



## ARGUMENT

### **I. This Court Should Dismiss Plaintiffs' Negligence Claims**

#### **A. Foreseeability is Not the Test for Determining the Required Element of Legal Cause under Louisiana Law**

As The Bayer Defendants discussed in their Memoranda in Support of their Motions for Summary Judgment on Plaintiffs' Negligence Claims, Louisiana's standards for determining legal cause are set forth in the Louisiana Supreme Court's decision in *PPG Industries v. Bean Dredging*, 447 So. 2d 1058 (La. 1984). In determining legal cause, the *Bean Dredging* court stated that courts must consider the "moral, social and economic values involved" in determining whether there is an ease of association between the defendants' conduct and the plaintiffs' damages. 447 So. 2d at 1061.

Plaintiffs continuously argue that the alleged harm to it here was foreseeable and "actually foreseen." See Pls.' Joint Opp'n at 8-14. But foreseeability is not the determining factor that Plaintiffs want it to be.<sup>1</sup> In *Hill v. Lundin & Assocs.*, 256 So. 2d 620 (La. 1972), for example, the Louisiana Supreme Court stated that foreseeability is not always a reliable guide for determining legal cause: "Just because a risk may foreseeably arise by reason of conduct, it is not necessarily within the scope of the duty owed because of that conduct." *Id.* at 622. In *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988), the Louisiana Supreme Court held that legal cause is a question of whether the scope of the duty that plaintiffs allege the defendant breached extends to the "type of damage[s]" that plaintiffs' claim. *Id.* at 1155. This inquiry involves

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<sup>1</sup> It is certainly foreseeable, for example, that damage to crawfishing areas would cause economic losses to commercial crawfishermen or that businesses along an interstate highway would suffer losses if a defendant's negligence caused the closure of the highway. See *La. Crawfish Producers Ass'n-West v. Amerada Hess Corp.*, 935 So. 2d 380 (La. Ct. App. 2006), writ denied, 943 So. 2d 1094 (La. 2006); *TS & C Invs. L.L.C. v. Beusa Energy, Inc.*, 637 F. Supp. 2d 370 (W.D. La. 2009), *aff'd*, 344 Fed. Appx. 907 (5th Cir. 2009). Yet in both of these cases the courts properly denied plaintiffs recovery for indirect economic losses.

“moral, social and economic considerations that a conscientious, objective policy maker would advert to in formulating a rule to govern the case.” *Id.* at 1161.

Similarly, in *Roberts v. Benoit*, 605 So. 2d 1032 (La. 1991), the Louisiana Supreme Court held that legal cause—and the “ease of association” consideration that courts discuss in determining whether it exists—is *not* based on foreseeability alone. *Id.* at 1045. The *Benoit* court properly recognized that legal cause limitations insure that a defendant’s liability for an alleged breach of duty does not “spiral[] outward until the end of time.” *Id.* at 1052.

Indeed, the Louisiana Supreme Court has long been concerned with the “chain of recoveries” that may occur where interference with one contract prejudices the performance of another contract and so on “more or less indefinitely.” *Great S.W. Fire Inc. v. CNA Ins.* (La. 1990).

Likewise in *Desormeaux v. Cent. Indus. Inc.*, 333 So. 2d 431 (La. Ct. App. 1976), *writ denied*, 337 So. 2d 225 (La. 1976), the court held that a plaintiff could not sue a telephone company who damaged the irrigation system that provided water to the plaintiff’s rice crop. The court specifically rejected plaintiffs’ argument that he was entitled to assert a claim because the damage to his crops was foreseeable. *Id.* at 434.

**B. Louisiana Courts Properly Conclude That Moral, Social and Economic Considerations Do Not Allow the Concept of Legal Cause to Extend to the Indirect Economic Losses that Plaintiffs Claim**

Precisely because alleged “substandard conduct does not render the actor liable for all consequences spiralling [sic] outward until the end of time,” *Benoit*, 605 So. 2d at 1052, Louisiana courts refuse to extend the concept of legal cause to the type of indirect economic losses that the Plaintiffs seek here.

The Fifth Circuit Court of Appeals has recently analyzed Louisiana law on this subject in a comprehensive opinion that mandates dismissal of Plaintiffs’ claims. *See Wiltz v. Bayer*

*CropScience Ltd. P'ship*, \_\_\_ F.3d \_\_\_, No. 10-30516, 2011 U.S. App. LEXIS 13172 (5th Cir. June 28, 2011). In *Wiltz*, the Fifth Circuit addressed claims by crawfish buyers and processors against Bayer CropScience, who claimed that Bayer CropScience's ICON pesticide killed or sterilized crawfish, which caused a substantial drop in the Louisiana crawfish crop. Plaintiffs alleged that the drop in the crawfish crop prevented them from buying and processing crawfish from crawfish farmers and thus caused them to lose profits.<sup>2</sup> The Fifth Circuit held that plaintiffs' claim was essentially one for negligent interference with contractual relations, which Louisiana law did not allow. *Wiltz*, 2011 U.S. App. LEXIS 13172, at \*29-30. It also found that the underlying claims were the same type of economic loss claims that the Louisiana Supreme Court had rejected in the *Bean Dredging* case. *Id.* at \*23-25. This, along with several similar Louisiana Court of Appeal decisions where the Louisiana Supreme Court had denied writs,<sup>3</sup> led to the Fifth Circuit's conclusion that there was no "ease of association" between the damage to the farmers' crawfish and the plaintiff's economic loss. 2011 U.S. App. LEXIS 13172, \*26-27.

The *Wiltz* Court also soundly rejected many of the same arguments that the Plaintiffs make here. For example, the Fifth Circuit held that even if an economic loss is "particularly foreseeable" (as Plaintiffs claim here) that is "not a sufficient reason to permit recovery of purely economic loss in tort." 2011 U.S. App. LEXIS 13172, at \*31. Plaintiffs strain to distinguish this portion of the *Wiltz* decision by citing a footnote where the Fifth Circuit noted in passing that there was no evidence in *Wiltz* that Bayer CropScience could have specifically foreseen the harm to the plaintiffs. *See* 2011 U.S. App. LEXIS 13172, at \*31-32, n.16. But Plaintiffs fail to

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<sup>2</sup> The plaintiffs in the *Wiltz* case raised claims similar to those asserted in *Phillips v. G&H Seed Co.*, 10 So. 3d 339 (La. Ct. App.), *writ denied*, 21 So. 3d 284 (La. 2009), discussed *infra*.

<sup>3</sup> *See Phillips v. G&H Seed, supra; La. Crawfish Producers Ass'n-West, supra; and Dempster v. Louis Eymard Towing Co.*, 503 So. 2d 99 (La. Ct. App.), *writ denied*, 505 So. 2d 1136 (La. 1987).

mention the Fifth Circuit's language immediately preceding that footnote (and quoted above) where the Fifth Circuit held that even if the loss to the plaintiffs had been "particularly foreseeable" that was not a basis for holding Bayer CropScience liable. 2011 U.S. App. LEXIS 13172, \*31.

Also, the Plaintiffs argue here that they are the "conduits" for the farmers by which rough rice is refined before it is later sold. Pls.' Joint Opp'n at 15. Similarly, in *Wiltz*, the plaintiff crawfish buyers and processors argued that they had a "symbiotic" relationship with farmers and thus were entitled to relief. Again, the Fifth Circuit rejected that argument as a repackaged foreseeability argument, which is not the standard under Louisiana law. *Waltz*, 2011 U.S. App. LEXIS 13172, at \*30-31.

The Plaintiffs also assert, as the plaintiffs in *Wiltz* did, that Bayer CropScience's alleged negligence adversely affected the entire market and thus there was no way for them to mitigate their losses. The *Wiltz* Court dismissed this argument, noting that "we do not think the extent of a plaintiff's (or even an entire industry's) loss determines the plaintiff's right to relief in tort." *Id.* at \*32. The Fifth Circuit held that such a result would undermine Louisiana Supreme Court's concern against casting liability "in an indeterminate amount for an indeterminate time to an indeterminate class," and that the problem of indeterminate liability would be "exacerbated, not solved, by a rule permitting recovery in tort for purely economic loss whenever the harm to an industry is most widespread." *Id.*

This Court need go no further than the *Wiltz* decision and the many Louisiana Supreme Court and Court of Appeals' decisions that it relies upon in dismissing the Plaintiffs' negligence claims.

**1. Farmers Milling’s economic loss claim is not allowed under Louisiana law.**

Farmers Milling’s damage claim is precisely the type of economic loss claim that Louisiana law forbids. Farmers Milling admits that its expert, Dr. Bateman has calculated its entire economic loss. *See* Farmers Milling’s Resp. to Bayer’s Statement of Undisputed Facts (“Farmers Milling’s Resp. SOF”), No. 6. It admits that Dr. Bateman’s calculations are “based upon market loss,” and that the European Union’s (EU) refusal “to accept importation of U.S. long grain rice contributed to a reduction in milled rice prices.” *Id.* No. 8, 3. But it also concedes that it did not sell rice directly to the EU prior to August 2006. *Id.* No. 1.

Farmers Milling’s damage claim is thus admittedly based on increased competition in some markets due to a shift in exports from a market into which Farmers Milling never sold. As discussed in the Bayer Defendants’ opening brief, such indirect and attenuated economic losses are not recoverable under Louisiana law. Further, there is no evidence Farmers Milling had title to any allegedly GMO contaminated rice at the time that admixture on cross-pollination occurred, which is a clear prerequisite to recovery under Louisiana law.<sup>4</sup>

Farmers Milling’s margin squeeze claim is a claim for negligent interference with contract in disguise—alleging that Farmers Milling could have contracted for higher prices absent the LLRICE announcement. Louisiana law does not recognize such a claim, *see Wiltz*,

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<sup>4</sup> As the Bayer Defendants discussed in their original memoranda in support of their motions for summary judgment, the weight of Louisiana authority supports their position that the plaintiffs cannot recover based on negligence unless they had a proprietary interest in the rice that was allegedly damaged when the release occurred. *See, e.g., La. Crawfish Producers*, 935 So. 2d at 382-384, *Phillips*, 10 So. 3d at 344. The *Wiltz* court cited these cases favorably in dismissing plaintiffs’ claims in that case. But even if Louisiana does not automatically bar indirect economic damage claims where the plaintiff does not have a proprietary interest in the property damaged, the lack of a proprietary interest here is another factor tipping the scales against finding that legal cause exists. *Compare Wiltz*, 2011 U.S. App. LEXIS 13172, at \*26, 32-34.

2011 U.S. App. LEXIS 13172, at \*27-28, and this Court accordingly should not recognize such a claim in this case. Farmers Milling's negligence claim should be dismissed.

**2. Kennedy's negligence claims should be dismissed.**

Kennedy's indirect economic loss claims result not from damage to its property, but from alleged reductions in rice grown by Louisiana farmers. Kennedy claims undisputedly consist of: lost value of its rough rice inventory allegedly based on "the introduction of GMO rice into the market"; "lost volume of rice" available for purchase because farmers grew less rice in 2007 and 2008; lost sales of Cheniere and CL-131 seed, and some cleaning costs. *See* Kennedy's Resp. to Bayer's Statement of Undisputed Facts Nos. 3, 5, 6 ("Kennedy's Resp. SOF").

Stated otherwise, Kennedy "expected" its rough rice would be worth more, it "expected" farmers to grow more rice in 2007 and 2008, it "expected" to mill more rice in those years absent the GMO announcement, it "expected" to sell certain rice for seed, and it "expected" not to have to clean its equipment as thoroughly. These are exactly the type of business expectancy losses that would require the Court to recognize a claim for negligent interference with contractual relations, which Louisiana law forbids. *See Wiltz*, 2011 U.S. App. 13172, at \*29-30. Kennedy's inventory-loss and lost-volume claims are especially indirect and attenuated. There cannot be an "ease of association" between the Bayer Defendants' alleged negligence and such injuries.

**3. Planters' negligence claim should be dismissed.**

Planters' claims likewise fail. Planters seeks damages for alleged lost margins on the sales of milled rice, decreased milling production due to the loss of export markets, and certain other alleged extra operational expenses. *See* Planters' Response to Bayer's Statement of Undisputed Facts Nos. 1, 3, 6, 7 ("Planters' Resp. SOF"). These claims are all essentially claims for negligent interference with contract—claiming that Planters could have contracted for higher

prices and would have continued contracting with prior customers like Riviana. As explained in Bayer's opening brief and above, Planters' claims for its lost business expectancies are beyond the reach of Louisiana negligence law. Finally, there is no evidence that Planters had title to any allegedly contaminated rice when admixture or cross-pollination occurred.

**C. The Plaintiffs' "Negligent Undertaking" and Plant Protection Act Arguments are Irrelevant**

The Plaintiffs' reliance on *J. Ray McDermott Engineering, LLC v. Fugro-McClelland Marine GeoSciences, Inc.*, No. 04-1335, 2007 U.S. Dist. LEXIS 9761 (E.D. La. Feb. 12, 2007), in support of their "negligent undertaking" argument likewise fails. *See* Pls.' Joint Opp'n at 20-21. The issue in *J. Ray McDermott* was whether a defendant who contracted with another party involved in a construction project owed an entity with which it was not in privity a duty to prevent economic losses on the project. Although the defendant attempted to frame the issue as one of lack of legal cause, the Court framed the issue as one of whether a duty existed at all and held that it did: "Louisiana specifically recognizes that an engineer owes a duty of care to persons with whom the engineer does not have privity, such as a subcontractor, and that a cause of action exists in tort to recover damages for a breach of that duty." 2007 U.S. Dist. LEXIS 9761, at \*12-13. Indeed, in granting, in part, a motion for reconsideration the Court noted that it "did not purport to make any legal findings as to whether FMMG's [Fugro's] duty extended to cover any of the specific losses claimed by JRM." 2007 U.S. Dist. LEXIS 19059, at \*4 (E.D. La. March 19, 2007). *J. Ray McDermott* was thus not a legal cause case.

Moreover, this case is factually distinguishable from *J. Ray McDermott*. There, the plaintiff and defendant's work related to a common construction project, and the defendant's duties were those of a professional engineer providing professional services. Here, there is no relationship between the Bayer Defendants and the Plaintiffs concerning GMO rice. Thus, there

was no “negligent undertaking” by the Bayer Defendants relating to Plaintiffs’ milling operations.

Plaintiffs assert that Bayer assumed responsibility for all economic losses stemming from a release of LLRICE—no matter how remote and attenuated—by testing LLRICE under the Plant Protection Act and by informing the rice industry about their intention not to commercialize LLRICE and the confinement measures that Bayer was implementing. None of Bayer’s statements to the rice industry, however, assumed the risk of all losses that would be sustained if somehow LLRICE was released despite the containment measures that were put in place. And even though the testimony may establish that *some* damages to the mills were foreseeable, they certainly do not establish that it was foreseeable to Bayer that mills would claim damages based on competition in unaffected markets for many years into the future.

Further, nothing in the Plant Protection Act, 7 U.S.C. § 7701, or associated regulations means that Bayer undertook any duty to protect Plaintiffs from economic losses or indicates any intent by Congress or the USDA to alter Louisiana’s rules of liability. Far from it. The portions of the Plant Protection Act addressing civil liability indeed *add* protection for companies like Bayer who seek to develop genetically modified crops. Among other things, the Plant Protection Act expressly preempts claims that seek to “regulate in foreign commerce any article . . . in order [to] . . . prevent the introduction or dissemination of a . . . plant pest.” 7 U.S.C. §7756(a). Absent a “clear indication from Congress” state rules of liability and duty are not affected by federal regulations. *Bourg v. Texaco Oil Co.*, 578 F.2d 1117, 1121 (5th Cir. 1978) (holding that the Outer Continental Shelf Lands Act (OCSLA) did not affect Louisiana state-law rules on agency). The Plant Protection Act thus does not modify Louisiana’s standards for legal cause, which the Fifth Circuit analyzed in the *Wiltz* case.

**D. Alternatively, the Plaintiffs Cannot Recover For Any Damages Beyond 2006**

As the *Desormeaux* court recognized, to allow a party to recover damages for future (unplanted) crops would impose liability on the defendants in an indeterminate amount for an indeterminate time to indeterminate claims. 333 So. 2d at 435. That type of expansive liability is exactly what the Louisiana Supreme Court prohibited in the *Bean Dredging* case.

Plaintiffs' attempt to distinguish *Desormeaux* is without merit. They argue that *Desormeaux* is not a tort case at all, but is a breach of contract case. Pls.' Joint Opp'n at 21. Plaintiffs misstate the *Desormeaux's* court's holding. *Desormeaux* was a negligence case filed by the plaintiff against an alleged tortfeasor. The basis for the holding was legal cause principles. The Court's reference to the plaintiff's potential breach of contract claim simply highlighted that the plaintiff had another remedy besides one in tort, which plaintiffs chose not to seek.

**II. Louisiana Civil Code Article 3546 Requires Application of Louisiana Law to Planters' and Kennedy's Claims for Punitive Damages**

Planters and Kennedy<sup>5</sup> concede that Louisiana law bars their claims for punitive damages. They, like the Louisiana Bellwether plaintiffs before them, claim that North Carolina law applies. It does not, and this Court should dismiss the claim for punitive damages just as it did in the Louisiana Bellwether case. June 7 Mem. & Order at 19-22. As discussed in the Bayer Defendants' opening brief, Louisiana choice of law governs in these cases and plaintiffs are barred from seeking damages unless two of the law of three locations from Article 3546—the place of injury, the place of the injurious conduct, and the place of the defendants' domicile—

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<sup>5</sup> Farmers Milling agreed that this Court's prior ruling denying punitive damages based on application of North Carolina law applies in this case. See Joint Mot. Incorporating Prior Briefs, D.E. 4185 (agreeing that the "Court's rulings from its orders at docket entries 1200, 1604, 2705, and 2981 will remain the same on these issues"); June 7 Mem. & Order at 19-22.

allow for punitive damages. *Sec. Title Guar. Corp. v. United Gen. Title Ins. Co.*, No. 95-31062, 1996 WL 400048, at \*2 (5th Cir. May 29, 1996). The Louisiana Plaintiffs have not shown that North Carolina law governs *any* statutory location, much less the requisite two. Plaintiffs therefore cannot recover punitive damages.

**A. Plaintiffs' Alleged Injuries Occurred in Louisiana**

Plaintiffs do not dispute that their rice crops were located in Louisiana and that all of their alleged injuries occurred in Louisiana. *See* Pls.' Joint Opp'n at 34 ("For injuries occurring in Louisiana, [as here] Louisiana plaintiffs must show that the state where 'the injurious conduct' occurred and the domicile of 'the person who caused the injury' allows punitive damages.") Louisiana's law applies under the first Article 3546 location.

**B. The Alleged Injurious Conduct Occurred in Louisiana**

The presence of LLRice in commercial rice was a result of field trials at Louisiana State University. *See* Kennedy's Am. Compl., D.E. 962 ¶¶ 59-67, Planters' Am. Compl., D.E. 963 ¶¶ 59-67. These Louisiana field trials encompass *all* of the physical actions that could have possibly resulted in Plaintiffs' alleged injuries. Louisiana law thus governs this second Article 3546 location, barring Plaintiffs' punitive damages claim.

Plaintiffs resist this conclusion with unsupported allegations that the Bayer Defendants made various corporate decisions in North Carolina. Plaintiffs' argument here is meritless. Even if the location of the Bayer Defendants' decision-making were relevant, Plaintiffs have presented *no* evidence that any particular decisions were made in North Carolina, let alone enough to say that the allegedly injurious conduct principally or even materially occurred there.

Almost all of the alleged decisions that Planters and Kennedy discuss involve Bayer employees who were *not* in North Carolina during the relevant time period. Moreover, the decisions that Kennedy and Planters reference are identical to those that the plaintiff farmers

raised in opposing the Bayer Defendants' Motion for Summary Judgment on Punitive Damages in the Louisiana Bellwether case. *Compare* Pls.' Joint Opp'n at 31-32, with the Louisiana Bellwether Pl.'s Opp'n, D.E. 2833, at 2-3. This Court has already held that these allegations do not show whether the injurious conduct occurred in North Carolina. *See* June 7 Mem. & Order at 20-21 ("Plaintiffs have not identified any evidence that these decisions [e.g. choosing to conduct the field trials at LSU, failing to monitor tests, failing to institute containment measures, and failing to stop testing] were actually made in North Carolina.").

In any event, the question of where particular people made various decisions related to the LLRICE field trials is irrelevant because Louisiana courts have held that out-of-state corporate decision-making such as plaintiffs allege does not constitute the relevant "injurious conduct" under Louisiana law. For example, in *In re Train Derailment Near Amite, La.*, No. 1531, 2004 WL 169805 (E.D. La. Jan. 26, 2004), the plaintiffs sought punitive damages under Mississippi law, claiming that the decisions of management-level employees in Mississippi contributed to a train derailment in Louisiana. *Id.* at \*1. The court rejected this argument, "[a]ssuming *arguendo* that management-level employees located in Mississippi contributed in some way to the derailment," but holding that such actions "cannot conceivably outweigh or equal the allegedly tortious conduct that occurred in Louisiana." *Id.* at \*2.

The same is true here. As this Court previously found, any management-level decisions made in North Carolina (or indeed in any other state) cannot possibly outweigh the situs of the actual field-trial operations that occurred in Louisiana. *See* June 7 Mem. & Order at 21-22. The alleged injurious conduct thus clearly occurred in Louisiana.

**C. The Bayer Defendants are Considered Domiciled in Louisiana for the Purposes of Louisiana Civil Code Articles 3546 and 3548**

Plaintiffs also cannot establish that the third location under Article 3546—the domicile of the person who caused the injury—points to anything other than application of Louisiana law.

Louisiana Civil Code Article 3548 establishes the domicile of a juridical person for purposes of Article 3546. Article 3548 provides, in pertinent part, that “a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state.” This provision “requires the court to treat such foreign juridical persons as Louisiana domiciliaries . . . if the court determines that, under the principles of Article 3542, such treatment is appropriate in the particular case.” La. Civ. Code Ann. art. 3548 (1992), Revision Comments-1991 ¶ (a). Under Articles 3548 and 3546, Louisiana is clearly the Bayer Defendants’ domicile.

Kennedy and Planters do not dispute that the Bayer Defendants “transacted business” in Louisiana.<sup>6</sup> Additionally, the Bayer Defendants alleged delictual obligation in this case arises from the field trials at LSU in Crowley, Louisiana, and thus from “activity” in Louisiana. These facts make it clear under Louisiana law that the Bayer Defendants should be treated as Louisiana domiciliaries.

In *Security Title Guarantee Corp.*, for example, the plaintiff sued two out-of-state insurance companies for allegedly breaching an obligation to provide information to the Louisiana Insurance Commissioner. 1996 WL 400048, at \*1. The plaintiffs in that case argued that the defendants were not Louisiana domiciliaries because their corporate decisions were made in other states and thus the activities giving rise to the tort obligation arose in those states.

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<sup>6</sup> See Kennedy’s Resp. SOF, No. 12, and Planters’ Resp. SOF No. 13.

The court flatly rejected these arguments, holding that “in a fair reading of Article 3548,” the court could not “disregard the considerable business activities that [defendants] conducted in Louisiana, which gave rise to the underlying tort and without which the resulting injury would not have occurred.” *Id.* at \*2. The court held that the defendants “must be treated as Louisiana domiciliaries for the purposes of the Code’s choice of law rules applicable to tort actions.” *Id.*

Similarly, in *Lenert v. Duck Head Apparel Co.*, No. 95-31122, 1996 WL 595691 (5th Cir. Sept. 25, 1996), a Louisiana partnership brought a copyright infringement action against a Georgia corporation. Plaintiffs claimed that, even though the defendant transacted business in Louisiana, it was not a Louisiana domiciliary for purposes of article 3548 because the defendants’ decisions occurred at its Georgia headquarters or in other states where it had offices. *Id.* at \*6 & n.6. The Court rejected that argument, holding that even if plaintiffs’ statements were true, “it does not create a fact issue concerning [Article 3548’s] application, because the tort obligation to the plaintiffs arose out of Duck Head’s business activity within Louisiana.” *Id.*

And in *Nicholas v. Allstate Ins. Co.*, 739 So. 2d 830 (La. Ct. App. 1999), *rev’d on other grounds*, 765 So. 2d 1017 (La. 2000), the plaintiff was a Louisiana resident who had been previously employed by an out-of-state defendant in Louisiana. Plaintiff brought a wrongful termination action and sought punitive damages under either Mississippi or Illinois law claiming that the defendant was domiciled in either of those states because that is where the defendant made the decision to fire him. *Id.* at 844. The court, however, held that the defendant was domiciled in Louisiana under Article 3548, even though the defendant’s regional office was located in Mississippi, its managers evaluated the plaintiff’s job performance in Mississippi, and the corporate decision to terminate plaintiff’s employment was made in Mississippi. *Id.*; *see also Rigdon v. Pittsburgh Tank & Tower Co.*, 682 So. 2d 1303, 1307 (La. Ct. App. 1996) (treating a

foreign corporation as a Louisiana domiciliary under Article 3548 because the defendant was transacting business in Louisiana and “is defending against a delictual obligation arising from its activity in Louisiana”).

**D. Planters’ and Kennedy’s Reliance on *Arabie v. CITGO* is Misplaced**

Apparently recognizing that Article 3546 precludes application of the law of any jurisdiction other than Louisiana, Planters and Kennedy rely on *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010), and assert that this Court’s choice of law analysis “must begin” with application of the *general* choice-of-law rule for Louisiana tort cases, Louisiana Civil Code Article 3542. Pls.’ Joint Opp’n at 32. Their reliance on *Arabie* is misplaced. First, the Louisiana Supreme Court granted writs from that decision, *see Arabie v. CITGO Petroleum Corp.*, 56 So. 3d 981 (La. 2011). The matter has been briefed to the Louisiana Supreme Court and oral argument concluded. The Court of Appeals’ decision is not final or definitive and is not entitled to any weight. *See* La. Code Civ. Proc. Ann. art. 2166; *Gulf States Utils. Co. v. Dixie Elec. Membership Corp.*, 252 So. 2d 670, 672 (La. 1971) (District Court erred in relying upon a Court of Appeal decision in which the Louisiana Supreme Court granted writs because the Court of Appeals’ decision “was never final in any respect ... and, therefore, not authoritative on any point.”).

Second, *Arabie* is clearly distinguishable. There the District Court found that the injurious conduct occurred in Louisiana based on intentional wrongful acts that the defendant committed in another state. As the court has recognized when declining to submit punitive damages based on intentional conduct under the law of other states, there are no such facts here. And this Court has already found that the injurious conduct in this case occurred in Louisiana. *See* June 7 Mem. & Order at 21-22.

It is black letter law in Louisiana, as elsewhere, that a specific statute governs over a general one. *Truxillo v. Johnson & Johnson*, No. 07-2883, 2007 U.S. Dist. LEXIS 46636, at \*8 (E.D. La. June 26, 2007) (Under Louisiana civilian interpretation methodology, the specific provision trumps the more general one). Consistent with this general rule, the comments to Article 3542 expressly state that where there is a specific conflict-of-laws article applicable to a determination of which law applies, it prevails over and trumps the general provisions of Article 3542. *See* La. Civ. Code Ann. art. 3542, Revision Comments – 1991 ¶ (b).

Even if the general choice of law article applied, Louisiana law would govern Kennedy’s and Planters’ punitive damage claims. Louisiana’s current choice of law statutes are relatively recent enactments, going into effect in 1992. *See Rigdon*, 682 So. 2d at 1305. But these Civil Code Articles reflect and protect Louisiana’s “unswerving” interest in the “rejection of punitive damages in a civil action.” *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453, 458 (W.D. La. 1976). Louisiana courts have long held that plaintiffs seeking punitive damages in cases “where Louisiana has a significant relationship to a tort action” bear a virtually “insurmountable” burden to prove an “interest in the foreign state so compelling as to transcend Louisiana’s interest in application of its substantive law.” *Id.* at 458-59.

Accordingly, even prior to the enactment of Article 3546, Louisiana courts repeatedly rejected arguments such as that advanced by the Louisiana Plaintiffs in this case. In *Ramsey v. Bell Helicopter Textron, Inc.*, 704 F. Supp 1381 (E.D. La. 1989), for example, the Court held that Texas’s interest in applying its punitive damages law to the in-Texas design and manufacture of a helicopter by a Texas corporation was dwarfed by Louisiana’s “clear interest in a Louisiana accident involving a Louisiana resident, and its interest in protecting the integrity of its legal system and effectuating and enforcing its own policies against exemplary damages.” *Id.* at 1383.

Louisiana's long-preserved interest in denying punitive damages awards is not limited to protecting in-state defendants, but instead "lies in the protection of its judicial system . . . from what it might consider inherently speculative awards." *Pittman v. Kaiser Aluminum & Chem. Corp.*, 559 So. 2d 879, 883 (La. Ct. App. 1990); accord *Lee v. Ford Motor Co.*, 457 So. 2d 193, 194-95 (La. App. Ct. 1984). To the extent Louisiana's rejection of punitive awards was designed to protect businesses, that interest extends to protect the Bayer Defendants, "who do business in Louisiana." *Karavokiros v. Ind. Motor Bus Co.*, 524 F. Supp. 385, 387 n.1 (E.D. La. 1981).

In any event, consideration of the factors stated in Article 3542 overwhelmingly favors application of Louisiana law on punitive damages here. Louisiana has an interest in regulating the agricultural activities within its borders and in applying its laws to any alleged agricultural contamination that occurs there, as well as injuries to Louisiana farmers. Indeed, Louisiana has a stated interest and policy in promoting the development of genetically modified crops, as evidenced by La. Rev. Stat. Ann § 56.3. That statute makes it a crime in Louisiana to intentionally damage genetically engineered crops, genetically engineered crop facilities, or genetically engineered crop information. *Id.*

Plaintiffs argue that North Carolina has a greater interest in this action, but that just is not so. Although Bayer CropScience's headquarters are in North Carolina, North Carolina choice of law principles would actually lead to the application of Louisiana law in this case. *See Boudreau v. Baughman*, 368 S.E.2d 849, 854 (N.C. 1988) ("[U]nder North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy."). This Court has already determined that prior Bellwether plaintiffs' claims do not have sufficient effect on North Carolina business for them to avail themselves of the benefit of North Carolina law. *See* Oct. 9,

2009 Mem. & Order, D.E. 1604, at 8-10 (rejecting application of the North Carolina Unfair Trade Practices Act). The same rationale applies to the choice-of-law analysis concerning punitive damages and demonstrates that Louisiana has a far greater interest than North Carolina on this issue. The Bayer Defendants status as Louisiana domiciliaries for the purpose of Louisiana choice of law rules is clearly appropriate.<sup>7</sup>

**E. Article 3547 Does Not Apply in This Case**

In a last-ditch effort to save their request for punitive damages, Planters and Kennedy ask this Court to hold that this is an “exceptional” case under Article 3547 that requires the imposition of North Carolina law. *See* Plaintiffs’ Joint Opposition at 36-37. For article 3547 to apply, however, Plaintiffs must prove that “from the totality of the circumstances of an exceptional case, it is *clearly evident* under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue.” La. Civ. Code Ann. art. 3547 (emphasis added); *see also Jefferson Parish Hosp. Serv. Dist. # 2 v. W.R. Grace & Co.*, No. 92-0891, 1992 WL 167263, at \*3 (E.D. La. June 30, 1992). This language is specifically intended to limit the Article’s application in order to prevent Article 3547 from “swallowing” Article 3546. *Jefferson Parish*, 1992 WL 167263, at \*3 (quoting Symeonides, *Louisiana’s New Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 667, 766 (1992)).

Planters and Kennedy cite no law and offer no evidence that makes it “clearly evident” that the interests of North Carolina would be seriously impaired if Louisiana law applies. Nor do they offer any facts or reasons why this is an “exceptional” case. Indeed, this Court rejected the

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<sup>7</sup> Even if the Bayer Defendants were treated as North Carolina domiciliaries, Louisiana law would still govern the Louisiana Plaintiffs’ claims for punitive damages. As discussed above, two of the three Article 3546 locations would still point to Louisiana law.

Louisiana Bellwether plaintiffs' attempts to apply article 3547 under the same facts, and the Court should do so here. June 7 Mem. & Order at 22.

Presumably, they again rely on the notion that the Bayer Defendants made unspecified business decisions in North Carolina that resulted in the alleged Louisiana contamination. Those allegations, however, do not give rise to exceptional circumstances. If Article 3547 were to apply in this case, then any case involving a foreign corporation sued in Louisiana would be an "exceptional" case.

Louisiana case law makes clear that Planters' and Kennedy's punitive damage claim is a run-of-the-mill case involving a foreign corporate defendant. In *Truxillo*, for example, the court rejected a plaintiffs' request for punitive damages against a New Jersey corporation, holding that it was "far from clear that New Jersey law would be most impaired if its law were not applied" because the place of the injury was Louisiana, the plaintiff was from Louisiana, and the contacts and relationship between the parties occurred in Louisiana as well. 2007 WL 185363, at \*10. Even where the plaintiff "may be correct that any alleged fraud or misrepresentation occurred in New Jersey (the principal place of business for [defendant]), that fact alone [did] not outweigh Louisiana's interest in this litigation." *Id.* (citing *Tolliver v. Naor*, 115 F. Supp. 2d 697, 701-02 (E.D. La. 2000)); *see also Jefferson Parish Hosp.*, 1992 WL 167263, at \*3 (finding nothing distinguishing that case from ordinary conflicts cases, and therefore rejecting application of Article 3547). Summary judgment is thus appropriate for Kennedy's and Planters' claims for punitive damages.

### III. This Court Should Dismiss Farmers Milling's Trespass Claim<sup>8</sup>

Farmers Milling completely fails in its response to explain how the alleged trespass was a cause-in-fact of its claimed damages. This lack of causation is fatal to its claim. *See Hillman v. Andrus*, No. 11-5, 2011 La. App. LEXIS 524, at \*27 (La. Ct. App. May 4, 2011). Farmers Milling merely states that an entity injured by trespass "is entitled to full indemnification" and that courts have discretion to award damages even though they cannot be "exactly estimated." *See Pls.' Joint Opp'n* at 29. Farmers Milling misses the point. Its expert has calculated its damages based on alleged market-wide reductions in prices for United States rough rice and milled rice. Farmers also seeks damages for reduced milling volumes due to lost exports of other mills. None of these alleged damages remotely relate to any alleged physical invasion of Farmers Milling's property.

Farmers Milling's reliance on *Terre Aux Boeuff Land Co. v. J.R. Gray Barge Co.*, 803 So. 2d 86 (La. Ct. App. 2001), in opposing the Bayer Defendants' motion is misplaced. The Court there recognized that a "defendant generally may *not* be held liable for trespass under Louisiana law in the absence of evidence that the trespass resulted from some intentional act taken by the defendant." 803 So. 2d at 96 (emphasis added). Indeed, although it did not decide the issue, the Louisiana Supreme Court in *Hogg v. Chevron USA, Inc.*, 45 So. 3d 991, 1002, n.11 (La. 2010), noted Louisiana's skepticism of trespass claims in the absence of intent. There is no evidence of intent here, and given the lack of a causal link between the alleged trespass and Farmers Millings' specified damages, the Court should dismiss the trespass claim.

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<sup>8</sup> Neither Planters nor Kennedy has asserted a trespass claim.

**CONCLUSION**

For the foregoing reasons, this Court should grant the Bayer Defendants' motions for summary judgment.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ John M. Hughes

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