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Supreme Court of Texas  
Dynegy Midstream Services Limited Partnership and Versado Gas  
Processors, LLC,  
Petitioners,

v.

Apache Corporation, Respondent.

No. 07-0043.

September 9, 2008.

Appearances:

Mike A. Hatchell, Locke Lord Bissell & Liddell LLP, Austin, Texas,  
for petitioner.

Geoffrey L. Harrison, Susman Godfrey L.L.P., Houston, Texas, for  
respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet  
O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht,  
Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated, please. And I think we've  
fixed the problem with the buzzer so it shouldn't go off this time. Uh-  
-the Court is now ready to hear, hear argument in 070043, Dynegy  
Midstream Services versus Apache Corporation.

COURT ATTENDANT: May it please the Court. Mr. Hatchell, will  
present argument for the Petitioners. Petitioner's have reserved five  
minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: (Inaudible) case the buzzer was operated by  
something that looked like a gas pedal. One of my first stance as the  
Marshall of the Court, I accidentally hit the gas pedal when the first  
lawyer came up, the lawyer happen to be my father." And then the mike  
came in so I know that we are all appreciate of the advances in  
technology. This is-this suit is for failure to pay for gas sold buy  
Apache to Versado. Their contract whereby Apache was paid a percentage  
of proceeds from the sale of the gas after it had been processed by  
Versado. The Trial Court rendered a judgment non abstante verdicto on  
the ground that the payment provisions of the contract which we have  
provided the Court uh, were ambiguous and Versado had paid all it was  
required to pay.

The Court of Appeals reversed and rendered judgment on the contract claim creating in our judgment a payment obligation not mentioned in the contract. It is not based on gas sold which is the only payment standard. But gay of-- but based somehow on the volume of gas delivered at the wellhead and that's why we are here today.

Despite a fairly voluminous record, the facts that the Court needs to know to decide this case are actually quite few. The first thing you need to know is what the payment provisions in the contracts are and they're not consistent but they fall into three categories and we have provided those to you. The typical one reads, "Buyer shall pay seller some percentage of the net proceeds from the sale on any residue gas." And that certainly seems simple enough and it becomes very simple when the Court considered two admitted facts in this case.

Fact number 1, it is admitted that Versado, properly measured and properly accounted for all gas that it sold at the tailgate of its plant.

And second, it is admitted that Versado has correctly paid Apache, for all gas sold at the tailgate of the plant.

And so you're sitting there asking me, "Well, what's the dispute in this case?" Where is the beef? So to speak. Well the-- the contract question in this case submitted this, this inquiry. Did Versado fail to comply with each of the contracts about pailing-- about failing to pay Apache for unaccounted for gas. What had happened was in a routine audit, Apache found certain balancing statements which are internal check and balance statements by which, by which Versado attempts to measure the efficiency of its system by comparing the amount of gas received at the where from the wellheads in amount of gas received at the end.

The balancing statements have nothing whatsoever to do with payment for gas. However, because that is based upon gas sold and it's a very simple fact ...

CHIEF JUSTICE JEFFERSON: For just to take there-- you know-- the, the-- what I considered from the brief, one of their strongest positions. Is it, it's not just a routine audit error of Dynegey's record were just crazy. They were very poorly-- poor calculations were made and there are some 22 billion cubic feet of gas that is unaccounted for and missing and not explained by leaks in the system along the way because that would have been evident in the towns through which the pipes went so there's a large amount of gas that unaccounted for. And they say, "Maybe it was stolen, maybe it was diverted to third parties who knows it's not our responsibility to say because Dynegey has complete control of the process." That seems to me part of the factual foundation for their, their claim and what do you say about that?

MR. HATCHELL: Absolutely. Well, what we say about that is that the amount of gas so-called missing is unimportant to the payment calculation because the payment calculation is based simply upon gas sold. While it-- what it is true, there are the balancing statements contain four categories of gas. Many of those, your Honor, which we are entitled to use without payment. You can have and I've, I've created my own chart, you can have reasons why gas does not make it from the wellhead to the tailgate which include loss during the process. But it also includes gas that's never there to begin with.

For example, you can have mathematical errors in reading meters. You can have meter errors, you can have two-phase flow which measures more gas than you've got. You have recycling back into the plant which double accounts. You have discrepancies caused by improper sampling and testing which inflates what you got. You have-- you can have more flare

than was measured which increases your losses. You can have more leaks than were recorded. And in this case, 84 percent of the leaks from this is, this ancient system dated for the 1930's are, are cannot-- have not even been discovered according to the testimony. There is more fuel and measure-- can be more fuel and measure because the fuel meters are improperly arranged but what, what drives these contracts, your Honor, is the dual incentive of both parties to push as much gas through the system as can be done because neither Dynegy or Versado or Apache make money if we are losing billions and billions of dollars of gas.

I think it's very-- to answer your question, it's very important to understand that unaccounted-for gas is not a room full of gas, an Alamo dome full of gas. It is an accounting category which says, "We know it's not here for sale, we just don't know why it's not here." And as I've explained, it could be because we measured too much coming in or we didn't measure enough going out.

JUSTICE WAINWRIGHT: All those possible ways that there's leakage in gas, wouldn't they all be considered lost, as well?

MR. HATCHELL: That, that is our position, your Honor and to be candid we haven't had have much luck selling that position. We think that the, that the word, "lost" and "unaccounted-for" sometimes used together. And they, they mean the same thing and of course, gas that is lost in the system is specifically gas that we do not have to pay for.

JUSTICE WAINWRIGHT: So internally, why did Dynegy use two separate categories that lost and unaccounted-for? What was Dynegy's view of the difference between the two, at least in its accounting records?

MR. HATCHELL: I think it's out of sheer honesty and the nature of accountants. Let me just give a colloquial example, let's suppose I'm out fishing and I knock my billfold into the water, I know that I've lost my billfold by knocking it into water. But suppose I come back from a long trip and I can't find my billfold. I don't know if I lost it, I dropped it in the water, I don't know if it was stolen. And in fact, I don't know if I still don't have it in my luggage. I know it's lost but I can't account for where it is. And, and in this particular instance, an accounting category was created which is I've said, it's to cover the situation we know it's not here for sale, we just don't know why it's not --

CHIEF JUSTICE JEFFERSON: Let's, let's some-- I mean, this is kind of a improbable hypothetical. But let's say the gas is delivered at the wellhead and Dynegy begins transporting it. And from the wellhead to the processing plant, you open whatever valve you open and there's no gas whatsoever, none-- I mean-- the, in this uncontested that the gas entered at the wellhead but it just doesn't appear at the processing plant. You're saying that you would not be liable to the producer for any of that gas because it just wasn't sold it was lost, some unaccounted-for whatever, we don't know what happened to it, it's just gone.

MR. HATCHELL: Literally, that's true. That can have-- have been now physically, I don't know how that can happen. Frankly, unless of course, it would just all leaked out which is an-- a category we don't have to pay for. If there were a tragedy where we had to flare all the gas we wouldn't have to pay for that. So yes, it's true if it is simply not there for sale, under these provisions of the contract we do not have to pay for that.

And I think, your Honor should bear in mind that there are contracts which do cover the situation that you're talking about that, that do measure payment based upon deliveries at the wellhead. These contracts do not, this contracts are popular in the industry because



they have the dual incentive for both producer and the processor to get as much gas to the end of the, of the stream as possible and to avoid all of these fights over where gas went.

It's, it's admitted in, in this case by everyone that the unaccounted for gas may well be lost gas which we don't have to pay for. It may well be flared gas, it may well be a, a some that we simply never, never got in the first place. But under the contracts, we don't have to pay for it because it's not gas that exist anywhere. It's not gas that can be sold and accounting for the gas would never result in a sale of proceeds.

JUSTICE WAINWRIGHT: It cannot ...

MR. HATCHELL: Let say, we don't have to pay for-- we don't have to pay for it in the breach of contract action which is the only thing we're dealing with.

JUSTICE WAINWRIGHT: Counsel, if there were proof that this 22 billion cubic feet of gas were intentionally taken by the processor and somehow used to its benefit without paying Apache any percentages of the proceeds, would the outcome be different?

MR. HATCHELL: I think the outcome would be different because that would be a theft of gas. In other words, we rigged up a pipe somewhere and pipe the gas out the back and then sold it ourselves and kept the proceeds clearly that would be a theft and we would be-- we would have some tort responsibility for that and probably not a contract to breach to me.

JUSTICE WAINWRIGHT: If, if this gas that is unaccounted for were just kept by the processor and then used to fuel-- you know-- that the gas is coming through the processing and it's not liquid condensate it's, it's gas that could be sold at the tailgate but it's just peeled off by the processor and kept to used to power its own facilities over time. Would the outcome be different?

MR. HATCHELL: The outcome would not be different in those two instances because those are categories of gas that we are permitted to use and our use is not considered to sell.

JUSTICE WAINWRIGHT: So your interpretation of the ability to use some of the gas as fuel includes no limit on that ability?

MR. HATCHELL: That's correct. I think it's important to look at ...

JUSTICE WAINWRIGHT: But Counsel that, that raises another question. You talked about earlier the dual and incentives that both sides have the incentive to sell as much gas as possible at the tailgate. And maximize the amount that gets there, these would be the wellhead amount? If what you just said is correct then both sides don't have the same incentive to sell as much gas at the tailgate?

MR. HATCHELL: Well, we certainly don't have any incentive to used excessive amounts of gas, running a system, it doesn't get gas out in the end. The-- the overall efficiencies of the plant are extremely important to us. And it because if we're not processing gas through to the end regardless of what we use this fuel what we have to flare and, and the like we have to be very, very efficient or we're not go to be in business very long to be candid, so-- there's every incentive for us and I think we'll see in the record that we make efforts and that's reason in fact we do the balancing state-- internal balancing statements every month so we're measuring the efficiency of our ...

JUSTICE WAINWRIGHT: Well, well, perhaps Counsel but if, if, if the processor is peeling off a lot of gas at the end just to use to power its facilities, not just this particular pipeline but other things that it needs fuel for. Then that's un-expensive, doesn't have to pay

someone else for a gas to fuel it facilities or, or keep it's a lot of  
...

MR. HATCHELL: I see. You're talking about other facilities that we may own somewhere and now we're going to disregard for the fact that there--- there is no such thing in the area here that we would be doing that for but let say we had of an officer a plant or something that to me that would be-- that would probably border again along the lines of theft. But bear in mind there is a portion of the definition of residue gas, that says "That gas bypassed around the plant is also not gas that we have to pay for, which may well actually cover the question that you have just asked. That the, that portion of that definition was not discussed in very detail."

CHIEF JUSTICE JEFFERSON: I take your point that there are incentives for both producer and processor to maximize the gas that goes out at the tailgate. But their, their answer to that is, that has, that says nothing about the damages that we suffered by this unaccounted for gas, it just means that we both lost but we still have a cause of action.

MR. HATCHELL: Well-- your Honor, it, it's-- to me is somewhat circular to say we have suffered damages. For example you haven't suffered damages if the gas is simply been over measured and the gas was never there in the first place. There have been no damages if all of this unaccounted-for gas is a leaked because we don't have to pay for that. There are no damages if for example, El Paso as, as the evidence is in this case suffered a tremendous calamity and had to shut down and we had to flare enormous amounts of a, of gas. So I, I think those-- the, the simple fact that you don't know where it went does not converted into a damage and definitely does not convert into a sale.

CHIEF JUSTICE JEFFERSON: Further questions, thank you.

MR. HATCHELL: Thank you.

CHIEF JUSTICE JEFFERSON: And the Court is ready to hear argument now from the Respondent.

COURT ATTENDANT: May it please the Court. Mr. Harrison will present argument for the Respondent.

ORAL ARGUMENT OF GEOFFREY L. HARRISON ON BEHALF OF THE RESPONDENT

MR. HARRISON: Good morning. May it please the Court. Dynegy's argument in this case, proceeds from the false premise that it performed the contracts as written, it did not. The jury found that Dynegy breached the contracts by failing to provide a full and detail accounting of the gas an expressed requirement of all 18 contracts at issue found in the payment provision of those contracts.

JUSTICE HECHT: You, you're saying it paid for all the residue gas they were supposed to but this is a, accounting cause of action.

MR. HARRISON: No, Justice Hecht. Not at all. There was a contractual obligation in the payment provision. Two account for all the gas, Dynegy absolutely breached that obligation. Their own expert admitted in his 35 years in the gas business. This is the worst he's ever seen a processor account for gas.

JUSTICE HECHT: I'm trying to understand if you agree or don't that whatever came out the tailgate of the plant was paid for?

MR. HARRISON: Absolutely, yes. What actually went out the tailgate, we have been paid for that is not the subject of this complaint. That is not what the jury found damages for. The jury found damages for what didn't go out the tailgate. The Court of Appeals found

that legally sufficient evidence supports the jury's award to Apache, of its benefit of the bargain expectation damages. The amount of money, Justice Hecht, that Apache expected to receive if Dynegey had to fulfilled it's contractual obligation to account for the gas. The decisions made by the fact finders in this case and there are two, are both supported by legally sufficient evidence and should upheld by this Court.

First, the jury found that Dynegey's breach of the contracts and it's unfair practices under the New Mexico Act caused Apache's damages.

And second, trial Judge Bruce Oakley, as fact-finder, found and declared that Apache is entitled under 11 of the contracts at issue to payment for condensate collected at the compressor stations formally known as North and South Eunice plants.

JUSTICE MEDINA: What consideration if any should we give the Amicus briefs that were filed?

MR. HARRISON: I think the Amicus briefs should merit this Court's full consideration. I think that they repeat arguments by Dynegey and I think that the suggestion that Texas's oil and gas industry somehow faces a crisis based on the Court of Appeals opinion is to put up gently hyperbole and demonstrably untrue there has been no crisis in the years since this opinion came down or in the four and a half years. Since the judgment was entered-- or the verdict came out and articles were written about the case.

The Court of Appeals is absolutely right, if gas processors honor their contracts, they have nothing at all to fear. It is easy to calculate damages exactly the way Apache calculated damages and the jury found damages in this case. You take the volumes of unaccounted for gas, you multiply those volumes by the monthly weighted average price, and that's your calculation.

JUSTICE HECHT: What if those volumes were just lost?

MR. HARRISON: We know, your Honor that they were not in this case. The evidence in this case, contained at volume 6 record 78 to 82, and volume 7 record at to 228 to 229 is fuel flare leaks and sales cannot possibly account for the unaccounted for gas, it wasn't lost.

JUSTICE BRISTER: Cannot possibly account for all of it or cannot be possibly account for any of it?

MR. HARRISON: In the words of Dynegey's corporate representative at trial can only account for a "tiny, tiny, tiny percentage," Justice Brister.

CHIEF JUSTICE JEFFERSON: And wasn't he talking about leaks?

MR. HARRISON: Absolutely ...

CHIEF JUSTICE JEFFERSON: What about flares and what about fuel and other you know, potential?

MR. HARRISON: Yes, your Honor. The litany that we heard from Counsel opposite. The evidence at trial was unequivocal and repeated that those at best are rounding error. And absolutely, cannot account for the 22 billion cubic feet of gas unaccounted-for by that.

CHIEF JUSTICE JEFFERSON: What about mathematical errors? You had with the meters or problems with the equipment?

MR. HARRISON: Absolutely. That was covered by the same testimony and the same evidence exist in this record. So-called ...

JUSTICE HECHT: But you, but you don't contend by stole it?

MR. HARRISON: They may have, your Honor. There's no evidence in the record that they did.

JUSTICE HECHT: Oh, well, I'm mean it-- I was referring to, I was referring to the record.

MR. HARRISON: We're comfortable with the record? Absolutely,



because the record disproves that the unaccounted gas could fall into a category for which Dynegy need not pay.

JUSTICE HECHT: But if something happens to it? The devil took it or something. And anyway, you've got-- everybody agrees whatever comes out the tailgate that's what we're going to get paid for. It's hard to see what the cause of action is for not doing a better job of measuring along the way.

MR. HARRISON: Yeah. Justice Hecht, I, I, I think that's, that's not a-- the proper (inaudible) to, to view this through because truly to separate accounting from payment is something that all 18 contracts don't allow us to do. The obligation to account to Apache for the gas delivered, is found squarely in the payment provision.

Literally, payment and that's where the obligation falls, and there's a reason for that because once the gas is delivered to Dynegy at the wellhead, Apache loses control of that gas, Dynegy has control of the gas. It is only Dynegy that can account for the gas. It is responsible for safeguarding the gas which as Counsel opposite suggest.

Everyone has an incentive to see sold so they can get paid. Further evidence by the way, that if the gas were accounted-for it would have been sold and be would have been paid, if their had not been a breach. And so to divorce the two, to way Dynegy wants us to is not allowed under the contracts and is senseless.

JUSTICE HECHT: Well, if you could point to the provision-- I, I mean-- it is easy to see why a payment is required on the volume delivered at the end. But what in the contract says and if you don't account for flares and plant use and falling out of the line and whatever, that's also-- you also may have to pay damages for that.

MR. HARRISON: Fair question or put even more aggressively if I might, Your Honor. What in the contract says, they got to pay for unaccounted-for gas--and the answer to that is, of course, nothing in those words says so in the contract because the parties did not contemplate, there would be unaccounted-for gas. Because the contracts expressly require, Dynegy to account for the gas. So the question becomes given Dynegy's breach, what is the appropriate measure of damages? And the evidence at trial is that Apache is entitled to its benefit of the bargain expectation damages.

And Your Honor's, question about the change in control that Dynegy becomes in possession of the gas. Is precisely why it was Dynegy's obligation. If it wanted to escape paying damages for, for its breach here, to account for the gas and put it in a category where need not be paid. They failed to do that throughout ...

CHIEF JUSTICE WAINWRIGHT: Let's take the devil's advocate side of the, of the arguments you're making. The 22 billion cubic feet was 2 percent of the total gas produced over time under these contracts. So its sounds like a lot but its two percent is -

MR. HARRISON: Six percent your Honor. But ...

CHIEF JUSTICE WAINWRIGHT: - six percent for all parties as I understand the briefing for Apache's well it was only two percent.

MR. HARRISON: That, that ...

CHIEF JUSTICE WAINWRIGHT: There's a difference there then you can cleared up with some post-submission briefing. So it sounds like a lot but perhaps it wasn't as much as it sounds. One point, the other side of the other point in the devil's advocate argument is for parties that want to focus on production at the wellhead. And insure that they get is much of that paid in their percentage of proceeds later. They then enter into contracts that say you pay based upon production at the wellhead. These contracts said pay based upon sales at the tailgate at

the end of the processing. And there many contracts out there in the industry that say, "Our, our perc-- our, our payment formula is based upon production at the wellhead," these contracts don't say that. Answer those two points.

MR. HARRISON: Absolutely, Your Honor. There are other kinds of contracts in the industry, indeed there are other kinds of contracts at issue in this case on which Apache did not sue Exhibits 18 and 19 that expressly unlike all contracts at issue in this case carve out unaccounted-for gas. As a category for which Apache need not be paid. The answer to your Honor's question, the duty on Dynegy to pay based on what goes out the tailgate, the percentage of proceeds is not the only duty in the contract.

In fact, that duty isn't even found in the payment provision, it's found in the pricing provision of these contracts. The payment provision contains the duty to account as we have discussed. And indeed Counsel, opposite in argument to this Court and in their briefing says that, that duty to account is "unimportant" or in their briefs "inoperative" based on the way Dynegy interprets this contract to look only at the tailgate.

That flatly violates this Court's bedrock principles of contract interpretation as stated soo many times. But certainly in the Balandran in 1998 decision, Court's "must read all parts of the contract together striving to give meaning to every sentence clause and word to avoid rendering any portion inoperative." Dynegy in its briefs in here concedes but it's, in my view, unreasonable interpretation does just that in violation of this Court's bedrock principles of interpretation but further Justice Wainwright.

It is contrary to the intent of the parties as evidence within the contract, for Dynegy to pay only based on what goes out to tailgate in the event of a breach. Most of these contracts contain "purpose clause" which provides that the purpose for Apache to deliver the gas is to be paid for it, that is also the dual incentive concept proposed by Counsel opposite here and in the briefs.

And Dynegy's Vice President, Clark White, the highest ranking person to testify at trial for Dynegy, say "the reason that Apache gives Dynegy its gas, is so it can't be paid for that gas." That's the evidence of the intent of the parties here.

And so to focus solely on the tailgate to the exclusion of other contract provisions to the exclusion of the purpose here is inconsistent with the contracts and doesn't address what happens in the event there is a breach as there was here by Dynegy.

One last point on that, there is a recent statute passed by the Texas legislature ...

CHIEF JUSTICE JEFFERSON: That doesn't provide for damages, right? I mean, you get the accounting and I don't know, maybe there's some administrative penalties but its-- you know-- would-- under the, the new resource code whatever do you get damages for a failure in accounting code?

MR. HARRISON: No. Absolutely not.

CHIEF JUSTICE JEFFERSON: Right.

MR. HARRISON: Absolutely not but Section 85.065 at §§ C7 and 9 of the Texas Resource Code is very interesting because-- Justice Hecht, it distinguishes between lost and unaccounted-for gas, comparing §§ 7 and 9. The Texas legislature recognizes, those are two different things.

CHIEF JUSTICE JEFFERSON: You know, I guess my point if I can understand of the, the-- and I can even understand the jury being mad based on the evidence of this very sloppy accounting um but the



question is different from that to me and that is what is the contract provide for? How is Apache compensated for producing this gas? And it seems that the contract says "your compensated when the gas is sold at the tailgate and, and, if that's done." Then maybe you have some-- you, you, you can go to the court to require an accounting, maybe there's negligence along the way is that-- you know-the pipelines exploded and maybe you have some damages from that but a breach of contracts seems far stretched.

MR. HARRISON: Mr. Chief Justice, the payment provisions of the contracts in the event there is no breach, do not define damages in the event, there is a breach. I'd like to also turn the Court's attention to the condensate issue the declaratory judgment, because there, Judge Oakley granted Apache as fact-finder a declaratory judgment. And that declaratory judgment should be upheld, if it can be sustained-- sustained upon any legal theory supported by the evidence.

JUSTICE HECHT: There are the two units plants (inaudible) ...

MR. HARRISON: Absolutely, Your Honor. The contracts, I believe are ambiguous on this point, because they don't say what happens in the event that facilities that are used as plants, continue to operate exactly as they did with respect to the compressors, but the rest of the plant is mothballed. Contracts don't tell us. It's ambiguous and therefore, if legally sufficient evidence supports Judge Oakley's declaratory judgment, this Court should uphold it.

JUSTICE HECHT: I was unclear whether the condensate is falling out in the line at the, at the compressors or some place else in the line or where, where is it happening?

MR. HARRISON: All of it? Condensate typically called in the words of vice-president White "nuisance" condensate falls out in the gathering line in the 5,500 miles of line that Dynegey speaks about. That is not what the declaratory judgment covers. That is not what we have sought or seeking here. We seek only the condensate that falls out at the high powered compressors at the North and South Eunice facilities. The exact same compressors that were in place when Dynegey used those facilities as full fledged plants. The compressors are the same, the pressure is the same. The amount of condensate is the same.

Clark White, testified and I quote at five record 77, "If that compression was in the plant, then they would be dewed to liquids for that compression." The only difference is when Dynegey changes what happens around to those compressors, the other processorings (sic) does that somehow eliminate that obligation to pay for condensate, I submit the answer is no. There's evidence of that and it comes straight from the contracts. The Court of appeals took away the declaratory judgment based on its misapplication of the word "plants."

Well, of the eleven contracts at issue in the declaratory judgment, six defined plant and six don't. All six defined plant exactly this way, "Plant shall mean the facilities used by buyer to process gas, contemplates multiple facilities, contemplates processing of gas." Clark White testified at five record 77-- 79, "processing of gas includes the removal of liquid hydrocarbons through compression." Applying only the definitions in the contract, the compressors at the North and South Eunice absolutely fall within the definition of plant and Apache should be paid just like Bruce Oakley's declaratory judgment found.

Furthermore, the North and South Eunice facilities, Justice Hecht, still exist. Simply, the non-compressor parts have been our fault, aren't being used. But the compressors are in the same way, Dynegey's argument elevates forms -- excuse me -- elevates form over substance by

saying, that because we Dynegey are no longer using these facilities as full fledged plants that should change the meaning of the contract.

JUSTICE WILLETT: Looking back to the contract claim really quickly, quick choice of law question nobody disputes the application of Texas contract law to the contract claim, right?

MR. HARRISON: Absolutely, right, Justice Willett.

JUSTICE WILLETT: Okay.

MR. HARRISON: And on that point I should note there is of course, another plant that gets at those same damages and that is the New Mexico Unfair Practices Act Claim. That claim gets to the same result as the breach of contract claim. We certainly don't seek recovery under both but the evidence of Dynegey's unfair and indeed deceptive practices in this case, is overwhelming. Dynegey's own vice-president Mr. White admitted, very clearly that Dynegey's reporting to Apache has been bad and they're beginning to think it is really false, that is reporting with respect to the, to the unaccounted-for gas, that is strong evidence.

JUSTICE HECHT: So you-your-- is your position that you might lose the contract claim but still win the statutory claim?

MR. HARRISON: In fairness Your Honor-- yes and no, let me be clear though. It depends on the reason why this Court might not give us-- might not uphold the jury's verdict on the contract claim. There certainly are some overlapping reasons. I think that we certainly could have the contract claim taken away and prevail on the Unfair Practice Act but it would depend on what the Court does and why? But I will say of course the New Mexico Act also provides phenomenal damages of \$100.00 troubled which would be laughable Justice Willett, except that it mandatorily requires in a word of attorney's fees which here are in the neighborhood of \$875,000 to Apache.

JUSTICE BRISTER: Let me ask this quickly, if Dynegey's uh, or Versado's negligence in the transporting caused an explosion, uh, a bunch of gas leaks out you wouldn't have a breach of contract claim?

MR. HARRISON: Agree. Absolutely, that would be lost.

JUSTICE BRISTER: There is because the negligence was in the accounting rather than how they actually lost it.

MR. HARRISON: I, I think that's, that's not quite right Justice Brister. Certainly if the gas were lost in explosion, a cataclysmic event like that or even a large leak or small one, would indeed be lost gas and we would not get paid. But, but to, to say that the only alternative is a failure to account is incorrect under the contracts and I think, doesn't give the Texas legislature its view for a recognizing this distinction. There is a breach here, there's a strong evidence of that breach by Dynegey. Apache should be entitled to recover its expectation damages under either the breach of contracts theory or the New Mexico Act in which case we would urge a remand for consideration of trouble damages.

JUSTICE WILLETT: One quick question, if we agree with Dynegey on their tailgate center interpretation of the contract, what does that do-- what is that basis do to your New Mexico claim?

MR. HARRISON: Justice Willace-- Willett, well, that would be a shame because it would not give a fact to bedrock principles of contract interpretation would be inconsistent with the contract. But the answer to your question is if that is how this Court goes that would leave us with nominal damages under the New Mexico Act.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you.

MR. HARRISON: Thank you.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

MR. HATCHELL: May it please the Court. On the contract question, there is one fundamental flaw in my good friend's excellent argument. He began his argument not by stating what the jury found which was, did we fail to pay for unaccounted-for gas. (Inaudible) but failed to comply with the contracts. He said, we breach the contracts by not giving a full detailed accounting of unaccounted for gas. And then makes the bold statement. If the gas had been accounted for it would have been sold and that is just simply not true. I said earlier, "Unaccounted-for gas" is gas we know it's not there but we don't know why. I-- it is undisputed and in this case and Apache has conceded that there is no evidence that the unaccounted-for gas is anything but fuel, flare or lost and if it's one of those categories, it's a category we can use without cost to us."

Therefore, accounting for whatever that means unaccounted-for gas would result in no additional sales because accounting for it would not produce gas that could be sold. And there can be no damages for unaccounted-for gas even if it we knew where it was and we could put it in a category because it is not gas that could be available for sale.

JUSTICE WAINWRIGHT: What's the formula you used to calculate lost gas?

MR. HATCHELL: Lost gas is generally assigned to leaks in the system. This system dates from the 1930's and candidly has a very leaky. It's estimated that we can find only 84 percent of the leaks and some of those leaks may have been in existence for quite a long time. We do the best we can by flying the lines, by walking the lines and when we find the leaks, we repair them. But we assigned just an arbitrary, you know, amount of the leak based on an arbitrary number of days to those leaks but-- cause we-- and if, if the leaks could have been longer and it lost more gas and there is a say 84 percent of the leaks we probably don't know yet.

JUSTICE WAINWRIGHT: So you're saying, you, you calculate the leaks not by process of deduction but by process of measurement which is admittedly not perfect.

MR. HATCHELL: To measure those that, that we can't find.

JUSTICE WAINWRIGHT: How do you calculate? What formula do you used to calculate unaccounted-for gas?

MR. HATCHELL: Unaccounted-for gas is gas that we cannot-- is leftover from the amount measured into the system that we can't put in one of the under categories. When-- we don't know that it's not in one of those categories. We just can't say, we cannot measure it.

JUSTICE WAINWRIGHT: So you measure-- in a different way unaccounted for gas by process of deduction?

MR. HATCHELL: Yes. Well, yes by process of deduction or elimination, we would love to be able to put it in, in a category not quite frankly, but we're being honest enough to say we can't do that.

JUSTICE WILLETT: Mr. Harrison says he can still recover under the New Mexico statute even if he were to lose the contract.

MR. HATCHELL: I think that the Court may have to consider the New Mexico statute but without seeing what, what the opinion is going to look like, I think that it is highly unlikely. You know, that is being recovery, it's because if we prevail on the theory that we have not breached the contract. I don't see where there in basis for a liability under the act. Here's the question that was submitted to the jury, "Was



there any false or misleading representation knowingly made in connection with the provision of services which tends or does deceive or mislead any party and includes failing to state of material fact that doing so tends to deceive."

The only un-- my understanding is that they're saying that you didn't provide us the balancing statements. But if you hold that the provisions of the contract that control are not the balancing statements but the settlement statements. That, that the balancing statements are simply our internal proprietary information. Then there's nothing that we didn't tell them, the settlement statements that we gave them everybody says were perfect.

So you have four, four lines of inquiry under the act. First of all, they are not a buyer so they have no standing under the New Mexico law. We made no misrepresentations because we had no duty to supply the balancing statements. There was no deception by admission and failing to reveal a balancing statements because they were not material to the calculation of anything. And they have no damages because they were paid under the contract for all gas that was sold.

JUSTICE MEDINA: The Amicus briefs seem to indicate that Apache prevails that industry is going to collapse [inaudible].

MR. HATCHELL: Well, these are, these are contracts that are in existence. The industry has always understood that payment obligations are measured by what is sold at the end of the pipeline. If we now have an implied obligation and then bear in mind, Your Honor, as to some of the contracts the obligation as implied by "industries standard." If that an unknown payment obligation (inaudible) into these contracts, what do we do? How do we measure the gas, when was it sold and what was the price? Because this is gas that does not exist and was never available for sale. And that's what creates chaos in the accounting.

JUSTICE GREEN: Are you aware of any other lawsuits filed, claims made in light of the judgment in this case?

MR. HATCHELL: Not yet but the last appendix to the petition for review contains an article exorting all producers to start now demanding balancing statements and bringing suits. So but I'm not aware of any, that have occurred yet but we can certainly looking to that.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. HATCHELL: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you Counsel, the case is submitted and the Court will take another brief recess.

COURT MARSHALL: All rise.

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