

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

**IN RE GENETICALLY MODIFIED RICE
LITIGATION**

4:06 MD 1811 CDP

This filing relates to the following case:

Kennedy Rice Dryers, LLC
v. Bayer CropScience, LP

Case No. 4:07-cv-01773-CDP

**BAYER DEFENDANTS’ MEMORANDUM IN SUPPORT OF
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT
ON CLAIMS OF KENNEDY RICE DRYERS**

INTRODUCTION

Kennedy Rice Dryers, LLC (“Kennedy”), is a sophisticated Louisiana business that dries rough rice for sale to millers. Kennedy seeks compensation from the Bayer Defendants¹ for (among other things) an alleged decline in the value of its rough rice inventories and for a decline in throughput because Louisiana rice farmers allegedly grew less rice. Such indirect economic losses are not cognizable under Louisiana law. Further, Kennedy’s claims of Negligence *Per Se*, Public Nuisance, Strict Liability, Constructive Fraud, and Declaratory Judgment should be dismissed. The Bayer Defendants file this memorandum in support of their consolidated motion for summary judgment on Kennedy’s claims.

¹ Kennedy has alleged claims against Bayer CropScience LP; Bayer CropScience Inc.; Bayer CropScience Holding, Inc.; Bayer CropScience LLC; Bayer Corporation, Stoneville Pedigreed Seed Company; Bayer BioScience, NV; Bayer CropScience Holding SA; Bayer CropScience AG; and Bayer AG. Collectively, these defendants will be referred to as “the Bayer Defendants.”

I. The Bayer Defendants Are Entitled to Summary Judgment on Kennedy's Damages Claims

Kennedy's claimed damages consist of alleged losses on the value of its rough rice inventory at the time of the August 18, 2006 announcement ("inventory-loss"), alleged losses due to diminished volume processed ("lost-volume"), increased costs for cleaning and inspecting equipment ("cleaning costs"), for increased costs of keeping GMO rice separate ("separation costs"), and for lost revenue on seed sales ("seed-loss"). *See* The Bayer Defendants' Statement of Undisputed Facts ¶1 ("SOF"). Kennedy's inventory-loss and lost-volume claims account for the vast majority of Kennedy's alleged damages, constituting approximately \$3.82 million of Kennedy's \$3.98 million damages claim. SOF ¶2.

Kennedy's \$1 million inventory-loss claim is based on an event study Dr. Bateman performed that estimates that all rough rice in the United States was worth less because of the presence of LLRICE in commercial rice. SOF ¶3. Kennedy's \$1.5 million lost-volume claim is based on Dr. Bateman's conclusion that Louisiana farmers produced less rice in 2007 and 2008, and that Kennedy therefore had less rice to process in its dryers. SOF ¶4.

Kennedy's claims for cleaning costs and separation costs are increased operational expenses due to the fact that Kennedy's rice contained LLRICE. SOF ¶5. And its claims for seed losses are based on the allegation that Kennedy was unable to sell seed-quality Cheniere and CL-131 that it had in inventory. SOF ¶6.

Such indirect economic harms are far too remote from any negligence on the part of Bayer, and are not cognizable under Louisiana law's "legal cause" doctrine. Kennedy's inventory-loss and lost-volume claims are barred because they are too attenuated from any negligence on the part of Bayer. Kennedy's cleaning costs, separation costs, and seed-loss claims, moreover, are barred because they are costs directly stemming from Kennedy's contracts

with its suppliers (and its failure to successfully contract for GM-free seed).

This Court upheld the negligence claims of Louisiana rice farmers because “the first individuals to be affected” by any escape of LLRICE “would naturally be rice farmers.” Mem. & Order at 6, June 7, 2010, D.E. 2981 (“Louisiana MDL Order”). Kennedy, however, is in a different position and its claims should not be allowed. Bayer’s conduct is not the “legal cause” of Kennedy’s injuries.

A. Louisiana Law on “Legal Cause” Bars Recovery in Negligence for Indirect Economic Losses

Louisiana Civil Code Article 2315(A) provides that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” *See generally Langlois v. Allied Chem. Corp.*, 249 So.2d 133, 136-37 (La. 1971). Included within Article 2315’s ambit are a variety of “delictual” (or tort) actions founded on different forms of fault, “namely, negligence or intentional misconduct, including abuse of rights.” *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93, 97 (La. 1975).

For liability to attach on a claim of negligence under Article 2315(A), a plaintiff must prove each of five separate elements under Louisiana’s “duty/risk” analysis:

- (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element);
- (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element);
- (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries (the cause-in-fact element);
- (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of liability or scope of protection element); and,
- (5) actual damages (the damages element).

Mathieu v. Imperial Toy Corp., 646 So.2d 318, 322 (La. 1994); *see also Joseph v. Dickerson*, 754

So.2d 912, 916 (La. 2000).

The fourth required element for a claim of negligence under Louisiana law—“legal cause”—is a pure question of law for the Court to decide. *See Todd v. State ex rel. Dep’t of Soc. Servs.*, 699 So.2d 35, 39 (La. 1997). This element limits, as a matter of public policy, the potential scope of liability for negligence: Louisiana standards of care are designed only to “protect *some* persons under *some* circumstances, against *some* risks.” *David v. Guidry*, 645 So.2d 1234, 1237 (La. Ct. App. 1994), *writ denied*, 649 So.2d 393 (La. 1995). “Policy considerations determine the reach of the rule, and there must be an ease of association between the rule of conduct, the risk of injury, and the loss sought to be recovered.” *PPG Indus., Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984).

The “ease of association” analysis focuses on far more than only the foreseeability of the alleged harm—“[f]oreseeability is not the only criterion for determining whether there was a duty-risk relationship” sufficient to establish liability between a particular plaintiff and a particular defendant. *David*, 645 So.2d at 1237. In addition to prohibiting recovery for unforeseeable damages, the “ease of association test” precludes recovery for claims of *indirect* economic loss.

In *PPG Industries*, for example, the Louisiana Supreme Court held that PPG Industries could not seek damages in tort for diminished business expectations stemming from the defendant’s negligent destruction of a third party’s natural gas pipeline. The Court held that because the plaintiff’s losses flowed most directly from its contractual relationship with Texaco (the owner of the pipeline), the defendant’s negligence could not be the legal cause of the plaintiff’s injury. The Court reasoned, “It is highly unlikely that the moral, social and economic considerations underlying the imposition of a duty not to negligently injure property encompass the risk that a third party who has contracted with the owner of the injured property will thereby

suffer an economic loss.” 447 So.2d at 1061. As the Louisiana Supreme Court explained:

imposition of responsibility on the tortfeasor for such damages could create liability in an indeterminate amount for an indeterminate time to an indeterminate class. . . . Because the list of possible victims and the extent of economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.

Id. at 1061-62 (internal citation and quotation marks omitted).

The *PPG Industries* Court relied for its holding on the policy considerations articulated by the United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). In *Robins*, the Court held that charterers of a ship could not sue a party that negligently damaged a ship they had chartered because they did not have a property interest in the vessel. *Id.* at 308. The Court held that any loss sustained by the charterers “arose only through their contract with the owners” and could not be recovered from the tort-feasor. *Id.* Louisiana courts have repeatedly followed this rule to find that liability in negligence “does not encompass the particular risk of injury of indirect economic loss.” *Peterson v. W. World Ins. Co.*, 491 So.2d 78, 80 (La. Ct. App. 1986) (rejecting claim for economic losses resulting from injury to a company’s president).

Louisiana courts have applied the *Robins Dry Dock* rule to cases involving diminished business expectations in agricultural products. 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 rice farmer who had contracted with his father for water could not sue a contractor for negligently damaging the culvert through which the water was to flow. The Court of Appeals held that the plaintiff did not have a cause of action in negligence because “the negligent act of defendant caused no direct damage to the crop. The damage to the crop was caused by the inability of plaintiff’s father to perform his contract to supply plaintiff with water.” *Id.* at 435. It did not matter that the damage

to the plaintiffs' crops may have been "foreseeable," because the rule from *Robins Dry Dock* barring recovery for indirect economic losses "has been adopted by our Louisiana Supreme Court and is still the law of this state." *Id.*

Louisiana law also requires that the plaintiff have a proprietary interest in property that was damaged before they may sue for economic losses due to such injury. In *Louisiana 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), plaintiffs were commercial fisherman who claimed damages from the alleged destruction of fishing areas due to defendant's oilfield activities. The Court applied *Robins*, which it described as "a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability" to hold that plaintiffs could not sue in tort because they had no proprietary interest in the property allegedly damaged, *id.* at 382-84.

B. The *Robins Dry Dock* Rule and Louisiana Law Bar Indirect Economic Loss Claims Even in the Absence of a Contractual Remedy

This Court held with respect to farmer-plaintiff claims that the rule followed by Louisiana courts bars only claims by parties who have contracted with the injured party. *See* Louisiana MDL Order at 7 n.6. Some of Kennedy's claims are related to the subject of contracts with farmers. Respectfully, however, the Louisiana law cited above applies to bar Kennedy's claims even in the absence of a contract claim.

Louisiana courts have repeatedly held that the *Robins Dry Dock* principle bars tort claims—even when no contract was involved—when the injury was "based solely on *harm to the interest of business expectancy.*" *Harp v. Pine Bluff Sand & Gravel Co.*, 750 So.2d 226, 230 (La. Ct. App. 1999) (emphasis added). In denying claims under Louisiana law for economic losses stemming from a closed interstate, the Western District of Louisiana surveyed Louisiana law and noted that "there has been a trend among both Louisiana state and federal courts not to

permit the recovery of indirect economic losses caused by a negligent injury to property, both in maritime and non-maritime contexts, and *in contractual and non-contractual settings.*” *TS & C Invs., L.L.C. v. Beusa Energy, Inc.*, 637 F. Supp. 2d 370, 379 (W.D. La. 2009) (emphasis added), *aff’d* 344 F. App’x. 907 (5th Cir. 2009). Many other cases barring claims for indirect economic loss in Louisiana do not involve contractual relationships between the claimant and the owner of the injured property. *See Conoco, Inc. v. Halter-Calcasieu L.L.C.*, 865 So.2d 813 (La. Ct. App. 2003), *writ denied* 869 So.2d 822 (La. 2004) (barring claims for economic losses caused by a dry dock that blocked commerce in the Calcasieu River); *Robinson v. Cheetah Transp.*, No.06-0005, 2007 U.S. Dist. LEXIS 13579 (W.D. La. Feb. 28, 2007) (holding claim for economic damages due to a bridge closure barred because there was no legal cause); *La. Swabbing Serv. v. Enter. Prods. Co.*, 784 So.2d 862 (La. Ct. App. 2001), *writ denied*, 796 So.2d 684 (La. 2001) (rejecting plaintiff’s claim for increased worker’s compensation premiums from benefits to four workers injured by an automobile collision).

Other courts have recognized that the *Robins Dry Dock* rule does not require a contract for an economic loss claim to be barred. For instance, if “a negligent accident in the Holland Tunnel backs up traffic for hours, imposing cumulatively enormous and readily monetizable costs of delay,” no one waiting in that traffic has a contractual claim; yet courts nonetheless refuse to allow recovery for the purely economic losses that flow from such accidents. *Rardin v. T&D Mach. Handling, Inc.*, 890 F.2d 24, 28 (7th Cir. 1989); *see also Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985). Louisiana law applies similarly to bar Kennedy’s claims here.

C. All of Kennedy’s Claimed Losses Are Indirect Losses To Business Expectations That Cannot Be Recovered.

Under the law set forth above, Bayer’s conduct was not the legal cause of any of

Kennedy's claims. Kennedy's seed-loss, cleaning cost, and separation-cost claims are all claims of lost profits due to the fact that the rice Kennedy contracted for contained LLRICE. These claims are identical in posture to those involved in *PPG Industries* and *Desormeaux*. In those cases, the value of the contracts those claimants had were diminished because a third party negligently interfered with the contracting parties' ability to perform. Kennedy's cleaning cost, separation cost, and seed-loss claims are allegations that they increased costs because of their inability to (or failure to) contract for GM-free seed from their suppliers. Such losses are too indirect and not cognizable under *PPG Industries* and *Desormeaux*.

Kennedy's inventory-loss and lost-volume claims are even more attenuated and indirect than those involved in *PPG Industries* and *Desormeaux*. Kennedy's inventory-loss claim, for example, is due to (1) the alleged inability of rice mills to contract for GM-free rice, which (2) allegedly disrupted mills' ability to enter into new contracts with some of their European customers, allegedly causing (3) increased competition in other markets, leading to (4) an alleged reduction in the price of rough rice. Kennedy's lost-volume claim is even two steps more attenuated, requiring an alleged (5) reduction in rice acreage planted by Louisiana farmers based on the decreased price of rice, causing (6) a reduction in the number of contracts to purchase rice Kennedy was able to enter into. It does not matter whether the damage to Kennedy was "foreseeable"—recovery of such damages is barred under Louisiana's legal cause doctrine. *Desormeaux*, 333 So.2d at 435.

There cannot be an "ease of association," for example, between Bayer's actions and Kennedy's claimed damages based on rice farmers' decisions to plant crops other than rice. Kennedy's claims create "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *PPG Indus.*, 447 So.2d at 1061 (quotation omitted).

The Louisiana cases denying the right to recover in negligence based upon damage to the instrumentalities of commerce (such as bridges and highways) are directly on point. *Harp*, 750 So.2d at 230; *TS & C Invs.*, 637 F. Supp. 2d at 379; *Robinson*, 2007 U.S. Dist. LEXIS 13579 at *5-6. The plaintiffs in those cases alleged that someone else's negligence caused a trade disruption and they subsequently lost customers. It follows that a business cannot recover for losses associated with the value of rough rice due to the fact that *other businesses* lost customers due to a disruption in trade. Similarly, it follows that a business cannot recover because suppliers had less to sell because of that reduction in price. Such damages based on increased competition and the business judgments of third parties are far too attenuated for there to be an "ease of association" with Bayer's negligence.

Kennedy's suit is also barred because Kennedy did not have any proprietary interest in the rice allegedly damaged at the time the release occurred. *See Louisiana Crawfish Producers*, 935 So.2d at 382-84. To the extent that Bayer's LLRICE damaged any property, it was the foundation or breeder seed for Cheniere and CL-131 which initially became mixed with Bayer's genetic material. It is undisputed that the release of LLRICE was the result of field trials at Louisiana State University ("LSU") in Crowley, Louisiana. SOF ¶ 7. Kennedy was not involved in breeding or producing seed for CL-131 or Cheniere and therefore had no title to the affected seed at the time the admixture or cross-pollination occurred. *See* SOF ¶ 8. Millers such as Kennedy did not obtain any rice containing LLRICE until several commercial transactions later (seed dealers purchasing foundation seed, farmers purchasing certified seed, rice farmers selling their rice, etc.). Each of these transactions significantly attenuates any negligence on the part of Bayer from any property interest of Kennedy.

Different panels of Louisiana's Third Circuit Court of Appeals have disagreed on

whether the “proprietary interest” requirement is categorical or whether it must be applied in the context of the broader “duty-risk” analysis. *Compare Phillips v. G & H Seed Co.*, 10 So.3d 339 (La. Ct. App. 2009), *writ denied*, 21 So.3d 284 (La. 2009), with *Phillips v. G & H Seed Co., Inc.*, No. 10-1405, 2011 WL 1773269 (La. Ct. App. May 11, 2011). The litigation in *Phillips* had to do with claims brought by processors and marketers of crawfish for losses related to the death of crawfish grown by farmers. The Court of Appeals initially held that plaintiffs could not recover because they did not have a proprietary interest in the crawfish. 10 So.3d at 344. A different panel recently held (without conclusively deciding) that such plaintiffs might be able to recover under the duty-risk analysis if they had had a “special interest in or relationship with the damaged property.” 2011 WL 1773269, at *7. The first *Phillips* panel had the better view of Louisiana law, but the conflict does not affect the result here.

In this case it is undisputed that Kennedy had no special interest in any rice that was contaminated at the time of the release, and no special interest in rice to be planted years after the USDA announcement. Kennedy’s attenuated claims of indirect economic harm thus fail under *PPG Industries* regardless of whether the “duty-risk” analysis incorporates a strict requirement that there be some proprietary interest in damaged property before economic losses can be recovered. At the very least, all of the Louisiana courts’ analysis shows that there is a heavy thumb on the scales against finding “legal cause” in cases where there is no proprietary interest in damaged property.

All of the policy reasons discussed in *PPG Industries* for declining to extend liability are applicable here. The “moral, social and economic considerations” underlying any duty in this case do not extend so far as to indemnify sophisticated businesses in the rice industry for losses related to price competition in markets that continued buying U.S. Rice. These considerations

especially do not extend to allow claims that suppliers grew less rice because they felt it was economically advantageous to them to grow other crops. *See* SOF ¶9.

The Louisiana Supreme Court held that liability for damage to *current* contractual relationships was too attenuated because “imposition of responsibility on the tortfeasor for such damages could create liability in an indeterminate amount for an indeterminate time to an indeterminate class.” 447 So.2d at 1061-62 (internal quotation and citation omitted). But the liability Kennedy seeks to impose on Bayer is far more indeterminate and expansive. Kennedy’s theory of liability would extend to any damages caused by any realignment in international trade, as far into the future as an expert might estimate harm. Louisiana tort law does not extend that far.

The expansiveness of Kennedy’s theory shows in particularly stark fashion why the “legal cause” rule in Louisiana should not be limited to claims of plaintiffs who contracted with the party most directly injured. A rule so limited bars Kennedy’s cleaning-cost, separation-cost, and lost-seed claims (because such damages are directly related to the contracts with the people Kennedy buys rice from). But Kennedy’s other alleged injuries that are not as closely related to a contract are even more attenuated (occurring because of lower prices obtained on all rice due to increased competition and a related alleged reduction in rice acreage). The existence of a contract generally makes economic harm *more* direct, not less so. Louisiana law does not support the conclusion that claims are less likely to be barred the more indirect the damages become. Louisiana law in fact provides the opposite. *See PPG Indus.*, 447 So.2d at 1061.

D. At a Minimum Bayer’s Actions Are Not the Legal Cause of Plaintiffs’ Claimed Damages For Rice Sold After the 2006-2007 Marketing Year.

Alternatively, even if the Court does not dismiss Kennedy’s claims in their entirety, it should dismiss Kennedy’s lost-volume claims for damages for any rice sales beyond the 2006

crop year. Kennedy seeks economic losses relating to the sale of rice that Kennedy could not have had a vested interest in.

In *Desormeaux*, the plaintiff tried to distinguish *Robins Dry Dock* and the other Louisiana cases on the ground that the plaintiff had a “vested interest in the rice crop.” 333 So.2d at 435. The Court of Appeals rejected that argument, explaining that “at the time the damage occurred to the culvert in November of 1973, plaintiff’s rice crop had not even been planted. *He had no vested interest in it.*” *Id.* (emphasis added). So too here. In 2006, Kennedy had no vested interest in the value of future contracts to dry rice on rice that had not been planted yet. Kennedy therefore cannot recover for those losses in negligence.

For the above reasons, legal cause does not extend to the indirect economic harm that Kennedy claims in these cases. The Bayer Defendants are entitled to summary judgment dismissing Kennedy’s negligence claims, or at the very least summary judgment on Kennedy’s lost-volume claims, or Kennedy’s cleaning-cost, separation-cost, and seed-loss claims.

II. Kennedy is Not Entitled to Punitive Damages

Kennedy’s complaint asserts a claim for punitive damages against the Bayer Defendants. “In Louisiana, there is a general public policy against punitive damages; thus, a fundamental tenet of [Louisiana] law is that punitive or other penalty damages are not allowable unless expressly authorized by statute.” *Ross v. Conoco, Inc.*, 828 So.2d 546, 555 (La. 2002); *see also Mosing v. Domas*, 830 So.2d 967, 973 (La. 2002) (“Under Louisiana law, exemplary or other ‘penalty’ damages are not allowable unless expressly authorized by statute.”). No statute exists in Louisiana that would allow punitive damages to be awarded in this case.

This Court previously granted the Bayer Defendants’ motion for summary judgment with respect to the Louisiana Bellwether Plaintiffs’ claims for punitive damages, holding that the Louisiana law applies to claims of Louisiana farmers suing Bayer. The same result follows here.

See Louisiana MDL Order 19-22.

An MDL court must apply the choice of law rules applicable in the transferor court. *See In re Temporomandibular Joint (TMJ) Implants Prods Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996). For this case, that is Louisiana law.

Louisiana Civil Code Article 3546 addresses the specific question presented here of whether Louisiana law, or the law of another jurisdiction, governs claims for punitive damages. Article 3546 identifies three locations that a court must consider in a choice-of-law analysis:

- (1) where the injurious conduct occurred;
- (2) where the resulting injury occurred; and
- (3) where the person whose conduct caused the injury is domiciled.

“Article 3546 expressly prohibits a Louisiana court from awarding punitive damages unless the substantive law of no less than two of the Article 3546 locations authorizes such an award.” *Security Title Guar. Corp. v. United Gen. Title Ins. Co.*, No. 95-31062, 1996 WL 400048, at *2 (5th Cir. May 29, 1996).

Louisiana governs all of the statutorily relevant locations. First, it is undisputed that Kennedy’s alleged injuries occurred in Louisiana. *See* SOF ¶10. Kennedy is a Louisiana company “domiciled in Mer Rouge, LA” that “operates and conducts a rice drying business in the State of Louisiana.” Compl. ¶1.

Second, the alleged injurious “conduct” occurred in Louisiana. As stated by Kennedy’s own experts, the presence of LLRICE in commercial rice was a result of field trials at Louisiana State University. SOF ¶7; *see also* Am. Compl. ¶¶59-67, D.E. 962 (alleging that the conduct of LSU on behalf of Bayer “directly led to and proximately caused” the release of LLRICE). These Louisiana field trials encompass *all* of the physical actions by Bayer that could have possibly

resulted in Kennedy's alleged injuries. Steve Linscombe, Bayer's alleged agent, made substantially all of the actual decisions about the way the field trials were run in Louisiana. *See* SOF ¶11.

Third, the domicile of the person who caused the injury requires application of Louisiana law. Louisiana Civil Code 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." Bayer transacted business in Louisiana. SOF ¶12. The Bayer Defendants' alleged delictual obligation arises from the field trials at LSU in Crowley, Louisiana, and thus from "activity" in Louisiana. Further, to the extent that Kennedy's claims are based on the acts of LSU (as Bayer's agent), then LSU's domicile should control. Under Articles 3548 and 3546, Louisiana is the Bayer Defendants' domicile.

Kennedy thus cannot establish that even one of the Article 3546 locations is governed by any state's law other than Louisiana. Courts have repeatedly held that Louisiana law on punitive damages applies to situations where there were even fewer connections between the defendant and Louisiana. *See, e.g., Lenert v. Duck Head Apparel Co.*, No. 95-31122, 1996 WL 595691, at *6 (5th Cir. Sept. 25, 1996); *Nicholas v. Allstate Ins. Co.*, 739 So. 2d 830, 844 (La. Ct. App. 1999), *rev'd on other grounds*, 765 So. 2d 1017 (La. 2000); *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"); *Truxillo v. Johnson & Johnson*, No. 07-2883, 2007 WL 1853363 (E.D. La. June 26, 2007).

The Court, accordingly, should grant summary judgment and dismiss Kennedy's claims

for punitive damages.²

CONCLUSION

The Bayer Defendants request that their Motion for Summary Judgment be granted.

² Even if punitive damages were available under some other state's law, there is insufficient evidence of malice or conscious indifference to the rights of others to submit a claim for punitive damages for the jury.

Dated: June 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 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

John M. Hughes