SUPREME COURT

STATE OF LOUISIANA

NO. 17-C-1519

GLORIA'S RANCH, L.L.C.

Plaintiff-Applicant

VERSUS

TAUREN EXPLORATION, INC., CUBIC ENERGY, INC., AND WELLS FARGO ENERGY CAPITAL, INC. ET AL.

Defendant-Respondent

CIVIL PROCEEDING

On Writ Application from the Court of Appeal, Second Circuit, No. 51,077-CA

OPPOSITION BY APPELLEE, GLORIA'S RANCH, L.L.C., TO APPLICATION FOR WRIT OF CERTIORARI BY APPELLANT, WELLS FARGO ENERGY CAPITAL, INC.

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I. INTRODUCTION.

Wells Fargo Energy Capital's ("Wells Fargo") writ application does not merit the Court's attention. The Second Circuit correctly applied the manifest error rule to affirm the district court judgment based upon established title cloud law. There is neither a material injustice nor a public interest in the ruling. Wells Fargo is not a bank or traditional lender[1] but rather an energy investment firm that provided equity and debt capital to Cubic and Tauren under similar agreements.[2] The issue presented by Wells Fargo's writ application is whether the Second Circuit erred in affirming the district court's finding of fact that Wells Fargo's refusal to release its interest in Gloria's Ranch's 2004 mineral lease (the "Lease"), which had expired, clouded Gloria's Ranch's mineral title. Recognizing Wells Fargo's unique conduct, the Second Circuit limited its decision to the facts of this case which include:

1. Wells Fargo's recorded Mortgage Instrument contained a provision which prevented its mortgagor from releasing a collateralized mineral lease without its written consent. Mortgage Instrument, ¶ 4.03, p. 16 (WF Appx. H). Indeed, Cubic told Gloria's Ranch that it could not release the Lease because of the Mortgage Instrument. 8/20/08 Email Ross to Lepow (Appx. 1). It is undisputed that Wells Fargo never consented to Cubic's release of, nor released its own interest in, the Lease.
2. Wells Fargo controlled all Lease operations, even specifying the location and depth of wells drilled, and all production revenue.
3. Wells Fargo refused to release its interest or to authorize Cubic's release in response to Gloria's Ranch's demand despite the fact that the Lease had obviously been extinguished for lack of production in paying quantities; the wells lost money the entire time they produced (about 18 months). *See* La. Rev. Stat. Ann. § 31:124 (to maintain mineral lease, production must be sufficient to induce a reasonably prudent operator to continue producing to yield profit or minimize loss).
4. Wells Fargo admitted in its answer and affirmative defenses that it owned a "leasehold interest" in the lease.[3] Aff. Def. 17, p. 3 (Appx. 1) ("Tauren, Cubic, Wells Fargo has a right to retain its

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[1] Indeed, national banks are not permitted to invest in mineral interests and other real estate,and there are strict limitations on ownership of such interests. *See* 12 U.S.C. § 24, 29.

[2] Calvin Wallen owned Tauren, took Cubic public, was its president and, at one time, its largest shareholder. Wells Fargo obtained mortgages of Tauren and Cubic's interests in the Lease, but released the Tauren mortgage upon repayment of its loan in connection with a 2009 sale of its leasehold interest to EXCO. Wells Fargo retained other interests and its mortgage on Cubic's leasehold interest through the time of trial. Wells Fargo also acquired 15% of Cubic's stock.

[3] *E.g.,* Pinnacle Operating Co. v. ETTCO Enter., Inc., 40,367 (La. App. 2d Cir. 10/26/05); 914 So. 2d 1144, 1146 n. 1 ("leasehold interest" is a lessee's interest in a tract or subsurface geological strata thereunder and is synonymous with lessee's working interest).

leasehold interest"). Although it now denies privity with Gloria's Ranch, Wells Fargo repeatedly pled the Lease terms as affirmative defenses, joined with other Lease owners in defending the case as a team, and used the same attorney. Answer ¶ 5, Aff. Def. 2-5, pp. 1-2, 5 (Appx. 2); Aff. Def. to Am. Pet., p. 1 (Appx. 3). Despite knowing the Lease had expired, Wells Fargo claimed it was still in effect, refused to release its interest in it, and concealed unaltered lease operating statements showing its unprofitability and, therefore, expiration.

5. At trial, Wells Fargo did not even attempt to prove profitability; instead, it frivolously asserted that efforts to sell the Lease constituted production in paying quantities that maintained the Lease.[4] As the appellate court aptly noted, the Mineral Code's paying quantities requirement was specifically designed to prevent such speculation. Opinion, p. 13 (WF Appx. E). No defendant seeks writs from the judgment terminating the Lease.
6. Paul Jarratt, an expert landman, testified that Wells Fargo's Mortgage Instrument created a title cloud on Gloria's Ranch's mineral title. Defendants expert landman did not rebut this testimony.
7. Wells Fargo did not send a representative to trial. It presented no evidence to support its claim that the control it exercised over its partners, Tauren and Cubic, is customary in the industry or its claim that its Mortgage Instrument did not cloud title.
8. Wells Fargo did not seek a writ regarding lease cancellation, but still has not released its interest.

The district court found Wells Fargo liable for clouding Gloria's Ranch's title by refusing to release its recorded Mortgage Instrument containing the "consent to release" provision or to authorize Cubic's release of the Lease. The Second Circuit affirmed, holding Wells Fargo was coextensively liable because it controlled Cubic's ability to release the Lease and did not allow Cubic to do so. The Second Circuit found that Wells Fargo clouded Gloria's Ranch's mineral title as an owner through its control of the rights of Lease ownership including abusus, which is the essential ownership right for the purpose of clearing mineral title. *See* La. Civil Code art. 477 (abusus is the owner's right to dispose of the thing).

Even if it hadn't controlled Cubic's release, Wells Fargo would still be liable because the consent to release provision in Wells Fargo's recorded Mortgage Instrument clouded Gloria's Ranch's mineral title preventing a new mineral lease, as Gloria's Ranch's expert in oil and gas leasing testified. Such a provision in a recorded mortgage means that a mortgagor's release of a collateralized lease without the

[4] Wells Fargo did not propose changing La. Rev. Stat. Ann. § 31:124. *See* La. Code Civ. Pro. art. 863 (signing answer certifies that each defense warranted by existing law or nonfrivolous argument for reversal). As it currently stands, Article 124 does not permit maintenance of a lease by sale of a portion of a portion of the lease.

mortgagee's written consent would not extinguish the lease or the mortgage. *See* La. Civil Code art. 3319 (extinguishment of the thing mortgaged extinguishes the mortgage); *see also* Matter of Dibert, Bancroft & Ross Co. Ltd., 117 F.3d 160, 172-173 (5th Cir. 1997) (similar "consent to release" provision barred release of lease by mortgagor). So, if Cubic released the Lease without Wells Fargo's consent, Wells Fargo could nevertheless foreclose on the Lease and assert, as it did in the trial court, that the Lease remained in effect. Answer, Aff. Def. 2 (Appx. 2). A potential lessee would not pay Gloria's Ranch for a new lease when Wells Fargo could still claim that the Lease had not expired.

Solidary liability is a red herring. Wells Fargo and *amici* mistakenly claim that Wells Fargo had no duty to release and incorrectly claim that Wells Fargo is not solidarily liable because it could not have released Cubic's interest and, thus could not have rendered the entire performance. The solidary obligation is the payment of Gloria's Ranch's lost leasing damages. Wells Fargo, Tauren, Cubic, and EXCO each had an obligation to remove the title cloud created by the expired Lease and Mortgage Instrument; their combined failure to do so prevented Gloria's Ranch from obtaining a new lease. When two or more parties are liable for the same damages, the obligation is solidary even if each party's liability arises from a different source (*e.g.*, contract, tort, etc.). Wells Fargo's liability is coextensive with that of the other defendants because its failure to authorize Cubic's release of the Lease or to release its interest caused the same damage.

Wells Fargo and *amici* erroneously assert that the appellate court ruling will devastate the oil and gas lending industry. But no reasonable lender would have acted as Wells Fargo did in this case. It could have avoided all liability by either releasing its interest in the Lease or issuing written consent to Cubic when Gloria's Ranch issued its demand. Instead, Wells Fargo wants the right (a) to refuse to release its interest in the extinguished Lease or to consent to a release, (b) to assert a frivolous defense that the Lease was maintained, (c) to withdraw its admission of leasehold ownership after judgment was rendered, and (d) to be immune from the damage the foregoing causes to a landowner.

The Second Circuit carefully limited its ruling to the unique facts of this case. Yet Wells Fargo and *amici* nonetheless try to convert the opinion into a sweeping pronouncement of law in an effort to get this Court to grant writs. They falsely contend that the court held that the mortgaging of a mineral lessee's rights imposes solidary liability upon its mortgagee for the lessee's contractual and statutory obligations to its lessor. In truth, the simple mortgage had nothing to do with the appeal court's ruling. A mortgage is granted by merely stating in writing that "mortgagor hereby mortgages the property to mortgagee." The appellate court focused on additional provisions in the Mortgage Instrument and Credit Agreement granting further rights, which Wells Fargo and *amici* euphemistically refer to as "collateral protection," *i.e.*, provisions that did not create a mortgage but rather granted operational control of the Lease to Wells Fargo. And no record evidence supports their assertion that the control granted to Wells Fargo is customary in the industry. *E.g.,* Texoma Broadcasters, Inc. v. Hosp. Corp. of Am., 542 So.2d 780, 783 (La. App. 3 Cir. 1989) (industry custom and intent proven by evidence). Wells Fargo sent no witness or expert to testify at trial and offered no evidence regarding intent, the customary nature of its contract provisions, or its exercise of the ownership rights it possessed.

The Banker Associations' *amici* brief contradicts itself in its effort to support the writ application. Bank Br., p. 12. After repeatedly stating that collateral safeguards are critical to lending, *amici* make an about face and assert that the "consent to release" provision did not prevent Cubic from extinguishing Wells Fargo's mortgage by releasing the Lease without consent.[5] This assertion, made without any authority, reflects a fundamental misunderstanding of the public records doctrine, which provides that a recorded instrument puts the whole world on notice of its existence *and its contents*, making them enforceable against third parties. Carr v. Oaktree Apts., 45,514 (La. App. 2 Cir. 8/11/10); 46 So. 3d 793, 797. A ruling that a "consent to release" provision in a recorded mortgage does not prevent the mortgagor from unilaterally releasing the "critical" collateral (and thereby extinguishing the mortgage) would needlessly limit a mortgagee's ability to protect collateral and undermine the public records doctrine, causing more damage to energy lending than a ruling that enforces the recorded Mortgage Instrument against the world and requires the mortgagee to exercise its rights responsibly.

II. STATEMENT OF THE CASE.

In 2004, Gloria's Ranch granted the Lease to Tauren, which assigned a 49% interest to its affiliate, Cubic. In 2007, Wells Fargo, a sophisticated oil and gas investor, extended capital to both Tauren and Cubic under similar Credit Agreements in exchange for interests in mineral leases including Gloria's Ranch's Lease. Tauren and Cubic each executed a "Mortgage, Collateral Assignment, Security Agreement and Financing Statement" ("Mortgage Instrument") that mortgaged and conditionally assigned the Lease and revenue therefrom to Wells Fargo. Wells Fargo controlled the right to release the Lease under the terms of the Mortgage Instrument, which provided: "[Cubic] shall not release any of

[5] A consent to release provision is treated like the *pact de non alienando* provision. Matter of Dibert, Bancroft & Ross Co. Ltd., 117 F.3d 160, 172-173 (5th Cir. 1997).

the Mineral Properties without [Wells Fargo's] . . . prior written consent." Mortgage Instrument, ¶ 4.03, p. 16 (WF Appx. H).

Wells Fargo controlled operations. Wells Fargo explicitly directed Cubic to drill three wells on Gloria's Ranch's property, specifying that the wells had to be deep enough to test the Cotton Valley and Haynesville formations and retaining the right to approve the exact locations. Credit Agreement, ¶ 2.4, pp. 17-18 (WF Appx. I), p. 14, Ex. 6 to Credit Agreement (Appx. 4) (defining "Southern Properties" as Gloria's Ranch Lease). These wells were ultimately completed per Wells Fargo's instructions. Wells Fargo dictated specific workovers and completions on identified wells and in particular formations. *Id.* Wells Fargo had physical access to the Lease property "at all times" and received regular reports of operational, cost, and revenue information. Mortgage Instrument, ¶ 4.13, p. 18 (WF Appx. H); Credit Agreement, ¶¶ 5.1-5.8, p. 34 (WF Appx. I), p. 35 (Appx. 4) (Wells Fargo entitled to contracts, maps, title materials, authorities for expenditures, drilling reports, well tests, completion reports, quarterly reports regarding drilling activity, and financial records).

Gary Milavec, Wells Fargo's corporate representative and senior vice president, has a masters degree in geology and over 25 years of experience in oil and gas lending. WF Depo., p. 25 (Appx. 5). Wells Fargo employed oil and gas professionals and valued collateralized leases every six months based on revenues and expenses. *Id.* p. 25, 39, 47 (Appx. 5). Wells Fargo tracked lease expiration dates, received monthly lease operating statements, and understood the paying quantities requirement. *Id.*, p. 45-47, 52 (Appx. 5).

A. Sale to EXCO.

In November 2009, Tauren and Wells Fargo conveyed to EXCO a 51% interest in the deep rights under the Lease for $18,000 per acre as part of a larger deal; the Lease was the most valuable asset conveyed and represented 25% of the total purchase price.[6] Closing Statement (Appx. 6). Simultaneously, Wells Fargo released the Tauren mortgage[7] and received $34,500,000, but only $25,000,000 constituted repayment of the secured loan. *Id.* EXCO paid Wells Fargo an additional $9,000,000, 10% of the total purchase price for the sale of Tauren's interest. Wells Fargo claimed these funds were attributable to a net profits interest,[8] but produced no documentation of its ownership of a net

[6] The purchase price was about $82,977,779, consisting of $52,024,969 in cash and $30,952,810 in drilling credits to be applied to the sellers' share of the future costs of EXCO's operations on the property conveyed.
[7] Wells Fargo retained the Mortgage Instrument and other rights in the Lease obtained from Cubic.
[8] A net profits interest of 10% would not be worth $9,000,000 (10% of the sale price for the lessee's working interest) because it is not as valuable as the working interest. The net profits interest is based on the revenue minus all well costs and other expenses and does not carry with it control of operations or ownership of the wells or facilities.

profits interest in the deep rights sold to EXCO. Wells Fargo admitted that its arrangement with Cubic was similar to its arrangement with Tauren indicating it owned a portion of Cubic's interest in the Lease.

On December 3, 2009, Gloria's Ranch requested well revenue and cost information from defendants because it suspected that the wells had not produced in paying quantities. At that time, defendants' internal lease operating statements showed that the wells were "deep in the red," *i.e.*, operating costs[9] greatly exceeded revenue. Upon receiving Gloria's Ranch's request, defendants altered their accounting records to conceal the wells' unprofitability and sent Gloria's Ranch altered lease operating statements without disclosing they had been altered. Three years later, Gloria's Ranch discovered the unaltered lease operating statements among arbitration exhibits in the record of a Texas court handling EXCO and Tauren's dispute over the sale.

B. Gloria's Ranch's Demand and Suit for Lease Cancellation.

In January 2010, Gloria's Ranch demanded that Tauren, EXCO, Cubic and Wells Fargo release the Lease, but received no response to its demand. In June 2010, Gloria's Ranch sued them for Lease cancellation and damages. In its answer, Wells Fargo admitted that it acquired a leasehold interest in the Lease and affirmatively pled that: (1) the Lease was valid and enforceable and its provisions constituted a defense (Aff. Def. 2, 3), (2) Wells Fargo met its express and implied obligations under the Lease (Aff. Def. 5), (3) the Lease produced in paying quantities at all relevant times (Aff. Def. 6), and (4) Wells Fargo had a right to retain its "leasehold interest" around wells producing or being reworked or drilled if lease cancellation was granted (Aff. Def. 17). Answer & Aff. Def. (Appx. 2). In April 2013, Wells Fargo responded to Gloria's Ranch's amended petition, reasserting these affirmative defenses and asserting a new one based on the terms of the Lease. Aff. Def. to Am. Pet., p. 1 (Appx. 3). At no time did Wells Fargo release the Lease or its Mortgage Instrument because it wanted to "maintain its ranking in secured assets." Post-Trial Br., p. 10, R. 2941.

In 2014, EXCO (which asserted against Tauren that the Lease had expired while defending Gloria's Ranch's claim) settled with Gloria's Ranch and was dismissed.

The evidence at trial overwhelmingly established that the Lease had expired for lack of production in paying quantities. Opinion, pp. 12-13 (WF Appx. E). Wells Fargo did not send an officer or employee to attend, or testify at, the trial. Instead, Mike McKenzie, its expert engineer, confirmed that the Lease had expired if paying quantities was determined by production, but erroneously claimed that

[9] Operating costs do not include the cost of drilling, completion, or workovers.

the Lease had been maintained by defendants' search for an investor to buy Tauren's interest in the Lease and help Cubic drill wells on it.

C. Lower Court Rulings.

The trial court ruled in open court that the Lease had terminated and that defendants were liable *in solido* for lost leasing damages, unpaid royalties and double that amount in damages, and attorneys' fees.[10] Reasons, p. 4 (WF Appx. A). On August 21, 2015, the court signed a final judgment, which it later modified by reducing the award by 25% to account for EXCO's pretrial settlement with Gloria's Ranch. The Second Circuit affirmed the judgment against Wells Fargo, Tauren, and Cubic *in solido* and awarded Gloria's Ranch additional fees for the appeal. Opinion (WF Appx. E). The Second Circuit aptly observed that the "defendants' actions were clearly speculative, and a textbook example of what the legislature intended to prevent in enacting" Mineral Code article 124's paying quantities requirement. *Id.* p. 13. The Second Circuit found no manifest error in imposing liability on Wells Fargo because it controlled Cubic's ability to release the Lease. *Id.* p. 24, 32. The court did not, as Wells Fargo contends, hold that a secured creditor is liable for the obligations of its debtor, but specifically found Wells Fargo liable for its conduct and limited the case to its unique facts.

III. THE MANIFEST ERROR STANDARD APPLIED TO THE APPEAL.

Appeals are taken from the judgment, not the reasons. La. Code Civ. Pro. arts. 2082-83; Greater New Orleans Expressway Com'n v. Olivier, 02-2795 (La. 11/18/03); 860 So. 2d 22, 24. To preserve the integrity of judgments as public records of court decrees, judgments are unalterable and prevail over reasons. Hebert v. Hebert, 351 So. 2d 1199, 1200 (La. 1977). Reasons merely explicate the court's determinations; they do not alter, amend, or affect the final judgment. Wooley v. Lucksinger, 09-571 (La. 4/1/11); 61 So. 3d 507, 572. Judgments may be upheld on appeal for reasons different from those assigned by the district court. *Id.* An appellate court will affirm if a reasonable factual basis supports the judgment. Bonin v. Ferrellgas, Inc., 03-3024 (La. 7/2/04); 877 So. 2d 89, 94-95.

Where a judgment rests on findings of fact, appellate courts apply the manifest error standard. Grosjean v. Grosjean, 45,529 (La. App. 2 Cir. 10/13/10); 50 So. 3d 233, 242 (trial court's determination of LLC ownership subject to manifest error review). Trial court judgments determining mixed questions of law and fact are also subject to manifest error review. Armenia Coffee Corp. v. Am. Nat'l Fire Ins. Co., 06-0409 (La. App. 4 Cir. 11/21/06); 946 So. 2d 249, 253, 255 (whether seller owned insurable

[10] The trial court did not issue findings of fact or conclusions of law, but commented on the evidence in open court at the time of its ruling.

interest in coffee mixed question of law and fact); Jackson v. Rubicon, Inc., 02-1156 (La. App. 3 Cir. 4/2/03); 844 So. 2d 394, 397 (solidary liability mixed issue reviewed under manifest error).

The manifest error standard precludes setting aside a trial court's judgment unless the findings are clearly wrong in light of the record viewed in its entirety. Harrison v. Myers, 25,902 (La. App. 2 Cir. 6/22/94); 639 So. 2d 402, 407. The appellate court should avoid re-weighing the evidence and must not reverse reasonable findings even though it feels its own interpretation of the evidence is more reasonable. Hayes Fund v. Kerr-McGee Rocky Mountain, LLC, 14-2592 (La. 12/8/15); 193 So. 3d 1110, 1116. It is not hard to prove a reasonable basis for a finding, making the manifest error doctrine very difficult to breach; this is precisely the function of the manifest error review. *Id.* Where there are two permissible views of the evidence, the factfinder's choice between them can never be manifestly erroneous. *Id.*

The evidence supporting the decisions of the trial court and Second Circuit finding Wells Fargo liable for clouding Gloria's Ranch's title includes Wells Fargo's (1) recorded mortgage giving it control over Cubic's right to release; (2) possession of the bundle of rights constituting ownership; (3) admission that it owned a working interest in the Lease, and (4) Mortgage Instrument containing an assignment of the Lease.

IV. THE SECOND CIRCUIT CORRECTLY FOUND WELLS FARGO LIABLE FOR CLOUDING GLORIA'S RANCH'S TITLE BECAUSE IT CONTROLLED CUBIC'S RELEASE OF THE LEASE AND WITHHELD ITS CONSENT.

An oil, gas and mineral lease is a real right and an incorporeal immovable. La. Rev. Stat. Ann. §§ 31:16, 18. The public records doctrine provides that third persons are deemed to have constructive knowledge of the existence and contents of recorded instruments affecting immovable property. Carr v. Oaktree Apts., 45,514 (La. App. 2 Cir. 8/11/10); 46 So. 3d 793, 797. When language in a recorded instrument fairly puts a third person on inquiry as to title and he does not avail himself of the means at hand to obtain knowledge of the true facts, he is considered to have bought at his own peril. Thomas v. Lewis, 475 So. 2d 52, 54 (La. App. 2 Cir. 1985). The public records doctrine affords the holder of a mortgage protection against third parties claiming rights to the property by virtue of acts prohibited by the mortgage. Matter of Dibert, Bancroft & Ross Co. Ltd., 117 F.3d 160, 172-173 (5th Cir. 1997).

A. Wells Fargo Possessed, Controlled, and Exercised the Bundle of Rights That Constitute Ownership.

The Second Circuit determined that that Wells Fargo controlled Cubic's ownership rights in the Lease, specifically the right to release, to such an extent that it was coextensively liable with Cubic for the title cloud created by the expired Lease. "Perfect ownership" unites three elements in one person to the exclusion of others: "Usus" or right to use, "fructus" or right to the fruits, and "abusus" or right to dispose. Giroir v. Dumesnil, 184 So. 2d 1, 6 (La. 1966). The essential quality of ownership, which distinguishes ownership from other real rights, is "the power of disposing of the thing, by consuming it, by physically destroying it and by transforming its substance." Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 10-2267 (La. 10/25/2011); 79 So. 3d 246, 259.

"Perfect ownership becomes imperfect when the property is mortgaged, by the alienation of that real right." Duclaud v. Rousseau, 2 La. Ann. 168, 173 (La. 1847). The mere creation of a mortgage, *i.e.*, the alienation of a real right in property as security for a debt, does not make the mortgagee an owner even though it transfers a portion of the ownership rights. *Id.* But additional terms in a mortgage instrument, such as Wells Fargo's consent provision and assignment of proceeds, convey ownership rights in addition to the mortgage. At some point, the mortgagor may transfer so many of the rights included in perfect ownership that the mortgagee may also be considered an owner.

In this unique case, through the Mortgage Instrument, Credit Agreement, production payment, and overriding royalty interest, Wells Fargo controlled the use of, the fruits of, and the right to abandon the Lease. Wells Fargo controlled the right to use the Lease because it: (1) required Cubic to drill three wells on Gloria's Ranch's property; (2) directed Cubic to perform specific workovers and completions; (3) controlled Cubic's right to enter operating agreements; (4) controlled Cubic's participation under existing operating agreements and prohibited a change of operator without its consent; (5) dictated lease operations it deemed necessary; (6) had physical access to the Lease property at all times; (7) received regular reports of all operational, cost, and revenue information and had unfettered access to any and all financial information; and (8) audited all of Cubic's operations, revenue and expenses. Credit Agreement, ¶¶ 2.4, 5.1-5.4, pp. 17-18, 34 (WF Appx. I), ¶¶ 5.5-5.8, p. 35 (Appx. 4); Mortgage Instrument, ¶¶ 4.09, 4.12-4.13, pp. 17-18 (WF Appx. H). Cubic transferred the fruits of the Lease to Wells Fargo through the collateral assignment of all production revenue and the overriding royalty interest. Most importantly, Wells Fargo gained control of the specific ownership right addressed by Article 206, *i.e.*, the right to abandon, by releasing, the Lease. Once it gave Wells Fargo the right to prevent a release by withholding consent, Cubic no longer held "the power of disposing of the thing, by consuming it, by physically destroying it and by transforming its substance." *See* Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 10-2267 (La. 10/25/2011); 79 So. 3d 246, 259.

After withholding discoverable documentation regarding its involvement with the Lease, and belatedly attempting to revoke its judicial admission of ownership, Wells Fargo now disclaims the rights it obtained from Cubic by asserting a lack of evidence that it actually exercised its rights. But the record evidence shows that Wells Fargo did in fact exercise these rights. Wells Fargo directed Cubic to drill three wells on Gloria's Ranch's property, specifying that the wells were to test the Cotton Valley and Haynesville formations. Credit Agreement, ¶ 2.4, pp. 17-18 (WF Appx. I), p. 14, Ex. 6 (Appx. 4) (defining "Southern Properties" as Gloria's Ranch Lease). Cubic complied and drilled these wells. Wells Fargo received lease operating statements, reviewed the profitability of the wells every six months, and regularly audited Tauren and Cubic's well cost and revenue information. Reasons, p. 4 (WF Appx. A); WF Depo., p. 39, 45-47, 52 (Appx. 5).

Importantly, both the trial court and Second Circuit noted that Wells Fargo exercised its right to prevent Cubic from releasing the Lease without its consent. As the Second Circuit observed, Gloria's Ranch requested a release of Sections 15 and 21 in 2008, and Cubic refused because its interest was collateralized in its credit facility with Wells Fargo. Opinion, p. 32 (WF Appx. E); 8/20/08 Email Ross to Lepow (Appx. 1). Wells Fargo controlled Cubic's ability to release the Lease for failure to produce in paying quantities, received Gloria's Ranch's request for release, but did not release its interest or authorize Cubic to release the Lease. *Id.*; Reasons, p. 4 (WF Appx. A). Meanwhile, Wells Fargo evaluated revenue and cost information every September and March to ensure the value of its collateral, but never examined paying quantities in these audits between when Gloria's Ranch requested information on production in December 2009, demanded release in January 2010, and sued in June 2010. WF Depo., p. 39, 45-47, 52 (Appx. 5). Moreover, Wells Fargo affirmatively asserted that the Lease was still in effect and refused to release it in answer to this lawsuit. Because Cubic could not release without its consent, this clouded Gloria's Ranch's title.

Wells Fargo mistakenly asserts that it can obtain extensive rights in mineral lease collateral without any obligation to the landowner. Wells Fargo states that the "*right* to consent is not an *obligation* to consent." WF Writ App., p. 7. This is correct in the context of its relationship with Cubic; Wells Fargo owed no obligation to Cubic to consent to a release and had the right not merely to consent, but also to prevent release by withholding consent. But this unfettered control of Cubic's ability to release gave rise to a duty to Gloria's Ranch, not Cubic, to remove the title cloud created by the expired Lease. Wells Fargo relies on the Mortgage Instrument's statement that Cubic may "not subject [Wells

Fargo] to . . . any obligation or liability of" Cubic. Mortgage Instrument, ¶ 2.12, p. 12 (WF Appx. H). Gloria's Ranch did not agree that Wells Fargo could cloud its title and was not a party to the Mortgage Instrument, so it does not does not relieve Wells Fargo of liability to Gloria's Ranch. Wells Fargo breached its obligations, not Cubic's, and is liable to Gloria's Ranch for that breach. *See* Coburn v. Comm. Nat'l Bank, 453 So. 2d 597, 604 (La. App. 2 Cir. 1984); Black Diamond Inv., LLC v. Chesapeake Louisiana, LP, No. 12-2079, 2013 WL 1750013, at *4 (W.D. La. Apr. 22, 2013).

B. Like the Pact De Non Alienando, Wells Fargo's Consent Provision Was Effective as to Third Parties, Nullifying Any Release By Cubic Without Wells Fargo's Written Consent.

Wells Fargo and *amici* acknowledge that the consent provision in the recorded Mortgage Instrument may be likened to a pact de non alienando, a provision barring alienation or encumbrance of the collateral without consent of the mortgagee. WF Writ App., p. 7; Bank Br., p. 11. The pact de non allows a mortgagee to ignore transfers of the property occurring after recordation and to foreclose on the property in the hands of a third person. Matter of Dibert, Bancroft & Ross Co. Ltd., 117 F.3d 160, 174 (5th Cir. 1997). A transfer by the mortgagor without the mortgagee's consent is null as to the mortgagee. *See* First Nat'l Bank of Shreveport v. Houseman, 160 So. 618, 620 (La. 1935) (pact de non makes later disposition of the property void as to mortgagee); Matter of Dibert, 117 F.3d at 174 (similar "consent to release" provision barred release of lease by mortgagor). *See also* Mohawk Oil Co. v. Layne, 270 F. 841, 849 (W.D. La. 1921) (mortgagor's admission that mineral lease expired, resulting in lease cancellation judgment, did not prevent mortgagee from asserting lease validity in a subsequent action).

Here, the pact de non was insufficient to protect Wells Fargo's collateral. As explained by banking *amici*, in a traditional mortgage encumbering land, the collateral "is not going anywhere." Bank Br., p. 7. In contrast, mineral leases are precarious collateral because the debtor can release the lease and extinguish the mortgage, leaving the mortgagor unsecured on the loan. *Id.* p. 8; *see* La. Civ. Code art. 3319. Wells Fargo included the consent provision in its recorded Mortgage Instrument to protect against this risk. In Matter of Dibert, Bancroft & Ross Co. Ltd 117 F.3d at 174, the United States Fifth Circuit held that a similar consent to release provision in a recorded mortgage notified the rest of the world that an action taken by the mortgagor in contravention of the provision would be of no effect vis-à-vis the mortgagee. The court noted that the provision allows the mortgage to survive the mortgagor's unilateral acts that could otherwise extinguish the lease. *Id.* at 179.

Similarly, contractual provisions requiring a lessor's consent for a lessee to assign or to sublease its interest invalidate such transactions made without the lessor's consent. *See* Owens v. Oglesby, 123 So. 2d 521 (La. Ct. App. 1960) (sublease ineffective without consent); Meyer v. Rothschild, 15 So. 383 (La. 1894) (lease assignment invalid without lessor's consent). And in Mohawk Oil Co. v. Layne, 270 F. 841, 849 (W.D. La. 1921), a lessee/mortgagor's judicial admission that a mineral lease had expired, and subsequent Supreme Court judgment cancelling the lease, was not effective against the mortgagee. Here, Wells Fargo's consent provision in the recorded mortgage meant that Cubic lacked the power to release the Lease without its written consent, nullifying any release granted without its consent.

Ignoring these authorities, banking *amici* argue that the consent to release provision in the recorded Mortgage Instrument did not prevent Cubic from unilaterally extinguishing the Lease and mortgage. This argument flies in the face of *amici*'s accurate observation that collateral protection is an "absolute necessity" for a lender, particularly where collateral is perishable as in the case of mineral leases, which can be released by the lessee. Bank Br., p. 12; *see* La. Civ. Code art. 3319. Under *amici*'s theory, Cubic could have validly released the Lease, extinguishing the collateral and the mortgage and leaving Wells Fargo with only a claim against Cubic. In that case, the mortgage would be useless and provide no greater security that the principal obligation will be fulfilled. Bank Br., p. 4. Wells Fargo would have had no reason for recording a mortgage because it would have the same rights against Cubic by including the consent provision in the unrecorded Credit Agreement. In reality, the collateral mortgage prevents Cubic's release and gives Wells Fargo "access to another source of value," the collateral, to compensate for the unfulfilled principle obligation if Cubic does not pay. *Id.*

Amici implicitly recognize that the control granted by the consent to release provision comes with a duty to exercise that control responsibly. Either (1) the consent provision prevents the mortgagor from releasing the Lease, and the mortgagee has the responsibility to remove this title cloud, or (2) it does not, in which case the mortgagor has the power to extinguish the mortgage. Supporting Wells Fargo's attempt to shirk liability, *amici* contradict their statement that collateral protection is "foundational" without considering the severe impact on energy lending that would result from a ruling that a mortgagee cannot prevent its mortgagor from extinguishing a collateralized lease and the mortgage. Few, if any, creditors would lend money secured by a mineral lease if a recorded mortgage could not stop a borrower from releasing and extinguishing the mortgage.

C. Wells Fargo's Recorded Mortgage Instrument Clouded Gloria's Ranch's Mineral Title Preventing It from Obtaining a Bonus Payment by Granting a New Lease.

A cloud on title is an encumbrance on the face of the public records that may render title unmerchantable. Martin v. Fidelity Nat'l Title Ins. Co., No. 09-4195, 2011 WL 4478431, at *4-5 (E.D. La. Sept. 26, 2011). Title is unmerchantable when it is encumbered or suggestive of litigation. *See, e.g.,* Parker v. Machen, 567 So. 2d 739, 743 (La. App. 2 Cir. 1990) (suggestive of litigation); Young v. Stevens, 209 So. 2d 25, 35 (La. 1967) (vendor must deliver merchantable title free of encumbrances and not suggestive of litigation); Langford Land Co. v. Dietzgen Corp., 352 So. 2d 386 (La. App. 4 Cir. 1977) (title unmerchantable if third party might make substantial claims against the property).

A plaintiff may bring a quiet title action for damages and to clear the public records where title is suggestive of litigation due to the existence of an invalid recorded encumbrance or mortgage. Walmsley v. Pan Am. Petroleum Corp., 153 So. 2d 375, 380 (La. 1963). *See* Rawls v. Thomas, 3 La. App. 484 (La. App. 2 Cir. 1926) (awarding damages in action to quiet title); Black Diamond Inv., LLC v. Chesapeake Louisiana, LP, No. 12-2079, 2013 WL 1750013, at *4 (W.D. La. Apr. 22, 2013) (recognizing claim for damages for cloud on title to mineral right). *See also* Carlson v. Ewing, 73 So. 2d 458, 459 (La. 1954) (discussing suit to erase mortgage as one for cloud on title). A lender is liable to third parties for damages caused by a wrongful failure to release an invalid security device. Coburn v. Comm. Nat'l Bank, 453 So. 2d 597, 604 (La. App. 2 Cir. 1984); *see also* Webb v. Pioneer Bank & Trust Co., 530 So. 2d 115, 118 (La. App. 2 Cir. 1988) (lender liable in damages to third party for negligently failing to detect forgery); Cypress Oilfield Contractors v. McGoldrick Oil Co., 525 So. 2d 1157 (La. App. 3 Cir. 1988) (lender liable for negligent misrepresentation to third party).

The recorded Mortgage Instrument clouded Gloria's Ranch's title. In the absence of Wells Fargo's release of its recorded interest, any potential lessee would be faced with the prospect of future litigation regarding the mineral rights in Gloria's Ranch's property. *See* Parker v. Machen, 567 So. 2d 739, 743 (La. App. 2 Cir. 1990) (suggestive of litigation). Paul Jarratt, an expert landman, testified that Wells Fargo's failure to release its recorded interest created a title cloud that deterred potential lessees from taking a lease from Gloria's Ranch, depriving it of a new lease bonus. By virtue of the public records doctrine, any third party considering a lease with Gloria's Ranch was on notice that a release by Cubic without Wells Fargo's consent would be ineffective as to Wells Fargo. Carr v. Oaktree Apts., 45,514 (La. App. 2 Cir. 8/11/10); 46 So. 3d 793, 797. Wells Fargo could seize and foreclose on the

Lease if Cubic released without consent. Wells Fargo and anyone purchasing the Lease at a sale after foreclosure could assert the continued validity of the Lease against Gloria's Ranch and its new lessee.

Wells Fargo incorrectly argues that it was not in privity with and could not owe a duty to Gloria's Ranch. First, Wells Fargo admitted privity with Gloria's Ranch when it claimed to own the Lease in its answer and pled its terms as defenses. Answer ¶ 5, Aff. Def. 3-6, 17, p. 1-3, 5 (Appx. 2). Second, a lender, and *a fortiori* an investor and active participant, can be liable to someone with whom it is not in privity where it refuses to release a cloud on title, such as an invalid mortgage. In Coburn v. Commercial National Bank, 453 So. 2d 597, 604 (La. App. 2 Cir. 1984), a mortgage placed on a jointly owned home by a husband without his wife's consent was null. The court found the bank liable to Mrs. Coburn, a third party not in privity with the bank, in damages for the cloud on her title caused by its failure to release its invalid mortgage. Similarly, Webb v. Pioneer Bank & Trust Co., 530 So. 2d at 118 and Cypress Oilfield Contractors, Inc. v. McGoldrick Oil Co., Inc., 525 So. 2d at 1162, found lenders owed duties to people with whom they were not in privity.

Wells Fargo argues that it cannot be held liable because Cubic never requested a release from Wells Fargo. While Jon Ross, Cubic's secretary, testified to that at trial, the trial court and Second Circuit discredited his testimony based on his email stating that the collateralization with Wells Fargo barred the release. 8/20/08 Email Ross to Lepow (Appx. 1). Also, Wells Fargo did not call a witness to testify on this issue and the court may infer that the testimony would not support Wells Fargo's argument. Regardless, Wells Fargo did not have to wait for Cubic's request to release; there is no trigger for Wells Fargo's written consent in the Mortgage Instrument. While the Mortgage Instrument prevented Cubic from releasing without Wells Fargo's consent, Wells Fargo's hands were not tied because nothing (other than its self-interest) prevented it from authorizing a release of the Lease even without a request from Cubic or the landowner. Indeed, the Credit Agreement specifically provides that Wells Fargo can waive any rights in the Mortgage Instrument at its discretion. Gloria's Ranch sued Wells Fargo in its capacity as a former owner of an expired mineral right pursuant to the Mineral Code and in tort. Wells Fargo is liable because of what it did and failed to do; neither the district court nor the Second Circuit held it vicariously liable for Cubic's acts.

Wells Fargo had the information and ability to quickly and easily investigate Gloria's Ranch's request for release and either release the Mortgage Instrument on the Lease or authorize Cubic to release the Lease. In fact, Wells Fargo evaluated revenue and expense information every six months, but chose to ignore Gloria's Ranch's request. Instead, Wells Fargo joined with Tauren and Cubic, and steadfastly claimed that the Lease had been maintained by production in paying quantities, though they had the unaltered lease operating statements showing Lease expiration and failed to produce them in response to discovery. WF Depo., p. 52 (Appx. 5). The district court's finding that Wells Fargo willfully clouded Gloria's Ranch's title is not manifestly erroneous.

D. Wells Fargo Did Not Prove that Its Consent Provision Is Customary in the Industry.

In its application for rehearing, Wells Fargo raised the same sky is falling arguments made in its writ application to this Court. Wells Fargo predicts the end of the lending and oil and gas industries and the demise of Louisiana's economy because the provisions in its Mortgage Instrument are standard, customary collateral safeguards. But at trial, it introduced no evidence that its consent provision and other "collateral safeguards" were customary in the industry. Wells Fargo now attempts to remedy this problem by presenting this Court with *amici* briefs explaining industry custom and asserting Wells Fargo's compliance. But *amicus* briefs cannot be used as a vehicle for presenting new evidence that was not before the trial court. U.S. Fidelity & Guar. Co. v. Victory Land Co., Inc., 410 So. 2d 359, 361 (La. App. 4 Cir. 1982). There is no evidence that Wells Fargo's control of Cubic is customary in the industry and, even if there had been, it would not have relieved Wells Fargo of the obligation to remove its cloud on Gloria's Ranch's title.

Banking *amici* contend that Wells Fargo's consent provision is typical in mineral lease mortgages. But its attorney, Pat Ottinger, contradicts this statement in his mineral lease treatise: "The mortgagee will require that the borrower maintain the encumbered mineral leases in force and effect, *unless the borrower, in good faith, determines that a lease is no longer economic*." Patrick S. Ottinger, Louisiana Mineral Leases: A Treatise, § 12-10 at 1107 (Claitor's Law Book & Publishing Div., Inc. 2016) (emphasis added). Mr. Ottinger's provision does not create a title cloud because it does not require the lender's consent to a release of a lease that has expired for lack of production in paying quantities. Menoah Petroleum, Inc. v. McKinney, 545 So. 2d 1216, 1220 (La. App. 2 Cir. 1989) ("paying quantities" means production income must exceed operating expenses). Mr. Ottinger's treatise shows that Wells Fargo's provision is atypical because it does not exclude leases that do not produce in paying quantities, but requires consent to all releases. The Second Circuit specifically noted that Wells Fargo "controlled Cubic's ability to release the lease for failure to produce in paying quantities" in finding that Wells Fargo was coextensively liable. Opinion, p. 33 (WF Appx. E)

E. Wells Fargo Is Also Liable for Failing to Release as a Former Owner of a Mineral Right Under Mineral Code Articles 206 And 207.

Mineral Code articles 206 and 207 supplement the cloud on title cases and enable a landowner to clear expired mineral leases from its title. La. Rev. Stat. Ann. §§ 31:206-07. *E.g.* Rushing v. Griffin, 121 So. 2d 229, 233 (La. 1960) (action for release of expired mineral right). The public records do not show whether a mineral lease has been maintained beyond its primary term by production in paying quantities because revenue and expense information needed for that determination can only be obtained from the mineral lessee. Where, as here, records of the Louisiana Office of Conservation show production and there is no recorded release, most oil companies believe that a lease is held by production and will not attempt to lease it. Articles 206 and 207 supplement existing title cloud law by removing the uncertainty created by this lack of information and ensure that owners of expired mineral rights promptly release by imposing liability for damages and attorney fees on those who do not. Under Article 206, the former "owner" of an extinguished mineral right shall furnish a recordable act evidencing the extinction or expiration of the right within thirty days after written demand by the person in whose favor the right has been extinguished. La. Rev. Stat. Ann. § 31:206. Failure to timely furnish such a release makes the former owner of a mineral lease liable for damages and attorneys' fees even if there is a good faith dispute. *Id.* at §§ 31:207-08.

Overwhelming evidence established that the Lease failed to produce in paying quantities, a fact known to Wells Fargo by virtue of its receipt of Cubic's operating statements, knowledge of the paying quantities requirement, and regular audits of Cubic's revenue and expenses. WF Depo., p. 46-47, 52 (Appx. 5). Rather than authorizing release, Wells Fargo joined with and assisted Cubic and Tauren in opposing plaintiff's demand and concealing evidence that the Lease had expired. *Cf.* La. Civ. Code art. 2324(A) (tortfeasors that conspire to commit a willful act are liable *in solido* for the damage caused). Wells Fargo's recorded interest in the Lease created a cloud on title that impaired Gloria's Ranch's ability to enter a new lease and triggered Wells Fargo's duty to release the Lease. Reasons, p. 4 (WF Appx. A).

1. Wells Fargo Admitted It Was a Former Owner of the Lease.

Wells Fargo admitted ownership of the Lease in its answer and affirmative defenses, subjecting it to liability under Mineral Code articles 206 and 207. An admission in a pleading constitutes a judicial confession and full proof against the party making it, waiving evidence as to the subject of the admission. La. Civ. Code art. 1853; C.T. Traina, Inc. v. Sunshine Plaza, Inc., 03-1003 (La. 12/3/03);

861 So. 2d 156, 159. The admitting party has the burden to withdraw its prior judicial confession. J&R Enter.-Shreveport v. Sarr, 43,346 (La. App. 2 Cir. 8/13/08); 989 So. 2d 235, 241.

Wells Fargo joined Tauren and Cubic in opposing lease cancellation, admitted it acquired an interest in the Lease, and never distinguished its interest from that of Cubic or Tauren. Answer, ¶ 4-5, p. 4-5 (Appx. 2). Far from disclaiming ownership, it affirmatively asserted "a right to retain its leasehold interest" in its joint answer and affirmative defenses filed in October 2011. Aff. Def. 17, p. 3 (Appx. 2). Pinnacle Operating Co.v. ETTCO Enter., Inc., 40, 367 (La. App. 2 Cir. 10/26/05); 914 So. 2d 1144, 1146 n. 1, explains that "leasehold interest" is synonymous with the lessee's working interest in a tract or geological strata. Wells Fargo pled (a) the Lease's provisions, (b) that neither it "nor any co-owners" breached them, (c) that it met its Lease obligations, and (d) the Lease's validity. Aff. Def. 2-6, p. 1-2 (Appx. 2). In April 2013, Wells Fargo reasserted its defenses and raised a new one based on the Lease terms. Aff. Def. to Am. Pet., p. 1 (Appx. 3).

In Cheatham v. City of New Orleans, 378 So. 2d 369, 374 (La. 1975), the City and two police officers "defended their lawsuit as a team," hired the same attorney, and jointly asserted an affirmative defense that the deceased victim resisted "lawful arrest and the lawful orders of the law enforcement officers of the Parish of Orleans." This Court found that the City's "explicit admission of an adverse factual element," *i.e.*, that the victim resisted lawful arrest by the City's law enforcement officers, was a binding judicial confession that the officers acted in the course of their employment. *Id.* Applying Cheatham here, Wells Fargo admitted a leasehold interest, pled the Lease terms, joined in Tauren and Cubic's team defense, and used the same attorney. Wells Fargo's admissions established it was a "former owner" of the Lease, and no further proof was required. J & R Enter., 989 So.2d at 241.

2. Ownership Is a Question of Fact that Can Be Admitted.

Whether someone owns property is a fact issue decided based upon proof at trial. *E.g.,* La. Civ. Code art. 531; La. Code Civ. Pro. arts. 3653-54; Arnett v. Trace Devel. Co., 407 So. 2d 471 (La. App. 1 Cir. 1981). *See* Martin v. Brister, 37,011 (La. App. 2 Cir. 7/23/03); 850 So. 2d 1106, 1110 (acceptance of $6,000 more than amount due evidenced transfer of ownership). Proof of ownership of an interest in immovable property may be established by admission. *See* Hayes v. Oertel, 195 So. 388, 391 (La. App. Orleans 1940) (defendant's admission that he once owned building, and failure to prove tax sale of building, precluded non-ownership defense); City of Shreveport v. Noel Estate, Inc., 41,148 (La. App. 2 Cir. 9/27/06); 941 So. 2d 66, 74-75 (city judicially confessed defendants owned property by naming them in expropriation suits); State, Dept. of Transp. & Devel. v. Restructure Partners, L.L.C., 07-1745 (La. App. 1 Cir. 3/26/08); 985 So. 2d 212, 230 (landowner pled claim to full expropriation deposit and could not later try to claim portion should be allocated to lessee); J&R Enter., 989 So. 2d at 241 (landowner's petition alleging failure to pay rent under a lease was a judicial confession precluding landowner from later denying lease).

In the Second Circuit, Wells Fargo incorrectly argued ownership was a question of law that could not be admitted but instead could only be decided based on the interpretation of its contracts. But ownership is resolved as a question of law by contractual interpretation only when the evidence of ownership is an unambiguous contract; a contract is just one form of evidence of ownership. *See, e.g.,* Arnett, 407 So.2d 471 (surveyor's testimony proved ownership). Wells Fargo's judicial confession of its leasehold interest constituted full proof of ownership, obviating the need for evidence. La. Civ. Code art. 1853.

Further, Wells Fargo cited no case in which an explicit, unrevoked judicial confession in a pleading did not bind the confessing party in the same case on an issue not impacting other litigants. Rather, its cases showed that one party's (or non-party's) admission cannot resolve a legal issue as to other parties. In Cities Service Oil & Gas Corp. v. State, 574 So. 2d 455, 461 (La. App. 2 Cir. 1991), the parties stipulated to the issues, and "the trial court was entitled to apply the law to the legal documents before it without being hindered by" erroneous admissions by the parties. *See* Howard Trucking Co., Inc. v. Stassi, 485 So. 2d 915, 918 (La. 1986) (admission in bankruptcy did not bind non-party guarantors); Fontenot v. Hanover Ins. Co., 465 So. 2d 743, 747-48 (La. App. 3 Cir. 1984), *rev'd,* 465 So. 2d 678 (La. 1985) (admission by non-party aligned in interest with party did not bind adverse party). Parties cannot tie the hands of the court with regard to the rights of litigants other than themselves, but may enter into stipulations, which have the effect of judicial confessions and bind those parties and the court, becoming the law of the case. R.J. D'Hemecourt Petroleum Inc., v. McNamara, 444 So. 2d 600, 601 (La. 1983) (citing Wickliffe v. Cooper & Sperrier, 108 So. 791, 792-93 (La. 1926)).

3. Gloria's Ranch Relied on Wells Fargo's Unrevoked Judicial Confession.

Relying on Wells Fargo's judicial confession, Gloria's Ranch did not compel discovery of the Tauren Credit Agreement or the other unrecorded Wells Fargo documents. EXCO paid Wells Fargo $9,000,000 over and above loan repayment for an alleged net profits interest that is not reflected in the documents. Closing Statement (Appx. 6). This amount was 10% of the originally negotiated sales price for Tauren's working interest in the mineral leases indicating that there was a conveyance of the Lease to Wells Fargo that was not produced. *Id.* Believing Wells Fargo's ownership of the Lease was not at issue, Gloria's Ranch did not search the public records or compel discovery as to what documents entitled Wells Fargo to an extra $9,000,000 and whether Cubic's contracts differed. Hebert v. Richard, 15-8 (La. App. 3 Cir. 6/17/15); 166 So. 3d 1265, 1271 (party's admission of adverse fact is binding where other party believes it is no longer at issue).

In May 2014, after the discovery cutoff and shortly before a trial setting, Wells Fargo first disputed its liability in an untimely partial summary judgment motion. The court declined to consider the motion, but later continued trial to March 2015. In the nine months before trial, Wells Fargo did not refile its motion, revoke its admissions, or seek to amend its pleadings to deny Lease ownership. But on appeal, it claimed the motion showed that Gloria's Ranch did not rely on its admissions, ignoring the facts that (1) Gloria's Ranch had already detrimentally relied on the admissions during discovery, and (2) the motion was filed two months before the scheduled trial (3) after the case had been pending for four years, and (4) the discovery deadline expired.

Since the trial court rendered judgment in accordance with Wells Fargo's judicial confession, it cannot now revoke the confession and attack the judgment based on an error of law. Succession of Williams, 418 So. 2d 1317, 1319 (La. 1982). In C.T. Traina, 861 So. 2d 156, 159, an answer admitting an oral contract was not revoked by an amended answer denying a contractual relationship but alternatively asserting an oral contract. As in C. T. Traina, alternate, invalid legal arguments in Wells Fargo's untimely motion did not withdraw the confessions in its pending affirmative defenses, which it continued to assert and attempted to prove at trial, without ever denying ownership of the Lease.

Wells Fargo incorrectly asserted that Gloria's Ranch first raised the judicial confession on appeal, but Gloria's Ranch referenced Wells Fargo's admissions in its opening statements at trial, post-trial brief, and opposition to Wells Fargo's new trial motion. In any event, the courts below did not need to specify reliance on the judicial confession. In Cheatham, the trial judge found that the officers acted in the course of their employment, and the Fourth Circuit reversed; but neither court mentioned the admission. Cheatham v. City of New Orleans, 368 So. 2d 146, 151 (La. App. 4 Cir. 1979) (quoting trial court's findings). Yet this Court held the City was bound by its judicial confession that the officers were in the course of their employment and reinstated the trial court's judgment. Cheatham, 378 So. 2d 369, 374-75. Here, Wells Fargo appealed the trial court's judgment, not reasons, and its admissions provide a reasonable factual basis for the judgment, regardless of whether the lower courts explicitly or implicitly relied on them. Hayes Fund, 193 So. 3d 1110, 1116. *See* Bonin, 877 So. 2d 89, 94-95 (appellate court will affirm if reasonable factual basis for judgment).

F. Wells Fargo Received a Collateral Assignment of the Lease in Its Mortgage Instrument.

A collateral assignment in a recorded mortgage conveys ownership rights to the mortgagee. Matter of Dibert, Bancroft & Ross Co., 117 F.3d 160, 163 (5th Cir. 1997), involved a lease which gave the lessee an option to purchase the land. The lessee granted a mortgage on the lease containing an assignment similar to the one involved here. *Id.* at 164. The lessee then exercised the option and acquired the land, giving rise to a claim that the lease was terminated by confusion and, consequently, the mortgage was extinguished. *Id.* at 165. In its initial opinion, the court ruled that the lease had been terminated, but the mortgage still encumbered the real estate. *Id.* at 179. The court affirmed this holding on rehearing, explaining that the lease, and therefore the option contained therein, became the property of the mortgagee by virtue of the collateral assignment without regard to any default under the mortgage. Matter of Dibert, Bancroft & Ross Co., 123 F.3d 279, 280-81 (5th Cir. 1997). Therefore, the lessee's purchase inured to the benefit of the mortgagee such that the mortgage burdened the property. *Id.*

In its new trial motion, Wells Fargo admitted that it received an assignment of the Lease but incorrectly argued that the assignment was subject to the suspensive condition of default. Like the Fifth Circuit in Dibert, Louisiana courts hold that a collateral assignment is effective immediately but subject to the resolutory condition of payment of the debt. *See* Coburn v. Comm. Nat'l Bank, 453 So. 2d 597, 604 (La. App. 2 Cir. 1984) (collateral assignment effective immediately); Dauzat v. Simmesport State Bank, 167 So. 2d 681, 686 (La. App. 3 Cir. 1964) (assignment is valid security device and transfers ownership at least until indebtedness repaid); Am. Bank and Trust Co. of Baton Rouge v. La. Sav. Ass'n, 386 So. 2d 96, 103-12 (La. App. 3 Cir. 1980) (conveyance of partnership interest to secure loan was assignment effective immediately); First Nat'l Bank of Comm. v. Hibernia Nat'l Bank, 427 So. 2d 569, 574-75 (La. App. 4 Cir. 1983) (assignment of certificate held as security effective immediately and lasted until loan paid); La. Civ. Code art. 1767.

Even if the condition were resolutory, Cubic had defaulted on the mortgage. In its deposition, Wells Fargo testified that a notice of default had been issued to Cubic, but claimed it did not know when the default occurred even though it admitted the information was in its records. WF Depo., pp. 18-20, 44, Ex. 260, Ex. Vol. 14. Wells Fargo neither reviewed its records of default prior to its deposition nor produced them in response to discovery. Again, Gloria's Ranch did not pursue a motion to compel because it had Wells Fargo's admission of ownership of the Lease. Wells Fargo did not to send a representative to testify at trial. The presumption, and natural inference, is that Wells Fargo had records that showed the Lease had expired and the loan was in default when Gloria's Ranch demanded release of the Lease.

A litigant's failure to produce evidence available to him raises a presumption that the evidence would have been detrimental to his case. Cook v. Mixon, 29,491 (La. App. 2 Cir. 8/22/97); 700 So. 2d 1264, 1269; Sayre v. PNK (Lake Charles), LLC, 15-859 (La. App. 3 Cir. 3/23/16); 188 So. 3d 428, 435. *See also* Horacek v. Watson, 11-1345 (La. App. 3 Cir. 3/7/12); 86 So. 3d 766, 770 (*citing* Driscoll v. Stucker, 04-589 (La. 1/19/05); 893 So. 2d 32, 47 (adverse presumption arises in a civil case when defendant fails to provide witness necessary to his defense and particularly within his own knowledge)). The district court correctly applied the presumption based on Wells Fargo's deposition testimony, its failure to produce documents, and its failure to produce a witness to testify at trial that the loan was not in default at the time of the demand for release of the Lease.

V. WELLS FARGO IS SOLIDARILY LIABLE FOR GLORIA'S RANCH'S DAMAGES BECAUSE ITS OBLIGATION TO PAY IS COEXTENSIVE WITH ITS CO-DEFENDANTS.

An obligation is solidary for the obligors when each obligor is liable for the whole performance. La. Civ. Code Ann. art. 1794. It "is the coextensiveness of the obligations for the same debt, and *not the source of liability*, that determines the solidarity of the obligation." Glasgow v. PAR Minerals Corp., 10-2011 (La. 5/10/11); 70 So. 3d 765, 770 (rejecting the proposition "that parties cannot be solidarily liable unless their liability is based upon the same cause of action) (*citing* Williams v. Sewerage & Water Bd. of New Orleans, 611 So. 2d 1383, 1388 (La. 1993)). The obligation may be *in solido* even though the obligations of the obligors arise from separate acts or by different reasons. For instance, in Hoefly v. Gov't Employees Ins. Co., 418 So. 2d 575, 579 (La. 1982) the court held that an uninsured motorist and the insurer which issued uninsured motorist insurance were solidarily liable even though the uninsured motorist is obliged because of his tort whereas the insurer is bound by the combined effect of the tortfeasor's wrongful act, the uninsured motorist statute, and the carrier's issuance of automobile liability insurance. *Accord* Rizer v. Am. Sur. & Fid. Ins. Co., 95-1200 (La.

3/8/96); 669 So. 2d 387, 389 (once extent of each debtor's liability determined, there is solidary obligation to extent they have common liability to injured party).

As an owner of the Lease, Wells Fargo is solidarily liable with its co-defendants. Wells Fargo admits that the owner of a mineral lease is obligated for the lease obligation, including the obligation to release the lease. This gives rise to solidary liability between all mineral leasehold owners for lost leasing damages. *See also* <u>Edmundson Bros. P'ship v. Montex Drilling Co.</u>, 98-1564 (La. App. 3 Cir. 5/5/99); 731 So. 2d 1049, 1065-66 (*in solido* damage award for lost leasing opportunity); <u>Hoover Tree Farm, LLC v. Goodrich Petroleum Co., Inc.</u>, 46,153 (La. App. 2 Cir. 3/23/11); 63 So. 3d 159, 180-81 (co-owners of lease, including assignees, solidarily liable for mineral lease obligations); <u>Alford v. Chevron U.S.A., Inc.</u>, 13 F. Supp. 3d 581, 587 (E.D. La. 2014) (successors in interest to lessee solidarily liable for restoration obligation); <u>Questar Expl. & Prod. Co. v. Woodard Villa, Inc.</u>, 48,401 (La. App. 2 Cir. 8/7/13); 123 So. 3d 734, 738 (mineral leases "presumptively indivisible"); <u>Wehran v. Helis</u>, 152 So. 2d 221, 222 (La. App. 4 Cir. 1963) (trial court imposed *in solido* damages on ten assignees; reversed on other grounds). Moreover, the evidence established, and the district court correctly found that if any one defendant failed to release, then Gloria's Ranch could not have obtained a bonus payment by granting a new lease on the property. Indeed, the full payment for the EXCO settlement agreement, which included the delivery of a new oil and gas lease to EXCO, was not due until all defendants released or a final and definitive judgment cancelling the Lease was rendered. So even if it was not an owner of the Lease, Wells Fargo is solidarily liable for the damages sustained by Gloria's Ranch for its failure to release the title cloud created by its Mortgage Instrument. La. Civ. Code Ann. art. 1789 (when joint obligation not subject to division, joint obligors subject to the rules governing solidary obligors). *See* La. Civ. Code Ann. art. 1815 (obligation is indivisible when the object of performance not susceptible of division).

VI. <u>CONCLUSION.</u>

The district court and Second Circuit properly found Wells Fargo liable for clouding Gloria's Ranch's title based in the record in this case. Wells Fargo acquired extensive rights in the Lease, including the right to withhold consent to Cubic's release for any reason or no reason at all. In drafting its Mortgage Instrument and exercising its control over Cubic, Wells Fargo shrewdly guarded its financial interest while disregarding Gloria's Ranch's rights. Despite receiving Gloria's Ranch's demand, Wells Fargo refused to examine whether the Lease had expired even though it tracked lease expiration dates, evaluated revenue and expense information every six months, and had the unaltered lease operating statements clearly showing that Cubic failed to produce the Lease in paying quantities. When it received Gloria's Ranch's demand, Wells Fargo could easily have emailed Cubic to authorize it to release if it determined the Lease had expired even in the absence of a request from Cubic. But Wells Fargo wanted to "maintain its ranking in secured assets." Post-Trial Br., p. 10, R. 2941. Indeed, Wells Fargo vigorously protected its security interests, asserting ownership of the Lease and the right to retain its leasehold interest. Wells Fargo, Cubic and Tauren defended the case as a team, hired the same attorney, and frivolously asserted that their attempts to profit from the sale of the Lease constituted production in paying quantities. And Wells Fargo did profit in the sale to EXCO, receiving $9,000,000 beyond repayment of its loan. After reaping the benefits of the Lease, Wells Fargo ignored its discovery obligations in this case and failed to produce the documents that entitled it to $2,250,000 for the sale its interest the Lease on Gloria's Ranch's property, which constituted 25% of the acreage transferred to EXCO. Further, Wells Fargo received lease operating statements dating to 2007, failed to produce them in response to discovery, and joined in Tauren and Cubic's efforts to conceal the expiration of the Lease. For almost eight years, Wells Fargo happily claimed and defended extensive rights in the Lease to its benefit. Now that it has been found liable for its irresponsible exercise of those rights, Wells Fargo minimizes its involvement with the Lease and contends it was a simple secured creditor. Yet, to this day, Wells Fargo has never released its interests in the Lease. The Second Circuit limited its opinion to the facts of this case because Wells Fargo's conduct is not typical, standard, or customary, but rather outstanding. The lower courts' decisions correctly imposed liability on Wells Fargo, and its writ application should be denied.

Respectfully submitted,

/s/ Guy E. Wall

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STATE OF LOUISIANA

AFFIDAVIT OF VERIFICATION AND MAILING

Before me, the undersigned notary public, personally came and appeared Guy E. Wall, who being duly sworn, did declare that the allegations of the foregoing opposition are true and correct to the best of his knowledge, information and belief and that he certifies that a copy of said writ application was mailed and/or emailed to the following:

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Harahan, Louisiana, this 6th day of October, 2017

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