CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 08-6979 c/w 11-97 **DIVISION "L"** **SECTION 6**

TERRY AND NIDA LONATRO, et al.

VERSUS

**ORLEANS LEVEE DISTRICT,
SOUTHEASTERN LOUISIANA FLOOD PROTECTION AUTHORITY-EAST,
AND UNITED STATES ARMY, CORPS OF ENGINEERS**

FILED:_____ _____
DEPUTY CLERK

FIRST SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, come Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo (hereafter collectively "Plaintiffs"), who hereby file this First Supplemental and Amending Petition in this consolidated case in accordance with this Honorable Court's January 24, 2011 Judgment and its oral reasons for judgment as set forth at the January 14, 2011 hearing. Plaintiffs suggest that the Orleans Levee District (hereafter "OLD"), the Southeastern Louisiana Flood Protection Authority-East (hereafter "SELFPA"), and the United States Army, Corps of Engineers are truly and justly indebted to them, jointly, severally and *in solido*, for the following reasons and in the following respects, to-wit:

Parties

1.

Plaintiffs herein are:

Terry and Nida Lonatro, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since August 15, 2006, and at all times relevant hereto, Mr. and Mrs. Lonatro have either individually or as a community owned and resided at residential property located at 6560 Bellaire Drive, Unit B and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal;

Craig and Cindy Berthold, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since May 25, 1990, and at all times relevant hereto, Mr. and Mrs. Berthold have either individually or as a community owned and resided at residential property located at 6644 Bellaire Drive and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal;

Dante and Monique Maraldo, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since August 17, 2005, and at all times relevant hereto, Mr. and Mrs. Maraldo have either individually or as a community owned and resided at residential property located on Bellaire Drive and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal;

Amy and George Sins, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since March 29, 2001, and at all times relevant hereto, Mr. and Mrs. Sins have either individually or as a community owned and resided at residential property located at 6728 Bellaire Drive and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal;

Albert and Kathleen Zuniga, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since 2004, and at all times relevant hereto, Mr. and Mrs. Zuniga have either individually or as a community owned and resided at residential property located at 6700 Bellaire Drive and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal; and

Roy and Tammy Arrigo, both natural persons of the age of majority and domiciliaries of the Parish of Orleans. Since June 15, 2000, and at all times relevant hereto, Mr. and Mrs. Arrigo have either individually or as a community owned and resided at residential property located at 6724 Bellaire Drive and adjacent to and/or abutting the levee surrounding the Seventeenth Street Canal.

2.

Defendants herein are:

Orleans Levee District, ("OLD") a political subdivision of the State of Louisiana, created by La. R.S. 38:307 and vested by law with the powers granted to levee districts within the State of Louisiana pursuant to La. R.S. 38:301, *et. seq*, subject to the restrictions on said powers set forth in the Louisiana Constitution;

Southeast Louisiana Flood Protection Authority, ("SELFPA") a political subdivision of the State of Louisiana, created by La. R.S. 38:330.1 and vested by law with the powers set forth therein, subject to the restrictions on said powers set forth in the Louisiana Constitution; and

United States Army, Corps of Engineers, (the "Corps"), a sovereign government, and the United States of America, Army Corps of Engineers, a division of the United States Government that maintains a district office in Orleans Parish and is subject to suit in accordance with law and made a party to this suit in accordance with this Court's Order dated January 24, 2011.

Jurisdiction and Venue

3.

This is a lawsuit brought by individuals living in and around an outfall canal in the Parish of Orleans, Louisiana, and against Defendants, seeking damages for the taking of their property without just compensation in violation of the Louisiana Constitution, for the disparate treatment of them by the Defendants in the payment of compensation for damages done to Plaintiffs' property,

and for a declaration that the *St. Julien* doctrine is either inapplicable or unconstitutional if actually applied herein. This Court therefore has jurisdiction over this matter pursuant to Louisiana Constitution **Article V, §16 and La. R.S. 13:3201.**

4.

This lawsuit seeks to prevent Defendants from trespassing and engaging in construction activities on Plaintiffs' immovable property in and around the 17th Street Canal, and seeks damages from Defendants' taking of property located in Orleans Parish. Venue therefore lies over this action in this Court pursuant to La. R.S. 13:5104 and **La. R.S. 13:3203, , La. C.Civ.P. art. 73-74.**

Factual Background

5.

At all times relevant hereto, Plaintiffs have been and remain owners of property located on Bellaire Drive in Orleans Parish, Louisiana, immediately adjacent to and/or abutting the levee surrounding the 17th Street Canal.

6.

The 17th Street Canal (hereafter the "Canal") is a non-navigable outfall drainage canal, flowing into Lake Pontchartrain, located on the boundary between New Orleans and Metairie, Louisiana. It was originally constructed in the 1850s, with the fill from the Canal being used to create an embankment for the adjacent Jefferson & Lake Pontchartrain Railroad right-of-way. The Southeast portion of the 17th Street Canal abuts Bellaire Drive, with a levee standing between the Canal and Bellaire Drive.

7.

On or about August 29, 2005, Hurricane Katrina struck New Orleans, Louisiana and caused substantial flooding due in part to a breach in the levee surrounding the Canal.

8.

On or about May 6, 2006, the Corps issued a certain report entitled *Project-Information Report-Rehabilitation and Repair of Hurricane or Shore Protection Projects Damaged by Hurricane Katrina* (hereafter the "Report"). *See*, attached Exhibit "A." In that Report, the Corps called for the removal of certain trees and improvements on property abutting the 17th Street Canal, in cooperation with SELFPA and OLD.

9.

Specifically, the Report called for the following:

> For this PIR [Project Information Report], emphasis will be placed on removing those trees that are within the existing levee section. In addition, this PIR proposes to remove trees that are within 15 feet of the levee toe, if this area is within the existing levee right-of-way. Another component of the PIR consists of the removal of trees and woody vegetation from the flood side (interior) of the 17th Street, Orleans Avenue, and London Avenue Outfall Canals. Clearing of the vegetation is needed in order to inspect the flood side condition of the protection.
>
> ***
>
> In locations where access through fences is required to remove trees, the Corps or its Contractor shall remove only that portion of fence required to safely access the property in order to remove the identified trees. The removed fence portions shall be placed in the backyard in a location that will not affect the tree removal effort and that will not impact existing paths or walkways. Orange flagging will be used to identify the removed fence portion. Additionally, in the area(s) where fence portions were removed to safely access the property, the Contractor shall place orange construction fencing. If, following the removal of the fence, there is a hole in the ground from the fence post, the hole will be backfilled and compacted. Following compaction, the bare earth and all other disturbed areas caused by tree removal operations will be fertilized and seeded. A full determination of the potential geotechnical impacts trees might have on the structural integrity of levees will be examined in Phase 2.

10.

The Corps conducts projects affiliated with flood control in the New Orleans region through SELFPA and OLD, pursuant to sharing agreements between the Corps and the state agencies.

11.

Subsequent to the issuance of the Report, the Corps enlisted OLD and SELFPA to obtain entry to the property located along Bellaire Drive and to execute the fence and tree removal called for in the Report.

12.

Throughout the early stages of Defendants' involvement in this project, they contemplated the "taking" of Plaintiffs' property through the payment of just compensation. At a meeting held on January 3, 2006, Fred Young of the Corps stated that "Probably the trees along the 17th Street Canal will be cleared from the levees so that trucks during inspection can pass through." This followed Mr. Young's statement of December 6, 2005—reported in the *Times-Picayune* on

December 12, 2005—to the effect that OLD would be buying private property for this clearing activity:

> In the first public indication that levee reconstruction will require a buyout of private property near the breaches, Fred Young, corps project manager for the levee reconstruction program, told an Orleans Levee Board committee that the additional space may be necessary for several alternatives being considered for adding protection to the levee wall system.
>
> "We're only going to take what we require, and then our real estate people in our office will have to take care of that," Young told reporters after addressing the board.

In the meeting referred to in the article, Mr. Young indicated that the Corps had been looking to "take" property for the clearance activities. Therefore, Defendants recognized that—as they had apparently done in the past—they would have to pay just compensation for the destruction and removal activities contemplated by this project.

13.

This attitude began to change in mid-2006. At a July 19, 2006 meeting of OLD, Mike Stout announced that the Corps had undertaken a study to determine whether removal of the trees along the Canal would enhance levee stability.

14.

At a September 20, 2006 meeting of OLD, Mr. Stout reiterated the need to undertake tree removal. Although the minutes of the meeting primarily reflect a discussion of the removal of trees around the London Canal, Mr. Stout foreshadowed the removal of all trees within six (6) feet of the toe of the levees around the London, 17th Street and Orleans Avenue outfall canals.

15.

At this point, Defendants apparently decided to dispense with the need of acquiring the property for this project through expropriation, and decided simply to take the land without payment of just compensation. In December of 2006, Janet Cruppi, a member of the Corps' Real Estate Division advised one of the Plaintiffs that the Corps had found a law that permitted the taking of property around the levees without the payment of just compensation. *See also*, Exhibit "B," Times-Picayune article dated September 22, 2006 referencing the "recent unearth[ing of] a state law." Thereafter, dispensing with the long-honored tradition of OLD to acquire property for levee

maintenance through expropriation and the payment of just compensation, Defendants embarked on a campaign to take Plaintiffs' property without payment of just compensation.

16.

SELFPA subsequently sent a letter to the property owners along Bellaire Drive—including Plaintiffs herein—informing them of the intent of SELFPA to perform the fence and tree removal projects called for in the report.

17.

As authority for its actions, SELFPA relied on La. R.S. 38:225, which provides for a legal predial levee servitude in favor of the levee district of the State to perform flood control activities the State provides:[1]

> A. No person shall:
>
> (1)(a) Place or cause to be placed upon or within six feet of any part of the levees fronting any waterway subject to the control or surveillance of police juries, levee boards, municipal corporations, or other authorized boards or departments any object, material, or matter of any kind or character which obstructs or interferes with the safety of the levees or is an obstacle to the inspection, construction, maintenance, or repair of any levee; or place or cause to be placed any object, structure, material, or matter of any kind or character upon any part of any land which the state or any agency or subdivision thereof may own or acquire by deed, lease, servitude, charge, or otherwise, and through its authorized representative, may donate, grant, or otherwise convey to the United States rights-of-way, easements, or other servitudes for the construction, improvement, or maintenance of any flood control structures or natural or other waterway, which may obstruct or interfere with the improvement or maintenance of such waterway or use of the land for flood-control purposes.
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> ***
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> B. If after forty-eight hours' notice by any district commissioner, levee inspector, or authorized representative of the state, agency or subdivision thereof, the object or objects, structures or other obstructions have not been removed, said objects can be removed or the menace abated and any damage repaired by the state, its agency or subdivision at interest at the expense of the owner, agent or person responsible therefor. The objects, structures or other obstructions may be attached and may be removed from said levee or land at the risk and expense of the owners or persons responsible therefor to

[1] Defendants' alternative reliance on La. R.S. 19:14 for their right of entry, destruction and removal misses the mark. First, reliance on that statute is mutually inconsistent with the existence of a levee servitude, for the statute mandates compensation be paid for activities occurring on the property held in good faith by the State for ten (10) years. *See,* La. R.S. 19:14. Second, the Defendants have not "possessed" the property at issue for ten (10) years—as the amendment to Article 665 suggests, no basis for any levee servitude existed prior to August 15, 2006. Thus, Defendants cannot establish the requisite period of possession of the alleged property they now seek to destroy and cannot rely on R.S. 19:14 to support any rights to conduct activities destructive of Plaintiffs' property.

> remove the menace to said levee or the obstacle to the improvement or maintenance of such waterway.

18.

Upon information and belief, Plaintiffs assert that Defendants have in the past acquired servitudes for levee improvements from landowners through use of the quick-taking expropriation authority granted under state and federal law. These statutes call for the payment of just compensation for any taking of private property for public use. Therefore, the Defendants have in these situations been required to and have paid just compensation for their expropriation.

19.

In an article dated January 5, 2009, the *Times-Picayune* reported that the Defendants were beginning to undertake the same destruction and removal activities in Jefferson Parish that they had wrought on Plaintiffs' property. *See,* attached Exhibit"C." Tellingly, the article reported that the Levee Districts had eschewed La. R.S. 38:225 and had instead utilized La. R.S. 38:301—the latter of which requires payment of just compensation—as their rationale for this action. *Id.* La. R.S. 38:301 specifically contemplates an appropriation of property and payment for the property taken:

> C. (1)(a) All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.
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> ***
>
> (I) The compensation for a permanent levee servitude defined herein shall apply to all lands, exclusive of batture, and improvements appropriated, taken, used, damaged, or destroyed for levee purposes after the effective date of this Act.

La. R.S. 38:301(C)(1)(a) and (C)(1)(I).

20.

In the early morning of March 29, 2010, nola.com ran a story entitled "Stalled Eastern New Orleans Levee Protection Work a Danger to Residents, Corps Official Says." *See,* attached Exhibit "D." The article discussed a stumbling block to the completion of levee repair in Eastern New Orleans. Tim Doody—Chairman of SELFPA—indicated that the slow progress was in part a result of SELFPA's desire to avoid the necessity of using the quick-taking statutes available to it:

> Doody said the authority also is trying to avoid using state law to

> seize property -- a legal process called "quick take" -- because of the potential financial consequences, as well as the corps' failure to pay for land acquired that way in the past.
>
> "We're very much aware of the legal mess we've gotten into resulting from the corps insisting on us commandeering property," Doody said. "In the past, the corps said commandeer the property and we'll pay for it. We did, and the corps still hasn't paid, and guess what? We got sued."

Id. These comments confirm that the Defendants have previously paid just compensation for the acquisition of levee servitudes of the kind that they claim to be a legal servitude burdening the property of Plaintiffs. They therefore evidence disparate treatment of Plaintiffs by the Defendants.

21.

La. R.S. 38:225 is a specific application of La. Civ. Code Article 665, which creates a predial legal levee servitude in favor of the State and its political subdivisions for levee construction and maintenance. As the Attorney General stated in AG Opinion 1995-106:

> It appears that some of the "levees" in question fall outside the normal conception of what actually constitutes a levee, as many sections of the system do not even border on water. That being the case, a workable definition of a levee should be a starting point for analysis. No Louisiana statute defines exactly what a levee is, but Black's Law Dictionary defines a levee as "an embankment or artificial mound of earth constructed along the margin of a river, to confine the stream to its natural channel or prevent inundation or overflow. Also, a landing place on a river or lake; a place on a river or other navigable water for loading and unloading of goods and for the reception or discharge of passengers to and from vessels lying in the contiguous waters...." It seems that this definition would restrict a "levee" to existing only as a barrier on a navigable waterway.
>
> Should that be the case, only the east side of the levee system, which abuts the Atchafalaya River, qualifies as a true levee. The southern and western boundaries of the system, which abut man-made or non-navigable waterways, are not levees in the sense of the above mentioned definition. On the northern side of the system, the "levees" do not abut a waterway at all, and thus on the northern, western, and southern boundaries of the system, the "levees" are more accurately described as flood control structures. Therefore, the levee servitude established in La.C.C. Art. 665 is not applicable to any of the abovementioned structures other than the eastern boundary of the system.

(emphasis added). *See also, Jeanerette Lumber & Shingle Co. v. Bd. of Com'rs.*, 187 So. 715, 718 (La. 1966) *Kimble v. Bd. of Com'rs.*, 598 So.2d 1251, 1252-53 (La.App. 4th Cir. 1992); *Deltic Farm*

& Timber Co. v. Bd. of Com'rs., 368 So.2d 1109, 1112-13 (La.App. 2nd Cir. 1979). Thus, the servitude imposed by La. R.S. 38:225 applies solely to those lands affected by C.C. 665.

22.

Prior to August 15, 2006, La. C.C. Art. 665 applied solely to riparian lands surrounding navigable bodies of water. The statute stated that "[s]ervitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. All that relates to this kind of servitude is determined by laws or particular regulations." La. C.C. Art. 665 (2005). On or about August 15, 2006, the Louisiana Legislature amended Article 665 to provide that "such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees." La. C.C. Art. 665 (2006)(emphasis added). Nothing in the Act creating this amendment stated that it was to apply retroactively.

23.

Absent a servitude under old La. C.C. Art. 665, Defendants have no right to enter Plaintiffs' property. Even if Defendants did possess such a servitude, they would nevertheless be required to pay just compensation for the exercise of any alleged rights of entry.

24.

The property on Bellaire Drive abutting the Canal, including the property owned by Plaintiffs, is not riparian because it does not front on a navigable body of water. "The Seventeenth Street Canal is not a navigable river or stream, but is a manmade drainage ditch at least three miles long. It has its beginning near the rear of the New Orleans waterworks plant in Orleans Parish and, after practically tracking the dividing line between Orleans and Jefferson parishes, empties into Lake Pontchartrain." *Board of Com'rs. v. Baron*, 109 So.2d 441, 443 (La. 1959).

25.

Plaintiffs all purchased their property on Bellaire Drive prior to August 15, 2006.

26.

Upon information and belief, the Defendants have never previously exercised any claimed rights under La. R.S. 38:225 to command removal of fences or trees that are within six (6) feet of the theoretical toe of the levee abutting the Canal. They have never demanded from Plaintiffs a right to remove fences and trees that are within six (6) feet of the theoretical toe of the levee abutting the Canal until they undertook the destruction and removal activities at issue herein.

27.

Furthermore, the Defendants have never previously demanded of the Plaintiffs that they remove fences and trees that are within six (6) feet of the theoretical toe of the levee abutting the Canal. Defendants' conduct with respect to the maintenance of the levees has previously respected the fences and trees on Plaintiffs' property, and Defendants have not previously indicated that such are hazards that must be removed.

28.

In November of 2006, the Corps issued an amended report (hereafter "Amended Report") concerning the destruction and removal projects called for in the Report. This Amended Report stated:

> (3) Tree removal at floodwalls and levees for flood control. This alternative consists of tree removal within the levee section and within 15 feet from the levee toe if this area is within existing and available levee and floodwall right-of-way (ROW). In locations where documented ROW is inadequate, the right to maintain the actual footprint of the levees, from toe to toe, is available to the project sponsors under the doctrine of unopposed use, as codified in Louisiana Revised Statute 19:14. In addition, the pertinent project sponsor will be asked to provide right of entry for the removal of trees to the area that is six feet from the levee by exercising its rights pursuant to Louisiana Revised Statute 38:225. Another component of the PIR consists of the removal of trees and woody vegetation from the flood side (interior) of the 17th Street, Orleans Avenue, and London Avenue Outfall Canals. Clearing of the vegetation is needed in order to inspect the flood side condition of the flood control system.
>
> For this PIR, emphasis will be placed on removing those trees that are within the existing levee section. In addition, this PIR proposes to remove trees that are within 15 feet of the levee toe, if this area is within the existing levee right-of-way (ROW). The existing ROW available for tree removal during Phase 1 includes

> documented right-of-way as well as levee maintenance rights available to the project sponsors under Louisiana statutes. In locations where documented ROW is inadequate, the right to maintain the actual footprint of the levees, from toe to toe, is available to the project sponsors under the doctrine of unopposed use, as codified in Louisiana Revised Statute 19:14. In addition, the pertinent project sponsor will be asked to provide right of entry for the removal of trees to the area that is six feet from the levee by exercising its rights pursuant to Louisiana Revised Statute 38:225. Under this law, a levee district has the right to remove obstructions within six feet of a levee fronting a waterway.

See, attached Exhibit "E" (underscoring in original). It again called for the same cooperative arrangements with SELFPA and OLD executing the activities called for in the Amended Report.

29.

Defendants have made numerous inconsistent statements regarding how much property is required and how much clearance is required for the exercise of their alleged levee servitude. In some documents they state the amount of property needed starts at the toe of the levee and extends to six (6) feet, and other documents suggest they may require up to twenty-one (21) feet from the toe of the levee. The OLD and SELFPA could have obtained a variance reducing the amount of clearance but inexplicably failed to do so.

30.

Despite the sense of urgency created by SELFPA and the Corps in their communications, SELFPA did not undertake any of the removal and destruction projects called for in the Report in 2007. It instead waited over two (2) years from the issuance of the Report—until 2008—to press again for the execution of the removal and destruction activities.

31.

At a May 15, 2008 meeting of SELFPA, SELFPA and OLD gave the Corps permission to use their purported servitude to conduct their destruction and removal activities, despite the candid admission at that meeting that alternative means of flood control without impingement on property rights were available. In early-June of 2008, SELFPA and the Corps commenced the surveying necessary in preparation for the destruction and removal projects called for in the Report and Amended Report. This consisted in some cases of the use of actual survey equipment, but in many

cases the "surveyors" simply conducted a visual inspection of the property and "guesstimated" the property necessary for the placement of the "theoretical toe plus 6 feet" servitude Defendants are utilizing. Once the surveyor determines the set back he or she deems appropriate, a "blue line" is placed to demonstrate the point beyond which no improvements will be left standing.

32.

As a result of these blue line surveys and the subsequent destruction and removal activities undertaken by Defendants, property owners along Bellaire Drive—including Plaintiffs—have lost control of in excess of 1,000 square feet of property per lot on the rear portion of their property.

33.

Defendants commenced the destruction and removal activities called for in the Report and Amended Report on July 7, 2008.

34.

On September 2, 2010, the Corps released to the public an Individual Environmental Report ("IER") detailing extensive construction work of a different sort that Defendants will be performing on Plaintiffs' property.

35.

Again, Plaintiffs objected to the work and the trespass on their property, stating that Defendants had no right to enter their property or to perform the work absent the payment of just compensation.

36.

The recent construction work consists of: (1) digging deeply into the disputed property; (2) building new structures on the disputed property; (3) engaging in "deep soil mixing," which is a process in which Defendants will insert a giant mixer up to 80 feet deep into the ground and churn up the soil; (4) inserting a Portland cement and bentonite mixture into the churned-up soil to create a subsurface wall; and (5) adding a new embankment wall. See Exhibit "F," IER, p. 16.

37.

In connection with the 2011 construction activities, Defendants have erected a 3-4 foot fence

on Plaintiff's property to prevent Plaintiffs and others from accessing Plaintiffs' property. Defendants are restricting Plaintiffs' access to their property, and have even placed "No Trespassing" signs to enforce restrictions on any use whatsoever of Plaintiffs' property.

38.

Although Plaintiffs have lost all right to and enjoyment of that portion of their property, they nevertheless remain liable for and pay property taxes on the entirety of their property.

39.

The existence and extent of the right-of-way on Plaintiffs' property is by no means clear, yet Defendants claim that they have a right to enter the property for the same reasons they asserted in 2008.

40.

Plaintiffs are entitled to damages for Defendants' trespass and for all the damage occasioned by the construction on their property.

41.

Not only have the Plaintiffs lost control of their property, they have further suffered additional harm associated with the invasions of their home sites by agents of Defendants. Specifically, the Plaintiffs have suffered damage—with no compensation offered by any of the Defendants herein—in the following ways:

a. Suffering Defendants' entry onto their property, with all the heavy machinery and other equipment necessary for the construction, destruction and removal activities;

b. Losing fences for which they expended substantial sums;

c. Losing trees along the edge of their property—some centuries-old—and the advantages afforded by said trees;

d. Enduring the seepage in the levees adjacent to their property occasioned by loss of trees and vegetation;

e. Enduring the construction and destruction activities on the property as set forth in the

IER and other damages that the IER failed to detail;

f. Potentially remaining legally liable for any accidents or injuries associated with the green space—because Defendants have not taken title to it—and thus being required to obtain liability insurance on the green space, with no reimbursement or other compensation from Defendants for this expense;

g. Remaining legally liable for all property taxes accruing on the green space because the Defendants have not taken title to it; and

h. Other damages that will be proven at trial.

Count One: Damages for Work Done Preparatory to the

Destruction and Removal Activities

42.

The allegations of Paragraphs 1-41 are reiterated as if copied *in extenso.*

43.

Defendants have caused damages to Plaintiffs' property in conducting the surveying and other activities preparatory to the destruction and removal activities contemplated.

44.

SELFPA has since 2007 advised Plaintiffs that it was imminently to impose and exercise a levee servitude over a portion of the rear of their property. It consistently indicated to Plaintiffs that it intends to destroy fences surrounding Plaintiffs' property and to remove trees which Plaintiffs have taken great pains to maintain. The result is that Defendants have deprived Plaintiffs of any ability to enjoy the property, have been incapable of making improvements on that threatened property, and have further taken the threatened property completely out of commerce.

45.

To add insult to injury, under the guise of exercising a levee servitude to which it has no right, SELFPA and the Corps have contracted with third-parties to trespass onto Plaintiffs' property for purposes of conducting surveys preparatory to the destruction and removal activities. These

trespasses have been conducted largely on the timetable artificially created by SELFPA and the Corps, and have caused unreasonable disruption of Plaintiffs' enjoyment of their property.

46.

Plaintiffs are entitled to all damages available to them for the injuries caused to their property by Defendants pursuant to La. R.S. 13:5111.

Count Two: Claim for Damages to Plaintiffs' Property Caused by the Construction, Destruction and Removal Activities

47.

All allegations contained in Paragraphs 1-46 are hereby re-alleged as if copied *in extenso*.

48.

Plaintiffs have real and substantial property rights in and to all immovable property, component parts and improvements on all property covered by their titles and deeds to the subject property.

49.

Defendants have damaged, impeded, impaired, hindered and ultimately destroyed Plaintiffs' rights in and to the immovable property, component parts and improvements on all property covered by their titles and deeds to the subject property.

50.

Defendants have torn down the fences, uprooted trees, destroyed the ground, and engaged in construction activities in and around Plaintiffs' property. These construction, destruction and removal activities commenced on July 7, 2008, and continue through this date and beyond. Once complete, Defendants have indicated that they will maintain a "green space" six (6) feet from the "theoretical toe of the levee," and will not permit Plaintiffs to construct any improvement on said property nor to add any component part to said property. Moreover, after the conclusion of the deep soil mixing and other construction work, Plaintiffs will have additional structures above and beneath their property. The damage is ongoing, and its full extent will be determined at trial.

51.

Defendants have not offered to compensate Plaintiffs for any of the damages Plaintiffs have sustained or will sustain as a result of these construction, destruction and removal activities, nor for the "green space" Defendants intend to retain in perpetuity.

52.

As a result of the construction, destruction and removal activities undertaken by Defendants, Plaintiffs have sustained the following compensable damages:

a. Loss of fences and other improvements;

b. Destruction of their trees and vegetation, with the accompanying decline in value of property and loss of enjoyment associated with said trees;

c. Sufferance of a right of access by Defendants onto their property;

d. Loss of use of the portion of their property necessary to maintain the green space six (6) feet from the "theoretical" toe of the levee;

e. Loss of the security afforded by the fences torn down by OLD and SELFPA;

f. Damages associated with the deep soil mixing above and beneath their property;

g. Property damage, nuisance, inconvenience and decline in property value associated with the construction activities described in Exhibit "F;"

h. Decline in property value of both the property occupied by Defendants and the remaining property; and

I. Other damages which will be proven at trial.

53.

Defendants have refused to expropriate the substantial portions of Plaintiffs' property Defendants will utilize to maintain the six (6) feet of green space from the "theoretical" toe of the levee and the portions upon which they will be conducting construction. The result of this refusal is to render that property worthless and totally out of commerce. Moreover, in view of Defendants' unfettered use of Plaintiffs' property without compensation, prospective purchasers will be

dissuaded from purchasing the property because Defendants apparently believe they have the right to enter and utilize the property whenever they see fit without compensating the landowners therefor.

54.

Furthermore, Plaintiffs are thus entitled to delay damages for Defendants' unreasonable delay in engaging in work on their property after effectively taking the property out of commerce.

55.

Finally, pursuant to La. R.S. 13:5111 and other statutory law, Plaintiffs are entitled to all costs and fees they have incurred in bringing this action—including but not limited to attorneys fees, court costs, expert witness fees, and the like—as well as legal and judicial interest.

Count Three: Damages for Disparate Treatment

56.

All allegations contained in Paragraphs 1-54 are hereby reiterated as if copied *in extenso*.

57.

Louisiana Constitution Article I, §3 states that "no person shall be denied the equal protection of the laws." La. Const. Art. I, §3. Case law delineates that "this guarantee does not remove from the legislature all power of classification, or require absolute equality or precisely equal advantages; the law merely requires equal application in similar circumstances." *City of New Orleans v. La. Assessors' Retirement Sys.*, 2005-2548 (La. 10/1/07); 986 So.2d 1, 26. When analyzing whether a particular classification demonstrates "equal application in similar circumstances" and the classification is not based on race, gender, political beliefs, religious beliefs, age, sex or culture, "it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest." *Id.*

58.

Upon information and belief, Plaintiffs assert that the Defendants never acquired any levee servitude of the type they claim herein from Plaintiffs or Plaintiffs' ancestors-in-title, either through the acquisition of a conventional servitude or the expropriation of such a servitude and the payment

of just compensation.

59.

Upon further information and belief, Plaintiffs assert that the Defendants have acquired levee servitudes of the type they claim herein from landowners similarly situated to Plaintiffs and Plaintiffs' ancestors-in-title, either through the acquisition of a conventional servitude or the expropriation of such a servitude and the payment of just compensation.

60.

There can exist no "appropriate state interest" for this disparate treatment of similarly situated landowners. Defendants may attempt to argue that economy and preservation of the public fisc requires them to exercise a purported levee servitude without the payment of just compensation to Plaintiffs, despite the fact that Defendants have previously acquired such servitudes either through the acquisition of a conventional servitude or the expropriation of such a servitude and the payment of just compensation. That is not, however, an "appropriate state interest." Article I, §4 of the Louisiana Constitution states that "neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose." La. Const. Art. I, §4(B)(3). This Article implicitly prohibits the payment of just compensation to one (1) group of landowners and the withholding of just compensation from a similarly situated group simply because the "incidental benefit" of cost savings inures to the latter option.

Count Four: Declaration of Extinction of Servitude by Non-Use

61.

All allegations contained in Paragraphs 1-60 are hereby reiterated as if copied *in extenso*.

62.

The Defendants have previously argued that they have acquired levee servitudes of the type at issue herein, burdening Plaintiffs' land, as a result of the application of the *St. Julien* doctrine. Although Plaintiffs deny that such acquisition has taken place, they plead in the alternative that—assuming *arguendo* the existence of such a servitude—the servitude has been abandoned and extinguished by virtue of non-use.

63.

Louisiana Civil Code Article 753 states that "a predial servitude is extinguished by nonuse for ten years." La. Civ. Code art. 753. Article 754 states that:

> Prescription of nonuse begins to run for affirmative servitudes from the date of their last use, and for negative servitudes from the date of the occurrence of an event contrary to the servitude. An event contrary to the servitude is such as the destruction of works necessary for its exercise or the construction of works that prevent its exercise.

La. Civ. Code art. 754.

64.

Defendants have argued that La. R.S. 38:225 creates a levee servitude. However, that statute is a quasi-criminal statute that merely prohibits the construction of certain works in or around levees. Plaintiffs deny the applicability of this statute to their property. Assuming solely for the sake of argument the applicability of that statute, however, any servitude it created would be a negative servitude not to erect obstructions to the levee and would not extend to any other type of activity.

65.

Since time immemorial, the Defendants have never exercised the rights they claim to possess in connection with the activities at issue herein. Plaintiffs are unaware of any instance in which the Defendants, within the ten (10) years prior to the commencement of the destruction and removal activities at issue herein, have ever advised them or their ancestors-in-title of the necessity of removing trees, fences and other alleged obstructions from their property, pursuant to La. R.S. 38:225. Plaintiffs are further unaware of any instance in which the Defendants, within the ten (10) years prior to the commencement of the activities at issue herein, have ever undertaken activities of the type at issue herein on their property. Therefore, upon information and belief, Plaintiffs allege that Defendants have not exercised any purported levee servitude of the type they claim herein within the ten (10) years prior to the activities sued upon herein.

66.

As a result of their failure to exercise any purported levee servitude of the type they claim herein within the ten (10) years prior to the activities sued upon herein, Defendants have lost any servitude they may have previously allegedly possessed.

67.

Likewise, Defendants have not exercised any other alleged rights on the property and have never engaged in the type of construction activities they now claim a right to perform. Because La. R.S. 38:225 does not extend to the construction of new works, and because Defendants disavow any type of levee servitude under La. Code Civ. P. art. 665, they have abandoned any type of claim of servitude on Plaintiffs' property.

Count Five: Declaration of Inapplicability of *St. Julien* Doctrine to Permit the Construction, Destruction and Removal Activities Described Herein

68.

All allegations contained in Paragraphs 1-67 are reiterated as if copied *in extenso*.

69.

Defendants have previously argued that they have acquired levee servitudes of the type at issue herein burdening Plaintiffs' land, as a result of the application of the *St. Julien* doctrine. Although Plaintiffs deny that such acquisition has taken place, they plead in the alternative that—assuming *arguendo* the existence of such a servitude—such a servitude would not extend to permit Defendants the right to undertake the destruction and removal activities described herein, or extend to permit the exercise of the new construction and deep soil mixing described herein.

70.

In addition, Plaintiffs contend that the scope of any alleged levee servitude remains undefined and even Defendants are unsure the precise geographical boundaries of any such alleged servitude.

71.

Defendants have been unable to identify when and the precise extent to which an alleged servitude was acquired.

72.

The *St. Julien* doctrine, distilled to its essence, holds as follows with regards to the rights of landowners who acquiesce in taking of their property for public use:

> Having thus permitted the use and occupancy of his land and the construction of a *quasi* public work thereon without resistance or

> even complaint, he cannot afterwards require its demolition, nor prevent its use, nor treat the Company erecting it as his tenant. He is not debarred from an action for damages by reason of the taking of the land and for its value, but having acquiesced in the entry and encouraged if he did not invite it, he cannot afterwards affect to treat it as tortious. Considerations of public policy, not less than the suggestions of natural justice, require that in such case the owner shall not be permitted to reclaim his property free from the servitude he has permitted to be imposed upon it, but shall be restricted to his right of compensation.

St. Julien v. Morgan, La. & Tex. R. Co., 1883 WL 475 at *1 (La.). The doctrine therefore prevents a landowner from ejecting a party erecting a public work for public use where the landowner acquiesced in the erection of the public work.

73.

Louisiana Civil Code Article 743 states that "rights that are necessary for the use of a servitude are acquired at the time the servitude is established. They are to be exercised in a way least inconvenient for the servient estate." La. Civ. Code art. 743. Where a servitude exists, but the exercise of the servitude becomes more burdensome, additional rights are being exercised in excess of the servitude. *See, e.g., McGuire v. CLECO, Inc.*, 337 So.2d 1070, 1072 (La. 1976). Therefore, the increase in burden implies an additional taking of property where it is done by a public entity for a public purpose.

74.

This was the impact of the *St. Julien* doctrine. In *Lake v. La. Power & Light Co.*, 330 So.2d 914 (La. 1976), the Louisiana Supreme Court prospectively overruled the *St. Julien* doctrine. In response, the Legislature amended La. R.S. 19:14 to re-instate the doctrine on a limited basis. In a 2007 amendment, the Legislature indicated that "the provisions of this Section shall not be deemed to authorize the acquisition of any interest in privately owned immovable property adjoining such facilities, including but not limited to a servitude, right of use, or any right of passage across or access to the private immovable property adjoining such facilities." La. R.S. 19:14(C). The Legislature indicated at the time of passage of this amendment that "the provisions of this Act are interpretative and remedial and are intended to clarify existing law." Act No. 362, Section 2, 2007 Louisiana Legislative Session. Therefore, the *St. Julien* doctrine has <u>never</u> implied that a public entity may acquire rights accessory to its public works through application of the *St. Julien* doctrine.

75.

The Defendants have alleged that they acquired a levee servitude under the *St. Julien* doctrine by virtue of the erection of the levee abutting the Canal. Plaintiffs deny this assertion. To the extent that the assertion is correct, however, the existence of the servitude would not extend the accessory rights of passage, entry and maintenance entailed by the activities described herein. Therefore, Defendants could not undertake these activities within the context of any property they acquired under the *St. Julien* doctrine, and the construction, destruction and removal activities constitute the taking of a new servitude for which Plaintiffs are entitled to compensation.

76.

Moreover, Defendants bear the burden of proof of showing that Plaintiffs' predecessors-in-title acquiesced to the servitude. Such a showing has not been made. Silence is not consent.

77.

Even, for purposes of argument only, Defendants obtained some type of servitude over the property, Plaintiffs are entitled to a declaratory judgment defining the precise extent of the servitude and the limited and permitted uses of the servitude.

78.

By engaging in their activities on Plaintiffs' property, Defendants have made the exercise of any alleged servitude more burdensome, which is impermissible under Civil Code article 656.

79.

Plaintiffs are therefore entitled to a declaratory judgment that Defendants do not have a servitude over their property. In the alternative, and for purposes of argument only, if Defendants could meet their burden of proving of showing the acquisition of a servitude, Plaintiffs are entitled to a declaratory judgment defining the precise parameters, geographical boundaries and permitted uses of the servitude and a declaration that just compensation is owed therefor.

Count Six: Declaration of the Unconstitutionality of the *St. Julien* Doctrine

80.

All allegations contained in Paragraphs 1-72 are reiterated as if copied *in extenso*.

81.

To the extent that the *St. Julien* doctrine applies herein, Plaintiffs assert in the alternative that

the application of the *St. Julien* doctrine to the activities described herein would result in a taking of property from Plaintiffs by the Defendants in a manner prohibited by Louisiana Article I, §4.

82.

Louisiana Constitution Article I, §4 states that "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 court for his benefit." La. Const. Art. I, §4. Jurisprudence interpreting this provision holds that it mandates "the landowner must be compensated not merely with the market value of property taken and severance damage to his remainder, but must be compensated to the full extent of his loss and placed in as good a position pecuniarily as he enjoyed prior to the taking." *Williams v. City of Baton Rouge*, No. 98-2024 (La. 4/13/99), 1998-1981 (La. 4/13/99); 731 So.2d 240, 249. Further jurisprudence holds that:

> There can be little doubt that one aim of Article I, § 4, of our state constitution in requiring that the owner shall be compensated for property "taken or damaged ... to the full extent of his loss" was to assure that the State and its subdivisions compensate owners for any taking or damaging of their rights with respect to things as well as for any taking or damaging of the objects of those rights. The history of Section 4 reveals a desire to increase the level and scope of compensation beyond that provided by pre-existing state law. The change from the 1921 constitution's language ("just and adequate compensation") to the new phrase ("compensated to the full extent of his loss") was deliberate, prompted by a belief on the part of the sponsors that inadequate awards had been provided under the prior law.

State, DOTD v. Chambers Inv. Co., 585 So.2d 598, 602 (La. 1992). Therefore, any damage to property of a landowner for a public purpose bears with it an obligation on the part of the public entity to pay just compensation for that damage.

83.

In this case, the rights that may have been created as a result of the erection of the levee abutting the Canal did not encompass the right of entry, passage, maintenance or new construction beyond the confines of any previously exercised servitude. Defendants did not previously attempt to exercise such rights. The activities at issue herein therefore create an additional servitude on Plaintiffs' property separate and apart from any servitude that previously existed. Although Plaintiffs contend that the *St. Julien* doctrine does not exonerate Defendants from payment of just

compensation for this new servitude, such application would be unconstitutional, for it permits the Defendants to acquire a new servitude—and create additional damage to Plaintiffs' property—without payment of just compensation.

84.

As this First Supplemental and Amending Petition does not mount a facial attack on any state statute, but instead seeks a declaration that, as applied to the case at bar, the *St. Julien* doctrine would be unconstitutional, Plaintiffs do not believe it necessary to serve the Attorney General with this pleading. Out of an abundance of caution, however, Plaintiffs have this date given notice to the Louisiana Attorney General of this pleading by sending a copy of the pleading to the Attorney General's Office.

WHEREFORE, Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, respectfully pray that this Honorable Court order citation of this matter on Defendants and that, after due proceedings are had, the Court:

a. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, condemning the latter to pay damages to the former in an amount sufficient to compensate the former for all damages caused to their property as a result of the construction, destruction and removal activities described herein;

b. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, condemning the latter to pay damages pursuant to Louisiana Revised Statute 51:2264;

c. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, declaring that no servitude exists on Plaintiffs' property (or, in the event that a servitude is found, that it be defined precisely), or that, if any servitude previously existed, said purported servitude was extinguished by non-use prior to the commencement of the activities described herein;

d. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, declaring the *St. Julien* doctrine inapplicable to the construction, destruction and removal activities at issue herein;

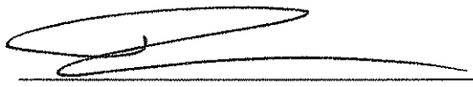
e. Alternatively, award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, declaring that—to the extent that the *St. Julien* doctrine applies to permit the construction, destruction and removal activities at issue herein without the payment of just compensation for those activities—the *St. Julien* doctrine is unconstitutional;

f. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the

United States Army Corps of Engineers, on the other, condemning the latter to pay the former all expert witness fees, costs, attorneys' fees and other expenses related to the bringing and prosecution of this litigation; and

g. Award judgment in favor of Terry and Nida Lonatro, Craig and Cindy Berthold, Dante and Monique Maraldo, Amy and George Sins, Albert and Kathleen Zuniga and Roy and Tammy Arrigo, on the one hand, and against the Southeastern Louisiana Flood Protection Authority-East, the Orleans Levee District, and the United States Army Corps of Engineers, on the other, granting the former all legal and equitable relief to which they may be entitled, including but not limited to an award of legal and judicial interest.

Respectfully submitted,



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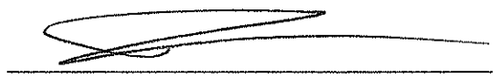
COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

Undersigned counsel certifies that he has served all parties with the foregoing pleading, via e-mail, this 10th day of February 2011. Additionally, on this 10th day of February 2011, undersigned counsel provided notice of this pleading to the Louisiana Attorney General by sending a copy of the pleading, via certified mail, to the Attorney General's Office.



RANDALL A. SMITH

**SHERIFF, PLEASE SERVE CITATION,
ORIGINAL PETITION, AND FIRST
SUPPLEMENTAL AND AMENDING PETITION UPON:**

THE UNITED STATES ARMY CORPS OF ENGINEERS
through their agents for service of process:

Hon. James Letten
U.S. Attorney
Eastern district of Louisiana
Hale Boggs Building
500 Camp Street
New Orleans, Louisiana 70130

—and—

Hon. Eric Holder
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530