

No. 2008-45087

STATE OF TEXAS,  
Plaintiff,

v.

PETROLEUM WHOLESALE, LP, ET  
AL.,  
Defendants.

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

334TH JUDICIAL DISTRICT

**DEFENDANTS' MOTION FOR MISTRIAL AND REQUEST FOR  
EXPEDITED/EMERGENCY HEARING**

Defendants Petroleum Wholesale, LP and PWI GP, LEC (collectively PWI) file this Motion for Mistrial and Request for Expedited/Emergency Hearing.<sup>1</sup> PWI specifically requests the Court's consideration of and ruling upon this Motion prior to the entry of any adverse Judgment in this matter. As the following establishes, PWI is entitled to a mistrial as a result of the jury's misuse of unadmitted material in forming its verdict. In support thereof, PWI would respectfully show the Court as follows:

**INTRODUCTION**

PWI has discovered that the jury was provided five boxes of documents labeled Plaintiff's Exhibit 1802 that were never admitted, and in fact were specifically excluded from evidence. The jury foreman, Mr. Duane Fuchser, as well as juror Raymond Barker, both state that "the jury considered, discussed and relied heavily upon Exhibit 1802." See

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<sup>1</sup> PWI files this motion without waiver of, or prejudice to, its rights to file post-judgment motions, including, but not limited to, any motion for new trial pursuant to Rules 320 through 329b of the Texas Rules of Civil Procedure and any motion to disregard jury findings and entry of judgment *non obstante verdicto* pursuant to Rule 301 of the Texas Rules of Civil Procedure.

Affidavit of Duane Fuchser, attached as Exhibit A; affidavit of Raymond Barker, attached as Exhibit C. The Court should not render any judgment against PWI based upon the jury's improper reliance on documents and information excluded from evidence. Thus, the Court should declare a mistrial.

### ARGUMENT AND AUTHORITIES

#### **I. PWI is Entitled to a Mistrial Based upon the Jury's Misuse of Unadmitted Materials.**

Since the conclusion of trial in this cause, it has become apparent that an exhibit which was not admitted into evidence – Plaintiff's Exhibit 1802 – was provided to the jury. (Affidavit of Timothy J Nisbet attached hereto as Exhibit B) Specifically, in reaching the verdict and answering the jury questions in this case, the jury considered, discussed and relied heavily upon Plaintiff's Exhibit 1802, which was not admitted into evidence. (Affidavit of Duane Frederick Fuchser attached hereto as Exhibit A; affidavit of Raymond Barker, attached as Exhibit C) As this Court no doubt recalls, Plaintiffs' Exhibit 1802 was offered by the State during the offer of proof of Todd Giberson on October 25, 2010. At that time, counsel for the State offered five boxes of documents comprising that exhibit. The five boxes of documents consisted of numerous volumes of purported summaries that Todd Giberson had prepared during trial; in fact, the exhibit was prepared subsequent to Mr. Giberson's trial testimony and subsequent to the exclusion of Dr. Sager's damages testimony, and was more than a mere summary of records. This Court accepted the five boxes – Exhibit 1802 – in connection with the offer of proof only; the exhibit was not admitted into evidence as trial evidence. It is not clear

whether the Exhibit (consisting of the five boxes) was ultimately even turned over to the Court at that time. The transcript of the State's offer reflects that counsel for the State advised the Court that the boxes would have to be appropriately marked; however, the Defendants never saw the boxes again, including when the parties agreed upon all admitted exhibits after the parties rested.

Defendants objected to the testimony of Mr. Giberson related to Exhibit 1802, as well as the exhibit itself. Ultimately, on October 29, 2010, this Court issued an order related to the proffered testimony of Mr. Giberson and the documents created by Mr. Giberson during trial. Per this Court's order, Mr. Giberson's additional testimony was refused and the related exhibits, including Plaintiff's Exhibit 1802, were not admitted into evidence. In fact, the Court signed a written order explaining some of the bases for its decision on October 29, 2010, stating:

"The Court finds unpersuasive Plaintiff's argument that Defendant would not be prejudiced by permitting [Exhibit 1802] and new testimony to be offered more than six weeks into trial after Defendants have already cross examined Mr. Giberson and every other witness on the subject and presentation of their case is imminent. ... The Court sustains Defendant's objections to the new testimony and denies the continuance filed after the Court had already ruled on the subject."

Upon the conclusion of trial, the parties reviewed each side's list of exhibits in order to agree to those exhibits that had been admitted into evidence. The State's list of admitted exhibits, which Defendants ultimately agreed to, did not include Exhibit 1802 as an admitted exhibit. Moreover, upon reviewing the documents that were to be sent to the

jury following closing arguments, Defendants were not shown the five boxes comprising Exhibit 1802 as exhibits to be provided to the jury. Regardless of the fact that Plaintiff's Exhibit 1802 was not admitted into evidence and Defendants did not agree to provide such exhibit to the jury, and for reasons currently unknown to Defendants, the exhibit was subsequently included amongst the State's exhibits and provided to the jury. In light of the fact that the jury considered, discussed, and relied heavily upon Plaintiff's Exhibit 1802 in reaching the verdict and answering the jury questions in this case, the inclusion of the exhibit along with the admitted exhibits was improper and clearly harmful.

The jury should not have been permitted to consider the five boxes of documents labeled Plaintiff's Exhibit 1802. The jury was specifically instructed that "[i]n arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court . . . . In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case." Charge of the Court at 1. Plaintiff's Exhibit 1802 was provided to the jury as part of the State's exhibits although it was not identified to Defendants as being on the State's list of admitted exhibits.

The jury considered and relied upon Exhibit 1802 and the information it contained in answering the questions against PWI. *See* Affidavit of Duane Fuchser, Ex. A; affidavit of Raymond Barker, attached as Exhibit C. Moreover, the documents prove their prejudice on their face. The documents purport to summarize PWI's "violations" and the monies acquired by PWI as a result of these violations. PWI strenuously objected to these documents when they were produced for the first time more than six weeks into

trial, and the Court correctly excluded the documents from evidence. The harm and prejudice to Defendants as a result of the improper production of Exhibit 1802 to the jury is unquestionable, and a mistrial is the only appropriate and just remedy. Because Exhibit 1802 was determined by the Court not to be coming into evidence, Defendants never questioned any trial witnesses about the documents, nor took any action to undermine the credibility of the documents that comprise that exhibit. Moreover, no pre-trial depositions ever discussed the exhibit since same wasn't even created until the trial was well underway.

Defendants do not lightly ask the Court to grant a mistrial. However, the jury's consideration of Plaintiff's Exhibit 1802 warrants a mistrial. Declaring a mistrial prior to entry of any adverse Judgment in this matter is the only fair and just remedy under these circumstances.

**II. Defendants Request an Expedited or Emergency Hearing on Their Motion for Mistrial Prior to Entry of Any Judgment Adverse to PWI.**

The entry of any Judgment adverse to PWI could have a significant negative impact upon the Defendants. It is the Defendants' intention to seek any and all appropriate post Judgment relief to the extent that an adverse Judgment is entered, and Defendants reserve their right to file such motions seeking relief. However, PWI requests, and suggests that the more prudent course of action would be that this Honorable Court permit a hearing to be conducted prior to the entry of such adverse Judgment so that the issue presented in this Motion can be heard in further detail and so that additional evidence might be offered and considered by this Honorable Court in

connection therewith. Defendants therefore request an emergency or expedited hearing on these issues.

**PRAYER**

PWI respectfully requests that this Honorable Court set this Motion for a hearing on an expedited basis, and upon hearing the Motion, grant a mistrial or a new trial of this cause. PWI additionally requests that this Honorable Court award to it such other and further relief, both general and special, at law or in equity, to which it is justly entitled.

Respectfully submitted,

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**Attorneys for Defendants Petroleum Wholesale, LP and PWI GP, LLC**

\* Signed by permission  
by Randy L. Fairless

**CERTIFICATE OF SERVICE**

This instrument was served in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure via electronic filing on this 15th day of November, 2010, upon the following counsel of record:

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Unofficial Copy Office of Chris Daniel District Clerk