No. 2008-45087

STATE OF TEXAS, Plaintiff,	§	IN THE DISTRICT COURT
v.	§	HARRIS COUNTY, TEXAS
PETROLEUM WHOLESALE, LP, ET AL., Defendants.	§	334TH JUDICIAL DISTRICT

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR MISTRIAL

NOW COME Petroleum Wholesale, LP and PWI GP, LLC (collectively "Defendants"), and file this Supplemental Brief in Support of Motion for Mistrial.[1] In support thereof, Defendants would respectfully show the Court as follows:

INTRODUCTION

As a supplement to the previously filed motion for mistrial, and pursuant to this Court's hearing regarding same, Defendants address and respond to some of the questions posed by this Court. First, was the jury's consideration of Plaintiff's Exhibit 1802, which was excluded from evidence by this Court but nevertheless included amongst the State's exhibits and provided to the jury (a fact that is undisputed), harmless error? Second, did Defendants waive their right to seek a mistrial by not arguing for same prior to the conclusion of trial when Defendants could not have known that the

[1] Defendants file this Supplement Brief in Support of Motion for Mistrial without waiving their right to seek, and previous request for, entry of a take-nothing judgment. For the reasons set forth in Defendants' Brief Regarding Proposed Entry of Judgment, there is no evidence to support any adverse judgment against Defendants and a take-nothing judgment is appropriate and warranted.

exhibit had been provided to the jury until after the jury had returned its verdict? For the reasons set forth herein, the answer to both of these questions is an unequivocal "no."[2]

ARGUMENT AND AUTHORITIES

I. The jury's reliance upon Plaintiff's Exhibit 1802 in reaching its verdict and answering the jury questions is not harmless because this Court properly excluded the exhibit as prejudicial and unreliable, and the State's arguments to the contrary are without merit.

Plaintiff's Exhibit 1802 consists of several spreadsheets created by Todd Giberson, an OAG employee, during trial (coming to light in the sixth week of trial) after the State's expert, Thomas Sager, proffered testimony setting forth the exact same damages theory presented in Plaintiff's Exhibit 1802 had been properly excluded by this Court. This Court excluded Plaintiff's Exhibit 1802 for a number of valid reasons and expressly held that admission of the exhibit would be prejudicial to Defendants. While it is arguably true that the spreadsheets contain some information stemming from a collection of evidentiary sources, it is equally, and more importantly, true that the spreadsheets (1) contain information that does not stem from any evidentiary source whatsoever and (2) rely on unsupported assumptions and opinions. In fact, the offer of Exhibit 1802 – which purports to match specific negative readings allegedly found during Operation Spotlight to specific consumer transactions occurring on dates that are weeks, months, and, in some cases, over a year prior to Operation Spotlight – was a calculated attempt by the State to provide the jury with its and its stricken expert's excluded theory

[2] Timing is critical with respect to any ruling on the motion for mistrial. Because of the complications that could arise with Defendants' refiners/suppliers and lenders if the motion for mistrial is denied and an adverse judgment is entered, Defendants do not have the luxury of waiting on a resolution to a future motion for new trial and/or an appeal; both will come too late.

of a damages model. The error in such evidence making its way into the jury room was not harmless; therefore, a mistrial is warranted.

A. This Court did not exclude Plaintiff's Exhibit 1802 because it failed to qualify as a summary; this Court excluded Plaintiff's Exhibit 1802 for the host of compelling reasons articulated in its written order of October 29, 2010.

While the State argues that Plaintiff's Exhibit 1802 is harmless because it is merely a summary of other admitted records, this Court did not exclude Plaintiff's Exhibit 1802 because it failed to qualify as a summary under Tex. R. Evid. 1006. This Court signed a seven-page written order on October 29, 2010 detailing the many reasons for the exclusion of Plaintiff's Exhibit 1802 and the testimony of Todd Giberson and Thomas Sager. The order articulates those reasons, and it recognizes the prejudice Defendants would suffer by its admission. Nowhere within the order excluding Plaintiff's Exhibit 1802 did this Court state that Plaintiff's Exhibit 1802 was excluded because it was not a summary under Rule 1006. The State's harmless error argument is a red herring.

As this Court will recall, the State offered Plaintiff's Exhibit 1802 far into trial, after the Court refused to allow the State's expert, Thomas Sager, to present his damage-model testimony to the jury. After Thomas Sager's testimony regarding his Stage 1 damage model was disallowed, the State had Todd Giberson reproduce Thomas Sager's damage model, and the State offered that reproduction as Plaintiff's Exhibit 1802. Plaintiff's Exhibit 1802 is merely a reproduction of Thomas Sager's "Stage 1 [Damage] Model." (*Compare* Plaintiff's Exhibit 1802 *with* Second Supplement to Expert Report of Dr. Thomas W. Sager dated Sept. 12, 2010 at 2 attached hereto as Exhibit "1.").

In excluding Plaintiff's Exhibit 1802, this Court wrote:

> The Court finds unpersuasive Plaintiff's explanation about why Giberson had not been asked to perform the work previously or why the need for such testimony could not have been reasonably foreseen. The Court also finds unpersuasive Plaintiff's argument that Defendant would not be prejudiced by permitting the new work and new testimony to be offered more than six weeks into trial after Defendants have already cross examined Giberson and every other witness on the subject and presentation of their case is imminent.

(Order of 10/29/2010 at 2.)

This Court concluded in October 2010 that Defendants would be prejudiced by the admission of Plaintiff's Exhibit 1802—even with the ability at that time to cross-examine Todd Giberson and call their own witnesses. Defendants are now all the more prejudiced by the jury's consideration of Plaintiff' Exhibit 1802 in the absence of any opportunity to cross-examine Thomas Sager and Todd Giberson about the damage model, and any opportunity to demonstrate to the jury its faulty assumptions and errors.

In excluding Thomas Sager's damage model and testimony, this Court concluded "that: (a) Plaintiff has not established that a reliable foundation exists for the three models - a foundation neither created nor verified by Dr. Sager; (b) Plaintiff has not established a sound methodology for the three models; the most pronounced analytical gaps exist in the 2005-2008 model and the 1998 - 2008 model; and (c) Plaintiff has not established that the critical assumptions made by Dr. Sager have any support in the record or are otherwise reliable." (Order of 10/29/2010 at 3.) This Court recognized that Thomas Sager did nothing to spot check or verify the data he accepted from the State. (*Id.* at 4.) And "Dr. Sager amended his report a number of times, in part, because he discovered that data provided to him **was not** accurate or complete." (*Id.*) (emphasis original).

The State argues that the transaction data on Plaintiff's Exhibit 1802 is identical to transaction data in evidence elsewhere. But the State has vouched for the accuracy of its data compilations before, and it has been wrong before. (*Id.*) As this Court recognized, Defendants had no opportunity to review, analyze or check the data in Plaintiff's Exhibit 1802. (*Id.* at 2.) The State's assertion that Plaintiff's Exhibit 1802 is accurate cannot be accepted as proof of harmless error, particularly when this Court has already held that "Plaintiff has failed to independently establish the reliability of the data supplied to Dr. Sager." (*Id.* at 5.)

This Court articulated several additional problems with Dr. Sager's damage models and testimony. All of those problems exist with Plaintiff's Exhibit 1802—and Defendants had no opportunity even to raise them with the jury. Plaintiff's Exhibit 1802—like Dr. Sager's damage models—relies upon "unreliable 'Date of Last Calibration' data." (*Id.* at 5.) "The Plaintiff has failed to provide evidence that the Date of Last Calibration data compilation is reliable and that the dates were derived from a sound methodology or any methodology at all." (*Id.*) The evidence is to the contrary. (*Id.*) Plaintiff's Exhibit 1802—like Thomas Sager's damage models—"deletes any data that demonstrates pump-readings on the positive side at some of those stations." (*Id.* at 7.) "It is undisputed in the evidence in this case that, over the past ten years, the TDA has found many of Defendant's pumps reading on the positive side. Assumptions cannot be contrary to all undisputed evidence." (*Id.* at 7.)

This Court correctly excluded Plaintiff's Exhibit 1802 and expressly rejected the State's argument that admission of the documents would not prejudice Defendants. There is no dispute that the jury was provided and considered Plaintiff's Exhibit 1802 in

reaching its verdict and in answering the jury questions. That error cannot now be excused as harmless. This Court should grant a mistrial.

B. Plaintiff's Exhibit 1802 is not a summary of any voluminous document.

The State contends that Plaintiff's Exhibit 1802 is merely a summary of the voluminous documents which comprise Plaintiff's Exhibit 1799. Such contention is patently false. Under Rule 1006 of the Texas Rules of Evidence, a summary must be authenticated as an accurate and fair presentation of the underlying voluminous material. In reality, the exhibit at issue (i.e., Plaintiff's Exhibit 1802) is a conglomeration of unrelated, unadmitted and unsupportable data spliced together to create and present a damage model in a format that has the appearance of evidence. It is Thomas Sager's repackaged damages model 1 with the same flawed assumptions and methodological errors. *See City of Dallas v. GTE Southwest, Inc.*, 980 S.W.2d 928, 935 (Tex. App.—Fort Worth 1998, pet. denied) ("We are not persuaded by the city's argument that the excluded exhibit did not contain expert opinions and did not require the supporting testimony of an expert's explanation. The exhibit was not simply a summary of GTESW's voluminous business records . . . ."). It is not a summary, and it is not evidence.

Plaintiff's Exhibit 1802 consists of spreadsheets with several columns of alleged "data." While some of the columns purport to pertain to consumer transaction information arising from the Nucleus POS data -- such as station number (column B), pump number (column C), blend (column D), transaction date (column E), and sale amount (column F) – other columns pertain to information extraneous to any consumer transaction data and extraneous to the Nucleus POS data – such as a numbering of the

transactions (column 1), an ID number (column A), inspection dates (column J), and purported "under" readings (column I). The State has acknowledged that the data in columns I and J is taken from the TDA device inspection data sheets (i.e., exhibits other than Exhibit 1799). Additionally, the purported transaction count information in column 1 and column A was not previously in existence in any exhibit. Some of the information contained within Plaintiff's Exhibit 1802 arises from different and multiple sources, and it pairs different types of information together to create an entirely new meaning and effect. Other information contained within Plaintiff's Exhibit 1802 does not arise from any evidentiary source; thus, it is not a summary of any single exhibit/document (voluminous or otherwise).

Moreover, Plaintiff's Exhibit 1799, the Nucleus POS data, does not contain any information indicating that the transactions completed on those dates were violative (or took place using devices with negative readings) of anything. Thus, such a representation within a purported "summary" (i.e., Plaintiff's Exhibit 1802) is wholly inaccurate, prejudicial and misleading. In other words, the exhibit "summarizes" only the State's theory of the case, nothing more. The creation of Plaintiff's Exhibit 1802 during trial was a last-ditch attempt by the State to get its excluded damages model in front of the jury.

A true summary of the Nucleus POS data would have served no purpose for the State in this case because same would not connect the dots for any damages calculations between a transaction date and a specific Operation Spotlight calibration reading. In order for the "summary" to have any effect for the State – i.e., in order for it to create a

damages model – it had to incorporate additional (non-Exhibit 1799) information and thereby suggest that the different groups of information should be taken together.

According to the State, Plaintiff's Exhibit 1802 identifies transactions at each station going back in time to the last date (as determined by the State) that the station was purportedly calibrated. However, as this Court will recall, the State's determination of the date of last calibration was often incorrect and changed numerous times, including admitted changes as a result of inaccuracies pointed out by the Defendants' expert. It was also demonstrated on numerous occasions that the existence of an invoice or work order did not establish that calibration of any or all devices at a station had in fact occurred. Basically, the "Date of Last Calibration" is the entire underpinning for the State's damages model and, if such dates are unreliable, so is the State's damages theory, and so is Plaintiff's Exhibit 1802 (which reflects transaction dates that begin at each location on the purported "Date of Last Calibration"). From the date of this Court's Order on October 29, 2010 to the end of trial, the State did nothing to establish that the "Dates of Last Calibration" were reliable, or that same were derived from sound methodology, both of which were previous bases for this Court's exclusion of Thomas Sager's damages testimony.

The unavoidable truth is that Plaintiff's Exhibit 1802 is not a summary at all, and it never should have been produced to the jury. The exhibit is, instead, a presentation of the State's theory of its case, pairing the State's chosen transactions with the State's chosen Operation Spotlight readings and incorporating the State's unsupported and unreliable assumptions and conclusions to create the appearance of a damage model.

C. Plaintiff's Exhibit 1802 is not cumulative of other admitted evidence.

The State argues that the production of Plaintiff's Exhibit 1802 to the jury was not harmful because the exhibit is cumulative of other evidence admitted during the trial. Again, the State's argument in this regard is incorrect.

Each row of Plaintiff's Exhibit 1802 links a purported negative reading from Operation Spotlight to a consumer transaction that occurred on a date that is weeks, months, or, in some cases, more than a year prior to Operation Spotlight. There is not a single document in evidence that the State can point to in support of such alleged "evidence." By way of example (and these are only a few of the hundreds of thousands of entries contained within Plaintiff's Exhibit 1802), the following information is presented by the State as purported "evidence":

A ID	B Station	E Transaction Date	I Under (Reading)
378104	290	5/3/07	4
183787	129	6/9/07	3
183788	129	6/9/07	5
374712	290	9/17/07	3
374716	290	9/18/07	3
378129	290	9/19/07	4
374736	290	9/20/07	3
438099	290	9/21/07	2
411472	290	9/22/07	5
381196	290	9/23/07	4
438194	290	9/24/07	2
409817	290	9/25/07	3
648860	440	10/17/07	1
382847	290	10/18/07	4
648864	440	10/18/07	1
374990	290	10/19/07	3
438860	290	10/20/07	2
648887	440	10/21/07	1
656754	447	12/6/07	4
319957	159	12/17/07	4

239250	142	12/18/07	2
322065	159	12/18/07	5
280168	142	12/19/07	6
319985	159	12/19/07	4
183908	131	12/30/07	2
1870	150	1/7/08	2
1882	150	1/7/08	5
1886	150	1/7/08	4
5494	487	1/14/08	2
5509	487	1/14/08	3
1036	124	1/28/08	3
2875	288	2/21/08	5
4905	436	2/28/08	4
4934	436	2/28/08	2
4599	424	3/14/08	4
4872	424	3/14/08	1
4875	424	3/14/08	3
4233	403	4/23/08	3
4303	403	4/23/08	2

There is neither a document, nor any testimony, to support any of the above "data," nor the hundreds of thousands of similar entries contained throughout Exhibit 1802. To be sure, there is no evidence to support any specific calibration reading on any of the dates set forth in Exhibit 1802. Such "evidence" is not, therefore, cumulative of anything in the record.

As this Court will recall, the State attempted – unsuccessfully – to present the exact same theory set forth in Plaintiff's Exhibit 1802 through its expert, Thomas Sager. During the offer of proof regarding Thomas Sager's proffered testimony, this Court asked the witness and the State what specific evidence existed to support the application of any negative reading to any specific date at any time prior to Operation Spotlight. The answer was "none."

Thereafter, in an effort to circumvent the exclusion of Thomas Sager's testimony, the State asked its witness employee, Todd Giberson, to create Plaintiff's Exhibit 1802 during trial. During the State's offer of proof, Todd Giberson testified (and counsel for the State later stated in the offer of proof argument) that Plaintiff's Exhibit 1802 set forth the negative readings from Operation Spotlight and matched them to consumer transactions prior to Operation Spotlight. The Court again refused – correctly -- to admit the evidence due to the prejudicial effect upon Defendants.

The entire purpose and intent of Plaintiff's Exhibit 1802 is to link specific Operation Spotlight readings to past consumer transactions for purposes of giving the jury a damages model. The assumptions upon which this argument is based, however, are not supported by any evidence found anywhere within the record, as determined by this Court in its prior Order. There is no evidence that a reading taken during Operation Spotlight would have been the same at any time prior, or on any date prior, to the time and date the Operation Spotlight reading was taken.

D. Defendants are unquestionably harmed by Plaintiff's Exhibit 1802 making its way into the jury room and by the jury relying upon same in reaching its verdict and answering the jury questions.

The State wanted and needed some evidence to set forth a damages model because Thomas Sager's testimony in that regard was properly excluded. Plaintiff's Exhibit 1802 was the State's attempted answer to that problem. The document was created (during trial) as a damages model containing (1) a numbering of transactions, (2) inspection dates, (3) negative readings, and (4) amounts of transactions. With the exception of the transaction amounts, none of this information came from the POS transaction records. Appropriately, the exhibit was never admitted as evidence.

Without Plaintiff's Exhibit 1802, the State had no evidence of damages, nor any damages model, to present to the jury. Instead, the State – and the jury -- merely had evidence of past transactions, and separate evidence of readings only "during" Operation Spotlight. Providing the jury with Plaintiff's Exhibit 1802, however, spoon-fed the jury the State's entire theory of the case, setting forth the State's unreliable damages model, in a packaged spreadsheet containing not only the damages model, but also the State's unsupported assumptions and conclusions which had previously been excluded by this Court. Importantly, it is undisputed (per juror affidavits) that the jury considered, discussed and relied heavily upon Plaintiff's Exhibit 1802 in reaching its verdict and answering the jury questions.

Plaintiff's Exhibit 1802 should never have been produced to the jury. It was not admitted evidence. It was not a mere "summary" of records. It was not simply cumulative of POS data. The exhibit was, in fact, "evidence" created by the State during trial with no purpose other than to get a damages model to the jury after the State's expert damages testimony was stricken. It is hard to imagine how Defendants could have been prejudiced or harmed more than they were prejudiced and harmed by the production of this properly excluded exhibit to the jury. Accordingly, a mistrial is warranted, is absolutely essential, and is the only justifiable remedy short of a take-nothing judgment.

II. PWI did not waive, and could not have possibly waived, its right to request a mistrial based upon the improper production of Exhibit 1802 to the jury when there was no knowledge of that occurrence until after trial.

Defendants have properly filed a motion for mistrial before judgment has been rendered. The Texas Supreme Court has twice articulated the distinction between a motion for mistrial and a motion for new trial:

> There is also a marked difference between a court grating a motion for a new trial and declaring a mistrial . . . . The former contemplates that a case has been tried, a judgment rendered, and on motion therefor said judgment set aside and a new trial granted. The latter results where, before a trial is completed and judgment rendered, the trial court concludes there is some error or irregularity that prevents a proper judgment being rendered, in which event he may declare a mistrial.

St. Louis Southwestern Ry. Co. v. Duke, 424 S.W.2d 896, 899 (Tex. 1967) (quoting *Cortimeglia v. Herron*, 281 S.W. 305 (Tex. Civ. App. 1926 writ ref'd)).

The motion for mistrial filed in *St. Louis Southwestern Ry.* was filed—like the one in this case—after the jury returned its verdict and before the trial court had signed a judgment. *Id.* at 897. The supreme court held that the motion was, in fact, a motion for mistrial, not a motion for new trial. *Id.* at 899. As the court explained: "This motion assails no judgment. It is correctly called a motion for mistrial and cannot be considered a prematurely filed motion for new trial under Rule 306c." *Id.*

Defendants correctly ask this Court to grant a mistrial before any judgment is signed because "there is some error or irregularity that prevents a proper judgment being rendered." *Id.* The jury's being furnished and allowed to consider a significant prejudicial exhibit that this Court excluded from evidence entitles Defendants to a mistrial. This Court should not render an adverse judgment against Defendants given this error.

Defendants' motion for mistrial is timely. A request for a mistrial is timely when it is made as soon as the grounds for it become apparent. *Van Allen v. Blackledge*, 35 S.W.3d 61, 66 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("As soon as the homeowners became aware of the improper coordination, they moved for a mistrial on those grounds. Under these circumstances, we hold that error was not waived."); *Mann*

v. Ramirez, 905 S.W.2d 275, 280 (Tex. App.—San Antonio 1995, writ denied) (motion for mistrial filed after verdict was returned but before entry of judgment was timely when filed "as soon as the irregularities became apparent"); *Menth v. Hartgrove*, 811 S.W.2d 626, 628 (Tex. App.—Austin 1990, writ denied) ("One must move for mistrial as soon as the ground for it becomes apparent.").

PRAYER

Based on the foregoing and the previously filed motion for mistrial, Defendants respectfully request that this Honorable Court enter a take-nothing judgment, or, alternatively, grant a mistrial. Defendants additionally request that this Honorable Court award to them such other and further relief, both general and special, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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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 17th day of November, 2010, upon the following counsel of record:

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