APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20599

APACHE DEEPWATER, L.L.C.,
Plaintiff-Appellee,

v.

W&T OFFSHORE, INCORPORATED,
Defendant-Appellant.

Filed: July 16, 2019

Appeal from the United States District Court
for the Southern District of Texas,

David Hittner, U.S. District Judge

Attorneys and Law Firms

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Before HIGGINBOTHAM, GRAVES, and WILLETT, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This dispute arises from a successful plugging and abandonment operation of three offshore oil and gas wells in the Mississippi Canyon area of the Gulf of Mexico. Apache Deepwater, LLC performed the operation and seeks payment from its non-operator partner, W&T Offshore, Inc. A jury awarded $43.2 million to Apache for W&T's breach of the Joint Operating Agreement. W&T challenges the district court's application of the Louisiana Civil Code and interpretation of the contract. Alternatively, W&T contends that it is entitled to an offset in damages because of Apache's bad faith. Finding no error, we affirm.

I.

In May 1999, Apache and W&T's predecessors entered into a Joint Operating Agreement ("JOA") that governed the operation of three offshore deepwater oil and gas wells (the "Wells") in the Mississippi Canyon area of the Gulf of Mexico. This dispute arises from operator Apache's plugging and abandonment ("P&A") of the Wells.

In 2012, Apache attempted to P&A the Wells with an intervention vessel called *Uncle John* with the consent of W&T, but that operation was unsuccessful. Following that failure, Apache contracted to use a different intervention vessel, the

Helix-534 ("*Helix*"). An internal figure by Apache estimated that the cost to P&A the Wells with the *Helix* was approximately $56,350,000. In June 2014, W&T contacted Apache to set up a status conference in July discussing the P&A operation, confirming that W&T knew "that the *Helix 534* is contracted for the project." At that meeting, W&T learned that Apache proposed using two drilling rigs for the project instead of the *Helix*, the *Ocean Onyx* ("*Onyx*") and *Ensco-8505* ("*Ensco*").

W&T and Apache offered to the jury competing explanations for the switch from the *Helix* to the *Onyx* and *Ensco* drilling rigs. By W&T's telling, Apache's decision to use the *Onyx* and *Ensco* was a simple matter of cost: W&T contends that Apache entered into a contract for the two drilling rigs for the purpose of drilling new deepwater wells, but abandoned that project in 2014 and was left with exorbitant stacking costs for the idle rigs (approximately $1,000,000 per day). W&T asserts that Apache's decision to use the rigs instead of the *Helix* was an attempt to recoup on the costs of contracting for the unused rigs because Apache had been unsuccessful in unloading the rigs onto another operator. Prior to the July meeting, Apache prepared estimates for the use of the rigs which totaled between $81 and $104 million. W&T points to an internal presentation in which Apache was weighing the costs of using the *Helix* against the rigs and determining that with the stacking costs Apache was paying for the idle rigs, the use of the rigs would be cheaper because the cost would be split with W&T. Apache cancelled the *Helix* contract. W&T claims that although Apache purported to rely on written

evaluations explaining the technical reasons the rigs were necessary (including that the *Helix* no longer complied with government regulations), Apache refused to provide those analyses to W&T.

Apache rejects W&T's economic explanation and argues that the *Helix* was not a safe option after the *Deepwater Horizon* spill and the government regulators would not have approved the *Helix* for the P&A operations. Apache put on evidence that it had discussed the risks of using the *Helix* with W&T, and demonstrated that technical difficulties posed by the Wells would make the "open water" operations of the *Helix* environmentally risky, that the Wells were "high risk," and that the drilling rigs were able to conduct the P&A operations with safeguards mitigating the risk of oil spills. Apache also claimed that the federal Bureau of Safety and Environmental Enforcement ("BSEE") advised Apache that it was no longer approving the type of open-water operations that *Helix* would need to perform to complete the P&A task. In Apache's version, W&T began "actively resisting" the P&A plan using the rigs because the *Helix* operation would be far cheaper for W&T and W&T was disregarding the environmental risk.[1] Apache argued to the jury that W&T ignored the fact that *Helix* would have had operational issues that would have increased the costs of the operation past

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[1] Apache points to an internal e-mail from W&T's vice president Cliff Williams in which he wrote: "I'd like to determine options should we not agree with operators plan and believe we can perform well abandonments cheaper. Can we non-consent and take over abandonment operations with Apache obligated to pay their share of estimated abandonment costs?"

the initial estimates and that the use of the rigs was "reasonably necessary." Amid their dispute over the appropriate intervention vessel, Apache sought W&T's approval for use of the rigs through an Authorizations for Expenditure ("AFE"), but W&T decided not to approve the use of the rigs,[2] and rejected two other requests for AFEs. Apache decided to use the rigs for the P&A and the work was successfully completed in February 2015 for a total cost of $139,900,000. Apache billed W&T for its contractual 49% share, or $68,570,000. W&T decided to pay $24,860,640, which represented 49% of the estimate for use of the *Helix*, contending that "Apache's insistence on using a drilling rig unnecessarily and unreasonably increased the costs of this work," and determining that it was not obligated to pay the full billed amount because it had not approved the AFEs.

Apache sued for breach of contract in Texas state court in December 2014 and the case was removed by W&T in January 2015. Prior to trial, W&T moved for summary judgment on Apache's breach of contract claim, arguing that the JOA was unambiguous in requiring the operator (Apache) to obtain an

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[2] In its response, W&T stated: "We believe Apache, as a prudent operator, has an obligation to conduct the operation in a cost effective and safe manner in compliance with all governmental regulations. We do not understand why Apache continues to advocate the use of the Ensco 8505 rig when it is clear that an intervention vessel could safely perform the abandonment work at a much lower cost....We do not believe W&T should be obligated to pay the additional charges arising from the use of the Ensco rig when other less expensive options are available."

approved AFE before expending over $200,000. The parties' argument turned on the reading of two provisions in the JOA: § 6.2 governing authorizations for expenditures and § 18.4 governing abandonment operations required by the government:

> **6.2. Authorization for Expenditure**: The Operator shall not make any single expenditure or undertake any activity or operation costing Two Hundred Thousand Dollars ($200,000) or more, unless an AFE has either (1) been included in a proposal for an activity or operation and is approved by the Participating Parties through their Election to participate in the activity or operation, or (2) received the approval of the Parties as a General Matter. When executed by a party, an AFE grants the Operator the authority to commit or expend funds on the activity or operation in accordance with this Agreement for the account of the Participating Parties....
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> **18.4. Abandonment Operations Requirement by Governmental Authority**: The Operator shall conduct the abandonment and removal of any well, Production System or Facilities required by a governmental authority, and the Costs, risks and net proceeds will be shared by the Participating Parties in such well, Production System or Facilities according to their Participating Interest Share.

The district court denied W&T's motion for summary judgment and determined that the interaction of the provisions in the JOA was

ambiguous, creating an issue of fact as to the "parties' intent on the applicability of § 6.2 to a government-mandated plugging and abandonment operation governed by § 18.4." The case proceeded to trial and the jury made five findings:

> 1) Did W&T fail to comply with the Contract by failing to pay its proportionate share of the costs to plug and abandon the MC 674 wells? **Yes**.
>
> 2) What sum of money, if any, would compensate Apache for W&T's failure to pay its proportionate share of costs to plug and abandon the MC 674 wells? **$43,214,515.83**.
>
> 3) Was Apache required to obtain W&T's approval under Section 6.2 of the Contract before Apache plugged and abandoned the MC 674 wells as required under Section 18.4 of the Contract? **No**.
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> 4) Did Apache act in bad faith, thereby causing W&T to not comply with the contract? **Yes**.
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> 5) By what amount, if any, should the amount you found in response to Jury Question No. 2 be offset? **$17,000,000**.

Following trial, the court entered its order and final judgment, determining that the jury's "bad faith" finding in Question 4 did not preclude Apache's recovery for breach of contract under Louisiana law and holding that W&T was not entitled to an offset under Louisiana law. The district court also denied W&T's motion for a new trial or remittitur and

renewed motion for judgment as a matter of law. This appeal followed.

II.

This court reviews the denial of a Rule 50(b) renewed motion for judgment as a matter of law *de novo*, "but our standard of review with respect to a jury verdict is especially deferential."[3] A party is only entitled to judgment as a matter of law on an issue where no reasonable jury would have had a legally sufficient evidentiary basis to find otherwise.[4] In evaluating the evidence, this court "credit[s] the non-moving party's evidence and disregard[s] all evidence favorable to the moving party that the jury is not required to believe."[5] This court also has jurisdiction "to hear an appeal of the district court's legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion."[6]

"A district court's resolution of a motion for new trial is reviewed for abuse of discretion, and '[t]he district court abuses its discretion by denying a new trial only when there is an "absolute absence of

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[3] *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016) (quoting *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007)) (internal quotation marks omitted).

[4] FED. R. CIV. P. 50(a)(1).

[5] *Janvey v. Romero*, 817 F.3d 184, 187 (5th Cir. 2016) (quoting *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013)) (internal quotation marks omitted).

[6] *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017).

evidence to support the jury's verdict." ' "[7] "A motion for a new trial or to amend a judgment cannot be used to raise arguments which could, and should, have been made before the judgment issued."[8] "To the extent that a Rule 59(e) ruling was a reconsideration of a question of law,... the standard of review is *de novo*."[9]

III.

W&T contends that the plain language of Louisiana Civil Code Article 2003 dictates that the jury's bad faith finding bars Apache's recovery for breach of contract. Article 2003 states that

> An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

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[7] *McCaig v. Wells Fargo Bank (Tex.), N.A.*, 788 F.3d 463, 472 (5th Cir. 2015) (quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013)).

[8] *Garriott v. NCsoft Corp*., 661 F.3d 243, 248 (5th Cir. 2011) (citation omitted) (internal quotation marks omitted).

[9] *Hoffman v. L&M Arts*, 838 F.3d 568, 581 (5th Cir. 2016) (internal quotation marks, citations, and alterations omitted). The parties dispute whether the district court's denial of W&T's Rule 59 motion involved a pure question of law, with W&T arguing that it did and Apache suggesting that W&T's motion merely criticized the evidence presented at trial. The Rule 59 motion and district court's ruling is discussed below in Section III.

> If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.[10]

In answering the fourth question on the verdict form, the jury found that "Apache act[ed] in bad faith thereby causing W&T to not comply with the contract."

The district court denied W&T's motion for judgment as a matter of law, concluding that it was bound by the Louisiana Supreme Court's decision in *Lamar Contractors, Inc. v. Kacco, Inc.*[11] The district court determined that, under *Lamar*, Article 2003's bad faith damages bar is only implicated where the obligor has established that the obligee failed to perform a contractual obligation that caused the obligor's failure to perform. In other words, to avoid liability pursuant to Article 2003's bad faith bar, W&T would have to show that Apache failed in its performance of the contract and that failure caused W&T's breach. Because the jury did not find that Apache had breached any obligation under the contract,[12] the district court reasoned that it was required to set aside the jury's finding on Question

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[10] La. Civ. Code art. 2003.

[11] 189 So. 3d 394 (La. 2016).

[12] The district court noted that the jury considered and rejected that Apache had breached. For example, had the jury answered Question 3 in the affirmative, that would have amounted to a finding that Apache had breached an obligation under the contract. Question 3 asked whether Apache was required to obtain W&T's approval under § 6.2 before completing the P&A as required by § 18.4, which the jury answered in the negative.

4—that Apache's bad faith caused W&T's failure to perform—meaning Apache was not barred from recovery under Article 2003.

W&T disputes the district court's reading of and reliance on *Lamar*, arguing that (1) *Lamar* is not binding on this court because it is not *jurisprudence constante* and this court must instead follow the plain language of Article 2003, which contains no language limiting Article 2003's application to situations where the obligee has breached; (2) *Lamar's* holding is limited to Article 2003's negligence clause; and (3) application of *Lamar* is contrary to public policy.

In diversity cases where this court must apply Louisiana substantive law,[13] "we look to the final decisions of the Louisiana Supreme Court."[14] In the absence of a final decision by the state's supreme court, we make an *Erie* guess, which requires us to "employ Louisiana's civilian methodology, whereby we first examine primary sources of law: the constitution, codes, and statutes."[15] Even caselaw rising to the level of *jurisprudence constant*e is "secondary law in Louisiana"[16] and, accordingly, we are not strictly bound by the decisions of Louisiana's

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[13] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[14] *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007).

[15] *Id.* at 206 (quoting *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003)).

[16] *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169 (5th Cir. 1999).

intermediate appellate courts.[17] So, it is only when the Louisiana Supreme Court has not made a determinative decision that this court must make an *Erie* guess, employing Louisiana's civilian methodology.[18]

The parties dispute whether *Lamar* speaks definitively on the issue of whether Article 2003 bars recovery of damages only when the obligee has been found in breach. In *Lamar*, the Louisiana Supreme Court considered a trial court's decision to reduce breach of contract damages awarded to a general contractor, *Lamar*, after finding that *Lamar* had contributed to the subcontractor's failure to perform.[19] The obligation imposed by Article 2003 is "correlative to the general duty imposed by [Article] 1983, which requires 'contracts must be performed in good faith.' "[20] However, the court warned that the duty of good faith is not to be considered in isolation,

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[17] *In re Katrina*, 495 F.3d at 206 ("Thus, although we will not disregard the decisions of Louisiana's intermediate courts unless we are convinced that the Louisiana Supreme Court would decide otherwise, we are not strictly bound by them.") (citing *Am. Int'l Specialty Lines*, 352 F.3d at 261).

[18] *Boyett v. Redland Ins. Co.*, 741 F.3d 604, 607 (5th Cir. 2014); *see also Moore v. State Farm Fire & Cas. Co.*, 556 F.3d 264, 269–70 (5th Cir. 2009) ("To determine Louisiana law, we look to the final decisions of the Louisiana Supreme Court. In the absence of a final decision by the Louisiana Supreme Court, we must make an *Erie* guess . . . . When faced with unsettled questions of Louisiana law we adhere to Louisiana's civilian decision-making process.").

[19] *Lamar*, 189 So. 3d at 395–97.

[20] *Id.* (citing La. Civ. Code art. 1983) (internal alteration omitted).

and that it is circumscribed by the obligations imposed by the contract.[21] The court noted that "[a]lthough we have not had occasion to consider [Article] 2003 since its enactment in 1985, jurisprudence interpreting the predecessor article ... emphasized that the obligor must establish that the obligee breached the contract, thereby making it more difficult for the obligor to perform its obligation."[22] It concluded: "[A]n obligor cannot establish an obligee has contributed to the obligor's failure to perform unless the obligor can prove the obligee itself failed to perform duties owed under the contract. Stated in other words, Kacco must demonstrate that Lamar failed to perform its obligations under the contract, which in turn contributed to Kacco's breach of the contract."[23] The question of the obligee's bad faith does not become relevant until there is a determination that the obligee failed to perform a contractual obligation that in turn caused the obligor's failure to perform.[24] For Article 2003 to apply as a damages bar, there must be an antecedent determination of breach.

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[21] *Id*. at 398.

[22] *Id.* (referring to its decisions in *Board of Levee Com'rs of Orleans Levee Dist. v. Hulse*, 167 La. 896, 120 So. 589, 590 (1929) and *Favrot v. Favrot*, 68 So. 3d 1099, 1109 (La. Ct. App. 2011)).

[23] *Id.*

[24] *Id.* at 399 (summarizing the intermediate appellate court's conclusion in *Favrot* that "the question of a party's good or bad faith does not become relevant until there has been a determination that the party failed to perform an obligation under the contract").

While W&T urges that the Louisiana Supreme Court's reading was limited to the second sentence of Article 2003—the negligence prong—the *Lamar* court drew no such limitation.[25] The reasoning of *Lamar* did not depend on the relationship between bad faith and negligence. W&T offers no principled reason why the Louisiana Supreme Court would have chosen not to recognize a requirement of breach had the obligee in that case acted in bad faith, rather than negligently. Indeed, we find no distinction in *Lamar*. Because *Lamar* is controlling here, the district court correctly concluded that the good-faith inquiry in Article 2003 is limited to situations where the obligee has breached.[26] The jury did not find that Apache breached so Article 2003 does not bar Apache's entitlement to damages as a matter of law.

IV.

W&T also contends that the case never should have gone before a jury because W&T did not breach the contract as a matter of law. Section 6.2 of the JOA provides that the operator "shall not make any single expenditure or undertake any activity or operation costing Two Hundred Thousand Dollars ($200,000 or

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[25] *Id.*

[26] W&T suggests as a last resort that this court may certify the question to the Louisiana Supreme Court. Because we conclude that the Louisiana Supreme Court resolved this issue in *Lamar*, certification is unnecessary here. *Cf. Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015) ("Given ... that this is a question of state law that no on-point precedent from the Supreme Court of Texas has resolved, that the Supreme Court of Texas is the final arbiter of Texas's law ... we believe it is best to certify the question at issue.").

more), unless an AFE [is approved]." W&T reads that provision in conjunction with Exhibit C, governing accounting, which provides that "[a]cceptable reasons for non-payment or short payment ... are as follows: ... when an AFE is not approved." Together, W&T argues, those provisions unambiguously resolve the issue of whether W&T breached. Because W&T as the non-operator decided not to approve any AFE, it contends that it was entitled to short the payment (and pay its share of the *Helix* P&A estimate) without being found in breach of the JOA. W&T emphasizes that Section 6.2 does not contain an explicit exception for government-mandated operations undertaken pursuant to Section 18.4 and suggests that AFE approval was required even for operations performed under that Section. W&T points out that the parties understood how to make an exception to Section 6.2 and did so in a separate instance, exempting the operator from obtaining AFE approval in the event of a safety-threatening emergency.[27]

Apache disputes W&T's reading of the contract, arguing that under Section 18.4, which covers government-mandated P&A operations, Apache was required to undertake its P&A of the Wells as the operator and was authorized to do so without obtaining an AFE from W&T pursuant to Section 6.2. Section 18.4 provides that

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[27] "Notwithstanding the foregoing, in the event of an emergency which poses a threat to life, safety, property, or the environment, the Operator is empowered to immediately make such expenditures for the Joint Account as, in its opinion as a reasonable and prudent Operator, are necessary to deal with the emergency."

> The Operator shall conduct the abandonment and removal of any well, Production System or Facilities required by a governmental authority, and the Costs, risks and net proceeds will be shared by the Participating Parties in such well, Production System or Facilities according to their Participating Interest Share.

Apache asserts that this provision contemplates cost-sharing between the parties and does not incorporate Section 6.2's AFE process. Apache stresses that requiring a Section 6.2 AFE for a government-mandated P&A operation would lead to an absurd result because the non-operator could essentially hold-up an operator from completing a P&A required by federal law to avoid sharing the costs.

The district court denied W&T's motion for summary judgment, concluding that the interplay between Section 6.2 and Section 18.4 was ambiguous, leaving a material question of fact as to the parties' intent. In answering Question Three, the jury found that Apache was not required to obtain W&T's approval through an AFE before conducting the P&A as required by Section 18.4.[28]

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[28] "Was Apache required to obtain W&T's approval under Section 6.2 of the Contract before Apache plugged and abandoned the MC-674 wells as required under Section 18.4 of the Contract?"

Whether contract language is ambiguous under Louisiana law is a question of law.[29] Under Louisiana law, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."[30] "[I]f a court finds the contract to be unambiguous, it may construe the intent from the face of the document—without considering extrinsic evidence—and enter judgment as a matter of law."[31] If the court determines that there is an ambiguity, the question of intent is an issue of fact.[32] "Louisiana courts will not interpret a contract in a way that leads to unreasonable consequences or inequitable or absurd results even when the words used in the contract are fairly explicit."[33]

Applying Section 6.2's expenditure provision to a government-mandated P&A undertaken pursuant to Section 18.4 would lead to an absurd consequence: namely a situation where a non-operator is empowered to hold an operator hostage, preventing

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[29] *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577, 580 (La. 2003).

[30] La. Civ. Code art. 2046.

[31] *Preston Law Firm, L.L.C. v. Mariner Health Care Mgmt. Co.*, 622 F.3d 384, 392 (5th Cir. 2010) (internal citation omitted).

[32] *Gebreyesus v. F.C. Schaffer & Assocs., Inc.*, 204 F.3d 639, 643 (5th Cir. 2000).

[33] *Tex. E. Transmission Corp. v. Amerada Hess Corp.*, 145 F.3d 737, 742 (5th Cir. 1998); *see also* La. Civ. Code art. 2046 ("When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.").

the operator from completing a legally required P&A, in order to extract a better bargain or avoid cost-sharing altogether. The oddity of that result is compounded by the fact that Section 18.4 has its own cost-sharing provision,[34] making the idea that the operator was required to obtain an AFE to complete the P&A less tenable. In light of that absurd consequence, the district court correctly concluded that the jury needed to resolve the question of the parties' intent.[35] We agree therefore that the question of whether Section 6.2's expenditure requirement applies to government-mandated P&A undertaken pursuant to Section 18.4—which itself mandates cost-sharing—is ambiguous and was properly put to the jury.

W&T's response to the absurdity concern is unavailing. It suggests that if the parties fail to agree on costs through the AFE process, the government can simply conduct the P&A operation itself and charge the operator and non-operator

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[34] "The Operator shall conduct the abandonment and removal of any well, Production System or Facilities required by a governmental authority, and the *Costs, risks and net proceeds will be shared* by the Participating Parties in such well, Production System or Facilities according to their Participating Interest Share."

[35] La. Civ. Code art. 2046 ("When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."); *Stewart Enters., Inc. v. RSUI Indem. Co., Inc.*, 614 F.3d 117 (5th Cir. 2010) (holding that the most straightforward reading of the contract would lead to an absurd result that "could not have been intended by the parties").

later.[36] W&T does not dispute that federal law required the P&A operation of the Wells—rather it reads the Section 6.2 AFE requirement to apply to government-mandated P&A operations and urges that Apache, having failed to obtain an AFE from W&T, could have decided not to comply with federal regulations and allow the government to P&A the Wells itself. Allowing Apache to evade its obligations under federal law to P&A the Wells is contrary to its duty to conduct all operations as would a prudent operator.[37] W&T's proposed answer to the troubling consequences of its reading is no solution at all.

V.

Finally, W&T claims that even if Apache was not barred from recovering damages, W&T is entitled to an offset based on Jury Question No. 5 and that the damages award of $43,214,515.83 should be reduced by $17 million. As to the legal basis for the offset, W&T points to "the basic law of damages" in Louisiana set out in La. Civ. Code art. 1995 that damages cannot place the obligee in a better position than it would have been in if the contract had been fulfilled. W&T posits that the jury determined that a $17 million offset was appropriate to account for the savings that Apache enjoyed by not incurring the

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[36] "If parties cannot agree about costs and thus fail to P&A wells, the government can arrange for the P&A, deem the bond the working interest owners were required to provide forfeited to the amount that would cover P&A costs, and charge the working interest owners for any excess costs."

[37] "The Operator shall conduct all operations in a good and workmanlike manner, as would a prudent operator under the same or similar circumstances."

stacking costs for the rigs. In its view, the jury credited testimony that Apache would have incurred stacking costs between $29.5 million and $36.4 million and adopted the $17 million figure as a reasonable determination of Apache's windfall. The district court denied W&T's motion for entry of judgment and motion for a new trial, concluding that W&T was not entitled to an offset on the basis of Question 5. Specifically, the district court determined that Questions 2 and 5 were not linked, and offset was unavailable as an affirmative defense under any of W&T's theories.

Article 1995 provides that "[d]amages are measured by the loss sustained by the obligee and the profit of which he has been deprived."[38] "The measure of damages for a breach of contract is the sum that will place plaintiff in the same position as if the obligation had been fulfilled."[39] On Question 2, the jury was instructed in accordance with Article 1995 to calculate "an amount that is fair compensation for those damages." The court then explained to the jury:

> Damages are measured by the loss sustained by the non-breaching party. These are called compensatory damages. The damages amount is the amount that will place Apache in the position it would have been in if the parties' contract had been properly performed. The

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[38] La. Civ. Code art. 1995.

[39] *Gloria's Ranch LLC v. Tauren Exploration, Inc.*, 252 So. 3d 431, 445–46 (La. 2018) (internal citation and quotation marks omitted).

> damages include the amount a party owed under the contract.

The jury was instructed to determine the actual loss sustained without reference to Question 5. W&T's own closing argument emphasized this understanding, encouraging the jury in calculating an amount for Question 2 to subtract the amount of savings W&T attributed to Apache's avoiding the stacking costs by using the rigs.[40] W&T's offset argument on appeal ignores the fact that the jury instructions with respect to Question 2 tracked the language of Article 1995. The two cases W&T relies on do not offer a theory entitling W&T to offset. In *Evangeline Parish School Bd. v. Energy Contracting Servs., Inc.*, the Louisiana appellate court considered a damages award in favor of an obligee to an energy-savings services contract.[41] The court reaffirmed the general principle of Article 1995 that "[d]amages for obligor's failure to perform are measured by the loss sustained by the obligee and the profit of which he has been deprived" and remanded, noting that the experts failed to calculate the amount overcharged and the appellate court was therefore "unable to make such a determination from the record."[42] There is no lack of clarity in the record here—W&T simply

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[40] "Number two is the damage issue. We believe that if you get to that issue, and you believe that somehow damages should be awarded in this case, they say it is 43.2 million. We think they benefited anywhere ... between 29 to 36 million. So we believe you should subtract that from any damage amount you decide to award in the case."

[41] 617 So. 2d 1259 (La. App. 3d. 1993).

[42] *Id.* at 1267.

disputes the jury's rejection of its stacking costs theory. In *Swoboda v. SMT Prop., LLC*, the Louisiana appellate court considered the damages award in a contract dispute involving the construction of a residential home.[43] In accordance with Article 1995, the court "consider[ed] the benefit to plaintiffs in maintaining ownership and possession of the adjacent lot [and] conclude[ed] that plaintiffs [we]re not entitled to reimbursement."[44] Again, W&T ignores that the jury was instructed in accordance with Article 1995 and explicitly calculated the actual loss sustained by Apache. W&T's stacking costs theory was rejected by the jury and it has offered no legal theory to support upsetting that verdict.

W&T posits two additional legal bases to support an offset in Apache's damages award. First, W&T suggests that Article 2323, governing comparative fault, provides an independent legal basis for a reduction. Article 2323 applies in tort cases; the Civil Code provides its own rule governing comparative fault in contract cases—Article 2003—that we have already determined does not aid W&T here.[45] W&T also claims the doctrine of compensation under Article 1893 gives independent grounds for an

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[43] 975 So. 2d 691 (La. App. 2008).

[44] *Id.* at 695.

[45] *See Justiss Oil Co. v. Oil Country Tubular Corp.*, 216 So. 3d 346, 356–57 (La. Ct. App.), *writ denied*, 227 So. 3d 830 (La. 2017) (quoting *Hanover Ins. Co. v. Plaquemines Parish Gov't*, No. 12–1680, 2015 WL 4167745, at *5–6 (E.D. La. July 9, 2015)).

offset.[46] As the district court correctly noted, W&T "previously admitted neither [compensation or unjust enrichment] could be the basis of the jury's finding, as that was not the nature of the evidence presented to the jury." In its post-verdict briefing, W&T conceded that Article 1893 did *not* apply, because "the jury was not instructed on the specific requirements of the traditional doctrine of offset or setoff, which requires debts owed by both parties being offset against each other." Neither comparative fault nor compensation provide a basis for a reduction in the damages award here.

Finally, W&T offers a last-ditch argument that the jury award was clearly excessive because of Apache's savings on the stacking costs. The district court did not abuse its discretion in denying W&T's motion for a new trial or remittitur. We agree with the district court the damages award was supported by substantial evidence. The jury logically awarded the precise amount that W&T shorted by making a partial payment after the P&A operation. Such an award was not excessive or "contrary to right reason"—rather, it reflects that the jury's consideration of the evidence led it to reject W&T's

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[46] Article 1893 provides that "Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due. In such a case, compensation extinguishes both obligations to the extent of the lesser amount." La. Civ. Code art. 1893.

assertion that Apache enjoyed a windfall by avoiding the stacking costs.[47]

VI.

For the foregoing reasons, the judgment of the district court is affirmed.

[47] *Laxton v. Gap, Inc.*, 333 F.3d 572, 586 (5th Cir. 2003) ("When a damage award is merely excessive or so large as to appear contrary to right reason, remittitur is the appropriate remedy.").

APPENDIX B

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

APACHE DEEPWATER LLC,

Plaintiff,

v.

W&T OFFSHORE, INC.,

Defendant.

Civil Action No. H-15-0063

Signed 05/31/2017

Attorneys and Law Firms

Abigail Claire Noebels, Geoffrey L. Harrison, Susman Godfrey LLP, Houston, TX, for Plaintiff.

Bryon A. Rice, David J. Beck, Beck Redden LLP, Houston, TX, for Defendant.

ORDER AND FINAL JUDGMENT

DAVID HITTNER, United States District Judge

Pending before the Court are W&T Offshore, Inc.'s Motion for Entry of Judgment (Document No. 125) and Apache's Motion for Entry of Final Judgment (Document No. 126). Having considered the motions, submissions, and applicable law, the Court

determines W&T's motion should be denied and Apache's motion should be granted.

On October 17, 2016, the Court commenced a ten-day jury trial in the above-titled action. The trial concluded on October 28, 2016, with closing arguments, and the jury commenced deliberations and returned a verdict that same day. The Court issued a five-question jury charge, which resulted in the following verdict:

1) Did W&T fail to comply with the Contract by failing to pay its proportionate share of the costs to plug and abandon the MC 674 wells?[1]

   Answer: Yes.

2) What sum of money, if any, would compensate Apache for W&T's failure to pay its proportionate share of the costs to plug and abandon the MC 674 wells?[2]

   Answer: $43,214,515.83.

3) Was Apache required to obtain W&T's approval under Section 6.2 of the Contract

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[1] The jury was instructed as to Question 1 that "[a]ll contracts must be performed in good faith" and "W&T's obligation to pay its proportionate share of costs to plug and abandon the wells only arises if you find that Apache complied with Section 5.1 and Section 5.2 of the Contract." *Jury Instructions*, Document No. 120 at 10–11.

[2] The jury was instructed to award compensatory damages in "the amount that [would] place Apache in the position it would have been in if the parties' contract had been properly performed." *Jury Instructions*, Document No. 120 at 12.

before Apache plugged and abandoned the MC 674 wells as required under Section 18.4 of the Contract?

Answer: No.

4) Did Apache act in bad faith thereby causing W&T to not comply with the contract?

Answer: Yes.

5) By what amount, if any, should the amount you found in response to Jury Question No. 2 be offset?

Answer: $17,000,000.00.

Following the jury's verdict, the parties filed cross-motions for entry of judgment. W&T contends the jury's finding on Question 4 precludes Apache from recovering any amount of damages, and in the alternative, the jury's award of damages in Question 2 be offset by the amount in Question 5. W&T does not contest the jury's verdict as to Questions 1–3, only the effect of those answers given how the jury answered Questions 4–5. Apache contends the bad faith provision underlying Question 4 would only preclude recovery if the jury had found Apache breached the contract and that Question 5's offset is not available under Louisiana law.[3] Further, Apache

[3] Apache also contends W&T did not properly plead and waived both the bad faith and offset defense, to extent either might be found applicable. As the Court below finds neither defense applicable under Louisiana law, the Court need not address that contention.

contends as the prevailing party it is entitled reasonable attorneys' fees and costs.

A. Question 4: Louisiana Civil Code Article 2003

W&T contends there is no controlling Louisiana case law interpreting Article 2003 and under the statute's plain meaning there was sufficient evidence at trial to support the jury's finding of bad faith. Apache contends there is a controlling Louisiana Supreme Court case that first requires a finding that Apache breached the contract in order to support a bar to recovering damages pursuant to Article 2003.

In diversity cases, "federal courts must apply state substantive law." *In Re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007). "In order to determine state law, federal courts look to final decisions of the highest court of the state. When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992).

Where Louisiana law applies in a diversity case, courts first look to "final decisions of the Louisiana Supreme Court." *In re Katrina*, 495 F.3d at 206. In the absence of a final decision, courts make an *Erie* guess employing Louisiana's civilian methodology. *Id.* Louisiana's Civil Law tradition looks first to primary sources of law—the constitution, codes, and statutes—and then to secondary sources of law, such as decisions of Louisiana's intermediate courts. *Id.* (internal citations omitted). The concept of stare decisis is foreign to Louisiana civil law. *Transcon.*

Gas Pipe Line, 953 F.2d at 988. While courts are not strictly bound by decisions of Louisiana appellate courts, under the concept of jurisprudence constante, courts do take appellate decisions into account when there are numerous decisions in accord on a given issue. *Id.* However, "jurisprudence, even when it rises to the level of jurisprudence constante, is a secondary law source in Louisiana." *In re Katrin*a, 495 F.3d at 206. Although federal courts are not "strictly bound" by Louisiana intermediate court decisions, when sitting in diversity, courts will not disregard those decisions unless they are "convinced that the Louisiana Supreme Court would decide otherwise." *Id.*

The parties agree Louisiana law controls this action. The parties dispute whether there is a final Louisiana Supreme Court case interpreting the "bad faith" clause of Louisiana Civil Code Article 2003. Specifically, the parties dispute the scope of the Supreme Court's decision in *Lamar Contractors, Inc. v. Kacco, Inc.*, 189 So. 3d 394 (La. 2016). W&T contends *Lamar* only addresses the negligence clause in Article 2003. Apache contends *Lamar's* holding pertains to Article 2003 in its entirety. Thus, whether *Lamar* is binding on this Court, while sitting in diversity, turns on the scope of *Lamar's* holding. If *Lamar* first interprets Article 2003 generally and then applies that interpretation to the specific question presented under the negligence clause, this Court is bound by *Lamar* as a Louisiana Supreme Court final decision. If *Lamar* only interprets Article 2003's negligence clause, the Court would be required to interpret the text of Article 2003's bad faith clause in the first instance utilizing

the primary sources of law in Louisiana's civilian methodology. The Court, therefore, turns to the *Lamar* decision.

Lamar arrived at the Louisiana Supreme Court following the appellate court's affirmance of the trial court reducing breach of contract damages for a general contractor (Lamar), after finding that Lamar's negligence contributed to the subcontractor's (Kacco) failure to perform. 189 So. 3d at 395–97. The Louisiana Supreme Court granted certiorari on the issue of whether the "district court erred in reducing Lamar's damages for breach of contract based on a finding that Lamar's negligence contributed to Kacco's breach of the contract." *Id*. at 397. Louisiana Civil Code article 2003 provided the statutory basis for the district court's reduction. Article 2003 provides:

> An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause failure.
>
> If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.
>
> LA. CIV. CODE ART. 2003.

Article 2003's second sentence, which pertains to an obligee's negligence, was bolded by the *Lamar* court. 189 So. 3d at 397. However, nothing in the analysis that follows restricts the *Lamar* court's analysis of Article 2003 to the negligence provision.

Article 2003 is cited in its entirety and the decision contains no limiting language stating the only relevant provision of the Article for the analysis is the second sentence. The court's construction of the statute turned on interplay between good faith and bad faith—not between good faith and negligence. Immediately following the statute's quotation, the court notes "this obligation" is correlative to the general duty to perform contracts in good faith as codified in Louisiana Civil Code article 1983. *Id.* at 397. While the court does not specify whether "this obligation" refers to Article 2003 in whole or merely the bolded negligence clause, the analysis that follows clarifies the court is interpreting Article 2003 globally because the interpretation of any entitlement to relief in Article 2003 is derived in part from the meaning of good faith in Article 1983.

In articulating the definition of good faith, the court quotes at length Professor Saul Litvinoff's law review article that postulates a promisee must affirmatively enable a promisor to perform, in addition to refraining from hindering performance. *Id.* at 398. This general duty of good faith is, however, "regulated and circumscribed by the obligations imposed by the parties' contract." *Id.* The court then cited two cases interpreting Article 2003's predecessor statute, *Board of Levee Commissioners of Orleans Levee District v. Hulse*, 120 So. 589 (La. 1929) and *Favrot v. Favrot*, 68 So.3d 1099 (La. Ct. App. 2011). *Id. Board of Levee* and *Favrot* both hold an obligor must establish an obligee breached a contractual obligation to show the obligor is entitled to relief under Louisiana Civil Code article 1934 (1870), which was Article 2003's predecessor statute.

Id. (noting *Board of Levee* requires showing a breach of obligations making it difficult for the defendant to perform and *Favrot* states an examination of good or bad faith only becomes relevant after showing an obligation has been breached). The Court then concluded, "[t]aken as a whole, these authorities support the proposition that an obligor cannot establish an obligee has contributed to the obligor's failure to perform unless the obligor can prove the obligee itself failed to perform duties owed under the contract." *Id.* Applying this holding to the specific facts in *Lamar*, the court found the subcontractor could not show the contractor violated any obligation under the contract, and therefore, the contractor could not have negligently contributed to the subcontractor's failure to perform. *Id.* at 398–99.

Lamar in effect establishes a two-step process for showing entitlement to relief under Article 2003. Before it becomes relevant whether the bad faith or negligence provision of Article 2003 is implicated, the obligor must first establish the obligee has also failed to perform a contractual obligation that caused the obligor's failure to perform. Only once an obligor establishes a failure of the obligee is there entitlement to relief under either the bad faith or negligence provision, and then it becomes relevant whether the facts support a bad faith or negligence finding. Notably, none of the authorities relied on by the *Lamar* court involved a purported entitlement to a reduction in damages due to negligence by the obligee. As such, despite arising in the negligence context, *Lamar* is a final Louisiana Supreme Court decision pertaining to when entitlement to relief under Article 2003 is available generally and not

only when a obligor asserts a right to a reduction in damages due to an obligee's negligence. Accordingly, as a final Supreme Court decision, this Court is bound by the *Lamar* court's holding that an obligor must first establish a breach by the obligee.

Here, Apache is the obligee and W&T is the obligor. To avoid liability pursuant to Article 2003, on the jury's Question 1 finding that W&T breached the contract, W&T would have to show Apache failed to comply with the contract and Apache's failure caused W&T's breach. The jury did not find that Apache breached any obligation.[4] As to Question 1, the jury was instructed the contract included an obligation of good faith performance. Therefore, the jury's finding that W&T breached its obligations under Sections 5.1 and 5.2 necessarily includes a finding Apache acted in good faith. This in turn precludes a finding of bad faith by Apache based on any of the evidence pertaining to Jury Question 1. Accordingly, the Court sets aside the jury's finding on Question 4, that Apache's bad faith caused W&T's failure to perform, as W&T is not entitled to relief pursuant to Article 2003 under the facts of this case and given the jury's findings. Therefore, the Court grants Apache's motion for entry of judgment finding that W&T is not entitled to a reduction in damages under Louisiana law.

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[4] For example, had the jury answered Question 3 in the affirmative that would have established the failure to perform an obligation by Apache.

B. Question 5: Availability of Offset under Louisiana Law

W&T contends it is entitled to an offset of the jury's award to Apache in Question 2 in the amount of the jury's answer to Question 5. Apache contends any potential basis W&T could assert entitling W&T to an offset is not available under Louisiana law.

"Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived." LA. CIV. CODE ART. 1995. "When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages." LA. CIV. CODE ART. 1999. "Louisiana law provides that no unjust enrichment claim shall lie when the claim is based on a relationship that is controlled by an enforceable contract." *Drs. Bethea, Moustoukas and Weaver LLC v. St. Paul Guardian Ins. Co.*, 376 F.3d 399, 408 (5th Cir. 2004); *see also* LA. CIV. CODE ART. 2298 (unjust enrichment is not available where "the law provides another remedy for the impoverishment or declares a contrary rule").

Even if W&T sufficiently pleaded offset as an affirmative defense, and not merely in regards to W&T's audit counter-claims, it is not available under the circumstances of this case. As to Question 2, the jury was instructed that: "Damages are measured by the loss sustained by the non-breaching party. These are called compensatory damages. The damages amount is the amount that will place Apache in the position it would have been in if the parties' contract had been properly performed. The damages include

the amount a party owes under the contract."[5] The jury found the answer to Question 2 was $43,214,515.83. In reaching that calculation, the jury necessarily accounted for proper performance of the contract and any amounts owed per the question's instructions.

W&T contends that Questions 2 and 5 are linked. However, the jury was instructed on Question 2 to find the actual harm to Apache when instructed to find a damage amount that "place[s] Apache in the position it would have been in if the parties' contract had been properly performed." No instruction was provided in Question 5 defining offset. Nor was Question 5 predicated on the jury making a certain finding on a prior question. Without the Court predicating Question 5 or instructing the jury to link Questions 2 and 5 to calculate actual harm, and given the jury's explicit instructions on Question 2, the jury was not instructed to calculate actual harm by combining its answers to Questions 2 and 5. Therefore, unless offset is both legally available as an affirmative defense under Louisiana law and the $17,000,000.00 is supported by substantial evidence, the Court will not reduce the jury's finding on Question 2.

The Court need not determine whether substantial evidence supports the jury's answer to Question 5, as there is not a legal basis for Question 5 under Louisiana law. *New Orleans Pacific Railway Company v. Gay*, 31 La. Ann. 430 (La. App. 1879), does not support awarding an offset in a breach of

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[5] *Jury Instructions*, Document No. 120 at 12.

contract case. The offset provided for in *Gay* was in the context of a land-use taking, not a breach of contract. *Gay*, 31 La. Ann. at 432. Nor do the additional three cases W&T cites support an offset in a breach of contract case. *Storey v. Weaver*, 139 So. 3d 1079, 1085 (La. App. 2014), involved an offset for the plaintiff's out-of-pocket costs applied against the defendant's credit for substantial performance, not an offset against a plaintiff's damages. *Bienvenu v. State Farm Mut. Auto. Ins. Co.*, 545 So. 2d 581 (La. Ct. App. 1989), involved an offset governed by Louisiana's community property statutes, not the breach of contract statutes that govern this case. *Stern v. Kreeger Store, Inc.*, 463 So. 2d 709 (La. Ct. App. 1985), involved a case where the plaintiff failed to present evidence of the present value of an item purchase five years earlier, and because damages were indeterminate, the court offset the damages by the value derived from the use of the item. Here, Apache presented sufficient evidence as to the precise value of the breach of the contract. Further, because the claim is controlled by an enforceable contract, W&T is not entitled to an offset in the amount found in Question 5 under a theory of unjust enrichment. Accordingly, because there is no basis under Louisiana law for an offset, or in the Court's jury instructions to support a reduction in the jury's award absent entitlement to an offset, the Court sets asides the jury's finding on Question 5 and grants Apache's motion for entry of judgment.

C. Prejudgment and Post–Judgment Interest

Apache contends under the terms of the contract it is entitled to prejudgment interest as the prevailing party. W&T does not contest Apache's contention. On

October 27, 2016, the parties entered into a stipulation agreeing that if Apache recovers damages, it is entitled to "recover interest on the damages amount calculated in accordance with the parties' 1999 Unit Operating Agreement, Exhibit C, section I.3.B."[6] Section I.3.B allows for the recovery of prejudgment interest.[7] Uncontested evidence at trial showed that as of October 1, 2016, prejudgment interested had accrued in the amount of $1,926,734.88. [8] Accordingly, per the parties' stipulation and Section I.3.B, the Court grants prejudgment interest to Apache in the amount of $1,926,734.88, plus any additional interest that has accrued between October 1, 2016, and the date of the entry of judgment. Apache's motion for post-

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[6] *Stipulations*, Document No. 100 at 1.

[7] Section I.3.B provides, in relevant part:

> Except as provided below, each Party shall pay its proportion of all bills within fifteen (15) days of receipt date. If payment is not made within such time, the unpaid balance shall bear interest compounded monthly using the U.S. Treasury Bill three month rate plus 3% in effect on the first day of the month for each moth that the payment is delinquent or the maximum contract rate permitted by the applicable usury laws in the jurisdiction in which the Join Property is located, whichever is the lessor, plus attorney's fees, court costs, and other costs in connection with the collection of unpaid amounts. Interest shall begin accruing on the day of the month in which the payment was due.

Plaintiff's Trial Exhibit 1 at W&T 00001075.

[8] *Trial Transcript*, Document No. 102 at 141:15–142:14.

judgment interest in accordance with 28 U.S.C. § 1961 is also granted.

D. Attorneys' Fees and Costs

Apache contends it is entitled to recover attorneys' fees as the prevailing party and costs under the terms of the contract. W&T contends, if the Court finds Apache is the prevailing party, it has a stipulated agreement with Apache as to the amount of attorneys' fees and costs but contests whether Apache is entitled to all categories of costs.

1. Costs

Apache contends it is entitled to recover all costs associated with the litigation per the terms of the contract. W&T contends Apache is only entitled to costs recoverable under 28 U.S.C. § 1920. Section I.3.B of the Joint Operating Agreement provides that a party is entitled to "attorney's fees, court costs, and other costs in connection with the collection of unpaid amounts."[9] Under the contractual terms, W&T agreed to pay "other costs in connection with the collection of unpaid amounts." W&T does not provide legal support for its contention that the general term "other costs in connection with collection of unpaid amounts" should be limited to the specific categories in 28 U.S.C. § 1920. *OMG, LP v. Heritage Auctions, Inc.*, No. 3:13–CV–1404–L, 2015 WL 12672698, at *4 (N.D. Tex. Apr. 14, 2015), does not limit contractually recoverable costs to those costs listed in 28 U.S.C. § 1920. While the *OMG* plaintiff asserted it was seeking contractual

[9] *Plaintiff's Trial Exhibit* 1 at W&T 00001075.

and not statutory costs, the court had found that OMG was not contractually entitled to costs and failed to timely file a bill of costs for recovery pursuant to 28 U.S.C. § 1920. *Id.* Apache has shown a contractual basis to recover not just "court costs," but "other costs in connection with collection of unpaid amounts." Thus, Apache is entitled to recover all categories of costs sought in this litigation under the contract. The parties stipulated that if the Court finds Apache is entitled to recover all categories, the following costs are reasonable and necessary: (1) $31,000.00 in litigation costs; (2) $610,000 in expert costs; (3) $50,000.00 in external document processing and printing costs; (4) $6,500.00 in court reporting costs; (5) $27,000 in private court reporting and videographer service costs; and (6) $25,500 in demonstrative vendor costs.[10] This amount totals $750,000.[11] Accordingly, the Court grants Apache's motion and awards all costs associated with collection of the unpaid contractual debt in the amount stipulated to by the parties as reasonable and necessary.

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[10] *Stipulation re Attorney's Fees and Costs*, Document No. 128, ¶ 3.

[11] Apache's motion requests $1,000,595.76 in costs. *Apache's Motion for Entry of Final Judgment*, Document No. 126 at 20. However, Apache has not provided the Court with a basis for departing from the amount stipulated to as reasonable and necessary in Document No. 128. Therefore, the Court will award costs in accordance with the parties' stipulation. Apache's proposed final judgment only requests costs in the amount of $750,000.00. *See Apache's Response in Opposition to W&T's Motion for Entry of Judgment*, Document No. 131, Exhibit 1 at 4 (*Final Judgment*).

2. Attorneys' Fees

Apache contends it is entitled to reasonable and necessary attorneys' fees under the contract's terms in a stipulated amount. W&T does not contest Apache's entitlement to attorneys' fees in a stipulated amount, if the Court finds Apache is the prevailing party. The parties stipulated that, if Apache is the prevailing party, $1,750,000.00 is a reasonable and necessary amount of attorneys' fees for Apache to have incurred in collecting the unpaid amounts at issue in the litigation.[12]

a. Calculation of Attorneys' Fees

The Fifth Circuit utilizes the two-step lodestar method to calculate an award of attorneys' fees. *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996). Under the lodestar method, the court determines the reasonable number of hours expended on the litigation by the movant's attorney and the reasonable hourly rate for the movant's attorney. *Id.* The court then calculates the lodestar by multiplying the reasonable number of hours by the reasonable hourly rate. *Id.* There is a strong presumption of the reasonableness of the lodestar amount. *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006). However, once the lodestar is calculated, the court may adjust the lodestar upward or downward as necessary, based on the twelve factors established in *Johnson v. Georgia Highway Express, Inc.*, to make the award of attorneys' fees reasonable. *Saizan*, 448 F.3d at 800;

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[12] *Stipulation re Attorney's Fees and Costs*, Document No. 128, ¶ 2.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717—19 (5th Cir. 1974). The movant bears the burden of establishing the reasonableness of the hours expended and rate charged. *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996).

i. Reasonable Number of Hours

To establish the reasonable number of hours expended on the litigation by the movant's attorney, "courts customarily require the [movant] to produce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours." *Bode v. United State*s, 919 F.2d 1044, 1047 (5th Cir. 1990). Courts examine both "whether the total number of hours claimed were reasonable and whether specific hours claimed were reasonably expended." *LULAC v. Roscoe Indep. Sch. Dist*., 119 F.3d 1228, 1232 (5th Cir. 1997). The movant must also produce evidence of billing judgment which is "documentation of the hours charged and of the hours written off as unproductive, excessive or redundant." *Saizan*, 448 F.3d at 799. Courts are to exclude from the lodestar calculation all time that is "excessive, duplicative, or inadequately documented." *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

Apache requests a fee award based on the hours expended by its counsel and paralegals as follows: (1) Geoffrey Harrison at 684.2 hours; (2) William Merrill at 1,324.6 hours; (3) Ashley McMillian at 1,361.2 hours; (4) Abigail Noebels at 935.4 hours; (5) Jeffrey McLaren at 836.9 hours; and (6) Rebecca Beard at

283.7 hours.[13] Apache does not seek fees for additional timekeepers who worked 279.6 hours on the matter.[14] As support for this request, Apache has submitted a declaration by William Merrill detailing the hours billed and the services rendered for those hours, in addition to summaries of the bills.[15] After reviewing the evidence submitted, the Court finds that Apache has exercised reasonable billing judgment.

ii. Reasonable Hourly Rate

To establish the reasonable hourly rate for the movant's attorney, courts must consider the attorney's regular rate as well as the prevailing market rate, which is the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate ... hourly rate." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 328 (5th Cir. 1995) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). If an attorney's customary rate is

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[13] *Apache's Motion for Entry of Final Judgment*, Document No. 126, Exhibit 5, ¶ 6 (*Declaration of William R. H. Merrill*) [hereinafter *Merrill Declaration*].

[14] *Merrill Declaration*, *supra* note 13, ¶ 11. Additionally, on October 12, 2016, Apache and Susman Godfrey converted their hourly fee arrangement to a contingent fee arrangement. *Merrill Declaration*, *supra* note 13, ¶ 5.

[15] *Merrill Declaration*, *supra* note 13, ¶¶ 5—20; *Apache's Motion for Entry of Final Judgment*, Document No. 126, Exhibit 6 at 1 (*Summary of Fees and Costs Incurred*).

requested and that rate is within the range of the usual market rates it is prima facie reasonable if uncontested. *La. Power & Light Co*, 50 F.3d at 328. A court may use their own expertise and judgment to make an independent determination of the value of an attorney's services. *Davis v. Bd. Of Sch. Comm'rs of Mobile Cnty.*, 526 F.2d 865, 868 (5th Cir. 1976).

Apache has requested the following rates for its counsel to be used in calculating the lodestar: (1) Geoffrey Harrison at $746.50 per hour averaged; (2) William Merrill at $517.41 per hour averaged; (3) Ashley McMillian at $450 per hour; (4) Abigail Noebels at $350 per hour; (5) Jeffrey McLaren at $270 per hour; and (6) Rebecca Beard at $125 per hour.[16] William Merrill's declaration states these fees were in line with the usual and customary fees charged in the community for similar matters by attorneys and paralegals from comparable firms.[17] The Court in its expertise and judgment finds these are reasonable rates and will use them in calculating the lodestar.

iii. Lodestar Calculation

The lodestar is calculated by multiplying the reasonable number of hours expended on the litigation by the reasonable hourly rate. *Forbush*, 98 F.3d at 821. Having determined the reasonable number of hours expended and the reasonable hourly rate, the Court determines the attorneys' fees

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[16] *Merrill Declaration*, *supra* note 13, ¶ 20.

[17] *Merrill Declaration*, *supra* note 13, ¶¶ 12–20.

incurred totaled $2,395,130.75. [18] Additionally, Apache receives a five-percent professional courtesy discount. [19] With that reduction, the lodestar is $2,275,374.21.

iv. Adjustment to the Lodestar

There is a strong presumption that the lodestar is reasonable, and it should be modified only in exceptional cases. *Watkins*, 7 F.3d at 458 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)). When deciding whether to make an adjustment to the lodestar, courts consider the Johnson factors, which are as follows: (1)the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services; (4) the preclusion of other potential employment by the attorney; (5) the customary fee charged for similar services in the relevant community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19. However, the most critical factor in the analysis is the "degree of success obtained." *Jason D. W. v. Hous. Indep. Sch. Dist*., 158 F.3d 205, 209 (5th Cir. 1998). Moreover, some of the factors are often subsumed in the initial lodestar calculation; therefore, courts cannot consider factors that were

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[18] *Merrill Declaration*, *supra* note 13, ¶ 20.

[19] *Merrill Declaration*, *supra* note 13, ¶¶ 14, 20.

already taken into account during the initial lodestar calculation when deciding whether to adjust the loadstar. *Id.*

The Court has carefully considered each of the *Johnson* factors as applied to this case and determines that their consideration is accurately reflected in the lodestar. However, here the parties have stipulated to, and Apache only seeks to recover, a reduced amount of attorneys' fees from the lodestar calculation in the amount of $1,750,000.00. [20] Accordingly, Apache is entitled to recover the stipulated attorneys' fees from W&T in the amount of $1,750,000.00.

E. Conclusion and Final Judgment

Accordingly, the Court hereby

ORDERS that W&T Offshore, Inc.'s Motion for Entry of Judgment (Document No. 125) is **DENIED**. The Court further

ORDERS that Apache's Motion for Entry of Final Judgment (Document No. 126) is **GRANTED**. The Court further

ORDERS that Plaintiff Apache Deepwater LLC recover from Defendant W&T Offshore, Inc., compensatory damages in the amount of $43,214,515.83; prejudgment interest in accordance with the parties' 1999 Unit Operating Agreement, Exhibit C, section I.3.B; post-judgment interest as provided in 28 U.S.C. § 1961; attorneys' fees in the

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[20] *Stipulation re Attorney's Fees and Costs*, Document No. 128, ¶ 2.

amount of $1,750,000.00; and costs in the amount of $750,000.00, as consistent with this order.

THIS IS A FINAL JUDGEMENT.

APPENDIX C

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

APACHE DEEPWATER LLC,

Plaintiff,

v.

W&T OFFSHORE, INC.,

Defendant.

Civil Action No. H-15-0063

Signed 08/25/2017

Attorneys and Law Firms

Geoffrey L. Harrison, Abigail Claire Noebels, Ashley Lauren McMillian, William RH Merrill, Susman Godfrey LLP, Houston, TX, for Plaintiff.

Bryon A. Rice, David J. Beck, Beck Redden LLP, Houston, TX, for Defendant.

ORDER AND FINAL JUDGMENT

DAVID HITTNER, United States District Judge

Pending before the Court are W&T Offshore, Inc.'s Motion for New Trial or Remittitur (Document No. 146) and W&T Offshore, Inc.'s Renewed Motion for Judgment as a Matter of Law and Motion to Alter or Amend the Judgment (Document No. 147). Having

considered the motions, submissions, and applicable law, the Court determines the motions should be denied.

I. BACKGROUND

On October 17, 2016, the Court commenced a ten-day jury trial in the above-titled action. The trial concluded on October 28, 2016, with closing arguments, and the jury commenced deliberations and returned a verdict that same day. The Court issued a five-question jury charge, which resulted in the following verdict:

1) Did W&T fail to comply with the Contract by failing to pay its proportionate share of the costs to plug and abandon the MC 674 wells?[1]

   Answer: Yes.

2) What sum of money, if any, would compensate Apache for W&T's failure to pay its proportionate share of the costs to plug and abandon the MC 674 wells?[2]

   Answer: $43,214,515.83.

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[1] The jury was instructed as to Question 1 that "[a]ll contracts must be performed in good faith" and "W&T's obligation to pay its proportionate share of costs to plug and abandon the wells only arises if you find that Apache complied with Section 5.1 and Section 5.2 of the Contract." *Jury Instructions*, Document No. 120 at 10–11.

[2] The jury was instructed to award compensatory damages in "the amount that [would] place Apache in the position it would have been in if the parties' contract had been properly performed." *Jury Instructions*, Document No. 120 at 12.

3) Was Apache required to obtain W&T's approval under Section 6.2 of the Contract before Apache plugged and abandoned the MC 674 wells as required under Section 18.4 of the Contract?

Answer: No.

4) Did Apache act in bad faith thereby causing W&T to not comply with the contract?

Answer: Yes.

5) By what amount, if any, should the amount you found in response to Jury Question No. 2 be offset?

Answer: $17,000,000.00.

Following the jury's verdict, the parties filed cross-motions for entry of judgment. On May 31, 2017, the Court denied W&T's motion for judgment and granted Apache's motion for judgment, thereby entering a judgment for Apache in the amount of $43,214,515.83, in accordance with the jury's findings on Questions 1 and 2, as well as prejudgment interest, attorneys' fees, and costs as provided for in the parties' contract and statutory post-judgment interest on the award. In finding for Apache, the Court found the jury's answer to Question 4 was of no effect under Louisiana law, because W&T did not establish that Apache failed to perform any contractual obligation that caused W&T's breach of the contract. As to Question 5, the Court found there was no basis under Louisiana law

to support an offset of a damages award in a breach of contract case.

On June 28, 2017, W&T filed two motions. In the motion for a new trial or remittitur, W&T contends: (1) the jury's findings on Questions 1, 2, and 3 are against the great weight of the evidence and the damages award is excessive; (2) the Court's failure to submit a jury question regarding Apache's breach resulted in prejudice; and (3) the erroneous rulings as to W&T's expert, Andrew Derman, substantially affected the jury's verdict. In the renewed motion for judgment and motion to alter or amend the judgment, W&T contends: (1) Apache's claim for the breach of the Joint Operating Agreement ("JOA") fails as a matter of law; (2) W&T is entitled to judgment as a matter of law because it established its affirmative defenses; and (3) any damage award should be reduced by the jury's offset findings.

II. STANDARD OF REVIEW

A. Rule 50(b) Standard

When a court overrules a motion made at the close of evidence pursuant to Rule 50(a), within twenty-eight days "a movant may file a renewed motion for judgment as a matter of law." FED. R. CIV. P. 50(b). "A motion for judgment as a matter of law in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). After a party has been fully heard by a jury, "judgment as a matter of law is proper [if] there is no legally sufficient evidentiary basis for a reasonable jury to have found for that

party with respect to that issue." *Id.* In considering a Rule 50 motion, courts review "all of the evidence in the record, draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence." *Coffel v. Stryker Corp.*, 284 F.3d 625, 630–31 (5th Cir. 2002). Judgment as a matter of law "should not be granted unless the facts and inferences point 'so strongly an overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'" *Flowers*, 247 F.3d at 235 (internal quotations omitted.)

B. Rule 59(a)(1)(A) Standard

"The court may, on motion, grant a new trial on all or some of the issues ... after a jury trial, for any reason for which a new trial has heretofore be granted in an action at law in federal court." FED. R. CIV. P. 59(a)(1)(A). A verdict may be set aside and new trial granted "if the verdict is against the clear weight of the evidence," even if there was substantial evidence which would have prevented granting judgment as a matter of law on a Rule 50 motion at trial. *See Reeves v. Gen. Foods Corp.*, 682 F.2 515, 519 n.6 (5th Cir. 1982).

III. LAW & ANALYSIS

A. W&T's Renewed Motion for Judgment as a Matter of Law and Motion to Alter or Amend the Judgment

1. The Sufficiency of the Evidence on Apache's Claim for Breach of the JOA as a Matter of Law

W&T first contends as matter of contract interpretation that it did not breach the JO A as a

matter of law and that there is no evidence that Apache suffered damages as the result of any alleged breach. Apache contends the evidence supports finding that W&T breached the JOA, and as a result, Apache suffered damages in the amount awarded by the jury in response to Question 2.

The Court previously held that the JOA was ambiguous as to the relationship between §§ 6.2 and 18.4.[3] That ruling on the construction of the JOA will not be revisited. Therefore, the Court turns to whether there is sufficient evidence to support the jury's finding on Question 3, which was that § 6.2 did not require Apache to receive an Approval For Expenditure ("AFE") when plugging and abandoning the well was required by § 18.4. At trial, W&T's witnesses gave testimony that a reasonable jury could have found indicated that the parties' intent was that § 6.2 did not require a signed AFE under the circumstances of this case.[4] This evidence is sufficient to support the jury's finding.[5] Nor was Apache required to show § 18.4 was triggered by the government requiring a particular type of vessel be used to plug and abandon the wells; instead, Apache only needed to show the plugging and abandoning of the wells was required in order to trigger § 18.4. The

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[3] *Order*, Document No. 76.

[4] *See*, *e.g.*, *Trial Transcript*, Document No. 107 at 58–59 (testimony of David Bump); *Trial Transcript*, Document No. 109 at 27–29 (testimony of Thomas Murphy).

[5] The jury's finding that an AFE was not required under § 6.2 when the well must be plugged and abandoned pursuant to § 18.4 also disposes of W&T's argument that Louisiana Civil Code article 1996 precludes W&T's liability here.

provisions that would be implicated by the type of vessel used are §§ 5.1 and 5.2, and there is sufficient evidence to show the vessels utilized here were reasonably necessary expenditures.[6] The damages awarded for the jury's finding that W&T breached its payment obligations under the JOA is also sufficiently supported by the evidence, as the amount of damages is exactly 49% of the plugging and abandoning costs after factoring in W&T's partial payment. Accordingly, the Court denies W&T's Rule 50(b) motion as to whether W&T breached the JOA as a matter of law.

2. Whether W&T Established Its Affirmative Defenses as a Matter of Law

a. Prior Material Breach, Justification, and Excuse

W&T contends it established the affirmative defenses of prior material breach, justification, and excuse as a matter of law. Apache contends that W&T did not establish these defenses because the jury found that Apache complied with its contractual obligations.

Under Louisiana law, a party is excused from complying with its contractual obligations if another party to the contract commits a "substantial breach." *LAD Servs. Of La., L.L.C. v. Superior Derrick Serv., L.L.C.*, 167 So.3d 746, 755-56 (La. Ct. App. 2014).

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[6] *See Apache's Response to W&T's Renewed Motion for Judgment as a Matter of Law and Motion to Alter or Amend the Judgment*, Document No. 149 at 6–7 (summarizing the evidence supporting the jury's finding). The Court has reviewed the cited evidence and concurs that it supports the jury's finding.

Here, as to Question 1, the jury was instructed it was only to find W&T had an obligation to pay the costs if it found Apache complied with the terms of the contract and that the contract must be performed in good faith. The jury also found, as to Question 3, that Apache was not required to obtain an AFE pursuant to § 6.2 in order to proceed with a plugging and abandonment operation required by § 18.4. Accordingly, the Court denies the motion for judgment as a matter of law, as the jury found there was no substantial breach that would have triggered the affirmative defenses of prior material breach, justification, and excuse.

b. Failure to Mitigate

W&T contends it established the affirmative defense of failure to mitigate. Apache contends W&T withdrew the affirmative defense in the Joint Pretrial Order and presented no evidence on the defense at trial. In the Joint Pretrial Order, W&T agreed that mitigation of damages did not apply and withdrew the affirmative defense.[7] Accordingly, the Court denies the motion for judgment as a matter of law because the failure to mitigate defense was abandoned prior to trial.

c. Bad Faith

W&T contends the jury's finding on Question 4 that Apache acted in bad faith should be given effect. Apache contends W&T is mostly reiterating arguments the Court rejected in issuance of the final judgment and that a finding of bad faith is not

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[7] *Joint Pretrial Order*, Document No. 53 at 14, ¶ 8(d).

necessarily inclusive of a finding of "designed breach."

The Court will not revisit its legal findings from its Final Judgment as to Question 4.[8] Therefore, the Court only addresses W&T's contention that a finding of bad faith necessarily includes a finding of "designed breach" under Louisiana law. In support of this contention, W&T cites *N-Y Associates, Inc. v. Board of Commissioners of Orleans Parish Levee District*, 926 So. 2d at 20 (La. App. 2006). *N-Y Associates* held that "[b]ad faith is not the mere breach of faith in not complying with a contract but a designed breach of it from some motive of interest or ill will." *Id.* at 24. However, that holding was in the context of determining the scope of Louisiana Civil Code article 1983's requirement that contracts be performed in good faith in the context of terminating an at-will employee. *See id.* (noting the parties agreed there was a right to terminate the contract at will and "the question presented in this case is whether or not that right was exercised in good faith as required by the Civil Code"). *N-Y Associates* is an intermediate appellate court decision that does not interpret Article 2003. *Lamar Contractors, Inc. v. Kacco, Inc.*, 189 So. 3d 394 (La. 2016), is an on-point Louisiana Supreme Court decision interpreting Article 2003's meaning. As a federal court sitting in diversity, assuming without deciding that there was any inconsistency in the decisions and even under Louisiana's civil law tradition, *Lamar* would still control. Accordingly, the Court denies W&T's renewed motion for judgment as a matter of law that

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[8] *Final Judgment*, Document No. at 3–10.

Apache is barred from any recovery given the jury's finding on Question 4 that there was bad faith.

3. Whether Apache's Damages Should Be Reduced by the Offset Finding

W&T contends Louisiana law recognizes the doctrine of offset in contract cases and the Court should give effect to the jury's answer to Question 5 and reduce Apache's award of damages by that amount. Apache contends that W&T's cited grounds of mitigation, compensation, unjust enrichment, and "actual damages" are either waived or not available under Louisiana law. The Court previously ruled that Questions 2 and 5 were not linked in the jury instructions, which precludes W&T's contention the questions should be read together to determine the actual damage to Apache. The Court will not revisit that ruling, as W&T has not met its burden on a Rule 50(b) motion. As to the availability of mitigation under Article 2002, the Court addressed that ground above and here in the offset context finds that W&T waived that as a potential ground supporting the offset finding when it withdrew the affirmative defense in the Joint Pretrial Order. Nor does compensation or unjust enrichment support the jury's finding, as W&T has previously admitted neither of those doctrines could be the basis of the jury's finding, as that was not the nature of the evidence presented to the jury.[9] Accordingly, the

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[9] *See W&T Offshore, Inc.'s Response to Apache's Motion for Entry of Final Judgment*, Document No. 130 at 24, 26 (stating neither offset under Article 1893 or unjust enrichment under Article 2298 were the "legal basis for securing the jury's finding," and that the jury was not instructed on the traditional

Court denies W&T's renewed motion for judgment as a matter of law that the Court apply the jury's offset finding in Question 5 because all cited grounds to do so are either waived or unavailable under Louisiana law in the context of this case.

B. W&T's Motion for New Trial or Remittitur

1. The Jury's Findings on Questions 1-3

W&T contends the jury's responses to Questions 1-3 were against the clear weight of the evidence. Apache contends that W&T fails to identify the trial evidence that supports its contentions and that the evidence fully supports the jury's findings. Above the Court denied W&T's Rule 50(b) motions as to the jury's findings on Questions 1-3. The Court reviewed the trial evidence cited by both W&T and Apache and determined there was substantial evidence supporting the jury's finding on all three questions. Here, while W&T generally discusses the evidence presented on those questions, it does not cite or otherwise direct the Court to the evidence that supports its burden to show the verdict was against the clear weight of the evidence. Moreover, even if W&T had done so, recalling the evidence presented at trial and after reviewing the parties' submissions, the Court finds that the jury's verdict on Questions 1-3 were not against the clear weight of the evidence. Specifically, the Court finds the damages awarded on Question 2 were not excessive because it is the exact portion of the remaining plugging and abandoning costs for which W&T was contractually responsible

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doctrine of setoff because that was "not the nature of the evidence").

for after its prior partial payment. Accordingly, the Court denies W&T's motion for a new trial or remittitur because Questions 1-3 were not answered contrary to the clear weight of the evidence nor were the damages excessive.

2. The Propriety of the Court's Jury Instruction

W&T contends the Court failed to submit a question on prior breach by Apache that prevented the jury from considering all relevant factors. Apache contends the jury fairly considered and rejected any prior breach contentions. The jury was instructed on prior breach on Question 1, because in order to find for Apache, the jury was instructed it must first find Apache acted in good faith and complied with §§ 5.1 and 5.2 of the contract. Further, the Court submitted Question 3, which might also support a prior breach finding, and the jury found that Apache complied with the contractual terms. Additionally, at the jury charge conference, W&T argued to the Court that Question 4 on bad faith had "nothing to do with any kind of prior breach of the contract."[10] Accordingly, the Court denies W&T's motion for a new trial because the issue of prior breach was either submitted to the jury or waived by W&T's arguments.

3. Andrew Derman's Expert Witness Testimony

W&T contends the Court's exclusion of its expert witness, Andrew Derman, supports granting a new trial because his testimony was necessary to explain to the jury how the various contractual provisions

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[10] *Trial Transcript*, Document No. 109 at 147: 10–11.

worked together. Apache contends W&T withdrew the relevant portions of Derman's testimony, which waived and also failed to preserve any error on the issue. The Court agrees that, by withdrawing those portions of Derman's testimony before the Court had an opportunity to rule on the admissibility of the opinions on how the various contract provisions worked together, W&T waived and failed to preserve any error.[11] Accordingly, the Court denies W&T's motion for a new trial because W&T either withdrew the portions of the testimony at issue or those portions would have invaded the province of the Court to interpret the contract.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that W&T Offshore, Inc.'s Motion for New Trial or Remittitur (Document No. 146) is **DENIED**. The Court further

ORDERS that W&T Offshore, Inc.'s Renewed Motion for Judgment as a Matter of Law and Motion to Alter or Amend the Judgment (Document No. 147) is **DENIED**.

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[11] The Court also notes that the portions of Derman's testimony that W&T cites as grounds supporting a new trial involve opinions about the legal interpretation of the contract, which is the province of the Court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20599

APACHE DEEPWATER, L.L.C.,
Plaintiff-Appellee,
v.
W&T OFFSHORE, INCORPORATED,
Defendant-Appellant.

Filed: August 13, 2019

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion July 16, 2019, 5 Cir., _____, _____
F.3d _____)

Before HIGGINBOTHAM, GRAVES, and WILLETT,
Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham

UNITED STATES CIRCUIT JUDGE