SUPREME COURT OF LOUISIANA

CIVIL PROCEEDING

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**NO. _____**

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GLORIA'S RANCH, L.L.C.,
*--- Plaintiff/Respondent*

VERSUS

TAUREN EXPLORATION, INC. CUBIC ENERGY, INC.,
WELLS FARGO ENERGY CAPITAL, INC., AND EXCO USA ASSET, INC.,
*--- Defendants/Applicants*

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**APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW ON BEHALF OF TAUREN EXPLORATION, INC.**

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FROM A JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEAL, NO. 51,077-CA (JJ. STONE, COX, and MOORE) AFFIRMING A JUDGMENT FROM THE FIRST JUDICIAL DISTRICT COURT, CADDO PARISH, CIVIL DOCKET NO. 541-768-A, HON. RAMON LAFITTE, PRESIDING

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Respectfully submitted,

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# SUPREME COURT OF LOUISIANA
# WRIT APPLICATION FILING SHEET

NO. _____

## TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

**TITLE**

Gloria's Ranch, LLC

VS.

Tauren Exploration, Inc., et al.

Applicant: Tauren Exploration, Inc.
Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No
Priority Treatment? No
**If so you MUST complete & attach a Priority Form**

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Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

**Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.**

## TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

## ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

## DISTRICT COURT INFORMATION

Parish and Judicial District Court: Caddo Parish, First JDC Docket Number: 541,768-A

Judge and Section: Sec A, Hon Ramon LaFitte Date of Ruling/Judgment: 11/24/2015

## APPELLATE COURT INFORMATION

Circuit: Second Cir. Docket No. 51,077-CA Action: Affirmed, Addt'l atty fees awarded

Applicant in Appellate Court: Tauren, Cubic, Wells Fargo Filing Date: 9/16/16

Ruling Date: 06/02/17 Panel of Judges: Moore, Cox, and Stone En Banc: ☐

## REHEARING INFORMATION

Applicant: Tauren and Wells Fargo Date Filed: 6/15/17 Action on Rehearing: Denied, 2 dissents

Ruling Date: 08/07/17 Panel of Judges: Brown, Bleich, Moore, Cox, Stone En Banc: ☐

## PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date: _____, ☐ Trial in Progress, ☑ Post Trial

Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

## VERIFICATION

**I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.**

9/6/2017
DATE

SIGNATURE

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## WRIT GRANT CONSIDERATIONS

This case involves an erroneous interpretation by the Second Circuit Court of Appeal of the provisions of the Louisiana Mineral Code regarding assignments of mineral leases, which led the court to render a decision that conflicts with an unbroken line of decisions by this Court going back almost ninety years. The error by the Second Circuit caused it to affirm a judgment holding defendant-applicant Tauren Exploration, Inc. ("Tauren") solidarily liable with other defendants[1] for over $22 million, for an obligation that Tauren did not owe and could not have performed.

Tauren entered into a mineral lease (the "Lease") with plaintiff-respondent Gloria's Ranch, L.L.C. ("Gloria's Ranch" or "Plaintiff"). The Lease allowed Tauren to assign its interests in the Lease in whole or in part, and provided that such an assignment "shall, to the extent of such assignment, relieve and discharge [Tauren] of any obligations hereunder to [Gloria's Ranch]. . .."[2] This Court has long recognized that such a provision makes a mineral lease divisible, such that a partial assignment of such a lease effectively results in two independent leases. *Tyson v. Surf Oil Co.* ("It has always been held in this State that a lease contract which contains such language was thereby rendered *divisible* and that, upon assignment, *independent leases resulted.*");[3] *Swope v. Holmes* (provision similar to paragraph 10 of Lease "makes the contract of lease a divisible one . . . .").[4]

Pursuant to paragraph 10 of the Lease, Tauren assigned its interest in all depths below the Cotton Valley formation, referred to as the "deep rights," to EXCO USA Asset, Inc. ("EXCO"). Tauren conveyed the entirety of its interest in those depths to EXCO. It did not reserve an overriding royalty interest, or a right of reversion, or any other interest in the deep rights. As a result, Tauren's assignment of the deep rights divided the Lease into two leases, pursuant to *Roberson v. Pioneer Gas Co.* ("[T]he effect of the assignment of the lease on the 40 acres of land . . . was to divide the original lease into two leases . . . under the terms and conditions stipulated in the original lease. What [the assignees] did, or failed to do, to keep their lease in force on the 40 acres of land, could not affect the lease which [the assignor] retained on the remaining 85 acres of

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[1] Cubic Louisiana, LLC ("Cubic"), successor to Cubic Energy, Inc., and Wells Fargo Energy Capital, Inc. ("Wells Fargo").
[2] September 17, 2004, mineral lease by Gloria's Ranch, L.L.C. to Tauren Exploration, Inc., para. 10 (Plaintiff's Exhibit 3).
[3] 195 La. 248, 272, 196 So. 336, 344 (1940) (emphasis by the Court).
[4] 169 La. 17, 21, 124 So. 131, 132 (1929).

land.").[5] And pursuant to paragraph 10 of the Lease Tauren was "relieve[d] and discharge[d] of any obligations hereunder"[6] with regard to the deep rights.

The Second Circuit missed this point entirely. It incorrectly read Mineral Code article 168 as providing that "the ownership of a mineral right, such as a mineral lease, is indivisible."[7] But article 168 does not say this. It says that "[m]ineral rights *are susceptible of* ownership in indivision,"[8] meaning that mineral leases may be indivisible or, if they include a provision like paragraph 10 of the Lease, are divisible, as this Court recognized in *Tyson*,[9] *Swope*,[10] and *Roberson*.[11]

The Second Circuit's false premise that the Lease had not been divided led it to a wrong conclusion—that Tauren was solidarily liable with the owners of the deep rights to provide a release of the deep rights upon their expiration, even though Tauren had divested itself of the deep rights and so had no power to release them. Accepting Gloria's Ranch's evidence that EXCO'S and Cubic's[12] failure to release the deep rights had deprived Gloria's Ranch of the opportunity to lease those rights for over $22 million, the Second Circuit held Tauren solidarily liable with EXCO and Cubic for that amount. It thus cast Tauren in judgment for EXCO's and Cubic's breach of an obligation to release the deep rights, when Tauren did not own those rights, could not have released them, and had been discharged pursuant to the Lease of any obligations relating to them.

The Second Circuit's decision is based upon its misreading of Mineral Code article 168, which implicates the writ grant consideration in Supreme Court Rule 10, Section 1(a)(4). Additionally, the decision conflicts with this Court's decisions recognizing the divisibility of mineral lease interests, implicating Rule 10, Section 1(a)(1). It is patently unfair for Tauren to be held liable for its assignees' breach of their obligations relating to the assigned interests. Owners of mineral leases have relied upon this Court's decisions upholding the principle of divisibility. When they divest themselves of interests in a mineral lease that contains a provision like paragraph 10 of the Lease, they believe they have been released from any obligations as to the divested

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[5] 173 La. 313, 320, 137 So. 46, 48 (1931).
[6] Lease (Plaintiff's Exhibit 3), para. 10.
[7] *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*, No. 51,007 (La. App. 2d Cir. 6/2/17), 2017 WL 2391927, *25.
[8] La. R.S. 31:168 (emphasis added); see Comment thereto ("Co-ownership of working interests in mineral leases is common. *This principle would not be applicable, however, if a partial assignment is made in the presence of a lease clause which is interpreted as importing a division of the lease when a partial assignment is made.*") (emphasis added).
[9] Note 3 above.
[10] Note 4 above.
[11] Note 5 above.
[12] Cubic owned 49% of the deep rights; EXCO owned 51%.

interests, consistent with this Court's holdings for many decades. If not reversed, the Second Circuit's decision will upset these justified expectations, introducing uncertainty into an area of mineral law that has been settled for many decades.

Another error committed by the Second Circuit was its misreading of Mineral Code article 140.[13] If a mineral lessee fails to pay its lessor the royalties due on production, pursuant to article 140 the trial court in its discretion "may award as damages double the amount of royalties due,"[14] in addition to interest and attorney's fees. Despite this limiting language, the trial court, upon finding that the Defendants had failed to pay royalties due on certain production, awarded *triple* the amount of royalties due. The Second Circuit affirmed, holding that "the correct method for awarding damages under article 140 is to award the amount of royalties due in addition to a separate damage award of twice the amount of royalties."[15]

The text of Mineral Code article 140 does not support the Second Circuit's award of treble damages against Tauren, especially in light of this Court's direction that penal statutes are to be strictly construed in favor of the defendant.[16] If the Legislature had intended to allow treble damages in the circumstances contemplated by article 140, it would have said so expressly, as it has unambiguously in several statutes.[17] The Second Circuit's misreading of Mineral Code article 140, like its misreading of article 168, implicates Supreme Court rule 10, Section 1(a)(4). Tauren accordingly asks that this Court grant its petition for a writ of certiorari to review the Opinion from the Second Circuit Court of Appeal.

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[13] La. R.S. 31:140.
[14] *Id.*
[15] *Gloria's Ranch, L.L.C.*, note 7 above, 2017 WL 2391927, *17, citing *Wegman v. Cent. Transmission, Inc.*, 499 So.2d 436, 451 (La. App. 2d Cir. 1986), *writ refused*, 503 So.2d 478 (La. 1987).
[16] *Louisiana Bag Co. v. Audubon Indemn. Co.*, 2008-0453 (La. 12/2/08), 999 So.2d 1104, 1120.
[17] *Cimarex Energy Co. v. Mauboules*, 2009-1170 (La. 4/9/10), 40 So.3d 931, 952 (Knoll, J., dissenting) (citing several Louisiana treble damages statutes).

## A. Statement of the Case

Plaintiff Gloria's Ranch filed suit seeking (i) a declaration that the Lease had expired in whole or in part, and (ii) damages, attorney's fees, costs, and interest. Plaintiff's suit named Tauren, Cubic, Wells Fargo, and EXCO as defendants. Plaintiff filed an amended petition adding a claim for penalties allegedly arising from nonpayment of royalties relating to an 80-acre tract operated by a non-party.

Plaintiff granted EXCO a new lease and dismissed it prior to trial. Following a four-day bench trial, the Trial Court rendered judgment in favor of Plaintiff and against Tauren, Cubic and Wells Fargo, *in solido*. The Trial Court awarded damages in excess of $22 million. In addition to that award, the Trial Court awarded $242,029.26 in unpaid royalties and an additional $484,058.52 as a penalty, together with interest on both amounts.

All three defendants filed motions for new trial. The Trial Court granted the motions in part and reduced the *in solido* damages by 25% to account for the dismissal of EXCO. The motions were otherwise denied. All three defendants appealed.

Tauren appealed the finding of solidary liability and the award of treble damages for unpaid royalties, among other issues. The Second Circuit affirmed the Trial Court's judgment on both issues. Tauren requested rehearing but was denied. Tauren now asks this Court to exercise its supervisory jurisdiction to review the imposition of solidary liability against Tauren and the award of treble damages relating to unpaid royalties.

## B. Statement of Relevant Facts

In 2004, Tauren leased Plaintiff's property by means of the Lease to explore for and produce oil and gas. In 2006, Tauren assigned 49% of the Lease (together with other leases) to Cubic. In 2007, Tauren drilled and completed Cotton Valley wells in Sections 9, 10, and 16 of the Lease. Tauren and Cubic spent more than $7 million attempting to develop the Cotton Valley formation on the Lease. In September 2007, while drilling the Section 16 Cotton Valley well, Tauren drilled, tested for, and confirmed the existence of the deeper Haynesville formation underlying the Plaintiff's Lease.

By the middle of 2008 Tauren had decided to assign its interests in its deep rights to a company with the financial resources to develop the Haynesville potential underlying Tauren's north Louisiana assets, including the Lease. Tauren searched for a company that was willing to

drill numerous multimillion-dollar wells to develop the Haynesville Shale rights. In September of 2009, Tauren entered into a letter of intent for EXCO to purchase all of Tauren's deep rights in the Lease. The deal closed on November 9, 2009.[18] Following the assignment to EXCO, Tauren did not own any deep rights (*i.e.*, Haynesville formation and below) in the Lease.

In December of 2009, Plaintiff requested accounting information asserting that it suspected the Lease was not producing in paying quantities. After receiving that request, Tauren conferred with representatives of EXCO and determined that through accounting errors, Tauren had been allocating revenues and expenses associated with the Lease in a manner that did not permit a reliable assessment of Lease's profitability as determined under Louisiana law (*e.g.*, Tauren had booked large, field-wide capital expenditures to the Lease). After recalculating the revenue and expenses to more accurately reflect the lifting costs associated with the Lease in accordance with Louisiana statute and case law, Tauren responded that its calculations indicated that the Lease was making a marginal profit.

On January 28, 2010, Plaintiff demanded a release of the Lease. In June of 2010, Plaintiff filed suit alleging that the Lease had terminated as to Sections 9, 10, 16, and 21 for failure to produce in paying quantities. In August of 2014, Plaintiff granted EXCO a new lease of its deep rights for a lease bonus of $6,700 per acre.

At trial, Plaintiff presented only evidence relating to the value of Haynesville leases. Plaintiff presented no evidence of alleged damages related to the shallow interests that were still owned by Tauren.

## C. Assignments of Error

1. The Second Circuit erred in finding Tauren solidarily liable for damages related to interests Tauren did not own.

2. The Second Circuit erred in awarding treble damages for unpaid royalties.

## D. Summary of Argument

The Second Circuit misstated the law regarding the divisibility of mineral ownership (as set forth in LSA-R.S. 31:168). Based on that misstatement and subsequent misapplication of the law, the Second Circuit failed to analyze the Lease and determine that the Lease had been divided

[18] Plaintiff's Exhibit 88, Assignment from Tauren to EXCO.

between the shallow rights and deep rights. The Second Circuit then incorrectly concluded that Tauren is solidarily liable for damages relating to interests it did not own.

The Second Circuit incorrectly interpreted LSA-R.S. 31:140 to permit an award of treble damages. The statutory language does not follow other instances where the Legislature has authorized treble damages. Rules requiring strict construction of penal statutes should lead to an interpretation permitting only double damage awards.

## E. Argument

### 1. TAUREN IS NOT A SOLIDARY OBLIGOR FOR DAMAGES RELATED TO THE HAYNESVILLE SHALE.

#### a. Solidarity arises from a clear expression of the parties' intent or the law.

Solidarity of obligation shall not be presumed. A solidary obligation arises from a clear expression of the parties' intent or from the law.[19] An obligation is solidary for the obligors when each obligor is liable for the whole performance.[20] This Court applied these principles in *Corbello v. Iowa Production*,[21] recognizing that separate obligors under separate leases with a landowner—in that case, a mineral lessee and a surface lessee of the same property—were not solidary obligors for site restoration on the tract burdened by both leases.[22]

#### b. The parties did not express a clear intent to be solidarily bound. On the contrary, the Lease plainly contemplates division.

The Lease at issue contains a "consent to assign" provision (paragraph 10) found in many mineral leases. It provides in pertinent part as follows:

> The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, executors, administrators, successors and assigns[.] . . . An assignment of this lease, in whole or part, shall, to the extent of such assignment, relieve and discharge Lessee of any obligations hereunder to Lessor and, if Lessor or assignee of part or parts hereof shall fail to comply with any other provisions of the lease, such default shall not affect this lease insofar as it covers a part of said lands upon which Lessee or any assignee shall comply with the provisions of the lease.

This paragraph permits a partial assignment and provides for discharge of obligations as to the portion assigned.

Tauren assigned 49% of its rights in the Lease to Cubic by assignment dated February 13, 2006, with an effective date of February 6, 2006.[23] Tauren then assigned its remaining lessee's

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[19] Louisiana Civil Code Art. 1796.
[20] Louisiana Civil Code Art. 1794.
[21] *Corbello v. Iowa Prod.*, 2002-0826 (La. 02/25/03); 850 So. 2d 686.
[22] 850 So. 2d, at 703.
[23] Plaintiff's Ex. 4.

interest (51%) in the Haynesville Shale and everything else below the base of the Cotton Valley ("deep rights") in the Lease to EXCO in November of 2009, with an effective date of September 10, 2009.[24] While Tauren retained leasehold interests in the Cotton Valley and above, it ceased to be a lessee of any Haynesville interests in the Lease as of September 11, 2009. When Plaintiff made its demand for release of the Lease, Tauren was without the ability to perform as it relates to deep rights. Thus, Tauren's obligation to perform differed from those parties still holding lessees' interests in the deep rights (*i.e.*, Cubic and EXCO).

The parties in this case did not express a clear intent to be solidarily liable. To the contrary, the Lease clearly expresses an expectation that their respective obligations would be several[25] or joint[26] and in either case divisible.[27] The parties in this case clearly contemplated the divisibility of the ownership of the mineral interests at issue. Paragraph 10 of the Lease expressly permits assignments of mineral rights resulting in the division of the Lease interests and obligations. Thus, pursuant to the clear language of the contract at issue, the conveyances between the parties resulted in ownership divided clearly between the shallow rights and the deep rights.

**c. There is no solidarity under the law because each obligor is not bound for the same thing and each cannot render the whole performance.**

Each party to the Lease was obligated to perform pursuant to its respective interest in the Lease. Civil Code article 1794 imposes solidarity among obligors only when each obligor is liable for the whole performance.[28] In this case each obligor was *not* obligated for the same thing and each obligor could not render the whole performance. EXCO could not have been obligated to release the shallow rights because EXCO did not own the shallow rights. Likewise, Tauren could not have been obligated to release the deep rights because Tauren did not own the deep rights. Solidary liability is not appropriate when each obligor cannot be compelled to render to the whole performance.[29] *Because of the division of ownership of the deep and shallow interests, performance of the whole by Tauren was an* ***impossibility***.

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[24] Plaintiff's Ex. 82.
[25] When each of different obligors owes a separate performance to one obligee, the obligation is several for the obligors. Louisiana Civil Code Art.1787.
[26] When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors. Louisiana Civil Code Art.1788.
[27] When a joint obligation is divisible, each joint obligor is bound to perform, and each joint obligee is entitled to receive, only his portion. Louisiana Civil Code Art. 1789.
[28] Louisiana Civil Code Art. 1794.
[29] See notes 26 and 27 above.

**d. The Mineral Code imposes liability on a lessee for failing to release its interest in a lease, but each lessee's liability must necessarily be limited to the damages arising from that lessee's failure to release the portion that it owns.**

Mineral Code article 207 (LSA-R.S. 31:207) imposes liability upon the former owner of an expired or otherwise extinguished mineral right for failure to release the right timely. The statute provides that the former owner is liable for the damages resulting from this recalcitrance. It does not follow, however, that the statute imposes liability on a former owner for damages resulting from another owner's actions related to a separate interest. Nor can the statute be viewed as creating an obligation by one owner regarding interests it doesn't own. One cannot be held liable for a performance one is powerless to render. The statute does not admit of such a broad reading that it permits solidary liability that would not otherwise exist by contract or law.

**e. The Second Circuit incorrectly held that mineral interests are indivisible and determined solidarity based on this error.**

In its appeal Tauren argued that it should only have been responsible for damages relating to the shallow rights. The Second Circuit disagreed, citing the Plaintiff's request for a release from all interest holders, and noting that one of the Plaintiff's experts had testified that recalcitrance by any party holding an interest would create a cloud on the title. These statements, even if they had been correct,[30] are not dispositive of the issue whether solidarity exists among the defendants holding differing interests. The Second Circuit's June 2, 2017 Opinion then provides, at page 25, the following:

> Furthermore, La. R.S. 31:168 provides that ownership of a mineral right, such as a mineral lease, is indivisible. Thus, the obligation of the owners of the lease to produce a recordable act evidencing the release of the lease was indivisible, and the trial court correctly found Tauren solidarily liable with the remaining defendants.

This rationale is problematic for two reasons. First, it offers a faulty premise, *i.e.*, that ownership of a mineral interest is, by law, indivisible. Second, it then offers a conclusion (the "thus" sentence) based on the faulty premise.

What R.S. 31:168 actually provides is that "Mineral rights are *susceptible of* ownership in indivision." (emphasis added). This is a wholly different premise from that stated by the Second Circuit. Ownership of a mineral right is not legally required to be indivisible. On the contrary, R.S. 31:168's positive statement that such rights are "susceptible" of ownership in indivision is recognition that divisible ownership is not simply possible, but is frequently the manner in which

[30] The Plaintiff's expert's contention is disproven by the fact that the Plaintiff twice leased the deep rights while Tauren's lease of the shallow rights persisted. (Plaintiff's Exhibit 77 and R. 3569, re: lease to Chesapeake for $8,250 per acre; and Defendant's Exhibit 10 re: lease to EXCO for $6,700 per acre.)

the interests are owned (just as in this case). Moreover, the Comment to R.S. 31:168 expressly provides that "Co-ownership does not exist between . . . owners of separate mineral rights," as in this case.

Because the Second Circuit incorrectly concluded that ownership of mineral interests is necessarily indivisible, it failed to properly analyze the imposition of solidary liability of the damages awarded in this case. The Second Circuit did not address the fact that paragraph 10 of the Lease permits assignment of the rights granted and further provides that "[a]n assignment of this lease, in whole or part, *shall, to the extent of such assignment, relieve and discharge Lessee of any obligations hereunder to Lessor* . . .."[31] This is the critical provision that makes solidary liability with the owners of the deep rights inappropriate. Because the Second Circuit misapprehended R.S. 31:168, it failed to conclude, as in *Roberson* discussed below, that the Lease had been divided and that no solidarity exists between Tauren and the owners of the deep rights for damages relating to the deep rights.

**f. The interests are divisible and were in fact divided, therefore there is no basis for solidarity.**

Divided ownership and the divided obligations resulting from the language in paragraph 10 of the Lease and the assignment are permitted under the law. The Comments to R.S. 31:168 provide: "*[Co-ownership principles] would not be applicable, however, if a partial assignment is made in the presence of a lease clause which is interpreted as importing a division of the lease when a partial assignment is made.*" (Emphasis added.) See *Roberson v. Pioneer Gas Co.*,[32] where this Court, having concluded that an assignment had occurred and taking cognizance of the clause regarding partial assignments, held that division resulted. Under the unambiguous language of the Lease, and established Louisiana law, the obligations of the respective parties were divided as follows: *shallow rights* 51% Tauren, 49% Cubic / *deep rights* 51% EXCO, 49% Cubic. This is the division agreed to, in writing, by the parties.

The lessees' interests and obligations were divided such that each was bound for a separate performance under the Lease. The lessees of the shallow rights were bound to perform relative to those shallow interests, and the lessees of the deep rights were bound to performance relative to their deep interests. There can be no solidarity between them for obligations not related to their

[31] Defendant's Exhibit 1, ¶ 10 (emphasis added).
[32] 173 La. 313, 318-19, 137 So. 46, 48 (1931).

respective interests. Tauren, therefore, cannot be liable for damages related to the deep rights it did not own.

**g. There is no evidence in the record of damages related to the shallow rights.**

At trial, Plaintiff did not put on any evidence as to the value of Tauren's interests in the Lease (*i.e.*, non-deep rights). The *only* mention of the shallower depths owned by Tauren occurred when Plaintiff's landman, upon being asked about the Cotton Valley formation (which is above the Haynesville Shale formation), stated that he didn't know if there was even any active pursuit of the Cotton Valley in the area of the Lease, and that he hadn't seen any wells spudded recently.[33] Accordingly, there is no evidentiary basis for an award of damages against Tauren because both the lost-leasing claims and the royalty claims relate solely to the deep rights. An award of damages is manifestly erroneous and clearly wrong if it is not supported by competent evidence of record.[34]

The Second Circuit clearly erred in finding Tauren solidarily liable with the other defendants as it relates to damages associated with the deep rights. Tauren recognizes that it will owe some portion of Plaintiff's attorney's fees fairly attributable to obtaining cancellation of the Lease as to the shallow depths owned by Tauren. This liability should be apportioned on an equitable basis to reflect the relative values of the shallow rights and the deep rights and Tauren's ownership of 51% of the shallow rights in the Lease.

**2. LSA-R.S. 31:140 DOES NOT AUTHORIZE TREBLE DAMAGES.**

Tauren was not a lessee of Plaintiff's Haynesville rights at the time Plaintiff made demand or at any time thereafter. For the reasons discussed above, Tauren believes that the Second Circuit's affirmance of an award of damages for unpaid royalties relating to Haynesville production is in error as it relates to Tauren. In the alternative, Tauren assigns error to the amount of that award.

The Trial Court awarded Plaintiff $726,087.78 on its unpaid royalties claim. That award includes $242,029.26 in royalties the Court found to be due and an additional $484,058.52 as a penalty.[35] The total award is tantamount to an award of treble damages. The Mineral Code makes no provision for such an award.

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[33] R. XVII: 3851.
[34] *Johnson v. Kennedy*, 235 La. 212, 222-23, 103 So.2d 93, 97 (1958).
[35] R. XVIII: 4098.

The interpretation of a statute is a question of law, and is reviewed by this Court under a de novo standard of review.[36] This Court owes no deference to the legal conclusions of the courts below, because this Court is the ultimate arbiter of the meaning of the laws of this state.[37] "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."[38] The words of a law must be given their generally prevailing meaning.[39]

R.S. 31:140 provides in pertinent part that "[i]f the lessee fails to pay royalties due . . ., the court may award as damages double the amount of royalties due . . .." This provision plainly authorizes a damages award of double the amount of royalties due, not triple. The argument advanced by Plaintiff, and others discussed below, is that the original amount of royalties due is somehow excluded from the Legislature's expression of the "amount of royalties due." This strained construction ignores the plain language of the article in violation of the rules of statutory construction.

The award of the underlying original royalties is an item of damages. The statute does not state that the Court may award double the amount due "as additional damages" or "as a penalty." There is no basis to conclude, therefore, that article 140 authorizes an award of both the damages represented by the original royalties due *and* an award of double that amount. In *Cimarex Energy Co. v. Mauboules,*[40] Justice Knoll's dissenting opinion addresses the issue (which was not reached by the majority because the case was reversed on other grounds) in compelling fashion:

> The far more natural reading of article 212.23(B) [sic: 212.23(C)][41] is to permit the plaintiff a total award of double the amount of unpaid royalties. As a simplified example, if the unpaid royalties total $100, the court has discretion to "double" the award by adding an additional $100 in statutory damages, for a total of $200.
> If the Legislature had intended article 212.23(C) to permit a treble damages award, it would have said so. Several Louisiana statutes unambiguously permit an award of treble damages. This is not one of them. Moreover, as [Mineral Code article 212.23(C)] is in the nature of a penal statute, it must be strictly construed in favor of the defendant. *Louisiana Bag Company. Inc. v. Audubon Indemnity Company*, 2008-0453 (La. 12/2/08), 999 So. 2d 1104, 1120.[42]

In the instant case, the Second Circuit affirmed the trial court's award in reliance on *Wegman v. Central Transmission, Inc.*[43] from the Second Circuit and *Cimarex Energy Co. v.*

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[36] *Lomont v. Bennett*, 2014-2483, p. 9 (La. 6/30/15), 172 So.3d 620, 6270.
[37] *Caldwell v. Janssen Pharmaceutical, Inc.*, 2012-2447, p. 9 (La. 1/28/14), 144 So.3d 898, 906.
[38] Louisiana Civil Code Art. 9.
[39] Louisiana Civil Code Art. 11.
[40] 2009-1170 (La. 4/9/10), 40 So. 3d 931, 952.
[41] Mineral Code Article 212.23(c) contains language materially identical to that of article 140.
[42] *Cimarex Energy Co. v. Mauboules*, 2009-1170 (La. 4/9/10), 40 So.3d 931, 952 (Knoll, J., dissenting) (citing several Louisiana treble damages statutes).
[43] 18086 (La. App. 2d Cir. 12/3/86), 499 So.2d 436.

*Mauboules*[44] from the Third Circuit. Those cases were wrongly decided. Their rationale reveals a fundamental misunderstanding of what the word "damages" means under Louisiana law in a breach of contract context. An award of "damages" puts the obligee in same position he would have occupied had the obligation been performed, by making good the loss the obligee sustained and restoring the profit of which he was deprived.[45] Damages are a judicial remedy, in money, that is a substitute for the obligation that was not performed. This Court has explained this more than once:

> '*Damages*' as used in discussing liability for violation of contract rights and obligations *is but another word for compensation, an equivalent in money for loss sustained* by the complaining party by reason of violation of such right or obligation.[46]
>
> The proper measure of *damages* in this case is therefore *the amount necessary to place Gibbs in the same position he would have been in* had Thomas completely fulfilled the suspensive condition and delivered the letter of credit.[47]

The Second Circuit, in its decision below and in *Wegman*,[48] and the Third Circuit, in *Cimarex*,[49] did not correctly understand the term "damages" as meaning a money substitute for the nonperformance of an obligation. *Cimarex*, which addressed Mineral Code article 212.23C, identically worded in relevant part[50] to article 140, shows this clearly: "*The royalties owed to Orange River are not damages* but merely a sum of money that would be owed to Orange River in any event, as Orange River is the rightful owner of those royalty interests."[51] This is absolutely wrong. The Third Circuit in *Cimarex* failed to recognize that the money award of unpaid overriding royalties was "damages" under articles 1994 and 1995 of the Louisiana Civil Code and this Court's decisions in *Fogle*[52] and *Gibbs*.[53] And the Second Circuit fell into error below by following that decision.

In Mineral Code article 140, the Legislature told Louisiana courts what remedy they may award if they find (in the context of this case) that a lessor has not been paid the royalties he is

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[44] 2008-452 (La. App. 3d Cir. 3/11/09), 6 So.3d 399, *rev'd on other grounds*, 2009-1170 (La. 2010), 40 So.3d 931.
[45] La. Civ. Code arts. 1994, 1995.
[46] *Fogle v. Feazel*, 201 La. 899, 910, 10 So.2d 695, 698 (1942) (emphasis added), quoting Words & Phrases, Permanent Edition, Volume 11, page 16.
[47] *Gibbs Constr. Co. v. Thomas*, 86-1208 (La. 1/12/87), 500 So.2d 764, 770 (emphasis added).
[48] Note 43 above.
[49] Note 44 above.
[50] La. R.S. 31: 212.23C, addressing the failure to pay overriding royalties ("the court may award as damages double the amount due").
[51] *Cimarex*, note 44 above, 6 So.3d at 407 (emphasis added).
[52] Note 46 above.
[53] Note 47 above.

owed. Using the well-defined term "damages," the Legislature directed courts that they may award, as a remedy for the lessee's breach of his obligation to pay royalties, twice the amount of royalties owed.[54] In awarding three times the amount of royalties owed, the Second Circuit did not follow the text of article 140 in its decision below and in *Wegman*, and the Third Circuit did not follow the similar text of article 212.23C in *Cimarex*.[55] By granting Tauren's instant writ application, this Court can correct those courts' misinterpretation of the statutes and their failure to follow this Court's precedent, pursuant to Supreme Court Rule 10, Section 1(a)(4) and (1).

## F. Conclusion

In the Lease Tauren and Gloria's Ranch agreed that if Tauren partially or wholly assigned its lessee's interest, the assignment to that extent would "relieve and discharge [Tauren] of any obligations hereunder to [Gloria's Ranch] . . . ."[56] Tauren relied on this contractual right, and assigned the entirety of its interests in the deep rights to EXCO. Pursuant to paragraph 10 of the Lease its assignment divided the Lease, such that Tauren no longer owed Gloria's Ranch any obligations related to the deep rights.

But the Second Circuit did not enforce Tauren's contractual rights. It incorrectly read Mineral Code article 168 as providing that mineral leases are indivisible, when in fact that article says only that mineral rights such as mineral leases "*are susceptible of* ownership in in division."[57] The Comment to article 168 expressly recognizes that a mineral lease with a provision like paragraph 10 of the Lease is divisible, and, more importantly, this Court has recognized and enforced the principle of divisibility of mineral leases in *Tyson,*[58] *Swope*[59] and *Roberson.*[60]

The Second Circuit's failure to enforce paragraph 10 of the Lease, based upon its misreading of Mineral Code article 168 and its failure to follow this Court's precedents dating back almost ninety years, caused it to hold Tauren solidarily liable for Gloria's Ranch's damages resulting from its alleged inability to lease the deep rights, when Tauren did not own those rights, had no power to release them, and had been discharged of any obligations relating to them. This Court should grant Tauren's writ application so it can correct the Second Circuit's error regarding the divisibility of mineral leases.

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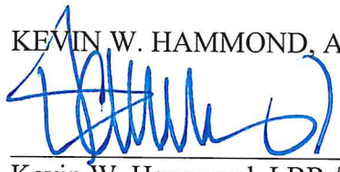
[54] Plus, interest and attorney's fees.
[55] Note 43 above.
[56] Lease, para. 10 (Plaintiff's Exhibit 3).
[57] La. R.S. 31:168 (emphasis added).
[58] Note 3 above.
[59] Note 4 above.
[60] Note 5 above.

The Second Circuit's opinion is in error in another respect as well. The opinion departs from the text of Mineral Code article 140[61] by affirming an award of treble damages for failure to pay a lessor's royalty, even though article 140 permits an award of only double damages. This error in the opinion is based upon misplaced reliance on earlier decisions by the Second and Third Circuits. This Court's writ grant considerations in Rule 10, Section 1 suggest that this Court should grant Tauren's writ application for this reason also.

Respectfully submitted,

KEVIN W. HAMMOND, APLC



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[61] La. R.S. 31:140.

## APPENDIX OF ITEM INCLUDED WITH THIS WRIT APPLICATION

1. Trial Court's Oral Reasons for Judgment from July 31, 2015 proceedings.

2. Trial Court's August 21, 2015 Judgment.

3. Trial Court's November 24, 2015 Judgment and Ruling on Motions for New Trial.

4. Second Circuit Court of Appeal Opinion dated June 2, 2017.

5. Second Circuit Court of Appeal Denial of Rehearing (with dissenting opinion) dated August 7, 2017.

## VERIFICATION AND CERTIFICATE OF SERVICE

PARISH OF CADDO

STATE OF LOUISIANA

Before me, the undersigned Notary Public in and for the Parish of Caddo, State of Louisiana, personally came and appeared:

**KEVIN W. HAMMOND,**

who, after being duly sworn, did depose and state that: (1) he is one of the attorneys for the applicant Tauren Exploration, Inc.; (2) he has read the foregoing Writ Application; (3) the allegations therein are true and correct to the best of his knowledge, information, and belief; and (4) he has forwarded a copy of the foregoing Writ Application by e-mail, and by depositing same in the United States mail with sufficient postage affixed thereon to the following:

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Shreveport, this 6th day of September 2017.

Kevin W. Hammond

Notary Public

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