

05-1076

IN THE SUPREME COURT OF TEXAS

EXXON CORPORATION and EXXON TEXAS, INC.,

Petitioners

v.

**EMERALD OIL & GAS COMPANY, L.P., AND
LAURIE T. MIESCH, ET AL.,**

Respondents

**RESPONSE TO THE ROYALTY OWNERS'
MOTION FOR REHEARING**

Shannon H. Ratliff
State Bar No. 16573000
Marla Broaddus
State Bar No. 24001791
RATLIFF LAW FIRM, P.L.L.C.
600 Congress Avenue, Suite 3100
Austin, Texas 78701
(512) 493-9601
(512) 493-9625 Facsimile

Patton G. Lochridge
State Bar No. 12458500
W. Timothy George
State Bar No. 07808500
Karen L. Watkins
State Bar No. 20927425
MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 495-6000
(512) 495-6093 Facsimile

COUNSEL FOR PETITIONERS

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**POINTS SUPPORTING THE COURT'S DECISION IN 05-1076 REGARDING
THE ROYALTY OWNERS' TORTS AND BREACH OF LEASE CLAIMS**

This Court should withdraw its decision to grant the Royalty Owners' Motion for Rehearing and uphold the portion of its March 27, 2009 reversal of the judgment against and rendition of judgment that the Royalty Owners take nothing because:

- the Court correctly applied established precedent to hold that the Royalty Owners knew or should have known of their tort claims by June 8, 1994 at the latest (*see infra* Part I. A-D);
- the same precedent compels the conclusion that Exxon did not fraudulently conceal the Royalty Owners' breach of lease claim that accrued in August 1991, and thus, the breach claim is also barred by the statute of limitations (*see infra* Part I. E); and
- the Court correctly construed the development clause in the leases and held that no evidence exists to support the determination that Exxon breached its development obligation (*see infra* Part II).

SUMMARY OF ARGUMENT

Rife with rhetoric and baseless allegations that ignore the governing legal standard, the Royalty Owners' motion for rehearing fails to provide a viable reason for this Court to reconsider its correct decision regarding their tort and breach of lease claims.¹ Established precedent supports this Court's conclusion that the statute of limitations bars the Royalty Owners' tort claims because they knew or should have known of the alleged wrongful injury as early as September 1990 but no later than June 1994. Tab A, *Exxon Corp. v. Emerald Oil & Gas and Miesch et al.* ("Op. 05-1076") at 6-8. Contrary to the Royalty Owners' assertions, it is irrelevant whether they knew of the specific act they would later allege caused their damages when they wrote to Exxon in September 1990 to protest Exxon's plugging of the active wells and assert such conduct would cause "waste" and lost royalty income. Further, the Royalty Owners' ignorance of Exxon's purported motivation when they received the June 1994 letter identifying the exact conduct by Exxon that the Royalty Owners contend caused their alleged damages is immaterial. Under this Court's established precedent, once the Royalty Owners' knew or should have known of the alleged wrongful injury or act, limitations began to run as a matter of law.

The same precedent that supports the Court's conclusion regarding the tort claims demonstrates why the breach of lease claim for Exxon's alleged failure to develop is likewise time-barred as a matter of law. The Royalty Owners contend that Exxon fraudulently concealed their claim until February 1999. However, the evidence

¹ The "tort claims" referenced in this response are all those by the Royalty Owners except their fraud claim, which is the subject of Exxon's Motion for Rehearing and fails as a matter of law for a variety of reasons. Petitioners' Motion for Rehearing (05-1076) at 5-13.

conclusively establishes the opposite because they knew at the time the leases terminated that Exxon had **not** provided the information they allege would have shown the field had more economic production potential. Additionally, the Royalty Owners actually believed at the time the leases terminated that more commercial production potential existed. Accordingly, the Court correctly referenced the breach of lease claim in its statute of limitations discussion.

Because it correctly held that the tort and breach claims are time-barred as a matter of law, the Court did not have to reach the legal sufficiency challenge to the breach of lease claim. Nonetheless, the Court's determination about this is correct because the evidence conclusively proves Exxon complied with the express terms of the leases' development clauses. The Royalty Owners' allegation that Exxon not only had to drill and complete wells within the specified acreage **but also** "fully exploit the tracts" would impermissibly require the Court to imply an obligation despite the express terms defining the development obligation. Furthermore, even if the Royalty Owners' development allegation were correct, the unreliable testimony of their expert does not support it and, in fact, proves the opposite. Accordingly, the Court should withdraw its decision to grant the Royalty Owners' groundless motion and uphold its correct decision disposing of their tort and breach claims.

RESPONSE ARGUMENTS

- I. **The Court Correctly Applied Its Jurisprudence To Hold That The Statute Of Limitations Bars The Royalty Owners' Tort And Breach Of Lease Claims.**
- A. **Neither The Discovery Rule (Assuming It Applies) Nor Alleged Fraudulent Concealment Extend Limitations Beyond The Time The Claimant Has Knowledge Of The Alleged Wrongful Injury.**

The Court correctly applied its precedent to conclude that the statute of limitations bars the Royalty Owners' tort **and** breach of lease claims. Op. 05-1076 at 6-8. Generally, "a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy." *Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003) (citing cases). Therefore, a claim accrues "when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." *Id.* at 221. A claim for injury to property, for example, accrues when the alleged wrongful act that caused the harm occurred and not when the claimant suffered the alleged damage. *Houston Water-Works Co. v. Kennedy*, 70 Tex. 233, 8 S.W. 36, 37 (1888). Similarly, a claim for breach of contract accrues when the allegedly breaching act occurs. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002).

In limited instances, the discovery rule may defer accrual of a cause of action or a defendant may fraudulently conceal a claim and be estopped from asserting a limitations defense.² *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). Application of the discovery rule is determined on a categorical basis—the rule applies only if the

² The Royalty Owners only raised the discovery rule to save their tort claims. As discussed later, the Royalty Owners erroneously contend that Exxon fraudulently concealed until February 1999 their breach of lease claim based on an alleged failure to develop. *See infra* Part I.E.

nature of the injury is inherently undiscoverable and the injury is objectively verifiable. *Id.* Even when the discovery rule applies to the class of cases involving the injury at issue (or fraudulent concealment is alleged), the statute of limitations on the claim begins to run **as soon as** “the plaintiff knew or in the exercise of reasonable diligence should have known” of the alleged wrongful injury or act. *Id.*; *see also PPG Indus. v. JMB/Houston Ctrs.*, 146 S.W.3d 79, 93 (Tex. 2004); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999).

On several occasions, this Court has been called upon to review decisions that a claimant had the requisite knowledge to trigger limitations. *See, e.g., PPG Indus.*, 146 S.W.3d at 93; *HECI*, 982 at 886; *KPMG Peat Marwick*, 988 S.W.2d at 749. The Court has instructed that limitations begins to run as soon as a claimant has or should have knowledge that “something [is] amiss.” *PPG Indus.*, 146 S.W.3d at 93-94. This is the case **even if**, at that time, the claimant does not know: the specific cause of the alleged injury, the party responsible for it, the injury’s full extent, or the chances of avoiding it. *Id.*; *see also KPMG Peat Marwick*, 988 S.W.2d at 749 (limitations runs even if specific act causing injury not known); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344 n.3 (Tex. 1992) (limitations runs even if wrongdoer is unknown). Accordingly, the critical inquiry is whether the plaintiff knew or should have known of the alleged wrongful act or injury.

B. Limitations Bars The Royalty Owners’ Tort Claims Because They Actually Knew Of The Alleged Wrongful Injury Or Act No Later Than June 1994.

The Royalty Owners assert that the alleged wrongful injury or act giving rise to their tort claims is Exxon’s manner of plugging wells that purportedly damaged “some

reserves” and made “others significantly more expensive to produce,” thus resulting in alleged lost royalty income. Motion at 2; PX 193 (damages report). Arguably, therefore, their tort claims accrued each time Exxon plugged a well at issue—events that occurred at various times over the four-decade life of the leases, not just between 1989 and 1991 as the Court mistakenly presumes.³ Op. 05-1076 at 19; *see also Provident Life and Acc. Ins. Co.*, 128 S.W.3d at 221; *Houston Water-Works Co.*, 8 S.W. at 37. Regardless of this and assuming the claims accrued upon the final event rather than in serial fashion, the tort claims could have accrued no later than August 1991 when Exxon plugged the last active well and abandoned the property. Yet, the Royalty Owners did not bring their tort claims until **five years later** in August and September 1996, respectively. I CR 38, 178.

According to the Royalty Owners, the discovery rule applies to save their belatedly asserted tort claims, tolling the limitations onset until **January 25, 1995** when Emerald purportedly “told them that Exxon’s internal well files showed that the wells had been sabotaged.”⁴ Motion at 5. The Court correctly focuses on two timeframes to determine whether the evidence conclusively establishes the Royalty Owners’ knowledge before this time:

- September 1990 when the Royalty Owners’ attorney wrote to protest Exxon’s intent to plug certain wells on the property and assert that such plugging “would commit waste,” “would be contrary to public policy and laws,” and “could be terribly expensive to Exxon and [the Royalty Owners]” (DX 88, 93); and

³ Their expert’s damages report shows the Royalty Owners seek damages related to wells Exxon plugged throughout the life of the leases and not just those plugged during the 1989 through 1991 time period. PX 193 at Att. 3 (seeking damages for wells plugged on, for example, January 22, 1972, July 24, 1973, and December 22, 1981, February 25, 1972, and September 9, 1973).

⁴ Although challenged several times, the Royalty Owners have never identified a shred of evidence showing what information, supposedly in Exxon’s internal well files, made them believe that Exxon had “sabotaged” the wells. There is no such evidence.

- June 1994 when Emerald wrote to the Royalty Owners to advise about its reentry efforts, explain that it had encountered cut casing or “junk” left in the well bores, and advise that certain wells were “not flowing” or “temporarily abandoned” or needed an “engineer report” (DX 139).

Based on this evidence, the Court has correctly held that it need not decide whether the discovery rule applies to save their claims (it does not), because the evidence conclusively establishes that the Royalty Owners had actual knowledge of “their injuries **by June 8, 1994 at the latest.**” Op. 05-1076 at 7 (emphasis added).

September 1990 Letters

Attacking the Court’s holding that the statute of limitations bars their tort claims, the Royalty Owners try to minimize the evidentiary significance of the September 1990 letters by asserting that they (1) were written before Exxon plugged the particular wells identified in that letter, (2) do not concern all the wells on the leases, and (3) somehow concern different conduct by Exxon. Motion at 3, 7. The Royalty Owners’ argument, however, ignores that the letters allege the **exact** harm they contend Exxon caused in this lawsuit—*i.e.*, “waste” caused by plugging the wells resulting in alleged lost royalty income. *Compare* DX 88, 93 *with* PX 193 (damages report). Therefore, when the leases terminated in August 1991 and Exxon plugged the last active wells despite their protests, the Royalty Owners knew or should have known in the exercise of reasonable diligence of their alleged injury. *PPG Indus.*, 146 S.W.3d at 93; *HECI*, 982 at 886; *KPMG Peat Marwick*, 988 S.W.2d at 749. The fact that they may not have known the “full extent” of their alleged damage or the “specific nature of each wrongful act that may have caused the

injury” (i.e., the cut casing and “junk”) does **not** change the analysis as a matter of law. *PPG Indus.*, 146 S.W.3d at 94; *KPMG Peat Marwick*, 988 S.W.2d at 749.

June 1994 Letter

Even if the September 1990 letters were not sufficient to establish their knowledge at the time the leases terminated (they are), the June 1994 letter identifying the specific conduct by Exxon that the Royalty Owners contend caused their harm clearly is enough. Striving to dismiss the conclusive effect of this evidence, the Royalty Owners raise variations of an argument repeatedly rejected by this Court: that limitations does not begin to run until the claimant knows every single detail about its claim. *PPG Indus.*, 146 S.W.3d at 93; *KPMG Peat Marwick*, 988 S.W.2d at 749; *Russell*, 841 S.W.2d at 344 n.3. Specifically, ignoring that the September 1990 letters show they knew Exxon was responsible for plugging the wells, the Royalty Owners contend that the June 1994 letter is not evidence of their knowledge because (1) it does not say *Exxon* was the responsible party, (2) it shows some wells were producing, and (3) there was nothing to indicate that the “junk” or cut casing that Emerald identified “presented a problem.” Motion at 9. According to the Royalty Owners, neither operators nor unsophisticated lessors like themselves would attach “any significance” to the junk and cut casing references; in fact, there was no suggestion “that Emerald had unusual concerns.” Motion at 8. Thus, the Royalty Owners assert, it was not until Emerald purportedly told them in January 1995 that it believed *Exxon* was responsible that limitations began to run. Motion at 5.

The June 1994 letter states that, with respect to a majority of the wells Emerald had tried to reenter, Emerald allegedly encountered either cut casing or “junk” left in the wells.

In most of those instances, contrary to the Royalty Owners' assertions and even though it is not necessary for limitations to begin to run, the letter expressly says that **Exxon** was responsible for the cut casing. DX 139 (wells E-3, A-8, B-11, B-5, A-5, E-6, A-3). The letter also says that many of these wells were not flowing or not producing much or that they had to be "temporarily abandoned" and possibly reentered later. DX 139 (wells B-11, E-3, A-5, B-1, E-6, A-3). Under this Court's precedent, this express information identifying the specific conduct that purportedly caused their alleged damages is more than enough to trigger limitations. *See, e.g., HECI*, 982 S.W.2d at 886. Whether Emerald or the Royalty Owners believed that Exxon was the wrongdoer and had purported motivation to "sabotage" the wells and whether the Royalty Owners understood that cut casing and junk presented a problem are irrelevant considerations **as a matter of law**. *PPG Indus.*, 146 S.W.3d at 93; *KPMG Peat Marwick*, 988 S.W.2d at 749; *Russell*, 841 S.W.2d at 344 n.3.

Accordingly, in September 1990, the Royalty Owners believed that Exxon's plugging of the wells would cause "waste" and thus lost royalty income. DX 82, 88, 93. By June 1994, the Royalty Owners not only knew "something was amiss," *PPG Indus.*, 146 S.W.3d at 93, they had identified the **exact** conduct by Exxon that they contend caused their harm. DX 139. As a matter of law, the statute of limitations on the tort claims began to run **by June 1994 at the latest** and cannot be tolled until January 1995.

C. The Court’s Holding Correctly Applies The Legal Sufficiency Review Standard Expressed In *City v. Keller*.

Citing *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), the Royalty Owners contend the Court should not have treated the September 1990 and June 1994 letters as conclusive evidence of their knowledge because (1) they dispute the letters provided enough information to put them on notice, (2) they must be considered in context, and (3) some evidence supports the jury’s finding that limitations did not begin to run until January 25, 1995. Motion at 5-6. In *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005) the Court iterated the established rule that, even when some evidence exists to support a jury’s finding, a court conducting a legal sufficiency review **cannot** disregard evidence that conclusively proves the opposite. The Court recognized that even evidence that is “hotly” disputed can be conclusive so long as it proves the opposite of a vital fact. *Id.* at 814-16.

Here, the alleged contextual evidence that the Royalty Owners insist must be considered is the **very same evidence** they rely on to contend that the letters did not apprise them of all the details about their tort claims. Motion 6-11 (discussing what other information or understanding they purportedly needed that the letters did not provide). Under the law, *see supra* Part I.A., this purported contextual evidence does not vitiate the conclusive effect of the letters because the letters establish the Royalty Owners knew or should have known of the alleged wrongful injury in the exercise of reasonable diligence, which is all that is needed. Accordingly, even assuming some evidence supports the finding that limitations did not begin to run until January 25, 1995, *City of Keller* instructs

that the September 1990 and June 1994 letters **cannot** be disregarded because they establish the opposite of this vital fact. *Id.* at 814-16.

D. The Statute Of Limitations Bars The Royalty Owners' Tort Claims Whether They Had Knowledge In September 1990 Or June 1994.

Disregarding the Court's ultimate holding that the Royalty Owners had actual knowledge of "their injuries by June 8, 1994 at the latest," Op. 05-1076 at 7, the Royalty Owners attack the Court's decision regarding the statute of limitations based on a sentence that says the Royalty Owners had knowledge of their waste and negligence claims on different dates. Motion at 2 (citing Op. 05-1076 at 7). The Royalty Owners assert that this is impossible because their tort claims allege the same injury.⁵

Although Exxon agrees that the alleged wrongful injury underlying the Royalty Owners' torts claims is the same such that knowledge of one type of claim establishes knowledge of all, the Royalty Owners' argument is a red herring. It does not matter whether the Court holds that the evidence establishes their knowledge in September 1990 or by June 1994 at the latest. Under either scenario, the tort claims brought much more than two years after either of these dates are time-barred as a matter of law.

E. The Court Also Correctly Held That The Statute Of Limitations Bars The Royalty Owners' Breach Of Lease Claim.

The Royalty Owners chastise the Court for referring to their breach of lease claim in its discussion regarding the reasons the statute of limitations bars the tort claims. Motion at 4 (citing Op. 05-1076 at 8). Despite the Royalty Owners' arm waving to the contrary,

⁵ The Royalty Owners cite *Provident Life and Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003), in which the Court held that limitations began to run on all claim on the same date.

the Court's reference to the breach of lease claim while discussing the statute of limitations in connection with the tort claims is not off the mark. Applying the law discussed earlier, *see supra* Part I.A., it is obvious the claim **is** indeed time-barred.

In its previous briefing, Exxon explained why the Royalty Owners' allegation of fraudulent concealment does not save their breach of lease claim based on Exxon's alleged failure to develop that was raised more than eight years after the leases terminated. Exxon BOM at 18-20; Exxon BOM Reply at 9-11. In particular, the Royalty Owners contend that, when Exxon provided information about the leases to the Royalty Owners and their expert Walker & McBroom in August 1990, Exxon fraudulently concealed interpretative information that showed its failure to develop two zones in the field with purportedly more economic production potential. *See* Royalty Owners' BOM at 20-22. The Royalty Owners assert that they believed Exxon had provided all information about the leases at that time, and thus, they did not learn about their claim until February 1999 when they supposedly acquired information in discovery that supported their breach of lease theory.⁶ *Id.* The evidence, however, conclusively proves the opposite of this vital fact. *City of Keller*, 168 S.W.3d at 814-16.

After Walker & McBroom reviewed the information Exxon made available about the leases, it specifically advised the Royalty Owners in writing that Exxon **had not provided** all "interpreted geologic information" about the leases that "could be invaluable

⁶ Significantly, these are the very same allegations the Royalty Owners assert to support their purported fraud claim, which, lies solely in contract and should not be remanded as a matter of law for several reasons. Exxon's Motion for Rehearing.

to future development in the area.”⁷ DX 82. Thus, Exxon **never** fraudulently concealed its alleged failure to develop—the Royalty Owners knew before Exxon plugged the last wells that Exxon had not provided the interpretative information that would have allegedly showed more production potential. Furthermore, the September 1990 letters authored by the Royalty Owners’ counsel and by Walker & McBroom demonstrate that the Royalty Owners were asserting that more production potential in the field existed—they protested Exxon’s plugging of the last remaining wells, demanded that production continue, and asserted that termination of the leases would cause “waste” and lost royalty income. DX 82, 88, 93. Even one of the Royalty Owners expressly advised her family that several wells have more “**commercial potential.**” PX 91. Applying *HECI* and its progeny, therefore, the Royalty Owners’ breach of lease claim accrued and the statute of limitations began to run, at the latest, when the leases terminated in August 1991. *HECI*, 982 S.W.2d at 886; *see also PPG Indus.*, 146 S.W.3d at 93; *KPMG Peat Marwick*, 988 S.W.2d at 749. Their claim brought **eight years later** is barred as a matter of law.

II. The Untimely Breach Of Lease Claim Also Fails Because, As A Matter Of Law, Exxon Complied With Its Development Obligation.

Because the Court correctly held that the breach of lease claim for Exxon’s alleged failure to develop is time-barred as a matter of law, it is not necessary for the Court to reach the question of the legally sufficiency of the evidence to support the jury’s finding that Exxon breached the leases. Nonetheless, the Court’s decision on this issue is

⁷ Walker & McBroom even advised the Royalty Owners that they should ask Exxon for the interpretative information based on a provision in their leases that the Royalty Owners have consistently contended required Exxon to give them this information. DX 82.

absolutely correct, because, as the Court held, the evidence conclusively establishes Exxon complied with the leases' development clauses.⁸ Op. 05-1076 at 9-13.

The Royalty Owners erroneously contend that the Court's interpretation of the leases' development clauses means "Exxon could hold all the thousands of acreage [sic] of the entire tract as to an entire horizon with just one well." Motion 14. To the contrary, the Court has correctly held that the plain terms of the development clause read in accordance with the industry's understanding of certain terms used in it required Exxon to drill and complete one well on a specified number of acres.⁹ Op. 05-1076 at 9-11. The Royalty Owners do not dispute that Exxon fulfilled this obligation by drilling and completing at least 121 wells on the tracts within the spacing requirements and penetrating each reservoir in the field—indeed, the Royalty Owners conceded this at trial. 3 RR 185-89, 198, 202-03; *see also* PX 1325.

To deflect from the conclusive impact of their admission that Exxon fulfilled its express development obligation, the Royalty Owners concoct a reading of the development clause that ignores its plain terms and contend that, to "fully develop" the leases, Exxon was not only required to drill and complete a well within the specified number of acres, it also had to "fully exploit the tracts." Motion at 11. For support, the Royalty Owners cite

⁸ The leases' development clause provides that Exxon shall "prosecute diligently a continuous drilling and development program until said tract is fully developed for oil and gas." PX 1 (art. 3). The leases explicitly define "fully developed" as when one well has been "drilled and completed to each horizon or stratum capable of producing gas in paying quantities for the number of acres fixed by the Railroad Commission" or, in the absence of such determination, one oil well every twenty acres and one gas well every 160 acres. PX 1 (art. 3).

⁹ In one part of the opinion, the Court mistakenly says Exxon's obligation was to "drill a requisite number of wells per acre," Op. 05-1076 at 11, when the obligation actually was to drill one well "for a specified number of acres" as the Court states earlier in the opinion. Op. 05-1076 at 9. This, however, does not alter the Court's ultimate correct conclusion about Exxon's development obligation and the evidence that conclusively proves Exxon complied with it.

to a provision that requires Exxon to conduct all its operations “with the best practice of the industry at the applicable time, to the end that the full value of the leased premises . . . shall be realized.” PX 1 (Art. 4). The Royalty Owners assert that this provision and the purported fact that Exxon’s and their incentives were not mutual demonstrate that “Exxon undertook to fully exploit these tracts” but failed to do so. Motion at 15.

The Royalty Owners’ expansive reading of the development clauses, however, ignores that they contain a definition of the phrase “fully developed” and make no reference to the clause the Royalty Owners now seize on. *See supra* n. 8. As even the Royalty Owners’ case law shows, it is thus impermissible to rely on the diligence clause and the parties’ alleged motives to imply a development obligation beyond the leases’ express terms. *Gulf Prod. Co. v. Kishi*, 129 Tex. 487, 492, 103 S.W.2d 965, 968 (Tex. Com. App. 1937) (implied covenant to develop only arises in the “absence of an express stipulation with respect to development of the leased premises”); *see also Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 374 (Tex. 2001) (Courts must not “rewrite [a] lease’s plain terms to give the Royalty Owners the benefit of a bargain they never made.”). Accordingly, the Court correctly rejected Emerald’s attempt to imply an obligation in the leases in contravention of the leases’ express terms.

Significantly, even assuming the Royalty Owners’ overbroad reading of the development clauses is correct (it is not), the Royalty Owners conveniently disregard that the evidence conclusively belies their breach theory. The Royalty Owners contend that their expert’s testimony shows that Exxon did not fulfill its development obligation “to

complete some wells in zones FS75 and H12 that had paying quantities.”¹⁰ Motion at 15. Yet, the vague and unreliable testimony of their expert who simply opined that “there was still a large remaining potential” when Exxon abandoned the leases does not establish that the two zones had “production in paying quantities” as their allegation requires. 8 RR 174 (emphasis added); *see also* Exxon BOM Reply at 21-23 (discussing flaws with evidence). In fact, their expert also testified that Emerald did **not** profit from production under its lease even discounting the costs Exxon’s allegedly wrongful conduct caused. 9 RR 52. If Emerald, an operator with a thirty-percent royalty obligation could not make a profit, then it is obvious that Exxon, an operator with higher overhead costs and a fifty-percent royalty obligation, could not have achieved production in paying quantities. Even under their erroneous theory, therefore, the Royalty Owners’ untimely breach of lease claim fails a matter of law.

CONCLUSION

For the reasons above, the Court’s opinion regarding the Royalty Owners’ tort and breach claims upholds established precedent from this Court about statute of limitations, lease interpretation, and legal sufficiency standards. This Court should therefore withdraw its decision to grant the Royalty Owners’ motion for rehearing and uphold its correct decision finally disposing of their waste, negligent misrepresentation, tortious interference, and breach of lease claims. Further, the Court should amend its opinion and judgment to

¹⁰ “Production in paying quantities” means production in such quantity as to enable the operator to realize a profit. 8 Patrick H. Martin and Bruce M. Kramer, WILLIAMS & MEYERS, OIL AND GAS LAW: MANUAL OF TERMS at 821 (LexisNexis Matthew Bender 2009).

hold that the distinct fraud claims of Emerald and the Royalty Owners fail as a matter of law for the reasons set forth in Exxon's Motion for Rehearing.

Respectfully submitted,

RATLIFF LAW FIRM, P.L.L.C.
600 Congress Avenue, Suite 3100
Austin, Texas 78701
(512) 493-9600
(512) 493-9625 (facsimile)

By: /s/ Shannon H. Ratliff
Shannon H. Ratliff
State Bar No. 1657300
Marla Broaddus
State Bar No.: 24001791

Patton G. Lochridge
State Bar No. 12458500
W. Timothy George
State Bar No. 07808500
Karen L. Watkins
State Bar No. 20927425
MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 495-6000
(512) 495-6093 (facsimile)

**ATTORNEYS FOR EXXON
CORPORATION AND EXXON TEXAS,
INC.**

Certificate of Service

I certify that on this the 11th day of January, 2010, I served a true and correct copy of the *Response to the Royalty Owners' Motion for Rehearing* on all counsel listed below via certified mail, return receipt requested.

Eileen O'Neill
WARE, JACKSON, LEE & CHAMBERS, L.L.P.
American Towers, 42nd Floor
2929 Allen Parkway
Houston, TX 77019

William J. Joseph, Jr.
LAW OFFICE OF WILLIAM J. JOSEPH, JR.
411 E. Creek Street
Fredericksburg, TX 78624

Maria Teresa Arguindegui
LAW OFFICE OF MARIA TERESA
ARGUINDEGUI
1005 Heights Blvd.
Houston, TX 77008

David P. Wilson
Darren L. Brown
PROVOST & UMPHREY
P.O. Box 4905
Beaumont, TX 77704

Jack Balagia, Jr.
EXXONMOBIL CORPORATION
800 Bell Street, Room 1533L
Houston, TX 77002

Deborah G. Hankinson
HANKINSON LEVINGER LLP
750 N. St. Paul Street, Suite 1800
Dallas, TX 75201

Alice Oliver-Parrott
BURROW & PARROTT, LLP
500 Dallas Street, Suite 3450
Houston, TX 77002-4712

Michael James Krueger
LAW OFFICE OF MICHAEL JAMES KRUEGER
617 E. Kleberg Avenue
P.O. Box 1538
Kingsville, TX 78364-1538

Karen L. Watkins
Patton G. Lochridge
W. Timothy George
MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.
600 Congress Avenue, Suite 2100
Austin, TX 78701

Everard A. Marseglia, Jr.
LISKOW & LEWIS
First City Tower
1001 Fannin, Suite 1800
Houston, TX 77002

Hartley Hampton
FIBRICH, HAMPTON LEEBRON &
GARTH, L.L.P.
1401 McKinney, Suite 1800
Houston, TX 77010

Craig T. Enoch
WINSTEAD SECHREST & MINICH P.C.
600 Travis Street, Suite 1100
Houston, TX 77002-5895

Zachary S. Brady, P.C.
Amber S. Brady
ATTORNEYS AT LAW
3409 19th Street
Lubbock, TX 79410-1201

William F. Warnick
Jane G. Sarosdy
Cristina M. Self
TEXAS GENERAL LAND OFFICE
1700 N. Congress Avenue
Austin, TX 78701

Susan Combs
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street, Room 104
Austin, TX 78774

John B. McFarland
Boyce C. Cabaniss
GRAVES, DOUGHERTY, HEARON & MOODY
A PROFESSIONAL CORPORATION
401 Congress Avenue, Suite 2200
Austin, TX 78701-3619

Keith Strama
Matthew R. Beatty
BEATTY BANGLE STRAMA P.C.
400 West 15th Street, Suite 1450
Austin, TX 78701

Jacqueline Lang Weaver
A.A. White Professor of Law
University of Houston Law Center
100 Law Center
Teaching Unit 2, Room 122
Houston, TX 77204-6060

/s/ Shannon H. Ratliff

Shannon H. Ratliff