IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-CA-01794

RE

PURSUE ENERGY CORPORATION
APPELLANT

VS.

NANCY CAROL GARRETT ABERNATHY, ET AL.
APPELLEES/CROSS-APPELLANTS

Appeal from the Chancery Court of
Simpson County, Mississippi

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS
The Sykes Plaintiffs

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I. ARGUMENT

A. Pursue cannot escape punitive damages based upon an arbitrary concept of value that is in direct conflict with The *Piney Woods* Case.[1]

1. Pursue can deduct only reasonable processing costs

If Pursue is asking this Court to apply The *Piney Woods* Case, then this Court must apply The *Piney Woods* Case as written. Pursue argues that *Piney Woods* defines the task before this Court as follows:

> The task is to determine "the value added by processing."

Reply Brief of Pursue at p. 8. Value did have something to do with the issue to which the *Piney Woods* Court was speaking, i.e., the determination of pricing. However, value had nothing to do

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[1] During preparation of The Sykes Plaintiffs' Reply Brief, undersigned counsel noticed that the Court had not been given a proper history of the eight *Piney Woods* decisions in the federal court system. During the course of the federal litigation, The *Piney Woods* Cases came to be referred to based on the order of their decision, e.g., *Piney Woods I, Piney Woods II,* etc. Attached at Addendum 1to this Reply Brief is a history of The *Piney Woods* Case, identifying each by number based on the order of decision. For the remainder of The Sykes Plaintiffs' Reply Brief, each *Piney Woods* Cases will be referenced by its number, corresponding to its order of decision.

with the issue of deductibility of processing costs, generally, or the deductibility of risk capital gas plant investment costs, specifically. The entire quote from The *Piney Woods* Case is as follows:

> Processing costs may be deducted only from valuations or **proceeds that reflect the value added by processing.** (emphasis added)

Piney Woods II, 726 F.2d 225, 240, headnote [19] (5th Cir. 1984). There are two components that determine what a royalty owners' check will be each month: 1) the proceeds/price for the gas; less, 2) actual processing costs charged to royalty. As the above quote demonstrates, when the Courts in The *Piney Woods* Cases discussed concepts of "value" they were speaking directly to the proceeds/pricing component. Because the leases were "market value leases", Pursue was ordered to pay royalty based on the higher priced "market value" of the gas at the time of production and delivery instead of the lower "amount realized" at the time of sale.[2] The concept discussed by the *Piney Woods* Courts with regard to the deductibility of processing costs was not value, it was **reasonable** and **actual** costs.

The *Piney Woods* Courts recognized that there were two components/issues that had to be resolved to determine the amount royalty owners should be paid. The Fifth Circuit identified these components/issues as follows:

> The basic issues underlying this case are the meaning of "market value" and "sold at the wells" in a royalty clause [pricing] and the propriety of deducting processing costs from lessors' royalties.

Piney Woods II, 762 F.2d at 230, headnote [1]. The biggest issue, and the one that was discussed

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[2] As discussed *infra*, market value pricing resulted in a higher price because it required Shell to take into account the added value of the gas to Shell's purchasers at the time of production and delivery. Shell wanted to price the gas, at the time of sale, based on old long term gas sales contracts.

the most in The *Piney Woods* Cases was gas pricing.

Under the Piney Woods royalty owners' leases, royalty was to be determined based on the market value of the gas sold "at the wells." *Piney Woods II*, 762 F.2d at 229. Relying on the "at the well" language in its leases, Shell priced its gas based on the smaller number as if the gas were being sold under old existing gas sales contracts, without taking into account the value added to the price of the gas, through processing and transportation, at the time of delivery.[3] Shell priced its gas by placing the "point of sale on the lease". The Fifth Circuit rejected this argument. The Fifth Circuit found that this procedure created "the opportunity for manipulation" and allowed Shell to avoid its obligation to pay royalties based on market value. *Piney Woods II*, 726 F. 2d at 232, headnote [4]. Because gas could not be "sold" until it was "produced", the Fifth Circuit agreed with The Piney Woods Plaintiffs. The basis for pricing the gas for purposes of paying royalty to The Piney Woods Plaintiffs "should be 'market value at the well' at the time of production and delivery, as the district court held." *Piney Woods II*, 726 F. 2d at 235, headnotes [7] [8] [9].

This definition of market value was recognized for the final time by the Fifth Circuit in *Piney Woods VI*, 116 F.3d 478, 1997 WL 256767, * 2 (5th Cir. 1997). The Fifth Circuit, citing *Piney Woods II*, found that the term "market value" under the Shell Piney Woods leases meant current market value at the time of production and delivery, and not, as Shell had argued, the value of gas at the well on the lease at the time that Shell had entered into its old gas contracts

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[3] Rejecting Shell's interpretation, the Fifth Circuit opined that "at the well" describes not only the location of the sale but the quality of the gas sold as well. *Piney Woods II*, 726 F.2d at 232, headnote [3]. Although the gas was sold under old gas sales contracts, at the time of its future production and delivery, the gas would have greater value.

with its purchasers. *Id.* at * 2. As the Fifth Circuit stated in *Piney Woods II*, The *Piney Woods* Courts agreed with the plaintiffs' theory of gas pricing, as follows:

> We therefore conclude that the gas was not sold until it was produced. The sale contract itself provides that title passes when the gas is delivered. Accordingly, the basis of royalty should be "market value at the well" at the time of production and delivery, as the district court held.

Piney Woods II, 726 F.2d at 234-235, headnotes [7] [8] [9].

Throughout the entirety of The *Piney Woods* Cases, when the Fifth Circuit discussed concepts of value, it was in connection with the pricing of the gas at the time of production and delivery. Anything that added value to the gas before Shell's purchasers took delivery of the gas must be added to the price of the gas before royalties could be determined (component 1 pricing). From this amount, to determine royalties paid, costs could be deducted as long as such costs were "reasonable."

Again, the Fifth Circuit stated as follows:

> We agree with the plaintiffs that the processing costs, under both the "market value" [royalty owners' argument] and "amount realized" [Shell argument] provisions, **must be reasonable**. . . .
>
> Finally, processing costs are not per se chargeable to market value royalty. They **must be reasonable costs** . . . (emphasis added).

Piney Woods II, 726 F.2d at 241, headnotes [23] [24].

In its Reply Brief, Pursue asks this Court to disregard the requirement of "reasonableness" and focus the deductibility inquiry on concepts of "value." Again, if Pursue wishes The *Piney Woods* Case to be applied, it must be applied as written. The *Piney Woods* Courts approved the deduction of processing costs only if such costs were reasonable and actual. The *Piney Woods* Courts did not approve the deduction of costs based on the arbitrary concept of

whether the processing costs created value to the gas.

2. Pursue can deduct only actual processing costs

The *Piney Woods* Courts approved only the deduction of **actual** processing costs which included Shell's **actual** gas plant investment. The *Piney Woods* Courts did not approve deduction of costs that were made up based on an arbitrary belief that the cost added value to the gas, e.g., Pursues arbitrary use of Shell's $41,000,000 gas plant investment. Once again, for emphasis, the description of the Shell Formula by the United States District Court in *Piney Woods I* follows:

> The cost of gas processing and sulfur recovery at the Thomasville field, together with costs of gathering and transporting, are deducted by Shell in calculating payments to royalty interest owners for their respective interests in the subject case. Similar charges are deducted *pro rata* from the working interest owners' share of production. To compute these payments, Shell devised an allocation and accounting procedure which insures that each well is properly credited for its share of the production while reimbursing the plant for costs associated with processing the gas. This later function is accomplished by equations [the Shell Formulae] which compute a "plant-lease split" of the residue gas and sulfur revenues. These equations are designed to accommodate such variables as the cost of operating the gas treatment and sulfur recovery facilities, **Shell's capital investment**, the production rate and revenue received from production, while simultaneously recovering the costs of processing the gas and sulfur.
>
> The equation used to compute the plant-lease split of residue gas is as follows:

$$\left[\left(\frac{\text{Treating Plant Operating Cost}}{\$/\text{Day}}\right)+\left(\frac{\text{Treating Plant Investment}}{\$}\right)\left(\frac{0.000728}{\text{Day}}\right)\right]\times\frac{\text{FDP Gross Sales Gas MCF/D Total}}{\text{Plant Inlet MCF/D}}+\left(\frac{\text{Gathering System Investment}}{\$}\right)\left(\frac{0.000728}{\text{Day}}\right)$$

> The first factor appearing in the numerator of the above expression considers the cost per day of the gas treating plant. Such costs includes not only the actual operating costs of the plant in the form of expenses for payroll, materials, insurance, taxes, etc. **but also reimbursement of the capital investment in the treating plant, together with a return on that investment.** "Cost" is expressed in the formula by adding the daily operational costs of the treating plant to a recovery factor representing **the plant investment** multiplied by the daily factor. (emphasis added).

Piney Woods I, 539 F. Supp. 957, 963-964. (ID Exhibit 33; R 446, 447).

This was the description of the Shell Formula accepted by the Courts in The *Piney Woods* Case. Nowhere does the formula state that the risk capital gas plant investment cost is to be computed based upon the arbitrary concept of whether the gas plant created "value" for the gas. The formula states, and The *Piney Woods* Courts accepted, that the investment component of the formula is **the capital investment in the plant.** Any reasonable person reading The Shell Formula, or The *Piney Woods* Courts' description of The Shell formula, can only accept that the formula allows for deduction of **actual** gas plant capital investment cost, plus a return on that **actual** investment, only. Nothing in the formula, or in The *Piney Woods* Courts' description of the formula, implies, suggests, or should give anyone reason to believe that The *Piney Woods* Courts approved deductibility of a gas plant investment, that was not actual, based upon Pursue's arbitrary decision that the gas plant "added value" to the gas produced.

The last opportunity that the Fifth Circuit had to visit the issue of processing costs was in 1997 in *Piney Woods VI*, 116 F.3d 478, 1997 WL 256767 (5th Cir. 1997). After reviewing the above, if this Court has any doubt as to whether The *Piney Woods* Courts approved only the deduction of **actual** processing costs, which would include only **actual** gas plant investment, then the following final conclusion of the Fifth Circuit should remove such doubt:

> We affirm the district court's June 6, 1995 Order, and hold that plaintiffs are entitled to recover from Shell for underpayment of royalty for the period November 1978 through November of 1982 with respect to the Section 107 wells. We approve the comparable sales evidence utilized by the district court in determining the interstate market value for processed gas and the propriety of subtracting from that market value **Shell's actual processing costs** to determine the market value of the gas "at the well." Damages shall be calculated accordingly . . . .

Piney Woods VI, 116 F.3d 478, 1997 WL 256767, * 16. Before reaching its conclusion, the Fifth Circuit noted that: "Shells' **actual costs of capital investment** (as well as its actual operating costs) appear to be have been passed on to the royalty owners as processing costs."[4] This last finding of the Fifth Circuit on the deductibility of gas plant processing costs is precise and unequivocal. If Pursue is asking this Court to apply The *Piney Woods* Case, then The *Piney Woods* Case must be applied as written. In order to deduct a risk capital gas plant investment charge as part of processing costs, Pursue was required by *The Piney Woods* Case to use a gas plant investment number that was both **actual** and **reasonable**. Pursue cannot escape punitive damages by corrupting *The Piney Woods* Case and suggesting that the issue of the deductibility of gas plant investment costs can be decided based on arbitrary concepts of "value added" to the gas.

B. Pursue's "value added"argument is the same argument that the Fifth Circuit found "reeked of the abstruse and arcane" in *Piney Woods VI*

Pursue argues in its Reply Brief that The Sykes Plaintiffs are not entitled to punitive damages because their theory of the non-deductibility of Pursue's gas plant charge ignores "the value added" to the gas by the processing plant. Reply Brief of Pursue at p. 20. Pursue's argument is simple. It doesn't matter that Pursue did not spend $41,000,000.00 in actual

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[4] *Piney Woods VI*, 116 F.3d 478, 1997 WL 256767, *13, fn. 18.

investment costs to purchase the Shell gas plant. Because the mere existence of the gas plant added value to the gas, Pursue was entitled to use Shell's number. This same "value added" argument was rejected, with contempt, by The *Piney Woods* Courts.

In *Piney Woods II*, the Fifth Circuit remanded The *Piney Woods* Case to the District Court on the issue of damages, i.e., a determination of how market value at the well would be calculated. *Piney Woods III*, No. J74-0307 (W) (S.D. Miss., April 24, 1989) (ID. Ex. 37; R. 521).[5] The Fifth Circuit set out three principle methods for determining market value. *Piney Woods III*, p. 4. (ID. Ex. 37; R. 522). During the trial of *Piney Woods III*, Shell offered a fourth approach. *Id.*

Shell's "value added" approach was presented by two expert witnesses who attempted to "postulate the construction and investment costs...in a hypothetical on-site gas processing facility similar to Shell's Thomasville facility." *Piney Woods VI*, 116 F.3d 478, 1997 WL 256767, *13. Shell argued, just like Pursue is arguing now, that operating costs based on gas processing plant investment should be greater than the actual investment because of the "value" that the processing plant "added" to the gas. The contempt with which the District Court and Fifth Circuit held Shell's "value added by the gas plant" argument can be plainly seen in each Court's comments.

In *Piney Woods III*, the District Court stated as follows:

> [T]his court unhesitatingly rejects this approach as here presented because it is rooted in too much pecuniary speculation and hypothetical supposition . . ..
> [T]he model, which was based upon the yearly construction of Thomasville

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[5] *Piney Woods III* was not published. A copy of *Piney Woods III* is contained in the trial court record at ID. Ex. 37, R. 519-559. The above discussion can be found at page three of the *Piney Woods III* opinion, R. 521.

> processing plants, is impregnated with abundant supposition and unpalatable to the court.

Piney Woods III, at p. 9. (ID. Ex. 37; R. 527-528).

The Fifth Circuit's rejection of this "value added" argument showed equal contempt:

> In sum, nothing in Shell's "value added" argument convinces us that the district court erred in law, or was clearly erroneous, in concluding that Shell's approach would not produce a determination of the Section 107 gas's market value at the well head more precise than that made by the district court. Shell's recourse to an increasing recondite panapoly of databases, charts, and indexes reeks of the abstruse and arcane, could properly be found to be susceptible to manipulation due to its amorphous quality, to resist empirical validation, and to offer the prospect of interminably prolonging this twenty-three-year-old case.

Piney Woods VI, 116 F.3d 478, 1997 WL 256767, *13. In its final comment, the District Court recognized that Shell's approach of arbitrarily inflating operating costs based on the "value added" by its Thomasville Plant, in the end, would result in the "plaintiffs now ow[ing] Shell money." *Piney Woods III*, at p. 10. (ID. Ex. 37; R. 528). As discussed *infra*, Pursue's investment in the Shell gas plant was zero. Pursue's attempt to justify use of Shell's $41,000,000.00 gas plant investment cost, based upon the arbitrary concept that this is the actual "value that the plant added" to the gas, is an argument which The *Piney Woods* Courts "unhesitatingly" rejected with contempt. Pursue cannot rely on its "value added" argument to escape punitive damages in this case.

C. The proof at trial supported punitive damages-Pursue did not use its actual gas plant investment in its formula and Pursue's use of Shell's number was unreasonable.

In its Reply Brief, Pursue suggests that The Sykes Plaintiffs did not offer proof consistent with The *Piney Woods* Case to support a claim for punitive damages. This is not true. The Sykes Plaintiffs offered proof that Pursue's use of the Shell gas processing formula was in

violation of the requirement that only "reasonable and actual" gas processing costs be deducted.

1. Pursue's $41,000,00.00 gas plant investment cost was not actual.

At trial, The Sykes Plaintiffs called Fred Hosey, the corporate representative/assistant secretary and general counsel for Pursue. Hosey was asked a direct question as to whether Pursue inserted a gas plant investment cost into its processing formula that was "far in excess of what you [Pursue] actually invested." (TR 68; lines 11-13). Hosey agreed. Hosey admitted that Pursue was showing a capital investment in the Shell plant of $41,000,000.00 even though Pursue did not pay $41,000,000.00. (TR 66; lines 17-23). Both Hosey and Pursue's president, Bruce Hunt, admitted that the result of a higher risk capital gas plant investment number in the processing formula would result in greater deductions from the Royalty Owners' checks, and more money in Pursue's pockets. (TR. 66; lines 24-29: 67; lines 1-2: 595; lines 5-9). Pursue did not insert an actual gas plant investment number into its processing formula. The record is undisputed.

2. Pursue's use of a $41,000,000.00 gas plant investment cost was not reasonable.

a. Pursue paid zero for the Shell Plant.

Pursue bought out Shell's interests in the Thomasville/Piney Woods fields for $30,103,000.00. (Ex. 6; R. 24). At trial, The Sykes Plaintiffs offered the testimony of Edwin Stacey, Pursue's reservoir engineering manager. The Sykes Plaintiffs also offered the testimony of Conrad Gazzier, a practicing petroleum geologist and one time state geologist for Mississippi. Gazzier was accepted as an expert in the field of evaluating gas reserves. Using Stacey's gas reserve analysis data, Gazzier testified as follows: "Based upon analysis of Mr. Stacey's data that

it would appear that the value of the [Shell] reserves at the time of purchase [by Pursue] exceeded or equaled the purchase price." (TR 198; lines 9-22). On cross-examination, Gazzier was asked whether "Pursue made a very good deal on [Shell's] reserves." Gazzier testified that Pursue made a "Heck of a deal . . . heck of a deal . . . heck of deal." (TR 199; lines 18-24).[6] As Bruce Hunt testified, Shell just wanted to get out of these fields and Pursue was the only buyer. (TR 601; lines 26-29: 602; lines 1-5). Gazzier testified that if you accept the reserve value as Stacey indicated in his bank reserve report to be the correct value, "the [Shell] plant becomes a non-cost [zero] item in the purchase agreement, in that scenario." (TR 187; lines 8-11).

Stacey, Pursue's reservoir engineering manager, prepared a projected discounted reserve valuation for Pursue's banks. (Ex. 20; R. 358). Using the most conservative method to value reserves, Stacey valued Pursue's 1996 gas reserves, which included those reserves purchased from Shell, at $58,901,000.00. (Ex. 20; R. 358).[7] Although the value of Shell's gas reserves contributed to well over fifty percent of this amount, i.e., Pursue had only 4 ¼ wells when it purchased 7 ¾ wells from Shell, Pursue paid only $28,103,000.00 for Shell's interest. The value of Shell's gas reserves alone exceeded the value of the entire deal.

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[6] Gazzier concluded by testifying that there was "no doubt" that the value of Shell's reserves exceeded the amount that Pursue allocated to those reserves in the purchase price. (TR 199; lines 25-29).

[7] Stacey's $58,901,000.00 1996 gas reserve evaluation was calculated based on an exponential decline curve analysis. Stacey admitted, on cross-examination, changing his reserve method to the more precise hyperbolic method in 1999 for Pursue's banks, an approach most engineers would have suggested Stacy should have taken from the beginning. (TR 440; lines 3-29: 441; lines 1-6). Using the more precise hyperbolic approach in 1999, Stacey calculated a reserve valuation of $88,618,000.00. (Ex. 20; R 358: TR 441; lines 27-29). Stacey's more accurate estimate of reserves in 1999 indicated that the value of Shell's gas reserves in 1996 was much higher.

Shell's gas plant was a throw in. Pursue should have assigned the Shell gas plant a zero number in Pursue's gas processing formula. Pursue should not have assigned the gas plant a $41,000,000.00 number using Shell's original cost of investment.

b. Pursue's royalty owners did not need Shell's plant

The Sykes Plaintiffs offered proof at trial that Pursue already had a perfectly good operating gas processing plant that had been paid for. The Pursue gas plant was built at a cost of $53,000,000.00 (TR 69; lines 13-18). By December 1995, Pursue had recovered the full amount of its investment and the bonds had been paid off. (TR 32; lines 16-24). The Pursue gas plant had the same capacity as the Shell gas plant. Each plant could process up to 100,000 Mcf of gas per day. (TR 31; lines 3-29). Although the Pursue plant had been downsized, decreasing the amount of gas that it could produce, that process was not irreversible. Pursue's witness, Gene Goar, testified that the plant could be up-sized to full capacity for the cost of $100,000.00. (TR 493; lines 20-29). Pursue's royalty owners did not need the Shell gas plant. Pursue should have stayed put, increased its plant to full capacity, and taken the $53,000,000.00 gas plant investment number out of its processing formula because the Pursue plant was paid for.

c. Pursue charged the royalty owners for a $41,000,000.00 Shell plant that they had already paid for.

The Sykes Plaintiffs offered the testimony of CPA, H. Kenneth Lefoldt, Jr. Lefoldt testified that the Shell gas plant had "paid out", i.e., Shell's royalty owners had paid back Shell the full value its investment, by 1990. (TR 218; lines 23-29: 219; lines 1-24). In its Reply Brief, it would appear that Pursue is being critical of Lefoldt for giving an opinion based upon a 1979 document reflecting both actual numbers and projections. Reply Brief of Pursue at p. 10.

Pursue's counsel cross-examined Lefoldt who addressed this issue at trial. Lefoldt stated that his opinions, in part, were based on the 1979 economic analysis. The economic analysis only contained Shell gas plant investment amounts up to $24,000,000.00. However, all parties agreed that Shell had invested $41,000,000.00 in its gas processing plant. Consequently, Lefoldt was aware that after Shell's economic analysis was prepared, Shell had to invest an additional $17,000,000.00 in its gas plant to reach the $41,000,000.00 total gas processing plant investment. (TR 231; lines 2-24).[8]

Lefoldt testified that by the time Pursue bought the Shell plant, Shell had already recovered the costs of its plant. Therefore, the gas processing [treatment plant] investment cost that Pursue should have used in its formula was zero. (TR 223; lines 8-29). Lefoldt testified that the affect of eliminating the risk capital gas plant investment number would be that Pursue would deduct only the daily operating costs of the gas plant. (TR 224; lines 18-26). The ultimate affect of reducing the gas plant investment number to zero would be a reduction in the processing charges allocated to the mineral interest owners. (TR 227; lines 13-20). It was unreasonable for Pursue to continue to use Shell's $41,000,000.00 gas plant investment number when Shell had already been paid for its plant.[9] It was unreasonable for Pursue to use Shell's $41,000,000.00 gas

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[8] In its 1979 economic analysis, Shell showed a gas plant investment of $24,000,000.00. Clearly, Shell would have had to invest an additional $17,000,000.00 to reach its total cumulative $41,000,000.00 gas plant investment number.

[9] During trial, Fred Hosey was cross-examined based upon his knowledge of The *Piney Woods* testimony of Danny Douglas, Shell's plant processing accountant. (TR 127; lines 26-29: 128: 129: 130; lines 1-8). Douglas testified in The *Piney Woods* Case that under the Shell Formula, once the cost of the initial capital gas plant investment was written off and fully amortized, then capital gas plant investment cost would be removed from the formula. To be fair to the record, Douglas testified that that was his understanding of how the formula would work, but that would not be his decision. Lefoldt relied on the testimony of Douglas when rendering

plant investment number in order to increase the charges to Pursue's royalty owners, and line the pockets of Pursue's investors with more cash.[10]

d. Pursue cannot escape liability for punitive damages by arguing that per Mcf processing charges at other gas processing plants were higher.

In *Piney Woods I*, the District Court recognized that at the time Shell developed these fields, the sour gas production was "an unprecedented discovery in its volume, deliverability, and reserves." *Piney Woods I*, 539 F. Supp. 957, 987, headnote [20]. After thirty-four pages of discussing the uniqueness of the Thomasville/Piney Woods gas, the District Court was unable to assign "a dollar and cent valuation to the subject gas because of the lack of relevant evidence addressing comparability." *Id.* at 987, headnote [21].

In *Piney Woods II*, the Fifth Circuit opined that comparable sales for the Thomasville/Piney Woods gas were not likely to be found. *Piney Woods II*, 726 F. 2d 225, 239, headnote [17] [18]. The Fifth Circuit noted a list of factors affecting the price of natural gas, making it highly unlikely that comparable sales existed for purposes of assisting the court in placing a market value on the Thomasville/Piney Woods' gas. These factors were as follows:

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his opinion that the cost of Shell's gas plant should come out of the processing formula once Shell recovered its full investment. (ID Ex. 21). The Chancery Court sustained Pursue's objection to further cross-examination of Hosey regarding Douglas's testimony. (TR 130; lines 2-8). Should this Court remand this case for further consideration on the amount of punitive damages owed, this Court should allow The Sykes Plaintiffs to explore in full the contradiction between this Shell accountant's testimony in The *Piney Woods* Case, and the position being taken by Pursue.

[10] This Court is reminded that at the time Shell's gas processing costs were deemed actual and reasonable in *Piney Woods III*, the Shell gas processing plant had not "paid out", i.e., Shell had not been paid in full for its investment. *Piney Woods III* was tried on a record developed in the first trial during the late '70s, and supplemented with additional evidence prior to the *Piney Woods III*, January 3, 1988 trial date. *Piney Woods III*, at p. 1. (ID Ex. 37; R. 519). Shell was not paid in full for its gas processing plant until two years later in 1990.

a. The volume available for sale;
b. The location of the gas leases and their proximity to prospective buyer's pipelines.
c. The quality of the gas, i.e., concentration of hydrogen sulfide.
d. Delivery point.
e. Heating value of the gas.
f. Deliverability/production volume of the wells.
g. Delivery pressure.

Piney Woods II, 726 F. 2d at 239 - 240, fn. 17.

Pursue offered evidence of "comparable higher gas processing fees" charged by three plants wholly unconnected with the Thomasville/Piney Woods field: The Western Gas Edgewood Facility-Dallas, Texas; The Sulfur River Plant-Cedar Creek, Texas; and The Cahouna Venture Plant-Southeast, Mississippi. Each of these plants were unique to their own fields. At trial, Pursue offered no evidence of the volume of gas reserves, deliverability of the gas reserves, location of gas reserves relative to prospective buyers, daily production volumes, etc..[11] As Bruce Hunt testified, the gas from the Thomasville/Piney Woods wells is "not worth anything" without the Shell or Pursue gas plant to process the gas. *Id.* (TR 601; lines 1-6). Likewise, the three gas plants identified by Pursue as "comparable" are not worth anything as they relate to the production of the Thomasville/Piney Woods gas. What other unique plants over three hundred miles away may have been charging as a per Mcf cost for processing gas is completely irrelevant to the reasonableness of gas processing charges made by Pursue.

One final point should not be lost on this Court. After twenty-three years and six *Piney Woods* decisions, the federal District Court and the Fifth Circuit refused to accept any of the

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[11] Each of these unique components would have an effect on the per Mcf costs of processing sour gas. As discussed *infra*, one of the most dramatic examples of changes in per Mcf gas processing costs occurs as the daily volume of gas processed at the plant increases and/or decreases. With gas plant costs fixed, per Mcf gas processing charges increase as daily plant volumes go down. The opposite effect occurs when daily plant volumes go up.

parties' evidence regarding comparable sales for purposes of establishing market value. This final decision was announced by the Fifth Circuit in *Piney Woods VI*, as follows:

> In *Piney Woods II*, we [Fifth Circuit] set out a hierarchy of three modes of analysis in determining what constitutes the relevant "market value" in this case; given our affirmance of the district court's finding that the plaintiffs' proof of comparable processed sweet gas sales for post-1982 period fails, the applicable analysis is by default that of **Shell's actual sales-minus-processing-costs system.** (emphasis added).

Piney Woods VI, 116 F.3d 478, 1997 WL 256767, *16. After twenty -three years of discussion about "market value", The *Piney Woods* Courts settled on Shell's simple analysis: actual sales price of the gas in the market minus actual processing costs. As The *Piney Woods* Courts recognized, there are no comparable high pressure sour gas processing operations similar enough to the Thomasville/Piney Woods fields.

e. The Sykes Plaintiffs would have benefitted from a lower per Mcf processing charge regardless of Pursue's purchase of the Shell Plant.

After Pursue purchased Shell's interest, The Sykes Plaintiffs would have benefitted from a lower per Mcf processing charge regardless of Pursue's use of Shell's gas plant investment cost in its processing formula. The explanation can be found in one word . . . VOLUME.

Shell had 9 wells in these fields. (Ex. 6; R. 24). Pursue only had 4 ¼ wells. (TR 114; lines 10-18). At the time Pursue bought Shell's interest, "Pursue wells were declining in production volume at a fairly predictable rate." *Id.* Pursue was only four to five years away from the wells and the plant becoming "uneconomic", i.e., due to low volumes it was going to cost more to produce and process the gas than Pursue could sell it for. *Id.* Pursue's higher processing costs per Mcf prior to the purchase of Shell's gas reserves is a matter of simply math.

Pursue's gas processing plant had a capacity of one hundred million cubic feet per day. (TR 543; lines 28-29: TR 544; lines 1-2). However, Pursue never processed more than thirty-five to forty-five million cubic feet per day through its plant. (Ex. 56; R. 918). Reply Brief of Pursue at p. 12. Although the Pursue plant was operating at only thirty-five to forty-five percent of capacity, Pursue was still charging its royalty owners their proportionate share of Pursue's $53,000,000.00 fixed cost/gas plant investment. As a matter of simple math, as long as the daily plant volume remained low, the per Mcf processing cost would be high.[12] After Pursue bought Shell's interest, Pursue went from 4 ¼ wells in the field to 13 wells in the field. Pursue owned one hundred percent of the gas in these fields. All Pursue had to do was stay put, operate its own paid for gas processing plant at one hundred percent capacity, and the per Mcf processing cost charged to The Sykes Plaintiffs would have gone down. Pursue is wrong. Pursue did not need to operate through Shell's gas plant to decrease the per Mcf processing charge to its royalty owners. Pursue cannot use this argument to escape punitive damages.

D. The Sykes Plaintiffs are owed punitive damages as a result of Pursue's breach of its fiduciary relationship.[13]

It is unclear why Pursue wishes The Sykes Plaintiffs to distinguish *Nygaard v. Getty Oil*

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[12] This can be demonstrated through a simple, although exaggerated, example. Pursue's "fixed cost" in its gas plant was $53,000,000.00. If Pursue was going to recover that entire fixed cost in one year, but only processed 1 Mcf of gas through its plant, the per Mcf cost to produce that gas, relative to the fixed gas plant cost, would be $53,000,000.00 per Mcf. If, however, Pursue processed 53,000,000 Mcf of gas through that same plant in one year, the per Mcf cost would go down to $1.00 per Mcf.

[13] This Court is reminded that the Chancery Court did find that a fiduciary relationship existed between The Sykes Plaintiffs and Pursue. (R 733-734; RE 15-16). However, after finding that a fiduciary relationship existed, and that there was a breach, the Chancery Court failed in its obligation to award punitive damages.

Co.,918 So.2d 1237 (Miss. 2005), to support a fiduciary relationship between The Sykes Plaintiffs and Pursue.[14] The plaintiff in *Nygaard* was a lessor/trust who had leased his interest to defendant/lessee Getty. *Id.* at 1239, ¶¶ 2-3. The claims between the parties related solely to claims between a lessor and lessee for unpaid royalties. *Id.* at ¶ 5.

As Pursue acknowledges in its Reply Brief, Pursue has a dual role. "Pursue acts **in distinct capacities** as plant owner and lessee." Reply Brief of Pursue at p. 1, 3. In its capacity as plant owner, Pursue is obligated to process The Sykes Plaintiffs' gas, charging only processing costs that are actual and reasonable. It is through Pursue's capacity as plant operator, the sole entity in control of processing, the sole entity in control of the books, the records, the accounting, and the release of information relating to processing costs, that the fiduciary relationship was created. While it is true that "Lessee Pursue" owes The Sykes Plaintiffs unpaid royalties, it was through Pursue's "distinct capacity" as "Plant Operator Pursue" that Pursue charged The Sykes Plaintiffs gas processing costs that were neither actual or reasonable.

The Sykes Plaintiffs had no interest in Pursue's gas processing plant. Bruce Hunt testified that The Sykes Plaintiffs were not given the option of selecting whether to upsize the Pursue plant as opposed to buying the Shell plant. (TR 581; lines 28-29: 582; lines 1-4). The Sykes Plaintiffs were not given the opportunity to chose to operate the Pursue plant, a more ecologically efficient plant, over the Shell plant. (TR 582; lines 5-23). The Sykes Plaintiffs were not given the opportunity to buy into Shell's gas plant. (TR 582; lines 24-29). The Sykes Plaintiffs had no choice but to trust that they would be treated fairly by Pursue when it came to

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[14] At p. 16 of its Reply Brief, Pursue argues that The Sykes Plaintiffs afforded no basis for a determination of a fiduciary relationship, and "*Nygaard* is directly on point."

deduction of gas processing costs. As the sole entity in control of the gas processing plant, Pursue had all of the power and influence to dominate and control The Sykes Plaintiffs. The fiduciary obligations of Pursue were created through this unique relationship: The Sykes Plaintiffs as interest owners in sour gas that had to be processed to be sold; and Pursue in its "distinct capacity" as the gas processing plant operator.

Pursue breached its fiduciary relationship with and duty to The Sykes Plaintiffs when it charged The Sykes Plaintiffs gas processing costs for its gas processing plant that were neither actual or reasonable. The Chancery Court awarded The Sykes Plaintiffs' damages on this claim. The Chancery Court should have awarded punitive damages as well. *Fought v. Morris*, 543 So.2d 167, 173 (Miss. 1989) (breach of fiduciary duty is recognized as an extreme or special circumstance when punitive damages may be awarded).

E. The Sykes Plaintiffs' pled a claim for prejudgment interest.

At page 22 of its Reply Brief, Pursue argues that The Sykes Plaintiffs are not entitled to prejudgment interest because they "never sought an award under §53-3-39 or asserted entitlement to interest thereunder."[15] It is unclear how Pursue could make this argument based on the pleadings filed in Chancery Court.

In their original Complaint for Discovery, Accounting and other Relief, The Sykes Plaintiffs made the following request in Count II:

> 59. Wherefore, for the foregoing reasons, the Plaintiffs' pray that the Court will order Pursue to fully account for all Royalty Owner money which it has

[15] Pursue's only authority is *B&W Farms v. Mississippi Transportation Commission*, 922 So.2d 857 (Miss. App. 2006). *B&W Farms* held that failure to pled a constitutional claim barred the plaintiffs right to recovery. The Sykes Plaintiffs' claim for prejudgment interest is not constitutional, it is statutory.

> received since it bought Shell's interest as aforesaid; that after considering the full accounting and relevant evidence, the Court will rule that Pursue has retained excessive and unreasonable amounts from the Royalty Owners' share of production; and, that the Court will order Pursue to pay the Plaintiffs a sum equal to the amounts unreasonably withheld, **plus prejudgment interest,** and costs.

(R. 10, ¶ 59).

In their Prayer for Relief, The Sykes Plaintiffs made demand:

> B. That, after the accounting is made, the Court will adjudicate the amount of the Plaintiffs' royalty money wrongfully withheld by Pursue and order that said amount shall be paid to the plaintiff royalty owners, **along with prejudgment interest,** and costs;

(R. 11, ¶ B).[16]

The language in The Sykes Plaintiffs' Complaint was sufficient to put Pursue on notice of a claim for prejudgment interest. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So.2d 974, 980, ¶ 27-29 (Miss. Ct. App. 2008) (plaintiff's request that "there is interest due" on its claim was sufficient by law to state a claim for prejudgment interest). Pursue is also prohibited from making a challenge to The Sykes Plaintiffs' claim for prejudgment interest based on Pursue's suggestion that The Sykes Plaintiffs did not specifically plead a claim pursuant to § 53-3-39. *Upchurch Plumbing, Inc. v. Greenwood Utilities Commission*, 964 So.2d 1100, 1118, ¶¶ 48-50 (Miss. 2007) (plaintiff's "simple" demand for prejudgment interest in its complaint was sufficient to support an award of statutory prejudgment interest pursuant to § 75-17-7). Finally, to the extent that prejudgment interest is allowed by statute, it is "a violation of statutory mandate" for a chancery court to fail to award interest in the amount prescribed by such statute.

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[16] By Order of the Court, on January 28, 2005, The Sykes Plaintiffs filed their First Supplemental Pleading Supporting Claim for Punitive Damages, Attorneys' Fees, and for other Relief. (R. 510-514). In their First Supplemental Pleading, The Sykes Plaintiffs again stated their claim for relief which included their claim for prejudgment interest. (R. 511, ¶ B).

Gordon v. Gordon, 929 So.2d 981, 986 ¶ 23 (Miss. Ct. App. 2006).

F. Miss. Code Ann. § 53-3-39 did not apply in *The Piney Woods* Case- the claims on which the plaintiffs were successful were different.

Section 53-3-39 applies to proceeds wrongfully withheld from royalty owners, i.e., royalty payments not disbursed. Chapter 477, House Bill 787, *Mississippi Session Laws* 1983. Pursue concedes this point in its Reply Brief at page 26. "Wrongfully withheld royalty" was not the issue on which the plaintiffs were successful in The *Piney Woods* Case.[17] As discussed in detail, *supra*, The *Piney Woods* Case was decided favorably to the plaintiffs on the issue of pricing.

Although The Piney Woods Plaintiffs did make the request, the courts in The *Piney Woods* Case did not apply § 53-3-39 to the award because Shell Oil did not wrongfully withhold royalty payments. Shell simply failed to calculate royalty based on the higher "market value at the well price" for the royalty owners' gas. The District Court's reasoning in *Piney Woods V* is instructive:

> The damages issue in the instant case involves the consideration of whether the defendant should have charged a higher price than it actually did for residue from the wells in question between 1979 and 1986. This Court found that the defendant should have charged a higher price for certain residue during this time period. However, there is no finding that the defendant **actually charged higher prices and withheld royalty on the proceeds from the plaintiffs.** Therefore, this Court finds that Mississippi Code Annotated § 53-2-39 (Supp. 1995) (sic) does not apply to the instant case.

Piney Woods V. (R 825-826)[18]

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[17] Pursue does not challenge that The Sykes Plaintiffs did plead a claim for recovery of all wrongfully/"unreasonably" withheld royalty payments. *See,* R. 10, ¶ 59.

[18] At the end of its decision in *Piney Woods V*, 1195 WL 917482 (S.D. Miss., June 6, 1995), the district court directed the parties to recalculate royalty payments and submit the matter

The Fifth Circuit's rationale for not applying § 53-3-39 was as follows:

> Shell's distinction is based upon its contention that § 53-3-39 addresses [wrongfully] "held" proceeds, which are due to the royalty owners, and that in this case, the District Court determined that Shell "should have charged higher prices" [market value price] and passed the profit on to the royalty owners, but that there was no evidence that it actually did charge more and that it withheld the fruits of doing so from the royalty owners. Thus the district court determined, Shell was not obligated by § 53-3-39 to pay prejudgment interest. (emphasis in original)

Piney Woods VIII, 218 F.2d 744, 2000 WL 821407, *3 (5th Cir. 2000). (R. 833).

Shell argued, and The *Piney Woods* Courts agreed, §53-3-39 applies to a claim for wrongfully withheld royalty, only. The Sykes Plaintiffs made no claims against Pursue based upon incorrect gas pricing. In their Complaint, The Sykes Plaintiffs requested relief against Pursue for "unreasonably/wrongfully withheld royalties." (R. 10, ¶ 59: 11, ¶ B). The Chancery Court awarded The Sykes Plaintiffs actual damages based on this request. The Sykes Plaintiffs were awarded their "pro rata" share of wrongfully withheld royalties based on risk capital gas plant charges wrongfully made for the six years up to and including December 2001. (R. 173; R.E. 13).

The Fifth Circuit applied § 53-3-39 in *First National Bank of Jackson v. Pursue Energy Corporation*, 799 F.2d 149 (5th Cir. 1986), when it found that Pursue Energy Corporation did not disburse all sulphur royalties owed to First National Bank under these same lease contracts. *Id.* at 153. The issue in *First National Bank of Jackson* was whether Pursue was required to pay

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for final judgment. *Id.* at *16. On September 28, 1995, the District Court entered its order on The *Piney Woods* Plaintiffs' motion for judgment pursuant to Rule 54 (B), as well as The *Piney Woods* Plaintiffs' motion for prejudgment pursuant to "Mississippi Code Annotated Section 53-2-39 (sic) (Supp. 1995)." The district court's September 27, 1995 order is unpublished. It was offered by Pursue as an exhibit to one of its pleadings, and is contained in the pleadings record of the trial court at p. 825-826.

sulfur royalties under the gas clause of its lease for hydrogen sulfide gas from which sulfur was produced, or under the sulfur mining clause under which royalties were paid at $1.00 per long ton. *Id.* at 151. Pursue paid royalties at $1.00 per long ton under the sulfur royalty clause, keeping the difference for themselves. *Id.* The Fifth Circuit found that the royalties on the sulfur should have been disbursed under the gas royalty clause. *Id.* at 152. The Fifth Circuit applied § 53-3-39 to award prejudgment interest finding that "the statute simply provides that purchasers shall be liable for prejudgment interest on royalties not disbursed." *Id.* at 153.

The Sykes Plaintiffs' claims against Pursue are for wrongfully withheld royalties, i.e., "royalties not disbursed." In *Piney Woods VIII*, Shell distinguished *First National Bank* on the basis that it involved an actual "withholding" of royalties share of proceeds. *Piney Woods VIII*, 2000 WL 821407, *3 (5th Cir. 2000). It is difficult to understand how Pursue can argue that *First National Bank* did not apply to a claim for withholding royalties when both Shell and the Fifth Circuit agree that it did. The reasoning of the Fifth Circuit in *First National Bank* is controlling. § 53-3-39 applies to The Sykes Plaintiffs' claims for wrongfully withheld royalties under the same market value lease contracts in these same fields **involving the same market value gas royalty payment provision.**

The Chancery Court was required to follow the statutory mandate of § 53-3-39 and award prejudgment interest at eight percent.

G. Pursue refuses to accept *In Re: Guardianship of Duckett* as the authority on compound interest.

In its Reply Brief, Pursue cites *Dedeaux Utility Co., Inc. v. City of Gulfport*, 938 So.2d 838 (Miss. 2006) as the controlling authority on awarding compound prejudgment interest.

Reply Brief of Pursue at p.30. *Dedeaux Utility* was a 2006 case which interpreted the eminent domain interest on judgment statute, Miss. Code Ann. § 11-27-19. Section 11-27-19 provides for "legal interest on the award of the jury from the date of the filing of the [eminent domain] complaint until payment is actually made." Miss. Code Ann. § 11-27-19; *Dedeaux Utility*, 938 So.2d at 846. The language of § 53-3-39 is different from § 11-27-19. Section 53-3-39 has the same language as Miss. Code Ann. § 75-17-7.

Section 75-17-7 allows for "interest at **per annum** rate." This same language is found in § 53-3-39 which requires a court to calculate interest on a judgment for wrongfully withheld royalties at the rate of "eight percent **per annum**."[19] This Court's interpretation of "per annum" in *In Re: Guardianship of Duckett v. Duckett*, 991 So.2d 1165 (Miss. 2008), is controlling.

In *In re: Guardianship of Duckett*, this Court interpreted § 75-17-7 interest at a "per annum" rate as giving the trial court judge discretion to award compound interest. The same "per annum" interest language appears in § 53-3-39. There is no reason to create a distinction between the two statutes. The "per annum" language gives the court equal discretion to award compound interest under both § 75-17-7 and § 53-3-39.

The Chancery Court got it right when it awarded prejudgment compound interest. However, the Chancery Court got it wrong when it set the rate. Section 53-3-39 requires prejudgment interest to be awarded at eight percent. The Chancery Court did not have discretion to reduce the rate from eight to six percent. *Gordon v. Gordon*, 929 So.2d at 986, ¶ 23 (failure to

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[19] The difference between the two statutes is that § 53-3-39 sets the rate at eight percent where § 75-17-7 allows the rate to be set by the judge. There is also a difference in timing. Section 53-3-39 requires prejudgment interest to be assessed 120 days after royalties are owed. Neither of these distinctions would suggest that compounding of interest would be different under either statute.

award the statutory rate of interest is a violation of the statutory mandate). The Sykes Plaintiffs urge this Court to correct this error in the Chancery Court's Final Judgment. Prejudgment interest should be awarded under § 53-3-39 at a rate of eight percent compounded annually, not six percent compounded annually.

II. CONCLUSION

As The Sykes Plaintiffs stated in their Primary Brief, the Final Judgment of the Chancery Court should be affirmed as it relates to actual damages, attorneys' fees, litigation expenses, and post-judgment simple interest at six percent. Based upon the above additional authority, this Court should reverse and render the Chancery Court's ruling on prejudgment interest awarded at the rate of six percent. Pursuant to § 53-3-39, prejudgment interest should have been calculated on actual damages at eight percent. This Court should affirm the trial court's compounding of interest, prejudgment, but should include compounding of such interest through date of entry of Final Judgment. Finally, for the additional reasons discussed above, this Court should reverse and render on the issue of punitive damages, sending this case back to the Chancery Court for a calculation of punitive damages owed.

THIS the 14th day of March, 2011.

PITTMAN, GERMANY, ROBERTS & WELSH L.L.P.

BY: C. Victor Welsh, III

C. VICTOR WELSH, III

CERTIFICATE OF SERVICE

I, C. Victor Welsh, certify that I have this day delivered by United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Reply Brief of Appellees/Cross-Appellants*** to the following:

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ADDENDUM 1
HISTORY OF THE *PINEY WOODS* CASE[1]

1. ***Piney Woods I***

Piney Woods Country Life School v. Shell Oil Co., 539 F. Supp. 957 (S.D. Miss. 1982).[2]

The original *Piney Woods* lawsuit was filed in 1974 against Shell. The lawsuit was certified as a class action in 1978. The plaintiff royalty owners claimed that Shell's practice of computing royalty from old long-term fixed rate gas contracts failed to take into account the inflation of gas prices at the time of future sales. The royalty owners argued that this practice by Shell was in derogation of their contractual right to be paid "market value" for their gas. In 1982, the district court held a bench trial and found for Shell on almost all claims.

2. ***Piney Woods II***

Piney Woods Country Life School v. Shell Oil Co., 726 F. 2d 225 (5th Cir. 1984), *rhg. en banc denied*, 750 F.2d 69 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985).

Piney Woods II was the interlocutory appeal of *Piney Woods I*. In *Piney Woods II*, the Fifth Circuit held that market value under Shell's leases meant "current market value at the time of production", not, as Shell argued, based on Shell's long-term fixed rate contracts. The Fifth Circuit suggested 3 methods for computing market value. One method included Shell's system of deducting actual processing costs from actual sale proceeds. With regard to deductibility of processing costs, the court held that "only reasonable processing costs could be so deducted." *Piney Woods II* was remanded to the district court for a determination of how "market value at the well" would be calculated. The district court was also requested to make a finding as to whether Shell's processing costs were reasonable.

3. ***Piney Woods III***

Piney Woods Country Life School v. Shell Oil Co., No. J74-0307 (W)(S.D. Miss., April 24, 1989).[3]

In *Piney Woods III*, the district court rendered judgment on the merits finding that the plaintiffs had failed to establish that the market value for their gas was at any time greater than actual proceeds under Shell's long-term gas sale contracts. The district court accepted Shell's

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[1] The history of *Piney Woods I* through *Piney Woods VI* is taken from *Piney Woods VI*, 116 F.3d 478, 1997 WL 256767, at *1 - *4 (5th Cir. 1997). A reading of *Piney Woods VI* will provide more detail about each case discussed.

[2] A copy of *Piney Woods I* is in the Chancery Court record at ID. Ex. 33, R. 439.

[3] A copy of *Piney Woods III* is contained in the trial court record at ID. Ex. 37, R. 519.

practice of using the actual sales price of the gas less actual processing costs to determine market value. The district court also found that Shell's actual gas processing costs were reasonable. There was no further appeal of the deductibility of gas processing costs.

4. ***Piney Woods IV***

Piney Woods Country Life School v. Shell Oil Co., 905 F.2d 840 (5th Cir. 1990).

Piney Woods IV was a direct appeal of *Piney Woods III.* In *Piney Woods IV*, the Fifth Circuit affirmed the district court's calculation of market value regarding federally regulated gas sold between the years 1972 through 1978 based on the federally mandated price ceilings in Shell's long term gas contracts. However, beginning in 1979, due to Federal de-regulation, gas could have come out from under these long term contracts and could have been sold by Shell on the new de-regulated interstate market a higher market price. The Fifth Circuit remanded the case once again to allow the district court to determine whether Shell owed additional royalties for the years 1979 through 1986.

5. ***Piney Woods V***

Piney Woods Country Life School v. Shell Oil Co., 1995 WL 917482 (S.D. Miss. June 6, 1995).

In *Piney Woods V*, the district court did not conduct any further evidentiary hearings. To determine Shell's liability for the years 1979 through 1982, the district court looked at Shell's sale of an "excess volume" of deregulated [section 107] gas that had come out from under an existing long term contract. Shell sold this "excess volume" on the interstate market and owed the royalty owners the difference between the lower long term gas sales contract price and the higher actual sales price. The district court found that Shell had paid royalties based on actual sales price less actual processing costs for the later years 1982 through 1986. Therefore, the district court found that Shell did not owe additional royalties for 1982 through 1986.

6. ***Piney Woods VI***

Piney Woods Country Life School v. Shell Oil Co., 116 F. 3d 478, 1997 WL 256767 (5th Cir. 1997).

Piney Woods VI was a direct appeal of *Piney Woods V.* In *Piney Woods VI*, the Fifth Circuit affirmed the district court's order that The *Piney Woods* Plaintiffs were entitled to recover from Shell underpayment of royalty for the period of November 1978 through November 1982, i.e. 1979 through 1982. The Fifth Circuit approved the district court's analysis/rejection of comparable sales evidence, and acceptance by default of Shell's "actual sales-minus-processing costs system" to determine market value. The Fifth Circuit also approved the district court's "propriety of subtracting from the market value **Shell's actual processing costs** to determine the market value of the gas "at the well." Finally, the Fifth Circuit approved the district court's determination that Shell had not underpaid royalties for the period November 1982 through

November 1986. *Piney Woods VI* was remanded a final time to the district court to address the issue of prejudgment interest on the plaintiffs' damages, and to address the question of whether additional members could be added to the plaintiffs' class.

7. ***Piney Woods VII***

Piney Woods Country Life School v. Shell Oil Co., 170 F. Supp.2d 675 (S.D. Miss. 1999).[4]

In *Piney Woods VII*, the district court denied The *Piney Woods* Plaintiffs' request to increase the size of the class. The district court denied The *Piney Woods* Plaintiffs' request for prejudgment interest pursuant to § 53-3-39 accepting Shell's distinction that the plaintiffs' claims related to amounts owed because Shell should have charged a higher price. The *Piney Woods* Plaintiffs' claims did not relate to wrongfully held royalty proceeds, to which § 53-3-39 would apply.

8. ***Piney Woods VIII***

Piney Woods Country Life School v. Shell Oil Co., 218 F.3d 744, 2000 WL 821407 (5th Cir. 2000).

Piney Woods VIII was a direct appeal of the district court's ruling in *Piney Woods VII.* In *Piney Woods VIII*, the Fifth Circuit affirmed the district court's ruling in *Piney Woods VII.*

[4] A copy of *Piney Woods VII* is included in the trial court record at ID. Ex. 41, R. 583.