

15<sup>TH</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE

STATE OF LOUISIANA

NO. 2021-6273

DIVISION "B"

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT

VERSUS

BENDEL PARTNERSHIP (A PARTNERSHIP IN COMMENDAM),  
CIRCLE "A" FARM, INC., STACEY ALBERT FARM, INC.,  
AND SOUTHERN ACRES, LLC

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

**MOTION TO TAX COSTS, AWARD AND QUANTIFY  
ATTORNEYS' FEES AND DAMAGES, AND  
SET A TELEPHONIC STATUS CONFERENCE  
TO ADDRESS BRIEFING, DEADLINES, AND HEARING(S)**

NOW INTO COURT, through undersigned counsel, comes Defendant, Bendel Partnership (A Partnership in Commendam) ("the Landowner"), who, for the reasons set forth in the accompanying Memorandum in Support, brings this Motion to Tax Costs, Award and Quantify Attorneys' Fees and Damages, and Set a Telephonic Status Conference to Address Briefing, Deadlines, and Hearing(s), all in accordance with this Honorable Court's May 5, 2022 Judgment and the Third Circuit Court of Appeal's December 21, 2022 Opinion and remand. (*Lafayette City-Parish Consolidated Government v. Bendel Partnership (A Partnership in Commendam)*, 2022-432 (La. App. 3 Cir. 12/21/22), \_ So.3d \_; 2022 WL 17825600).

The Landowner additionally requests any other such just and equitable relief to which it may be entitled.

Respectfully submitted,



\_\_\_\_\_  
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*Counsel for Defendant, Bendel Partnership  
(A Partnership in Commendam)*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record, via U.S. Mail, facsimile, and/or e-mail, this 31<sup>st</sup> day of January, 2023.



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**RANDALL A. SMITH**

15<sup>TH</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE

STATE OF LOUISIANA

NO. 2021-6273

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AND SOUTHERN ACRES, LLC

FILED: \_\_\_\_\_

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**MEMORANDUM IN SUPPORT OF MOTION TO TAX COSTS,  
AWARD AND QUANTIFY ATTORNEYS' FEES AND DAMAGES, AND  
SET A TELEPHONIC STATUS CONFERENCE  
TO ADDRESS BRIEFING, DEADLINES, AND HEARING(S)**

Defendant, Bendel Partnership (A Partnership in Commendam) ("the Landowner"), respectfully submits this Memorandum in Support of its Motion to Tax Costs, Award and Quantify Attorneys' Fees and Damages, and Set a Telephonic Status Conference to Address Briefing, Deadlines, and Hearing(s). The Landowner requests that this Honorable Court: (1) tax costs against Lafayette City-Parish Consolidated Government ("LCG"); and (2) conduct an evidentiary hearing or hearings on the Landowner's claims for attorneys' fees and damages, all in accordance with this Court's May 4, 2022 Judgment (as amended) and the Third Circuit Court of Appeal's December 21, 2022 Opinion and remand. (*Lafayette City-Parish Consolidated Government v. Bendel Partnership (A Partnership in Commendam)*, 2022-432 (La. App. 3 Cir. 12/21/22), \_ So.3d \_; 2022 WL 17825600.

**BACKGROUND**

On December 6, 2021, LCG expropriated the entirety of the Landowner's 372.21 acres of property ("the Property") pursuant to La. R.S. 19:139 *et seq.* and deposited \$2,580,000.00 as its estimate of just compensation for the Property.<sup>1</sup> The alleged public purpose for the expropriation

<sup>1</sup> After LCG objected to the Landowner's Motion to Withdraw the deposited funds, the parties stipulated that the Landowner could withdraw \$500,000.00 of the amount deposited into the Court registry, but LCG maintained its objection to the Landowner's withdrawal of the remainder. To the Landowner's knowledge, the remaining funds remain in this Court's registry.

was to construct the largest detention pond project in Lafayette Parish, which required the excavation and removal of millions of cubic yards of soil from the Property.

The Landowner responded with a Motion to Dismiss the expropriation on grounds that it did not serve a valid public purpose or necessity under Louisiana law, citing *Recreation & Park Com'n for Parish of East Baton Rouge v. C & S Dev., Inc.*, 97-2652 (La. 7/8/98), 714 So.2d 706, 707-708 and *Red River Waterway Com'n v. Fredericks*, 566 So.2d 79, 83 (La. 1990). In its Memorandum in Support, the Landowner requested that the court award attorneys' fees, costs, and any other damages incurred as a result of the unlawful taking via subsequent proceedings in the event of dismissal, citing La. R.S. 19:201; La. R.S. 48:460; La. Code Civ. P. art. 1920; and La. R.S. 13:5112. The Landowner "request[ed] that attorneys' fees, costs, and damages be quantified via a separate motion to tax and hearing after entry of the order dismissing the Petition for Expropriation."

LCG initially agreed that it would not begin construction on the Property until after the hearing on the Landowner's Motion to Dismiss, which was originally scheduled to occur on February 1, 2022. After the hearing was delayed for reasons beyond the parties' and the Court's control, and over the Landowner's objection, on or about February 2, 2022, LCG commenced its excavation of the Property, with full knowledge of the pending Motion to Dismiss and the jurisprudence supporting dismissal. LCG cleared the Property and excavated millions of cubic yards of dirt. Some of the dirt was stockpiled on the Property. Other dirt was removed from the Property and never returned.

This Court conducted an evidentiary hearing regarding the Landowner's Motion to Dismiss on March 17, March 18, and April 6, 2022. For several weeks in March and April, this Court enjoined LCG from performing additional work on the Property. However, LCG resumed excavation activities as soon as the term of the restraining order expired and continued to clear and excavate the Property until on or about May 4, 2022, when this Court rendered a Judgment dismissing LCG's Petition for Expropriation, ordering "LCG to cease work on the Landowner's property," and casting LCG for costs. See May 4, 2022 Judgment.

On May 13, 2022, the Landowner filed a timely Motion for Partial New Trial, requesting that this Court amend the May 4, 2022 Judgment to expressly reserve ruling on the merits of the

Landowner's claims for attorneys' fees and damages. Without conducting a hearing on the Motion, on May 26, 2022, this Court signed an Amended Judgment reserving ruling on Bendel's additional claims.

Both parties filed timely appeals from both Judgments. On December 21, 2022, the Third Circuit issued its opinion and affirmed the dismissal of the expropriation. In addition, although the Third Circuit: "vacate[d] the trial court's May 26, 2022 judgment and reinstate[d] the May 4, 2022 judgment," it amended the May 4 Judgment "to include the following language: 'Bendel Partnership's rights regarding any claims for attorney's fees and/or damages are hereby reserved.'" See Exhibit "1," p. 1.

In addressing the Landowner's entitlement to attorneys' fees and damages, the Third Circuit stated:

This court has held that "[b]y its clear and unambiguous terms, La. R.S. 19:201 is a mandatory provision insofar as it states that a court having jurisdiction over an expropriation proceeding 'shall' award attorney's fees when expropriation proceedings are dismissed or abandoned." *Town of Jonesville v. Griffing*, 95-1365, p. 3 (La. App. 3 Cir. 3/6/96), 670 So.2d 737, 739, writ denied, 96-825 (La. 5/10/96), 672 So.2d 928 (emphasis in original). But, the "right to recover attorney fees under La. R.S. 19:201 is contingent upon either the rendition of a final judgment to the effect that the expropriating authority cannot acquire the property, or the abandonment of the expropriation proceeding by the expropriating authority." *St. Tammany Par. Hosp. Serv., Dist. No. 2 v. Schneider*, 96-2798, p. 4 (La. App. 1 Cir. 2/20/98), 707 So.2d 156, 157. The jurisprudence has further defined a general rule that "absent a finding of bad faith or abuse, no damages are warranted when an expropriation suit by ordinary proceeding has been commenced, and later dismissed or abandoned under timely and appropriate circumstances." *St. Tammany Par. Hosp. Serv., Dist. No. 2 v. Schneider*, 00-247, p. 10 (La. App. 1 Cir. 5/11/01), 808 So.2d 576, 585.

Accordingly, we find no merit to the LCG's assertion that Bendel is precluded from seeking to recover attorney's fees and damages. We deem it just, legal, and proper based on the record in this case to amend the May 4, 2022 judgment to include a reservation of Bendel's right to seek attorney's fees and damages.

See Third Circuit Court of Appeal's December 21, 2022 Opinion and remand, pp. 21-22. The Third Circuit thus remanded this matter "for further proceedings consistent with this opinion." *Id.*

On January 4, 2023, LCG filed an Application for Rehearing En Banc or in the Alternative, for Panel Rehearing in the Third Circuit Court of Appeal, and the Landowner filed a timely Opposition. LCG's Application remains pending. Although the Landowner anticipates future proceedings in the courts of review, it is filing its Motion now in an effort to ensure that its rights

are not jeopardized, and that this matter proceeds expeditiously once all proceedings in the courts of review are concluded.

### ARGUMENT

**I. Under Louisiana law, the Landowners are entitled to damages to its Property that were caused during the time that the Property was in LCG's possession.**

In its Opinion, the Third Circuit cited the jurisprudential “general rule” that “absent a finding of bad faith or abuse, no damages are warranted when an expropriation suit by ordinary proceeding has been commenced, and later dismissed or abandoned under timely and appropriate circumstances.” Opinion, p. 22, citing *St. Tammany Par. Hosp. Serv., Dist. No. 2 v. Schneider*, 00-247, p. 10 (La. App. 1 Cir. 5/11/01), 808 So.2d 576, 585. In view of: (1) this Court’s finding that LCG did commit an abuse of discretion; (2) the fact that this was a “quick-taking” in which title transferred immediately; (3) the Third Circuit’s affirmation of the dismissal; and (4) the Third Circuit’s acknowledgement of the Landowner’s right to seek damages, the Landowner respectfully requests that this Court schedule an evidentiary hearing regarding the Landowner’s damage claims and, after consideration of the evidence, award the Landowner damages sufficient to compensate it for the damages incurred as a result of LCG’s actions and make the Landowner whole.

In addition to the jurisprudence upon which the Third Circuit relied, Louisiana statutes also contemplate an award of damages when an expropriation is dismissed. Takings by LCG are governed by La. R.S. 19:139 *et seq.*, which incorporates La. R.S. 48:441 through 460. See La. R.S. 19:139(C) (“Except as otherwise provided in this Part, such expropriation by the governing authority shall be conducted in the manner that the Department of Transportation and Development may expropriate property for highway purposes, as set forth in R.S. 48:441 through 460.”). La. R.S. 48:454, in turn, provides that, “Except as provided in this Part, these suits are tried in accordance with the provisions of the Code of Civil Procedure and general expropriation laws.”

Under La. R.S. 48:460, “[t]he plaintiff shall not be divested by court order of any title acquired under these provisions except where such court finds that the property was not taken for a public purpose. In the event of such findings, the court shall enter such judgment as is necessary to compensate the defendant for the period during which the property was in the possession of the plaintiff and to recover for the plaintiff any award paid.” Public necessity—which this Court found

was lacking in this case—is a component of public purpose. As explained by the Third Circuit in affirming this Court’s dismissal of LCG’s expropriation Petition:

“Whether the expropriator’s purpose is public and necessary is a judicial determination that will not be reversed on appeal absent manifest error. In the context of expropriation, ‘necessary’ refers to the necessity of the purpose for the expropriation not the necessity for a specific location.’ *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 09-1629, p. 12 (La. 3/16/10), 35 So.3d 192, 200 (citations omitted).

See Third Circuit Court of Appeal’s December 21, 2022 Opinion and remand, p. 5. Thus, where the taking is dismissed due to a lack of public necessity, La. R.S. 48:460 is applicable. If La. R.S. 48:460 were not applicable, then LCG would retain title to the Property, even after this Court’s dismissal of an unlawful expropriation proceeding. Such an interpretation would be absurd. The purpose of these statutes is clearly to put the Landowner back into the position that it occupied before its Property was unlawfully expropriated.

While LCG was in the possession of the Property, with full knowledge that the Landowner’s Motion to Dismiss was pending and that its expropriation stood a good chance of being dismissed, LCG intentionally and willfully destroyed the Property. LCG completely cleared the Property; cut down trees; interfered with the oil and gas operations and related improvements on the Property; destroyed grading, roadways, and drainage features; removed significant amounts of earthen material (leaving gaping holes); stockpiled other earthen material (rendering those portions of the Property unusable); and altered the drainage and ditches on the Property.

As a result of LCG’s conduct, the Landowner is entitled to damages, including, but not limited to: property damages; damages sufficient to restore the Property to its former condition (or, at the Landowner’s option, damages for diminution in value); damages to replace the earthen material, trees, and grass removed from the Property; damages for loss of revenue and for taking the Property out of commerce; damages for loss of enjoyment and inconvenience; and interest.

The Landowner proposes to present the evidence of damage and expert testimony regarding the compensation to which they are entitled for LCG’s damage to the Property during the period that the Property was in its possession. The Landowner requests that this Court conduct an evidentiary hearing regarding the Landowner’s damages claims against LCG and render judgment in the Landowner’s favor.

**II. Under La. R.S. 19:201, the Landowner is entitled to recover its attorneys' fees actually incurred.**

In view of this Court's May 5, 2022 Judgment and the Third Circuit's Opinion and remand, the Landowner now seeks an award of attorneys' fees in accordance with La. R.S. 19:201, which provides that the Court:

...shall award the owner of any right, or title to, or interest in the property sought to be expropriated such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney fees, and court costs, actually incurred because of the expropriation proceeding, if the final judgment is that the plaintiff does not acquire at least fifty percent of the immovable property requested in the petition for expropriation or if the proceeding is abandoned by the plaintiff. If the expropriating authority is the state or its political corporations or subdivisions, any such award shall be paid from the same funds from which the purchase price of the property would have been paid.

B. The rights of the owner herein fixed are in addition to any other rights he may have under the Constitution of Louisiana.

“By its clear and unambiguous terms, La. R.S. 19:201 is a mandatory provision insofar as it states that a court having jurisdiction over an expropriation proceeding ‘shall’ award attorney’s fees when expropriation proceedings are dismissed or abandoned.” See Third Circuit Court of Appeal’s December 21, 2022 Opinion and remand, quoting *Town of Jonesville v. Griffing*, 95-1365 (La. App. 3<sup>rd</sup> Cir. 3/6/96), 670 So.2d 737, 739 (emphasis in original). Attorneys’ fees are recoverable and warranted where a court “declare[s] the taking] to be unconstitutional,” because “since the Louisiana Constitution, Article 1, Section 4 allows the landowner to recover attorney fees in litigating a legal expropriation, it is only logical that attorney fees can be awarded in litigating an unconstitutional expropriation.” *Wilson v. State, Dept. of Trans. and Dev.*, 464 So.2d 343, 345 (La. App. 5<sup>th</sup> Cir. 1985), writ denied 468 So.2d 1207 (La. 1985).

The fees recoverable under La. R.S. 19:201 are those which are “actually incurred because of the expropriation proceeding.” *Prentice Oil & Gas Co. v. State, Dept. of Trans. and Dev.*, 421 So.2d 937, 940 (La. App. 1st Cir. 1982), writ denied, 423 So.2d 1165 (La. 1982) (finding that an award of attorneys’ fees was authorized under LSA R.S. 19:201 for an unsuccessful or abandoned Title 48 expropriation); see also *State, Dept. of Trans. and Devel. v. Illinois Central Gulf Railroad Co.*, 464 So.2d 401 (La. App. 1st Cir. 1985) (following *Prentice* and concluding that, “It is this Court’s opinion, as it was in *Prentice*, that LSA R.S. 19:201 is applicable to an unsuccessful or abandoned Title 48 expropriation.”). The explicit language of La. R.S. 19:201 and the



jurisprudence interpreting it require that the attorneys' fees be paid out of the deposit made by the expropriating body into the registry of the court. *See, e.g. Prentice, supra* at 941 (holding that the landowner was "entitled to have the deposited funds used to satisfy its judgment" for fees and costs).

The Landowner respectfully requests that this Court award the Landowner its attorneys' fees actually incurred, to be established at an evidentiary hearing set for that purpose.

**III. In accordance with this Court's May 5, 2022 Judgment, the Landowner requests that this Court quantify and tax the costs payable by LCG.**

The Third Circuit amended and reinstated this Court's May 5, 2022 Judgment, which taxed LCG with costs.

Under Louisiana law, the award of costs is authorized by overlapping statutory and codal provisions: La. R.S. 13:5112, which provides for the discretionary award of costs in favor of a successful party in a suit against the state or a political subdivision; and La. Code of Civ. Proc. article 1920, which provides that "costs shall be paid by the party cast in judgment," unless the court, in equity, rules otherwise. *Vela v. Plaquemines Parish Government*, 2000-2221 (La. App. 4 Cir. 3/13/02), 811 So.2d 1263, 1282. Items that may be taxed as costs are governed by La. R.S. 13:4533, concerning general costs, and include costs of the clerk and sheriff, witness fees, costs of taking depositions, copies of acts used at trial, and "all other costs allowed by the court." *Id.*

Costs include the Landowner's costs of its expert witness, Toby Fruge. *Natchitoches Parish Port Commission v. Deblieux & Kelley, Inc.*, 99-313, 99-314, 99-315 (La. App. 3 Cir. 3/22/00), 760 So. 2d 393, 410, writ denied, 00-1121 (La. 6/2/00), 763 So. 2d 601; *Vela v. Plaquemines Parish Government*, 2000-2221 (La. App. 4 Cir. 3/13/02), 811 So.2d 1263, 1282; La. C.C.P. art. 1920; La. R.S. 13:5112; La. R.S. 13:3666 (providing that the additional compensation of expert witnesses should be taxed as costs to be paid by the party cast in judgment). "[A]ll that is required to impose expert witness fees against a political subdivision in accordance with La. R.S. 13:5112 is a substantive judgment in favor of the party requesting the award, provided the expert witness fees were reasonably necessary to the presentation of that party's case." *Board of Sup'rs of Louisiana State University and Agr. and Mechanical College v. 1732 Canal Street*,

*L.L.C.*, 2013-0976 (La. App. 4 Cir. 1/15/14), 133 So.3d 109; *State, Dep't of Transp. and Dev. v. Restructure Partners, L.L.C.*, 07-1745, p. 28 (La. App. 1 Cir. 3/26/08), 985 So.2d 212, 233.

The Landowner respectfully requests that this Court set an evidentiary hearing to quantify those costs and enter judgment in amount sufficient to reimburse the Landowner for all allowable costs incurred.

**IV. The Landowner respectfully requests a telephonic status conference with the Court and parties to: (1) schedule a hearing or hearing(s) regarding the taxation of costs and the Landowner's claims for attorneys' fees and damages; and (2) address any other procedural issues relating to the case on remand.**

Although the law clearly spells out the Landowner's entitlement to recovery of damages, the jurisprudence is not clear regarding the type of hearing or procedure for quantifying those damages. LCG's illegal taking and its damage to the Property were of extraordinary magnitude. The Property has been destroyed. Although the parties informed the Court of LCG's presence on the Property during the evidentiary hearing, the extent of LCG's work and the damage caused thereby was not before the Court. Moreover, the damage continued even after conclusion of the hearing on the Landowner's Motion to Dismiss.

In light of the extensive damage to the Property while in the possession of LCG, the uniqueness of the issues and circumstances involved, and the potential need for additional briefing and presentation of evidence regarding damages, attorneys' fees, and costs, the Landowner respectfully requests that this Court convene a telephonic status conference to address any procedural issues and to set one or more evidentiary hearings to address the Landowner's claims for damages, attorneys' fees, and costs, including expert witness fees. Because this matter is still being reviewed by the courts of review, the Landowner suggests that the parties discuss a timeline for resolving these claims after the courts have completed their review of the dismissal.

#### **CONCLUSION**

The Landowner respectfully requests that this Honorable Court: (1) conduct a telephonic status conference with all parties; (2) establish a procedure and hearing date(s) for resolving the Landowner's remaining claims on remand of this matter by the Third Circuit Court of Appeal; and (3) after conducting any necessary evidentiary hearing(s), award the Landowner all attorneys' fees, costs (including expert witness fees), and damages to which it is entitled, plus interest.

Respectfully submitted,



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*Counsel for Defendant,  
Bendel Partnership  
(A Partnership in Commendam)*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record, via U.S. Mail, facsimile, and/or e-mail, this 31<sup>st</sup> day of January, 2023.



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**RANDALL A. SMITH**

15<sup>TH</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE

STATE OF LOUISIANA

NO. 2021-6273

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LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT

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FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

**RULE TO SHOW CAUSE**

Considering the foregoing Motion to Tax Costs, Award and Quantify Attorneys' Fees and Damages, and Set a Telephonic Status Conference to Address Briefing, Deadlines, and Hearing(s) by Bendel Partnership;

**IT IS HEREBY ORDER, ADJUDGED, AND DECREED** that the Court will conduct a telephonic status conference with Lafayette City-Parish Consolidated Government and Bendel Partnership on the \_\_\_ day of \_\_\_\_\_, 2023, at \_\_\_\_\_.m. to establish a procedure and hearing date(s) for taxing costs and resolving the Landowner's claims for damages and attorneys' fees on remand of this matter by the Third Circuit Court of Appeal.

**READ, RENDERED, AND SIGNED**, this \_\_\_ day of \_\_\_\_\_, 2023, in Lafayette, Louisiana.

\_\_\_\_\_  
HON. VALERIE GOTCH GARRETT

**SERVICE WILL BE EFFECTED  
PURSUANT TO ARTICLE 1313.**