2009-CA-01794- RT

Statement Regarding Oral Argument

Pursue Energy Corporation respectfully requests oral argument. Oral exposition of the parties' fundamentally different approaches to the threshold determinative issue of ascertainment of sour gas value at the well may assist the Court. Moreover, oral argument addressing the relationship of this controversy to the controlling decision in *The Piney Woods Country Life School, et al. v. Shell Oil Company*, which is res judicata on material issues, would likely aid the Court.

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Introduction

The issue in this case is whether Plaintiffs met their burden of proving they were paid less than they were owed for their share of gas production. Plaintiffs utterly failed to prove the value of their interests. Pursue proved it paid Plaintiffs properly. Plaintiffs fundamentally fail to address the real issues on appeal.

The controlling leases indisputably provide for royalty[1] based on value at the well. Plaintiffs never meaningfully engage this determinative question. Plaintiffs completely fail to recognize that Pursue acts in distinct capacities as mineral lessee versus as plant owner. Plaintiffs' persistent ranting that Pursue never made a $41 million investment in Shell's Thomasville Plant (while Pursue's predecessor-in-interest Shell unquestionably did and Pursue otherwise had made a $53 million investment in another Thomasville plant) says nothing about whether Pursue's plant owner fee overstates the value added by processing. Nor have Plaintiffs sustained their burden of proof by their irrelevant assertion that because the processing plants had "paid out," Pursue's processing fee cannot exceed mere reimbursement of actual day-to-day processing costs. The fact that Pursue's fee understates the value added by processing and thereby overstates wellhead value stands effectively unchallenged.

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[1] Pursue's principal brief noted that some Plaintiffs own working interests or other mineral interests, not just royalty. Plaintiffs have made no effort to challenge Pursue's payments of any revenue besides royalty, and have not challenged the processing fee as charged to non-royalty interests in their brief.

Plaintiffs deceptively distort the holding and applicability of the *Piney Woods* Case.[2] Seemingly acknowledging the res judicata effect of the *Piney Woods* Case, Plaintiffs wrongly suggest the only preclusive judicial finding on processing costs is the Fifth Circuit's holding that processing costs must be "reasonable." Plaintiffs compound their error by misleadingly emphasizing the Fifth Circuit did not hold Shell's processing fee was reasonable. While the Fifth Circuit's finding that processing costs must be reasonable is noteworthy, the determinative judicial finding on this record is the 1989 district court final decision that Shell's processing fee *was indeed reasonable*. (Exh. 37 I.D. at 547-48.) Thus, it has been conclusively established as to the *Piney Woods* Plaintiffs not only that a plant processing fee shared by royalty and other well revenue owners may include amounts above actual operating costs and plant investment but also that Pursue's fee as Shell's successor-in-interest permitting such recoupment was itself reasonable.

Plaintiffs' misapprehension of the mineral lease contractual relationship extends to their conclusory assertion of a fiduciary relationship. They point to no applicable case authority. They mischaracterize Pursue disclosures of information. They wrongly argue royalty payment practices give rise to an otherwise nonexistent fiduciary relationship. Plaintiffs' allegations of purported grounds for an award of punitive damages are patently

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[2] *The Piney Woods Country Life School, et al. v. Shell Oil Co.*, 539 F. Supp. 957 (S.D. Miss. 1982), *aff'd in part, rev'd in part*, 726 F.2d 225 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985); *on remand*, No. J74-0307(W) (S.D. Miss. April 24, 1989), *aff'd in part, rev'd in part*, 905 F.2d 840 (5th Cir. 1990); *on remand*, 1995 WL 917482 (S.D. Miss. 1995), *aff'd in part*, 116 F.3d 478 (5th Cir. 1997); *on remand*, 170 F. Supp. 2d 675 (S.D. Miss. 1999), *aff'd*, 218 F.3d 744 (5th Cir. 2000) (Exhs. 32-37 I.D.) (the "*Piney Woods* Case").

meritless.

Plaintiffs erroneously invoke *Miss. Code Ann.* § 53-3-39 in seeking prejudgment interest compounded annually at 8%. Plaintiffs failed to plead the statute and it is in any event not applicable. The statute does not apply to this dispute which challenges *calculations* of admittedly *timely* disbursed royalty proceeds.

Equally clear is that Plaintiffs' claims for underpayment arose at the time of payment. Consequently, portions of their claims are plainly time-barred.

Argument

I. Plaintiffs misapprehend the controlling significance of the contractual provisions requiring royalty based on value at the well.

Plaintiffs' arguments that royalty has been underpaid fundamentally clash with the controlling contractual provisions as applied in the *Piney Woods* Case and with the record in this action. Disregarding the objective of a wellhead value determination of sour gas, Plaintiffs wrongly assail Pursue's processing fee because it includes charges greater than actual operating costs after plant payout. Plaintiffs never address the value added to production by processing. They fail to recognize the distinct capacities in which Pursue acts as plant owner and lessee; they misapply the *Piney Woods* Case; and they make no showing that Pursue's processing fee overstates the value added to production by processing.

A. Plaintiffs fail to recognize Pursue acts in distinct capacities as plant owner and lessee.

Plaintiffs' assertion that the leases are to be construed against Pursue is pointless on

this record. (Plaintiffs' brief at 25.) Plaintiffs necessarily acknowledge the leases call for royalty based on value "at the well." The gas at the well is unprocessed sour gas which must be processed by someone for revenues to be derived. For counsel to assert that Plaintiffs allegedly had "no basis to assume from the leases" the gas produced would require processing is disingenuous. The very requirement of an "at-the-well" determination contemplates costs may be incurred by a lessee away from the well and value may be added to gas production by processing. An indisputable fundamental purpose of the "at-the-well" provision is to adjust for instances where the value or proceeds realized from sale of plant end products include value added after production on which royalty is not based. Indeed, the Plaintiffs do not assign as error the Chancery Court's allowance of some processing charges and they themselves seek to rely on the *Piney Woods* Case.

As emphasized by Pursue in its principal brief, the record irrefutably establishes gas processing may be performed by either the mineral lessee or a third party. (Pursue principal brief at 8-9, 17, 28-32.) Processing fees charged by third-party processors to owners of gas production manifest the value added by processing which must be deducted from processed gas sales prices to determine the pertinent value of unprocessed gas at the well. There is no reason for the determination to be made any differently if the gas processor is also a lessee. Plaintiffs' expert necessarily acknowledged this reality, but Plaintiffs' brief self-servingly ignores it. Plaintiffs' argument that the processing fee cannot include operating costs and plant charges over actual investment (as every third-party plant owner's fee unquestionably

would) fails to account for economic realities that determine wellhead value.

B. Plaintiffs misleadingly characterize Mississippi law on costs shared by royalty and misapply the *Piney Woods* Case.

Plaintiffs misleadingly characterize royalty "as free of all costs" as if processing costs are therefore not shared by royalty. (Plaintiffs' brief at 25.) The Mississippi decisions cited by Plaintiffs themselves state that the costs not chargeable to royalty are those of "discovery and production." Such recognition is altogether consistent with the at-the-well determination. The *Piney Woods* Case explicitly so held. Pursue has made no charges to royalty for the discovery and production of sour gas. The charges made are for activities after production.

Plaintiffs' halfhearted suggestion that post-production costs are not shared by royalty quickly dissipates as Plaintiffs for all practical purposes concede that such costs are shared. Plaintiffs' basic position is not that no processing costs should be borne by royalty but that "no profit or gain above the actual costs should be collected." (Plaintiffs' brief at 26.) Plaintiffs erroneously premise this assertion on two cases. They wrongly rely on the inapposite decision in *Pursue Energy Corporation v. State Oil & Gas Board*, 524 So. 2d 569 (Miss. 1988). Not disputing res judicata principles are to be applied regarding the *Piney Woods* Case, Plaintiffs misconstrue the holding in *Piney Woods*.

Pursue v. State Oil & Gas Board addresses whether "interest charges are recoverable as 'costs of development and operation' under Mississippi's force-pooling statute, *Miss. Code Ann.* § 53-3-7 (1972)." 524 So. 2d at 569. The controversy was between the unit well

operator working interest owner (Pursue) and a working interest owner who had refused to consent to contractually pool its mineral interests with those of Pursue. The controversy had nothing to do with payment of royalty pursuant to contract. The issue was strictly one of statutory construction. Other statutes addressing different circumstances explicitly authorized payment of interest, but the subject statute plainly did not. This Court found interest expense was not a "'necessary cost' of drilling a well." *Id.* at 571. The Court held interest expense is "the cost of money" and an operator's election to finance operations with debt rather than equity does not constitute a statutory "'cost of development and operation.'" *Id.* at 571-72.

Plaintiffs' contentions that they are situated similarly to the nonconsenting working interest owner in *Pursue v. State Oil & Gas Board* are meritless. Plaintiffs have contracts with Pursue which determine the revenue payment obligation. In addition to authorizing Pursue to develop the minerals, the contracts authorize Pursue to market production and gas processing is part of the marketing efforts to realize revenue from the sour gas production. For Plaintiffs to say that they are "unwilling participants" in plant gas operations begs the question. The plant performs a necessary function to realize revenue from wellhead production, revenues in which Plaintiffs share. The plant owner charges a fee for this necessary function. This fee is borne pro rata by all revenue owners which the working interest owner lessee (Pursue and all other such working interest owners including some Plaintiffs here) may pass through to their royalty owners because of the "at the well" royalty

clause.

Plaintiffs are not being "taxed with costs that were not incurred"; they are being paid for the value of gas at the wellhead. Calculating that value includes deduction of a processing fee which includes recovery of actual daily operating expenditures and a return on risk capital or a "profit" associated with plant operations. Payment or recognition of a reasonable processing fee is an essential component of determination of value at the well. It cannot be analogized to a well operator's election to finance drilling operations by debt and such operator's attempt to require a nonconsenting owner to share in such elective financing costs under a statute which cannot be so applied.

1. *Plaintiffs concede the Piney Woods Case is res judicata for numerous Plaintiffs.*

Plaintiffs state that res judicata under the *Piney Woods* Case "is a two way street." They emphasize the Fifth Circuit found "'processing costs are not per se chargeable to market value royalty. They must be reasonable costs.'" (Plaintiffs' brief at 27, 30.) The initial salient point, however, is the reason the Fifth Circuit held processing costs must be reasonable. Again, the ultimate determinative issue is value *at the well.* The value of the production at the well may be determinable in some instances without consideration of processing costs. For example, there may be sales to third parties of gas as produced in its natural state of sufficient comparability to establish wellhead value. No such sales exist here. Use of unreasonably high processing costs to ascertain wellhead value understates the value at the well. By the same token, use of "unreasonably" low processing costs overstates

wellhead value. The task is to determine "the value added by processing." *See Piney Woods*, 726 F.2d at 240.

It makes no sense for Plaintiffs to suggest that the value added by processing of poisonous sour gas is limited to actual daily operating costs with no consideration for the costs of, compensation for or value of the plant owner's incurrence of substantial operating risks and plain entitlement to a business profit. If Pursue's daily processing expenses were above-market and therefore excessive, or below-market, those costs would not be helpful to calculate wellhead value. All parties and witnesses necessarily acknowledged, including Plaintiffs' industry expert, that it is the gas processing that enables realization of such revenues and significantly contributes enormous value to the otherwise unusable and therefore entirely valueless but deadly unprocessed sour gas. (T. 25-27, 189-94.)

The opinion of the district court on remand in the *Piney Woods* Case which has res judicata effect explicitly recognized that the reasonableness of a processing fee was to be assessed in relationship to the value added to production by processing. The district court expressly stated: "[T]he plaintiffs have not made any successful evidentiary showing that the processing costs in any manner outweighs the value added to the processing of raw gas into salable sweet gas." (Exh. 37 I.D. at 548.) The fee has not changed since the *Piney Woods* decision, when it was adjudicated to be reasonable.

2. *The Piney Woods Case establishes a mineral lessee may require royalty to share in a processing fee it charges as plant owner which includes payments in excess of actual operating costs and actual plant investment.*

Plaintiffs' emphasis on the Fifth Circuit's finding in *Piney Woods* that processing fees must be reasonable fails to acknowledge the full import of the district court's final judgment. The preclusive effect of the *Piney Woods* Case is not limited to the declaration that processing costs must be reasonable in order to be included in calculating wellhead value. The district court held that Shell's processing costs were indeed reasonable and these fees included revenues above actual operating costs and actual plant investment (profit). The judicial approval of the ongoing return *on* investment, not just *of* investment, affirmed the right of Shell as lessee to require royalty owners to share in the processing fee which earned Shell, as plant owner, a profit. The *Piney Woods* Plaintiffs in this action are thereby precluded by res judicata from challenging the actions of Pursue as Shell's privy or successor-in-interest in passing through as lessee to the same royalty owners the same processing fee under which Pursue as plant owner earns a profit.

Plaintiffs mischaracterize both the holding in the *Piney Woods* Case and the record before the district court. At different points in their brief Plaintiffs necessarily acknowledge the *Piney Woods* Case approves a return on investment, or profit. (Plaintiffs' brief at 28, 29.) Plaintiffs, however, then wrongly assert Pursue is not entitled to receive any processing fee greater than actual operating costs and actual investment and repeatedly insist there can be no processing fee greater than actual costs after the processing plant has "paid out." (Plaintiffs' brief at 16, 26, 27, 32.) Plaintiffs define "'payout'" as "when revenues equal the cost of investment. After 'payout' everything else is pure profit." (Plaintiffs' brief at 31

n.26.)

Again, the district court in the *Piney Woods* Case explicitly approved a mineral lessee's practice of passing through to its royalty owners a processing fee under which it was profiting as the plant owner. The claim in the *Piney Woods* Case was not simply that royalty owners do not share in any processing cost; the claim was that Shell was making "improper and excessive" charges. (Exh. 32 I.D.) The issue of reasonableness revolved around Shell's entitlement to fees from its royalty owners above actual costs. The *Piney Woods* Plaintiffs placed the issue of Shell's alleged entitlement to a profit squarely before the court.

Plaintiffs here also misrepresent the record in the *Piney Woods* Case at the time of the district court's 1989 final judgment. Shell's plant had long since "paid out." Plaintiffs' statement that "the *Piney Woods* Case was complete in the 1970s" is wrong. (Plaintiffs' brief at 32.) The district court's 1989 opinion (Exh. 37 I.D.) and final judgment (Exh. 36 I.D.) followed a two-week trial in 1988 (Exh. 37 I.D. at 1). Plaintiffs' statement that Shell did not recover its plant investment until 1990 is likewise clearly erroneous. Plaintiffs misinterpret a trial exhibit (Exh. 5) to substantiate their baseless assertion. This exhibit is entitled "Thomasville Plant Economic Analysis 8/79." It is a 1979 document reflecting actual numbers through its 1979 preparation and projections thereafter. The document evidences through 1979 total revenues of $41,381,000, total direct operating costs of $13,920,000 and total investment of $22,242,000. Thus, revenues exceeded cost of investment under Plaintiffs' definition of "payout" by $19,000,000. If actual operating costs are included,

revenues exceeded "payout" by approximately $5,000,000. Plaintiffs misleadingly note that "Pursue's counsel, who was also counsel for Shell, informed the Chancery Court that the issues regarding processing costs dropped out of The *Piney Woods* Case in 1989." (Plaintiffs' brief at 32 n.27.) The reason processing costs "dropped out" was because the *Piney Woods* Plaintiffs elected not to appeal the 1989 final judgment that Shell's processing costs, pursuant to which Shell was receiving a profit and under which Shell continually received substantial revenues after plant payout, were reasonable.

C. Plaintiffs have made no showing that Pursue's processing fee exceeds the value added to production by processing.

1. *Plaintiffs' challenge of the indisputably relevant evidence of higher processing fees charged by sour gas processors other than Pursue is unavailing.*

Plaintiffs, who bear the burden of proof, inexcusably made no effort at trial to address the value added by processing or to prove the wellhead value of the gas. Pursue did prove those values; Plaintiffs find themselves lamely asserting Pursue's proof, which was admitted into evidence without objection, is "irrelevant." (Plaintiffs' brief at 43-45; T. 519-34.) Through an eminently qualified industry expert, Pursue identified plants processing sour gas and submitted the fees charged for processing that gas. In each instance the fees were significantly higher than those charged by Pursue. Such evidence unquestionably establishes, particularly in the absence of any plaintiff evidentiary rebuttal, that Pursue's processing fees cannot be found to be unreasonably high. Pursue's lower processing fees result in a higher wellhead value. (T. 518-34; Exhs. 57, 74-77.) Plaintiffs did not show that *any* gas processor,

under any circumstances, charges less than Pursue does.

Plaintiffs offer no legitimate basis for disregard of the only evidence addressing the reasonableness of processing fees. That the comparable plants had smaller design capacities than Pursue's plant is of no moment. The issue is not one of whether the comparable gas plants could have handled 100% of the sour gas production from the fields serving the plant. Regardless, the design capacities of 65,000 Mcf per day (65 million cubic feet per day) and 70,000 Mcf per day (70 million cubic feet per day) for the Edgewood and Sulfur River plants could have handled 100% of the actual subject sour gas production. Between 1996 and 2001 daily sour gas production transported to Pursue's plant always averaged less than 45,000 Mcf per day and in several years less than 35,000 Mcf per day. (Exh. 56.)[3] Nor is use of the 25,000 Mcf per day Cahouna Venture plant problematic. The sour gas per-Mcf processing charge for the Cahouna Venture plant including sulfur recovery is over twice Pursue's per-Mcf processing fee.[4]

Plaintiffs' emphasis on the recovery of liquids at the comparable sour gas plants is also misplaced. (Plaintiffs' brief at 43-44.) Pursue's expert adjusted the sour gas per-Mcf fees to take the liquids into account. (T. 545.) Further, he explained that the presence of

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[3] Exhibit 56 depicts raw gas production volumes on an annual basis. The averages in the text are based on a conservative 330-day operations year.

[4] Additionally, Pursue's expert explained that he appropriately adjusted the maximum plant inlet volumes in light of the presence of liquids in the raw gas stream. Unadjusted, the Sulfur River plant, for example, had an inlet capacity of 100 million cubic feet per day of sour gas which was 35% hydrogen sulfide. (T. 548.)

liquids in the sour gas production actually subsidized the gas treating and sulfur recovery portions of the plant which resulted in a lower fee than would be charged if there were no liquids, reinforcing that Pursue's charges are far below market. (T. 546.)

Plaintiffs' attempt to argue noncomparability of the processing plants identified by Pursue's expert based on the location of the plants is particularly frivolous. Whether it would be uneconomic to transport the subject sour gas to the comparable processing plants has no bearing on the comparability of the sour gas processing. The point is that sour gas processing plants appropriately located proximately to the sour gas production charge processing fees one-third to one-half higher than the fees charged by Pursue for processing sour gas proximately located to its plant.

Similarly, Plaintiffs' assertion that the subject sour gas production is "'not worth anything'" without a processing plant does not establish "uniqueness." The same is undeniably true for the sour gas production processed at the Edgewood, Sulfur River, and Cahouna Venture plants. The undeniable bottom line is that Pursue's charges for gas processing are *below* market rates, and lead to wellhead value payments *above* market rates.

2. *Plaintiffs wrongly distort Pursue's reasoned implementation of a processing fee consistent with Shell's practices.*

Plaintiffs' frantic insistence that the processing fee is based in part on a $41,000,000 plant investment Pursue never made is misguided from multiple perspectives. Preliminarily, Shell indisputably made such an investment. Pursue is Shell's successor-in-interest. In return for Pursue's assumption of Shell's obligations thereunder, Shell assigned all its rights,

titles and interests under the subject leases and other instruments of mineral ownership to Pursue. As assignee, Pursue "stands in [Shell's] shoes . . . taking whatever rights [Shell] possessed." *E.g., Southern Mississippi Planning & Development District v. ALFA General Insurance Corp.*, 790 So. 2d 818 (Miss. 2001). Pursue's rights and ascertainment of its obligations to pay royalties and other revenue payments on acquisition of Shell's gas reserves and plant were no different than those of Shell.

Further, the reasonableness of the processing fee is not to be determined in the context of Plaintiffs' rhetoric of royalty owners allegedly having to "pay for" the processing plant numerous times. Whether the valuable processing plant has been "paid for" is no reflection of the value of the gas at the well. Plainly, a "paid for" processing plant adds the same substantial value to the wellhead value of sour gas just as surely as an "unpaid for" processing plant. The determinative question is one of how much value is being added beyond the well by the gas processing, and it cannot be seriously suggested plant investment "payout" increases the value of sour gas at the well.

Nor is there anything untoward about inclusion of the $41,000,000 investment amount in the fee calculation methodology apart from its being Shell's actual investment. Pursue's plant investment was $53,000,000. Utilization of Pursue's actual total processing-plant investment in the judicially approved Shell methodology would have of course yielded a higher fee. Re-creation of the same processing plant capabilities in 2001 would have cost over $60,000,000. (T. 476.) Plaintiffs' own expert acknowledged not only the substantial

investment required for the essential gas processing facilities but also the considerable value added to the sour gas production in excess of actual investment. (T. 190-94, 196, 198-99.)

Similarly, Plaintiffs' argument that "it was unreasonable for Pursue to force the Shell plant onto its royalty owners when Pursue's plant was capable of the same production and had already been paid for" is yet another Plaintiff red herring. Processing all of the sour gas through the newly acquired Shell plant resulted in a substantially lower processing fee for all owners including those with interests in Pursue-operated wells whose gas had been processed in Pursue's plant prior to the Shell acquisition. Before the Shell acquisition, Pursue's processing fee was on average $1.81 per sour gas Mcf; the fee after the acquisition was only $0.75 per sour as Mcf. (T. 392-93.) While Pursue's plant had reached "payout" as of January 1, 1996, the return on Pursue's high-risk plant investment was a meager 3.42%, a return markedly below current industry norms exceeding 30% and the identified return of 15% in the Shell formula. (T. 535-36, 541.) Moreover, continued operation of two processing plants would have obviously been imprudent, and use of Pursue's plant would have required an incremental investment of over $10,000,000 and also would have resulted in higher operating costs. (T. 121, 537, 569-71.)

Plaintiffs' contention that Pursue's investment in Shell's plant was "zero" dollars is erroneous and irrelevant. Shell's processing plant indisputably had value. (T. 121, 198-99, 569-71.) That Pursue acquired Shell's gas reserves and processing plant for a lump sum purchase price *plus* the assumption of substantial environmental risks and liabilities (the

reason Shell sought to divest itself of its sour gas operations) (T. 115-18, 566-69) does not remotely suggest Pursue made no investment in Shell's plant. Nor does Plaintiffs' contention that because the gas reserves were worth more than the total cash sales price, the parties could not allocate any portion of Pursue's cash payment to the plant hold any water. Again, the sour gas reserves were worthless without a gas processing plant and Shell's plant was more valuable than Pursue's $53,000,000 plant. Further, as previously emphasized, the actual dollar investment in processing facilities is not determinative of the value of the wellhead gas, or of the market value of processing. If Pursue had paid Shell $100,000,000 for the plant, we doubt Plaintiffs would concede the wellhead value of the gas decreased as a result.

II. The relationship between Pursue as mineral lessee and Plaintiffs as mineral lessors is not fiduciary.

The Chancery Court cited no legal authority whatsoever in support of its erroneous finding of a fiduciary relationship between Plaintiffs and Pursue. Plaintiffs do no better. They ignore this Court's controlling decision in *Nygaard v. Getty Oil Co.,* 918 So. 2d 1237, 1241-42 (Miss. 2005). Plaintiffs misapply inapposite decisions of this Court concerning existence of a fiduciary relationship. They say nothing about their failure to plead a fiduciary relationship. Plaintiffs afford the Court no basis for a determination other than the relationship is contractual and not fiduciary.

Nygaard is directly on point. That Nygaard was an overriding royalty owner, as are

some but not all Plaintiffs here, is a distinction without a difference. The same plaintiff-contrived grounds for an alleged fiduciary relationship for a royalty owner apply equally to an "overriding" royalty owner whose royalty interest may have been reserved after conveyance of his working interest. (T. 84.) The working interest owner's activities are for both its benefit and the benefit of overriding royalty owners; the working interest owner controls "the books, the records, the accounting, and the release of information relating thereto" for royalty and overriding royalty owners alike. (Plaintiffs' brief at 46-47.) The overriding royalty owner, just like other royalty owners, expects the working interest owner to fulfill its contractual obligations regarding "gas production, gas processing, distribution of royalty payments, distribution of information, and the accounting procedures used." (Plaintiffs' brief at 47.) That the royalty owner, like the overriding royalty owner, lacks "control" over working interest owner practices beyond insistence on fulfillment of contractual obligations is an inadequate basis to find the relationship to be fiduciary.

Nor does the absence of a detailed breakout of all elements of the processing fee disclosed on the revenue check or the existence of maybe a dozen revenue owners who negotiated to pay a lower or no processing fee serve in any way to establish a fiduciary relationship. (Plaintiffs' brief at 47-49.) Such alleged conduct is no predicate for defining the nature of the relationship arising out of the contracts. Moreover, the suggestion that there is something improper about these circumstances is meritless. The revenue payment checks made more than adequate disclosures. (See Pursue's principal brief at 45-46.) That perhaps

12 revenue interest owners negotiated more favorable provisions regarding gas processing than did 1,800 others says nothing about any alleged fiduciary relationship.

Plaintiffs' ill-conceived attempt to fabricate a fiduciary relationship is further manifested by their manipulation of two letters to royalty owners, one of whom is a plaintiff. (Plaintiffs' brief at 48-49.) Plaintiffs unduly emphasize Pursue stated in the letter that "Pursue Energy charges all owners a processing charge" as if use of the word "all" is inexcusable on this record. That there may be a handful of owners out of 1,800 owners who pay no processing fee is no basis for chastising Pursue for these isolated letter communications. Equally apparent is that Pursue's statement that the "processing charge is necessary because of the cost incurred in removing hydrogen sulfide gas (H_2S), sulfur and other impurities from the gas" is accurate. That the processing fee charged by Pursue as plant owner to well revenue interest owners includes costs above actual costs does not impugn Pursue's disclosure. Moreover, like Plaintiffs' general contentions concerning the check stubs and more favorable treatment of 12 royalty owners, these letters are no predicate for finding a fiduciary relationship.

Plaintiffs cite the general parameters under which a fiduciary relationship may be found as set forth in *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991) and *University Nursing Associates, PLLC v. Phillips,* 842 So. 2d 1270, 1274 (Miss. 2003).[5] These premises do not assist them. The circumstances here are not so extraordinary as to be

[5] Plaintiffs erroneously assert that a fiduciary relationship "will" be found under such circumstances as if such a finding is always judicially compelled.

characterized as anything other than a normal business relationship. *See Burgess v. BankPlus,* 830 So. 2d 1223, 1227-28 (Miss. 2002) (normal business relationship pursuant to contract does not establish fiduciary relationship absent extraordinary circumstances where *both* parties understand "'special trust and confidence has been [justifiably] reposed'").

Plaintiffs' reliance on *Allred v. Fairchild,* 785 So. 2d 1064 (Miss. 2001) is also misplaced. The relationship between Allred and Fairchild was a "long and informal business relationship," in the nature of a partnership or principal-agent relationship, which being "based on little more than a handshake" without any written documentation was deemed to be a "confidential relationship." *Id.* at 1068. The Court imposed a constructive trust because Fairchild fraudulently misrepresented the payout status of wells on which Allred's right to commissions on revenue derived from the parties' joint ventures depended. These circumstances in *Allred* are a far cry from the arm's-length, written contractual relationships between Plaintiffs and Pursue, many of which arose by assignment from Shell without any dealings between Plaintiffs and Pursue other than Pursue's forwarding of well revenue checks.

III. Plaintiffs are not entitled to punitive damages.

Plaintiffs assert entitlement to punitive damages based on their erroneous allegations of existence of a fiduciary relationship and the alleged satisfaction of punitive damages factors identified in *Miss. Code Ann.* § 11-1-65(e) (Rev. 2002). Yet, there is no fiduciary relationship as explained both above and in Pursue's principal brief. This action having been

commenced before 2004, § 11-1-65 does not apply because this is a breach of contract action. Regardless of the inapplicability of § 11-1-65, the record does not remotely support a punitive damages award under any properly applied criteria. Nor does the record support an award of attorneys' fees in lieu of an actual monetary award of punitive damages. (See Pursue's principal brief at 32-42.)

The essence of Plaintiffs' baseless demand for punitive damages is the presence of the $41,000,000 investment number in the Shell formula utilized by Pursue in determination of the processing fee. Preliminarily, by isolation of this circumstance, Plaintiffs again ignore the threshold determination of the value of the sour gas at the wells; and this determination substantially depends on ascertainment of the value added by processing. That Pursue did not expend $41,000,000[6] out-of-pocket to purchase Shell's plant speaks to neither the requisite determination of wellhead value in light of value added by processing nor the reasonableness of Pursue's conduct. (See Pursue's principal brief at 29-32, 35-36 and *supra* at 14-16.)

Plaintiffs assert that incorporation of the $41,000,000 number into the formula created by Shell, and adopted by Pursue, negatively impacted Plaintiffs because use of a lower number would have lowered the processing fee and that Pursue understood this circumstance. Such allegations are pointless. Use of Pursue's $53,000,000 actual investment in its own

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[6] Of course, Pursue never claimed to have invested $41,000,000 or any other figure in communicating with Plaintiffs. That figure was simply a component of a judicially approved formula for calculating processing fees. What mattered to Plaintiffs was the amount of their revenue payments, not the arithmetical method of calculating those payments.

plant on which it had received barely a minuscule return would have resulted in a higher number. Use of the Shell formula resulted in a processing fee lower than the fee being paid by all owners before Pursue acquired Shell's plant. Having stepped into Shell's shoes with respect to the vast majority of sour gas production, Pursue reasonably elected to continue Shell's court-approved practices.

For similar reasons, Plaintiffs' contention that "Pursue's motivation [in use of the $41 million number] was simple, increase its profits on the backs of its royalty owners" is preposterous. (Plaintiffs' brief at 52.) There is no record support for this outlandish allegation. The record contains a thorough explanation of Pursue's decision to use Shell's judicially-approved fee. Pursue abandoned its former processing fee approach which would have reasonably charged higher processing fees than the lower Shell fee calculation. Pursue's actions as plant owner lowered the fee for all well revenue interest owners. It is absurd to suggest that implementation of a judicially approved methodology by the successor-in-interest was improperly motivated by illicit profiteering.

Nor does Pursue's continued implementation of its processing fee approach warrant any criticism, much less punitive exposure. Plaintiffs have not demonstrated, because they could not demonstrate, that anyone would process the gas for less than what Pursue charged or that Pursue's processing fee overstates the value added by processing. Likewise, Pursue's letter response to a plaintiff royalty owner cannot remotely be described as malicious concealment of allegedly wrongful conduct. The royalty owner's inquiry itself is not in the

record; Pursue's letter suggests nothing more than an inquiry was made "concerning invoices that had been generated for your account." (Exh. 10.) Pursue responded by relating processing charges were necessarily made to owners' interests because high levels of hydrogen sulfide gas required processing for the gas to have any market value. Moreover, Pursue's polite response concluded with the following: "Please contact me at 214-880-8583 if you have any more questions concerning these invoices." (Exh. 10.)

IV. *Miss. Code Ann.* § 53-3-39 addressing interest on royalty payments suspended or not timely disbursed was not pled by Plaintiffs and does not apply.

On cross appeal Plaintiffs contend the Chancery Court erred by not awarding prejudgment interest at 8% compounded annually from 1996 through the October 1, 2009 final judgment. They assert entitlement to such interest under *Miss. Code Ann.* § 53-3-39 (Rev. 2003). Plaintiffs never pled an alleged right to such statutory interest. Furthermore, the failure to plead the statute is easily understood as the statute plainly does not apply to the controversy before this Court.

A. Plaintiffs' failure to plead the statute bars its assertion.

Plaintiffs assert that "Chancery Courts have limited discretion when considering a request for assessment of interest when both entitlement and the rate are set by statute." (Plaintiffs' brief at 56.) Yet, Plaintiffs' complaint never sought an award under § 53-3-39 or asserted entitlement to interest thereunder. The failure to plead the purported claim bars its assertion. *See B&W Farms v. Mississippi Transportation Commission*, 922 So. 2d 857,

859 (Miss. App. 2006) (summary judgment affirmed as allegation of "unlawful" conduct by defendant state entity not sufficient to put it on notice of constitutional claim).

Section 53-3-39 provides in pertinent part as follows:

> *Purchasers* of oil or gas production from any oil or gas well shall be liable for the payment of interest on royalty proceeds which have not been disbursed to the royalty owners from and after one hundred twenty (120) days following the date of the *first* sale of oil or gas.
>
> The rate of interest shall be eight percent (8%) per annum and shall be computed from the date of one hundred twenty (120) days after such *first sale*; however, from and after July 1, 1992, the rate of interest shall be the greater of eight percent (8%) per annum or two percent (2%) above the federal discount rate in effect as of the second day of January of each year during which interest on such royalty proceeds is payable, except in those instances where the royalty proceeds cannot be paid because the title thereto is not marketable, in which case the rate of interest on a per annum basis shall be equal to the federal reserve discount rate in effect as of the second day of January of each year during which interest on the royalty proceeds is payable. The accrued interest shall be paid to the royalty owners at the time of the payment of the *accrued royalty proceeds*, such rate of interest to be displayed on the disbursement document. As used herein, "*first sale*" shall mean the first commercial sale of production after completion of the well and shall not include sales of oil or gas during initial testing prior to completion of the well.
>
> Whenever the disbursal of royalty proceeds is suspended for any reason whatsoever, the purchasers of production shall be liable for the payment of interest on the royalty proceeds which have been *suspended*. Except as otherwise provided, the rate of interest shall be eight percent (8%) per annum and shall be computed from the date that the royalty payments were *halted or suspended*; provided, however, that if such date is less than one hundred twenty (120) days after the first sale of oil or gas,

> then such interest shall be computed from the date of one hundred twenty (120) days after such first sale. . . . The *accrued* interest shall be paid to the royalty owners at the time of the payment of the *suspended* royalty proceeds, such rate of interest to be displayed on the disbursement document.
>
> The *purchaser* of production from a well shall be exempt from the provisions of this section and the operator and/or the owner of the right to drill and to produce under an oil and/or gas lease shall be substituted for the purchaser herein where the operator and/or the owner and purchaser have entered into an arrangement *where the royalty proceeds are paid by the purchaser to the operator and/or the owner who assumes responsibility of paying the proceeds to the royalty owners legally entitled thereto*. Where the operator and/or the owner of the drilling rights are substituted herein for the purchaser, the interest provided for hereinabove shall accrue from the date set forth hereinabove or from the date of such operator and/or owner's *receipt of the proceeds* of such production, whichever is the later date. (Emphasis added.)

Plaintiffs' complaint does not allege that Pursue failed to disburse royalty within 120 days of the date of first sale of gas. Plaintiffs' complaint does not allege that Pursue suspended disbursal of royalty proceeds. Consequently, Plaintiffs did not plead a claim for interest owed under § 53-3-39. Indeed, there is no mention of the statute whatsoever in the complaint.

B. Alternatively, the statute does not apply to the circumstances before this Court.

In addition to not having been pled, the plain language of § 53-3-39 establishes the statute is in any event not applicable. The statute is clearly intended to address one of two circumstances: (i) instances where the party with the royalty payment obligation fails to

disburse royalty proceeds within 120 days of the first sale of the oil or gas or (ii) instances when the payment of royalty proceeds has been suspended. Neither circumstance exists here.

Section 53-3-39 is a statute in derogation of the common law. As such, the statute is to be "strictly construed, not extending liability 'beyond that which is clearly indicated by its express terms.'" *Warren ex rel. Warren v. Glascoe*, 880 So. 2d 1034, 1037 (Miss. 2004). Having enumerated the subjects on which it operates (held sales proceeds related to the first sale of gas and the suspension of royalty payments), § 53-3-39 should be construed as excluding those subjects not covered (a dispute over the amount of timely disbursed royalty proceeds). *See Shelter Mutual Insurance Company v. Dale*, 914 So. 2d 698, 702 (Miss. 2005) ("'[W]here a statute enumerates and specifies the subject or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned or under a general clause.'").

Moreover, the Legislature passed § 53-3-39 in April 1983 to address the gas market turmoil prevailing in Mississippi. Gas purchasers were disregarding contractual obligations to purchase gas and failing to take gas production ratably from producing reservoirs with numerous working interest owners. *See, e.g., Transcontinental Gas Pipeline Corporation v. The State Oil & Gas Board of Mississippi*, 457 So. 2d 1298 (Miss. 1984), *rev'd*, 474 U.S. 409 (1986); *Forest Oil Corp. v. Tenneco, Inc.*, 626 F. Supp. 917 (S.D. Miss. 1986); *Forest Oil Corp. v. Tenneco, Inc.*, 622 F. Supp. 152 (S.D. Miss. 1985). Royalty owners were caught in the middle of disputes between the purchasers and producers, and between working

interest owners with and without gas sales contracts, over entitlement to sales proceeds. *See id.*; Pierce, *Lessor/Lessee Relations in a Turbulent Gas Market*, 38 INST. ON OIL & GAS L & TAX'N 8 (1987) (R. 797-822.) These disputes over entitlement to production sales proceeds caused inordinate delays in payment of royalty. The provisions for interest under § 53-3-39 were intended to address those instances where either the gas purchaser or seller was holding the sales proceeds on gas delivered pending determination of the interest owners entitled to share in such proceeds. Royalty payments were not being made pending that determination.

Hence, the title of the House Bill that became § 53-3-39 states: "An act to provide that oil and gas owners and producers shall be liable for interest at the federal reserve discount rate to royalty owners whenever the royalty payments have not ***yet*** been disbursed to the royalty owners or have been ***suspended*** for any reason; and for related purposes." Chapter 477, House Bill No. 787, *Mississippi Session Laws* 1983 (emphasis added). The statute provides for payment of *accrued* interest on *accrued* royalty proceeds. Section 53-3-39 does not address an alleged underpayment of royalty attributable to the determination of the value of the gas at the well when royalty payments are being timely made.

Pursue disbursed royalty on sales proceeds within 120 days of the first sale of the gas and made timely disbursements thereafter. Nor is any suspension of royalty payments in issue. There are no "accrued royalty proceeds" under § 53-3-39 on which interest is owed.

Plaintiffs wrongly rely on *First National Bank v. Pursue Energy Corporation*, 799 F.2d 149 (5th Cir. 1986). (Plaintiffs' brief at 57-58.) That this Fifth Circuit decision

addressed royalty payments under leases comparable to those involved in this action on production from the same fields is of no moment. Plaintiffs erroneously assert "the only difference [between *First National Bank* and this case] is that the *First National Bank* case involves payment of sulfur royalties where the instant action involves payment of gas royalties." The issue in *First National Bank* was whether royalty attributable to the end product elemental sulfur recovered from the sour gas was due under the gas royalty clause or under the sulfur "mined and marketed" royalty clause. Royalty under the sulfur mined and marketed clause was payable at a fixed rate of $1.00 per long ton regardless of the amount of the sales proceeds received or the value of the elemental sulfur. The Fifth Circuit rejected Pursue's position that royalty attributable to recovered sulfur was payable under the sulfur mined and marketed clause and required Pursue to make payment under the gas clause. 799 F.2d at 152. Pursue had paid royalty at the fixed rate of $1.00 per long ton and had made *no* payments based on *proceeds* of sulfur sales. Pursue had thus withheld the sulfur sales proceeds and never disbursed royalty on them. Such circumstances are not at all comparable to those before this Court. *First National Bank* is not applicable.

Plaintiffs also erroneously and misleadingly assert that *First National Bank* is the "primary" case interpreting § 53-3-39 without citation of the applicable authority. (Plaintiffs' brief at 57.) To the contrary, dozens of these *Sykes* Plaintiffs unsuccessfully asserted § 53-3-39 in the *Piney Woods* Case. The courts in *Piney Woods* found that the mineral lessee (Shell) had underpaid royalty on sour gas production (for reasons other than gas processing

deductions). The plaintiffs in *Piney Woods* contended *First National Bank* required the payment of interest on those underpayments under § 53-3-39. The district court and the Fifth Circuit held, however, that § 53-3-39 did not apply. (District court opinion at R. 825-26; Fifth Circuit opinion at R. 827-28, 832-34.) The district court "reviewed this statute and [found] that it prohibit[ed] the accumulation of royalty proceeds beyond 120 days." (R. 826.) Like Pursue in this action (and unlike Pursue in *First National Bank*), Shell had not withheld royalty proceeds and had paid royalty under the lease's gas royalty provisions.

Pursue has not accumulated royalty proceeds beyond 120 days of the first sale of gas; there has been no suspension of royalty payments. That Pursue's timely royalty payments, like Shell's, may be judicially found to have resulted in the underpayment of royalty on sour gas does not invoke § 53-3-39. The statute does not apply to a dispute over the factors affecting the amount of timely disbursed royalty proceeds.

C. Further in the alternative, any prejudgment interest due under § 53-3-39 or otherwise should be simple and not compound.

Plaintiffs "do not take issue with [the Chancery] Court's award of 6% simple interest, post-judgment." (Plaintiffs' brief at 56.) They do contend, however, that the Chancery Court should have awarded prejudgment interest at 8% compounded annually under § 53-3-39 and alternatively assert the Chancery Court properly exercised its discretion in compounding interest after December 31, 2001 through entry of judgment.

Plaintiffs never specifically argue that § 53-3-39 provides for compound interest. Rather and no doubt aware that statutes such as § 53-3-39 have been construed to provide for

simple and not compound interest, Plaintiffs wrongly contend the Chancery Court's finding of a fiduciary relationship requires interest be compounded. It has already been demonstrated that no fiduciary relationship exists here (*supra* at 16-19), and the fiduciary relationship cases Plaintiffs cite are not remotely comparable to the facts before this Court. The notions that in all breach of fiduciary duty cases "an award of prejudgment interest compounded annually 'must be charged'" and "the awarding of prejudgment interest in a case where a fiduciary relationship has been breached is not discretionary" are wrong. (Plaintiffs' brief at 59.) The determination of whether to award any prejudgment interest against a fiduciary is within the trial court's discretion. *USF&G Co. v. Conservatorship of Melson*, 809 So. 2d 647, 661-62 (Miss. 2002) (finding award of prejudgment interest against conservator not "mandatory"; affirming chancery court refusal to award prejudgment interest on liquidated amounts owed by conservator).

Plaintiffs assert a purported statutory predicate of § 53-3-39 for the award of any interest, and then self-servingly abandon that statute to assert fiduciary relationship contentions to enhance the monetary amount. When it applies, § 53-3-39 specifically includes the obligation of "the owner of the drilling rights" to pay royalty. The statute thereby addresses the relationship between royalty owner/mineral lessor and the working interest owner/mineral lessee. There is no statutory suggestion, however, that an obligation to pay interest "per annum" permits the compounding of interest. Applicable case law and the statutory language preclude compounding.

The common law rule is that "when interest is allowable, it is to be computed on a simple rather than compound basis in the absence of an express authorization otherwise." *Greenville Riverboat, LLC v. Less, Getz & Lipman, P.L.L.C.*, 131 F. Supp. 2d 842, 849 (S.D. Miss. 2000) (applying Mississippi law). *See Stovall v. Illinois Central Gulf Railroad Co.*, 722 F.2d 190, 192 (5th Cir. 1984) (applying Mississippi law and noting "the general American rule that when interest is allowable, it is to be computed on a simple rather than compound basis in the absence of express authorization otherwise"); *Dedeaux Utility Co., Inc v. City of Gulfport*, 938 So. 2d 838, 846 (Miss. 2006) (following the Fifth's Circuit's interpretation in *Stovall* and holding that "'legal interest' is not compounded, but is, rather, simple interest").

This Court's decision in *Dedeaux Utility* is instructive. The compound interest issue before the Court involved the awardability of interest in eminent domain actions. The trial court had awarded compound prejudgment interest and simple post-judgment interest based on its interpretations of *Miss. Code Ann.* §§ 75-17-1 and 75-17-7 (Rev. 2009). Section 75-17-1 specifically provided for compound interest as it required interest to be calculated "according to the actuarial method." This Court found, however, that the eminent domain statute, *Miss. Code Ann.* § 11-27-19 (Rev. 2004), and not § 75-17-1 or § 75-17-7, applied. Section 11-27-19 provided that "any judgment finally entered in payment for property to be taken shall provide legal interest on the award of the jury from the date of the filing of the complaint until payment is actually made." 938 So. 2d at 846. Because § 11-27-19 called

for the payment of "legal interest" and not interest calculated "according to the actuarial method," the Court followed the Fifth Circuit's decision in *Stovall* and found that "legal interest is not compounded, but is, rather, simple interest." *Id.* The Court further held "there is no distinction under the eminent domain statute between pre-judgment interest and post-judgment interest." *Id.*

For reasons similar to those in *Dedeaux Utility*, any interest awardable under § 53-3-39 is to be simple interest only. The statute provides only "for the payment of interest *on royalty proceeds* which have not been disbursed to the royalty owners." Unlike § 75-17-1, § 53-3-39 states only that the "rate of interest shall be eight percent (8%) per annum" with no provision for calculation "according to the actuarial method." There is no provision authorizing the award of interest on any previously accrued but unpaid interest. The award of interest must be calculated based solely on the amount of any "royalty proceeds which have not been disbursed." This statutory language unambiguously requires that any award of interest be calculated using the simple, rather than compound, method.[7]

V. Plaintiffs' allegations that fraudulent concealment tolled the statute of limitations are meritless.

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[7] Pursue recognizes that this Court held in *Guardianship of Duckett v. Duckett*, 991 So. 2d 1165, 1181-83 (Miss. 2008), that trial courts have the discretion under *Miss. Code Ann.* § 75-17-7 (Rev. 2009) to award compound interest. The *Duckett* decision is not applicable, however, to any award of interest under § 53-3-39. The principles of judicial discretion on which the Court relied do not apply to § 53-3-39. Nor is there interest subject to compounding under § 75-17-7 as demonstrated in Pursue's principal brief explaining no prejudgment interest is awardable. (Pursue principal brief at 42-44.)

Unquestionably, Pursue provided revenue payment information to all Plaintiffs disclosing, among other things, (i) the total sales proceeds on which payments were based, (ii) the total processing fee being charged, and (iii) the owners' shares of such proceeds and processing fee. (Pursue principal brief at 45.) Such check stubs thereby clearly disclosed the degree to which gross sales revenues were being reduced by processing charges.

That the check stubs did not disclose all elements of the processing charges does not constitute fraudulent concealment. Plaintiff Sykes admitted all he had to do was ask Pursue about the charges, but he elected never to do so. (T. 140, 146-48.) As to the inquiry of Plaintiff Johnston, the absence of impropriety in Pursue's reply has been previously explained. (*Supra* at 18, 21-22.) Further, for statute of limitations purposes, it bears repeating that Pursue concluded its reply with an invitation for further requests if additional information was desired. (Exh. 10.) There is no record suggestion that the royalty owner elected to ask any question about the elements of the processing charges or anything else.

Plaintiffs' reliance on "fraudulent concealment" to avoid the statute of limitations is unavailing. *Miss. Code Ann.* § 15-1-67 governs "fraudulent concealment" and requires the plaintiff to prove that "(1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on their part to discover it." *Channel v. Loyacono*, 954 So. 2d 415, 423 (Miss. 2007). The defendant's "affirmative act" must be designed to prevent the plaintiff's discovery of his claim. *Id.*

It is undisputed that each plaintiff received checks with stubs showing the *exact*

amount of processing fees included in calculating their payments. The supposed evidence of "concealment" is absence of underlying details of the method of calculating fees. There was no "affirmative act" of concealment, and no evidence of a "design" to prevent discovery.

Certainly no plaintiff proved due diligence that would justify discarding the statute of limitations. Few plaintiffs bothered to testify at all. Whether each individual plaintiff was prevented from "discovering" a claim, and whether each was duly diligent, is a matter of individualized proof.[8] Certainly no plaintiff who failed to testify satisfied his burden to prove "fraudulent concealment."

Plaintiffs' attempt to distinguish this Court's decision in *Nygaard* is without merit. (Plaintiffs' brief at 62-63.) They wrongly assert a Pursue failure to disclose the elements of the processing fee as a circumstance allegedly not present in *Nygaard.* Again, Plaintiffs never asked for such information and there is no evidence it was fraudulently concealed. Plaintiffs state that unlike the plaintiff in *Nygaard*, they had no way to determine how much royalty they were allegedly due. Yet, Plaintiffs clearly could have investigated the processing charges, including retention of a consultant as in *Nygaard* if so desired, and

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[8] *See, e.g.*, *Archer v. Nissan Motor Acceptance Corp.*, 633 F. Supp. 2d 259, 266-67 (S.D. Miss. 2007) (separately analyzing each plaintiff's evidence on "due diligence" under § 15-1-67); *Compagnie de Reassurance d'Ile de France v. New England Reins. Co.*, 944 F. Supp. 986, 1004 (D. Mass. 1996) ("To obtain the benefit of the fraudulent concealment exception to the statute of limitations, each plaintiff must prove that it was not aware of the facts underlying this lawsuit"); *Anderson v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1126, 1131 (W.D. Pa. 1990) (to avoid statute of limitations based on fraudulent concealment, each plaintiff was required to prove elements individually; "[g]iven the nature of the tolling argument, it is incumbent on each plaintiff to come forth with some evidence sufficient to create a genuine issue of fact in their case on the fraudulent concealment issue."). No plaintiff proved the elements of § 15-1-67.

thereafter timely pursued a claim within the three-year statutory period if warranted.

Conclusion

For the reasons set forth in Pursue's principal brief and this brief, the Chancery Court's decision should be reversed and rendered. No underpayment to Plaintiffs has occurred. The claims of the *Piney Woods* Case Plaintiffs are barred by res judicata. No basis exists for an award of punitive damages, attorneys' fees or prejudgment interest.

This the 23RD day of February, 2011.

Respectfully submitted,

PURSUE ENERGY CORPORATION

BY: William F. Ray

Paul H. Stephenson, III (MB #[redacted]
William F. Ray (MB #[redacted]
G. David Garner (MB #[redacted]

ATTORNEYS FOR APPELLANT/
CROSS APPELLEE

OF COUNSEL:

Watkins & Eager PLLC
The Emporium Building
Suite 300, 400 E. Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 965-1900

G. David Garner
124 Main Street
Raleigh, Mississippi 39153
Telephone: (601) 782-9090

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant/Cross Appellee certifies that he has this day caused to be served a true and correct copy of the foregoing Reply Brief of Appellant and Brief of Cross Appellee on the Chancery Court and counsel of record as follows:

By United States Mail

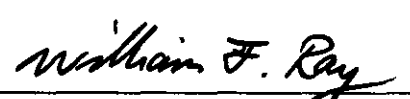
Honorable David Shoemake
Chancellor
Post Office Box 1678
Collins, Mississippi 39428

By Hand Delivery

C. Victor Welsh, III
Pittman Germany Roberts & Welsh, L.L.P.
410 South President Street
Jackson, Mississippi 39201

Marcus M. Wilson
Bennett Lotterhos Sulser & Wilson, P.A.
190 East Capitol Street
Suite 650
Jackson, Mississippi 39201

This the 23RD day of February, 2011.



WILLIAM F. RAY