United States Court of Appeals
Fifth Circuit
FILED
March 21, 2022
Lyle W. Cayce Clerk

United States Court of Appeals
for the Fifth Circuit

No. 21-30335

Ariyan, Incorporated, *doing business as* Discount Corner; M. Langenstein & Sons, Incorporated; Prytania Liquor Store, Incorporated; West Prytania, Incorporated, *doing business as* Prytania Mail Service/Barbara West; British Antiques, L.L.C., Bennet Powell; Arlen Brunson; Kristina Dupre; Brett Dupre; Gail Marie Hatcher; Betty Price; Et Al.,

Plaintiffs—Appellants,

versus

Sewerage & Water Board of New Orleans; Ghassan Korban, In his Capacity as Executive Director of Sewerage & Water Board of New Orleans,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-534

Before Barksdale, Stewart, and Dennis, *Circuit Judges*. James L. Dennis, *Circuit Judge*:

Plaintiffs who succeed in winning a money judgment against a state governmental entity in state court in Louisiana often find themselves in a frustrating situation. Though they have obtained a favorable judgment, they lack the means to enforce it. The Louisiana Constitution bars the seizure of public funds or property to satisfy a judgment against the state or its political subdivisions. La. Const. art. XII, § 10(c). Instead, the Legislature or the political subdivision must make a specific appropriation in order to satisfy the judgment. *Id.*; La. R.S. 13:5109. And since Louisiana courts lack the power to force another branch of government to make an appropriation, the prevailing plaintiff has no judicial mechanism to compel the defendant to pay. *See Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1265 (La. 2008). The "plaintiff who succeeds in an action against a governmental unit thus becomes a supplicant," relying on the grace of the government to appropriate funds to satisfy her judgment. David W. Robertson, *Tort Liability of Governmental Units in Louisiana*, 64 Tul. L. Rev. 857, 881 (1990).

Finding themselves in this position, the Plaintiffs in this case, like others before them, have turned to the federal courts to force payment on their state court judgment. They claim that the Defendants' failure to timely satisfy a state court judgment violates the Takings Clause of the Fifth Amendment. The district court granted the Defendants' motion to dismiss, applying long-standing precedent that there is no property right to timely payment on a judgment.

We agree and AFFIRM.

I.

In 2013, the United States Army Corps of Engineers and the Sewerage and Water Board of New Orleans (the "SWB") began construction on a massive flood control project across Uptown New Orleans as part of the Southeast Louisiana Urban Flood Control Program ("SELA"). The Uptown phase involved the construction of underground box culverts that run the length of several major thoroughfares. Plaintiffs are seventy landowners, including both businesses and private homeowners, who suffered property damage and economic loss as the result of SELA construction. The Plaintiffs filed suit in state court and obtained final judgments against the SWB for a combined $10.5 million. Some of these judgments became final in early 2018 and 2019, others as recently as fall 2020.

As of January 2021, though, the Plaintiffs had not received any payment from the SWB. So, in March 2021 they filed a § 1983 suit in district court under the theory that the SWB's failure to comply with the state court judgments "creates a secondary Constitutional violation of Plaintiffs' Fifth Amendment rights," more specifically a violation of their due process rights and their rights to just compensation for a taking. As relief, the Plaintiffs requested a writ of execution seizing the SWB's property in order to satisfy the judgments. Separately, the Plaintiffs' complaint sought a declaration that the SWB is contractually obligated to seek reimbursement from the Army Corps for the judgments via a procedure the two entities agreed to, called the "Damages SOP."

The SWB filed a motion to dismiss under Rule 12(b)(6) and the district court granted it. The court sympathized with the Plaintiffs' frustrations, but noted that there were "centuries of precedent" establishing that a state's failure to timely pay a state

court judgment did not violate any federal constitutional right. With no underlying constitutional right at issue, Plaintiffs' § 1983 claim was "legally baseless." The district court also declined to exercise jurisdiction over Plaintiffs' request for declaratory relief as a standalone claim, citing the "particularly local nature of this dispute." Finally, the court denied Plaintiffs' generic request to amend their complaint should a failure to state a claim be found, holding that any amendment would be futile. Plaintiffs appealed.

II.

We review dismissal of a case under Rule 12(b)(6) *de novo*, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff. *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 177 (5th Cir. 2018). "In the context of a 12(b)(6) motion in a section 1983 suit, the focus should be whether the complaint properly sets forth a claim of a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States caused by persons acting under color of state law. If there is no deprivation of any protected right the claim is properly dismissed." *S. Christian Leadership Conf. v. Supreme Ct. of State of La.*, 252 F.3d 781, 786 (5th Cir. 2001) (internal citation omitted).

Ordinarily a district court's denial of a motion to amend a complaint is reviewed for abuse of discretion. *Stripling v. Jordan Prod. Co., LLC,* 234 F.3d 863, 872 (5th Cir. 2000). However, when denial is based on the futility of amendment, we "apply the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* at 873 (citation omitted). If the complaint, as amended, would be subject to dismissal, then amendment is futile and the district court was within its discretion to deny leave to amend. *Id.*

III.

A.

The Plaintiffs' claim is fairly discrete. They "do not seek to re-litigate the legal or factual issues or compensation awards decided in the state courts." Rather, their case "concerns an independent Takings Clause violation—the failure to timely pay just compensation once the compensation was determined and awarded." This nonpayment is, according to the Plaintiffs, a "second taking," and the only one at issue in their case.[1]

More than a century ago, the Supreme Court decided the case of a pair of litigants in a similar situation as the Plaintiffs here. In *Folsom v. City of New Orleans*, 109 U.S. 285 (1883), two relators had obtained state court judgments against the City of New Orleans for property damage caused by riots in 1873. In 1879, a new state constitution limited the taxes New Orleans could levy to just enough to cover the City's budget. *Id.* at 287. The effect was that the relators were prevented from collecting on their judgments. *Id.* The relators argued that this state constitutional change deprived them of property without due process of law in violation of the Fourteenth Amendment. *Id.* The Supreme Court rejected the argument, agreeing that the judgments were property, but holding that "the relators cannot be said to be deprived of them so long as they continue

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[1] In their complaint, Plaintiffs asserted a separate due process violation "because Defendants have treated them differently than non-litigants merely because Plaintiffs have exercised their constitutional right to file suit." Plaintiffs did not argue this claim in their briefs before the district court or in their briefs before this Court. It is therefore deemed abandoned. *Yohey v. Collins*, 985 F.2d 222, 224 (5th Cir. 1993).

an existing liability against the city." *Id.* at 289. In dissent, Justice Harlan wrote that an unenforceable judgment is no judgment at all. "Since the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property." *Id.* at 295.

The *Folsom* majority's notion of a judgment as an "existing liability," conceptually distinct from its recovery, has only been reinforced in the intervening years. In *Minton v. St. Bernard Parish School Board*, this Court, citing *Folsom*, reiterated that "the property right created by a judgment against a government entity is not a right to payment at a particular time but merely the recognition of a continuing debt of that government entity." 803 F.2d 129, 132 (5th Cir. 1986). Based on that principle, we held that the government defendant's "failure to appropriate funds to pay the debt to the Mintons does not constitute a taking in violation of the due process clause." *Id.*

Again, in *Freeman Decorating Company v. Encuentro Las Americas Trade Corporation*, our Court held that there was no Takings Clause violation where the City of New Orleans failed to make timely payment on a state court judgment because there had been no taking of any property. "[T]he only property right [the plaintiff] has is the recognition of City's [*sic*] continuing debt." 352 F. App'x 921, 924 (5th Cir. 2009); *see also Guilbeau v. Par. of St. Landry*, 341 F. App'x 974 (5th Cir. 2009); *cf. Evans v. City of Chicago*, 689 F.2d 1286, 1297 n.13 (7th Cir. 1982) (distinguishing *Folsom* because Illinois Constitution created property right to immediate payment on a judgment). In short, "[a] party cannot be said to be

deprived of his property in a judgment because at the time he is unable to collect it." *Folsom*, 109 U.S. at 289. Thus, Plaintiffs' claim that their property has been taken by the SWB's failure to timely pay must fail under *Folsom*.

The Plaintiffs try to get around this precedent in two ways. First, they argue that *Folsom* and its progeny are distinguishable because the underlying judgments in those cases sounded in state tort and contract law, while the Plaintiffs' judgments are based on violations of a federal constitutional right. But Plaintiffs' underlying state court cases were *not* based on any asserted federal right. As the SWB pointed out in briefing, and as the record shows, Plaintiffs' state court judgments were for violations of Louisiana law, not for violations of the Fifth Amendment Takings Clause as the Plaintiffs have asserted to this Court. But even if the underlying judgments were based on violations of federal rights, we are not sure why that distinction would make a difference. After all, under Plaintiffs' theory, the SWB's failure to pay the judgments constitutes an "independent" or "second" Fifth Amendment taking of their property, namely the purported property right to be paid timely on a judgment. But since *Folsom* said there is no property right to timely payment on a judgment, there must be something special about a judgment based on federal constitutional rights that confers this additional property interest for the Plaintiffs' argument to succeed. Plaintiffs do not explain why the legal right underlying a judgment would create this additional property right for some judgments and not others, and it remains unclear to us. It seems that a judgment compensating someone for a breach of contract should confer no less a property interest than a judgment compensating someone for the police's excessive force.

Vogt v. Board of Commissioners of Orleans Levee District, 294 F.3d 684 (5th Cir. 2002), and *Lafaye v. City of New Orleans*, No. 2:20-CV-41, 2021 WL 886118 (E.D. La. Mar. 9, 2021), also do not aid the Plaintiffs in escaping *Folsom*'s holding. In *Vogt*, the Court stated in dicta that the governmental defendant's refusal to satisfy a judgment could constitute a taking. 294 F.3d at 697. But the judgment in that case was, in part, a declaratory judgment by the state courts that mineral royalties *in the government defendant's possession* were the property of the plaintiff. *Id.* at 688. The government's refusal to "pay over the retained royalties constitutes a taking because the governmental entity is withholding private property from its owners." *Id.* at 697. This situation, where the judgment debtor is in possession of property determined to belong to the creditor, is different from a judgment wherein the debtor owes compensation to the creditor. *Lafaye* turns on the exact same distinction. As the district court wrote in that case, "[b]oth *Vogt* and this case involve the government's refusal to return private property to its rightful owner." *Lafaye*, 2021 WL 886118, at *9. Plaintiffs' judgments here are for compensation and damages, not for the return of private property that "the government has forcibly appropriated . . . without a claim of right." *Vogt*, 294 F.3d at 697.

Plaintiffs' second argument is that two Supreme Court cases—*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) and *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019)—provide a federal forum for their claim. Plaintiffs misunderstand those cases. They are right that *Knick* and *Williamson County* discuss when a plaintiff may file a Takings Clause claim in federal court, but the cases say nothing about whether failure to timely pay a state court judgment constitutes a taking or any

other deprivation of a federal right actionable under § 1983. Whether a claim is ripe for federal adjudication, as *Williamson County* and *Knick* decided, is very different from whether certain facts state a claim at all. Amici's citations to Supreme Court dicta that the Fifth Amendment is "self-executing" and that a property owner "acquires a right to compensation immediately upon an uncompensated taking" also fail to address the actual issue presented by Plaintiffs' appeal, namely whether a government's failure to timely pay a court judgment constitutes a taking in the first place. Neither *Williamson County* nor *Knick* speak to that question. Plaintiffs' § 1983 claim remains foreclosed by *Folsom*.

B.

Plaintiffs invoked federal question jurisdiction, relying on their Fifth Amendment claim, to bring this suit. With that claim dismissed, the district court declined to exercise jurisdiction over Plaintiffs' separate claim for a declaration of the parties' rights and duties under the Damages SOP. The Declaratory Judgment Act "does not of itself confer jurisdiction on the federal courts." *Jolly v. United States*, 488 F.2d 35, 36 (5th Cir. 1974). Without an underlying federal claim, or any other basis for jurisdiction asserted by the Plaintiffs, the district court properly declined to hear Plaintiffs' standalone claim to declaratory relief.

As a final matter, the district court also properly declined to grant leave to Plaintiffs to amend their complaint. Though Rule 15(a)'s mandate that leave to amend must be "freely give[n] . . . when justice so requires" significantly limits a district court's discretion, a district court still acts within its bounds when it denies leave because amendment would be futile. Fed. R. Civ. P. 15(a)(2). Futility here means "that the amended complaint would fail to state a

claim upon which relief could be granted." *Stripling*, 234 F.3d at 873. The Plaintiffs did not specify what amendments they wished to make, or attach an amended pleading. Rather they simply asked for leave to amend "if their pleadings are found to be deficient in any manner." This failure to specify how amendment would cure the fundamental deficiencies in their pleading, especially when the core of Plaintiffs' claims is so clearly foreclosed by settled law, supports the district court's determination that amendment would be futile. *See Legate v. Livingston*, 822 F.3d 207, 212 (5th Cir. 2016). We cannot say the court abused its discretion.

IV.

Like the district court, we understand the Plaintiffs' frustration. They have succeeded in winning a money judgment. Without any judicial means to recover, they are compelled "to rely exclusively upon the generosity of the judgment debtor." *Folsom*, 109 U.S. at 295 (Harlan, J., dissenting). But the Plaintiffs' case before the district court turned entirely on a purported property interest not recognized in Fifth Amendment jurisprudence. They therefore failed to state a claim for relief, and the district court properly dismissed their case.

We AFFIRM the district court's judgment.

Appendix B-1

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Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-534

Before Barksdale, Stewart, and Dennis, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

Case 2:21-cv-00534-MLCF-JVM Filed 06/09/21

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

ARIYAN, INC., ET AL. CIVIL ACTION

v. NO. 21-534

SEWERAGE & WATER BOARD OF NEW ORLEANS, ET AL. SECTION "F"

ORDER AND REASONS

Before the Court is the defendants' Rule 12(b)(6) motion to dismiss. For the reasons that follow, the motion is GRANTED.

Background

When a flood-control project damaged their homes and businesses in Uptown New Orleans, the 70 plaintiffs in this case took the defendant[1] – the Sewerage & Water Board of New Orleans (SWB) - to Louisiana state court.[2] In state-court actions "specifically not[ing] that 'any substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of the federal and [Louisiana] constitutions," the plaintiffs secured monetary awards

[1] In this case, the plaintiffs have also sued Ghassan Korban, "in his [official] capacity as Executive Director" of the SWB. Aside from prefatory language naming Korban as a defendant, the plaintiffs' complaint mentions Korban just once (with regard to a written demand for payment the plaintiffs made upon the SWB). See Compl., ¶ 54.

[2] In their various state-court actions, the plaintiffs sought compensation for property damages, losses of residential use and enjoyment, and business losses occasioned by the project at issue.

for property damage and restrictions they sustained in connection with the project at issue. See Opp'n at 3. Acknowledging that those successful lawsuits resulted in "state court judgments [that] memorialized and quantified the just compensation to which [they] are entitled," the plaintiffs now bring § 1983 and declaratory judgment claims against the SWB in *this* Court for the SWB's allegedly "unlawful refusal to pay" such compensation. See, e.g., id. at 6. The plaintiffs make no bones about their intention in bringing this federal action: as they put it, they "have exhausted their state court remedies in seeking just compensation from the [SWB], have not received the just compensation that was awarded, and now are seeking to enforce the payment of that just compensation in this Court." See id. at 8. The SWB concedes that it has not yet made good on the plaintiffs' damages awards but insists that it does plan to pay the plaintiffs in the future.

Thus, with unpaid state-court judgments in hand and no "certainty at all that they will ever be paid just compensation for their loss of property interests," the plaintiffs urge this Court to "recognize that a Section 1983 claim is available when state actors take private property but fail to pay [a] state court judgment establishing the amount of just compensation due." See id. at 6–7.

Rule 12(b)(6) allows a party to move for dismissal of a complaint that fails to state a claim upon which relief can be granted. "To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). To demonstrate a facially plausible basis for relief, a plaintiff must plead facts which allow "the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In determining whether a plaintiff has met this burden, a court must "accept all well-pleaded facts as true and view all facts in the light most favorable to the plaintiff," but must not accord an assumption of truth to conclusory allegations and threadbare assertions. Thompson v. City of Waco, 764 F.3d 500, 502 (5th Cir. 2014).

The foregoing presumptions are not to be applied mindlessly, however. Thus, in considering a motion to dismiss, the Court may review any documents attached to or incorporated into the plaintiff's complaint by reference. Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir. 2004). In addition, the Court may judicially notice matters of public record and other facts not subject to reasonable dispute. See United States *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 379 (5th Cir. 2003).

II.

With this standard in view, the Court proceeds to evaluate whether the plaintiffs' complaint states a plausible claim for relief.

A. Count One: § 1983 Claims

1. The Plaintiffs Fail to State a Baseline Legal Violation

The crux of the plaintiffs' case is a § 1983 claim for asserted violations of the Takings Clause[3] and

[3] The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use[] without just compensation," and is "made applicable to the States by the

constitutional due process and civil rights. See Compl., ¶¶ 56–68. 42 U.S.C. § 1983 "provides injured plaintiffs with a cause of action when they have been deprived of federal rights under color of state law." Doe v. Dall. Indep. Sch. Dist., 153 F.3d 211, 215 (5th Cir. 1998). To state a claim under § 1983, a plaintiff must first allege a threshold violation of constitutional or statutory rights. See, e.g., D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 456 (5th Cir. 2010).

Here, the plaintiffs assert that the SWB's refusal to pay their state-court judgments violates their Fifth Amendment "right" "to be actually paid just compensation for the taking of their property by inverse condemnation" "without unreasonable delay."[4] See Compl., ¶¶ 58, 62. The Court understands the plaintiffs' frustrations, but this claim is legally baseless. Courts have consistently observed a distinction between a state's *taking* of property without just compensation and its temporary *retention* of just compensation that has been fixed and awarded by a state court. In this district specifically, Judge Lemelle forcefully applied this principle in Violet Dock, where he dismissed a similar § 1983 claim because a state's temporary delay in paying a state-court judgment does not give rise to a

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Fourteenth Amendment." U.S. CONST. amend. V; Kelo v. City of New London, 545 U.S. 469, 472 n.1 (2005).

[4] The plaintiffs also claim that their Fourteenth Amendment "due process rights have been violated, because Defendants have treated them differently than non-litigants merely because Plaintiffs have exercised their constitutional right to file suit to protect their rights and property interests." See Compl., ¶ 64. The plaintiffs' claim in this regard has no basis in law.

constitutional violation.[5] See 2019 WL 6307945, at *3. As he aptly concluded there:

> Plaintiff has failed to state a claim under § 1983. Plaintiff's complaint and opposition demonstrate that it is not seeking to bring a claim for the unlawful taking of the property expropriated by [the state agency defendant], because final judgment has already been rendered on that issue in state court. Rather plaintiff only wishes to pursue its entitlement to the state court's compensation award and is attempting to use § 1983 as the vehicle for such relief. However, the "property right created by a judgment against a government entity is not a right to payment at a particular time, but merely the recognition of a continuing debt of that government entity." Guilbeau v. Par. of St. Landry, 2008 WL 4948836, at *10 (W.D. La. Nov. 19, 2008), *aff'd*, 341 F. App'x 974 (5th Cir. 2009) (citing Minton v. St. Bernard Par. Sch. Bd., 803 F.2d 129, 132 (5th Cir. 1986)); Davis v. Cantrell, 2018 WL 6169255, at *5 (E.D. La. Nov. 26, 2018). Thus, defendant's delay in paying . . . the state court's judgment has not given rise to a Fifth Amendment violation. Additionally, plaintiff's attempt to distinguish Minton and subsequent cases on the grounds that the judgments in those cases did not

[5] Recognizing the threat that Violet Dock poses to their case, the plaintiffs make much of the fact that the pronouncements of a sister section of this court do not bind the Court here. That is, of course, true in the abstract.

> involve takings of private property is unavailing, because plaintiffs makes clear in its opposition that it is not seeking to relitigate the underlying takings claim or the amount of just compensation owed.

Id. Judge Lemelle's holding was grounded in centuries of precedent establishing that a state's temporary deprivation of damages does not violate any constitutional right. See, e.g., Louisiana ex rel. Folsom v. City of New Orleans, 109 U.S. 285, 289 (1883) ("A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it."); Minton, 803 F.2d at 132 ("[T]he property right created by a judgment against a government entity is not a right to payment at a particular time but merely the recognition of a continuing debt of that government entity."). In addition, the length of delay in paying the judgments is not helpful to the plaintiffs. See, e.g., Guilbeau, 341 F. App'x at 975 (deeming plaintiff's "constitutional argument [] foreclosed by Minton" where state's refusal to pay plaintiff's damages had persisted for seventeen years).

This Court finds no reason not to follow the Violet Dock Court's lead in this nearly identical case. Here, as in Violet Dock, the plaintiffs openly admit that they are suing not to *determine* the just compensation to which they are constitutionally entitled, but to enforce the *state courts*' determinations of that very amount. That issue has been fully litigated in state court and the plaintiffs repeatedly acknowledge as much in their opposition. See, e.g., Opp'n at 8 ("Here, Plaintiffs are not seeking to re-litigate any issue decided by the state court. Plaintiffs recognize that the amount of compensation that is due is binding here. Instead,

Plaintiffs are seeking to compel payment of the just compensation judgments . . . .").

In search of a way to do so, the plaintiffs turn to the Supreme Court's decision in Knick v. Township of Scott, 139 S. Ct. 2162 (2019), which explicitly overruled the Court's prior decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). In Knick, the Court overruled the "state-litigation requirement of Williamson County" and accordingly held that "[a] property owner may bring a [federal] takings claim under § 1983 upon the taking of his property without just compensation by a local government." Knick, 139 S. Ct. at 2179. The Justices said nothing, however, about a plaintiff's ability to bring a § 1983 suit to enforce a *state court*'s judgment in a takings case that has already been litigated in state court. To the contrary, the question in Knick was limited to whether Williamson County should have been overruled, and thus, whether "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights – and thus cannot bring a federal takings claim in federal court – until a state court has denied his claim for just compensation under state law." Id. at 2167.

In overruling Williamson County, the Supreme Court left in place its decision in San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005), where it held that a "state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." Id. In fact, San Remo's continued application is a logical linchpin of the Knick decision. Indeed, but for San Remo preclusion, the pre-Knick

"takings plaintiff [would not have found] himself in [the] Catch-22" "preclusion trap" the Court took issue with in Knick; he still could not have gone "to federal court without going to state court first; but if he [went] to state court and [lost], his claim [*would not*] be barred in federal court." See id. That was not the case in the pre-Knick world of San Remo *and* Williamson County.

Thus, the plaintiffs' core argument – namely, that "Knick Provides a Direct Legal Basis" for the plaintiffs' § 1983 claims – rests on a fundamental misunderstanding of Knick and its interworking with San Remo. To the contrary, the defendants are correct that Knick makes "where to file a constitutional takings suit [] an either/or proposition"; a plaintiff who chooses to bring suit in state court cannot later come to federal court to relitigate issues the state court already decided. See Mot. at 12; see also San Remo, 545 U.S. at 341–48.

That is precisely what the plaintiffs wish to do here.

2. Practical and Structural Considerations Also Compel Dismissal

Apart from the flaws in the plaintiffs' claims that have already been discussed, consider the implications of blessing the plaintiffs' transparent attempt to use § 1983 to collect a state- court judgment in federal court. Doing so would likely run afoul of the full faith and credit statute, encourage forum shopping, and erode the comity federal courts are to diligently maintain with state courts, who are

certainly capable of enforcing their own judgments.[6]

This predictable parade of confusion has led countless federal courts, including this one, to resist calls to enforce judgments rendered in state court. See, e.g., Bennett v. City of New Orleans, 2004 WL 60316, at *3 (E.D. La. Jan. 9, 2004) ("Plaintiffs' claims impinge on comity principles that operate in the area of federal-state relations. To hold that every unpaid state court judgment provides a would-be plaintiff with a cognizable due process claim 'would assign the federal courts the role of ombudsmen in monitoring the execution of state court judgments,' a role that would surely be destructive of federal-state relations." (quoting Biser v. Town of Bel Air, 991 F.2d 100, 105 n.2 (4th Cir. 1993) (Wilkinson, J.)). Under no constitutional guise should federal courts "become embroiled in a party's attempt to enforce state court judgments . . . against states and municipalities." See Williamson v. Chicago Transit Auth., 185 F.3d 792, 795 (7th Cir. 1999).

As in Bennett, the plaintiffs' "reliance on Vogt v. Board of Commissioners of the Orleans Levee District, 294 F.3d 684 (5th Cir. 2002) . . . is misplaced." While the plaintiffs are correct in noting that "Bennett expressly distinguished Vogt [] because the Vogt plaintiffs had stated a 'federal takings claim,'" Vogt is nonetheless no help to them here. For starters, the plaintiffs in this case have *not* stated a federal takings claim; to the contrary, they have disclaimed any

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[6] It might also, in this particular case, violate the Louisiana Constitution's prohibition on seizures of public property or public funds to pay judgments. See LA. CONST. art. XII, § 10(C). The Court need not, and accordingly does not, address this issue here.

intent to relitigate the takings claims they advanced in state court. Moreover, the bottom-line conclusion the plaintiffs draw from Vogt is incorrect: Vogt did *not*, as the plaintiffs suggest, create a free-floating rule that a state's "failure to pay a state court judgment awarding just compensation for a taking itself effected an unconstitutional taking that could be remedied via a Section 1983 action," but merely declared, in a fact-specific manner, that the state's retention of mineral royalties made the minerals themselves the object of a constitutional taking since the judgment at issue was "just an accounting or quantification of the mineral royalties" flowing from ownership of the minerals. See Vogt v. Bd. of Comm'rs of Orleans Levee Dist., 2002 WL 31748618, at *3 (E.D. La. Dec. 5, 2002). In other words, royalties flowing from ownership of property can perhaps be "taken" by a state which refuses to remit such property-linked royalties to a plaintiff, but a state-court damages award that itself becomes property of the plaintiff is not "taken" by a state's temporary failure to make good on the award. See id. at *2 (drawing "crucial" "distinction" between earlier taking *already* "adjudicated in the state courts" and *ongoing* taking of "mineral royalties themselves" alleged before the court).

* * *

42 U.S.C. § 1983 provides a cause of action to parties subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States, but the plaintiffs allege no such deprivation here.

B. Count Two: Declaratory Judgment Claims

That leaves the plaintiffs' second and final cause of action. There, the plaintiffs seek a judicial declaration of the parties' rights and duties with regard to a so-called "'Damages SOP,'[7] specifically created in anticipation" of the kind of damages the plaintiffs suffered as a result of the flood-control construction at issue. See Compl., ¶¶ 69–75.

There is no "*per se* rule requiring a district court to hear a declaratory judgment action"; rather, "the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995); Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 394 (5th Cir. 2003).

Here, there is little reason to – and perhaps abundant reason *not* to – allow the plaintiffs' largely conclusory declaratory judgment allegations to proceed as standalone claims in federal court. In 2017, then-District Judge Engelhardt remanded a previous iteration of this litigation to state court in light of this

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[7] The "Damages SOP" is a claims process established by the SWB and the U.S. Army Corps of Engineers "to identify properties subject to damage as a result of the [] Project [at issue] and to investigate and resolve [related] property damage." See Compl., ¶ 70. In the second count of their complaint, the plaintiffs seek judicial declarations that they are third-party beneficiaries to the Damages SOP and that the SWB's alleged failures to follow through on its commitments thereunder have violated the plaintiffs' contractual and constitutional rights. See id. ¶¶ 72–75.

Court's "limited jurisdiction and in light of the particularly local nature of this dispute with the Sewerage and Water Board." See Sewell v. Sewerage & Water Bd. of New Orleans, 2017 WL 5649595, at *1 (E.D. La. Jan. 5, 2017), *aff'd*, 697 F. App'x 288 (5th Cir. 2017). The plaintiffs' dispute with the SWB is no less local now, and for the reasons discussed at length with regard to the deficient § 1983 claims at the heart of this case, dismissing this action in favor of further state-court proceedings – with state- court judges, state-court judgments, state-resident plaintiffs, and a state-agency defendant – is the best use of this Court's "unique and substantial discretion." Cf. Wilton, 515 U.S. at 286.

* * *

State courts can enforce their own judgments.

Accordingly, IT IS ORDERED: that the defendants' motion to dismiss is GRANTED. The plaintiffs' claims are DISMISSED WITH PREJUDICE.[8]

New Orleans, Louisiana, June 9, 2021

s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[8] The plaintiffs' request for leave to amend their complaint is denied as futile. See, e.g., Stripling v. Jordan Prod. Co., 234 F.3d 863, 872–73 (5th Cir. 2000) ("It is within the district court's discretion to deny a motion to amend if . . . the amended complaint would fail to state a claim upon which relief could be granted." (citations omitted)).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARIYAN, INC., ET AL	CIVIL ACTION NUMBER: 21-534
VERSUS	SECTION: "F" (1)

SEWERAGE & WATER BOARD OF NEW ORLEANS, ET AL

J U D G M E N T

Considering the Court's Order and Reasons granting defendants' Rule 12(b)(6) motion to dismiss, record document no. 22; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Sewerage and Water Board of New Orleans and Ghassan Korban and against plaintiffs. The plaintiffs' claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 9th day of June 2021.

s/ Martin L.C. Feldman
Martin L.C. Feldman
District Court Judge

Case: 21-30335 Document: 00516284628 Page: 1
Date Filed: 04/19/2022

United States Court of Appeals for the Fifth Circuit

No. 21-30335

Ariyan, Incorporated, *doing business as* Discount Corner; M. Langenstein & Sons, Incorporated; Prytania Liquor Store, Incorporated; West Prytania, Incorporated, *doing business as* Prytania Mail Service/Barbara West; British Antiques, L.L.C., Bennet Powell; Arlen Brunson; Kristina Dupre; Brett Dupre; Gail Marie Hatcher; Betty Price; Et Al,

Plaintiffs—Appellants,

versus

Sewerage & Water Board of New Orleans; Ghassan Korban, *In his Capacity as Executive Director of Sewerage & Water Board of New Orleans*,

Defendants—Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
USDC No. 2:21-CV-534

ON PETITION FOR REHEARING EN BANC

Before Barksdale, Stewart, and Dennis, *Circuit Judges*. Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

Appendix F-1

LSA-Const. Art. 12, § 10

§ 10. Suits Against the State

Section 10. **(A) No Immunity in Contract and Tort.** Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

(B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

(C) Limitations; Procedure; Judgments. Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 15-10789
Trial Flight I
Commercial Plaintiffs

Div. "D." Sec.12

ARIYAN, INC., d/b/a DISCOUNT CORNER

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: DEPUTY CLERK

CONSENT JUDGMENT

NOW INTO COURT, jointly come, Plaintiffs, Ariyan, Inc., d/b/a Discount Comer ("Discount Corner"), M. Langenstein & Sons, Inc. ("Langenstein's"), Prytania Liquor Store, Inc. ("Prytania Liquor"), West Prytania, Inc., d/b/a Prytania Mail Service/Barbara H. West ("Prytania Mail"), and British Antiques, L.L.C./Bennett Powell ("British Antiques") (collectively, "the Commercial Plaintiffs"), and Defendant, the Sewerage & Water Board of New Orleans ("SWB"). The following is made a judgment of the Court:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the SWB shall pay the sum of two million one-hundred and twenty-five thousand dollars and no cents ($2,125,000.00) to the Commercial Plaintiffs, which signifies compensation for all claims in the suit, including claims for physical property damages, any other damages, attorneys' fees, and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the SWB shall pay judicial interest on the above-amount from December 18, 2015, until paid.

New Orleans, Louisiana this FEB 27 2018 day of _____ 2018.

Sgd Nakisha Ervin-Knott
Judge, Division "D"
A TRUE COPY

_____
HON. NAKISHA ERVIN-KNOTT
Civil District Court
Parish of Orleans, State of La.

FILED
2018 FEB 26
CIVIL DISTRICT COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 15-10789 Div. "D." Sec.12
Trial Flight I
Commercial Plaintiffs

ARIYAN, INC., d/b/a DISCOUNT CORNER

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS

Approved as-to form and content:
Dated: February 26, 2018

s/

CRAIG MITCHELL (#24565)
MITCHELL &ASSOCIATES, APLC
615 Baronne Street, Suite 300
New Orleans, Louisiana 70113
Telephone: (504) 527-6433
Facsimile: (504) 527-6450

-and-:

ANTHONY J. STEWART (#02128)
SEWERAGE & WATER BOARD OF NEWORLEANS
625 St. Joseph Street, Room 201
New Orleans, LA 70165
Telephone: (504) 585-2236
Facsimile: (504) 585-2426

Attorneys for Defendant, Sewerage & Water Board of New Orleans

Approved as to form and content:
Dated: February 26, 2018

s/

RANDALL A. SMITH, T.A. (#2117)
SARAH LOWMAN (#18311)
TIFFANY DAVIS (#20855)
MARY NELL BENNETT (#32339)
Of
SMITH: & FAWER
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
Facsimile: (504) 525-2205

Attorneys for the Commercial Plaintiffs

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO: 15-4501 DIVISION: D SECTION: 12

ELIZABETH SEWELL, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED:_____ _____
DEPUTY CLERK

RESIDENTIAL TRIAL GROUP A
JUDGMENT

This matter came before the Court for trial on the 12th day of March, 2018.

Present:
Joseph M. Bruno (La. Bar# 3604)
Daniel A. Meyer (La. Bar# 33278)
Alexis A. Butler (La. Bar# 32376)
Michael T. Whitaker (Pro Hac Vice)
Counsel for *Sewell* Plaintiffs

Craig B. Mitchell (La. Bar# 24565)
Chris D. Wilson (La. Bar# 27142)
Joseph B. Morton, III (La. Bar # 19072)
Counsel for Sewerage and Water Board of New Orleans

This Judgment concerns the following group of plaintiffs known as Residential Trial Group A:

Plaintiffs:
George and Beth Deussing -5626 Prytania St.
David Epstein-5617 Prytania St.
Faye Lieder -731 Napoleon Ave.
Thomas Ryan and Judith Jurisich -1106 Napoleon Ave.
Dorothy White -8833 South Claiborne Ave.

In consideration of the law and the evidence, the Court hereby renders the following:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs suffered an inverse condemnation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Sewerage and Water Board of New Orleans ("SWB") is liable for damages owed to plaintiffs under the theory of inverse condemnation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that SWB is the owner of the SELA Project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the SELA Project construction activities caused new damage to, or exacerbated pre-existing damage within, the plaintiffs' properties. The SELA Project caused plaintiffs to suffer a loss of use and enjoyment of their properties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that SWB is strictly liable under La. C.C. art. 667 for ultrahazardous pile driving that occurred at the White residence, 8831-8833 South Claiborne Ave., during Claiborne Phase I. The Court does not find that ultrahazardous activity occurred at any other property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that SWB is strictly liable under La. C.C. arts. 2317 and 2317.1.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that SWB failed to demonstrate that fault should be allocated to a separate entity pursuant to the comparative fault statutes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Court finds that the SELA Project did not cause damage to the foundations of the plaintiffs' homes such that they need replacing or reinforcing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Court does not find that plaintiffs are entitled to relocation damages or damages to cover the cost moving and storing the contents of their homes during repairs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that SWB owes damages to plaintiffs in the following amounts:

1. George and Beth Deussing - 5626 Prytania St.

Property Damage:	$46,660.95

Loss of Use and Loss of Enjoyment:	$19,225.00
Total:	$65,885.95

2. David Epstein - 5617 Prytania St.

Property Damage:	$56,088.05
Loss of Use and Loss of Enjoyment:	$23,887.50
Total:	$79,975.55

3. Faye Lieder - 731 Napoleon Ave.

Property Damage:	$126,048.71
Loss of Use and Loss of Enjoyment:	$38,016.00
Total:	$164,064.71

4. Thomas Ryan and Judith Jurisich - 1106 Napoleon Ave.

Property Damage:	$91,094.55
Loss of Use and Loss of Enjoyment:	$23,751.75
Total:	$114,846.30

5. Dorothy White - 8831-8833 S. Claiborne Ave.

Property Damage:	$65,726.57
Loss of Use and Loss of Enjoyment:	$28,154.00
Total:	$93,880.57

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the above calculations, plaintiffs in Residential Trial Group A are hereby awarded a money judgment against SWB in the amount of FIVE HUNDRED EIGHTEEN THOUSAND, SIX HUNDRED FIFTY-THREE DOLLARS AND EIGHT CENTS ($518,653.08).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to La. C.C.P. art. 1920, La. R.S. § 13:3666, La. R.S. § 13:4533, and La. R.S. § 13:5111, the Court awards reasonable attorney fees to plaintiffs, and SWB is taxed with the costs associated with the prosecution of this matter, all to be determined pursuant to a rule to show cause.

RENDERED, READ AND SIGNED this 25th day of April, 2018, in New Orleans, Louisiana.

S/_____
HONORABLE NAKISHA
ERVIN-KNOTT
JUDGE, CIVIL DISTRICT
COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO: 15-4501 DIVISION: D SECTION: 12

ELIZABETH SEWELL, ET AL.
VERSUS
SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED:_____ DEPUTY CLERK

REASONS FOR JUDGMENT

I. FACTS AND EVIDENCE

A. Background

Homeowners filed suit against the Sewerage and Water Board of New Orleans ("SWB") asserting property and other related damages allegedly caused by the installation of drainage canals in the Uptown and Carrolton neighborhoods of New Orleans.

The installation of the canals form part of the Southeast Louisiana Urban Drainage Program ("SELA"), which consists of several federally sponsored projects aimed at improving the local drainage system. The project at issue consists of seven phases: Claiborne I, Claiborne II, Jefferson I, Jefferson II, Napoleon II, Napoleon III, and Louisiana I (the "SELA Project"). Approximately three hundred homeowners have joined the Sewell lawsuit. The

plaintiffs in the instant matter, referenced as Residential Trial Group A, include five sets of homeowners above the age of seventy: George and Beth Deussing, David Epstein, Faye Lieder, Thomas Ryan and Judith Jurisich, and Dorothy White (hereinafter the "plaintiffs").

Plaintiffs seek to hold SWB liable for damages pursuant to multiple theories of recovery including inverse condemnation, strict liability, and negligence. SWB has denied any and all liability. SWB asserts defenses of comparative fault, denial of negligence and strict liability, and that inverse condemnation is inapplicable. In the event the Court finds SWB liable, SWB asserts plaintiffs' recovery should be limited to just compensation under the Fifth Amendment to the United States Constitution.

SWB has maintained that the project was constructed under the administration of the project's federal sponsor, the United States Army Corps of Engineers ("USACE"), and that USACE and the contractors who performed construction work on the project should be held liable. SWB filed multiple third-party claims against the contractors selected by USACE for the SELA Project. The third-party contractors effectively removed these claims to the United States District Court for the Eastern District of Louisiana. There, the presiding judge dismissed SWB's third-party claims upholding the contractors' defense of government contractor immunity.

1. Contractual Agreements Establishing the SELA Project

In 1997, the Army (referred to in the contracts as the "Government") and SWB entered into a Project Cooperation Agreement ("PCA") for the construction of certain work to improve the interior drainage system and reduce flood-related damage in Orleans Parish.

On January 16, 2009, the Army and the Coastal Protection and Restoration Authority of Louisiana ("CPRA") entered into an agreement called the Project Partnership Agreement ("PPA"). The PPA defines CPRA as the "non-federal sponsor" and identifies the multiple phases of the SELA Project. The PPA outlines the "65/35" cost share arrangement between the Army and the non-federal sponsor. The agreement authorizes the Army to allocate money to fund 65% of the cost of the project and states the non-federal sponsor would share 35% of the cost. Additionally, the PPA provides that the non-federal sponsor would enter into a Cooperative Endeavor Agreement with SWB for the performance of the non-federal sponsor's obligations under the PPA.

Also on January 16, 2009, SWB and CPRA entered into the Cooperate Endeavor Agreement ("CEA"). This agreement would form the basis upon which SWB operated in conjunction with the State of Louisiana and the USACE for the performance of all SELA projects.

The CEA provides in parts:

> WHEREAS, JP (Jefferson Parish] and SWBNO [SWB] have been solely responsible, as between JP and SWBNO

and the Government for any responsibilities and/or obligations undertaken under the PCAs, including the providing of funding, land, easements, and right of way acquisition, and various types of in-kind work for the Project;

WHEREAS, CPRA and JP and SWBNO are entering into this Agreement for the purpose of having CPRA sign the SELA PPA as the Non-Federal Sponsor, as required by the Government, but to continue to recognize JP's and SWBNO's jurisdiction and primary participation **as the non-federal local entities that will be directly partnering with the Government in carrying out the design and construction of the Project and as the entities that will undertake and be responsible for the operation, maintenance, repair, replacement, and rehabilitation of their respective portions of the Project once it or functional portions thereof are completed**;

WHEREAS, **CPRA will in fact delegate in whole or in part its responsibilities of the Non-Federal Sponsor under the SELA PPA to JP and SWBNO**, which responsibilities fall within the respective constitutional and statutory purposes, duties, and authorities of JP and SWBNO, and JP

> and SWBNO desire to accept and perform their respective purposes, duties, authorities, and responsibilities; and
>
> WHEREAS, CPRA, and JP and SWBNO intend for this Agreement to provide for the respective obligations and responsibilities of each party in relationship to each other and in relationship to the Government relative to the obligations and responsibilities assumed under the SELA PPA to be signed between CPRA and the Government ...

IV. Hold Harmless and Indemnify

> . . . .
>
> B. As to those portions of the Project under its authority and jurisdiction and care, custody, and control, SWBNO agrees and obligates itself and its successors and assigns to defend, indemnify, save, protect, and hold harmless CPRA and its successors, officers and employees against any and all claims, demands, suits, actions, judgments, attorney's fees, or costs arising or allegedly arising out of its responsibilities enumerated and undertaken herein, or any violation of Louisiana or Federal law or regulations, or any negligent act, omission, operation,

> or work by SWBNO or its employees, agents, representatives, or contractors, except for damages due to the fault or negligence of CPRA, its employees, or its contractors.
>
> C. To the extent required by CPRA as the Non-Federal Sponsor under the SELA PPA, JP and/or SWBNO shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

(Emphasis added). These agreements show that CPRA executed the PPA as the non-federal sponsor for and on behalf of SWB so SWB could assume all of CPRA's contractual responsibilities and obligations in order to execute the SELA Project. Moreover, the agreements show that SWB would indemnify CPRA and the Government from damages arising out of the construction of the project, excluding damages due to negligence of the CPRA, and the Government or its contractors.

2. <u>The SELA Project: USACE and SWB Roles and Responsibilities</u>

SWB and USACE shared a number of responsibilities with regard to the design and execution of the SELA Project. Deposition transcripts and testimony from representatives of USACE and

SWB were admitted into evidence. SWB was responsible for the conceptual designs of the different phases of the SELA Project. John Fogarty Deposition 42, Aug. 10, 2016. SWB retained consultants, known as designers of record, who developed all of the plans for the project. *Id*. SWB maintained a Network and Drainage Engineering Department that acted as the department lead for SELA. Melvin Spooner Deposition 58, Nov. 7, 2017. The consultants who designed the SELA projects reported to the department head of the Network and Drainage Engineering Department. *Id*. at 58-59. SWB had the ability to make recommendations to the design consultants. *Id*. at 62. During the preliminary design stages, USACE goes through a review process of the plans and specifications and provides comments back to SWB's designers of record. Fogarty Dep. 42-43, Aug. 11, 2016.

SWB employed a SELA Project manager who was responsible for the oversight of the engineering firms and was there to resolve or take appropriate measures. *Id*. SWB coordinated with USACE on the actual construction of the project and reviewed the progress of the project. Fogarty Dep. 1317, Aug. 15, 2016. USACE performed daily inspections to ensure that contractors built the box culverts in accordance with the plans and specs. *Id*. at 66. At times, SWB and USACE performed walk-throughs together. *Id*. SWB had review and acceptance authority over aspects of the SELA Project construction. Spooner Dep. 59.

In certain instances, SWB performed construction work. Fogarty Dep. 254, Aug. 10, 2016. SWB performed an emergency valve repair, sewer main

replacement, and parking lane repair. *Id*. at 254-255. SWB provided access to the lands, easements, and rights-of-way to build the drainage system. Spooner Dep. 88. SWB tied in the SELA drainage system with the existing drainage system. *Id*. at 89. At times, SWB coordinated with the contractors to relocate or install new water mains. Fogarty Dep. 722, Aug. 12, 2016.

SWB did not select contractors for the work. *Id*. at 259. USACE was responsible for the award and the administration of the construction contracts. *Id*. SWB could not directly instruct the contractors to do something but had to go through USACE because USACE had the contract with the contractors. *Id*. at 261. USACE required contractors to submit a Quality Control Plan. *Id.* at 960. SWB was not involved in drafting the contractor's quality control plans. *Id*. at. 958.

SWB hired a forensic contractor, Leonard Quick of Quick and Associates, to perform pre-construction inspections of the properties and to install piezometers and inclinometers.[1] Fogarty Dep. 168, Aug. 10, 2016; Spooner Dep. 56. SWB maintained a SELA Project Hotline whereby complaints were logged with the SWB. Fogarty Dep. 270, Aug. 10, 2016. SWB received the complaints through their consulting firm and then passed along the complaints to the project manager for USACE who would act on the complaints. *Id*. Additionally, USACE maintained its own separate hotline. *Id*. at 272.

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[1] A piezometer measures groundwater. An inclinometer measures incline.

3. Anticipated Consequences of the SELA Project: Vibrations and Adverse Effects

Prior to the start of construction, SWB and USACE were aware that vibrations were a concern. Spooner Dep. 52; Fogarty Dep. 1125-1126, Aug. 15, 2016. USACE anticipated there would be vibrations due to pile driving, the operating of heavy equipment, excavations, and other construction activity. Fogarty Dep. 108, Aug. 10, 2016.

A SELA Brochure, made available on the SELA website and to patrons at SWB's public meetings, acknowledges the potential for impacts to the surrounding areas due to SELA Project construction. Pls.' Ex. P-19. The Brochure explains that noise and vibrations from moving and operating heavy construction equipment could have an impact on structures located within close proximity to the Zone of Impact ("ZOI").[2] Id. The Brochure explains that scientific research has established the most significant factor to best indicate the potential for damage is peak particle velocity ("PPV"), which is measured in inches per second ("ips"). *Id.* The Brochure states that a limit of 0.25 ips PPV is "very conservative." *Id.*

In April of 2010, SWB signed a Programmatic Agreement ("PA"). The PA recognized that SELA Project construction posed a risk of adverse effects to

[2] "The construction ZOI is defined is defined as the area in which it is more likely than not that damages will occur. Based on scientific data obtained to date, the ZOI's outer boundary is at the line formed upon the surface at a forty-five (45) degree angle from the bottom tip depth of driven sheet pile." Pls.' Ex. P-19.

properties located in the Uptown and Carrolton neighborhoods. Pls.' Ex. P-5. The PA mapped out structures within the Area of Potential Effects ("APE") that were susceptible to indeterminate damage as a consequence of construction vibrations. *Id*. Additionally, the PA mapped out areas within the Construction Impact Zone ("CIZ") where the potential existed for soil vibration associated with project-related activities. *Id*. The PA provided that USACE would require contractors to perform work within a manner limiting vibrations at the structure nearest to the site of construction activity to a maximum of 0.25 inches per second. *Id*.

During construction, vibration monitoring was accomplished by a monitor hired by the USACE. Fogarty Dep. 110, Aug. 10, 2016. The contracts required contractor's operations to remain under the .25 inches per second particle velocity as detected by vibration monitoring. *Id*. at 110. If a vibration exceeded .25 ips PPV, the vibration monitor was instructed to report it to the USACE inspector, and the USACE inspector was to report it to the contractor. *Id*. at 116.

As illustrated by the deposition testimony, the PA, and the SELA Brochure, SWB and USACE anticipated adverse consequences due to construction related vibrations.

B. Fact Witnesses

1. Plaintiff: George Deussing

Dr. George Deussing is a seventy-one year old retired pediatric dentist who resides at and owns the property located at 5626 Prytania St. with his wife Beth Deussing. Dr. Deussing and his wife purchased the property in 2012. As he was retiring, Dr. Deussing testified that he and his wife wanted to relocate to New Orleans to be closer to their two daughters.

After the purchase, the couple hired a home construction company, Guillot Building, to perform a complete renovation. The couple spent just under $560,000.00 on the renovation. The only thing that was not renovated, according to Dr. Deussing, was the electrical system. Dr. Deussing stated he was satisfied with the renovation and there were no defects in the home.

Dr. Deussing testified that the construction activities caused cracks to appear that were not present at the conclusion of the renovation. He testified that the crown molding began separating from the base boards and cracks appeared in the crown molding, among other damages.

Both roads bordering his property, Prytania St. and Arabella St., were tom up for construction activities. He testified there was no room for a personal vehicle. He stated they lived at “ground-zero” and there was always pounding of some nature occurring outside of the home. He complained that he constantly heard a generator, and he and Mrs. Deussing sometimes had to take sleep medication in order to fall asleep. He described hearing a “clacking”' sound on regular basis and often times smelled diesel fumes emitting from the construction equipment. Dr.

Deussing declared he and his wife spent three years next to a "demo derby"' and the project was beyond an annoyance. He testified that when they moved to the neighborhood they looked forward to being social with the new neighbors; however, after construction began, they did not want to socialize. Dr. Deussing testified they now wish to sell their Prytania St. home.

2. Plaintiff: David Epstein

David Epstein is seventy-five years old and owns and lives at the property located at 5617 Prytania St. When he purchased the property in 1978, it was a double. He later converted the property into a single family unit. He stated he has never performed foundation work on the home. In 2011, he performed a renovation where he put in a new kitchen, stripped the floors, and replaced the molding. Prior to the SELA construction, Mr. Epstein testified his home was in "'pristine" condition. He admitted that there were cracks in the mortar but not in the bricks of the foundation. Other than hairline cracks, Mr. Epstein testified no major work needed to be done.

According to Mr. Epstein, the construction began in February of 2014, when workers began to operate jackhammers outside his home. Mr. Epstein testified that the construction activities caused cracks to form along the sheet rock, along the baseboards and in the molding. He claimed the construction work caused his kitchen cabinets to fall off of the wall.

Mr. Epstein testified his porch sat eighteen feet from the construction site. He constantly felt vibrations. He testified that workers were active every

day from early morning until 4:00 P.M. He complained that at times he could not work from home, as a day trader, because the noise was too loud. The SELA Project caused Mr. Epstein to stop entertaining guest as much as he preferred. He was unable to get to his property by car and could not access his driveway during construction. He further testified that SWB held public meetings but they became a joke because nothing SWB said ever came true. Mr. Epstein testified that the SELA Project was the second worst thing to happen to him next to losing his son.

3. Plaintiff: Faye Lieder

Faye Lieder is seventy-six years old and lives and owns the three-story home located at 731 Napoleon Ave. Ms. Lieder testified when she acquired the property, in 1973, it was in terrible condition. She testified she spent $300,000.00 on renovations. Prior to construction, she testified that there were "hairline" cracks in some rooms, but there was zero damage to the plaster work. She claimed that the construction work caused cracks to open up and the natural plaster started to fall. Even though she recently refurbished the front porch and porch columns, she contended that the construction work caused the porch steps to separate from the buttresses and the porch to separate from the home. Ms. Lieder further stated that cracks formed around her three fireplaces.

Ms. Lieder complained that construction caused “constant dust everywhere.” She testified to hearing constant noise. She complained no one could come over to visit. She recalled that trucks and backhoes

were outside her home all day and blocked access to her driveway.

In June of 2016, Ms. Lieder made a Hotline Complaint to report that a backhoe was pounding metal sheeting into the ground and causing her home to shake. Pls.' Ex. P-11. Additionally, she reported that there was no vibration monitor on site. *Id.*

4. Plaintiff: Thomas Ryan

Thomas Ryan is seventy-one years old and lives at 1106 Napoleon Ave. with his wife, Judith Jurisich, who co-owns the property. Prior to SELA, Mr. Ryan said his home was in "good" condition. He admitted there were minor cracks in the home but no major work needed to be done. He recalled there being small cracks within certain piers. Mr. Ryan stated his property did not suffer Hurricane Katrina related damage but he did replace the shingles after the storm. He renovated the kitchen right before SELA construction began. He further testified he performed shoring work under the kitchen and both bathrooms. He admitted that no foundation reinforcement was done as part of a renovation but he did clarify that he had the foundation checked and the piers repointed. Mr. Ryan stated construction began in June of 2014.

Mr. Ryan complained that he witnessed backhoes tear up the street and break up concrete and both activities caused his home to shake, shift, and jump. He said that his porch started pulling away from his home. He testified that on a normal day, construction crews worked from 6:00 A.M. or 7:00 A.M. until 3:00 P.M.

In December of 2014, Mr. Ryan placed multiple calls to the Hotline and complained that cracks began appearing inside his home, activities caused his home to shake violently, and he did not see a vibration monitor on site. Pls.' Ex. P-6, P-7, and P-8.

Mr. Ryan testified that construction related vibrations from the construction caused stucco on brick piers to fall off and caused cracks in the bricks to open up. Each room in his home, Mr. Ryan declared, incurred some type of damage and the cracks and damages worsened overtime.

He complained of a tremendous amount of dust and noise and stated that his porch was unusable for the duration of construction. Mr. Ryan and his wife had to park on side streets and could not park in front of their property. Construction workers, Mr. Ryan stated, exacerbated the problem by taking up parking spots with their construction trucks. Mr. Ryan recalled that construction ended around Mardi Gras in 2017.

5. Plaintiff: Dorothy White

Dorothy White is eighty-five years old and lives at the property located at 8831-8833 South Claiborne Ave. (hereafter referred to as "8833 S. Claiborne Ave."), which she owned with her husband Donald White, who sadly passed away last December.

She and Mr. White purchased the home in 1969. She testified her husband did a good bit of renovation after moving in. Her property suffered damage from

Hurricane Katrina. After the storm her husband tore out the walls and put up sheetrock.

As to physical damage, Ms. White stated that the construction caused cracks to appear in the floor, cracks in the wall and down the window sill. Additionally, she said her hardwood floors "opened up." Ms. White claimed she could not rest during the day and could not rest at night. She too complained about the noise. She would hear piles being driven down into the ground and the pounding down of "tin" sheets. She stated the machines would shake her out of bed and she felt her whole home shift. She complained about the amount of dust, explaining she had to clean her property constantly.

Ms. White testified the SELA Project was right in front of her home. She further testified that access to her home was blocked off and she had to park blocks away from her property and walk with grocery bags. Ms. White testified the construction ended in 2017.

6. Brenda Lackings

Brenda Lackings is not a plaintiff in this case; however, she testified to the condition of Ms. White's neighborhood during construction. Ms. Lackings lives at 8817 South Claiborne Ave. and operates a daycare business nearby. She is friends with Ms. White.

Ms. Lackings testified that before SELA the neighborhood was wonderful and peaceful. She testified that SELA construction began in 2011, which is the time she noticed workers bringing in equipment and materials. Ms. Lackings captured two videos that

were presented during trial. The videos showed large construction machines operating outside of the White property and noises and disturbances during a "typical day" of construction.

She complained of noise in addition to dust and dirt. At times, Ms. Lackings stated she could barely see from one end of the street to the other due to the dust. She witnessed vibration monitoring but at one time she had to wake a worker up who had fallen asleep while he was supposed to be monitoring. When asked about the overall effect of construction on the neighborhood she testified that it was "horrific" and she felt like she and her neighbors were "sacrificial lambs."

7. Donald White

Donald White did not testify at trial but his deposition transcript from November 3, 2017, was admitted into evidence. Mr. White indicated, as to shoring, that around the time that he bought the property, in 1969, he performed work on the foundation, but only on one side of the home. Additionally, Mr. White did subsequent foundation work ten to twelve years ago. Mr. White reported that his home suffered roof damage, flooding, and mildew damage from Hurricane Katrina. He completely renovated the home after Katrina by putting in sheetrock walls, a new roof, and eventually new windows.

Mr. White recalled during construction that he saw pile driving and "big iron track Caterpillars" that appeared to run "a hundred miles an hour." He stated

he could not park at his property and had to park around the comer and on the sidewalk. Mr. White attested the construction caused nervous problems. He reported plumbing issues, cracks in the walls, and unlevel windows. When asked about pre-existing cracks, Mr. White stated, "We had a few minor cracks. Now we have a bunch of major cracks."

When asked why he believed such damages were caused by the construction projects, Mr. White responded, "Because there was no damage before the construction projects, and all that vibration, that's my reason for believing it and knowing that it was caused by the construction."

C. Expert Testimony-General Findings on Causation

1. Plaintiffs' Expert: Dr. Rune Storesund

Plaintiffs called Dr. Storesund to testify on whether the SELA construction activities caused plaintiffs' alleged damages. Dr. Storesund is a licensed civil engineer in multiple states including Louisiana, California, Hawaii, and Washington. He has seventeen years of experience as a civil engineer. He is also a licensed geotechnical engineer in California with twelve years of forensic engineer experience in the areas of geotechnical, water resource, and environmental engineering. He has a Doctorate of Engineering in Civil Systems and a Masters in Geotechnical Engineering from the University of California, Berkeley. Dr. Storesund was admitted as an expert in forensic geotechnical engineering.

Dr. Storesund testified to two opinions that applied to all five properties. First, he found that the SELA construction activities were a "substantial factor of harm" to all subject properties. He relied on pre-construction and post-construction photos, Hotline Complaints, contractual agreements pertaining to the SELA Project, vibration monitoring reports, maps, project specs, and other pieces of data. Dr. Storesund testified that the .25 PPV threshold was exceeded on several occasions during all project phases. The SELA construction, he concluded, was the "but for" cause of physical damage to the subject properties.

2. Plaintiffs' Expert: Frederick Gurtler

Frederick Gurtler ("F. Gurtler") is a licensed civil engineer and a licensed home inspector specializing in residential properties. He and his brother, Michael Gurtler, operate Gurtler Bros. Consulting, Inc. ("Gurtler Bros."), a licensed Louisiana engineering company. F. Gurtler claimed to have inspected five to seven thousand properties in the Uptown area. He was admitted as an expert in civil engineering, field structural integrity, vibration analysis, and distress in residential structures.

Similar to Dr. Storesund, Mr. Gurtler opined that all five homes exhibited ground vibration distress. Mr. Gurtler was struck by the "'widespread cracking" common to all five properties. He compared the subject properties to thousands of properties he has inspected in different area codes throughout New Orleans. While discussing ground vibrations, F.

Gurtler opined that 0.12 PPV, not 0.25 PPV, would be the appropriate threshold for the subject properties because they are historic. F. Gurtler found that considering the "commonality"' of damages not present in homes not along the SELA Project, the SELA construction was a "substantial cause" of the damage to the properties and the "but for"' cause of the damage.

3. Plaintiffs' Expert: Michael Gurtler

Michael Gurtler ("M. Gurtler") of Gurtler Bros. is a licensed general contractor. He has testified in two dozen or more cases and in hundreds of depositions on issues including engineering, construction management, moisture management, and wind versus flood damage. M. Gurtler was admitted as an expert in home building and general contractor inspection.

M. Gurtler visited the subject properties multiple times and took over a thousand photographs for his engagement. M. Gurtler did not rely on vibration monitoring, but said it was possible that every exceedance over .25 PPV could cause damage. When comparing the subject properties to the "body of evidence" – thousands of homes without comparable damages – M. Gurtler opined that SELA was the cause of the alleged damages. M. Gurtler noted that the properties in the present action differ from the other properties he has inspected because they show "block after block after block" of similar damage.

4. Defendant's Expert: Dr. David W. Sykora

SWB called Dr. David Sykora to opine on whether the SELA Project caused the alleged property damages. Dr. Sykora is a licensed professional engineer in Louisiana. He earned his Masters in Geotechnical Engineering and his Doctorate in Civil Engineering from the University of Texas. Dr. Sykora works for Exponent, an engineering and scientific consulting finn that specializes in analyzing accidents and failures. The Court accepted Dr. Sykora as an expert in geotechnical engineering.

Dr. Sykora testified that all of the properties have significant age to them. He declared that no ultrahazardous activity – blasting or pile driving – occurred at Jefferson II or Napoleon III, but testified that pile driving occurred at Claiborne I. Dr. Sykora concluded there was no structural or foundational damage to any of the properties. Moreover, he found that there was no architectural or cosmetic damage to the Deussing, Epstein, and Lieder properties. He did, however, find that the Ryan and White properties suffered some cosmetic damage on account of the SELA Project. In explaining his findings, Dr. Sykora stated he considered the age of the homes (one hundred years or more), the conditions the homes experienced over their lifespan, the "soft clay" soils on which the homes rest, and the fact that each beam and pier of the foundation performs differently.

5. Defendant's Expert: Dr. James R. Bailey

Dr. James Bailey is a licensed professional engineer who has been practicing for thirty-six years. Like Dr. Sykora, he works for Exponent. Dr. Bailey received his Masters in Civil Engineering and his

Doctorate in Civil Engineering from Texas Tech University. His primary area of expertise is with structures, failures, and property damage related claims. Dr. Bailey was admitted as an expert in structural engineering.

Dr. Bailey explained that structural engineering is a field where science and physics are applied to understand load carrying ability. Dr. Bailey testified that renovations can have an impact on loads within a building. He stated that wood frame structures, like the homes at issue, are inherently flexible. When evaluating the properties, Dr. Bailey stated Exponent looked at the homes inside and out to determine the causes of stress, performed laser levels, and floor surveys. He did not agree that commonalities existed between the homes noting that each property was unique in terms of design, soil, age, and experience with different loads.

Dr. Bailey concluded that the foundations of all five properties were sound. He opined there was no SELA related damage done to the Deussing, Epstein, and Lieder homes. He concluded there was "exacerbation" to the White and Ryan properties as a result of the SELA Project construction activities.

D. The SELA Project Phases and Property Specific Evidence

1. Deussing - 5626 Prytania St.

The Deussing property was affected by Jefferson Phase II (SELA (22)). The selected contractor was Cajun Constructors. Pls.' Ex. P-28. The general

construction activities that took place on Jefferson Phase II consisted of jet grouting,[3] excavation for the drainage culvert (installation of bracing and removal of soil with dump trucks), and culvert backfilling (rebar installation and pouring of concrete). *Id*. Water mains were relocated, catch basins and drain lines were installed, sewer mains replaced, and roadways had to be tom up and restored. Fogarty Dep. 1142-1143, Aug. 15, 2016. Dr. Storesund found the purported ZOI could not be validated due to a lack of data, but based on the depth of jet grout columns, the Deussing property fell within the ZOI. Pls.' Ex. P-28. Moreover, he found that based on the vibration monitoring reports for SELA 22, vibration levels exceeded the .25 PPV threshold on 44% of the days of construction. *Id*.

There are no pre-construction photographs or videos available for the Deussing property. M. Gurtler testified that the wood flooring developed separations, a gap developed in the walkway, and a slope developed in the home, among other damages. F. Gurtler testified the Deussing property, being one of the properties with a chimney, showed signs of vibration

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[3] Jet grouting essentially replaces the requirement of driving timber piles to support the foundation for a box culvert. Fogarty Dep. 719, Aug. 12, 2016. The jet grout operation involves a soil mixing type operation with a cement slurry that blends with the soils in the ground below the box culvert foundation. *Id*. The jet grout subcontractor augers a hole into the ground, blends a slurry of cement and soil together, makes a circular column, and starting at the invert depth of that column, works up towards the bottom of the box culvert. *Id*. Once a column is filled, the subcontractor moves over and continues the operation for one-hundred percent coverage underneath the box culvert foundation. *Id*. at 719-720.

distress at the fireplace in the form of a vertical crack. Contrastingly, Dr. Bailey explained that since chimneys carry highly concentrated loads, cracks at fireplaces are common and not necessarily tied to the SELA Project. Dr. Bailey found that by adding walls, closets, and doorways during the renovation, these renovations affected the loads on the foundation. Dr. Sykora testified that he would have expected the stucco, a brittle material, in the foundation, to have cracked if the property suffered construction related damages.

2. Epstein - 5617 Prytania St.

The Epstein property was affected by Jefferson Phase II (SELA (22)). As stated above, the general construction activities that took place on Jefferson Phase II consisted of jet grouting, excavation for the drainage culvert, culvert backfilling, water main replacement, and road destruction and restoration. Pls.' Ex. P-28. Dr. Storesund found that the property fell within the ZOI. *Id*. Construction related vibrations from Jefferson Phase II exceeded the .25 PPV threshold numerous times.

Defendants presented preconstruction photographs dated April 2, 2013, and a pre-construction video dated April 22, 2013. The photographs depict a noticeable horizontal crack running across the railing on the front porch as well as a "stair-step" crack in the front porch foundation. Additionally, the photographs show cracks in the mortar (piers) and a vertical crack beneath a window. The video shows cracks in the ceiling, the den walls, and in various rooms of the home.

F. Gurtler and M. Gurtler testified that the SELA Project caused new damages or exacerbated pre-existing damages inside the home, at the foundation, and outside of the home, at the front porch and gate. M. Gurtler opined the SELA Project caused the kitchen cabinets to fall off the wall. Additionally, M. Gurtler noted that at one pier in the foundation, the home was resting on half of a brick. M. Gurtler further testified that cracks within the home were not consistent with normal settlement because they were not at a forty-five degree angle. He found the cracks were attributable to construction activities.

Dr. Sykora testified that cracks in mortar are common. Moreover, Dr. Sykora claimed that damages allegedly occurring further away from the construction site, such as in the back deck, were not related to the SELA Project. Dr. Bailey testified that the video shows cracks along the molding and those cracks were not caused by the construction activities.

3. Lieder - 731 Napoleon Ave.

The Lieder property was affected by Napoleon Phase III (SELA (23a)). The construction work was performed by Boh Bros. Construction Co., LLC ("Boh Bros."). The general construction activities that took place on Napoleon Phase III consisted of excavation and installation of a temporary retaining system ("TRS") and jet grout column installation. Pls.' Ex. P-28. Dr. Storesund found, however, that the Lieder property was not located next to an excavation area but was adjacent to a "soilcrete" test column area, which would later become a staging and laydown area.

Id. Dr. Storesund further found that due to a lack of documentation, the purported zone of influence could not be validated. *Id*.

The "pre-construction" photos are dated October 1, 2014. The photographs show cracking and separation of the steps on the front porch. The photos also show a crack above decorative plaster on the walls in one of the rooms on the first floor. The photographs show cracking and separation of the steps on the front porch. The photos also show a crack above decorative plaster on the walls in one of the rooms on the first floor. Ms. Lieder testified that by the time these photos were taken, construction had started and heavy damage had already been done. Dr. Storesund testified that in April of 2014, six months before the alleged pre-construction photos were taken, workers installed jet grout test columns.

Dr. Storesund testified that there were numerous exceedances of the .25 PPV threshold on Napoleon III. On cross-examination, however, Dr. Storesund admitted no vibrations were recorded directly in front of the Lieder property. Rather, Dr. Storesund testified the closest vibration readings were collected across Napoleon Ave., about 100 feet away. Even so, Dr. Storesund opined the disparity of vibration data evidences "underreporting," suggesting there were exceedances that went unaccounted, and there were locations that should have been monitored but were not.

Regarding the front porch, Dr. Bailey testified that a porch is a much heavier load and it was not surprising to see settlement there. Dr. Sykora opined,

after looking at the photos, the construction activity, the level data, and considering the age of the cracks, that the damages were not caused by SELA.

4. Ryan/Jurisich - 1106 Napoleon Ave.

The Ryan property was affected by Napoleon Phase III (SELA (23a)) As explained above, the general construction activities that took place on Napoleon Phase III consisted of excavation, installation of the TRS, jet grout column foundation installation, installation of the culvert, replacement of dirt and sod, and road repair. Pls.' Ex. P-28. Dr. Storesund found that due to a lack of documentation, the purported zone of influence could not be validated.

The "pre-construction" photographs are dated October 21, 2014. Mr. Ryan testified that the photos were not taken prior to construction because crews started working months earlier, in June of 2014. F. Gurtler admitted that cracks in sheetrock may be attributable to the age of a home. Dr. Bailey testified that inside the home, he noted that a crack behind a bookcase, which was reported as damage in 2017, was the same one that existed in 2014.

Dr. Sykora did not find any .25 PPV exceedances at the Ryan property. Even so, Dr. Sykora agreed that some damage was attributable to the SELA Project. The Exponent experts testified that near a fireplace, an adjacent wall showed some cracking that was not recorded prior to SELA. Therefore, Exponent concluded that there was exacerbation to the Ryan property from SELA.

5. White - 8833 S. Claiborne Ave.

The White property was affected by Claiborne Phase I (SELA (24)). The selected contractor was Cajun Constructors. The general construction activities that took place during Claiborne Phase I consisted of the installation of test piles, removal of test piles, installation of foundation piles, sheet pile installation, excavation, backfill and compaction, and sheet pile removal. Pls.' Ex. P-28. Dr. Storesund found that in 2012, five timber piles were installed immediately across from 8833 S. Claiborne Ave., and workers installed additional piles adjacent to the property between 2012 and 2014. *Id*. Work crews utilized large cranes ranging in weight from 50-60 tons to drive the piles. *Id*. Dr. Storesund found that timber piles extended to a typical depth of 71 feet at the subject property and as such, the property fell within the ZOI.

Pre-construction photographs of the White property were taken on January 3, January 5, and January 6, of 2012. Dr. Sykora commented that the photographs show cracks in the brick and mortar on the front porch foundation, a horizontal crack above a door frame, and vertical cracks in the kitchen, among others damages. Dr. Bailey testified that the condition of the front porch appeared the same in 2017 when compared to the photographs from 2012.

M. Gurtler opined that chimney cracking at the White property was related to and caused by the effects of construction. M. Gurtler discussed "foundation shifting" and observed the "separation of joints." He noted cracking on the walls adjacent to the

chimney and within the chimney, wall to ceiling separations, and differential movement of piers. M. Gurtler found that the front porch would need to be scrapped and a new porch built.

When asked about the back addition to the home, which slopes down, Dr. Bailey testified that the workers should have added another pier and the workers simply failed to provide enough support. Dr. Bailey declared that vibrations could not have caused the tilt to the back addition. Dr. Sykora testified that dewatering occurred at the White property. Dr. Sykora believed that the White property experienced shaking and damage from SELA.

II. CAUSATION AND CAUSES OF ACTION

A. SELA Project Caused Damage to Plaintiffs, Properties or Exacerbated Pre-Existing Damages

It is impossible for this Court to perform a crack-by-crack analysis in order to determine precisely which cracks existed prior to or formed as a consequence of SELA construction. In some instances, such as at the Epstein property, pre-construction photos offer better evidence of pre-existing conditions. In most instances, however, there were either no pre-construction photographs at all or there was a delay between the start of the project and the date when pre-construction photographs were purportedly taken.

The evidence shows that once construction began, all of the subject properties experienced vibrations

due to construction activity. This activity included timber pile driving, excavation, sheet pile insertion, soil testing, jet grouting, backfill paving, among other activities. These acts required the use of backhoes, jackhammers, sky-scraping 60-ton cranes, and the constant loading and movement of dump trucks. All of this created constant noise, dust, dirt, blocked access, and what felt like a never-ending nuisance for all of the homeowners. The plaintiffs were misled into thinking the project would take several months when in reality it lasted from two to five years.

The Court finds the fact witnesses to be very credible. All fact witnesses had first-hand knowledge of the condition of their homes before and after construction. They experienced the disturbances first-hand by electing to remain in their homes during the project. All plaintiffs complained that they could feel their homes shake or jump due to vibrations emitted from the construction activities. Though the extent of damage varied property-to-property, the evidence shows a consistency and commonality of damage shared by all. All homes displayed cracks in the molding, separations between walls and ceilings, and, where applicable, gaps adjacent to chimneys and porches. Gurtler Bros. was struck by the "widespread cracking" throughout the homes. Moreover, they pointed out that the commonality of damages was distinct from thousands of properties they inspected in areas away from the SELA Project.

Just as it is impossible for this Court to perform a crack-by-crack analysis, it is impossible for the Court to perform a vibration-by-vibration analysis. The vibration monitoring evidence presented by plaintiffs

did not tie a specific activity or spike to a specific damage. The only way to determine what act caused what damage, M. Gurtler explained, would be to monitor each property every day. M. Gurtler noted, however, this would be very difficult.

Dr. Storesund plotted vibration activity for all three phases where exceedances of the .25 PPV threshold occurred. These plots show that the .25 PPV threshold was exceeded numerous times on an almost daily basis. Dr. Storesund admitted on cross that the data points did not identify the exact location of the occurrences. SWB attempted to show that this data was unreliable. SWB's expert, Dr. Sykora, even opined that he believed analysis of the vibration logs would be a "misapplication of science." Importantly, however, the Court agrees with the plaintiffs' experts that the disparity of vibration data, and lack of monitoring locations, shows "underreporting." Dr. Storesund opined that a number of vibration exceedances occurred that went unreported. This Court agrees. Such underreporting, or rather, absence of reporting, was evident with other pieces of data as well.

SWB hired a forensic contractor, Quick and Associates, and paid it hundreds of thousands of dollars to collect piezometer and inclinometer data for purposes of claims resolution. Interestingly, though, when it became time to resolve claims (this lawsuit), SWB was unable to produce piezometer and inclinometer readings. This information, Dr. Storesund opined, could have provided the experts with valuable data about the soil conditions before, during, and after the SELA Project. SWB's failure to

present this data shows disorganization on behalf of SWB and the Court questions how SWB could have paid so much money for data only to never use it.

SWB's experts, Exponent, admitted that two of the properties incurred SELA related damages. The Court finds some of Exponent's findings to be reliable, namely with regard to the strength and integrity of the foundations. The evidence, however, simply does not support Exponent's conclusions that three of the properties incurred no damage related to SELA.

Dr. Deussing testified that he spent approximately $560,000.00 on a renovation. The property was renovated to excellent condition. Importantly, the renovation was completed just months before the project began. Shortly after construction started, Dr. Deussing testified that cracks began to form in the crown molding and the baseboards began separating. The only significant activity that took place following the renovation was the SELA Project.

The facts show that Mr. Epstein's property experienced vibrations from large scale construction activities at close proximity. Mr. Epstein's front porch rested eighteen feet from the construction site. Prytania St. was completely excavated and a TRS was put in place for the jet grouting operation and installation of the box culvert. Dr. Storesund's vibration logs show that vibrations recorded on Jefferson Phase II exceeded the .25 PPV threshold 44% of the time.

Pre-construction photographs, and a video, show a number of pre-existing damages at the Epstein home. There were, however, a number of damages reported by Mr. Epstein and Gurtler Bros. that were not depicted in the pre-construction footage. For example, M. Gurtler and Mr. Epstein testified that the SELA Project construction activities caused Mr. Epstein's cabinets to fall from the wall. Given the recency of Mr. Epstein's kitchen renovation, the Court finds the kitchen cabinets would not have fallen off the wall but for the SELA Project and related vibrations.

Both Ms. Lieder and Mr. Ryan objected to the assertion that someone took pre-construction photographs at their homes. SWB argues it is unreasonable for the homeowners to claim that damages to their homes occurred in the months prior to when the photographs were taken because no major construction activity had taken place yet. As previously stated, the Court finds the testimony of Ms. Lieder and Mr. Ryan credible. The evidence shows that both properties experienced vibrations, dust, and noise from construction related activity. Even though Ms. Lieder's property was not adjacent to an excavation site, the Court finds that the staging, soil testing, and movement of heavy equipment outside of her property emitted vibrations that caused damage to her home.

Mr. Ryan's property was adjacent to an excavation site where the road was broken up and pieces of concrete were hauled off in dump trucks. Workers operated large multi-ton cranes for installation of the TRS system and the jet grouting. The Court finds that these activities emitted

vibrations that exacerbated pre-existing or created new damages at the Ryan property. SWB's experts acknowledged one instance of SELA related damages at the Ryan property, but the Court finds that SELA caused more damages than those reported by SWB's experts.

The White property experienced the most vibration producing activity for the longest period of time. The evidence shows that construction activities began in 2011 and concluded in 2016. The White property was adjacent to where timber pile driving occurred, an activity that is ultrahazardous and known to emit vibrations that can cause physical damage. The Court finds that there were pre-construction photographs for the White home, but these photographs do not show all of the asserted damages. The Court finds that SELA was not the cause of the slope in the back addition of the home. The experts agreed that this addition was not properly supported by the installers. The evidence does show, however, cracked walls and separations in all rooms of the home, within the exterior, and within the front porch. The Court finds that some of these cracks were pre-existing, but based on the evidence presented by Gurtler Bros. and Dr. Storesund, the construction activities, which were ultrahazardous and lasted up to five years long, caused physical damage to the White home.

For these reasons, and ,pursuant to the findings of fact and evidence stated above, the Court finds that the SELA Project caused new or exacerbated pre-existing damage at all of the subject properties. As it relates to the foundations of the homes, however, the

Court finds the evidence supports the opinions of SWB's experts that the foundations of the homes were structurally sound and as such, do not need repair or reinforcement.

B. Plaintiffs' Causes of Action

1. Control and Ownership of the SELA Project

SWB has consistently argued that it is not the owner of the SELA Project. The USACE, SWB argues, is the administrator of the SELA projects and assumes full and complete control the SELA Project in this case. SWB claims it did not perform any construction activities and did not select the contractors, subcontractors, or equipment for the work. Thus, SWB maintains it did not have the care, custody or control of the SELA Project.

SWB made identical arguments in the *Holzenthal* case. There, the Fourth Circuit addressed SWB's position: "underlying all of SWB's arguments with respect to liability is its repeated assertion ... that the [SELA Project] is not SWB's project because the construction was directly supervised by entities other than SWB. It asserts it was merely a "local sponsor" of the project and that it contracted away to third parties any responsibility it otherwise would have had for damages." *Holzenthal*, 950 So.2d at 61. The *Holzenthal* Court agreed with the trial court's ruling and rejected SWB's argument finding SWB could not and did not contract away the duties it owed the plaintiffs. *Id*.

In so finding, the appellate court reviewed a cooperation-agreement between [the Army Corps of Engineers] and SWB noting: (1) the project was connected to SWB's infrastructure and existed as SWB's property on SWB servitudes and easements; (2) SWB had the final right of approval over the contractors' activities; (3) a project coordination team was made up of representatives from the government and SWB to oversee the project; (4) SWB's requirement to contribute 25% to 50% of the total project costs; and (5) SWB was required to hold and save USACE free from project damages, among others reasons. *Id*. at 67-68.

All of these same facts exist in the present matter. The SELA Project is owned and maintained by SWB. Spooner Dep. 22. SWB was in charge of the engineering and design of the project. *Id*. at 51. SWB was always involved with the design consultants. *Id*. at 61. SWB owns the lands, rights of way, and easements, and SWB provides USACE access to them. *Id*. at 88. The Project Coordination Team consisted of SWB and USACE representatives. *Id*. at 78-79. Pursuant to the PPA and CEA, SWB must cover 35% of the cost of the SELA Project. Joint Exhibits J-1 and J-2. Pursuant to those agreements, SWB must hold harmless and indemnify USACE from damages related to the design, construction, and maintenance of the project. *Id*.

Accordingly, if there were any doubt, this Court finds that SWB is the owner and controller of the SELA Project and SWB should be considered as such under plaintiffs' theories of recovery.

2. Inverse Condemnation

Louisiana Constitution Article I, Section 4, provides, "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit." La. Const., Art. I, Section 4. The Constitution requires compensation even in those cases in which the State has not initiated expropriation proceedings in accordance with the statutory scheme set up for that purpose. *Holzenthal*, 950 So.2d 55, 62, citing *State, Through Dept. of Trans. and Dev. v. Chambers Investment Company, Inc.*, 592 So.2d 598, 602 (La. 1992). As the Louisiana Supreme Court noted in Chambers, it is now hornbook law that any substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of federal and state constitutions. *Id.* at 62-63. The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. *Chambers*, 592 So.2d 598, 602 citing *Reymond v. State, Dept. of Highways*, 255 La. 425, 231 So.2d 375, 383 (1970). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. *Id.* [Citations omitted].

The Louisiana Supreme Court developed a three-part test to determine whether a claimant is entitled

to eminent domain compensation: (1) whether a person's legal right with respect to a thing or object has been affected; (2) if a property right is involved, whether the property has been taken or damaged in a constitutional sense; and (3) whether the taking or damage is for a public purpose. *See Holzenthal*, 950 So.2d at 63.

In *Holzenthal*, the trial court applied this test and found SWB committed inverse condemnation. Id. The *Holzenthal* court declared, "[t]his is clearly a case in which a valid and vital public purpose, improved drainage of our city-below-sea-level was served ... [d]espite the best efforts of the SWB and [Army Corps of Engineers] and the contractors, dewatering and vibration damage to these neighboring interests was the natural consequence of the Project." *Id*. at 85. For reasons similar to those articulated in *Holzenthal*, applying the *Chambers* test, this Court finds that plaintiffs suffered an inverse condemnation of their property. First, plaintiffs have a legal right in their properties because they are owners. Moreover, their testimony, as well as the expert testimony, shows that property rights were adversely affected by construction activities. Second, plaintiffs' damages were an integral consequence of the SELA Project, which was specifically carried out to improve the drainage system and to reduce flood-related damage in the New Orleans area. Last, the Court finds that providing drainage improvement to the neighborhoods of New Orleans certainly serves a public purpose. As such, the Court finds SWB committed inverse condemnation.

3. Strict Liability for Ultrahazardous Pile Driving Under Article 667

Pursuant to La. C.C. art. 667, "the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives." La. C.C. art. 667.

In *Vicknair v. Boh Bros. Construction Co.*, the Fifth Circuit found that the installation of steel sheeting with a vibratory hammer, and the driving wood sheeting with a backhoe (for an emergency sewer repair) was not ultrahazardous. 2003-1351 (La. App. 5th Cir. 3/30/04); 871 So.2d 514. In *Suire v. Lafayette City-Parish Consol. Gov't.*, the Louisiana Supreme Court cited *Vicknair* approvingly and found that the driving of metal sheets with backhoes did not constitute pile driving under article 667. 2004-1459 (La. 4/12/05), 907 So.2d 37. In *Holzenthal*, the Fourth Circuit distinguished *Suire* and found that driving of metal sheets into the ground with a crane and vibratory pile-driving hammer, opposed to a backhoe, constituted "pile driving." 950 So.2d 55. The court relied on vibration monitoring evidence, which showed that the highest levels of vibrations would have been caused by crane movement regardless of the type of pile driving. *Id*.

In the instant case, there is no dispute that timber pile driving occurred adjacent to the White property as part of Claiborne Phase I. The Court finds that ultrahazardous pile driving occurred at the White

property and that such activity caused damage. Additionally, regarding the Lieder property, Ms. Lieder's property was not adjacent to an excavation area rather it was across from a staging area. Pls.' Ex. P-28. Thus, unlike the other properties, there were no sheet or timber piles inserted by Ms. Lieder' s property.

At the Deussing, Epstein, and Ryan properties, no timber pile driving occurred and no sheets were installed with a vibratory hammer. Fogarty Dep. 844, Aug. 12, 2016. Contractors installed metal sheet piles into the ground as part of the TRS. In contrast to *Holzenthal*, the metal sheet piles were not installed with a crane and vibratory hammer, they were installed with a crane and a piece of equipment known as a Giken Silent Piler ("Giken"). Fogarty Dep. 842, Aug. 12, 2016. According to Mr. Fogarty, "the steel sheet pile for the retaining structure system is installed with the press-in machine only [Giken]." *Id*. at 722. Similarly, as explained by Dr. Sykora, the sheet piles are "pressed" into the ground, not driven.

The Court finds that the definition of ultrahazardous activity should not be expanded under these facts. The Louisiana Supreme Court in Suire explained, "In light of the 1996 amendment, Louisiana courts are relieved of the responsibility to decide whether a certain activity is ultrahazardous for purposes of deciding whether the absolute liability standard applies. *Suire*, 901 So.2d 37, 48-49, citing *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998–0495 (La. App. 4th Cir. 5/12/99); 753 So.2d 269 (discussing the 1996 amendment and noting that "[t]he new definition by amendment

defines an ultrahazardous activity legislatively"). "Any other activities besides the two the article specifically lists are not ultrahazardous for purposes of article 667. Thus, to qualify for the absolute liability standard, the plaintiff must show that the activity complained of is either 'pile driving' or 'blasting with explosives.'" *Suire,* 901 So.2d at 49. Following the Louisiana Supreme Court's analysis in *Suire*, this Court does not find that the installation of metal sheet piles into the ground with a Giken constitutes the ultrahazardous activity of pile driving. Even though the contractors utilized a crane with the Giken, the evidence shows that a Giken is a piece of equipment that emits less vibrations than other types of equipment traditionally used for driving timber or sheet piles. Thus, SWB is not strictly liable for an ultrahazardous activity at the Deussing, Epstein, Ryan, or Lieder property.

4. Strict Liability and Negligence Under articles La. C.C. arts. 2315, 2317 and 2317.1

Plaintiffs' strict liability claims arise pursuant to La. C.C. arts. 2317, and 2317.1. Article 2317 reads, "[w]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." La. C.C. art. 2317. Those modifications are contained in article 2317.1:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing

> that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

La. C.C. art. 2317.1.

As a threshold matter, to prevail under articles 2317 and 2317.1, a plaintiff must establish custody or *garde*. The owner of a thing is the presumed guardian of its structure. *Doughty v. Insured Lloyds Ins. Co.*, 576 So.2d 461, 464 (La. 1991). The test for determining custody or *garde* is twofold: (1) whether the entity has control or authority over the thing; and (2) whether the person receives a substantial benefit. *Id*. Here, SWB has control and authority over the SELA Project because SWB is responsible for the city's public drainage system and it contracted with the USACE to engineer and execute the project. See supra Section I.A.2; Section 11.B.1. SWB derives a benefit because the SELA Project's purpose is to improve the public drainage system, for which SWB is responsible.

With custody and *garde* established, a plaintiff must also prove: (1) the project presented an unreasonable risk of harm; (2) the owner could have prevented the harm had it exercised reasonable care;

and (3) the owner's failure to exercise such care caused the plaintiffs' damages. La. C.C. arts. 2317 and 2317.1

First, SWB was well aware the project presented a risk of harm to plaintiffs' properties pursuant to the terms of the PA and its understanding from USACE that properties could experience vibration related damages, especially those properties located within the ZOI and APE. Second, SWB had notice that construction was adversely impacting the properties. The evidence shows that SWB received vibration data, showing exceedances over .25 PPV, on a regular basis. Additionally, the evidence shows SWB received numerous complaints on the Hotline. Yet, there is no evidence that SWB exercised care to prevent further damage. Last, the evidence shows that the construction activities, which lasted several years, caused physical damage to plaintiffs' homes in the form of cracks and separations and caused disturbances that interfered with plaintiffs' use and enjoyment of their properties. For these reasons, the Court finds that plaintiffs presented sufficient evidence to hold SWB strictly liable under La. C.C. arts. 2317 and 2317.1.

As this Court understands, the essential difference between the strict liability and negligence theories is knowledge of a defect. *See Pool v. City of Shreveport*, 601 So.2d 861, 863-64 (La. App. 2nd Cir. 1992). Knowledge of a defect gives rise to a corresponding duty to act. *See Soccorro v. City of New Orleans*, 519 So.2d 931 (La. 1991). Under article 2317, knowledge of the defect is unnecessary. *Id.*; *see also Loescher v. Parr*, 324 So.2d 441, 446 (La. 1976). Given that this Court found SWB strictly liable under

articles 2317 and 2317.1, the Court does not find that a negligence analysis is necessary.

III. CONCLUSIONS AND DAMAGES

A. Quantum

The Court accepts the testimony of, and finds that the evidence supports, Exponent's opinion that all of the homes' foundations were structurally sound and not damaged by SELA construction activities. Accordingly, the Court is not awarding damages for foundation or shoring repair. Since the homes will not receive new foundations, this Court finds that the homeowners will not incur an expense to have their "contents" moved, stored, and returned to their homes.

Plaintiffs' expert, Dr. Wade Ragas, was admitted as an expert in real estate evaluation, real estate market analysis, comparable sales, externalities, and loss of use of property rights. Dr. Ragas rendered opinions on what he described as "negative externality damages." These damages would compensate plaintiffs for the loss of the use and loss of the enjoyment of their properties during the construction phases. Additionally, Dr. Ragas provided estimates on damages that would compensate plaintiffs for having to move into a comparable home for the duration of repairs to their homes.

SWB did not provide its own expert to refute Dr. Ragas' numbers. Dr. Ragas' calculations, specifically with regard to the duration of phases, contained inaccuracies. Nevertheless, the Court recalculated Dr.

Ragas' estimates using timelines derived from the testimony and expert reports.

As it relates to Dr. Ragas' estimates to cover the cost of relocation to a house of comparable rental, the Court does find that plaintiffs are entitled to such damages. As previously stated, the Court does not find that repairs will require plaintiffs to move out of their homes. The Court's duty is not to provide plaintiffs with new homes. Rather, the Court's duty is to make the plaintiffs whole as best it can. The following damage awards are based on the expert opinions and provide plaintiffs with compensation to make repairs to their homes for conditions created or exacerbated by the SELA Project.

1. Deussing - 5617 Pzytania St.

M. Gurtler testified that the property damage repair would cost $100,382.25.[4] The Court finds this number excessive and reduces it according to estimates provided by Gurtler Bros.

Property Damage

Estimate:	$100,382.25
Foundation/Shoring Repair:	($32,292.47)
Contents:	($21,428.83)
Total:	$46,660.95

Dr. Deussing's testimony regarding the start of construction was unclear. Mr. Epstein, however, who

[4] M. Gurtler rendered opinions on the costs of repairs using the insurance-approved software called Xactimate.

lives a couple doors down, testified that the construction activities began in February of 2014. As to the end date, Dr. Storesund's report states the project was "largely completed" in March of 2016. Dr. Ragas opined that $769.00 per month for forty-six (46) months represents the value of the Deussings' loss of use and loss of enjoyment. The Court calculates twenty-five (25) months based on the evidence that the construction work began in February of 2014 and was largely completed in March of 2016.

Loss of Use and Loss of Enjoyment

Total (25 months):	$19,225.00

Damages Total

Property:	$46,660.95
Loss of U/E:	$19,225.00
Total:	**$65,885.95**

2. Epstein - 5626 Prytania St.

M. Gurtler testified that the property damage repair would cost $124,463.42. The Court finds this number excessive and reduces according to estimates provided by Gurtler Bros.

Property Damage

Estimate:	$124,463.42
Foundation/Shoring Repair:	($49,220.86)

Contents:	($19,154.51)
Total:	$56,088.05

Mr. Epstein testified that construction activities began outside of his home in February of 2014. This date is corroborated by a Hotline Complaint, made on his behalf, dated January 30, 2014. Pis.' Ex. 30. As to the end date, Dr. Storesund's report states that the project was largely completed in March of 2016.

Dr. Ragas opined that $955.50 per month for forty-six (46) months represents the value of Mr. Epstein's loss of use and enjoyment. The Court calculates twenty-five (25) months based on the evidence that the construction work started in February of 2014 and was largely completed in March of 2016.

Loss of Use and Loss of Enjoyment

Total (25 months):	$23,887.50

Damages Total

Property:	$56,088.05
Loss of U/E:	$23,887.50
Total:	**$79,975.55**

3. Lieder - 731 Napoleon Ave.

M. Gurtler testified that the property damage repair would cost $308,998.63. The Court finds this

number excessive and reduces according to estimates provided by Gurtler Bros.

Property Damage

Estimate:	$308,998.63
Foundation/shoring Repair:	($154,954.57)
Contents:	($27,995.35)
Total:	$126,048.71

Construction activities outside the Lieder home began in April of 2014 as this was the time, according to Dr. Storesund, that workers installed jet grout test columns. Ms. Lieder's testimony corroborates this date. Ms. Lieder testified that the alleged "pre-con" photos, taken in October of 2014, were not actually pre-construction photos because construction began months earlier. As to the construction end date, Dr. Storesund's report states the project was largely completed in November of 2016.

Dr. Ragas opined that $1,188.00 per month for forty-three (43) months represents the value of Ms. Lieder's loss of use and loss of enjoyment. The Court calculates that construction lasted thirty-two (32) months based on the evidence that workers installed jet grout test columns in April of 2014 and that construction was completed in November of 2016.

Loss of Use and Loss of Enjoyment

Total (32 months):	$38,016.00

Damages Total

Property:	$126,048.71
Loss of U/E:	$38,016.00
Total:	**$164,064.71**

4. Ryan/Jurisich - 1106 Napoleon Ave.

M. Gurtler testified that the property damage repair would cost $137,902.87. The Court finds this number excessive and reduces it according to estimates provided by Gurtler Bros. Note, Gurtler Bros.' estimates did not contain a figure for the contents.

Property Damage

Estimate:	$137,902.87
Foundation/Shoring Repair	($46,808.32)
Total:	$91,094.55

Mr. Ryan testified that construction activities began outside of his home in June of 2014 and ended around the time of Mardi Gras 2017, which would have been in February of 2017. Dr. Storesund's report states that Napoleon Phase III was largely completed in November of 2016. Finding Mr. Ryan's testimony credible, the Court uses February of 2017 as the end date for calculation purposes.

Dr. Ragas estimated that $719.75 per month for forty-one (41) months represents the value of Mr. Ryan's loss of use and loss of enjoyment. The Court calculates thirty-three (33) months based on the testimony that the construction work started in June of 2014 and concluded in February of 2017.

Loss of Use and Loss of Enjoyment

Total (33 months):	$23,751.75

Damages Total

Property:	$91,094.55
Loss of U/E:	$23,751.75
Total:	$114,846.30

5. White - 8833 S. Claiborne Ave.

M. Gurtler provided two different estimates for the cost of repair to the White home, explaining that there was a code compliance issue: Ms. White's home is not at base flood elevation. M. Gurtler testified there is a provision in the building code that states if a home has incurred damages that amount to 50% of its value and a repair is done to the home, the entire home must be upgraded to the current code. M. Gurtler further testified that if Ms. White's foundation were to be fixed it would need to be elevated to the current base flood elevation. To replace the foundation entirely and make the home code compliant, M. Gurtler estimated a $244,072.72 cost of repair. In the alternative, M. Gurtler estimated a

$128,515.82 cost of repair that would repair the foundation but not repair the home to code compliance. This Court uses the second estimate and reduces it according to figures provided by Gurtler Bros.

Property Damage

Estimate:	$128,515.82
Foundation/Shoring Repair:	($47,389.53)
Moving:	($15,399.72)
Total:	$65,726.57

Brenda Lackings, Ms. White's neighbor testified that construction activity began in the neighborhood in 2011. Dr. Storesund's report corroborates this testimony. His report reads that SELA(24) construction began in October of 2011. Though Ms. White testified that the construction ended in 2017, Dr. Storesund's report shows that all phases of work were completed in May of 2016.

Dr. Ragas estimated that $502.75 per month for fifty-nine (59) months represents the value of Ms. White's loss of use and loss of enjoyment. The Court calculates fifty-six (56) months based on the evidence that the work SELA(24) work began in October of 2011 and concluded in May of 2016.

Loss of Use and Loss of Enjoyment

Total (56 months):	$28,154.00

Damages Total

Property:	$65,726.57
Loss of U/E:	$28,154.00
Total:	**$93,880.57**

B. Just Compensation and Comparative Fault

1. Just Compensation

SWB argues in its post-trial brief that any damages assessed against SWB must be limited to that allowable under the Fifth Amendment to the Unites States Constitution, which precludes recovery of consequential damages, including for loss of use and enjoyment. Moreover, SWB argues that this Court should apply *South Lafourche v. Jarreau*, 16-0788 (La. 3/31/17); 217 So.3d 298, to limit plaintiffs' potential damage awards. This Court finds the facts of this case distinct from *South Lafourche v. Jarreau*. Furthermore, the Court finds SWB's just compensation argument without merit.

2. Comparative Fault

SWB argues in its post-trial brief this Court must assess a portion of fault on USACE and other nonparties under Louisiana Civil Code articles 2323 and 2324. Contrastingly, plaintiffs argue that the burden was on SWB to prove that another party was at fault and SWB failed to meet its burden. Plaintiffs contend none of the witnesses testified to an allocation

of fault and none of the deposition excerpts identify any of the nonparties at fault. This Court agrees with plaintiffs.

The issue of contractor liability was discussed in *Holzenthal*. 950 So.2d at 68. As a matter of law, a contractor on a state or federal project who complies with the project's plans and specifications is not liable for damages to the property of third parties. *Holzenthal*, 950 So.2d 55, 80-81, citing *Yearly v. W.A. Ross Construction Co.*, U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940); La. R.S. § 9:2771. This Court does not recall hearing testimony that the contractors deviated from the SELA Project specifications. Nevertheless, a party asserting comparative fault bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause in fact of the. damage complained of. *Pruitt v. Nale*, 45, 483 (La. App. 2nd Cir. 8/11/2010), 46 So.3d 780, 783; [citations omitted]. This Court finds SWB has failed to carry its burden of proving that another party was at fault.

READ AND SIGNED this 25th day of April, 2018, in New Orleans, Louisiana.

S/_____
HONORABLE NAKISHA ERVIN-KNOTT
JUDGE, CIVIL DISTRICT COURT

A TRUE COPY

S/_____

DEPUTY CLERK, CIVIL
DISTRICT COURT
PARISH ORLEANS
STATE OF LA.

CIVIL DIST CT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 15-11971 c/w 15-11394 Div. "D." SECTION 12
Trial Flight 2 - Commercial Plaintiffs

M. LANGENSTEIN & SONS, INC., ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

Consolidated With

K & B LOUISIANA CORPORATION d/b/a RITE AID CORPORATION

VERSUS

SEWERAGE AND WATER BOARD OF NEW ORLEANS

FILED:_____ _____
DEPUTY CLERK

CONSENT JUDGMENT

NOW INTO COURT, jointly come Plaintiffs, Fine Arts Management, L.L.C. d/b/a Prytania Theatre, Superior Seafood & Oyster Bar, L.L.C., The Magic Box, Ltd. d/b/a Magic Box Toys, and Pascal-Manale Restaurant, Inc., and Defendant, the Sewerage &

Water Board of New Orleans ("SWB"). The following is made a judgment of the Court:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the SWB shall pay the sum of two million ninety-six thousand three hundred four dollars and 60/100 ($2,096,304.60) to the above Commercial Plaintiffs, which signifies compensation for all claims due the above Commercial Plaintiffs in the suit, including claims for physical property damages, any other damages, attorneys' fees, and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the SWB shall pay judicial interest on the above amount from December 18, 2015, until paid.

New Orleans, Louisiana this day of JAN 02 2019.

Sgd Nakisha Ervin-Knott
Judge, Division D
__S/_____
HON. NAKISHA ERVIN-KNOTT
Civil District Court
Parish of Orleans, State of La.

Chelsey Richard Napoleon
CLERK OF CIVIL DISTRICT COURT
INST #: 2019-01455 01/10/2019 01:03:23 PM
TYPE: C JDGMT 3 pg(s)

Approved as-to form and content:
Dated: December 20, 2018

s/_____
CRAIG MITCHELL (#24565)
JOSEPH B. MOARTON, III (#19072)
CHRIS WILSON (#27142)
MITCHELL & ASSOCIATES, APLC
615 Baronne Street, Suite 300
New Orleans, Louisiana 70113
Telephone: (504) 527-6433
Facsimile: (504) 527-6450

-and-:

ANTHONY J. STEWART (#02128)
SEWERAGE & WATER BOARD OF NEW ORLEANS
625 St. Joseph Street, Room 201
New Orleans, LA 70165
Telephone: (504) 585-2236
Facsimile: (504) 585-2426

Attorneys for Defendant,
Sewerage & Water Board of New Orleans

Approved as to form and content: .
Dated: December 19, 2018

s/_____

RANDALL A. SMITH, T.A. (#2117)
SARAH LOWMAN (#18311)
MARY NELL BENNETT (#32339)
Of
SMITH & FAWER
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
Facsimile: (504) 525-2205

Attorneys for the Commercial Plaintiffs

Appendix J-1

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO. 2016-621 DIVISION "D" SECTION 12

ANNE LOWENBURG, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

&

CASE NO. 2015-11971 DIVISION "D" SECTION 12
c/w 2015-11394

M. LANGENSTEIN & SONS, INC., ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

Consolidated with

K&B Louisiana Corporation d/b/a RITE AIDE CORPORATION

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED:_____ _____
DEPUTY CLERK

JUDGMENT FOR RESIDENTIAL TRIAL GROUP C & WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST

This matter came before the Court for trial on the 28th, 29th, 30th, and 31st of January,2019.

* * * * *

This Judgment concerns the following group of plaintiffs:

Plaintiffs:

Elio, Charlotte and Benito Brancaforte –1201 Jefferson Avenue/ 5351 Coliseum Avenue
Dr. Josephine Brown–5224 Prytania Street
Robert Parke and Nancy Ellis–5419 Prytania Street
Mark.Hamrick–1300-1302 Jefferson Avenue
Dr. Robert and Charlotte Link–5534-36 Prytania Street
Ross and Laurel McDiarmid-5429 Prytania Street Jerry Osbome-5518 Prytania Street
Jack Stolier-1408 Jefferson Avenue
Dr. William Taylor-5432-34 Prytania Street

&

Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries-4400 St. Charles Avenue ·

In consideration of the law and evidence, the Court hereby renders the following:

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiffs suffered an inverse condemnation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Sewerage and Water Board of New Orleans ("SWB") is liable for damages owed to plaintiffs under the theory of inverse condemnation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SWB is the owner of the SELA Project.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the SELA Project construction activities caused new damage to, or exacerbated pre-existing damage within, the plaintiffs' properties. The SELA Project caused plaintiffs to suffer a loss of use and enjoyment of their properties.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SWB failed to demonstrate that fault should be allocated to a separate entity pursuant to the comparative fault statutes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SWB owes damages to plaintiffs in the following amounts:

1. Elio, Charlotte, and Benito Brancaforte-1201 Jefferson Avenue/5351 Coliseum Street

Property Damage:	$35,000.00
Loss of Use and Enjoyment:	$48,589.10
Out-of-Pocket Expenses	$1,300.00
Lost Rents	$22,300.00
Total:	$107,189.10

2. Dr. Josephine Brown-5524 Prytania Street

Property Damage:	$22,000.00
Loss of Use and Enjoyment:	$57,785.40
Out-of-Pocket Expenses. ·	$0.00
Total:	$79,785.40

3. Robert Parke and Nancy Ellis - 5419 Prytania Street

Property Damage:	$25,000.00
Loss of Use and Enjoyment:	$63,892.35
Out-of-Pocket.Expenses:	$3,900.00
Total:	$92,792.35

4. Mark Hamrick - 1300-1302 Jefferson Avenue

Property Damage:	$23,000.00
Loss of Us and Enjoyment:	$29,901.30
Lost Rents:	$0.00
Out-of-Pocket Expenses	$0.00
Total:	$52,901.30

5. Dr. Robert and Charlotte Link–5534-36 Prytania Street

Lost Rents:	$41,838.00
Loss of Use and Enjoyment:	$44,198.00
Lost Rents:	$18,500.00
Out-of-P9cket Expenses:	$425.17
Total:	$104,961.17

6. Ross and Laurel McDiarmid-5429 Prytania Street

Property Damage:	$28,000.00
Loss of Use and Enjoyment:	$46,967.55
Total:	$74,967.55

7. Jerry Osborne--5518 Prytania Street

Property Damage:	$30,000.00
Loss of Use and Enjoyment:	$54,480.00
Out-of-Pocket Expenses	$ 5,400.00
Total:	$89,880.00

8. Jack Stolier–1408 Jefferson Avenue

Property Damage:	$13,000.00
Loss of Use and Enjoyment:	$61,992.00
Total:	$74,992.00

9. Dr. William Taylor–5432-34 Prytania Street

Property Damage:	$24,000.00
Loss of Us .and Enjoyment:	$63,615.60
Out-of-Pocket Expenses	$0.00
Total:	$87,615.60

10. Watson Memorial Spiritual Temple of Christ–4400 St. Charles Avenue

Property Damage:	$135,000.00
Lost Profits:	$ 98,788.00
Total:	$233,788.00

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to the above calculations, the plaintiffs in Residential Trial Group C are hereby awarded a money judgment against SWB in the amount of SEVEN HUNDRED SIXTY-FIVE THOUSAND EIGHTY-FOUR DOLLARS AND FORTY-SEVEN CENTS ($765,084.47).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to the above calculations, Watson Memorial Spiritual Temple of Christ is hereby awarded a money judgment against SWB in the amount of TWO HUNDRED THIRTY-THREE THOUSAND SEVEN HUNDRED EIGHTY-EIGHT DOLLARS AND ZERO CENTS ($233,788.00).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Louisiana Code of Civil Procedure article 1920, Louisiana Revised Statute § 13:3666, Louisiana Revised Statute § 13:4533, and Louisiana Revised Statute§ 13:5111, the Court awards reasonable attorney fees to plaintiffs, and SWB is taxed with the costs associated with the prosecution of this matter, all to be determined pursuant a rule to show cause.

RENDERED, READ, AND SIGNED this 21st day of March, 2019, in New Orleans, Louisiana.

s/ Sgd Nakisha Ervin-Knott
Judge, Division "D"
A TRUE COPY
HONORABLE NAKISHA ERVIN-KNOTT JUDGE, CIVIL DISTRICT COURT
Civil District Court Parish of Orleans, State of La.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO. 2015-11971 DIVISION "D" SECTION 12
c/w 2015-11394

M. LANGENSTEIN & SONS, INC., ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

Consolidated with

K&B Louisiana Corporation d/b/a RITE AIDE CORPORATION

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

REASONS FOR JUDGMENT

I. FACTS AND EVIDENCE

A. Background

This is the fourth trial that this Court has heard regarding the claims made by various homeowners and businesses against the Sewerage & Water Board of New Orleans ("SWB") for damages allegedly caused

by the South Louisiana Urban Drainage Program ("SELA"). However, this is the first judgment rendered under the above captions. For reasons similar to the ones rendered in the Court's previous judgments[1], the Court finds SWB liable for the damages suffered by the current plaintiffs. As it pertains to the general structure and control of the SELA project, the Court will rely on evidence submitted at this trial and take judicial notice of facts established in the *Sewell* trials.

The SELA project involved the installation of canals and consisted of several federally sponsored projects aimed at improving the local drainage system. The project consisted of seven phases: Claiborne I, Claiborne II, Jefferson I, Jefferson II, Napoleon II, Napoleon III, and Louisiana I (the "SELA Project"). The homeowner plaintiffs in this trial were all affected by the Jefferson II phase of the project, and Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries ("Watson Memorial"") was affected by the Napoleon III phase. The plaintiffs in the instant matter, referenced as Residential Trial Group C, include nine sets of homeowners: Elio, Charlotte, and Benito Brancaforte; Dr. Josephine Brown; Robert Parke and Nancy Ellis; Mark Hamrick; Dr. Robert and Charlotte Link; Ross and Laurel McDiarmid; Jerry Osborne; Jack Stolier; and Dr. William Taylor.[2] Watson Memorial, a commercial plaintiff, had its claims heard in

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[1] *See* Case No. 2015-4501: *Elizabeth Sewell v. Sewerage & Water Board of New Orleans.*

[2] Residential Trial Group C is a part of Case No. 2016-621: *Anne Lowenburg, et al v. Sewerage & Water Board, et al.*

conjunction with the residential plaintiffs.[3] Plaintiffs seek to hold SWB liable for damages pursuant to multiple theories of recovery, including inverse condemnation, strict liability, and negligence. SWB has denied any and all liability. SWB asserts a defense of comparative fault, denies negligence or strict liability, and argues that inverse condemnation is inapplicable.

SWB has maintained that the SELA project was constructed under the administration of the project's federal sponsor, the United States Army Corps of Engineers ("USACE"), and that USACE and the contractors who performed construction work on the project should be held liable. SWB filed multiple third-party claims against the contractors selected by USACE for the SELA Project. The third-party contractors effectively removed these claims to the United States District Court for the Eastern District of Louisiana. There, the presiding judge dismissed SWB's third- party claims upholding the contractors' defense of government contractor immunity.

1. Contractual Agreements Establishing the SELA Project

In 1997, the Army (referred to in the contracts as the "Government") and SWB entered into a Project Cooperation Agreement ("PCA") for the construction of certain work to improve the interior drainage

[3] Watson Memorial is part of Case No. 2015-11971: *M Langenstein & Sons, Inc., et al v. Sewerage & Water Board of New Orleans.*

system and reduce flood-related damage in Orleans Parish.

On January 16, 2009, the Army and the Coastal Protection and Restoration Authority of Louisiana ("CPRA") entered into an agreement called the Project Partnership Agreement ("PPA"). The PPA defines CPRA as the "non-federal sponsor" and identifies the multiple phases of the SELA Project. The PPA outlines the "65/35" cost share arrangement between the Army and the non-federal sponsor. The agreement authorizes the Army to allocate money to fund 65% of the cost of the project and states that the non-federal sponsor would share 35% of the cost. Additionally, the PPA provides that the non-federal sponsor would enter into a Cooperative Endeavor Agreement with SWB for the performance of the non-federal sponsor's obligations under the PPA.

Also on January 16, 2009, SWB and CPRA entered into the Cooperative Endeavor Agreement ("CEA"). This agreement would form the basis upon which SWB operated in conjunction with the State of Louisiana and the USACE for the performance of all SELA projects.

The CEA provides in parts:

> WHEREAS, JP [Jefferson Parish] and SWBNO [SWB] have been solely responsible, as between JP and SWBNO and the Government for any responsibilities and/or obligations undertaken under the PCAs, including the providing of funding, land,

easements, and right of way acquisition, and various types of in-kind work for the Project;

. . . .

WHEREAS, CPRA and JP and SWBNO are entering into this Agreement for the purpose of having CPRA sign the SELA PPA as the Non-Federal Sponsor, as required by the Government, but to continue to recognize JP's and SWBNO's jurisdiction and primary participation **as the non-federal local entities that will be directly partnering with the Government** in **carrying out the design and construction of the Project and as the entities that will undertake and be responsible for the operation, maintenance, repair, replacement, and rehabilitation of their respective portions of the Project once it or functional portions thereof are completed;**

WHEREAS, **CPRA will in fact delegate** in **whole or in part its responsibilities of the Non-Federal Sponsor under the SELA PPA to JP and SWBNO,** which responsibilities fall within the respective constitutional and statutory purposes, duties, and authorities of JP and SWBNO, and JP and SWBNO desire to accept and perform their respective purposes,

duties, authorities, and responsibilities; and

WHEREAS, CPRA, and JP and SWBNO intend for this Agreement to provide for the respective obligations and responsibilities of each party in relationship to each other and in relationship to the Government relative to the obligations and responsibilities assumed under the SELA PPA to be signed between CPRA and the Government ...

. . . .

IV. Hold Harmless and Indemnify

. . . .

B. As to those portions of the Project under its authority and jurisdiction and care, custody, and control, SWBNO agrees and obligates itself and its successors and assigns to defend, indemnify, save, protect, and hold harmless CPRA and its successors, officers and employees against any and all claims, demands, suits, actions, judgments, attorney's fees, or costs arising or allegedly arising out of its responsibilities enumerated and undertaken herein, or any violation of Louisiana or Federal law or regulations, or any negligent act, omission, operation, or work by SWBNO or its employees,

> agents, representatives, or contractors, except for damages due to the fault or negligence of CPRA, its employees, or its contractors.
>
> C. To the extent required by CPRA as the Non-Federal Sponsor under the SELA PPA, JP and/or SWBNO shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

(Emphasis added).

These agreements show that the CPRA executed the PPA as the non-federal sponsor for and on behalf of SWB so that SWB could assume all of the CPRA's contractual responsibilities and obligations in order to execute the SELA Project. Moreover, the agreements show that SWB would indemnify the CPRA and the Government from damages arising out of the construction of the project, excluding damages due to negligence of the CPRA, the Government, or its contractors.

2. The SELA Project: USACE and SWB Roles and Responsibilities

SWB and USACE shared a number of responsibilities with regard to the design and execution of the SELA Project. Deposition transcripts

and testimony from representatives of USACE and SWB were admitted into evidence.

SWB was responsible for the conceptual designs of the different phases of the SELA Project. John Fogarty Deposition p. 42, Aug. 10, 2016.[4] SWB retained consultants, known as "designers of record", who developed all of the plans for the project. *Id.* SWB maintained a Network and Drainage Engineering Department that acted as the department lead for SELA. Exs. P16 & D3-4, p. 58. The consultants who designed the SELA projects reported to the department head of the Network and Drainage Engineering Department. *Id.* at 58-59. SWB had the ability to make recommendations to the design consultants. *Id.* at 62.

During the preliminary design stages, USACE went through a review process of the plans and specifications and provided comments back to SWB's designers of record. Fogarty Dep. pp. 42-43, Aug. 11, 2016.[5] USACE's process was known as BCOE, which stands for Biddability, Constructability, Operability, and Environmental Review. *Id.* at 42. There was an extensive comment process where USACE generated BCOE related opinions. *Id.* at 46.

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[4] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board of New Orleans* - Reasons for Judgment Trial Groups A, B, and D.

[5] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board of New Orleans* - Reasons for Judgment Trial Groups A, B, and D.

SWB employed a SELA Project manager who was responsible for the oversight of the engineering firms and was there to resolve or take appropriate measures. *Id.* SWB coordinated with USACE on the actual construction of the project and reviewed the progress of the project. Ex. D15, p. 1317.[6] USACE performed daily inspections to ensure that contractors built the box culverts in accordance with the plans and specifications. *Id.* at 66. At times, SWB and USACE performed walk-throughs together. *Id.* SWB had review and acceptance authority over design aspects of the SELA Project construction. Exs. P16 & D3-4, p. 59.

In certain instances, SWB performed construction work. Fogarty Dep. p. 254, Aug. 10, 2016.[7] SWB performed an emergency valve repair, sewer main replacement, and parking lane repairs. *Id.* at 254-255. SWB provided access to the lands, easements, and rights-of-way to build the drainage system. Exs. P16 & D3-4, p. 88. SWB tied in the SELA drainage system with the existing drainage system. *Id.* at 89. At times, SWB coordinated with the contractors, for example to relocate or install new water mains. Fogarty Dep. p. 722, Aug. 12, 2016.[8] SWB did not select contractors for the work. *Id.* at 259. USACE was responsible for the award and the administration of the construction

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[6] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al* v. *Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

[7] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

[8] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

contracts. *Id.* SWB could not directly instruct the contractors to do something; instead, SWB had to go through USACE because USACE held the contract with the contractors. *Id.* at 261.

USACE established a Quality Assurance team that included Quality Assurance representatives on site at any time to monitor the contractor's operations. *Id.* at 948-49. SWB was not involved in the drafting of a Quality Assurance plan. *Id.* at 1810. USACE required contractors to submit a Quality Control plan that addressed the provisions in the contract. *Id.* at 960. SWB was not involved in drafting the contractor's Quality Control plans; those were drafted by the contractors. *Id.* at 958.

SWB hired a forensic contractor, Leonard Quick of Quick and Associates, to perform background pre-construction inspections of the properties, install piezometers and inclinometers, and settlement reference points.[9] Fogarty Dep. 168, Aug. 10, 2016;[10] Exs. P16 & D3-4, p. 56. SWB maintained a SELA Project Hotline whereby complaints were logged with the SWB. Fogarty Dep. p. 270, Aug. 10, 2016.[11] SWB received the complaints through their consulting firm and then passed along the complaints to the project manager for USACE who would then act on the

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[9] A piezometer measures groundwater. An inclinometer measures incline.

[10] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

[11] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

complaint. *Id.* Additionally, USACE maintained its own separate hotline. *Id.* at 272.

3. Anticipated Consequences of the SELA Project: Vibrations and Adverse Effects

Prior to the start of construction, SWB and USACE were aware that vibrations were a concern. Bxs. P16 & D3-4, p. 52; Exs. P17 & DI, pp. 1125-26. USACE anticipated there would be vibrations due to pile driving, the operation of heavy equipment, excavations, and other construction activity. Fogarty Dep. 108, Aug. 10, 2016.[12]

A SELA brochure, made available on the SELA website and to patrons at SWB's public meetings, acknowledges there would be impacts to the surrounding areas due to construction of the SELA Project. *See* Ex. P8(f). The brochure explains that noise and vibrations from moving and operating heavy construction equipment could have an impact on structures located within close proximity to the Zone of Impact ("ZOI"). *Id.*[13] The brochure explains that scientific research has established the most significant factor to best indicate the potential for damage is peak particle velocity ("PPV"), measured in

[12] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board*-Reasons for Judgment Trial Groups A, B, and D.

[13] "The construction ZOI is defined as the area in which it is more likely than not that damages will occur. Based on scientific data obtained to date, the ZOI's outer boundary is at the line formed upon the surface at a forty-five (45) degree angle from the bottom tip depth of driven sheet pile." Ex. P8(f).

inches per second ("ips"). *Id.* The brochure stated that a limit of 0.25 ips PPV was "very conservative." *Id.*

In April of 2010, SWB signed a Programmatic Agreement ("PA"), which recognized that the SELA Project construction posed a risk of having adverse effects to properties located in the Uptown and Carrollton neighborhoods. Ex. P5. The PA mapped out structures within the Area of Potential Effects ("APE") that were susceptible to indeterminate damage as a consequence of construction vibrations. *Id.* Additionally, the PA mapped out areas within the Construction Impact Zone ("CIZ") where the potential existed for soil vibration associated with project-related activities. *Id.* The PA provided that USACE would require contractors to perform work within a manner that would limit vibrations at the structure nearest to the site of construction activity to a maximum of 0.25 inches per second. *Id.*

During construction, vibration monitoring was accomplished by a monitor hired by the USACE. Fogarty Dep. 110, Aug. 10, 2016.[14] The contracts required the contractor's operations to remain under the .25 inches per second peak particle velocity as detected by vibration monitoring. *Id.* at 110. If a vibration exceeded .25 ips PPV, the vibration monitor was instructed to report it to the USACE inspector, and the USACE inspector was to report it to the contractor. *Id.* at 116.

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[14] Referenced in Case No. 2015-4501: *Elizabeth Sewell, et al v. Sewerage & Water Board of New Orleans* - Reasons for Judgment Trial Groups A, B, and D.

As illustrated by the deposition testimony, the PA, and the SELA brochure, SWB and USACE anticipated adverse consequences due to construction related vibrations.

B. Fact Witnesses

1. Residential Group C Plaintiffs and Watson Memorial

Each of the plaintiffs offered testimony regarding their experiences throughout the SELA construction and the damages they have observed to their properties. Their testimony will be covered in detail in Section III.

2. Mubashir Magbool

Mubashir Maqbool did not testify at trial, but his deposition testimony was submitted into evidence in this trial and in past *Sewell* trials. Ex. D5. Mr. Maqbool is an engineer with SWB, and his department primarily worked with the designs and specifications for the SELA project. He would respond to Request for Information ("RFI") submitted by USACE to SWB and worked to resolve the issues presented in the RFI. He would also attend monthly meetings regarding the progress of the SELA project.

Mr. Maqbool testified that the SELA project was a collaborative effort between SWB, USACE, the designers, and the contractors. One of the goals of the project was for the construction to be conducted in a manner that had the least amount of effect on the environment and was the least disruptive to the

residents and businesses of the area. He also admitted that SWB knew that the quality of life for nearby residents would be disrupted because of limited access to their properties and traffic conditions.

3. Melvin Spooner

Melvin Spooner did not provide live testimony at trial, but his deposition was submitted into evidence in this trial and in past *Sewell* trials. Exs. P16 & D3-4. Mr. Spooner is the Chief Engineer for SWB. He testified that SWB and USACE worked in conjunction on the SELA project. SWB was mostly involved during the design phase of the project. SWB hired independent consultants to create the design for the project, and then SWB would ultimately approve these designs. USACE was in charge of overseeing the actual construction of the project and hiring contractors to perform the construction. Mr. Spooner admitted that there was a potential for damage from the SELA construction activities. SWB created a hotline for residents to call regarding issues they experienced with the construction, and public meetings were held with the residents in the affected neighborhoods. Further, Mr. Spooner admitted that vibrations, noise, and dust were associated with the SELA construction.

4. John Fogarty

John Fogarty did not provide live testimony at trial, but his deposition was submitted into evidence in this trial and in past *Sewell* trials. Exs. P17 & D1. Mr. Fogarty works as a civil and residential engineer for the United States Army Corp of Engineers and was

the administrative contracting officer for the SELA construction. While the SELA project was a joint effort between USACE and SWB, Mr. Fogarty testified that the USACE handled the majority of the project. SWB designed the project and then handed it over to the USACE to implement the project. SWB was not responsible for overseeing the construction or the contractors.

Mr. Fogarty testified that Cajun Constructors, LLC ("Cajun") performed the construction for the Jefferson II phase of the SELA project. SWB was not a party to the contract between the USACE and Cajun, and SWB did not have the authority to order Cajun to stop working on the project. Cajun did not use an excavator to insert sheet piles for the box culvert or retaining structures on Jefferson II. The Giken was used to install all of the sheet piles for the TRS installation, but an excavator may have been used to press in piles for the installation of utilities, storm drainage pipes, manholes, and catch basins. During Jefferson II, a drainage box culvert was installed that extended along Jefferson Avenue to Constance Street and another box culvert extended along Prytania Street to Nashville Street. The two culverts tied into each other. During the construction, water mains were relocate catch basins and drain lines were installed, sewer mains replaced, and roadways tom up and restored.

Mr. Fogarty testified that Boh Bros., LLC ("Boh Bros.") performed the construction for the Napoleon III phase of the SELA project SWB was not a party to the contract between the USACE and Boh Bros., and SWB did not have the authority to order Boh Bros. to

stop working on the project. He testified that Boh Bros. performed its work in accordance with the plans and specifications for the project. He also stated that USACE had the requisite knowledge of the potential for damage to occur during the construction. During the Napoleon III phase of the project, jet grout columns were installed to create a jet grout foundation and permanent sheet piles were placed into the ground. The jet grouting replaced the need for timber piles that were used in other phases of the project. As a result, pile driving did not occur during the Napoleon III phase. USACE approved the use of a vibratory hammer to install the sheeting at the corner of St. Charles and Napoleon Avenue with the condition that additional monitoring would be placed in the area.

5. Paul Nola

Paul Nola did not provide live testimony at trial, but his deposition was submitted into evidence in this trial and in past *Sewell* trials. Ex. D2 (Case No. 2016-621). Mr. Nola testified as the representative for Cajun Constructors, LLC. Mr. Nola worked as the project manager for the Jefferson II phase of the SELA project and was a point of contact between Cajun and the USACE. Mr. Nola testified that Cajun overall performed its work in compliance with the plans and specifications for Jefferson II During the construction, there were times when streets, intersections, and driveways would be blocked. Whenever residents in the area complained about the construction, they were directed to send their complaints to the SELA hotline.

6. Stephen Switzer

Stephen Switzer did not provide live testimony at trial, but his deposition was submitted into evidence in this trial and in past *Sewell* trials. Exs. P18 & D6 (Case No. 2016-621). Mr. Switzer was Cajun's area superintendent for the Prytania Street portion of the Jefferson II phase of the SELA project from December 2014 until June 2016. His testimony was similar to Paul Nola's in that the construction required streets to be closed and driveways to be blocked. Whenever homeowners complained about the construction or property damage, he would direct them to the SELA hotline. Further, Mr. Switzer testified that SWB did in fact have the authority to stop construction work and would supervise Cajun's work regarding water line tie-ins, pressure tests, and chlorination.

7. Kevin Vanderbrook

Mr. Kevin Vanderbrook testified at trial regarding the alleged roof damages at Watson Memorial. Mr. Vanderbrook testified that he investigated the roof of the sanctuary at Watson Memorial on three separate occasions. The first time he investigated the roof was in connection with Watson Memorial's claim for damages resulting from a March 2011 hail storm. He returned to inspect the property again after the church filed a claim for roof damages that resulted from Hurricane Isaac, and he returned yet again in 2016 after Watson Memorial made another claim for roof damages. Each time he visited the property, Mr. Vanderbrook found that the claimed damages arose from a lack of maintenance of the property, and he provided his reports with these findings at trial. *See* Exs. D6-D9 (Case No. 2015-

11971). During these inspections, Mr. Vanderbrook also had the opportunity to observe the interior and exterior of the church building. He specifically noted that the he observed the same damages each time he visited the property. Specifically, Mr. Vanderbrook noted the signs of widespread water intrusion throughout the sanctuary, and he provided pictures of these damages at trial.

8 Kevin Stolzenthaler

Mr. Kevin Stolzenthaler did not provide live testimony at trial, but his deposition was submitted into evidence. Ex. D2 (Case No. 2015-11971). Mr. Stolzenthaler was the project manager for Boh Bros. during the Napoleon III phase of the SELA project. He testified that a Giken Silent Piler had been used to insert the sheet piles during Napoleon III. However, a traditional vibratory hammer had also been used at the intersection of St. Charles and Napoleon Avenue, at the intersection of Coliseum Street, and at the Pitt Street lateral tie-in.

Mr. Stolzenthaler testified that if an exceedance of the .25 ips limit ever occurred, the protocol required that the incident be reported to the Quality Control representative for the project. Such exceedances typically occurred as a result of excavation operations and trucking activities. The noise limit for Napoleon III was eighty-five decibels. Boh Bros. defined hours of operations were from 7:00 A.M. until 9:00 P.M., but Mr. Stolzenthaler admitted that no extra measures taken to control noise if work extended into the night hours.

C. Expert Testimony-General Findings on Causation

1. Plaintiffs' Expert: Dr. Rune Storesund

Dr. Rune Storesund is a licensed civil engineer in multiple states including Louisiana. He is an expert in geotechnical engineering and provides services regarding construction impact. He has testified during all phases of the *Sewell* trial that have come before this Court. His role in the SELA litigation is to review SELA documents, provide needed geotechnical input, and evaluate the possibility of the types of damages that could arise from the SELA construction.

Dr. Storesund testified that the vibration monitoring data gathered during the construction was incomplete and unreliable. There were many instances when the construction activities were not monitored at all, or if they were being monitored, the monitoring equipment was not at a location closest to the construction site. Despite this lack of reliable monitoring, the vibration monitoring charts Dr. Storesund studied showed exceedances of the .25 PPV threshold.

Dr. Storesund also opined that the plaintiffs were potentially exposed to prolonged, excessive noise that exceeded the specified limit. The same equipment that was used to monitor vibrations also had the capability to monitor noise levels. His understanding from reading the contracts provided is that the SWB was responsible for monitoring the noise levels at the construction site, but SWB failed to do so.

Dr. Storesund testified that there is no scientific basis or analysis for the USACE's ZOI and that the ZOI is not a proper threshold to determine whether a property is likely to suffer damages from the SELA construction. He found numerous instances where vibrations extended outside of the defined ZOI. Further, Dr. Storesund opined that there were numerous inconsistencies between the boundaries of the ZOI, APE, and CIZ.

Dr. Storesund also offered a new opinion in this trial that has not been considered by the Court in any of the previous trials. During the course of the SELA construction, a sinkhole formed in the 5500 block of Prytania Street. Dr. Storesund opined at trial that the TRS system used on the Jefferson II phase acted as a barrier and dammed up the natural subterranean water flow from the Mississippi River towards St. Charles Avenue, thus creating the sinkhole. Although French drains and weep holes were installed in the Prytania box culvert to alleviate the water flow, Dr. Storesund asserted that the solution is not a permanent one and does not equilibrate the two sides of the box culvert. Dr. Storesund opined that, because the box culvert and sheet piles remain in place, the ground water modification is a permanent condition and that there is a future susceptibility of damages to the homes on Prytania Street as a result of the groundwater modification created by the SELA construction.

2. Plaintiffs' Expert: Stradford Goins

Stradford Goins is an expert in civil and structural engineering. He owns his own consulting

business and has been an engineer for thirty-five years. This trial was the first time that this Court has heard from Mr. Goins in any of the SELA project cases. Mr. Goins testified that he inspected each of the plaintiffs' properties. Overall, he concluded that the vibrations generated from the various construction activities during the SELA construction damaged the plaintiffs' properties. He testified that although it is normal for properties uptown to have hairline cracks, the homes he inspected have already finished the majority of their settling. Mr. Goins also testified that he saw similar damages throughout the properties such as cracking in the interior and signs of movement and separation on the exterior. For each of the properties in this trial, he prepared a cost repair estimate for the damages that he attributes to the SELA construction. *See* Ex. P25.

3. Plaintiffs' Expert: Dr. Wade Ragas

Dr. Wade Ragas is an expert in real estate development. Dr. Ragas prepared charts that calculated the temporary diminishment in rent each property suffered during the SELA construction. Ex. P24. He also testified during all the phases of the *Sewell* trials that have come before this Court.

Dr. Ragas looked at similar places in the area near the residential plaintiffs' properties to determine the market rent He then deducted costs for loss of parking, dust and vibrations, noise, and the extent of repairs to be made at each property. All of this added to the total impact experienced by each plaintiff at his or her property, which then valued the total percentage of rent lost by each homeowner. Mr. Ragas

reviewed the construction contracts, the activities in each area, Mr. Goins' reports, and the testimony of each plaintiff in order to create his chart.

4. Defense Expert: Dr. David Sykora

Dr. David Sykora is a licensed professional engineer in Louisiana and an expert in geotechnical engineering. He is employed by Exponent, an engineering and scientific consulting firm that specializes in analyzing accidents and failures. He testified during all the phases of the *Sewell* trial that have come before this Court. Dr. Sykora physically inspected the properties owned by the plaintiffs in this case. He analyzed ground conditions at the properties and determined that each property will have progressive and long-term differential settlement over its lifetime. He also reviewed all the documents and allegations submitted by the Plaintiffs. To reach his final conclusion, Dr. Sykora assessed each building's age, the type of construction occurring nearby, the soil at the property, and the existing documents regarding each property before and after the construction occurred. Dr. Sykora's overall opinions regarding the SELA construction is that (1) the vibration monitoring was sufficient, (2) most of the cosmetic damage can be attributed to the soil settlement, (3) settlement would have occurred without the SELA construction, and (4) the SELA construction did not cause damage to these properties. Dr. Sykora also testified that there was no timber pile driving during the Jefferson II phase of the SELA construction, and therefore, these properties were not subjected to ultra-hazardous activities. In regards to the sinkhole that formed during the Jefferson II phase of the construction, Dr. Sykora

testified that the hole stayed within the CIZ and ZOI, between the pilings and the curb of the properties. As such, he opined that there was no possibility that the sinkhole could have adversely affected the properties for Jefferson II.

5. Defense Expert: Dr. James Bob Bailey

Dr. James Bob Bailey is a licensed professional engineer who is also employed by Exponent. He is an expert in structural engineering and has also testified during all the phases of the *Sewell* trial that have come before this Court.

As part of this litigation, he performed a differential diagnosis analysis to see what could be potential causes of distress on the properties, including construction vibrations. He relied on a number of sources, including publicly available data, the plaintiffs' expert reports, and his own personal observations. Before reaching his opinion, he would assess the building's age, construction type, and layout. He would also compare pre- and post-construction conditions of the properties and assess other potential sources of damage. Dr. Bailey opined that there was no clear pattern of distress in the properties near the SELA construction site. He opined that if a property were damaged by SELA, then the damages would be more severe in the areas closer to the SELA construction activities and diminish in severity in areas further away from the construction. Instead, the plaintiffs' properties have widespread damage throughout the entirety of the structures.

Overall, Dr. Bailey's opinion is that the SELA construction activities did not cause structural, foundational, or cosmetic damages to the properties at suit. The cosmetic damages he observed are due either to the differential settlement over time or to some other form of distress. The cosmetic damage does not affect the structural integrity of the properties.

II. CAUSATION AND CAUSES OF ACTION

A. The SELA Project Caused Damage to Plaintiffs' Properties or Exacerbated Pre-Existing Damages

It is impossible for this Court to perform a crack-by-crack analysis in order to determine precisely which cracks existed prior to or formed after the SELA construction. In some instances, pre-construction photos and videos offered better evidence of pre-existing conditions than others. In other instances, there were either no pre-construction photographs or there was a delay between the start of the project and the date when pre-construction photographs or videos were taken. However, the Court finds that the pre-construction photos and videos introduced in this trial to be enlightening regarding the conditions of the properties prior to the start of the SELA construction and the condition of their current, documented damages.

SWB anticipated that damages would occur. SWB was aware of the USACE's Programmatic Agreement which identified the potential ZOI. Moreover, SWB was familiar with the SELA brochure that was provided to homeowners, which clearly spelled out

that vibrations may cause damage. SWB hired a forensic contractor for purposes of claims resolution. SWB provided a hotline for anticipated complaints from homeowners, and SWB maintained a capital program with its legal department for purposes of handling damage claims. Exs. P16 & D3-4, p. 190.

The evidence shows that once construction began, all of the subject properties experienced vibrations from the operation of heavy construction equipment. This activity included excavation, sheet pile insertion, soil testing, and backfill paving, among other activities. These acts required the use of backhoes, jackhammers, and cranes; the constant loading and movement of dump trucks; and the installation of a large cement box culvert. All of this noise, dust, dirt, and blocked traffic access created a constant nuisance for all of the homeowners.

The Court finds the fact witnesses credible. All fact witnesses had first-hand knowledge of the condition of their homes before and after the construction, although their perspective of the damages sometimes differed from the pre-construction photographs and videos presented. They experienced the disturbances first-hand by electing to remain in their homes during the construction. All plaintiffs complained that they could feel their homes shake due to vibrations that emitted from the construction activities, even properties that were not located directly in front of the construction site. Though the extent of damage varied from property-to-property, the evidence shows a consistency and commonality of damage shared by all the houses along the SELA Project route. All houses showed cracks in

the molding, separations between walls and ceilings, and those properties with chimneys and porches exhibited gaps. Mr. Goins noted the distinctive widespread cracking throughout the homes.

Just as it is impossible for this Court to perform a crack-by-crack analysis, it is also impossible for the Court to perform a vibration-by-vibration analysis. The vibration monitoring evidence presented by the plaintiffs did not tie a specific activity or spike to a specific damage. SWB emphasized this point. SWB experts also emphasized that the .25 PPV limit established by the USACE is a conservative limit. Dr. Sykora testified that .5 PPV is typically accepted as the lowest value for potential damage to occur. He also testified that only spikes *above* the .25 PPV were reported to the USACE; spikes at the .25 PPV limit were not reported. On cross-examination, the plaintiffs demonstrated that the vibration monitors were often placed at different locations depending on where the contractor expected the vibrations to have the most impact. Therefore, there were often other areas where vibration monitoring did not take place but still could have experienced spikes above the .25 PPV threshold.

It would be disingenuous to simply conclude, as SWB's experts did, that the SELA Project did not cause any exacerbation or damage to the plaintiffs' properties. While impossible for the Court to determine which of the many complained of damages can be attributed to the SELA construction, the Court finds that the commonality of the damages indicates that these properties were adversely affected by the construction activities. However, the Court is

skeptical of the necessity of all the repairs proposed by Mr. Goins. In his reports, for instance, Mr. Goins provided estimates for repairs to be made in almost all the rooms of the properties and for the entire exterior of the properties to either be painted or power washed. In another instance, Mr. Goins testified that after patching a crack in one area of a property, he would paint all the walls of the property that are the same and continuous color of the repaired area so that there would not be "differences in the paint." The Court finds this to be unreasonable. Furthermore, although the Court finds the plaintiffs' to be credible, their perception of the damages greatly differed from the opinions of the respective experts in some instances. Although the majority of the residential plaintiffs testified that their properties had been in "excellent" condition, the evidence introduced at trial demonstrated that all of the properties had extensive cracking prior to the start of the SELA construction. The job of the Court is to place the plaintiffs in the same position they were in prior to the SELA construction, not in a better position. Therefore, the Court does not give credence to items it deems to be improvements.

A. Plaintiffs' Cause of Action

1. Control and Ownership of the SELA Project

SWB has consistently argued that it is not the owner of the SELA Project. The USACE, SWB argues, is the administrator of the SELA projects and assumes full and complete control of the SELA Project in this case. SWB claims it did not perform any

construction activities and did not select the contractors, subcontractors, or equipment for the work. Thus, SWB maintains it did not have the care, custody or control of the SELA Project.

SWB made identical arguments in the *Holzenthal* case. There, the Fourth Circuit addressed SWB's position: "underlying all of SWB's arguments with respect to liability is its repeated assertion ... that the [SELA Project] is not SWB's project because the construction was directly supervised by entities other than SWB. It asserts it was merely a 'local sponsor' of the project and that it contracted away to third parties any responsibility it otherwise would have had for damages." *Holzenthal v. Sewerage & Water Bd of New Orleans,* 2006-0796 p. 6 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 61. The *Holzenthal* Court agreed with the trial court's ruling and rejected SWB's argument, finding SWB could not and did not contract away the duties it owed the plaintiffs. *Id.*

In so finding, the appellate court reviewed the Project Cooperation Agreement between USACE and SWB noting that: (1) the project was connected to SWB's infrastructure and existed as SWB's property on SWB servitudes and easements; (2) SWB had the final right of approval over the contractors' activities; (3) the created project coordination team had representatives from the government and SWB to oversee the project; (4) SWB's requirement to contribute 25% to 50% of the total project costs; (5) SWB was consulted in order to determine lands, easements, and rights of way for the project; and (6) SWB was required to hold and save USACE free from project damages. *Id.* at 67-68.

All of these same facts exist in the present matter. The SELA Project and the large drainage systems are owned and maintained by SWB. Bxs. P16 & D3-4, p. 22. SWB was in charge of the engineering and design of the project. *Id.* at 51. SWB was always involved with the design consultants. *Id.* at 61. SWB owns the lands, rights of way, and easements, and SWB provides USACE access to them. *Id.* at 88. The Project Coordination Team consisted of SWB and USACE representatives. *Id.* at 78-79. Pursuant to the PPA and CEA, SWB must cover 35% of the cost of the SELA Project. Exs. S1 & S4. Also, pursuant to those same agreements, SWB must hold harmless and indemnify USACE from damages related to the design, construction, and maintenance of the project. *Id.*

Accordingly, if there were any doubt, this Court finds that SWB is the owner and controller of the SELA Project and SWB should be considered as such under Plaintiffs' theories of recovery.

2. Inverse Condemnation

Louisiana Constitution Article I, Section 4, provides, "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit." La. Const., Art. I, Section 4. The Constitution requires compensation even in those cases in which the State has not initiated expropriation proceedings in accordance with the statutory scheme set up for that purpose. *Holzenthal,* 950 So. 2d 55, 62 citing *State, Through Dept. of Trans. and Dev. v. Chambers Investment*

Company, Inc., 592 So. 2d 598, 602 (La. 1992). As the Louisiana Supreme Court noted in *Chambers,* it is now hornbook law that any substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of federal and state constitutions. *Id.* at 62-63. The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. *Chambers,* 592 So. 2d 598, 602 *citing Reymond v. State, Dept. of Highways,* 255 La. 425, 231 So. 2d 375, 383 (1970). The action for inverse condemnation is available in all cases where there has been a taking or damaging of-property and where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. *Id.* [Citations omitted].

The Louisiana Supreme Court developed a three-part test to determine whether a claimant is entitled to eminent domain compensation: (1) whether a person's legal right with respect to a thing or object has been affected; (2) if a property right is involved, whether the property has been taken or damaged in a constitutional sense; and (3) whether the taking or damage is for a public purpose. *See Holzenthal,* 950 So. 2d at 63.

In *Holzenthal,* the trial court applied this test and found SWB liable for inverse condemnation. *Id.* The *Holzenthal* court declared, "[t]his is clearly a case in which a valid and vital public purpose, improved drainage of our city-below-sea-level was served ...

[d]espite the best efforts of the SWB and [Army Corps of Engineers] and the contractors, dewatering and vibration damage to these neighboring interests was the natural consequence of the Project." *Id.* at 85. For reasons similar to those articulated in *Holzenthal,* applying the *Chambers* test, this Court finds that the Plaintiffs suffered an inverse condemnation of their property. First, the Plaintiffs have a legal right in their properties, and their testimony, as well as the expert testimony, show that their properties were damaged and that their property rights were adversely affected. Second, the plaintiffs' damages were an integral consequence of the SELA Project, which was specifically carried out to improve the drainage system and to reduce flood-related damage in the New Orleans area. Last, as to public purpose, the Court finds that providing drainage improvement to neighborhoods of New Orleans that are susceptible to flooding and flood-related damage certainly serves a public purpose. As such, the Court finds that the plaintiffs are entitled to damages under the theory of inverse condemnation.

3. Strict Liability for Ultrahazardous Pile Driving Under Article 667

Pursuant to Louisiana Civil Code article 667, "the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives."

In *Vicknair v. Boh Bros. Construction Co.,* the Fifth Circuit found that installation of steel sheeting with a vibratory hammer, and driving wood sheeting with a backhoe (for an emergency sewer repair) was not ultrahazardous. 2003-1351 (La App. 5th Cir. 3/30/04), 871 So. 2d 514. The Louisiana Supreme Court, in *Suire v. Lafayette City-Parish Consol. Gov't.,* cited *Vicknair* approvingly and found that the driving of metal sheets with backhoes did not constitute pile driving under article 667. 2004-1459 (La 4/12/05), 907 So. 2d 37. In *Holzenthal,* the Fourth Circuit distinguished *Suire* and found that the driving of metal sheets into the ground with a vibratory pile-driving hammer, as opposed to a backhoe, constituted "pile driving". 950 So. 2d at 55. The court noted that seventy-ton cranes were used with the vibratory hammer and relied on vibration monitoring evidence showing that the highest levels of vibrations would have been caused by crane movement regardless of the type of pile driving. *Id.*

The legislature did not intend for the use of "cranes" alone to constitute an ultrahazardous activity. The Louisiana Supreme Court in *Suire* explained that, "[i]n light of the 1996 amendment, Louisiana courts are relieved of the responsibility to decide whether a certain activity is ultrahazardous for purposes of deciding whether the absolute liability standard applies. *Suire,* 907 So. 2d at 48-49, citing *Mossy Motors, Inc. v. Sewerage and Water Bd of City of New Orleans,* 1998-0495 (La App. 4th Cir. 5/12/99), 753 So. 2d 269 (discussing the 1996 amendment and noting that "[t]he new definition by amendment defines an ultrahazardous activity legislatively"). "Any other activities besides the two the article

specifically lists are not ultrahazardous for purposes of article 667. Thus, to qualify for the absolute liability standard, the plaintiff must show that the activity complained ofis either 'pile driving' or 'blasting with explosives.'" *Suire,* 907 So. 2d at 49. Following the Louisiana Supreme Court's analysis in *Suire,* this Court does not find that the installation of metal sheet piles into the ground with a Giken constitutes the ultrahazardous activity of pile driving. Thus, SWB is not strictly liable for ultrahazardous activity.

4. Strict Liability and Negligence Under La. C.C. arts. 2315, 2317, and 2317.1

Plaintiffs' strict liability and negligence claims arise pursuant to Louisiana Civil Code articles 2315, 2317, and 2317.1. Article 2317 reads, "[w]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." La. C.C. art. 2317. Those modifications are contained in Article 2317.1:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing

> in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

La. C.C. art. 2317.1.

As a threshold matter, to prevail under articles 2317 and 2317.1, a plaintiff must establish custody or garde. The owner of a thing is the presumed guardian of its structure. *Doughty v. Insured Lloyds Ins. Co.,* 576 So. 2d 461, 464 (La. 1991). The test for determining custody or garde is two-fold: (1) whether the entity has control or authority over the thing; and (2) whether the person receives a substantial benefit. *Id.* Here, SWB has control and authority over the SELA Project because SWB is responsible for the public drainage system for the City of New Orleans and it contracted with the USACE to engineer and execute the project. Moreover, SWB had access to the work sites and actively participated in project oversight and plan modification when necessary. SWB derives a benefit because the SELA Project's purpose is to improve the public drainage system, for which SWB is responsible.

With custody and garde established, a plaintiff must also prove: (1) the project presented an unreasonable risk of harm; (2) the owner could have prevented the harm had it exercised reasonable care; and (3) the owner's failure to exercise such care caused the plaintiffs damages. La. C.C. arts. 2317 and 2317.1.

First, SWB was well aware that the project presented a risk of harm to the plaintiffs' properties pursuant to the terms of the PA and its understanding from USACE that properties could experience

vibration related damages, especially those properties located within the ZOI and APE. Second, SWB designed the project with the help of consultants. SWB's project plans anticipated that damage could be caused from vibrations. Still, the damages were foreseeable, and the plans were carried out anyway. Site-specific monitoring data (survey points, piezometers, inclinometers, ground vibrations, and noise) was collected during construction. SWB hired a forensic contractor who was required to collect photo documentation of all existing structures prior to initiation of construction for purposes of claim resolution. Third, a hotline was established to address concerns and complaints during construction work. Even after receiving reports of damages on its hotline and receiving vibration data showing exceedances over .25 PPV, there was no evidence that SWB took further measures to prevent property damage. Lastly, the evidence presented during trial demonstrated that the construction activities, which lasted several years, caused physical damage to the plaintiffs' properties in the forms of cracks and separations, and also caused disturbances that interfered with the plaintiffs' use and enjoyment of their homes. For these reasons, the Court finds that plaintiffs presented sufficient evidence to hold SWB liable under Louisiana Civil Code articles 2315, 2317 and 2317.1.

As this Court understands, the essential difference between strict liability and negligence theories is knowledge of a defect. *See Pool* v. *City of Shreveport,* 607 So. 2d 861, 863-64 (La. App. 2nd Cir. 1992). Knowledge of a defect gives rise to a corresponding duty to act. *See Soccorro* v. *City of New Orleans*. 579 So. 2d 931 (La 1991). Under article 2317,

knowledge of the defect is unnecessary. *Id.; see also Loescher v. Parr,* 324 So. 2d 441,446 (La. 1976). Given that this Court found SWB strictly liable under articles 2317 and 2317.1, the Court does not find that a negligence analysis is necessary.

III. CONCLUSIONS AND DAMAGES

A. Preliminary Findings

1. Plaintiffs' Motion for Contempt and Adverse Presumption

Trial for Residential Group C was scheduled to begin on Monday, January 28, 2019. On Tuesday, January 22, less than a week before trial, counsel for the plaintiffs filed a Motion for Contempt and Sanctions against SWB, alleging that SWB had withheld critical geotechnical evidence regarding Quick and Associate's piezometer data taken for the Jefferson II phase of the SELA Project. Counsel claimed that this data had previously been requested in discovery and that the Court had ordered SWB to produce this data.

Plaintiffs sought an adverse presumption that the modifications to the groundwater in the Jefferson II phase of the SELA Project caused structural damage to the plaintiffs' properties. However, the only exhibits the plaintiffs attached in support of their motion were requests and orders for the data in the *M Langenstein* (Case No.2015-11971), *Ariyan* (Case No. 2015-10789), and *K & B* (Case No. 2015-11394) cases, all of which are commercial plaintiff suits against SWB. Notably, the plaintiffs did not attach any

discovery requests or orders that had been filed in the *Lowenburg* suit to their memorandum. SWB filed an opposition to this motion and attached the Requests for Production of Documents that was propounded to SWB on December 21, 2018 in the *Lowenburg* suit. SWB argued that nowhere in the discovery requests did the plaintiffs request piezometer, inclinometer, or any geotechnical data.

Plaintiffs' motion was set for hearing the morning of trial. At the hearing, the Court denied plaintiffs' motion, finding that the it could not hold SWB in contempt for failing to produce information requested in *other* cases when the same information had never been requested in *their* case. Plaintiffs' objection to this ruling was noted, and trial commenced.

Multiple times throughout the trial, counsel for the plaintiffs re-urged their objection to the Court's ruling on the contempt, despite the fact that their objection had been noted at the outset of trial and despite the Court ordering counsel to stop making duplicative objections. Given that the Court's ruling on plaintiffs' contempt motion was argued throughout the trial, the Court reissues its ruling and further explains its reasoning.

As was previously noted at the hearing on plaintiffs' Motion for Contempt and Adverse Presumption, and per the exhibits attached by counsel to the plaintiffs' motion, the only specific requests for the geotechnical, piezometer data for the Jefferson II phase of the SELA Project were made in the commercial litigation cases, not in the *Lowenburg* suit. Although the cases arise from the same incident

and are handled by the same attorneys, the Court cannot hold SWB in contempt for information that was not requested in this specific case. Louisiana jurisprudence is clear that separate cases have separate procedural identities and must stand on their own merits.[15] Notably, the *Lowenburg* suit is not even consolidated with the commercial suits where the information was requested, so as a matter of law the Court cannot hold SWB in contempt for failing to produce information that was never requested for this specific case.

Alternatively, counsel for plaintiffs argued at the hearing on the motion, and through their objections at the trial, that this data was requested in the *Lowenburg* suit. The Court has reviewed the Request for Production sent in the *Lowenburg* case that was attached to SWB's opposition. Even if the language of those requests somehow included the withheld geotechnical data (which the Court finds that it did not), the plaintiffs are still not entitled to a contempt order and an adverse presumption at trial because

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[15] *Williams v. Scheinuk,* 348 So. 2d 340, 341 (La. App. 4th Cir. 1978) ("Procedural or substantive rights peculiar to one case are not rendered applicable to the companion suit by the mere fact of consolidation. ***Each case must stand on*** *its* ***own merits.")*** (Emphasis added); *Broome v. Gauthier,* 443 So. 2d 1127, 1131 (La. App. 4th Cir. 1983) ("*After consolidation each case must be* ***procedurally correct.*** Rights peculiar to one case do not become applicable to a companion case by the mere fact of consolidation.") (Emphasis added); *Ricks* v. *Kentwood Oil Co., Inc.,* 2009- 0677, p. 5 (La. App. 1 Cir. 2/23/10), 38 So. 3d 363, 366-67 ("Consolidation does not render the procedural or substantive rights peculiar to one case applicable to a companion case, and in no way enlarges or decreases the rights of the litigants. Despite an order of consolidation, ***each case must stand on*** *its* ***own merits.")*** (Emphasis added).

there was no prejudice in the SWB's failure to produce the data in this case. The Court notes that the Request for Production in the *Lowenburg* case was sent to SWB on December 21, 2018—the Friday before Christmas, three weeks prior to the discovery cut-off deadline, and almost a month before the trial. Louisiana Code of Civil Procedure article 1462 (B)(l) states that a party upon whom a discovery request is served shall have thirty days to serve the written responses upon the mover. Therefore, SWB would have had until January 20, 2019 to provide the plaintiffs with the requested information, and plaintiffs would have received this information only *eight days* prior to trial. Counsel for plaintiffs argue that they and their experts were prejudiced in their trial preparation because they discovered this information at the beginning of January and less than a month before trial. However, if this information had been timely produced in accordance with the December 21 request, the plaintiffs still only would have had eight days prior to trial to utilize this information, which is significantly less time than when they had actually received the geotechnical data. The date for this trial was issued on July 6, 2018.[16] Yet, counsel for plaintiffs waited until three weeks before the close of discovery and a month before trial to send a request for production to SWB. The Court cannot speculate as to why the counsel for plaintiffs waited to request such information, but the Court also finds that the plaintiffs were not prejudiced by the "late" revelation of this geotechnical data when the information was discovered much earlier than if SWB had produced it

[16] *See* Scheduling Order for *Lowenburg* Plaintiffs, Residential Trial Group C.

timely in accordance with the *Lowenburg* discovery requests.

Third, at trial, counsel for plaintiffs continually asked their experts when the piezometer data for the Jefferson II phase had been provided, to which the experts responded that they had not received the data until the *Friday before trial.* Counsel for plaintiffs also questioned SWB's experts on cross-examination if they were aware that the piezometer data had not been provided to the plaintiffs' experts until the *Friday before trial.* Dr. Storesund, *plaintiffs' own expert,* writes in his amended report, "On ***January* 7, *2019*** [counsel for plaintiffs] forwarded documentation received from Eustis Engineering Services to my office. This new documentation contained requested piezometer data."[17] (Emphasis added). Again, the Court cannot speculate as to who counsel for plaintiffs sent this data to or why counsel for plaintiffs would wait until the Friday before trial to give their experts this data, but it is clear from this letter that Dr. Storesund had this data prior to the Friday before trial despite counsel implying otherwise. The Court cannot find that the plaintiffs' experts were prejudiced in their trial preparation when the counsel for plaintiffs failed to give their own experts the data on January 7, 2019 after they had received it.

Therefore, the Court reaffirms its earlier ruling that Plaintiffs' Motion for Contempt and Adverse Presumption is denied.

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[17] Dr. Storesund's amended report was attached as Exhibit H to Plaintiffs' Motion for Contempt and Adverse Presumption. The report is dated January 13, 2019.

2. Expert Findings

Both Mr. Goins and Dr. Ragas included in their estimate of damages awards for the removal and storage of the residential plaintiffs' furnishing and for the cost of living for the plaintiffs to live elsewhere while repairs are being made to their homes. The Court does not find it necessary for the plaintiffs to move out of their homes while repairs are being made and will not provide an award for furnished rentals or for the removal and storage of each property's furniture.

Additionally, the Court's method for estimating the plaintiffs' property damages differs from that used in the previous *Sewell* trials because the *Lowenburg* plaintiffs retained Mr. Goins, as opposed to the Gurtler Bros., to calculate their damages. Mr. Goins' property damage reports greatly differed from that of the Gurtler Bros. While the Gurtler reports contained detailed lists of itemized repairs, Mr. Goins' reports contained minimal information on the repairs to be made, and his calculations were incorrect in some instances. Even though Mr. Goins' reports greatly differed from that of the Gurtler Bros., the Court does not find that the property damages experienced by Residential Trial Group C differ from those experienced by their respective counterparts in Residential Trial Groups A and D.

B. Quantum

1. Elio. Benito, and Charlotte Brancaforte-1201 Jefferson Avenue/5351 Coliseum Avenue

A. Plaintiff's Testimony

Elio Brancaforte testified on behalf of himself and his parents, Benito and Charlotte Brancaforte. All three share an ownership interest in the property and reside there. Mr. Brancaforte testified that he has lived at the property since 2002, and his parents have resided there since 2004. Mr. Brancaforte works as a professor at Tulane University; his parents are retired professors.

Mr. Brancaforte testified that he first noticed the SELA construction in the summer of 2013 when the preliminary work began. He testified that the work occurred directly in front of his home and that the intersection of Coliseum Street and Jefferson Avenue appeared to be a staging area. Mr. Brancaforte attested that the work lasted for approximately three and a half years, ending sometime in late 2016. While the work was on-going, the Brancafortes had restricted access to their property. Cross streets would intermittently close and re-open throughout the construction without notice, making it difficult for the Brancafortes to plan their routes accordingly. Mr. Brancaforte testified that this was especially hard on his elderly parents. Jefferson Avenue closed for the duration of the construction work. At times, people would block the carport on the side of the property facing Coliseum Street, forcing the Brancafortes to park elsewhere.

When the construction work was on-going, it produced noise, dust, and vibrations. The construction would start at 7:00 A.M. each weekday and end around night time. Mr. Brancaforte described the

noise from the construction site as an incessant pounding that was an aggravation. Both he and his wife's sleep schedules were disturbed, and neither of them were able to concentrate and work from home. Further, Mr. Brancaforte asserted that, although they are retired, his parents had projects they would work on at home that were disrupted because of the noise. Although not an everyday occurrence, Mr. Brancaforte testified that the construction would sometimes extend into the night and occur on the weekends.

In addition to the noise, the construction work also generated lots of dust, and Mr. Brancaforte stated that his wife had to move to Boston because the dust irritated her allergies. Mr. Brancaforte testified that his neighborhood experienced a rodent infestation during the time of the SELA project, and at one point, a large hole formed near and extended up to his property. The hole was covered up multiple times throughout the course of the construction, but whenever the hole was uncovered, dust would accumulate.

According to Mr. Brancaforte, his property was in very good condition prior to the SELA construction. At trial, Mr. Brancaforte provided a chart he had created that demonstrated where damages have appeared in his home. Ex P38. He noted that the front porch has separated from the home, there are cracks throughout the basement and in the Tiffany windows, and several doors do not close correctly. However, the Cajun pre-construction video shown by SWB on cross-examination indicates that there were many pre-existing damages in the home.

At trial, Mr. Brancaforte testified that his family would often rent out portions of the home whenever members of the family were away for extended periods of time. During the construction, Mr. Brancaforte was absent from his home for the majority of the summers. Furthermore, he was gone for the year of2015 and for the Fall 2016-Spring 2017 academic year. Prior to the SELA construction, Mr. Brancaforte had been able to rent out the home for $2,300.00 per month and never had any trouble finding tenants. Notably, he was unable to find a tenant to occupy the property for 2015. Although he was able to rent the home during the Fall 2016 and Spring 2017 semesters, this was only after he had lowered the price to $1,450.00 per month. Mr. Brancaforte estimates that his total lost rents amount to $36,100.00. *See* Ex. P44.

B. Expert Opinions

Mr. Goins testified that the Brancaforte property was about twenty feet away from the construction work. Both he and Dr. Sykora agree that the building fell within the USACE defined APE. Mr. Goins noted from his inspection that cracks and separations appeared throughout the entire property. Dr. Bailey also noted that the property had cosmetic distress, but he testified that all these distresses pre-existed the SELA construction. Further, he noted that Mr. Goins' repair estimate constituted 94% of the home's appraisal value. Dr. Sykora testified that the property was forty-five feet to the TRS. The highest vibrations near the property was an .84 ips exceedance. Dr. Sykora testified that the property's manometer survey was within a normal range for a building of its age.

Although the property did have a three-inch differential, this differential is normal for the neighborhood where the property is located.

C. Damages

Mr. Goins estimated that it would take $446,697.36 to repair the damages at the Brancaforte property. Ex. P25. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$466,697.36
Repairs/Expenses Unrelated to SELA	($431,697.36)
Total	**$35,000.00**

Dr. Ragas estimated that that the Brancafortes suffered a 40% loss in the monthly rent value of their home. However, he also gave them the full value for nighttime noise. While evidence and testimony provided at trial indicated that construction work sometimes occurred at night and generators were sometimes left to run all night, the evidence did not indicate that nighttime noise was a daily occurrence. Therefore, the Court reduces Dr. Ragas' estimate by 5%. Additionally, Dr. Ragas admitted on cross-examination that he did not factor into his

calculations the periods when the Brancafortes were not present at the property. Mr. Elio Brancaforte, for example, testified that he was away for the summer months and for all of 2015. Therefore, the Brancaforte total award is reduced by one-third.

Loss of Use and Enjoyment

Total (41 months) (reduced by 1/3) **$48,589.10**

The Brancafortes also provided the Court with various receipts for repairs they claim are related to the SELA construction. The Court finds that the Brancafortes have failed to prove that all the repairs they made are attributable to SELA damage. *See* Ex. P42. However, the Court does find that the repairs made to the cracks in Mrs. Brancaforte's bedroom and bathroom are more likely than not attributable to the SELA construction.

Out-of-Pocket Expenses

Total **$1,300.00**

The Brancafortes also make a claim for lost rents for the time periods they were unable to lease their property. *See* Ex. P44. Although Mr. Brancaforte testified that his family was always able to easily find tenants in the past, he only provided one prior lease agreement and testified at trial that he normally limits his advertisement of the property to the academic community. Mr. Brancaforte attempted to rent his property twice during the SELA construction. He first tried to rent out his home for the entire year of 2015 when he went abroad and was unsuccessful in

finding a tenant. He only expanded his search for tenants outside of the academic community right before he left. The second time that he attempted to rent the property was for the Fall 2016-Spring 2017 academic year when he was away on sabbatical. After lowering the price to $1,450.00 per month, he was able to successfully find a tenant. Therefore, the Court does not find that the lost rents claimed by the Brancafortes were completely attributable to the SELA construction project. Although the Court finds that Mr. Brancaforte did not perform due diligence in only advertising to the academic community, the Court also acknowledges that 2015 was the "height" of the SELA construction work near the property and more likely than not affected his ability to rent his home. Accordingly, the Court reduces Mr. Brancaforte's request for lost rents in 2015 by half.

Lost Rents

Total	**$22,300.00**

Total Damages for 1201 Jefferson Avenue/ 5351 Coliseum Avenue

Property Damage	$35,000.00
Loss of U/E	$48,589.10
Out-of-Pocket Expenses	$1,300.00
Lost Rents	$22,300.00
Total	**$107,189.10**

2. Dr. Josephine Brown-5524 Prytania Street

A. Plaintiff's Testimony

Dr. Josephine Brown has owned 5524 Prytania Street since 1978 and is the sole owner of the property. She testified that she was first impacted by the SELA project in June 2013 when trucks and other vehicles transporting materials would speed down. her street. The movement of these vehicles caused her house to shake. The construction took place directly in front of her property and disrupted her life for about three and a half years. Dr. Brown testified that she could hear the construction workers arrive at 6:45 A.M. each day, and the noise would disrupt her sleep. The construction work usually lasted until the early evening, and at times, it would extend into the weekend.

The construction work generated significant noise and vibrations. Dr. Brown testified that she would wear earplugs to help dampen the constant noise generated by the construction machinery. At one point, generators were brought onto the street to help with water drainage, and the generators were left to run throughout the night. After a sinkhole had formed in front of her home, pumps ran constantly all day and all night until the sinkhole could be filled. The noise level was so extreme that her son moved from the front bedroom to the upstairs bedroom in order to lessen the impact.[18] Additionally, her home

[18] Dr. Brown also testified that her son's bipolar disorder requires him to keep a strict routine and that the SELA construction made his life very difficult because of the constant disruptions.

experienced vibrations from the heavy machinery used, and Dr. Brown testified that she could always feel vibrations while she was inside the house.

Overall, Dr. Brown testified that the SELA construction caused a loss of quality of life. During the construction, the house required extra cleaning because of the dust that was generated by the work. Dr. Brown testified that she enjoys being outdoors. However, the air quality became poor because of the constant dust in the air, and Dr. Brown asserted that she lost her privacy because workers would look into her yard. Her street experienced a rodent and bird infestation which resulted from the cumulating trash on the street. Dr. Brown asserted that the workers would leave their lunches and containers out in the open instead of disposing of them properly. The City stopped picking up trash, and the rodents were attracted to the dumpsters that were placed on the street. Dr. Brown also testified that conditions at night became unsafe when black tarps were erected along the construction route. The tarps created tunneled walkways in which Dr. Brown feared that she would be assaulted or trapped. Therefore, she would not go outside at night unless she had an escort.

Prytania Street was closed during the construction, and Dr. Brown was forced to park on neighboring streets. In addition, the construction work required certain intersections to be closed and traffic to be re-routed, further hampering her ability to access her property and walk the neighborhood. Dr.

During the course of the SELA construction, he was hospitalized twice, and she believes this was related to the SELA construction.

Brown specifically recounted that she was forced to take a different route in order to attend her morning classes at the Jewish Community Center ("JCC") and that this new route required her to walk through mud. While the work was on-going, Dr. Brown was unable to entertain at her home because of the difficulty in accessing her property and hardships created by the SELA construction work.

Dr. Brown testified that her home was in very good condition prior to the start of the SELA project and that she regularly maintained the property. During the project, however, damages were sustained. Dr. Brown testified that her driveway has buckled, tiles have loosened, certain doors no longer close properly, and cracks have formed on the interior and exterior of her home. Additionally, she has a broken slate on her walkway that she believes resulted from the bucket of a crane hitting the walkway as it dug up her street.[19] Dr. Brown testified that she has repaired some of the damages at her home and has incurred approximately $26,000.00 in expenses. *See* Ex. P29. She testified that she also has concerns about the re-sale value of her home. During the course of the SELA project, a sinkhole, which she claims was the size of a swimming pool, opened up directly in front of her property. Despite multiple efforts to repair the sinkhole, it continued to grow for months after its formation. Although it has been covered up, Dr. Brown testified that the sinkhole still had active water coursing through it at the time it was finally closed.

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[19] Video of this incident was shown at trial. *See* Ex. P31.

B. Expert Opinions

Dr. Storesund noted that the sinkhole that formed during the SELA construction was directly in front of Dr. Brown's property. Mr. Goins testified that the sinkhole expanded the width of the entire property and reached all the way to Dr. Brown's sidewalk. Mr. Goins noted that there was cracking throughout the home. In addition, he observed damage to the piers of the home and witnessed signs of porch movement. Mr. Goins opined that it is necessary to stabilize the foundation of the property to prevent further damage from occurring.

Mr. Goins and Dr. Sykora agreed that Dr. Brown's property fell within the USACE defined APE. Dr. Sykora testified that the property was forty feet from the TRS and the sinkhole was twenty-seven feet away from the home. Dr. Sykora opined that there was no possibility that the sinkhole could have influenced the foundation of Dr. Brown's home and that there was no damage to the building's foundation. He found that the floor manometer survey was within normal range. Further, he stated that there were no vibration exceedances above .5 ips on the block where Dr. Brown's home is located. However, Dr. Sykora did admit that Dr. Brown's walkway was damaged by the SELA construction, and Dr. Bailey agreed. Except for the walkway, Dr. Bailey found that all the distresses at the property pre-existed the SELA construction.

C.Damages

Mr. Goins estimated that it would take $257,227.63 to repair the damages to Dr. Brown's

property. Ex. P25. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$257,227.63
Repairs/Expenses Unrelated to SELA	($235,227.63)
Total	**$22,000.00**

Dr. Ragas estimated that Dr. Brown suffered a 55% loss in the monthly rent value of her home. However, Dr. Ragas awarded Dr. Brown 15% for the loss of use of her driveway. In past trials[20], the maxim.um amount Dr. Ragas awarded for loss of parking was 10%. Accordingly, the Court reduces Dr. Brown's estimate for loss of parking to 10%. Furthermore, Dr. Ragas awarded Dr. Brown the full amount for nighttime noise. While evidence and testimony provided at trial indicated that construction work sometimes occurred at night and generators were sometimes left to run all night, the evidence did not indicate that nighttime noise was a daily occurrence. Therefore, the Court reduces Dr. Ragas' value for nighttime noise by 5%.

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[20] *See* 2015-4501: *Elizabeth Sewell v. Sewerage & Water Board of New Orleans* Reasons for Judgment for Trial Group A and Trial Group B.

Loss of Use and Enjoyment

Total (41 months)	$57,785.40

Dr. Brown a1so claims that she incurred about $25,939.00 in expenses repairing damages to her property that are related to the SELA construction. See Ex. P29. The Court finds that she has not met her burden in showing that these expenses are related to SELA damage.

Out-of-Pocket Expenses

Total	**$0.00**

Total Damages for 5524 Prytania Street

Property Damage	$22,000.00
Loss ofU/E	$57,785.40
Out-of-Pocket Expenses	$0.00
Total	**$79,785.40**

3. Robert Parke and Nancy Ellis-5419 Prytania Street

A. Plaintiff's Testimony

Mrs. Nancy Ellis testified on behalf of herself and her husband. Both she and her husband own the property at 5419 Prytania Street, and they have lived there for over twenty-one years. Mrs. Ellis asserted that her life was first impacted by the SELA project in

July 2013. Her block was used as a staging area for the construction, and her property was cut-off almost immediately because of the equipment stored on her block. Her block was one of the last ones to be re-opened after the construction finally ended in 2016. Overall, Mrs. Ellis testified that her life was disrupted for a period of about three and a half years.

The SELA construction took place directly in front of Mrs. Ellis' property. Both her street and Jefferson Avenue were shut down during the construction, so she and her husband were unable to park their vehicles near their home. Mrs. Ellis described the parking situation as awful. The farthest she had to park was about five blocks away from her property, and her car was hit three times throughout the course of the construction while she was parked on a side street. The fact that she could not park at her property was particularly concerning at night. Mrs. Ellis testified that she did not feel safe walking the neighborhood at night because there were no street lights and portions of the sidewalk were buckled. Once the black tarps were erected, Mrs. Ellis testified that she could not see at all. Mrs. Ellis' in-laws were no longer able to visit her home because the parking situation rendered it unsafe for them, even during the day. Although she still tried to entertain guests at her home, she was unable to do so.

Mrs. Ellis described the noise generated from the construction work as terrible. Mrs. Ellis testified that she was home during the day when the construction was on-going and that noise was a daily occurrence. She described the noise as terrible. She specifically recalled believing that her house was collapsing after

a crane dumped materials on her street. Mrs. Ellis testified that she could hear the workers arrive at the construction site around 6:30 A.M. each day. The construction work would usually end around dark, but it would sometimes extend into the night and the weekend. In addition to the noise, Mrs. Ellis complained about the vibrations generated from the construction work. She testified that she often felt vibrations in the house. Some of these vibrations she described as ripples while others felt as if something heavy had been dropped on the ground. Mrs. Ellis testified that the majority of the vibrations came from the heavy equipment being driven down her street.

Mrs. Ellis attended community meetings held by SWB and USACE, and she testified that it was represented at these meetings that the construction work would only last between six to nine months. Mrs. Ellis also testified that she had been told that normal trash pick-up services would be continued throughout the construction. Instead, trash was placed in a giant dumpster on the street and left alone for weeks at a time. This eventually resulted in a rat infestation. Further, a port-o-let for the construction workers was stationed near her home, and Mrs. Ellis often had to call the company for it to be cleaned because it was disgusting.

Mrs. Ellis testified that her property was in excellent condition prior to the SELA project She claimed that she regularly maintained the home. In 2011, the family renovated the master bathroom, attic, and sitting room. However, damages were sustained during the course of the construction work. Specifically, Mrs. Ellis noted the following damages:

cracks in the piers and foundation of the home, cracks in the bricks in the backyard, nails popping out of frames, siding falling off the house, a sagging ceiling, and cracks throughout the entirety of the home. Also, she testified that the fa9ade of the property has sunk about four inches into the ground, and Mrs. Ellis testified that she believed that this is a result of the sinkhole that formed about a block away from her property.

B. Expert Opinions

Mr. Goins testified that the damages he observed at the Ellis home included separations in the front porch, nails popping out from the home's siding, cracks in the exterior fireplace, and cracks and separations throughout the whole of the property. Dr. Sykora testified that the home was thirty-five feet to the TRS. He also testified that none of the vibrations that occurred near the property exceeded .41 ips. Overall, Dr. Sykora found that the property did not have structural or foundational damage and that there was no damage to the piers of the home. Dr. Bailey testified that he did witness cosmetic damages throughout the interior and exterior of the home along with evidence of moisture intrusion. He also noted that Mr. Goins' estimate constituted 58% of the appraisal value of the property.

C. Damages

Mr. Goins estimated that it would take $332,995.01 to repair the damages to the Ellis property. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the

foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$332,995.01
Repairs/Expenses Unrelated to SELA	($307,995.01)
Total	**$25,000.00**

Dr. Ragas estimated that the Ellis property suffered a 50% loss in its monthly rent value. However, Dr. Ragas awarded full value for nighttime noise. While evidence and testimony provided at trial indicated that construction work sometimes occurred at night and generators were sometimes left to run all night, the evidence did not indicate that nighttime noise was a daily occurrence. Therefore, the Court reduces the estimate for nighttime noise by 5%.

Loss of Use and Enjoyment	
Total (41 months)	**$63,892.35**

The Ellis family also provided various receipts to the Court for repairs they claim are related to SELA construction damage. *See* Ex. P34. While the Court finds that the plaintiffs have not met their burden of proving all the repairs were related to SELA, the Court finds that the repairs to the separated floor

boards are more likely than not attributable to the SELA construction.

Out-of-Pocket Expenses	
Total	$3,900.00

Total Damages for 5419 Prytania Street	
Property Damage	$25,000.00
Loss of U/E	$63,892.35
Out-of-Pocket Expenses	$3,900.00
Total	**$92,792.35**

4. Mark Hamrick-1300, 1300A, 1302, 1302A Jefferson Avenue

A. Plaintiff's Testimony

Mr. Hamrick is the owner of a four-plex property located at 1300-02 Jefferson Avenue, and he has lived there for thirty years. Mr. Hamrick lives in two of the apartments and manages the rest as rentals. Therefore, he was usually at home during the day when the construction work occurred. Mr. Hamrick testified that he was first impacted by the SELA project in June 2013 when traffic was re-routed and preliminary work began. The construction work extended from Perrier Street to his property and lasted until December 2016. The work started early in the morning and ended when it was dark outside. However, sometimes the construction work would

extend into the night Mr. Hamrick asserted that work would also occur on the weekends frequently but that he never received prior notification.

During the construction, Mr. Hamrick witnessed deep excavation work by his property, and he specifically recalled jackhammers being used to break cement. A massive blue filtration tank was installed on the side yard of his property and remained there for about a year. The tank was so tall that a person could climb on top of it and then jump onto Mr. Hamrick's balcony.

At trial, Mr. Hamrick recounted that the SELA construction created daily disruptions in his life. He complained of constant noise and vibrations generated from the work. He asserted that the noise generated was far above normal noise levels. Although the construction work usually ended around dark, at one point generators and pumps were brought to the site and left to run all night. Mr. Hamrick testified that he developed a major sleeping problem and would sometimes sleep over at his mother's house. Mr. Hamrick began to keep a log of the vibrations and noise he experienced at the property, *see* Ex. P83, and he noted that the disruptions progressively worsened. Besides the noise and vibrations, Mr. Hamrick testified that the construction work also created plenty of dirt and dust. Mr. Hamrick claimed that he suffered from a major upper respiratory infection that ruptured his ear drums, and he attributes the illness to the dust from the construction.

Mr. Hamrick testified that traffic conditions and parking were also a major problem during the

construction. Although he owns a driveway, his driveway was often blocked by construction and personal vehicles. One of his neighbors sent him an email indicating that Cajun construction workers were parking in his driveway when he was not there. *See* Ex. P76. When his driveway was not being blocked, Mr. Hamrick had a place to park, but he testified that his tenants had to find parking elsewhere. Mr. Hamrick also experienced difficulty with street closures. Mr. Hamrick testified that the intersection of Perrier Street and Jefferson Avenue was closed for the majority of the project. Other side streets were closed intermittently without any notice being given to the neighboring residents.

Mr. Hamrick testified that his property was in excellent condition prior to the start of the SELA project and that he always maintained the property. However, he asserted that his property sustained damages from the SELA construction. Mr. Hamrick testified that the concrete steps are pulling away from the porch and the interior of the home has cracking and separations.[21] On September 14, 2013, a power line fell on his house, and Mr. Hamrick testified that this was a result of Entergy re-routing the power lines for the SELA construction. Although Mr. Hamrick made an insurance claim regarding the damage from the power line, *see* Ex. P72, Mr. Hamrick is making additional claims for other items of damage, such as appliances that were damaged as a result of power surges related to the downed power line. See Ex. P73. Although Mr. Hamrick has already made some

[21] This includes a giant crack in the living room of 1300 Jefferson Avenue.

repairs, *see* Ex. P78-79, he claims that more repairs are needed to repair the damages at his property.

Mr. Hamrick also claims that he suffered a loss of rental income while the SELA construction was on-going. Mr. Hamrick testified that he had a seventeen-month vacancy during the SELA project During those seventeen months, Mr. Hamrick testified that he was unable to find someone willing to rent the apartment for $1,750.00 per month, which Mr. Hamrick alleges is a fair market price for the unit. Mr. Hamrick testified that he assumed his first tenant left because of the SELA construction. During the construction, he did have a tenant stay in one of the other apartments at a rate of $1,550.00 per month. Mr. Hamrick claims that he wanted to raise that tenant's rent to $1,750.00 but feared that she would move.

B. Expert Opinions

Both Mr. Goins and Dr. Sykora testified that Mr. Hamrick's property fell within the USACE defined APE. Mr. Goins also testified that deep excavation work occurred both in the front and on the side of Mr. Hamrick's property. Mr. Goins observed cracking throughout the property and noted movement of the stairs away from the building. While Mr. Goins found that the property needed some foundation repairs, he testified that the repairs should be limited to the front porch. Dr. Sykora testified that Mr. Hamrick's property was fifty feet from the TRS. He noted that there was only one exceedance of .25 ips near the property and that the manometer survey of the home was normal. However, Dr. Sykora did attribute the widening of the porch to the SELA construction. Dr.

Bailey testified that he observed cosmetic distress throughout the interior and exterior of the property. He found that the distresses pre-existed the SELA construction except for the crack in the chain wall. He included the damage to the chain wall in his repair estimate for the property.

C. Damages

Mr. Goins estimated that it would take $197,328.00 to repair the damages at Mr. Hamrick's property. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$197,328.00
Repairs/Expenses Unrelated to SELA	($174,328.00)
Total	**$23,000.00**

Dr. Ragas estimated that Mr. Hamrick's property suffered a 40% loss in its monthly rent value. He included the square footage of Mr. Hamrick's rental units in his calculations for Hamrick's loss of use and enjoyment. However, in previous SELA trials, specifically in the trial for *Sewell* Plaintiffs Residential Group D, Dr. Ragas testified that he had taken out the portions of square footage in homes that were also used as rental property. Mr. Hamrick's

home is a four-plex property in which Mr. Hamrick resides in two of the units and rents the others to tenants. Therefore, the Court reduces the total square footage that Dr. Ragas included in his calculations by one-half. Dr. Ragas also awarded Mr. Hamrick 10% for his loss of parking. However, on cross examination, Dr. Ragas admitted that he was not sure if Mr. Hamrick ever lost use of his driveway. At trial, Mr. Hamrick testified that his driveway would occasionally be blocked by construction vehicles, but overall, he was still able to use his driveway during the course of the construction. Accordingly, the Court reduces Dr. Ragas' award for loss of parking to 0%.

Loss of Use and Enjoyment

Total (41 months) **$29,901.30**

Mr. Hamrick is also making a claim for lost rents for the seventeen months that unit 1302 remained vacant. *See* Ex. P84. However, SWB brought out on cross-examination that Mr. Hamrick had actually been performing work on the unit between 2014 and 2016 in order to make it "rentable" for future tenants. Mr. Hamrick did not advertise the unit until January 2016 and had a tenant by April 2016. Furthermore, Mr. Hamrick testified at trial that he had been approached by prospective tenants but turned down their offers because they wanted a lower rental price. Given all of this, the Court does not find that Mr. Hamrick suffered a loss in rents because of the SELA construction.

Lost Rents

Total **$0.00**

Additionally, Mr. Hamrick is making a claim for property damage related to a power line falling on his property. *See* Exs. P72-73. Mr. Hamrick testified at trial that the accident was a result of Entergy re-routing existing lines for the SELA construction. Further, he testified that his outlets and appliances were damaged from power surges related to the downed power line. The Court finds that an award for damages related to the power line is unwarranted. The SWB does not own nor have control of Entergy's power lines, and Mr. Hamrick has already made an insurance claim for the incident.

Further, Mr. Hamrick provided a list of expenses he incurred for repairs he claims are related to SELA construction damage. *See* Ex. P79. The Court finds that Mr. Hamrick has failed to show that these expenses were related to the SELA construction.

Out-of-Pocket Expenses

Total **$0.00**

Total Damages for 1300-02 Jefferson Avenue

Property Damage	$23,000.00
Loss of Use and Enjoyment	$29,901.30
Lost Rents	$0.00
Out-of-Pocket Expenses	$0.00

Total $52,901.30

5. Dr. Robert and Charlotte Link - 5534-36 Prytania Street

A. Plaintiff's Testimony

Mrs. Link testified on her behalf and on behalf of her husband. She and her husband own 5534-36 Prytan.ia Street and have lived there for thirty years. The property is a side-by-side double, in which Mrs. Link and her family reside in one side and rents the other side to tenants. Mrs. Link is a licensed real estate agent, and her husband is an emergency room physician. Mrs. Link testified that she loves the neighborhood where her property is located because it is quiet and affords convenient access to nearby community spots.

Mrs. Link testified that she and her family were first impacted by the SELA project in July 2013 when traffic was re-routed and construction trucks started driving down the street. The construction work would not end until 2016, and Mrs. Link testified that she and her family were adversely impacted by the construction for about three and a half years. The intersection at Jefferson Avenue and Prytania Street was closed, making access in and out of her neighborhood difficult. This intersection remained closed for the entire duration of the construction. The intersection of Octavia Street and Jefferson Avenue would also be closed intermittently for months at a time, further complicating access to her property. Prytania Street was closed for the entire duration of the project. The street closure prevented the family

from being able to park near their home, and they would often have to park two or three blocks away from their house. Mrs. Link noted that walking to her home at night was particularly frightening and unsafe, especially after black tarps were erected over the sidewalks.

Mrs. Link testified that the construction work began early in the morning and ended around dark; however, sometimes the work would extend into the night and continue on the weekend. Mrs. Link complained about feeling vibrations inside her home that resonated from trucks driving down the street and from the operation of heavy construction equipment. Mrs. Link specifically recalled one instance where her husband was knocked down from a large booming vibration that occurred right in front of her home. Mrs. Link also complained of the constant noise she and her family were forced to experience for the duration of the project. Although she prefers to work from home, Mrs. Link testified that she often had to retreat to her office to escape the noise. Her husband often has to work nights at the emergency room, and the daytime noise made it difficult for him to sleep. She testified that the family had to endure night time noise for a significant portion of the project. Generators and pumps ran constantly at one point in time in order to pump water out of the box culvert, and when the sinkhole formed, pumps were brought out again in order to draw water out of the hole. The construction work also created a lot of dust that would cumulate over the property and would be tracked inside the house.

During the course of the construction, a sinkhole formed in front of the Links' property. Mrs. Link testified that the hole was about twenty feet wide and it extended up to the curb of her sidewalk. The sinkhole remained in front of her home for a period of about five months. Mrs. Link testified to seeing active water in the hole up until the point when it was finally covered. Mrs. Link still worries about the sinkhole to this day. She testified to seeing a continual subsidence to the land in the area where the sinkhole had formed. Further, she worries about the value of her property and her ability to sell it in the future because she will have to disclose the sinkhole to potential buyers.

Mrs. Link testified that her property was in good condition prior to the SELA project. The family regularly maintained the property, and sometime in 2008, they installed an addition onto their kitchen. Now, the property has cracks throughout the entirety of the interior and exterior. Most notable, there is a huge crack on the exterior wall of the home, a giant "crevice" in Mrs. Link's daughter's room, and separations in the downstairs kitchen addition. The Links made repairs that they felt were necessary prior to trial, which included reattaching bathroom sinks that had pulled away from the wall and fixing a number of broken windows. *See* Ex. P46.

In addition to their claim for property damage, the Links are also making a claim for lost rents. Mrs. Link testified that her family was unable to find tenants for the attached unit for a period of twenty months. A young family had stayed at the property until April 2015 but left because of the inconveniences related the SELA construction. After they had moved out, the

family placed a rental sign on the front porch and posted a listing on Craigslist. Mrs. Link asserted at trial that she had always been able to rent the property within days of posting an advertisement prior to the start of the SELA construction. However, on-cross examination, Mrs. Link admitted that, despite being a real estate agent, she let her husband handle the listing of the property. On cross-examination, SWB provided two Craigslist advertisements that did not have any photos of the property attached, and Mrs. Link admitted that photos should have been attached. Mrs. Link did not know whether her husband kept the advertisements online updated or whether he received any emails of interest. Mrs. Link did recall that at one point the family received an offer from four men, but her husband rejected the offer because he believed that it was "too much" for four men to inhabit the apartment.

B. Expert Opinions

Mr. Goins testified that the Link property was twenty feet away from the construction work and noted that there was cracking throughout the property. Both he and Dr. Sykora testified that the property was within the USACE defined APE. Dr. Sykora testified that the property was thirty- five feet to the TRS and experienced only one exceedance of .51 ips. Dr. Sykora also noted that the floor was in relatively good condition and that no foundation repairs are needed. Dr. Bailey noted that the property suffered interior and exterior distresses but also that these distresses are indistinguishable from the distresses seen in the pre-construction videos.

C. Damages

Mr. Goins estimated that it would take $317,899.57 to repair the damage to the Links' property. Ex. P25. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture. After reviewing the testimony and evidence, the Court finds the Exponent estimate to more accurately reflect the repairs that are attributable to the SELA construction.

Property Damage	
Goins' Estimate	$317,899.57
Repairs/Expenses Unrelated to SELA	($276,061.57)
Total	**$41,838.00**

Dr. Ragas estimated that the Links suffered a 45% loss in the monthly rent value of their property. However, Dr. Ragas provided an estimate for the Links' loss of parking. Mrs. Link testified at trial that her home does not have a private parking space and that the family had always parked on the street near the home. Accordingly, the Court reduces Dr. Ragas' estimate for loss of parking to 0%. Additionally, Dr. Ragas allotted the Links full value for nighttime noise. While evidence and testimony provided at trial indicated construction would sometimes occur at night and generators were sometimes left running all

night, these instances were not daily occurrences. Therefore, the Court reduces Dr. Ragas' estimate for nighttime noise by 5%.

Dr. Ragas also included the square footage of the Links' rental unit in his calculations for the Links' loss of use and enjoyment. However, in previous SELA project trials, specifically in the trial for *Sewell* Plaintiffs Residential Group D, Dr. Ragas testified that he had reduced the square footage of homes that were also used as rental properties. When questioned why he did not do so here, Dr. Ragas testified that Mrs. Link indicated she experienced stress over not having a tenant to occupy the apartment and that this interfered with her enjoyment of the property. The Court finds such an award to be unwarranted. The Links' property is a duplex in which the Links occupy one unit and rent out the other unit. Therefore, the Court reduces the total square footage that Dr. Ragas included in his calculations by one-half.

Loss of Use and Enjoyment

Total (41 months) **$44,198.00**

The Links provided the Court with receipts for repairs they attribute to SELA. *See* Ex. P46. The Court finds that the Links have failed to prove that all the repairs are attributable the SELA construction. However, the Court does find that the repairs made to the Links' bathroom and windows are more likely than not attributable to the SELA construction.

Out-of-Pocket Expenses

Total	**$425.17**

The Links are also making a claim for lost rents as a result of their rental property remaining vacant for twenty months during the SELA construction. *See* Ex. P49. Mrs. Link testified at trial that their previous tenants left in April 2015 because of the inconveniences caused by the SELA construction. However, despite being a licensed real estate agent, Mrs. Link admitted that she left the advertisement and leasing of the property to her husband. Mrs. Link also admitted that she did not know how long her husband advertised the property, why he had not included pictures of the property on his advertisements, and whether he had received emails from potential tenants. Mrs. Link did admit, however, that the family had received an offer from a group of men interested in renting the unit and that her husband turned down the offer. Given all of this, the Court finds the Links have failed to prove that they were unable to re-lease their property solely because of the SELA construction, but the Court believes that the earlier tenants vacated the property because of the construction. Therefore, the Court reduces the requested amount by half.

<u>Lost Rents</u>

Total (reduced by 1/2)	$18,500.00

<u>Total Damages for 5534-36 Prytania Street</u>

Property Damage	$41,838.00
LossofU/E	$44,198.00

Out-of-Pocket Expenses	$425.17
Lost Rents	$18,500.00
Total	**$104,961.17**

6. Ross and Laurel McDiarmid - 5429 Prytania Street

A. Plaintiff's Testimony

Mr. Ross McDiarmid testified at trial on behalf of himself and his wife. Both he and his wife have owned the property at 5529 Prytania Street since April 2011. Mr. McDiarmid testified that his family began to be impacted by the SELA construction in the summer of 2013, and the construction did not end until late 2016. The construction work occurred directly in front of Mr. McDiarmid's home, and Mr. McDiarmid testified that the work would start around 7:30 A.M. each morning and would end in the mid-afternoon. However, at times the work would extend late into the night and on the weekends.

While the construction was on-going, the family experienced many disruptions. The main disruption Mr. McDiarmid noted was the difficulty in accessing his home. Mr. McDiarmid testified that prior to the SELA construction, he had always been able to park in front of his home. However, after the SELA work began, he and his family were forced to park on side streets. This resulted in unfriendly notes from neighbors, two hit-and-runs, and a pair of prescription sunglasses being stolen from his car. The family was

also forced to endure other disturbances, such as noise and dust. Mr. McDiarmid testified that he could hear the slamming of metal plates into the box culvert and generators and pumps running at night. The family tried to endure the noise as best as possible. Mr. McDiarmid testified that his wife would wear ear plugs and sit towards the back of the house. Mr. McDiarmid also testified that employing simple utilities became an issue during the project. He stated that the family had to walk their trash out to the side street and could not switch internet services nor install gas in the home because the companies could not access the area. Further, the electrical transformer in front of bis property needed to be replaced, but the electric company could not do so until after the SELA construction was complete. As a result, the home often experienced power outages. After the SELA project had ended, Mr. McDiarmid's home almost flooded because the catch basins outside the property had not been properly connected to the main sewer line. Although SWB came out and allegedly remedied the problem, Mr. McDiarmid still has concerns over whether the catch basins are properly connected.

Prior to the SELA construction, the McDiarmids had spent approximately $150,000.00 in repairing the home. However, Mr. McDiarmid testified that the home has sustained damages throughout the property. The pillars to the home have noticeable cracking, and the home has separations and cracking throughout the entirety of its interior.

B. Expert Opinions

Mr. Goins testified that the McDiarmid residence was located within the USACE defined APE and was located twenty feet away from the SELA construction. Mr. Goins opined that foundation repairs are necessary because of damages related to the SELA construction, and he stood by bis opinion even after counsel for SWB presented a 2011 pre-purchase inspection report that noted that the property had a differential level of six to seven inches.

Dr. Sykora testified that the property was forty feet away from the TRS and experienced a one-time exceedance of .41 ips. Dr. Sykora opined that the piers of the unit all had pre-SELA construction separation and that foundation repairs were not warranted. Dr. Bailey similarly opined that all the distresses he observed at the property pre-existed the SELA construction. Further, he testified that the exterior siding of the property is decayed and displaced at the joints but that this could be remedied without having to repair the entire exterior of the home. He also noted that Mr. Goins' repair estimate was 144% of the appraised value of the home.

C. Damages

Mr. Goins estimated that it would require $370,536.43 to repair the damages to the McDiarmid property. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repairing and painting the entire exterior of the property, repairing and painting nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$370,536.43
Repairs/Expenses Unrelated to SELA	($342,536.43)
Total	**$28,000.00**

Dr. Ragas estimated that the McDiarmids suffered a 40% loss in the monthly rent value of their property. However, Dr. Ragas included an estimate for loss of parking despite the fact that the McDiarmids do not have an off-street parking space. Therefore, the Court reduces Dr. Ragas' award for loss of parking to 0%.

Loss of Use and Enjoyment:	
Total (41 months)	$46,967.55

Total Damages for 5429 Prytania Street	
Property Damage	$28,000.00
Loss of U/E	$46,967.55
Total	**$74,967.55**

7. Jerry and Linda Osborne - 5518 Prytania Street

A. Plaintiff's Testimony

Mrs. Linda Osborne testified on behalf of her husband at trial. Her husband owns the home at 5518

Prytania Street, and the couple has lived there for twenty-eight years. Mrs. Osborne testified that the SELA construction began to adversely affect them in June 2014. She stated that the construction work would begin around 7:30 A.M. each morning but always end at different times. Sometimes the work would extend into the night and continue on the weekends. Mrs. Osborne was home during while the construction work was on-going because she is retired. She testified that the construction work times were erratic and that she was unable to schedule anything because she never knew when the work would occur nor for how long it would last.

The construction work generated lots of vibrations and noise. Mrs. Osborne testified that the vibrations in the home were so bad that the crystals in her chandelier would come loose and fall to the ground. Mrs: Osborne often watches her grandchildren at the house, and the children were terrified of the giant booms that could be heard in front of the home. The noises would extend into the night, and Mrs. Osborne moved her grandchildren's beds into her bedroom in order for them to be able to sleep. Mrs. Osborn asserted that she could not let the grandchildren play in the front yard because of the construction and dust it created. Parking and accessibility to her home also became a major issue during the construction. Mrs. Osborne noted that it was difficult trying to transport groceries or her grandchildren from the car to her home. It became especially dangerous walking from the car to the house during the night.

During the course of the construction work, a sinkhole opened directly to the left of Mrs. Osborne's

property. The sinkhole remained visible for months while workers would pile rocks and dirt inside of it. Mrs. Osborne testified that when the hole was eventually covered up, she could still see water flowing inside of it. Even though the sinkhole is now closed, Mrs. Osborne has noticed that the soil in the front of her house is subsiding. She testified that she worries about the long term effects this sinkhole may have, and she suffers from reoccurring nightmares about the sinkhole.

Mrs. Osborne testified that her home was in excellent condition prior to the start of the SELA construction. Now, it is plagued with cracks and separations throughout the property. She noted that the left side of the house is bulging and that one of the piers has collapsed. Some of the floors are buckling, and the upstairs balcony separated from the home, which caused a water intrusion during the SELA construction. Mrs. Osborne attributes all the damages at her home to the construction. Prior to this trial, Mrs. Osborne had some of the damages, such as the buckling floor boards and balcony separation, repaired. *See* Ex. P58.

B. Expert Opinions

Mr. Goins testified that the Osbornes' residence was adjacent to the SELA construction and twenty feet away from the work. When he performed his inspection of the property, Mr. Goins witnessed damage in the crawl space of the home and observed cracking throughout the property. He attributes the buckling floors to moisture and condensation intrusion caused by the air condition shifting from the

vibrations generated from the construction. He also noted that the sinkhole had formed one house away from the property and that the property was within the USACE defined APE. Mr. Goins testified that the bump he witnessed in the floors of the home were consistent with the foundation damage to the piers. Dr. Sykora testified that the Osbornes' home was forty-feet away from the construction work and experienced one exceedance of .93 ips. Dr. Sykora opined that the SELA construction did not cause any foundational damage and that structural repairs to the property are not warranted.

C. Damages

Mr. Goins estimated that it would require $383,809.17 to repair the damages at the Osborne property. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage	
Goins' estimate	$383,809.17
Repairs/Expenses Unrelated to SELA	($353,809.17)
Total	**$30,000.00**

Dr. Ragas estimated that the Osborne property suffered a 40% decrease in its monthly rent value during the SELA construction. However, Dr. Ragas also estimated that the Osbornes were adversely affected by the SELA construction for a period of forty-one months. *See* Ex. P24. At trial, Mrs. Osborne testified that her family was not adversely affected by the construction until June 2014.

Loss of Use and Enjoyment

Total (30 months)	**$54,480.00**

The Osbornes also provided the Court with various receipts for repairs they claim are related to SELA construction damage. The Court finds that the Osbornes have failed to prove that all of the repairs made were related to SELA damage. However, the Court does find that the repairs made to the balcony and floors are more likely than not attributable to the SELA construction.

Out-of-Pocket Expenses

Total	$5,400.00

Total Damages for 5518 Prytania Street

Property Damage	$30,000.00
Loss of U/E.	$54,480.00
Out-of-Pocket	$5,400.00
Total	**$89,880.00**

8. Jack Stolier -1408 Jefferson Avenue

A. Plaintiff's Testimony

Jack Stolier testified at trial. Mr. Stolier is the sole owner of 1408 Jefferson Avenue and has lived there with his wife since late 2011. Mr. Stolier testified that his family began to be impacted by the SELA construction in the summer of 2013. Traffic was re-routed, trees were cut down, and the street was dug up on both sides. The construction work took place directly in front of his home and continued until the fall of 2016. Mr. Stoller testified that his family was adversely affected for a period of three years.

Mr. Stolier testified that access to and from his property was severely restricted, and at times completely blocked, while the SELA construction was on-going. The intersection of Jefferson Avenue and Prytania Street was closed for the majority of the project, and on occasion, the side streets around Jefferson Avenue would also be closed. Mr. Stolier testified that street parking became competitive and that at one point his wife had to park several blocks away from their home. Mr. Stoller testified that the family's usual routes to and from the house were no longer accessible, and the limited access presented a major challenge for his parents and in-laws to visit the home. Further, the limited access presented a safety issue in walking from the car to the house at night.

Mr. Stolier testified that the construction work normally started around 6:30 A.M. each morning. At times, the work would extend into the night and

through the weekend. Mr. Stolier often came home in the afternoons to do work, so he was present at his property while the construction was on-going. The construction work created vibrations that the family could feel inside the home. The family would often be bothered by the vibrations and loud noises that emitted from the construction and the family would try to avoid the front of the home where the noise was the loudest. Furthermore, Mr. Stolier testified that it was difficult to keep the house clean during the construction work. A "lake of mud" formed in front of his house, and people would continually track in mud and dust that came from the construction site. Utilities such as water and electricity would be shut off intermittently and without warning.

Mr. Stolier testified that his home was in good condition prior to the SELA construction. He spent over $300,000.00 in renovating the property after he purchased it, and he regularly maintains the property. Before the SELA construction, the home had some minor cracks that have since elongated. Now, there are cracks everywhere throughout the property. Mr. Stolier specifically noted that his newly installed bathroom tiles are popping up and that his recently remodeled kitchen has separations between the walls and the counters.

B. Expert Opinions

Mr. Goins testified that he observed damage to the roof's tiles, damage to the exterior pool area, and nails popping out of the siding at the Stoller property. Unlike all the other properties in this trial group, Mr. Goins opined that the Stolier home did not require

foundation repairs. Dr. Sykora testified that the property was located sixty feet from the TRS. He noted that the manometer survey was within. normal range and opined that the property did not sustain any damage from the SELA construction. Although Dr. Bailey testified that he observed interior and exterior cosmetic distress at the residence, he opined that all the damages he observed pre-existed the SELA construction.

C. Damages

Mr. Goins estimated that it would require $79,677.44 to repair the damages to the Stolier property. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs and painting to nearly every room and expenses for the removal and storage of furniture.

Property Damage	
Goins' Estimate	$79,677.44
Repairs/Expenses Unrelated to SELA	($66,677.44)
Total	**$13,000.00**

Dr. Ragas estimated that the Stolier property suffered a 40% decrease in its monthly rental value. Ex. P24. However, Dr. Ragas also calculated that the Stoliers were impacted by the SELA construction for a period of 41 months. At trial, Mr. Stolier testified that he and his family were adversely affected by the SELA construction for a period of about three years.

Loss of Use and Enjoyment	
Total (36 months)	**$61,992.00**
Total Damages for 1408 Jefferson Avenue	
Property Damage	$13,000.00
Loss of U/E	$61,992.00
Total	**$74,992.00**

9. Dr. William Taylor - 5432-34 Prytania Street

A. Plaintiff's Testimony

Dr. William Taylor testified at trial. He is the sole owner of the property at 5432-34 Prytania Street and has owned the property since 1984. He lives there with his wife and children. Dr. Taylor testified that he enjoys the neighborhood and likes the fact that his home is near Audubon Park, the Prytania Theater, and the restaurants on Magazine Street.

Dr. Taylor testified that his family became adversely impacted by the SELA construction beginning in July 2013. The construction lasted for about three and a half years, ending in late 2016. During that time period, the construction work occurred directly in front of Dr. Taylor's home. According to Dr. Taylor, the area around his home appeared to be a staging area with heavy equipment and construction vehicles constantly traveling to and from the work site. Traffic disruptions began in 2013

and had magnified by 2014. Dr. Taylor testified that the traffic patterns appeared to be arbitrary and streets were often closed without warning. Many of the side streets around Jefferson Avenue were closed intermittently throughout the project, and Prytania Street was inaccessible for the entirety of the construction. Although Dr. Taylor had a driveway, his family was unable to access it while the construction was on-going.

Dr. Taylor testified that he could hear the construction workers arrive at the site each morning around 6:30 A.M. The work would generally end at night, but sometimes it would extend into the weekends. He testified that the workers would use his front yard as a managerial point of receiving supplies and components for the project. Dr. Taylor testified to feeling vibrations from inside his home and was particularly concerned about the violent vibrations that were generated from the driving of sheet piles into the ground. Dirt and debris were also kicked up from the construction work. Dr. Taylor noted that the neighborhood suffered a rat infestation as the result of garbage dumpsters containing food and waste left behind by the workers. At one point during the construction, a sinkhole formed near his property, and Dr. Taylor is concerned about having to disclose the sinkhole if he would ever decide to sell his property in the future.

Dr. Taylor testified that his home has sustained damages from the SELA construction. Notably, there are cracks in almost every room of the home, there are separations of the molding and baseboards from the walls, the comer of the house and porch are subsiding,

a banister has cracked, and the ceiling in one of the rooms is collapsing inward. Dr. Taylor testified that he did do some repairs after the SELA construction ended and provided the cost for these repairs. *See* Ex. P68.

B. Expert Opinions

Mr. Goins testified that Dr. Taylor's property had a four inch differential and that foundation repairs are necessary. He noted that the pre-construction video of the property showed a slight gap in the front porch and that the slight gap has now extended into a four-inch differential. Contrary to Mr. Goins, Dr. Sykora testified that Dr. Taylor's home does not have foundational issues. Furthermore, the property only experienced two exceedances above .5 ips, with the highest exceedance being registered at .62 ips. Dr. Bailey testified that the property had interior and exterior distresses. He opined that all of the distresses he observed pre-existed the SELA construction and worsened because of water intrusion.

C.Damages

Mr. Goins estimated that it would require $292,604.78 to repair the damages to the Taylor property. Ex. P25. The Court finds this amount to be excessive. In his estimate, Mr. Goins included repairs to the foundation of the house, repainting the entire exterior of the property, repairs and painting to nearly every room, and expenses for the removal and storage of furniture.

Property Damage

Goins'Estimate	$292,604.78
Repairs/Expenses Unrelated to SELA	($268,604.78)
Total	**$24,000.00**

Dr. Ragas estimated that the Taylor property suffered a 45% decrease in its monthly rent value. Ex. P24. However, Dr. Ragas allotted Dr. Taylor the full amount for daytime noise. Dr. Taylor testified that he was usually at work between 8:30 A.M. to 5:00 P.M. while the construction work was on-going. Therefore, the Court reduces Dr. Ragas' estimate for daytime noise by 5%.

Loss of Use and Enjoyment

Total (41 months)	**$63,615.60**

Dr. Taylor also provided the Court with various receipts for repair expenses he claims are related to SELA. Ex. P68. However, the Court finds that Dr. Taylor has failed to meet his burden in showing that these repairs are attributable to the SELA construction.

Out-of-Pocket Expenses

Total	**$0.00**

Total Damages for 5432-34 Prytania Street

Property Damage	$24,000.00

Loss of U/E ·	$63,615.60
Out-of-Pocket Expenses	$0.00
Total	**$87 615.60**

10. Watson Memorial Spiritual Temple of Christ-4400 St. Charles Avenue

A. Plaintiff's Testimony

Corey Watson testified as a representative on behalf of Watson Memorial. Mr. Watson works as a construction and project manager at C. Watson Group, L.L.C. and as a pastor for the Westbank location of Watson Memorial. He graduated from Tulane University with a degree in electrical engineering and has worked in the construction field for twenty-one years. Mr. Watson testified that Watson Memorial is a religious, non-profit church that was founded in 1925 by his great-grandfather. The church purchased the property located at 4400 St. Charles Avenue in 1996.

Unlike the other plaintiffs in this trial group, Watson Memorial was affected by the Napoleon III phase of the SELA project. Mr. Watson testified that the construction started near the church building in 2013. Watson Memorial is located at the corner of St. Charles Avenue and Napoleon Avenue, so the church was surrounded by the construction on both sides. Mr. Watson testified that the church was "at ground zero" for the project. Blue Iron equipment was used near the property, which created vibrations, noise, and dust.

The construction went on to last for four years, ending around Mardi Gras in 2017. During this time, Mr. Watson testified that the church and its community had to endure many inconveniences. Whenever Mr. Watson was inside the church, he could feel the entire building shake from the construction vibrations. Mr. Watson testified that his father often had to pause services and ask the construction workers to stop working before the services could continue. Water and electricity were often interrupted without notice to the church.

Mr. Watson testified that Watson Memorial has sustained damages related to the SELA construction. Mr. Watson has noticed cracks throughout the tiles, walls, and ceiling of the vestibule. Further, Mr. Watson stated that he has noticed exterior bowing in the foundation and that the Napoleon and Jena Street side of the building leaning. Further, Mr. Watson testified that the main roof of the sanctuary has sustained damages from the vibrations felt at the property. On cross-examination, SWB presented evidence that Watson Memorial has made claims for roof damage on at least three occasions since March 2011. *See* Exs. D6-D9 (Case No. 2015--11971). However, Mr. Watson maintained that the roof was in good condition prior to the SELA construction and that the claim Watson Memorial is making for the roof is separate from the past claims. Since the SELA construction, Watson Memorial has made some repairs. *See* Ex. P92.

Mr. Watson also testified that the basement has sustained eight feet of water from flooding. Mr. Watson asserted that he didn't notice how bad the

flooding was until the Gurtler Bros. came to inspect the property. Mr. Watson admitted that the basement would sustain minor rainwater prior to the SELA Construction, but the church had used a sump pump to remove the water. The pump was destroyed in the summer of 2015 when the construction work was at its peak. Mr. Watson also noted that standing water has become a problem around the property because the drainage in the area was disconnected for the SELA construction.

B. Expert Opinions

Dr. Storesund testified that the charts he reviewed show that Watson Memorial vibrations between .1 ips and .5 ips during the SELA construction. Sheet piles were driven into the ground near the property using a vibratory hammer. The construction equipment was not stationed on the neutral ground as called for in the design specifications, but rather much closer to the church. Furthermore, the construction noise level exceeded the allowable limits as defined in the project specifications. Dr. Storesund therefore opined that the SELA construction was a substantial factor of harm to Watson Memorial.

Mr. Goins testified that Watson Memorial is a historic building, and he opined that the .25 ips limit defined in the SELA project specifications is too high for historic structures. He also noted that precautions were not taken to reduce the effect of the construction on the building despite the fact the church fell within the USACE defined APE. Watson Memorial is located at the corner of St. Charles Avenue and Napoleon

Avenue, so the church was surrounded by the construction and received vibrations on both the front and side of the building. Additionally, Mr. Goins noted that deep excavation work occurred on both sides of the church, and traffic disruptions to the area contributed to the damages the property sustained. Mr. Goins found that the church has a four-inch dip that puts components of the building under tremendous stress; he opined that foundation repairs are necessary or else more damages will occur. Mr. Goins also testified that the roof of the sanctuary sustained damages related to the SELA construction. Although SWB argues that the roof damages are the same damages the church has claimed in the past, Mr. Goins asserted that these are damages that have been re-opened because of the vibrations and settlement experienced at the building.

Dr. Sykora testified that Watson Memorial was located seventy-five feet away from the TRS and eighty feet away from the vibrated sheet piles. The church was located within the USACE defined APE and was on the outside edge of the CIZ. Dr. Sykora opined that the church had many pre-existing damages and that none of the present day damages are related to the SELA construction. Rather, he relates all the damages at the church to deferred maintenance of the property. Dr. Sykora testified that the maximum vibration exceedance near the property registered at .54 ips. Taking into account attenuation, Dr. Sykora opined that there is no possibility that vibrations of .25 ips or higher could have reached the church building. Furthermore, Dr. Sykora testified that he did a floor level survey when he inspected the property and that the survey indicated that the floor

is level. Therefore, because the floor is level, Dr. Sykora asserted that the foundation is in good condition.

Dr. Bailey testified that the Watson Memorial church building is in fair or good condition, depending on the section of the building being assessed. He does not relate any structural damage at the building to the SELA construction. Moreover, Dr. Bailey opined that all interior and exterior distresses he observed at the church pre-existed the SELA construction and are attributable to deferred maintenance and inadequate pest control. Despite the basement being flooded, Dr. Bailey testified that he did not observe any signs of active pumping to clear that water when he inspected the property in 2018.

C. Damages

Mr. Goins estimated that it would take $846,651.98 to repair the damages observed at Watson Memorial. Ex. P25. The Court finds this number to be excessive. In his estimate, Mr. Goins includes repairs to the building's foundation, repairs and painting for the entire :interior and exterior of the sanctuary, and repairs to the roof. The testimony and evidence adduced at trial illustrate that the church had extensive pre-existing damage. The Court particularly notes that the church has made a claim for roof damage on three separate occasions since 2011. Despite Watson Memorial's assertions that the damages were all different, it is clear to this Court that the roof's damages did not originate from the SELA construction activities. Further, while the church may have experienced exacerbations, the

preconstruction video and photographs demonstrate that the majority of its damages pre-existed the SELA construction.

Property Damage

Goins' Estimate	$845,651.98
Repairs/Expenses Unrelated to SELA	($710,651.98)
Total	**$135,000.00**

Prior to the start of this trial, the parties stipulated that Watson Memorial Day Care Center suffered lost profits in the amount of $98,788.00.

Lost Profits

Total	**$98,788.00**

Total Damages for Watson Memorial

Property Damage	$135,000.00
Lost Profits	$98,788.00
Total	**$233,788.00**

C. Just Compensation and Comparative Fault

1. Just Compensation

SWB argues in its post-trial brief that any damages assessed against SWB must be limited to that allowable under the Fifth Amendment of the Unites States Constitution, which precludes recovery of consequential damages, including for loss of use and enjoyment. Moreover, SWB argues that this Court should apply *South Lafourche v. Jarreau* and limit plaintiffs' potential damage awards pursuant to that holding. The Court finds the facts of this case distinct from *South Lafourche v. Jarreau*. Furthermore, this Court finds SWB's just compensation arguments to be without merit.

2. Comparative Fault

SWB argues in it's post-trial brief that this Court must assess a portion of fault on USACE and other nonparties under Louisiana Civil Code articles 2323 and 2324. Simply put, however, SWB failed to present sufficient evidence to allow this Court to find USACE or other nonparties at fault. The evidence shows that the SELA Project is owned by SWB. It is not a project that is exclusively within the control of the federal government. *See Holzenthal*, 950 So. 2d at 68.

The issue of contractor liability was discussed in *Holzenthal. Id.* at 80-81. As a matter of law, a contractor on a state or federal project who complies with the project's plans and specifications is not liable for damages to the property of third parties. *Holzenthal*, 950 So. 2d 55, 80-81 citing *Yearly v. W.A. Ross Construction Co.*, U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940); La. R.S. 9:2771. This Court does not find that SWB presented evidence that demonstrated that the contractors deviated from the SELA Project specifications. A party asserting comparative fault

bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause in fact of the damage. *Pruitt v. Nale*, 45, 483 (La. App. 2nd Cir. 8/11/2010), 46 So. 3d 780, 783; [citations omitted]. This Court finds SWB has failed to carry its burden of proving that another party was at fault.

RENDERED, READ, AND SIGNED this 21st day of March, 2019, in New Orleans, Louisiana.

Sgd Nakisha Ervin-Knott
Judge, Division "D"
HONORABLE NAKISHA ERVIN-KNOTT
JUDGE, CIVIL DISTRICT COURT
Civil District Court
Parish of Orleans, State of La.

Case 2:21-cv-00534-MLCF-JVM Filed 03/16/21

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARIYAN, INC. D/B/A DISCOUNT CORNER, M. LANGENSTEIN & SONS, INC., PRYTANIA LIQUOR STORE, INC., WEST PRYTANIA, INC. D/B/A PRYTANIA MAIL SERVICE/BARBARA WEST, BRITISH ANTIQUES, L.L.C./ BENNET POWELL, FINE ARTS MANAGEMENT, L.L.C. D/B/A PRYTANIA THEATRE, SUPERIOR SEAFOOD AND OYSTER BAR, L.L.C., THE MAGIC BOX, LTD. D/B/A MAGIC BOX TOYS, MARK DEFELICE, SAVARE DEFELICE, JR., ESTEFF DEFELICE, and VIRGINIA DEFELICE, all on behalf of the entity f/k/a PASCAL-MANALE RESTAURANT INC., ARLEN BRUNSON, KRISTINA and BRETT DUPRE, GAIL MARIE HATCHER, BETTY PRICE, BOJAN RISTIC, PATSY SEARCY, HELEN GREEN, THEADA THOMPSON, KIM ALVAREZ and ALLAN BASIK, JOHN, JR. and JILL BOSSIER, DAVID ENGLES, ESTATE OF LOUISE STEWART, CATHLEEN HIGHTOWER, RUTH and LEON HINSON, MARGARET and HARRY LECHE, GEORGE MOULEDOUX, ELIZABETH and WILLIAM SEWELL, PATRICIA WYNN, GERALDINE BALONEY, ABBRICA CALLAGHAN, BURNELL COTLON	CIVIL ACTION NO. SECTION JUDGE DIVISION MAGISTRATE

EIRINN ERNY and GREGORY KOZLOWSKI, LARRY HAMEEN, NOELLA HAYES, STEPHEN HOGAN and FRANSISCA MEDINA-HOGAN, KEEBA and GAYLIN MCALLISTER, CODY MYERS, HEATHER WEATHERS, ELIO, CHARLOTTE, and BENITO BRANCAFORTE, DR. JOSEPHINE S. BROWN, RICHARD PARKE ELLIS and NANCY ELLIS, MARK HAMRICK, DR. ROBERT and CHARLOTTE LINK, ROSS and LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, DR. WILLIAM B. TAYLOR, III, WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, GEORGE and BETH DUESSING, DAVID EPSTEIN, FAYE LIEDER, THOMAS RYAN, JUDITH JURISICH, DOROTHY WHITE, THOMAS and JUDITH LOWENBURG, JOHN and LORI OCHNER, RONALD RUIZ, ANNE LOWENBURG, SARAH A. LOWMAN, BARBARA H. WEST, NANETTE COLOMB, MARY and CLAY KEARNEY, MICHAEL T. GRAY, MARK and ANNA KURT, THE AMERICAN INSURANCE COMPANY (AS SUBROGEE OF MARK AND ANNA KURT), VIRGINIA CARTER STEVENS MOLONY, DAT DOG ENTERPRISES, LLC, DAT DOG PROPERTIES, LLC, SUPERIOR BAR & GRILL, INC., THE FRESH MARKET, INC., K&B CORPORATION D/B/A RITE AID CORPORATION, AND 1900 & 1901 COLLIN, L.L.C.

Plaintiffs,

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS, AND GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF SEWERAGE & WATER BOARD OF NEW ORLEANS

Defendants.

COMPLAINT

NOW INTO COURT, through undersigned counsel, come Plaintiffs:

* * * * *

(hereinafter referred to as "Plaintiffs"), who allege, as follows:

PARTIES

1.

Plaintiffs are individuals or businesses all domiciled in Orleans Parish, Louisiana, within the Eastern District of Louisiana, who brought suit for inverse condemnation against the Sewerage & Water Board of New Orleans (hereinafter, "the SWBNO") in various consolidated actions in Orleans Parish (hereinafter, "the SELA litigation").

2.

The SWBNO is a political subdivision of the State of Louisiana, created pursuant to La. R.S. 33:4071, located and operating within this District. The SWBNO is charged with the construction, operation, and maintenance of the water, sewerage, and drainage systems for the City of New Orleans. The SWBNO operates independently of New Orleans city government as a "special board," and it meets the U.S. Government Accountability Office criteria for classification as a "stand-alone governmental entity." The SWBNO's publicly-proclaimed "Mission, Vision, and Values" statement includes the representation, among other things, that it will provide services "at a reasonable cost to the community" and to "use financial resources prudently."

3.

Ghassan Korban is the Executive Director of the SWBNO, a person of the full age of majority, and a resident of this District.

JURISDICTION AND VENUE

4.

This Court has jurisdiction under 28 U.S.C. §1331 and 1343, and 42 U.S.C. § 1983. Declaratory relief is authorized by 28 U.S.C. § 2201 and 2202.

5.

Venue is proper in this District and division under 28 U.S.C. § 1391(b), because the underlying acts and conduct violating applicable laws and constitutional rights occurred in this District, and/or the defendants conduct its/his affairs in, or is an inhabitant of, resides in, or has an agent in this District.

FACTUAL ALLEGATIONS

6.

The SELA litigation arose from damage to Plaintiffs' homes and businesses during the construction of the drainage project in Uptown New Orleans known as the South Louisiana Urban Drainage Project or Southeast Louisiana Urban Flood Control Program (hereinafter, "the SELA Project").

7.

The U.S. Army Corps of Engineers (hereinafter, "the USACOE"), a division of the United States government under the direct jurisdiction of the United

States Army, and the SWBNO jointly constructed and managed the SELA Project.

8.

The impetus for the SELA Project was "the periodic flooding that had occurred in the seventies, eighties and nineties." The goal of the Project was to improve drainage and minimize flooding in the Uptown basin of New Orleans and was unrelated to hurricane protection.

9.

The SELA Project involved the construction of massive underground drainage canals to store and transport storm water. The SELA Project has been in operation in various New Orleans locations since the 1990s and has been implemented in phases, as funding, designs, and construction became available and approved. The construction costs for the SELA section at issue in the underlying actions have been reported to exceed $500 million.

10.

The Project Partnership Agreement and Cooperative Endeavor Agreement, executed with the USACOE in 2009, establish the SWBNO's role as the local sponsor of the SELA Project in direct partnership with the USACOE to carry out the design and construction of the Project.

11.

As joint partners, the USACOE and the SWBNO were responsible for 65% and 35% of the SELA Project's costs, respectively. The USACOE advanced the costs entirely with the intention that the SWBNO repay its portion over thirty (30) years. Under an established claims process, known as "the Damages SOP," the SWBNO was charged with investigating and resolving all SELA-related property damage claims on behalf of the joint partnership. All resulting settlements were to be directly credited against the SWBNO's indebted share of the SELA Project costs.

12.

Documents distributed by the USACOE and the SWBNO to the public explain the SELA claims process under the Damages SOP, as follows:

1. Residents initiate the property damage claims process by calling the SELA Hotline.
2. Once the claim is received, it is forwarded to the attention of the Forensic Engineer who contacts the resident to arrange an inspection of the property.
3. A report is sent to the SWBNO delineating any and all related damages found to the property during the inspection, along with a detailed estimate of the cost of repairs.
4. In instances where there is damage, the SWBNO forwards a claim packet to the USACOE on the property detailing the damages for its review and approval.
5. When the review is complete, assuming that funds expended on a particular claim count toward the SWBNO's 35% contribution, the

SWBNO contacts the property owner with a settlement offer.

6. Once a compromise is reached, upon execution of closing documents, a settlement check is issued.

13.

The USACOE and the SWBNO implemented the SELA Project in various phases in New Orleans over the past decades. By the time construction began in front of Plaintiffs' properties, the SWBNO already had years of experience with prior phases of the SELA Project and was aware that these projects caused property damages.

14.

The SELA phases encompassing Plaintiffs' homes and businesses in the underlying actions are located in the Uptown and Carrollton Historic Districts of New Orleans on large portions of South Claiborne Avenue, Jefferson Avenue, Napoleon Avenue, Prytania Street, and Louisiana Avenue. These SELA phases are formally identified as: Claiborne I, Claiborne II, Jefferson I, Jefferson II, Louisiana, Napoleon II, and Napoleon III. Plaintiffs' homes and businesses are located within and near these Phases.

15.

The SELA construction on the Claiborne I, Claiborne II, Jefferson I, Jefferson II, Louisiana, Napoleon II, and Napoleon III phases included installing large drainage box culverts in the middle of the streets near Plaintiffs' properties. This installation involved, among other disruptive activities, constant demolition, excavation, pile driving, jet grouting, and backfill. Furthermore, the

oversized construction equipment and numerous construction workers needed to construct the box culverts were constantly present and created the cacophony of noise, house-shaking vibrations, and unrelenting clouds of diesel exhaust, dust, and dirt that invaded Plaintiffs' homes and businesses for years.

16.

The SWBNO and the USACOE both recognized that the SELA Project would damage nearby properties adjacent to the construction sites. Various contracts specify the locations where damage was expected and describe them as:

A. The Zone of Impact ("ZOI") is where damages to properties were more likely than not to occur, even if the construction work was performed in accordance with the contracts and specifications;

B. The Area of Potential Effect ("APE") is where "the potential exists for indeterminate damage to properties or structures…as a consequence of construction vibrations;" and

C. The Construction Impact Zone ("CIZ") is where the potential exists for soil vibration associated with project-related activities.

17.

The Programmatic Agreement ("PA") anticipated damage to Plaintiffs' neighborhoods and included aerial photographs of the properties fronting the SELA Project construction sites outlined in red and precisely pinpointing the homes and businesses that

were expected to be damaged by the SELA Project construction.

18.

Damage from the SELA Project construction extended far beyond the projected damages outlined in the PA. These projections were unrealistically conservative, and damage to Plaintiffs' properties located outside of these zones or areas occurred as frequently and as severely as the damage to homes and businesses within the described zones and/or areas.

19.

Despite proceeding in accordance with the SWBNO's plan, the SELA Project construction caused widespread property damages and disturbances to Plaintiffs' homes and businesses, including but not limited to: structural damage (including damaged foundations); shifting porches; broken floors; cracked interior and exterior walls; broken and shifting fireplaces; leaking roofs, plumbing, and sewer lines; cracked sidewalks, patios, and decks; excessive vibrations; noise; dust; and inoperable, leaky doors and windows. These damages were not present prior to construction or were substantially exacerbated after the SELA Project construction.

20.

In addition to widespread physical damages, Plaintiffs were deprived of the use and enjoyment of their properties for years. These impacts included, but were not limited to: noise; dust; dirt; diesel exhaust; chronic traffic congestion; blocked access to properties; demolition activities; sewer and water line replacement; timber pile installation; sheet pile

installation; jet grouting; excavation of the temporary retaining structure; construction of the box culvert; backfill; and paving.

21.

After construction began, the SWBNO was repeatedly notified that the Project was causing damages and disturbances to the nearby property owners. Plaintiffs made complaints of property damages and disturbances to the SWBNO-managed SELA Hotline multiple times during construction. Additionally, during the SWBNO's public meetings regarding the SELA Project, the SWBNO directly received complaints of property damages and disturbances. All SELA damage complaints were sent to the SWBNO's Legal Department for investigation and resolution.

22.

As evidence of the SELA Project's consistent, unmitigated damages and disturbances, the SWBNO received copies of vibration monitoring reports that indicated that the SELA construction activities were far exceeding the established vibration thresholds for the SELA Project. Most importantly, the SWBNO was well aware that these monitoring reports indicated excessive vibrations near Plaintiffs' properties on a regular basis, directly causing the physical damages previously described.

23.

Despite knowing the SELA Project was causing substantial damage to the surrounding area, the SWBNO ignored the complaints and took no action whatsoever to prevent or minimize the damages and disturbances. Instead, the SWBNO prolonged the

process to provide any redress or compensation to Plaintiffs for the SELA-caused damages to their homes and businesses. On information and belief, the SWBNO conceived, knew of, approved, or tacitly ratified this strategy, while concealing this knowledge and participation from Plaintiffs, other SELA victims, and the public at large.

24.

As joint managers of the Project, the USACOE and the SWBNO hired "forensic engineers" to report the absence of SELA-related damages to homes and businesses, despite substantial evidence that several homes and businesses were damaged by SELA construction. Using these biased reports, both the USACOE and the SWBNO denied claims entirely, or as the basis to offer pennies on the dollar when compared to the true and actual cost to repair SELA damage. Furthermore, the SWBNO has failed to provide any evidence that it has submitted credit packages to the USACOE in order to compensate Plaintiffs, while publicly threatening the affected homeowners, including Plaintiffs, for seeking redress with the Court.

25.

As part of the joint agreement between the SWBNO and the USACOE, as a federal entity, all damage settlements paid will be credited toward the SWBNO's share of the project costs outlined in paragraph 11 of this Complaint. Upon receipt of a claim for damage to real property, the SWBNO is required to notify the USACOE and to investigate the claim to determine whether the claims are eligible for compensation under the Damages SOP. As the federal government has acted as the creditor for this Project, the SWBNO should promptly compensate its citizens

and file the appropriate claim credits with the USACOE, since the settlements paid will reduce its total debt owed to the USACOE and federal government.

26.

According to the SWBNO Strategic Plan, 2011-2020, Mission, Vision, and Values, it has promised the citizens of New Orleans, including Plaintiffs herein, the following:

> Our mission is to provide safe drinking water to everyone in New Orleans; to remove wastewater for safe return to the environment; to drain away storm water; to provide water for fire protection; to provide information about products and services; and to do all this continuously at a reasonable cost to the community.
>
> Our vision is to have the trust and confidence of our customers for reliable and sustainable water services. We believe in these values as the foundation for how we will perform our mission and pursue our vision:
>
> ….
>
> We will be truthful, trustworthy, and transparent.
> We will be knowledgeable and diligent in the performance of our duties.
> We will use financial resources prudently.
> We will be accountable for our performance.
> We will continuously improve our performance.

27.

As alleged above, and as follows, the SWBNO violated the foregoing terms of the Mission Statement in the treatment of Plaintiffs, as alleged herein in this Complaint, by: failing to resolve Plaintiffs' claims at a reasonable cost and within a reasonable period of time; failing to treat Plaintiffs with dignity and respect; failing to be truthful, trustworthy, and transparent in the handling of Plaintiffs and their claims; failing to be knowledgeable and diligent in the treatment of Plaintiffs and their claims; failing to use its financial resources prudently in the handling of Plaintiffs' claims; failing to remain accountable for its treatment of Plaintiffs and their claims; and failing to improve its performance in the handling of Plaintiffs' claims.

28.

In order to determine whether a damage claim should be paid, and qualifies as a settlement credit, the SWBNO must determine:

A. whether the damages are within the ZOI;

B. whether the damages are of the type for which credit is to be allowed under the Damages SOP;

C. whether the damages were caused by the SELA construction;

D. whether the damages are of the type for which the SWBNO is legally liable; and

E. whether any circumstances exist which would justify expanding the ZOI to allow for

settlement of claims for damages to properties located outside of the ZOI.

29.

Upon concluding the investigation for each property, the SWBNO is required to submit a "credit package" to the USACOE, which will review and approve the settlement, then issue a credit toward the SWBNO's outstanding federal debt.

30.

The SWBNO hired Leonard Quick & Associates ("Quick") to conduct pre-construction and post-construction inspections of properties damaged by the SELA Project.

31.

Written in identical, boilerplate language, the Quick reports regularly and consistently reported "no damage" to any of the examined homes or businesses. The SWBNO used these generalized reports to obtain nominal settlements to the few claims it settled and, more frequently, to completely deny damage claims. Plaintiffs' claims were denied based on these generalized reports.

32.

In *Holzenthal v. Sewerage & Water Bd. Of New Orleans*,[1] the court found that expert reports Quick issued denying SELA damages were "not credible" and held the SWBNO liable for the claimed damages. Once again, with regard to Plaintiffs, the SWBNO attempted to deny valid damage claims through superficial and inaccurate damage evaluations.

33.

While the claim process was explicitly outlined in the Damages SOP, and the SWBNO had many credible claims to settle and later file with the USACOE, they failed to follow the administrative process to provide just compensation for the affected homeowners. However, Quick found $130,735.90 in SELA-caused damages at the residence of a local television personality located at 2320 Jefferson Avenue, despite Quick finding no such damage to the homes immediately adjacent to, across the street from, or in the same block.

34.

Consistent with the Damages SOP, the SWBNO promptly submitted a credit package to the USACOE for that residence and recommended the settlement amount estimated in Quick's report. Additionally, the SWBNO requested that this claim be expedited. The

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[1] *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 2006-0796 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 63, *writ denied*, 2007-0294 (La. 3/30/07), 953 So. 2d 71.

USACOE's internal correspondence notes that the "Office of Counsel asked that we move this one along as quickly as possible. This claim is part of the *Sewell* litigation in Uptown New Orleans." To date, based upon currently available information, that settlement remains the largest SELA claim settled by the SWBNO and an outlier of all of reports issued by Quick that estimated damages.

35.

Plaintiffs' cases were originally filed in State Court. Based largely upon the precedent of the *Holzenthal* decision, Plaintiffs named the SWBNO as the sole Defendant, alleging causes of action for inverse condemnation, custodial liability, strict liability, and related theories, specifically noting that "any substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of federal and state constitutions."[2] Inverse condemnation, a regulatory taking:

> [A]rises out of the self-executing nature of the constitutional command to pay just compensation . . . [and] provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a government . . . entity having the powers of eminent domain where no expropriation has commenced. The action for inverse

[2] *Holzenthal*, 2006-0796 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 63, *writ denied*, 2007-0294 (La. 3/30/07), 953 So. 2d 71.

> condemnation is **available in all cases where there has been a taking or damaging of property where just compensation has not been paid.**

Holzenthal, 2006-0796 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 63, *writ denied*, 2007-0294 (La. 3/30/07), 953 So. 2d 71, (citing *State through Dep't of Transp. & Dev. v. Chambers Inv. Co.,* 595 So. 2d 598, 602 (La. 1992)).

36.

The *Ariyan, Inc. d/b/a Discount Corner v. Sewerage & Water Board of New Orleans* matter, CDC No. 15-10789, consisting of Ariyan, Inc. d/b/a Discount Corner, M. Langenstein & Sons, Inc., Prytania Liquor Store, Inc., West Prytania, Inc. d/b/a Prytania Mail Service/Barbara H. West, and British Antiques, LLC/Bennett Powell, resulted in a Judgment dated February 27, 2018 for the sum of two million one hundred and twenty-five thousand dollars and no/100 ($2,125,000.00), plus judicial interest from December 18, 2015, until paid.

37.

The *M. Langenstein & Sons, Inc., et al. v. Sewerage & Water Board of New Orleans* c/w *K & B Louisiana Corporation d/b/a Rite Aid Corporation v. Sewerage & Water Board of New Orleans* matters, CDC No. 15-11971 c/w 15-11394, consisting of Fine Arts Management, LLC d/b/a Prytania Theatre, Superior Seafood & Oyster Bar, LLC, The Magic Box, Ltd. d/b/a Magic Box Toys, and Pascal-Manale

Restaurant, Inc.,[3] resulted in a Judgment dated January 2, 2019 for the sum of two million ninety-six thousand three hundred four dollars and 60/100 ($2,096,304.60), plus judicial interest from December 18, 2015, until paid.

38.

The *Elizabeth Sewell, et al. v. Sewerage & Water Board of New Orleans* matter, CDC No. 15-4501, Group A case, consisting of George and Beth Duessing, David Epstein, Faye Lieder, Thomas Ryan, Judith Jurisch, and Dorothy White, proceeded to a bench trial on March 12, 2018. On April 25, 2018, the trial court ruled that: the *Sewell* Group A Plaintiffs suffered an inverse condemnation; the SWBNO owned the SELA Project; the Project had either caused new damage to, or exacerbated pre-construction damages within, the *Sewell* Group A Plaintiffs' properties; and caused loss of use and enjoyment of their properties, finding a total of five hundred eighteen thousand six hundred fifty-three dollars and 08/100 ($518,653.08) owed to the *Sewell* Group A Plaintiffs.

39.

On July 17, 2018, the trial court granted the *Sewell* Group A Plaintiffs' Motion for Attorney's Fees and Costs, awarding four hundred thousand dollars ($400,000.00) in fees and one hundred forty-five thousand dollars ($145,000.00) in recoverable costs.

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[3] Mark Defelice, Savare Defelice, Jr., Esteff Defelice, and Virginia Defelice are appearing individually herein on behalf of the entity f/k/a Pascale-Manale Restaurant, Inc.

40.

The SWBNO attempted to appeal the *Sewell* Group A ruling; however, on May 29, 2019, the Louisiana Fourth Circuit Court of Appeal affirmed the award, with only a minor amendment of moving and storage damages for the Jurisch/Ryan residence. The Louisiana Supreme Court denied the SWBNO's writ application on October 16, 2019, rendering the underlying judgments final and executory.

41.

On August 3, 2020, the trial court issued a judgment in favor of the *Sewell*, CDC No. 15- 4501, Groups E and F Plaintiffs, consisting of Arlen Brunson, Kristina and Brett Dupre, Gail Marie Hatcher, Betty Price, Bojan Ristic, Patsy Searcy, Helen Green, Theada Thompson, Kim Alvarez and Allan Basik, John, Jr. and Jill Bossier, David Engles, Estate of Louise Stewart, Cathleen Hightower, Ruth and Leon Hinson, Margaret and Harry Leche, George Mouledoux, Elizabeth and William Sewell, and Patricia Wynn. The court ruled that: the *Sewell* Group E and F Plaintiffs suffered an inverse condemnation; the SWBNO owned the SELA Project; the SELA Project had either caused new damage to, or exacerbated pre-construction damages within, the *Sewell* Group E and F Plaintiffs' properties; caused other economic losses due to the Project; and caused loss of use and enjoyment of their properties, finding a total of one million three hundred six thousand one hundred twenty-nine dollars and 88/100 ($1,306,129.88) owed to these Plaintiffs. The trial

court also awarded reasonable attorneys' fees and costs to the Groups E and F Plaintiffs in the amount of five hundred forty-eight thousand three hundred ninety dollars and 25/100 ($548,390.25).

42.

The SWBNO has not timely filed an appeal of the *Sewell* Groups E and F Plaintiffs' judgment pursuant to Louisiana Code of Civil Procedure articles 2087 and 2123. Accordingly, this judgment is final and executory.

43.

On September 29, 2020, the trial court issued a judgment in favor of the *Sewell*, CDC No. 15-4501, Group G Plaintiffs consisting of Geraldine Baloney, Abbrica Callaghan, Burnell Cotlon, Eirrin Erny and Gregory Kozlowski, Larry Hameen, Noella Hayes, Stephen Hogan and Fransisca Medina-Hogan, Keeba and Gaylin McAllister, Cody Myers, and Heather Weathers. The trial court ruled that: the *Sewell* Group G Plaintiffs suffered an inverse condemnation; the SWBNO owned the SELA Project; the Project had either caused new damage to, or exacerbated pre-construction damages within, the *Sewell* Group G Plaintiffs' properties; caused other economic losses due to the Project; and caused loss of use and enjoyment of their properties, finding a total of four hundred eighty-seven thousand four hundred fifty-

three dollars and 44/100 ($487,453.44) owed to these Plaintiffs.[4]

44.

The SWBNO has not timely filed an appeal of the *Sewell* Group G Plaintiffs' judgment pursuant to Louisiana Code of Civil Procedure articles 2087 and 2123. Accordingly, this judgment is final and executory.

45.

The *Anne Lowenburg, et al. v. Sewerage & Water Board of New Orleans* matter, CDC No. 2016-621, consisting of Elio, Charlotte, and Benito Brancaforte, Dr. Josephine Brown, Richard Parke Ellis, Nancy Ellis, Mark Hamrick, Dr. Robert and Charlotte Link, Ross and Laurel McDiarmid, Jerry Osborne, Jack Stolier, and Dr. William Taylor, c/w *M. Langenstein & Sons, Inc., et al. v. Sewerage & Water Board of New Orleans* c/w *K&B Louisiana Corporation d/b/a Rite Aid Corporation v. Sewerage & Water Board of New Orleans* matters, CDC No. 15-11971 c/w 15-11394 cases, consisting of Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries, proceeded to a bench trial on January 28-30, 2019. On March 21, 2019, the trial court granted the aforementioned Plaintiffs a collective award, totaling nine hundred ninety-eight thousand eight hundred seventy-two dollars and 47/100 ($998,872.47), and it ruled that: Plaintiffs suffered an

[4] The trial court also awarded reasonable attorneys' fees and costs to the Group G Plaintiffs in the amount of $166,963.37.

inverse condemnation; the SWBNO is liable for damages owed to Plaintiffs under the theory of inverse condemnation; the SWBNO owned the SELA Project; the SELA Project had either caused new damage to, or exacerbated pre-existing damages within, Plaintiffs' properties; caused loss of use and enjoyment of their properties; and the SWBNO failed to demonstrate that fault should be allocated to a separate entity, pursuant to the comparative fault statutes. Additionally, pursuant to La. Code of Civ. Pro. art 1920, La. R.S. 13:3666, La. R.S. 13:4533, and La. R.S. 13:5111, the Court awarded reasonable attorneys' fees to these Plaintiffs and taxed the SWBNO with the costs associated with the prosecution of these matters.

46.

On September 12, 2019, the trial court granted the paragraph 45, above, parties' Judgment for the sum of five hundred seventeen thousand two hundred thirty-one dollars and 03/100 ($517,231.03) as the total attorneys' fees and costs due Plaintiffs in Paragraph 45, plus interest at the Louisiana legal rate from September 12, 2019, until paid.

47.

On July 29, 2020, the Louisiana Fourth Circuit Court of Appeal amended, remanded, modified and rendered, and affirmed the trial court's Judgment referenced in paragraph 46, amending the Judgment to include judicial interest from the date of judicial demand, remand for a hearing on attorney's fees on appeal, and to modify and render the Judgment to

read "'Property Damage $41,838.00' for Appellees Dr. Robert and Charlotte Link" and affirmed as amended.

48.

No writ was taken to the Louisiana Supreme Court, so the paragraph 46 Judgment became final on August 29, 2020.

49.

The *Anne Lowenburg, et al v. Sewerage & Water Board of New Orleans* matter, CDC No. 2016-621, consisting of Thomas and Judith Lowenburg, John and Lori Ochsner, and Ronald Ruiz, resulted in a Judgment dated November 19, 2020 for the sum of two hundred eighty-five thousand twelve and 75/100 ($285,012.75), plus judicial interest from December 18, 2015, until paid.

50.

The *Anne Lowenburg, et al v. Sewerage & Water Board of New Orleans* matter, CDC No. 2016-621, c/w *American Ins. Co. a/s/o Ana Caputto v. U.S. Army Corps of Engineers, et al.* matter, CDC No. 16-3168, consisting of Anne P. Lowenburg, Sarah A. Lowman, Barbara H. West, Nanette Colomb, Mary and Clay Kearney, Michael T. Gray, Mark and Anna Kurt, The American Insurance Company, and Virginia Carter Stevens Molony, resulted in a Judgment dated November 19, 2020 for the sum of seven hundred fourteen thousand five hundred nineteen and 54/100 ($714,519.54), plus judicial interest from December 18, 2015, until paid.

51.

The *M. Langenstein & Sons, Inc., et al. v. Sewerage & Water Board of New Orleans* c/w *K&B Louisiana Corporation d/b/a Rite Aid Corporation v. Sewerage & Water Board of New Orleans* matters, CDC No. 15-11971 c/w 15-11394, consisting of Dat Dog Enterprises, LLC, Dat Dog Properties, LLC, Superior Bar & Grill, Inc., The Fresh Market, Inc., K&B Corporation d/b/a Rite Aid Corporation, and 1900 & 1901 Collin, LLC, resulted in a Judgment dated November 19, 2020 for the sum of nine hundred fifty-six thousand one hundred eleven and 33/100 ($956,111.33), plus judicial interest from December 18, 2015, until paid.

52.

For all of the above-referenced final judgments, the SWBNO owes Plaintiffs approximately $10,530,236.70, plus interest accruing on a daily basis at the legal rate.[5]

53.

The SWBNO's latest financial statements indicate that it possesses assets exceeding $3 billion and a projected budget surplus. Furthermore, the SWBNO has the ability to increase rates, issue bonds,

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[5] There are additional damages and attorneys' fees and costs judgments issued by the trial court for the *Sewell* Groups B and D Plaintiffs totaling $2,022,593.85. These judgments are not yet final and executable, but Plaintiffs reserve the right to seek to amend the Complaint to add these Plaintiffs if and when the judgments do become final and executable.

and otherwise raise capital to satisfy these outstanding judgments. Regardless of what the SWBNO may claim, the Damages SOP outlines the process for any settlements paid on behalf of the SELA Project and specifically notes that settlements will count as a credit against the SWBNO's federal debt, on which the SWBNO is already making payments.

54.

On January 11, 2021, counsel for certain Plaintiffs made written demand upon the SWBNO, through Mayor LaToya Cantrell, each and every SWBNO Board Member, and Executive Director Ghassan Korban, for payment of amounts owed to certain Plaintiffs totaling $7,175,820.69 in principal and $1,804,964.66 in interest through December 31, 2020. The correspondence "demand[ed] payment, appropriation for payment, and a reasonable plan for payment" as well as "the courtesy of a reply within ten (10) days." No response to the correspondence has been received.

55.

The SWBNO has had a reasonable period of time to pay the above-referenced judgments. Despite amicable demand, the SWBNO has failed to pay any final judgment, appropriate any funds for payment, and/or make a reasonable plan for payment in the near future. At times, the SWBNO has represented through its lawyers that it had not submitted any of Plaintiffs' claims to the USACOE for credit under the Damages SOP, and at other times said that the SWBNO had submitted the claims of five (5)

unidentified Plaintiffs for credit to the USACOE. Based upon these conflicting statements Plaintiffs are uncertain as to what has actually transpired; however, the SWBNO has not provided any evidence that it has submitted any of Plaintiffs' claims to the USACOE for credit under the SELA Damages SOP, and there have been no communications with Plaintiffs whatsoever regarding any claims that may have been submitted. Plaintiffs now have no reason to believe that the SWBNO has any intention of complying with the Court's final judgments. The SWBNO's clear intention—to avoid payment (or a plan for payment) of Plaintiffs' claims—constitutes a sufficient federal interest in the claims, such that this Court should intervene and enforce the awards.

COUNT I: VIOLATION OF TAKINGS CLAUSE, DUE PROCESS CLAUSE, AND PLAINTIFFS' CIVIL RIGHTS

56.

Plaintiffs repeat, re-allege, and incorporate by reference each of the preceding allegations of this Complaint as though fully set forth at this point.

57.

Defendants are able to sue and be sued in their own names, are "persons" within the meaning of 42 U.S.C. §1983, and were, at all times mentioned herein, acting under State law.

58.

Plaintiffs had their property and property rights forcibly taken from them by the SWBNO without a claim of right by inverse condemnation. The underlying judgments establish this as a final and unappealable matter of law. Furthermore, the final judgments set the dollar amount the SWBNO is required to pay in damages. Plaintiffs possess the right, guaranteed by the Fifth Amendment of the United States, to be actually paid just compensation for the taking of their property by inverse condemnation.[6]

59.

Plaintiffs have made amicable demand for payment, appropriation for payment, and a reasonable plan for payment, without success. See, e.g., paragraph 54, *supra*.

60.

In addition to the key fact that any amounts paid will be effectively reimbursed by the federal government, the SWBNO's 2020 financial statements demonstrate that the funds are available, yet Defendants have failed to pay any of the court's final judgments.

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[6] *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

61.

Defendants' actions and omissions in handling Plaintiffs' SELA Project claims are directly contrary to the SWBNO's Strategic Plan, 2011-2020, Mission, Vision, and Values.

62.

The Takings Clause of the Fifth Amendment of the United States Constitution, applied to the States through the Fourteenth Amendment, requires the government to compensate its citizens for any taking of private property for a public purpose "without unreasonable delay."[7] Plaintiffs fully pursued the state remedy available and received final judgments from the court obligating the SWBNO to compensate the Plaintiffs for violating their Constitutional rights through inverse condemnation.

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[7] See *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919), quoted in *State, Dept. of Highways v. Olinkraft, Inc.*, 333 So.2d 721 (La. App., 1976), aff'd 350 So.2d 865 (La. 1977). While neither the federal constitution nor any court have said precisely how long is too long to wait to pay just compensation, one court explained, "Just compensation in my opinion means exactly what it says, and it means that the owner himself is entitled to receive his compensation; not that his estate or his children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future." *United States v. 9.94 Acres of Land in City of Charleston*, 51 F.Supp. 478, 483-84 (E.D.S.C.1943); quoted in *Wileman v. Wade*, 665 S.W.2d 519, 520 (Tex. App.-Dallas 1983). See also, *McGibson v. County Court*, 95 W.Va. 338, 121 S.E. 99 (1924) (finding that where land is taken by condemnation "there must be…some remedy to the owner whereby he may have compensation within a reasonable time…he must not be put to risk or unreasonable delay.").

63.

Defendants' refusal to honor their obligations to make payment of just compensation, pursuant to the final judgments rendered by the Louisiana state courts after demand and reasonable opportunity, constitutes a knowing, willful, and ongoing violation of Plaintiffs' constitutional rights under 42 U.S.C. §1983, which is now ripe for adjudication. As the United States Supreme Court found in *Knick v. Twp of Scott, Pennsylvania*:

> The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983.

Knick, 139 S. Ct. 2162, 2171, 204 L. Ed. 2d 558 (2019).

64.

Further, and without reasonable basis therefore, Plaintiffs' due process rights have been violated, because Defendants have treated them differently

than non-litigants merely because Plaintiffs have exercised their constitutional right to file suit to protect their rights and property interests. This constitutes a violation of the Due Process Clause of the Fourteenth Amendment, which prohibits any State governmental agency, such as Defendants, from depriving any person of life, liberty, or property without due process of law.

65.

The Supreme Court of the United States has recognized that state and federal claims may arise simultaneously when a Constitutional right is violated, and it expressly stated:

> Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Knick, 139 S. Ct. 2162, 2179, 204 L. Ed. 2d 558 (2019).

66.

Unlike *Knick*, Plaintiffs did pursue inverse condemnation claims in state court and received final judgments, thus completing the procedure for the available state remedy. The SWBNO's failure to comply with its agreement with the USACOE to investigate and resolve SELA damage claims under the Damages SOP is a clear violation of the

Constitutional guarantees of the Fifth Amendment and the Takings Clause. However, the outright refusal to comply with a final judgment and continue to withhold just compensation creates a secondary Constitutional violation of Plaintiffs' Fifth Amendment rights. Defendants' actions, and lack thereof, have continued to damage Plaintiffs and implicate substantial federal interests and funds. These federal interests are sufficient as a matter of law to overcome Louisiana's anti-seizure laws and enable this Court to enforce the underlying judgments against the SWBNO.

67.

The relevant federal interests at issue include: the USACOE's role as a federal agency; the federal financing, administration, and oversight of the SELA Project, and its funding, administering, and overseeing construction of the SELA Project; the USACOE's financial role, as a federal entity, as a creditor with a substantial interest in the debts incurred by the SWBNO during the SELA Project; the United States legislature's approval and appropriation of the funds for the Project; and, finally, but not exhaustively, the USACOE's managerial and administrative role in the review and approval of property damage claims submitted by the SWBNO.

68.

These federal interests and the precedent set by the Supreme Court of the United States permit this Court to protect the Constitutional rights of Plaintiffs by ordering Defendants to fulfill their obligation

under the state of Louisiana and the Constitution to compensate Plaintiffs for their damages.

COUNT II: DECLARATORY RELIEF

69.

Plaintiffs repeat and reallege all foregoing allegations as though fully set forth at this point.

70.

As evidenced by sworn testimony of a SWBNO representative, the Damages SOP, specifically created in anticipation of SELA damages, is for the direct benefit of the owners and/or residents of properties damaged by the SELA Construction that are located at, near, or within the ZOI, APE, and/or CIZ. The purpose of the Damages SOP is to identify properties subject to damage as a result of the SELA Project and to investigate and resolve SELA-caused property damage to them. This document outlined the procedure to file damage claims, the SWBNO's role as investigator, and the USACOE's ultimate decision to grant a settlement. Furthermore, this agreement outlines how the financial obligations between the SWBNO and the USACOE are directly affected by homeowners' and businessowners' damage claims. This procedure was created with the complete expectation that third parties would be directly impacted by the SELA Project and explicitly anticipates the process to be for the benefit of those third parties.

71.

Both the USACOE and the SWBNO specifically anticipated and acknowledged that damages to Plaintiffs' properties as a result of SELA construction were likely to occur.

72.

Plaintiffs are third-party beneficiaries to the Damages SOP and agreed-upon procedure with the USACOE, and, as a result, Defendants have violated Plaintiffs' constitutional rights, as stated above, and in addition breached their contractual obligations to both the USACOE and Plaintiffs by violating the terms of the Damages SOP. The SWBNO failed to objectively and truthfully investigate damages to Plaintiffs' homes and businesses, failed to provide evidence of any submissions to the USACOE of credit packages representing the amounts awarded to Plaintiffs in the underlying judgments, and has failed to resolve Plaintiffs' claims in accordance with the procedure outlined in the Damages SOP and followed by Plaintiffs to final judgment.

73.

An actual controversy between Defendants and Plaintiffs arose at the time of the taking, and then again at the SWBNO's continuous refusal to comply with the Damages SOP. The SWBNO is obligated, by their agreement with the USACOE in the Damages SOP, to: investigate and resolve Plaintiffs' claims; submit credit packages to the USACOE representing the amounts awarded to Plaintiffs in the underlying

judgments; and pay the sums awarded in underlying judgments, pursuant to the terms of the Damages SOP. Defendants, in violation of state and federal law, apparently deny that any such obligations exist.

74.

Per the Constitutionally-protected rights enumerated in the Takings Clause, Plaintiffs should receive an explicit judicial determination of the respective rights and duties of Defendants regarding these constitutional and contractual violations.

75.

Such judicial declarations are necessary and appropriate at this time, as an actual and justiciable controversy exists between Plaintiffs and Defendants regarding the violation of their Fifth Amendment rights and Defendants' obligations under the Damages SOP.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment in their favor and against the Defendants, as follows:

1. For a judicial declaration that:

    a. Defendants' conduct has deprived Plaintiffs of their rights, privileges, and immunities secured by the Constitution of the United States;

b. Defendants are obligated, per the Damages SOP, to investigate and resolve Plaintiffs' claims;

c. Defendants are required to submit credit packages to the USACOE representing the amounts awarded to Plaintiffs in the underlying judgments in order to reduce the total debt owed to the federal government; and

d. Defendants are obligated to pay to Plaintiffs within a reasonable time, pursuant to the terms of the Damages SOP and the United States Constitution, the full sums awarded to them in the underlying judgments;

2. For a judgment and issuance of a writ of execution under FRCP Rules 69 and 70, authorizing seizure by appropriate authorities of the SWBNO's property, wherever located, in amounts sufficient to satisfy the underlying judgments;

3. For judicial interest pursuant to the Judgments until paid;

4. For attorney's fees in accordance with 42 USC §1988;

5. For costs of suit herein; and

6. For such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,
SMITH & FAWER, LLC
BY: /s/*Randall A. Smith*
Randall A. Smith (#2117)
Mary Nell Bennett (#32339)
Sarah A. Lowman (#18311)
Smith & Fawer, LLC
201 St. Charles Ave., Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
rasmith@smithfawer.com
mnbennett@smithfawer.com
salowman@smithfawer.com

Counsel for Plaintiffs, Ariyan, Inc. d/b/a Discount Corner, M. Langenstein & Sons, Inc., Prytania Liquor Store, Inc., West Prytania, Inc. d/b/a Prytania Mail Service/Barbara West, British Antiques, L.L.C./Bennet Powell, Fine Arts Management, L.L.C. D/B/A Prytania Theatre, Superior Seafood and Oyster Bar, L.L.C., The Magic Box, Ltd. d/b/a Magic Box Toys, Mark Defelice, Savare Defelice, Jr., Esteff Defelice, and Virginia Defelice, all on behalf of the entity f/k/a Pascal-Manale Restaurant Inc., Elio, Charlotte, and Benito Brancaforte, Dr. Josephine S. Brown, Richard Parke Ellis, Nancy Ellis, Mark Hamrick, Dr. Robert and Charlotte Link, Ross and Laurel McDiarmid, Jerry Osborne, Jack Stolier, Dr. William B. Taylor, III, Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries, Thomas and Judith Lowenburg, John and Lori Ochsner, Ronald Ruiz, Anne Lowenburg, Sarah A. Lowman, Barbara H. West, Nanette Colomb, Mary and Clay Kearney, Michael T. Gray, Mark and Anna Kurt, The American Insurance Company (as subrogee

of Mark and Anna Kurt), Virginia Carter Stevens Molony, Dat Dog Enterprises, LLC, Dat Dog Properties, LLC, Superior Bar & Grill, Inc., The Fresh Market, Inc., K&B Corporation d/b/a Rite Aid Corporation, And 1900 & 1901 Collin, L.L.C.

BRUNO & BRUNO
BY: /s/ *Joseph M. Bruno*
Joseph. M. Bruno (La. Bar # 3604)
Daniel A. Meyer (La. Bar # 33278)
Bruno & Bruno
855 Baronne Street
New Orleans, LA 70113
Telephone: (504) 525-1335

-AND-

Michael T. Whitaker (Cal. Bar # 118403)
Alexis A. Butler (La. Bar #32376)
The Whitaker Law Firm, APC
201 St. Charles Avenue, Suite 2500
New Orleans, Louisiana 70170
Telephone: (504) 313-0168
lexybutler@whitakerlaw.net

Counsel for Plaintiffs, George and Beth Duessing, David Epstein, Faye Lieder, Thomas Ryan, Judith Jurisich, Dorothy White, Arlen Brunson, Kristina and Brett Dupre, Gail Marie Hatcher, Betty Price, Bojan Ristic, Patsy Searcy, Helen Green, Theada Thompson, Kim Alvarez and Allan Basik, John, Jr. and Jill Bossier, David Engles, Estate of Louise Stewart, Cathleen Hightower, Ruth and Leon Hinson, Margaret and Harry Leche, George Mouledoux, Elizabeth and William Sewell, Patricia Wynn, Geraldine Baloney, Abbrica Callaghan, Burnell Cotlon, Eirinn Erny and Gregory Kozlowski, Larry Hameen, Noella Hayes, Stephen Hogan and Fransisca

Medina Hogan, Keeba and Gaylin McAllister, Cody Myers, and Heather Weathers