed that "virtually none" of this reported gas was produced by the A-13 well. Tr. 1288-91.

Gas continued to flow at high rates from the A-1 Well until April 1998, when the wellbore filled with sand, preventing gas production. Tr. 1300-01, 1941. Although this was clear proof that the well had a casing leak, Texas Petroleum made no attempt to locate and repair leaks. Tr. 1941-43. Instead, it swabbed the well in a "quick, cheap" attempt to reestablish gas production. Tr. 1302, 1942-43, 1966. When swabbing failed, Texas Petroleum undertook a workover of the A-1 Well. Tr. 1942-43, 1954.

During the workover, Texas Petroleum washed all the sand and debris out of the well down to a depth of 7550 feet, stopping fifty feet above the top of the fish. Tr. 1954-55. It then ran a "packer"[15] in the well and located two casing leaks, one at 3,000 feet and another between 6,565 and 7,327 feet. Tr. 1968-71; Ex. 4. With the packer set above the leaking interval (6,565

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[14] Lowe testified that he assigned gas to the A-13 well in August 1997 even though he knew the A-13 well was shut in for repairs. Tr. 1813-14. In September 1997, he gave half of the A-1 Well's daily production of 1,000 Mcf to the A-13 well even though he knew *all* production was coming from the A-1 Well. Tr. 1794-95. Lowe described his own November 1997 allocation to the A-13 as "impossible." Tr. 1789-90. However, he continued to assign gas production to the A-13 from September 1997 through 2000 even though he knew that pressure differentials prevented the A-13 from sending gas through the A Lease meter. Tr. 1787-89; Ex. 56.

[15] A "packer" is a device used to isolate an interval in the wellbore for production and is also used to test for casing leaks. Tr. 1298-1300. First, a temporary plug is placed in the well, preventing communication with deeper zones. Then the packer is set above the plug. The isolated interval is "swabbed" by sucking fluids through the tubing that runs from the surface through the packer and into the isolated interval. If oil or gas comes into the wellbore, this indicates a casing leak in the isolated interval. *Id.* In this case, the fish clogging the wellbore served as the plug; otherwise, the swabbing would not have been successful. *See* Tr. 1308-10.

to 7,327 feet), Texas Petroleum produced gas and some oil from the well. Tr. 1968-71. But when the packer was set below the interval, the well did not make gas, *id.* & Ex. 4; this confirmed that gas was coming from Tellus's shallow zones. Rather than repair the casing leaks, Tr. 1966, Texas Petroleum moved the packer above the leak to 6,357 feet, swabbed the well and resumed gas production. Tr. 1976-78.

Texas Petroleum's production foreman could not explain why the packer was moved above the leaking interval in May 1998 and could think of no "legitimate reason" for doing so. Tr. 1976. He and Bugge agreed that, if Texas Petroleum wished to produce oil and gas from the deep zones, the packer should have been set as deep as possible. Tr. 1316-17, 1975-76. Texas Petroleum's production manager, Doug Miguez, testified that the company's standard practice was to set the packer as close as possible to the intended production zone. Ex. 225 (R.E. 387). Here, Texas Petroleum set the packer more than 2,000 feet above the productive deep zones and above a leaking shallow zone interval. It remained there until November 2005. Tr. 3170.

Texas Petroleum continued to produce the A-1 Well from both the tubing and the casing and left the casing open until July 2004. Tr. 1798-1800. Lowe, the Baxterville Field pumper, testified that the well flowed from the casing the entire time. Tr. 1809-11. During a June 10, 2004 field visit, a state inspector confirmed that the A-1 Well's casing valve was open and that gas was flowing from the well even though Texas Petroleum's sworn reports did not disclose any production. Tr. 2011; Ex. 349 (R.E. 448). By the end of June 2004, the A-1 Well was essentially depleted. Tr. 1811. In July 2004, Texas Petroleum shut in the A-1 Well because it was no longer economical to produce the well. Tr. 2010; Ex. 210 (R.E. 337). From 1995 until July 2004, Texas Petroleum certified to the Mississippi Oil and Gas Board that all of the gas produced on the Bilbo A Lease came from the deep zones. Tr. 1295-96.

C. Gas from Bilbo A-1 could flow into Texas Petroleum's sales gas and fuel gas systems which linked all of Texas Petroleum's wells in Baxterville Field.

In addition to the deep zone rights under the Bilbo A Lease, Texas Petroleum owned several nearby leases in Baxterville Field with operating wells. Tr. 1473-75. The Bilbo A Lease was connected to these other leases by two pipeline systems – the sales gas system (or gas gathering system) and the fuel gas system. Tr. 1452; Ex. 169. Exhibit 169 is a depiction of Texas Petroleum's pipeline systems. R.E. 333. The sales gas system collects gas from all of Texas Petroleum's gas wells and sends the combined gas to a single sales station, where it is compressed and sold. Tr. 1484-85. Texas Petroleum metered the sales gas from each lease and then metered the commingled sales gas from all gas wells at the sales station. *Id.*

The fuel gas system collects "casing head gas"[16] from Texas Petroleum's oil wells and redistributes that commingled gas to Texas Petroleum's fuel-burning equipment for over 30 wells at eight "tank batteries"[17] throughout Baxterville Field. Tr. 1608-09 & Ex. 170 (R.E. 334-36). Although fuel gas was burned every day from May 1995 to July 2004, Texas Petroleum kept no records of how much gas was burned. Tr. 1607. Further, Texas Petroleum kept no records of how much gas each well contributed to the total amount of fuel gas burned during this nine-year period. Tr. 1543, 1607. Texas Petroleum installed meters on its fuel gas system only after Tellus filed suit. Tr. 1476. Texas Petroleum was then forced to begin paying state severance taxes on the fuel gas that it produces and uses to fuel its equipment. Tr. 3097-98.

Although the A-1 Well was designated as an "oil" well, it was uniquely configured so that gas could flow from the well into both the sales gas system and the fuel gas system. Tr.

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[16] Casing head gas is natural gas that is dissolved in oil. When the oil is produced, the casing head gas is separated from the oil at the lease's tank battery. Tr. 1335-36.

[17] A "tank battery" is a group of tanks that collects and stores production from crude oil wells on the lease. At the tank battery, the crude oil is sent through a "heater-treater," which uses heat to separate the oil from gas and water that has also been produced by the wells. Tr. 1655-57.

3125-31. Gas entering the sales gas system from the A-1 Well was commingled with A-13 gas and, ultimately, with Texas Petroleum's other gas wells in Baxterville Field. Tr. 3125-26. Gas entering the fuel gas system from the A-1 Well was commingled with gas from all of Texas Petroleum's oil wells. Tr. 1543-44.

D. Texas Petroleum's commingled gas system rendered it impossible to determine how much gas was produced by the Bilbo A-1 Well.

From May 1995 to July 2004, Texas Petroleum metered and sold 2,740,113 Mcf of gas from wells connected to its sales gas system. Tr. 2609; Ex. 401-A (R.E. 455). There was no way to determine how much of this gas was produced by the A-1 Well from May 1995 to September 1997 because Texas Petroleum's sworn reports listed the well as "shut in" during that period. Ex. 1. Further, Texas Petroleum did not report gas production from the A-1 well from November 2003 through July 2004, Ex. 1, even though its internal records show substantial amounts of gas being produced from the well, Ex. 205.[18] There was no way to determine how much of the reported sales gas was produced by the A-1 Well from September 1997 until sometime in 2000 because gas from both the A-1 and A-13 wells was sent through a single meter on the Bilbo A Lease during this period. Tr. 1892. Texas Petroleum's allocation between these wells was unreliable because Lowe arbitrarily split the gas between the two wells, rather than performing the required well testing. Tr. 1789-96. As discussed above, Lowe's arbitrary allocations significantly short-changed the A-1 Well.

Tellus was forced to use experts to estimate the amount of commingled gas contributed by the A-1 Well. Henry Coutret, an expert reservoir engineer, concluded that at least 432,735 Mcf of Texas Petroleum's reported sales gas from May 1995 to July 2004 was contributed by the A-1 Well. Tr. 2833 & Ex. 399-A. Jim Koerber, an expert in oil and gas accounting, working

[18] In addition to this discrepancy in Texas Petroleum's reporting, Connie Gipson, the Texas Petroleum employee responsible for filing sworn reports with the Mississippi Oil and Gas Board, admitted that she had filed false reports for another well at the direction of Texas Petroleum's management. Tr. 4113-17.

with Richard Schroeder, a petroleum engineer, concluded that Texas Petroleum failed to account for 1,074,669 Mcf of gas that was sent from the A-1 Well *unmetered* into its fuel gas system from May 1995 to July 2004. Tr. 2611 & Ex. 401-A (R.E. 455); Tr. 3908-09. Koerber reached his conclusion by calculating the amount of fuel that was likely burned by all of Texas Petroleum's well operating equipment connected to the fuel gas system in Baxterville Field. Tr. 2577-78. Schroeder and Coutret concluded that most of the unaccounted-for gas was produced by the A-1 Well. Tr. 2884, 3894, 3899-900.[19]

According to these experts, the reported production attributable to the A-1 Well and the unaccounted-for fuel gas burned in Baxterville field during Texas Petroleum's ownership period totaled 1,507,404 Mcf. Tr. 2884-95; Ex. 399-A (R.E. 450-54). The market value of this gas at the time it was burned or sold was $4,723,422.13.[20] Tr. 4,127-29 & Ex. 405-A (R.E. 456-59). These experts conceded that, because Texas Petroleum failed to meter the A-1 Well gas before it was commingled, it was impossible to know how much gas was contributed by the A-1 Well. Tr. 3899-900.

E. The zone of the Bilbo A-1 Well's production was disputed at trial.

At trial, experts offered competing opinions on the zones from which the A-1 Well produced gas. Tellus called four experts on the subject. Ken Hanby, an expert well log analyst,[21] testified that there were no gas caps or gas reservoirs[22] in the deep zones under the

[19] Texas Petroleum's documents support these conclusions. For example, in February 1998, Texas Petroleum sold over 7,000 Mcf of gas more than was metered at all of its wells. Tr. 1949-51; Ex. 56. There were similar overages in March and April of the same year. Tr. 1952. The overages stopped when the A-1 Well went off production during the May 1998 workover, but returned when the A-1 Well resumed production. Tr. 1952-54. While the A-1 Well was off production during the workover, Texas Petroleum's gas sales decreased by about 1,000 Mcf per day. Tr. 1944-45; Ex. 24.

[20] Although Tellus proffered evidence of its lost profit damages, which may have exceeded $16,000,000, the trial court limited Tellus's jury presentation on damages to the market value of the gas at the time it was taken by Texas Petroleum. As discussed in Section VI, *infra*, the trial court's exclusion of lost profit damages was error.

[21] A well log can be used to determine the nature of hydrocarbons at various depths in the well. Tr. 2176.

Bilbo A Lease, Tr. 2174-76, 2196-97; thus, any gas production came from the shallow zones. Craig Barclay, a petroleum geologist, agreed that were no gas caps or gas reservoirs in the deep zones beneath the Bilbo A Lease. Tr. 2358-59, 2363-65. Barclay concluded that none of the gas produced by the A-1 Well in the 1990s and 2000s came from the deep zones. Tr. 2365. Dr. Mark McCaffrey, an organic chemist and expert in distinguishing the zone from which hydrocarbons were produced, testified that all of the gas produced by the A-1 Well entered the wellbore through shallow zone casing leaks. Tr. 2460-61. Coutret, the reservoir engineering expert, reached the same conclusion – the gas produced by the A-1 Well from 1995 through 2004 came from the shallow zones. Tr. 2847-48.

In addition, experienced lay witnesses testified that the A-1 Well could not produce gas from the deep zones due to the fish at 7,600 feet. When Total first discovered the fish in 1991, it consisted of a pump and tubing anchor covered with 150 to 200 feet of "fill" or debris clogging the casing and tubing. Tr. 3150-53. Total washed away the fill, but was unable to recover the pump, tubing anchor and tubing; it cut the tubing and left the fish in the well. Tr. 3156-58. During the May 1998 workover, Texas Petroleum found that fill had again stacked on top of the fish far up the A-1's wellbore. Tr. 3158-59. It washed this fill out to a depth of 7550 feet, leaving more than 200 feet of fill in the wellbore. Tr. 3159. When the fish was finally removed in late 2005, it consisted of heavy drilling mud, scale from corroded casing and tubing, shale rock, and sand clogging the wellbore. Tr. 2060; 5319-20.

Texas Petroleum's geologist, Norris, admitted that the fish would prevent the flow of oil or gas from the deep zones. Ex. 225 (R.E. 360-62). Texas Petroleum's engineer, Bugge, and production foreman, Walters, admitted that Texas Petroleum's own consulting experts concluded

[22] A "gas reservoir" is a reservoir in which all of the hydrocarbons exist in a gaseous phase. Tr. 2175. A "gas cap" is an *oil* reservoir that contains some gas at the top. *Id.*

during the May 1998 workover that the fish was effectively a "solid plug" in the well at 7,550 feet. Tr. 1308-09, 1958-63. Although Walters surmised that the well may not have been "completely plugged off" in 1998, Tr. 1969, he acknowledged that in 2005, when the fish was retrieved, the well was "plugged solid" with scale, drilling mud, and sand. Tr. 2145-46. Wade Gipson, Tellus's lease operator in Baxterville Field, testified that the fish would have to be washed out completely in order to get production from the deep zones. Tr. 3159. A fish like this one, covered with drilling mud, scale, shale and sand, "will just effectively close your well off, nothing will pass through." Tr. 5319-20.

When the fish was finally removed in 2005, it was not stained by oil. Tr. 2062-63, 3187. Walters conceded that if the A-1 Well had produced oil and gas through the fish, the fish would be stained black with oil. Tr. 2146. Gipson agreed that the fish would be stained with oil if the A-1 Well had been producing from the deep zones. Tr. 5320-21.

Texas Petroleum called three experts to testify that the A-1 Well produced gas and oil from the deep zones. Two of the experts, Dr. Nathan Meehan and Rick Garza, were petroleum engineers who had not been licensed by the State of Mississippi. Tr. 4817, 5066.[23] Dr. Meehan disputed Coutret's opinion that the A-1 Well had drained much of the shallow Selma Chalk zone. Tr. 5083-84. He also testified that Koerber's conclusion regarding the amount of unaccounted-for gas produced by the A-1 Well was not reasonable. Tr. 5085-88. Finally, he disagreed with Dr. McCaffrey's conclusion that the A-1 Well produced shallow gas because, according to Dr. Meehan, Dr. McCaffrey did not analyze the requisite amount of gas samples. Tr. 5102-03.

Garza testified that any gas produced from the A-1 came from the deep zones. Tr. 4821-22. He also opined that the shallow zones in the vicinity of the A-1 Well were either depleted

[23] The third expert was Bob Hilty, a geologist, who testified that there was no gas in the shallow sands that could have been produced by the A-1 Well after 1970. Tr. 4749-50. Mr. Hilty did not address whether oil and gas could have been produced from the deep zones.

prior to 1971 or incapable of production without mechanical or chemical fracturing (in the case of the Selma Chalk). Tr. 4885-90. Texas Petroleum's counsel then asked Garza to cover "other topics . . . raised by Tellus through the course of this trial." Tr. 4891-92. Over Tellus's objections, Garza offered his previously undisclosed opinions that the fish was not a plug in the A-1 Well, that gas and oil could be produced through the fish, and hot water associated with the production would "steam clean" the fish, removing any oil staining. Tr. 4906-07.

SUMMARY OF THE ARGUMENT

Significant legal and evidentiary errors prevented the jury from fairly considering Tellus's evidence that Texas Petroleum produced Tellus's shallow gas through casing leaks in the A-1 Well, commingled that shallow gas with gas from Texas Petroleum's other wells in Baxterville Field, and then sold that commingled gas for profit or used it to secretly fuel its field equipment. Legal errors prevented the jury from returning a verdict for Tellus *even if* the jury found that Texas Petroleum wrongfully produced and commingled Tellus's shallow gas. Evidentiary errors undermined Tellus's case that the A-1 Well could not produce deep zone gas and prevented the jury from properly assessing the credibility of Texas Petroleum's key witness.

First and foremost, the trial court failed to apply the settled law of commingling to this case. By erroneously reversing the burden of proof on this issue, the trial court imposed an improper and much too high hurdle to a jury finding of liability against Texas Petroleum and virtually guaranteed that the jury would return a defense verdict. Texas Petroleum did not accurately account for the A-1 Well's sales gas production and did not meter any of the gas sent by the A-1 Well into the commingled fuel gas system. Therefore, one of the most significant burdens at trial was accounting for the gas produced by the A-1 Well from 1995 to 2004 without any historic records of its production. Under the law of commingled goods, the jury should have been instructed that, if Tellus proved that Texas Petroleum wrongfully produced and

commingled Tellus's shallow gas, the *burden shifted* to Texas Petroleum to prove its share of the commingled gas or forfeit the full amount to Tellus. The commingling doctrine is designed to protect an innocent party from losses arising from the inherent difficulty in identifying its own fungible goods once they have been commingled by the defendant. The trial court recognized that a commingling instruction was warranted, but refused to apply the doctrine's well-settled burden shifting framework. The trial court's instruction gutted the doctrine and permitted Texas Petroleum to escape liability even if the jury found that Texas Petroleum produced and commingled Tellus's gas. This error clearly prejudiced Tellus.

Second, the trial court compounded the prejudice created by its incorrect burden of proof instruction when it conditioned a general verdict on the jury's ability to answer special interrogatories requiring that the jury allocate damages annually. This instruction generally reinforced the erroneous notion that Tellus had to prove the amount of gas Texas Petroleum had wrongfully commingled. Specifically, the submission of these interrogatories was error for three reasons: (1) they were precipitated by the trial court's erroneous ruling that prejudgment interest is not an element of damages in a conversion case; (2) they violated Miss. R. Civ. P. 49 because they did not relate to the ultimate fact issues in the case, but were submitted solely to facilitate the trial court's post-verdict interest calculations and were imposed only after the close of evidence; and (3) they misled the jury to believe that it could not return a verdict for Tellus unless it agreed on complex and immaterial annualized damages calculations. A trial court may not exclude all evidence of prejudgment interest and then condition the verdict on the jurors' ability to answer complex interrogatories that related solely to prejudgment interest.

Third, the trial court allowed two Texas Petroleum witnesses to violate the Mississippi Engineering Practices Act by giving "expert technical testimony" without a license. Their unlicensed testimony was intended to lead lay jurors in an engineering-based decision regarding

the sources of the A-1 Well's gas production. This deliberate violation of state law would have been punishable as a crime in any other setting. The trial court erred by sanctioning it in the courthouse.

Fourth, the trial court improperly allowed Texas Petroleum's unlicensed engineer, Rick Garza, to surprise Tellus with an undisclosed expert opinion regarding the A-1 Well's ability to produce deep zone oil and gas through the 200 foot fish in the wellbore. Tellus made the case that the fish plugging the A-1 Well prevented deep zone production; therefore, Texas Petroleum must have produced shallow gas from the well. After failing to counter this evidence with lay witnesses and having not disclosed any expert opinions on the matter, Texas Petroleum surprised Tellus when it elicited Garza's previously undisclosed expert testimony that the fish was not a plug and would not prevent deep zone production. By allowing Garza's new expert opinion, the trial court deprived Tellus of its essential right to discover and prepare for the expert opinions on which its opponent intends to rely. Texas Petroleum ambushed Tellus's case without any warning and in direct violation of this Court's rules.

Fifth, the trial court excluded material evidence that Texas Petroleum's employee and key fact witness, Brad Lowe, harbored a dual bias *against* Tellus and *in favor* of Texas Petroleum. Before trial, Lowe stole property from both Tellus and Texas Petroleum. Tellus supported his prosecution and sought restitution, but Texas Petroleum refused to prosecute Lowe and kept him on its payroll even after his thefts. At trial, Lowe, the only witness with regular access to the well, testified very favorably for Texas Petroleum, telling jurors that Texas Petroleum metered all production from the A-1 Well and never sent gas from the well into the unmetered fuel system. In fact, Lowe was allowed to bolster his own testimony by disclaiming any debts to Texas Petroleum and announcing that he was telling the truth regarding Texas Petroleum's operation of the A-1 Well. Although evidence of Lowe's bias was critical to the

jurors' assessment of his testimony, trial court kept them in the dark about his thefts and debts to the parties in this case. The exclusion of this material evidence was a violation of Mississippi Rule of Evidence 616.

Finally, the trial court erred by denying Tellus's request for lost profits on the basis that the New York Mercantile Exchange (NYMEX)'s commodity futures index, on which an expert based lost profits calculations, was too speculative to permit recovery. The NYMEX is used by commodity producers to lock in prices for long-term production contracts. It provides a "reasonably certain" basis for deriving lost profits in this case and the trial court's exclusion of lost profits damages should be reversed. In any event, the trial court also excluded evidence of lost profits with respect to sales that would have occurred before trial; as to these sales, prices were based on historical fact.

ARGUMENT

I. The Jury Instructions Misstated the Burden of Proof Under the Commingled Goods Doctrine and Permitted Texas Petroleum to Escape Liability Even If It Had Wrongfully Produced and Commingled Tellus's Gas.

Jury instructions that misstate the burden of proof are inevitably prejudicial because they ensure that the facts will be determined under an improper legal standard. *See Tharp v. Bunge Corp.*, 641 So. 2d 20, 27 (Miss. 1994) (failing to properly instruct jury on burden of proof is "extremely prejudicial" error); *Lewis v. Lewis*, 129 So. 2d 353, 360-61 (Miss. 1961) (instruction imposing impermissible burden of proof requires reversal); *Williams v. Morehead*, 77 So. 658, 660 (Miss. 1918) (recognizing importance of correctly instructing jurors on the burden of proof). The burden of proof was significantly misstated here, crippling Tellus's claims on both liability and damages. Under the commingled goods doctrine, where a defendant wrongfully commingles his fungible goods with those belonging to the plaintiff, the burden rests with the defendant to

prove his share of the goods. A failure to meet this burden means that all of the commingled goods are deemed to belong to the plaintiff.

The trial court correctly recognized that the evidence warranted a commingling instruction. There was ample evidence that Texas Petroleum produced Tellus's shallow gas from the A-1 Well. Evidence showed that Texas Petroleum wrongfully allowed casing leaks in the A-1 Well to go unrepaired for years, misallocated gas from the A-1 Well to the A-13 well, diverted gas from the A-1 Well to its fuel gas system, and chose not to meter its fuel gas system until the shallow zones had been depleted. Tellus also produced substantial evidence that shallow gas produced by the A-1 Well was commingled with gas from Texas Petroleum's other wells. The configuration of the A-1 Well's connection to Texas Petroleum's combined sales gas and fuel gas systems was undisputed. If the well produced shallow gas, that gas was commingled with gas from Texas Petroleum's other wells in Baxterville Field. Tellus also proved the total amount of commingled sales gas measured at the Bilbo A Lease and the total amount of unmetered fuel gas commingled in Texas Petroleum's fuel gas system.[24]

Moreover, Texas Petroleum was the only party with regular access to the Bilbo A Lease; its employees were on site daily to meter and inspect the wells. Texas Petroleum was in the best position to record how much gas was sent from the A-1 Well into the sales and fuel gas systems from 1995 to 2004. Tellus had no employees on the Bilbo A Lease prior to 2003, no peculiar knowledge of the A-1 Well's production history, and no records with which to readily determine the well's historical gas production and prove its share of the commingled gas. Under these

[24] Tellus's estimates of unmetered fuel gas consumption were reasonable. Coutret's reservoir studies confirmed that more gas was missing from the shallow zones beneath the Bilbo A Lease than the conservative estimate of Texas Petroleum's unaccounted-for fuel gas that was presented to the jury by Tellus's expert accountant, Koerber. Tr. 2867-68. Texas Petroleum's own expert geologist, Richard McLeod, made a similar finding regarding the amount of missing reserves. Tr. 2244-25, 3036-39; Ex. 545. Texas Petroleum decided not to call Mr. McLeod to testify at trial.

facts, Tellus was entitled to an instruction that it should recover for all of the wrongfully commingled gas unless Texas Petroleum could account for the A-1 Well's production.

Even though the trial court recognized that commingling had occurred, it inexplicably refused to instruct the jury on the burden-shifting consequence of wrongful commingling. Instead, the court gave the following instruction, as part of its general damages instruction:

> The Court instructs you that if you find from a preponderance of evidence 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 with gas from other sources owned by such Defendant without making a reasonably accurate record of the amount of the commingled gas produced from the Shallow Zones, then 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) (Instruction No. 9). This instruction misstates the law of commingling by failing to place on Texas Petroleum the burden to prove its rightful share of the commingled gas. The instruction permitted Texas Petroleum to escape liability *even if* the jury found that Texas Petroleum had wrongfully produced and commingled Tellus's shallow gas. By failing to shift the burden of proof to Texas Petroleum, the trial court negated Tellus's commingling evidence and penalized *Tellus* for Texas Petroleum's failure to separately account for the A-1 Well's production. Such an error – of clear prejudice to Tellus – requires reversal and a new trial.

A. The law places the burden to prove its share of the wrongfully commingled gas on Texas Petroleum, the party responsible for commingling shallow gas.

"The doctrine of confusion of goods has been a part of English and American law for continuous centuries." *Troop v. St. Louis Union Trust Co.*, 166 N.E.2d 116, 122-23 (Ill. Ct. App. 1960). The commingled goods doctrine is recognized by almost every American jurisdiction, including Mississippi, and it applies to any type of goods that are indistinguishable in nature and value once commingled. *See Miller v. Bank of Indianola*, 107 So. 548, 549-50 (Miss. 1926); *Basin Elec. Power Coop. v. ANR Western Coal Dev. Co.*, 105 F.3d 417, 422-23 (8th Cir. 1997)

(citing cases); *Sullivan v. Murphy*, 478 F.2d 938, 970 n.74 (D.C. Cir. 1973) (citing cases and recognizing the "vitality of the principle, and its application to new and modern problems"); *In re Twin B. Auto Parts, Inc.*, 271 B.R. 71, 87 (Bankr. E.D. Va. 2001) (citing cases). Of course, courts have long applied the doctrine to cases of commingled oil and gas. *See Humble Oil and Refining Co. v. West*, 508 S.W.2d 812, 817-18 (Tex. 1974) (gas);[25] *Troop*, 166 N.E.2d at 122-23 (oil); *Russell v. Producers' Oil Co.*, 83 So. 773, 774 (La. 1920) (oil); *Stone v. Marshall Oil Co.*, 57 A. 183, 186-87 (Pa. 1904) (gas); 1 W.L. SUMMERS, THE LAW OF OIL AND GAS § 2.5 (3d ed. 2004); 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 11.7 (1987).

The most important aspect of the commingled goods doctrine is its burden-shifting consequence. Once a plaintiff proves that the defendant has wrongfully commingled the plaintiff's goods, the burden shifts to the defendant to prove its share of the commingled goods. *Humble Oil*, 508 S.W.2d at 817-18; *Basin Elec.*, 105 F.3d at 422-23; *see also Belmont v. Umpqua Sand & Gravel, Inc.*, 542 P.2d 884, 891 (Or. 1975); *Hopkins v. Hemsley*, 22 P.2d 138, 140 (Idaho 1933); *Vest v. Bond Bros.*, 137 So. 392, 393 (Ala. 1931); *Lightner Mining Co. v. Lane*, 120 P. 771, 779 (Cal. 1911); 1 Am. Jur. 2d *Accession and Confusion* § 20; 15A C.J.S. *Confusion of Goods* § 14.

Mississippi adopted the rule more than 80 years ago. In *Miller v. Bank of Indianola*, 107 So. 548 (Miss. 1926), a bank improperly commingled a county's tax collections with other county funds. *Id.* at 549. The Court held that the bank had the burden of separating the funds:

> [The banks] are under the duty to show, when called on to account, the amount of money received, and the true daily balances of such account, and, if they commingle the funds in such manner that this cannot be ascertained from their

[25] The commingling doctrine has been applied in oil and gas cases in Texas Petroleum's home state for more than 60 years. *See Humble Oil*, 508 S.W.2d at 817-18; *Mooers v. Richardson Petroleum Co.*, 204 S.W.2d 606, 607-08 (Tex. 1947); *W.L. Lindemann Operating Co. v. Strange*, 256 S.W.3d 766, 781-82 (Tex. App. 2008); *Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d 243, 256 (Tex. App. 1987); *Exxon Corp. v. West*, 543 S.W.2d 667, 668-69 (Tex. Civ. App. 1977).

> books *they must be able to point out and make a correct accounting*, or, in default, they would be held liable for interest on the entire account.

Id. at 549-50 (emphasis added); *see also Peterson v. Polk*, 6 So. 615, 615 (Miss. 1889) (defendant who improperly mingled fungible staves could not impose burden on plaintiff to identify her staves). This Court relied on the Pennsylvania Supreme Court's decision in *Stone v. Marshall Oil Co.*, among other cases, to support application of the confusion of goods doctrine. *Id.* at 550. *Stone* applied the doctrine to wrongfully commingled natural gas. 57 A. at 186-87.

Burden-shifting is critical to the commingling doctrine. It gives force to the equitable principle that, as between an innocent party and one responsible for commingling, justice requires the commingling party to bear the loss if he cannot separate his goods from the confused mass. *See Lackey v. Lackey*, 691 So. 2d 990, 993 (Miss. 1997) (refusing to place burden on innocent party to prove her share of commingled trust account); *In re Twin B. Auto Parts*, 271 B.R. at 87 ("[I]f goods have been commingled, the burden of identifying the property belongs to the one most culpable for the commingling."); *Farrow v. Farrow*, 238 S.W.2d 255, 256-57 (Tex. Civ. App. 1951) ("The principle, we apprehend, is but a part of equity's declination to extricate the wrongdoer from self-imposed hard conditions, or to tax the innocent, where one of two not *in pari delicto* must suffer."). As a practical matter, the burden shifts because the proof necessary to separate the commingled goods is peculiarly within the knowledge of the party responsible for the commingling. *See Humble Oil*, 508 S.W.2d at 818; *Sullivan*, 478 F.2d at 970 & n.74. If a commingling jury instruction does not shift the burden to the responsible party, the instruction – and the doctrine – are meaningless.

B. The trial court's failure to instruct the jury that Texas Petroleum bore the burden to prove its share of the commingled gas requires reversal.

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.[26] Instead, the trial court merely instructed that a finding of commingling did "not preclude[]" Tellus from recovering damages. R. 12646. Tellus objected to this instruction because it misstated the burden of proof. Tr. 5469-70. Although the court's instruction called the jury's attention to the issue of commingling, it failed to explain that the burden of proof shifted if the jury found that commingling occurred. Instead, Instruction No. 9 required Tellus "to prove the amount of their loss . . . ." Texas Petroleum precipitated this error by arguing that Mississippi does not recognize the commingling theory. Tr. 5472. This is simply wrong. *See Miller*, 107 So. at 549-50; *Polk*, 6 So. at 615; *cf. Lackey*, 691 So. 2d at 993.

The commingled goods doctrine permits the jury to return a verdict for a plaintiff complaining of the misappropriation of its goods even where it cannot be determined how much of the commingled goods belong to the plaintiff. The trial court's commingling instruction had precisely the opposite effect. If the jury found that Texas Petroleum had commingled shallow gas from the A-1 Well with gas from its other wells in Baxterville Field, it had to determine the amount of shallow gas taken before it could render a verdict. Here, the burden of proof is critical. If Tellus must prove the portion of the commingled gas that belonged to it, as the jury instruction erroneously required, Texas Petroleum could avoid liability *even though it had wrongfully taken Tellus's shallow gas* if the jury could not determine the amount of gas taken.

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[26] The trial court refused Tellus's proposed jury instruction with the proper burden-shifting standard. R. 12667 (No. P-17). Tellus's proposed instruction provided as follows:

> 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 reasonable 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.

Id. Another proposed instruction defined the "1949 JOA Gas Horizons" as the shallow sands. R. 12655.

Ironically, the means by which Texas Petroleum could escape liability would be a second legal wrong – its unlawful commingling of gas that it had taken without any legal right and without keeping accurate records. These compound wrongs meant that a jury had to render a defense verdict even if it found that Texas Petroleum had wrongfully commingled gas, if the jury also found that Tellus did not prove *how much* shallow gas had been commingled.

If the burden of proof had been shifted to Texas Petroleum, as it should have been, a jury finding that commingling had occurred would conclude the liability discussion. The only remaining question would be damages, *i.e.* the amount and value of shallow gas wrongfully taken. Texas Petroleum would, of course, be permitted to mitigate its liability by demonstrating the amount of the wrongfully commingled gas it owned and had a right to produce.

Failing to properly instruct the jury on the burden of proof is an "extremely prejudicial" error in any case. *See Tharp*, 641 So. 2d at 27; *Lewis*, 129 So. 2d at 360-61. It was especially so here. The commingling jury instruction did not simply misstate the burden of proof – *it imposed the burden on the wrong party.* As a result, Texas Petroleum was permitted to escape liability even if the jury found that it had wrongfully produced and commingled Tellus's gas.

II. The Trial Court's Special Interrogatories Violated Rule 49 and Prevented the Jury from Returning a General Verdict For Tellus.

Mississippi Rule of Civil Procedure 49(c) requires special interrogatories to relate to "one or more factual issues *the decision of which is necessary to a verdict.*" Miss. R. Civ. P. 49(c) (emphasis added). Rule 49 interrogatories "may inquire concerning issues of fact *necessary to the decision.*" *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38, 49 (Miss. 1992) (emphasis added), *overruled on other grounds by Richardson v. APAC-Miss., Inc.*, 631 So. 2d 143 (Miss. 1994). Interrogatories should not require the jury to answer abstract legal questions or decide ancillary factual matters. *See* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL

PRACTICE AND PROCEDURE § 2511 (3d ed. 2008). The submission of interrogatories is reviewed for abuse of discretion. *Missala Marine Servs. v. Odom*, 861 So. 2d 290, 296 (Miss. 2003).

The trial court submitted a general verdict form with special interrogatories that required the jury to allocate damages on a year-by-year basis for an historical period of nine years. R. 12650-54 (R.E. 81-85). Submission of these interrogatories was error for three independent reasons: (A) they were based on an erroneous ruling that the jury may not award prejudgment interest in a conversion case; (B) they violated Rule 49 because they did not relate to the fact issues presented to the jury, but were submitted solely to facilitate the court's post-verdict interest calculations; and (C) they misled the jury to believe that it could not return a verdict for Tellus unless it agreed on complex and immaterial annualized damages calculations.

A. The special interrogatories were based on the trial court's misapplication of the common law of conversion.

As part of its claim for conversion damages, Tellus claimed interest from the time of the taking. R. 1240-41. The defendants moved to exclude evidence of prejudgment interest, arguing that prejudgment interest is not permitted in a conversion case. R. 10455-57; Tr. 578-80. Instead, the defendants argued that any prejudgment interest award is a matter of discretion for the trial judge and could not be considered by the jury. *Id.* (citing *Hancock Bank v. Ensenat*, 819 So. 2d 3, 15 (Miss. Ct. App. 2001)). The trial court mistakenly adopted this position and excluded all evidence of prejudgment interest. Tr. 708-09. In the trial court's view, prejudgment interest was not an element of damages appropriate for jury consideration, but instead could only be awarded in the court's discretion in post-trial proceedings. Tr. 582-83.

Contrary to the trial court's decision, this Court has long recognized that, absent proof of consequential damages,[27] the "*measure of damages* for conversion . . . is the fair market value of

[27] As discussed in Section VI, *infra*, Tellus sought consequential (lost profits) damages as the most reasonable measure of conversion damages in this case and was prepared to offer evidence of its lost

the converted property at the time of the conversion, with interest from the date of the conversion." *Pride Oil Co., Inc. v. Tommy Brooks Oil Co.*, 761 So. 2d 187, 191 (Miss. 2000) (emphasis added); *Ingram Day Lumber Co. v. Robertson*, 92 So. 289, 292 (Miss. 1922). It is the jury's province to award actual damages – including interest – in a common law conversion case. *See Phillips Distribs., Inc. v. Texaco, Inc.*, 190 So. 2d 840, 842 (Miss. 1966); *Skrmetta v. Clark*, 177 So. 11, 12 (Miss. 1937) ("actual damages" in conversion case, including value of property with interest, is an "issue to be determined by the jury").

To be sure, the trial court has discretion to grant prejudgment interest *in addition to actual damages* to the "prevailing party" if the damage amount was liquidated when the claim was made (i.e. breach of contract cases) or if the defendant has denied the claim frivolously or in bad faith. *Moeller v. Am. Guar. And Liab. Ins. Co.*, 812 So. 2d 953, 958 (Miss. 2002). In a conversion action, however, interest on the value of the converted property is *not* a matter of post-verdict discretion for the trial judge. It is an essential "measure of actual damages" to be considered and awarded by the jury. *See Pride Oil*, 761 So. 2d at 191; *Phillips Distribs.*, 190 So. 2d at 842; *Skrmetta*, 177 So. at 12; *Ingram*, 92 So. at 292.

B. The annualized damages interrogatories violated Rule 49 because they did not relate to factual issues "the decision of which [was] necessary to a verdict."

The trial court committed other errors in dealing with the prejudgment interest issue. First, it erroneously excluded all evidence of prejudgment interest as part of Tellus's common law conversion damages. But for this error, no special interrogatories would have been required. Second, the trial court compounded its error by submitting interrogatories that bore no relation to

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profits. The trial court denied Tellus's request for lost profits damages and limited Tellus to the value of the gas at the time it was converted.

the facts presented to the jury and led the jury to believe that it could not return a verdict for Tellus unless Tellus proved its damages on an annualized basis.

1. The trial court required special interrogatories solely to facilitate its post-verdict interest award.

Before trial, the court heard the defendants' motion to exclude all evidence of prejudgment interest, discussed in Section A. Tr. 578-83 (R.E. 88-93). Although the court thought that the motion was "not ripe" because the court would conduct "a bifurcated trial on liability and damages," Tr. 579, the court agreed that prejudgment interest was not a jury issue: "I don't think that I have to let the jury award [prejudgment interest] within their verdict. I think that's a post." Tr. 582-83. Therefore, Tellus was instructed to remove prejudgment interest from its expert's damages calculations. Tr. 583.

On October 21, 2008, the parties convened for a final pre-trial hearing. Tr. 671-74, 703-28 (R.E. 94-122). The trial court raised the verdict-form issue *sua sponte*, asking the parties to discuss "whether the Court will require the jury to render a separate damage verdict for each month of conversion." Tr. 673. Tellus again argued that the jury should be permitted to return a general verdict for damages, including prejudgment interest. Tellus explained that it would be "very burdensome," perhaps "impossible," for the jury to return a month-by-month damages verdict. Tr. 704-06. In any event, Tellus's counsel urged the trial court to make a final decision on the issue so that the parties could adapt accordingly:

> And I think, obviously, everyone has to know, *before we get started with this trial*, whether the court's going to do the calculation or whether the jury, because it affects what kind of jury instructions we're going to submit to the court. Now, we've got to submit our jury instructions in a few days, and I need to know what type of form of verdict to submit.

Tr. 706-07 (emphasis added).

The trial court again ruled that the jury would award damages "without interest" for any converted gas and proposed that interest be "calculated by the Court by appointing a master."

Tr. 708-09. But the court reiterated its position that any discussion of prejudgment interest was "premature" because the jury would not be permitted to award interest:

> But I think it's still premature. I will allow a master to determine that. And the Court, on its own accord, can award interest if we deem it appropriate. A master, that being your person or their person, can then compute the interest and allow it to the damages that the jury would decide.

Tr. 721. On October 28, 2008, the parties submitted proposed jury instructions. Tellus proposed a general verdict form. R. 12217-18. No party submitted a special verdict form or proposed that the jury answer interrogatories regarding damages. R.12244-89, 12307-73. Trial commenced on October 30. Tr. 1002.

Tellus closed its case in chief with the testimony of Oscar Hartman, its expert damages witness. Tr. 4180. Although Mr. Hartman would have testified to Tellus's total conversion damages, including prejudgment interest, he was precluded from doing so by the court. Tr. 583. After Tellus had rested, the court returned to the verdict-form issue for the first time since the trial began. Tr. 4293-4310 (R.E. 123-40). The court ruled that it would award prejudgment interest from the date of conversion if the jury returned a verdict in Tellus's favor. Tr. 4304. In keeping with this ruling, Tellus requested that the jury first return a general verdict and, only if the verdict was for Tellus, the jury could be sent back to allocate damages by year. Tr. 4304. Initially, the trial court agreed that the jury would return a general verdict and, if necessary, the court would apply interest to that verdict. Tr. 4306.

However, when Texas Petroleum's counsel sought to clarify that the court would prorate any prejudgment interest "rather than have the jury come back and find out how much of [the gas] was taken when," the trial court reversed its position. Tr. 4306. Rather than prorate the prejudgment interest, the trial court proposed for the first time that a jury instruction be submitted to facilitate the court's determination of prejudgment interest: "I think that should be determinative by the jury instruction. If you find for the plaintiff, then your verdict shall be, and

it should list year, year, year, year." Tr. 4306-07. Tellus's counsel protested this approach because it would be "very confusing for the jury," and urged the court to adhere to its initial ruling that would allow the jury to return a single damages verdict against Total and a single damages verdict against Texas Petroleum. Tr. 4307-08. Texas Petroleum's counsel quickly embraced the trial court's approach and suggested that the jury be required to answer questions regarding annual damages: "The question could be very simple. Do you find that a taking occurred during – you know, put in the amount for every taking that occurred during the following years, if any. Then you list those years, and then the jury can decide whether any taking occurred, and if so, how much." Tr. 4309. The trial court acknowledged that a year-by-year verdict form "could get too complex" and left the issue unresolved. Tr. 4310.

The verdict-form issue was not revisited until the court conducted an informal charge conference on December 12, 2008, after all parties had rested. Tr. 5450-51. Tellus submitted amended jury instructions that included both a general verdict form (No. P25-A) and, alternatively, pursuant to the trial court's instruction, a verdict form with annual allocation interrogatories (No. P25-B). R.12492-95 (R.E. 470-73). Total offered a verdict form that would have required monthly allocations. R. 12699-705. Ultimately, the trial court adopted Jury Instruction No. 12. The trial court abandoned its planned bifurcation and its proposed use of a special master, and the jury was not permitted to return a general verdict (i.e. a single damages number) without making annual calculations.

2. The special interrogatories violated Rule 49 by seeking answers that were not necessary to the general verdict.

As shown above, the special interrogatories were submitted solely to elicit responses that *the court* could use to calculate prejudgment interest *after a verdict was returned.* This was a plain violation of Rule 49, which limits the use of special interrogatories to "one or more factual issues *the decision of which is necessary to a verdict.*" Miss. R. Civ. P. 49(c) (emphasis added).

The trial court's interrogatories did not seek answers that were "necessary" to a damages verdict on Tellus's claims. No rule requires a jury to allocate damages on a yearly basis or by any other unit of time as a condition for returning a general damages verdict. *E.g.*, *Parker Tractor & Implement Co. v. Johnson*, 819 So. 2d 1234, 1238-39 (Miss. 2002) (affirming general verdict for lost profits); *Peterson v. Ladner*, 785 So. 2d 290, 297 (Miss. Ct. App. 2000) (affirming general verdict for lost earnings). General damages verdicts are customary under Mississippi law. *See* Miss. R. Civ. P. 49(a) & cmt.; *accord Flournoy v. Brown*, 26 So. 2d 351, 355 (Miss. 1946).

The interrogatories were harmful as well as unnecessary. They required complex annualized damage allocations that were relevant only to *post-verdict* interest calculations by the judge. The court excluded interest testimony because it thought that prejudgment interest was a post-verdict issue for the judge. Thus, the jury heard no evidence on prejudgment interest. Yet, the court required the jury to make annual damage allocations that related solely to prejudgment interest – the very issue it had excluded from the jury's consideration. Once the trial court decided that prejudgment interest was a pure matter of law, it was error to require jurors to perform the most complex aspect of those legal calculations with virtually no evidence on which to base such calculations.

C. The trial court's special interrogatories precluded a verdict for Tellus unless the jury completed complex and legally irrelevant annualized damages allocations.

The most prejudicial aspect of this confusing verdict form was that it made the ability of the jury to return a verdict for Tellus *dependent upon* Tellus's proof of its damages on a year-by-year basis. The verdict form instructed the jurors that, "[i]f your verdict be for the Plaintiffs against Texas Petroleum . . . you *shall* apportion the damages for each year[.]" R. 12653 (R.E. 84) (emphasis added). Under this mandatory instruction, the jury's verdict was conditioned on its ability to agree on annualized damages. *Cf. Mariner Health Care, Inc. v. Estate of Edwards*

ex rel. Turner, 964 So. 2d 1138, 1154 (Miss. 2007) (recognizing that the "precise language" of jury instructions is crucial). Unless Tellus proved – and the jury was able to determine – the amount of shallow gas produced by the A-1 Well with year-by-year precision, no general verdict for Tellus could be returned.

Proof of damages may support a verdict even if those damages are not allocated by date. To be sure, a plaintiff's failure to make time-specific damages proof may have consequences when prejudgment interest is sought, but there is no requirement that such proof be made as a prerequisite to any recovery at all. The interrogatories reinforced the mistaken notion, introduced by the erroneous commingling instruction, that Tellus bore the burden to prove its share of the wrongfully commingled gas and compounded that error by requiring the jury to derive a verdict with expert-like yearly precision. The complexity of this task was not lost on Texas Petroleum's co-defendant, who closed with the following assessment of the special interrogatories: "That's a complicated form. It's got a lot of stuff to fill out in it. I'm asking ya'll not to do any of it." Tr. 5670.

The form was complicated in part because jurors heard virtually no testimony about annual damages calculations during trial. Before trial, the court had informed the parties that it would "bifurcate" the trial into separate liability and damages phases. Later, the trial court recognized that the prejudgment interest calculations were likely to be so complex that a special master would be required to complete them. Obedient to the court's pretrial ruling, Tellus deleted prejudgment interest from the damage calculations that were presented to the jury.

Tellus tried the case with the understanding that it would go to the jury on a general verdict and any interest calculations would be made in separate, post-verdict proceedings. Tellus's evidence conformed to this understanding. As a result, the testimony of Tellus's damages expert, Oscar Hartman, focused on his summary of the total damages caused by Total

($931,570.08) and Texas Petroleum ($4,723,422.13). Tr. 4147-48; Ex. 405-I (R.E. 466). Hartman discussed his methodology and offered a spreadsheet of monthly damages calculations to support his testimony. Tr. 4127-33; Ex. 405-A (R.E. 456-59). Although Hartman noted that his damage calculations could be annualized by adding the months in each year, Tr. 4133, neither his testimony nor any documentary evidence provided such annual allocations for the jury. In fact, the jury heard no specific testimony on annualized damages at all. In 5,700 pages of transcript, the only evidence that could support an annualized damages calculation is confined to six pages of testimony and one exhibit showing monthly calculations.

Tellus's decision to present a single, easy-to-understand damages figure made sense when trying the case to a general verdict. With interest calculations to be made post-verdict, perhaps by a special master, it would have been unnecessary and unwise to overwhelm the jury with complex, annualized damages allocations irrelevant to a general verdict.

However, Tellus's trial strategy was completely and irreparably undercut when the trial court reversed its pretrial ruling *after all parties had rested.* The trial court's last minute decision to submit special interrogatories that required the jury to allocate damages separately by year came too late to give Tellus notice that it must lay a jury-friendly foundation for annualized damages. As a result, the only evidence from which the jury could compute annualized damages was Hartman's unexplained spreadsheet. *See* Ex. 405-A (R.E. 456-59). Unless the jury understood and chose to adopt Hartman's monthly production estimates wholesale,[28] it was left with the hopelessly confusing task of dividing whatever volume of production (in Mcf's) it could

[28] The jury may have wished to depart from Hartman's general damage calculations. The jury might have desired to depart downward (in Texas Petroleum's favor) because Hartman's figures were estimates from the entire A Lease, as opposed to a precise accounting of the A-1 well's production, Tr. 4156-57, 4162-63, or because Total's expert testified that Tellus's unaccounted for shallow gas estimates were too high, Tr. 4446-47. The jury might have desired to depart upward (in Tellus's favor) because Hartman's damage calculations were based on the most conservative estimates of unaccounted for shallow gas production, Tr. 2637, or the most favorable assumptions regarding the efficiency of Texas Petroleum's fuel-burning equipment, Tr. 4148-49.

agree on into monthly units from May 1995 to June 2004. Even if the jurors could agree on monthly production volumes, they then had to convert those volumes into monthly damages amounts based on Hartman's spreadsheet. Finally, the jurors had to annualize those damages for a nine-year period. In other words, the trial court's interrogatories required the jury to adapt Hartman's expert methodology to their agreed-upon production volumes. The interrogatories forced the jurors to become their own experts.

Had Tellus known that such allocations would be critical to the verdict, it could have adapted its proof accordingly. Hartman could have provided a year-by-year damages allocation. Annualizing the historic value of fluctuating natural gas production is a complex task, the domain of expert witnesses, under the best circumstances. These were the worst circumstances because the interrogatories were not developed until *after* Tellus rested its case. Tellus had a right to fair notice that it must educate jurors to perform what became their most critical and complicated task under the special interrogatories – annualizing a general damages verdict.

The trial court's special interrogatories precluded a general verdict for Tellus *unless* the jurors agreed not only on Tellus's damages, but on how those damages should be annualized over a historic period of nine years. It was error to tie a general verdict to such complex and legally irrelevant calculations. It was prejudicial to do so after Tellus had presented its case with the understanding, reinforced by the trial court's express pretrial preference, that the jury would return a general verdict.

III. The Trial Court Erred by Permitting Two Unlicensed Witnesses to Offer Expert Engineering Testimony in Violation of Mississippi Criminal Law.

The Mississippi Engineering Practices Act (the "Act") requires a license in order to practice engineering in the state. Miss. Code § 73-13-1. Engaging in the practice of engineering without a license is a criminal offense, punishable by a prison sentence of up to three months and a fine of up to $5,000. Miss. Code § 73-13-39. The Act defines the "practice of engineering" as

"any service or creative work the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as . . . expert technical testimony . . . ." Miss. Code § 73-13-3.

Thus, no witness may testify regarding engineering matters unless he or she is a licensed engineer in the State of Mississippi. *See* Miss. Code § 73-13-3; *Bossier v. State Farm Fire and Cas. Co.*, 2009 WL 4061501, *3 (S.D. Miss. Nov. 20, 2009) (slip op.). Operating under substantially identical rules of evidence, federal courts have uniformly enforced the statute to exclude unlicensed witnesses from presenting technical engineering testimony that could impact the jury's deliberations. *See Aiken v. Rimkus Consulting Group Inc.*, 333 Fed. Appx. 806, 813 (5th Cir. 2009) (excluding unlicensed plaintiff expert's proposed testimony that a licensed engineer breached his duty of care); *Bossier*, 2009 WL 4061501 at *3 (excluding unlicensed defense expert's proposed testimony regarding the cause of plaintiff's property loss). In *Bossier*, the court excluded the testimony of an expert witness in the field of engineering even though he satisfied both Rule 702 of the Federal Rules of Evidence and the familiar *Daubert* standard. 2009 WL 4061501 at *1. These courts reasoned that permitting such unlicensed testimony would effectively sanction a deliberate violation of Mississippi substantive law. *See Aiken*, 333 Fed. Appx. At 813; *Bossier*, 2009 WL 4061501 at *6.

Over Tellus's objections, the trial court permitted two Texas Petroleum witnesses to tell the jury that, as a matter of engineering fact, the A-1 Well did not produce shallow gas. Although Nathan Meehan was not licensed to do so, he attacked the engineering-based methodology and conclusions of Henry Coutret, a licensed petroleum engineer. Tr. 5083-85. Rick Garza, also unlicensed, testified that the A-1 Well could only have produced gas from the deep zones. Tr. 4821-22. These unlicensed witnesses conducted an engineering-based

investigation of Baxterville Field and the A-1 Well, evaluated the conclusions of licensed engineers, then led lay jurors in an engineering-based decision on the sources of gas produced by the A-1 Well.

Texas Petroleum's unlicensed witnesses indisputably engaged in the practice of engineering. Their conduct would have been illegal in all other settings. It should not be sanctioned in the courthouse.

IV. The Trial Court Erred by Permitting Texas Petroleum's Expert Witness to Offer at Trial a New Theory on the A-1 Well's Production Capabilities.

Tellus made a strong case that the "fish" in the A-1 Well acted as a plug, preventing deep zone production. However, Texas Petroleum ambushed Tellus with an undisclosed expert opinion that the fish was not a plug. Allowing this surprise expert opinion was reversible error.

The right to discover and prepare for the testimony and opinions of an opponent's experts is essential to a fair trial. *Coltharp v. Carnesale*, 733 So. 2d 780, 786 (Miss. 1999). The Mississippi Rules of Civil Procedure require each party to designate any expert witness before trial and "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). This Court has made clear that "[a]n expert should not be allowed to testify concerning a subject matter which is not included in the response to the interrogatory, and allowance of such would be reversible error." *Canadian Nat'l/Illinois Cent. R. Co. v. Hall*, 953 So. 2d 1084, 1097 (Miss. 2007). Violation of expert witness disclosure requirements is particularly egregious when the expert is permitted to offer a new theory at trial. *Carnesale*, 733 So. 2d at 786; *T.K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 951 (Miss. 1992).

A. Texas Petroleum's expert witness, Rick Garza, surprised Tellus at trial with a previously undisclosed opinion that the A-1 Well could produce deep zone oil and gas through a 200 foot plug.

Texas Petroleum's unlicensed expert engineer, Rick Garza, disclosed no pre-trial opinion on whether the "fish," which consisted of a pump, tubing anchor, and tubing covered by 150 to 200 feet of heavy drilling mud, scale, shale rock, and sand lodged in the well at a depth of 7,600 feet, could impact the A-1 Well's ability to produce oil and gas from the deep zones below 8,000 feet. Before trial, Garza disclosed three opinions: (1) the gas produced by the A-1 Well came from the LTOP deep zones; (2) there were no gas reserves in the shallow zones; and (3) Tellus's experts' estimates of actual shallow gas production by the A-1 Well were based on faulty assumptions. *See* Expert Report of R.Garza, P.R.E. 474-546.[29]

Garza's opinions were based solely on his historical analysis of oil and gas production by wells in Baxterville Field, not a structural analysis of the A-1 Well. *See* P.R.E. 476-78. In fact, Garza never observed the well while the fish was lodged in the wellbore. *See id.* (noting that Garza's opinions are based, in part, on two field visits in April and May 2006; the fish was removed in December 2005). Nowhere does Garza's report mention the fish or discuss how the fish, which effectively plugged the well, could impact production from the deep zones. *See id.*

Garza expressed no pretrial opinion regarding the ability of a well to produce oil and gas through a 200 foot plug. At trial, he suddenly developed one. After Garza presented his disclosed opinions to the jury, Texas Petroleum's counsel invited him to discuss "other topics . . . raised by Tellus through the course of this trial . . . ." Tr. 4891-92. Garza proceeded to offer four new opinions, all beyond the scope of his expert report. Tr. 4892-907 (R.E. 141-58). The

[29] Texas Petroleum incorporated Garza's expert report into the record by reference when it designated Garza as an expert. R. 3293-94. However, a copy of the report was not physically placed in the Record on Appeal. Therefore, Tellus has moved contemporaneously with the filing of this brief to have a copy of the report added to the appellate record. As the Court has not yet acted on this motion, Tellus has labeled Garza's expert report as a Proposed Record Excerpt, "P.R.E. __."

trial court overruled Tellus's objections to these new opinions and announced in front of the jury that it would allow Garza's testimony "because it's come up, and he is an expert, and I believe it can aid the jury in making a determination." Tr. 4902. The highlight of Garza's new testimony came when he closed by offering his expert opinion that the 200 foot plug did not prevent the A-1 Well from producing deep zone oil and gas and that the production of deep zone oil would not leave any stains on the fish. Tr. 4906-07 (R.E. 157-58).

This surprise opinion prejudiced Tellus. A key part of Tellus's evidence that the A-1 Well did not produce gas from the deep zones was that the fish effectively plugged the well and prevented deep zone production. Texas Petroleum's consulting engineering expert concluded that the fish plugged the well. Tr. 1958-63; Ex. 440. Witnesses for both sides also testified to this fact. Texas Petroleum's geologist, Norris, testified that the fish would prevent the flow of oil and gas from the deep zones. Ex. 225 (R.E. 360-62). Texas Petroleum's production foreman, Walters, admitted that the fish was "an effective type of plug" in the well, Tr. 1959-60, and acknowledged that the well was "plugged solid" when the fish was retrieved in 2005, Tr. 2145-46. Wade Gipson, Tellus's lease operator, testified that it was impossible to get production from the LTOP unless the fish was removed. Tr. 3159. Finally, Walters admitted that, if the A-1 Well had produced oil from the deep zones, the fish would be stained black with oil. Tr. 2146. Walters and Gipson both testified that there was no oil staining on the fish. Tr. 2062-63, 3187.

This virtual unanimity of opinion on the effectiveness of the fish as a plug, and the fact that Texas Petroleum had not designated any expert to counter it, caused Tellus to offer no expert testimony on the plug-like properties of the fish. Instead, Tellus relied on the consistent testimony of Texas Petroleum's consulting engineer and geologist, Texas Petroleum's field workers, and Tellus's field workers, all of whom testified that the fish plugged the well and prevented production from the deep zones. Further, eyewitnesses to its extraction in 2005

uniformly testified that there was no oil staining on the fish. As the trial began, there was no physical evidence or expert proof to support Texas Petroleum's claim that the well had produced oil from the deep zones.

Garza's surprise testimony was intended to provide that evidence under circumstances that prevented Tellus from challenging his testimony. Garza testified that the fish was "very porous, very permeable," contrary to the field workers' accounts. Tr. 4907 (R.E. 158). Then, Garza told the jurors that oil could pass through the 200 foot plug without staining it. *Id.* According to Garza, hot water produced with the heavy crude would "steam clean" the fish, leaving no trace of the oil production. *Id.* Garza told the jurors that, in his expert opinion, the other witnesses were wrong – the fish was not a solid plug, but a self-cleaning sieve. Not a word of this testimony had ever been disclosed or forecast before trial.

B. Garza's surprise expert opinion unfairly ambushed Tellus's case.

Permitting Garza to surprise Tellus with an expert opinion that the A-1 Well could produce significant amounts of deep zone oil and gas through a 200 foot fish that other witnesses described as a "solid plug" was reversible error. This Court has stressed that, in order to ensure fairness at trial, the parameters of an expert's testimony are set by his pretrial report. Allowing an expert to offer a new theory at trial is prejudicial error that warrants reversal. *See Carnesale*, 733 So. 2d at 786 (allowing expert physician to offer new theory at trial on the cause of plaintiff's injuries was reversible error); *T.K. Stanley*, 614 So. 2d 950-51 (allowing expert on cause of disability to offer undisclosed opinion at trial on permanency of disability was reversible error); *see also West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 721 (Miss. 1995) (affirming exclusion of expert opinion that was not disclosed during discovery); *Winston v. Cannon*, 430 So. 2d 413, 415 (Miss. 1983) (same).

Garza's surprise testimony deprived Tellus of its ability to counter Texas Petroleum's expert evidence by preparing a demonstration of the plug's properties, obtaining an expert witness to review and rebut Garza's theory, and effectively preparing to cross-examine Garza regarding his new theory.[30] *See Harris v. Gen'l Host Corp.*, 503 So. 2d 795, at 797-98 (Miss. 1986) (recognizing that cross-examination or rebuttal evidence can be "far more effective" when party is given fair opportunity to prepare). Here, Garza's surprise expert opinion was particularly damaging because it directly undermined the testimony of *lay* witnesses. This Court has recognized the powerful effect that an expert opinion can have on jury deliberations. *See Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 147 (Miss. 2008) (acknowledging that "juries usually place greater weight on the testimony of an expert witness than that of a lay witness"); *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007) ("[J]uries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience"). As noted above, the trial court compounded the prejudicial impact of Garza's testimony by signaling to the jury that Garza's previously undisclosed opinions were critical and, in fact, would "aid the jury in making a determination." Tr. 4902. Garza's undisclosed opinions may well have overridden the lay witness testimony regarding the fish's plugging properties.

This Court's rules requiring advance disclosure of expert testimony should be "rigidly enforced." *Carnesale*, 733 So. 2d at 786. Texas Petroleum was permitted to ambush Tellus with an expert opinion that undermined the virtually unanimous evidence that the well was plugged by a fish the prevented deep zone production. If a party is allowed to offer undisclosed expert

[30] Although the trial court attempted to ameliorate its error by permitting Tellus to call rebuttal witnesses, Tr. 5318; 5327, the opportunity to adequately prepare for Garza's testimony had been lost and the irreversible harm had already been done. *See Harris*, 503 So. 2d at 797-98. The prejudice caused by Garza's severely undercutting testimony could not be undone at trial.

proof at trial, the protections of Rule 26(b)(4) will be completely eviscerated and all trials will be by ambush. The trial court's ruling was reversible error.

V. The Trial Court Erred by Excluding Evidence that a Key Fact Witness, Brad Lowe, Was Biased Against Tellus and In Favor of Texas Petroleum.

Evidence that a key fact witness may be biased for or against a party is always relevant. Brad Lowe was a key witness for Texas Petroleum. He also had strong reasons to resent Tellus and favor Texas Petroleum. Lowe had stolen property from both companies while this litigation was pending; Tellus assisted in his prosecution and sought restitution from Lowe, while Texas Petroleum declined to prosecute him. Evidence of Lowe's crimes, and the parties' divergent responses to those crimes, was important to the jury's ability to assess his testimony. However, the jury was not permitted to hear evidence of Lowe's potential bias.

A. Evidence of Brad Lowe's dual bias against Tellus and in favor of Texas Petroleum was material and admissible under Mississippi Rule of Evidence 616.

Evidence that Brad Lowe may have harbored a dual bias, against Tellus and in favor of Texas Petroleum, was both relevant and material to the jury's ability to assess his testimony. The Mississippi Rules of Evidence specifically provide for the use of such bias evidence: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice or interest of the witness for or against any party to the case is admissible." Miss. R. Evid. 616. Indeed, "bias, motive or interest are *always material* and may be proven by extrinsic evidence." *Cantrell v. State*, 507 So. 2d 325, 330 (Miss. 1987) (emphasis added); *see McLemore v. State*, 669 So. 2d 19, 25 (Miss. 1996) (proof of bias, motive or interest "is always relevant").

A jury cannot fairly weigh a witness's testimony if it is not informed of that witness's material biases and partiality. *See* 1 MCCORMICK ON EVIDENCE § 39 (6th ed.). Therefore, "[a]ny incentive a witness may have to falsify his testimony, commonly referred to as bias, is relevant to the witness's credibility and the resulting weight the jury should accord to the witness's

testimony." *United States v. Leslie*, 759 F.2d 366, 379 (5th Cir. 1985). Preventing a party from introducing evidence of bias is reversible error. *McLemore*, 669 So. 2d at 25, 27. This is particularly true when the biased witness is a key fact witness, whose testimony regarding key facts cannot be corroborated. *See Zoerner v. State*, 725 So. 2d 811, 814 (Miss. 1998).

B. The trial court admitted Lowe's factual testimony regarding the A-1 Well's production which was crucial to Texas Petroleum's case.

Brad Lowe, Texas Petroleum's full-time pumper, was the most critical eyewitness to production by the A-1 Well from January 1996 to July 2004. He maintained the well and visited it regularly to ensure that it was producing gas. Tr. 1777-78. He took daily meter readings and assigned gas production between the A-1 and A-13 wells. Tr. 1778-81. Lowe was the one witness who could say whether Texas Petroleum had misallocated sales gas between the A-1 and A-13 wells or diverted gas from the A-1 Well's casing through a bypass line into the fuel gas system. Because only Lowe had daily access to the A-1 Well, no eyewitness could rebut his testimony.

At trial, Lowe gave testimony very favorable to Texas Petroleum. Lowe testified that, even though the A-1 Well's casing was open and the well was configured so that it *could* send gas into the unmetered fuel system, it sent gas only into the metered sales gas system. Tr. 1809, 1887-88. Lowe acknowledged that gas *could* be sent from the A-1 Well into the excess fuel gas system through a "bypass" line, but said that Texas Petroleum "had no reason" to send gas through the bypass because it could get fuel gas from another source. Tr. 1838, 1843-46.

Lowe also bolstered Texas Petroleum's case with surprise testimony that he and Larry Courtney made a significant piping change to the A-1 Well in 2000 in order to accommodate the "real thick oil" that the well began producing after the 1998 workover. Tr. 1804-09.[31] Lowe

[31] Lowe admitted that he had never told anyone about this alleged piping change before trial. Tr. 1825.

said that Texas Petroleum wanted all of the gas from the A-1 Well metered, Tr. 1889, and that no one at Texas Petroleum ever told him to send gas into the fuel gas system, Tr. 1891. Although Lowe conceded on cross-examination that he arbitrarily assigned gas production between the A-1 and A-13 wells, he told the jury that he conducted "well tests" and employed "scientific" principles to allocate production on the Bilbo A Lease. Tr. 1892-93. Finally, Lowe testified that Texas Petroleum was not part of any "wrongdoing" related to the A-1 Well. Tr. 1893.

Lowe's testimony was central to Texas Petroleum's closing argument, which relied on Lowe to establish three crucial propositions. First, Lowe's testimony regarding "heavy oil" production was used to support Texas Petroleum's theory that the A-1 Well was producing oil and gas from the deep zones, not the shallow zones. Tr. 5594. Second, Lowe's testimony was cited as support for Texas Petroleum's theory that all Bilbo A Lease gas was metered: "Mr. Lowe said everything got metered for sales." Tr. 5601. "They didn't send gas – remember, earlier, [Lowe] said that all the gas that came from the A-1 was metered." Tr. 5617. Lowe also supported Texas Petroleum's defense that it never secretly sent gas through the bypass line:

> So what Mr. Lowe is saying is that, yeah, he remembers gas coming onto the lease from the area, but it didn't go off the lease. In fact, what we know is, what he said was that the gas always was metered because the owners [of Texas Petroleum] wanted it metered.

Tr. 5618. Third, Lowe's testimony was cited as support for Texas Petroleum's theory that there was no misallocation of gas between the A-1 and A-13 wells because Lowe "analyzed" the A Lease production: "Mr. Lowe would allocate between the wells based on his analysis of what was being produced. There was no high-level scheme here to do anything wrong." Tr. 5620.

According to Texas Petroleum, the jury could rest their verdict on Lowe's word. He was the witness who was regularly on the Bilbo A Lease, monitoring the A-1 Well on a daily basis and supposedly reporting just the facts to the jury. He would tell the jurors if Texas Petroleum had "do[ne] anything wrong." *See* Tr. 5620.

C. The trial court excluded evidence of Lowe's dual bias which was crucial to jury's ability to fairly weigh his favorable testimony for Texas Petroleum.

In addition to being Texas Petroleum's star witness, Lowe was a confessed thief. *See* Ex. 227 (R.E. 389-423).[32] In the winter of 2007, in the midst of this litigation, Lowe and others stole copper from well sites belonging to both Tellus and Texas Petroleum. In December 2007, Lowe confessed to stealing about $2,400 worth of Texas Petroleum's property. Ex. 227. In January 2008, Lowe pled guilty to conspiring to steal $9,416.70 worth of Tellus's property. *Id.*

Tellus assisted in Lowe's prosecution and sought restitution for his crimes. Lowe pled guilty to conspiracy to commit grand larceny as a result of his thefts from Tellus. *Id.* Rather than accept the guilty plea, the court entered an Order of Non-Adjudication and sentenced Lowe to five years of probation, during which time he was forbidden to leave Mississippi, consume alcohol, or possess a firearm. *Id.* Lowe was also confined to his home after 11:00 p.m. and ordered to pay a $1,500 fine and his share of $9,416.70 in restitution to Tellus. *Id.* Perhaps mindful of Lowe's importance to its case, Texas Petroleum took a much different approach. Rather than seek restitution for Lowe's copper thefts, Texas Petroleum refused to prosecute him; instead, Texas Petroleum continued to pay Lowe his salary during the pendency of this litigation! Tr. 1883; Ex. 227. In fact, Lowe continued to be employed by and draw a salary from Texas Petroleum at the time he testified at trial. Tr. 1775; *id.*

Without a doubt this evidence, strongly suggesting that Lowe harbored a dual bias against Tellus and in favor of Texas Petroleum, would have directly impacted the jury's assessment of

[32] Exhibit 227 is Tellus's proffer on Brad Lowe's bias. It was marked for identification only and the trial court prohibited its introduction or discussion. Tr. 1900. The trial court mistakenly barred this evidence under Rule 609 of the Mississippi Rules of Evidence. Rule 609 prohibits the use of *unrelated* criminal convictions and accusations of criminal conduct for the purposes of generally attacking on the witness's credibility. *See* Miss. R. Evid. 609(a)(1)(A); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). However, Rule 609 does not prohibit the use of a criminal conviction, guilty plea, or non-adjudication to expose a witness's case-specific or party-specific bias. *See id.*; *Zoerner*, 725 So. 2d at 814.

Lowe's credibility. But the jurors were not permitted to hear any of it. Before trial, Texas Petroleum moved to exclude all evidence of Lowe's non-adjudication and his guilty plea under Rule 609 of the Mississippi Rules of Evidence because Lowe received a "non-adjudication" rather than being convicted of a crime. R. 10490-502. The trial court granted the motion in limine, stating that the court was "just not going to let [Lowe's] criminal record taint himself when he doesn't really have a criminal record." Tr. 591-92 (R.E. 160-61). This precluded any discussion of Lowe's thefts against Tellus.

At trial, Tellus was also precluded from discussing Lowe's thefts against Texas Petroleum and Texas Petroleum's benevolent decision not to prosecute him for those thefts. In fact, Lowe flatly denied that he had any reason to be biased in favor of Texas Petroleum:

> Q. Would you agree with me that you do, in fact, have a very strong reason to be biased in favor of Texas Petroleum in this case?
> A. No, sir.
> Q. Well, sir - -
> A. Unless they are planning on firing me, I wouldn't be biased.
> Q. Well - -
> A. I've told the truth to the best of my knowledge.
> Q. I understand but - -
> A. I'm going to keep continuing.

Tr. 1862. Lowe signaled to the jurors that he was not biased and could be trusted to tell the truth.

When Tellus's counsel attempted to follow up on Lowe's professed neutrality and honesty by asking if he had "stolen a fair amount of property from Texas Petroleum," the trial court cut him off. Tr. 1862.[33] Instead, Tellus was limited to asking Lowe whether he "owed a debt of gratitude to Texas Petroleum," which Lowe also denied: "No, sir. I've repaid that debt already." Tr. 1883.[34] Lowe was permitted to explain away his theft of $2,400 worth of Texas Petroleum property as a simple misunderstanding over "copper salvaging." *Id.*

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[33] This exchange and the subsequent bench conference are set forth at R.E. 159-184.

[34] Lowe's remark about repaying his debt, was a reference to Texas Petroleum's requirement that he purchase gasoline for his truck for a period of four months while performing his duties as the company's

The trial court thus excluded the most critical evidence of Brad Lowe's dual bias – bias *against* Tellus, from whom Lowe had stolen property and was punished, and *in favor* of Texas Petroleum, from whom Lowe had stolen property and was pardoned. Lowe surely harbored significant animosity toward Tellus, who he likely viewed as the party responsible for his financial losses (restitution payments) and his loss of freedom (probation). By contrast, Texas Petroleum certainly held a favored place in Lowe's mind, as an employer who kept him on the payroll even after he had stolen property from the company. At the very least, these events – occurring literally months before trial – were highly likely to have colored his view of the parties and impacted his testimony. But this evidence was kept from the jury. Lowe was permitted to testify that he was not biased in favor of Texas Petroleum, not biased against Tellus, and owed no debts to Texas Petroleum – the jurors could trust him to tell the truth about the A-1 Well.

At trial, Lowe walked a fine and favorable line for Texas Petroleum, admitting that the well *could* produce gas from the casing to the sales gas system without proper allocations and produce gas from the casing into the fuel gas system without any metering whatsoever, but denying that Texas Petroleum ever did do those things. Tellus had no eyewitness to rebut Lowe's testimony because the Bilbo A-1 was Texas Petroleum's well and no one other than Lowe visited it on a daily basis. Lowe knew this as well as the parties did. Under these circumstances, the jury's assessment of Lowe's credibility and motivations was critical. Any evidence tending to show that he favored one party or resented the other was material to its decision. Preventing jurors from hearing evidence that went to the heart of Lowe's credibility undermined the jury's fact-finding function and warrants a new trial. *See Zoerner*, 725 So. 2d at

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Baxterville Field contract pumper. Tr. 1883. This was the only "discipline" that Texas Petroleum imposed on Lowe. Tr. 1883; Ex. 227.

814 (reversing on grounds that party was not permitted to use prior convictions to show bias of State's key fact witness).

VI. The Trial Court Erred by Excluding Tellus's Evidence of Lost Profits Damages.

Tellus 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. The trial court excluded that evidence as "speculative," and limited Tellus's damages to the market value of the gas at the time it was converted by Texas Petroleum – April 1995 to June 2004. Tr. 4096-107. The court failed to recognize that Tellus could not have produced the shallow gas reserves until January 2003 and did not drill its first shallow gas well until 2006. Tr. 4067-69.

While the fair market value of converted property is the general measure of conversion damages, lost profits may be awarded in cases where the injured party would have used the converted property to derive future profits. *See e.g.*, *Community Bank, Ellisville, Mississippi v. Courtney*, 884 So. 2d 767, 775 (Miss. 2004); *Georgia-Pacific Corp. v. Blakeney*, 353 So. 2d 769, 773 (1978). Tellus proffered evidence of its lost profits. Richard Mills, Tellus's CEO, testified that Tellus did not have the right to drill for any shallow gas beneath the Bilbo A Lease until January 2003. Tr. 4067-69 (R.E. 190-92). Further, Tellus followed a drilling plan that did not call for the first well to be drilled until 2005 or later. *Id.* One of those wells, the Bilbo 7-15, was drilled in early 2006. Tr. 4067-68. A second well was planned, but not drilled after the Bilbo 7-15 revealed that the shallow reserves were depleted. *Id.*

Oscar Hartman, an expert in oil and gas accounting, concluded that Texas Petroleum's depletion of the shallow gas reserves in the vicinity of the Bilbo A Lease cost Tellus as much as $16,200,000 in lost profits. Tr. 4182-90 (R.E. 232-39); Ex. 405D (R.E. 463-65). He based his conclusion on the fact that Tellus planned to drill two wells on or near the Bilbo A Lease and produce the shallow gas reserves. *Id.* Hartman calculated Tellus's lost profits from April 2005

to May 2014, using actual prices received by Tellus for gas sold from April 2005 through May 2008 and the New York Mercantile Exchange ("NYMEX") natural gas futures prices from June 2008 to May 2014. Tr. 4184-86. The NYMEX's future prices are commonly used in the oil and gas industry to lock in rates for long-term production contracts. Tr. 4073-74.

The trial court excluded all evidence of lost profits, both past and future, because, in its view, basing lost profits on NYMEX futures trading prices was too speculative to permit recovery under Mississippi law. Tr. 4096-107 (R.E. 219-30). This was error. "[T]he general rule is that compensation for lost profits may be recovered in an action for conversion, where the loss is a proximate result of the defendant's act, and where the loss can be shown with reasonable certainty." *Pride Oil*, 761 So. 2d at 192. "Damages are deemed speculative only when the cause is uncertain, not when the amount is uncertain." *Warren v. Derivaux*, 996 So. 2d 729, 737 (Miss. 2008). As *Derivaux* explained: "When loss is realized, but 'the extent of the injury and the amount of damage are not capable of exact and accurate proof,' damages may be awarded if the evidence lays 'a foundation which will enable the trier of fact *to make a fair and reasonable estimate* of the amount of damage.'" *Id.* (emphasis in original).

The NYMEX provides a reasonably certain basis for determining an oil and gas producer's losses when the commodity that it would have produced in the future was wrongfully converted. *Accord BP North Am. Petroleum v. SOLAR ST*, 250 F.3d 307, 311 (5th Cir. 2001) (oil and gas producer could recover losses in the commodity futures market because such losses are not speculative when a producer uses the futures market to hedge against price changes). In any event, the allegedly speculative nature of future lost profits has nothing to do with the trial court's exclusion of evidence of lost profits that predated the trial (April 2005 to May 2008).

Under the proffered evidence, it was undisputed that Tellus could not have drilled for shallow gas under the Bilbo A Lease until January 2003. It is also undisputed that Tellus did not

plan to begin producing shallow gas until 2005 or later. Under these circumstances, the most reasonable measure of Tellus's damages is the value of the gas at the time it would have been produced and sold, not at the time it was wrongfully converted by Texas Petroleum. Tellus's lost profits were provable to a reasonable certainty based on the NYMEX commodity futures index and the trial court erred by excluding evidence of those damages.

CONCLUSION

For the reasons stated above, Tellus respectfully requests that this Court reverse the jury's verdict and remand this case for a new trial.

RESPECTFULLY SUBMITTED, this the 17th day of September, 2010.

TELLUS OPERATING GROUP, LLC, et al.
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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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This, the 7th day of September, 2010.

Michael J. Bentley