

No. 19-30992

**In the United States Court of Appeals
for the Fifth Circuit**

**VIOLET DOCK PORT, INCORPORATED, L.L.C.,
Plaintiff – Appellant**

v.

**DREW M. HEAPHY, in his capacity as Executive Director of St. Bernard
Port, Harbor & Terminal District; ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT,
Defendants – Appellees**

**Appeal from the United States District Court for the Eastern District of Louisiana,
No. 19-CV-11586, the Hon. Ivan L.R. Lemelle, District Judge, presiding**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Violet Dock Port, Inc., LLC certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Fifth and Fourteenth Amendments require payment of just compensation to private property owners whose property is taken by the government for a public use. When property is taken, it is common (and indeed required at the time of the taking of Appellant's property) for state court litigation to follow to resolve issues regarding the constitutionality of the taking and amount of compensation that is due. The issue here is whether there is a federal court remedy under 42 U.S.C. §1983 to compel a state actor to pay the compensation judgment that was ordered to be paid by the state court. In other words, when the government refuses to pay the state court compensation judgment and invokes state statutes and procedures to protect against collection of the judgment, may the federal courts grant relief to remedy the uncompensated taking of property?

Oral argument may assist the Court with understanding the background and procedural history of this case. Oral argument may also assist the Court when evaluating this case in light of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which used to require a claimant to exhaust state remedies before seeking relief in federal court (which VDP has done), and *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), which overruled *Williamson County*'s exhaustion requirements.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this Section 1983 case under 28 U.S.C. §§ 1331 & 1343. The district court entered a final judgment dismissing VDP's claims on November 23, 2019. ROA.131-137. VDP filed a timely notice of appeal on December 2, 2019. ROA.139. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

VDP sued St. Bernard Port under 28 U.S.C. § 1983 for failing to pay just compensation after taking VDP's property over nine years ago.¹ Since the property was taken, VDP has been litigating against St. Bernard Port through the Louisiana state court system, pursuing its state remedies for the taking. Nearly a year ago, the state courts ordered St. Bernard Port to pay significantly more for VDP's property than was tendered to VDP in 2010. The state court entered a final judgment against St. Bernard Port; yet, despite having over \$90,000,000.00 in net assets, St. Bernard Port has not paid it. St. Bernard Port contends that VDP has no right in either state or federal court to compel payment of that judgment, despite the requirements of the Fifth and Fourteenth Amendments of the U.S. Constitution. The issue presented is:

Did the district court err when it held as a matter of law that there is no federal cause of action under 42 U.S.C. § 1983 to compel a state actor to pay the just compensation award required by the Fifth and Fourteenth Amendments following entry of a state court judgment setting the amount of compensation that is due?

¹ VDP is not appealing or otherwise challenging the dismissal of defendant Drew M. Heaphy.

STATEMENT OF THE CASE

A. Introduction

“The Takings Clause of the Fifth Amendment states that ‘private property [shall not] be taken for public use, *without just compensation.*’” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (emphasis added). “[A] government violates the Takings Clause when it takes property without compensation.” *Id.* at 2177. “[A] property owner may bring a Fifth Amendment claim under § 1983 at that time.” *Id.*²

Prior to *Knick*, the Supreme Court required property owners to exhaust state remedies before seeking relief in federal court, but the Court never held that federal court relief was unavailable in cases where the state procedures failed to provide just compensation:

if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson Cty. Reg’l Planning Comm’n v. Hamilton Ban of Johnson City, 473 U.S. 172, 195 (1985), *overruled by Knick*, 139 S.Ct. at 2167.

Here, VDP alleged that St. Bernard Port took VDP’s property, failed to pay just compensation at the time of the taking, and after VDP exhausted the state

² The Fifth Amendment directs that “private property” shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. The Fifth Amendment applies to the states by operation of the Fourteenth Amendment. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122-23 (1978).

The Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

procedures available to seek just compensation, St. Bernard Port violated VDP's constitutional rights once again by failing to pay the just compensation judgment. The district court expressly recognized that VDP would have stated a viable Section 1983 claim to seek compensation for the taking of its property if this case had arisen post-*Knick*. ROA.136. However, the district court held that VDP failed to state a claim because VDP pursued state court remedies through a final judgment in VDP's favor. ROA.135. The fundamental flaw in the district court's analysis is that VDP has yet to be justly compensated for the taking of its property. An unpaid paper judgment is no substitute for the just compensation required by the Fifth and Fourteenth Amendments.

B. Factual Background

1. St. Bernard Port expropriated VDP's private port, knowing that VDP believed St. Bernard Port was grossly undervaluing the Property.

St. Bernard Port is a principally self-funded political subdivision, with the authority to tax, issue bonds, and buy and sell property. ROA.9-10 (§XXI). St. Bernard Port has over \$91 million in net assets. ROA.11 (§XXIV). It also generates substantial revenues from using VDP's former property, including revenues from customers, like the U.S. Navy, that previously were under contract with VDP. ROA.9 (§XX). St. Bernard expropriated VDP's property in 2010. ROA.6 (§VI). It has the financial ability to pay the full amount of the judgment it was ordered to pay as just compensation for taking VDP's property. ROA.11 (§XXIV).

For several decades before St. Bernard Port took its Property, VDP operated a commercial marine business on its wholly-owned, 75-acre private port facility in Violet, Louisiana, downriver from New Orleans. The Property's unique features—including one mile of Mississippi River, railroad, and highway frontage, and the five heavy-duty, deep-water docks and related infrastructure—rendered the property indispensable to VDP's long-standing commercial marine business. ROA.6 (§VII). When St. Bernard Port took VDP's property, it put VDP out of business.

In 2010, when St. Bernard Port expropriated the property, it deposited \$16 million into the registry of the St. Bernard Parish court. ROA.6 (§VI). St. Bernard Port knew that VDP believed its Property was worth far in excess of \$16 million, even before St. Bernard Port filed its Petition for Expropriation. ROA.7 (§X). Indeed, on September 24, 2010, VDP's counsel notified St. Bernard Port that VDP's improvements alone were valued in excess of \$35 million. ROA.7 (§X). St. Bernard Port elected to expropriate the Property anyway, and it assured VDP that it could and would pay any just compensation award rendered in VDP's favor, even if the final compensation judgment was tens of millions of dollars more than the \$16 million deposited at the time of expropriation. ROA.7 (§XII).

2. VDP obtained a final state court judgment establishing the amount of just compensation due to VDP, but St. Bernard Port has failed and refused to pay that judgment.

On September 12, 2018, almost eight years after St. Bernard Port expropriated the Property, a five-judge panel of the Louisiana Fourth Circuit Court of Appeals

held that just compensation for the Property was \$28,764,685.00—more than \$12 million more than St. Bernard Port’s 2010 deposit—plus interest and attorney’s fees. ROA.23. The parties subsequently resolved the remaining issues through a Consent Judgment awarding VDP an additional sum of \$3,342,626.90 for its attorneys’ fees, expert fees, and costs incurred in the state court expropriation litigation. ROA.24. The Louisiana Fourth Circuit’s award became final and executory on February 20, 2019, after the Louisiana Supreme Court denied writs. ROA.8 (§XVI).

It has been more than a year since the Louisiana Fourth Circuit Court of Appeals increased the amount of compensation due to VDP, and nearly one year since a final judgment was rendered by the St. Bernard Parish court. Yet St. Bernard Port has failed to pay the just compensation awarded by the Louisiana courts. As of July 8, 2019, St. Bernard Port owed VDP \$21,609,508.33, with interest accruing at \$2,298.06 per day. ROA.9 (§XVIII).

C. Procedural History

1. The state court litigation between VDP and St. Bernard Port is complete.

This case has a lengthy procedural history in the Louisiana state courts. When this dispute began, VDP was bound by the state court exhaustion requirement imposed by *Williamson County*, which prevented VDP from directly seeking relief in federal court until after it had concluded the state court proceedings challenging

the just compensation award.³ There are many published opinions in this matter, but two are particularly noteworthy. On January 30, 2018, the Louisiana Supreme Court upheld the authority of St. Bernard Port to take VDP's property, but it vacated the St. Bernard Parish court's judgment on just compensation because of errors in calculating the amount due to VDP. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So.3d 243 (La. 2018). On remand, the Louisiana Fourth Circuit Court of Appeals issued its opinion greatly increasing the amount of compensation due to VDP. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 255 So.3d 57 (La. App. 4 Cir. 2018). Those opinions provide a good introduction to this case, including its procedural history through the state court system.

After final judgment was rendered by the St. Bernard Parish court, VDP made demand for payment on St. Bernard Port. ROA.9 (¶XIX). VDP also waited for a reasonable period of time to give St. Bernard Port an opportunity to pay the judgment. St. Bernard Port did not pay it or take any steps to arrange for payment. St. Bernard Port's position has been that there is nothing that VDP could do to enforce its judgment against the Port in state court.

³Although *Williamson County* was an inverse condemnation case, federal courts recognized that its requirements applied to cases involving a physical taking, too. See *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 513 (2d Cir. 2014) ("While *Williamson County* applies to regulatory and physical takings alike, a physical taking in itself satisfies the need to show finality.")

2. VDP sued in federal court after St. Bernard Port failed to pay the just compensation ordered to be paid by the Louisiana state courts.

While VDP was waiting for payment, the Supreme Court decided *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), which overruled *Williamson County's* state court exhaustion requirements, thereby making it easier for a claimant to seek relief in federal court to remedy an uncompensated taking of its property.

By the time the *Knick* decision was issued, VDP had already employed the state court procedures and had already obtained a final judgment in state court quantifying the just compensation to which it was entitled for the taking of its Property. Yet, VDP's compliance with the state procedures did not result in payment of just compensation. Instead, VDP has been denied just compensation by St. Bernard Port's refusal to pay.

A paper judgment is not the same as the "just compensation" required by the Fifth Amendment. VDP does not seek to re-litigate the issues decided in the state courts. This case concerns an independent Takings Clause violation—the failure to timely pay just compensation once that amount is finally determined. After *Knick*, VDP should not be forced to spend several more years in litigation trying to collect a judgment in state court, as St. Bernard Port attempts to assert every state procedural roadblock it can to obstruct collection efforts. Under the Supremacy Clause, state procedural hurdles should not bar collection of a federal court judgment protecting a federal constitutional right.

VDP sued St. Bernard Port alleging a violation of 42 U.S.C. § 1983 based on the facts set forth above. ROA.1-13. VDP alleged that: “The duty to pay an award of just compensation for the expropriation of property for a public purpose is mandatory and required by law—namely, the self-executing provisions of the Fifth Amendment of the United States Constitution, as applied to the States through the 14th Amendment, and failure to pay just compensation is a violation of same and 42 U.S.C. § 1983, et seq.” ROA.11. VDP concluded that: “The failure of Defendants to pay just compensation, pursuant to final adjudication by the Louisiana State courts ... is a knowing, willful, and ongoing violation of Plaintiff’s rights guaranteed under the Constitution and 42 U.S.C. §1983, et seq.” ROA 12.

3. The district court granted St. Bernard Port’s motion to dismiss.

St. Bernard Port moved to dismiss VDP’s complaint under Fed. R. Civ. P. 12(b)(6). ROA.43. St. Bernard Port argued that the constitutional mandate to pay just compensation for the taking of property is “discretionary,” and payment of a judgment awarding just compensation cannot be compelled by *any* court. ROA.60 (“any such payment is not mandatory and St. Bernard Port has discretion to decide whether or not to pay for expropriated lands from unappropriated funds under its control”).

The district court granted St. Bernard Port’s motion on November 23, 2019. ROA.138. The entirety of the district court’s legal analysis is, as follows:

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

The Court further notes that the Supreme Court's recent opinion in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177, (2019) does not alter this ruling. *Knick* overruled the state-exhaustion requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to permit landowners to bring a Fifth Amendment claim under § 1983 as soon as a local government takes property without compensation. "[B]ecause the violation is complete at the time of the taking," the Court held that "pursuit of a remedy in federal court need not await any subsequent state action." *Knick* at 2177. Plaintiff contends that it should not be penalized for exhausting state court remedies while *Williamson* was still the law of the land. Rec. Doc. 9 at 10. The Court recognizes that if *Knick's* [sic] had been issued before the expropriation of plaintiff's property, plaintiff could have proceeded directly to federal court. Nevertheless, *Knick* does not convert § 1983 into a tool for collecting payment due on state court judgments that issued prior to initiation of the federal action.

ROA.135-136. The three cases cited in the first paragraph involved attempts to collect state tort judgments, which have nothing to do with the just compensation owed under the Constitution following a taking. ROA.135. The district court offered no additional insight into its reasons for dismissing VDP's claims with prejudice, other than to acknowledge that, if VDP's dispute arose today, VDP would have had the right to sue directly in federal court, given the change in law effected by *Knick*. ROA. 136. VDP appeals the district court's judgment. ROA.139.

SUMMARY OF THE ARGUMENT

The Fifth Amendment requires payment of just compensation when private property is taken by the government for public use. Government may not take property without paying for it. Here, St. Bernard Port has over \$90 million in net assets. It runs business operations that generate millions in revenue, including from running VDP's former docks and servicing VDP's former customers. Yet, St. Bernard Port has failed and refused to pay the bill for the property that was taken.

When VDP's property was taken, controlling authority required VDP to proceed through the state court system to exhaust state remedies before a federal claim would ripen. VDP exhausted those remedies, which took nine years. In place of its physical property, VDP now has a paper judgment valued at over \$20 million, which has not been paid. Substituting a paper judgment for property taken by the government is not the just compensation due under the Fifth Amendment. Instead,

the government's failure to pay the compensation judgment within a reasonable period of time is in itself a violation of the Fifth and Fourteenth Amendments.

VDP has stated a claim for relief under Section 1983. The district court's judgment should be reversed.

STANDARD OF REVIEW

This Court conducts a *de novo* review of the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *See Clyce v. Butler*, 876 F.3d 145, 148 (5th Cir. 2017). The Court must "accept as true all well pleaded facts ... and the complaint is to be liberally construed in favor of the plaintiff." *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). Further, "[a]ll questions of fact and any ambiguities in the controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). A court ruling on a Rule 12(b)(6) motion may rely only upon the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citing *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)).

When considering a motion to dismiss under Rule 12(b)(6), the Court should not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim would entitle him to relief. *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). A "well-pleaded complaint may proceed even if

it appears that a recovery is very remote and unlikely.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Although a district court’s denial of a motion for leave to amend is generally reviewed for abuse of discretion, where, as here, the denial of leave to amend was based solely on futility, this Court instead applies a *de novo* standard of review identical in practice to the Rule 12(b)(6) standard. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). When a party seeks leave from the court to amend and justice requires it, the district court should freely give it, and refusal to do so is error. Fed. R. Civ. P. 15(a)(2).

ARGUMENT

A. VDP stated an actionable claim under 42 U.S.C. § 1983 because the Fifth Amendment requires payment of just compensation without unreasonable delay.

Section 1983 provides a federal cause of action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. Here, St. Bernard Port’s conduct deprived VDP of its right to just compensation secured by the Fifth and Fourteenth Amendments.

When the government “physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.” *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (internal quotation marks and citation omitted). Although the Supreme Court does not require that payment precede the taking, it has clarified that a quick taking does not violate due process

under the Fourteenth Amendment “where adequate provision is made for the *certain payment* of the compensation *without unreasonable delay*.” *Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (emphasis added). Thus, while courts have accepted that just compensation need not be paid prior to, or at, the exact time of the taking:

[I]t has never been said that just compensation was to be paid for less than all the property or that it could be paid in installments. Postponement of the date of payment is often required by judicial delays, but the taking of property envisages the pledge of the faith of the nation to make just compensation.

United States v. Bauman, 56 F.Supp. 109, 115 (D. Or.1943); *see also Wileman v. Wade*, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ) (same); *McGibson v. Roane County Court*, 121 S.E. 99, 103 (W. Va. 1924) (where land is taken by condemnation proceedings, “there must be ... some remedy to the owner whereby he may have compensation within a reasonable time ... he must not be put to risk or unreasonable delay”); *West Virginia Dept. of Highways v. Arbogast*, 201 S.E.2d 492, 494-95 (W. Va. 1973) (same); *Maury County v. Porter*, 257 S.W.2d 16, 17 (Tenn. 1953) (law delaying trial on just compensation until 12 months after the project’s completion was unconstitutional, because “adequate provision should be made for the payment of damages to the land owner without unreasonable delay”).⁴

⁴A taking that is declared valid based upon a promise of prompt payment may later be declared unconstitutional if the government does not keep its promise. *See In re Fifth Avenue Coach Lines, Inc.*, 219 N.E.2d 410, *modified*, 221 N.E.2d 174 (N.Y. 1966). In *In re Fifth Avenue Coach Lines, Inc.*, the city failed to pay just compensation for a taking that had previously been deemed to be constitutional. At that point, four years later, the Court of Appeals warned the city that the city’s failure to pay “on alleged statutory grounds” was “verging” on invalidating the taking. 221 N.E.2d at 742-43. The court declared that the city should “now” pay the judgment, because “[o]nly by

Payment of just compensation cannot be deferred to some indefinite, later date years into the future. To the contrary:

Just compensation ... means exactly what it says, and it means that the owner himself is entitled to receive his compensation; not that his estate or his children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future.

United States v. 9.94 Acres of Land in City of Charleston, 51 F.Supp. 478, 483-84 (E.D.S.C. 1943) (quoted in *Bauman*, 56 F.Supp. at 115); *Wileman*, 665 S.W.2d at 520.

VDP was constitutionally entitled to “*certain payment* of the compensation *without unreasonable delay*.” *Bragg*, 251 U.S. at 62 (emphasis added). The state court judgment memorialized and quantified the just compensation to which VDP is entitled, but it did not result in payment of the compensation that was due.

As a result of St. Bernard Port’s unlawful refusal to pay, VDP is now left without its Property, without its business, and without any certainty at all that it will ever be paid just compensation for its property. Although St. Bernard Port contends that the obligation to pay just compensation is not mandatory, ROA.60, the Fifth Amendment’s language is expressly to the contrary. This Court should recognize that a Section 1983 claim is available when state actors take private property but fail to pay the state court judgment establishing the amount of compensation due.

making adequate provision for prompt payment without unreasonable delay do we ensure that the taking does not contravene or violate the claimants’ right to due process of law guaranteed by our Constitution....” *Id.* at 743.

B. VDP’s claim is properly in federal court under either *Williamson County*, which applied when the dispute began, or under *Knick*, which is the standard that applies today.

Regardless of whether the old law or new law is applied, VDP’s claim is properly before the federal courts. There is no merit to the district court’s implicit assumption that VDP may be deprived of its federal remedies, just because VDP followed the law in existence at the time St. Bernard Port took its property.

1. VDP’s claim is viable under *Williamson County*.

Prior to the Supreme Court’s decision in *Knick*, a federal takings claim against a state governmental entity was not ripe until a plaintiff had first exhausted all procedures and remedies that the state provided. *Williamson County*, 473 U.S. at 194-95. The Supreme Court held:

[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process “yield[s] just compensation,” then the property owner “has no claim against the Government” for a taking. ... [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. (citations omitted). Thus, under *Williamson County*, “[w]hen the state provides a procedure by which a party may seek just compensation ... the plaintiff must seek relief in state court before bringing a claim in federal court.” *Adam Bros. Farming, Inc. v. Cty. of Santa Barbara*, 604 F.3d 1142, 1147-48 (9th Cir. 2010).

By that same holding, the Supreme Court made it clear that it was not barring the ability to bring a federal claim. *See Knick*, 139 S.Ct. at 2167 (“The *Williamson*

County Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a ‘ripe’ federal takings claim in federal court.”). In subsequent cases such as *San Remo Hotel*, however, property owners were prohibited by claim preclusion from re-litigating issues in the federal courts that were already decided in the state courts. *San Remo Hotel, L.P. v. City and Cty of San Francisco*, 545 U.S. 323, 347 (2005).

Here, VDP is not seeking to re-litigate any issue decided by the state court. VDP recognizes that the state court’s holdings on the constitutionality of St. Bernard Port’s taking and the amount of compensation that is due are binding here. Instead, VDP is seeking to compel payment of the just compensation judgment, which is exactly what the *Williamson County* Court anticipated could be done following the exhaustion of state remedies. Though *Knick* overruled the exhaustion requirement, there is nothing in *Knick* that precludes seeking relief in federal court when state court procedures and remedies prove unable to secure payment of compensation as required under the Fifth and Fourteenth Amendments.

VDP is aware of no federal court cases that have rejected a Section 1983 claim, such as this one, involving a state actor refusing to pay just compensation awarded by the state courts. Neither St. Bernard Port nor the district court have cited any authority holding that a claim such as VDP’s is not actionable.

Even before *Knick*, Louisiana federal courts recognized that a Section 1983 action was proper to remedy a local government’s taking of private property, even

when the taking is reflected by a state court judgment. *See, e.g., Vogt v. Board of Commissioners of the Orleans Levee District*, No. 00–3195, 2002 WL 31748618 (E.D. La. Dec. 5, 2002). In *Vogt*, the district court held that the Levee District’s failure to pay a state court judgment awarding just compensation for a taking itself effected an unconstitutional taking that could be remedied via a Section 1983 action. 2002 WL 31748618, at *4.

In *Vogt*, the court observed that the Levee District “has not satisfied the [state court] judgment, and the plaintiffs have been unsuccessful in securing any relief under Louisiana law.” 2002 WL 31748618, at *4. The court concluded that “[i]t is evident that just compensation has been denied by the defendants, and, as such, a violation of the Fifth Amendment of the United States Constitution has occurred,” and held that the landowner could properly seek relief under Section 1983 “for an ‘uncompensated taking.’” *Id.* at *9.

The same result should apply here. St. Bernard Port violated VDP’s Fifth and Fourteenth Amendment rights when it took VDP’s property, and it violated those rights once again when St. Bernard Port failed to pay the compensation judgment issue to remedy the first constitutional violation. Section 1983 is the proper vehicle to remedy those constitutional violations in federal court.

2. VDP also stated a claim in accordance with *Knick*.

Knick recently reaffirmed the importance of there being a federal court remedy to protect private owners against Fifth and Fourteenth Amendment

violations. *Knick* reemphasized that the Fifth Amendment’s Just Compensation Clause is to be taken seriously and not as “‘a poor relation’ among the provisions of the Bill of Rights.” *Knick*, 139 S. Ct. at 2169. *Knick* also reaffirmed that a landowner “‘is entitled to reasonable, certain and adequate provision for obtaining compensation’ after a taking.” *Id.* at 2175 (quoting *Cherokee Nation v. S Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). As explained by the Court, “[t]he Framers meant to prohibit the Federal Government from *taking* property without paying for it. Allowing the government to *keep* the property pending subsequent compensation to the owner ... was not what they envisioned.” *Id.* at 2176 (emphasis in original). For over a hundred years, the Court has recognized that these rules apply to state actors.

With regard to state law remedies for seeking just compensation, the Court explained:

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

Id. at 2171. The Court specifically rejected the view that there are “§ 1983-specific” requirements beyond what the Constitution provides. *Id.* at 2175 n.6.

The Court overturned *Williamson County*'s exhaustion requirement, finding that it was unworkable and inequitable, because it often placed landowners in a "Catch-22" situation in which they were prevented from ever bringing otherwise valid Fifth Amendment claims. The Court opined that "*Williamson County* effectively established an exhaustion requirement for § 1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit." *Knick*, 139 S. Ct. at 2173. The Court concluded that "the state-litigation requirement [set forth in *Williamson*] imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Id.* at 2167.

Here, the district court acknowledged that, if *Knick* "had been issued before the expropriation of plaintiff's property, plaintiff could have proceeded directly to federal court." ROA. 136. However, it inexplicably failed to recognize that the same rule applies here. Given that the Supreme Court's intent in overturning *Williamson County* was to ensure an adequate forum for resolution of Fifth Amendment takings claims, the district court defied both the letter and the spirit of *Knick* by depriving VDP of a federal forum to resolve its Section 1983 claim.

C. The district court erred by basing its decision on cases involving payment of a tort judgment rather than takings cases.

The district court erred by relying upon inapplicable personal injury cases addressing the collectability of personal injury judgments rendered against governmental entities. ROA.135 (district court’s Order and Reasons, citing *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 132 (5th Cir. 1986); *Guilbeau v. Par. of St. Landry*, 2008 WL 4948836, at *10 (W.D. La. Nov. 19, 2008), *aff’d*, 341 F. App’x 974 (5th Cir. 2009); and *Davis v. Cantrell*, 2018 WL 6169255, at *5 (E.D. La. Nov. 26, 2018)). All three cases hinge upon the applicability of La. Const. Art. XII, § 10 and La. Rev. Stat. § 13:5109(B)(2), which have no application to a judgment mandating compliance with a federal Constitutional duty to pay just compensation.

In *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986), *supra*, plaintiff filed a Section 1983 suit asserting a wide variety of claims arising out of the School Board’s refusal to pay a tort judgment for personal injuries caused by a school bus accident. The district court dismissed plaintiff’s suit for failure to state a claim. *Id.* at 130. This Court reversed and reinstated the suit, except for plaintiff’s due process claim. The Court held “that the property right created by a judgment against a government entity is not a right to payment at a particular time but merely the recognition of a continuing debt of that government entity.” *Id.* at 132 (citing a 19th century case involving the collection of a tort judgment, *State of Louisiana ex rel. Folsom v. Mayor, Etc., of the City of New Orleans*, 109 U.S. 285

(1883)). VDP's rights, however, derive not simply from a judgment, but also from the Fifth Amendment's protection against property being taken without just compensation. The tort claims and judgments at issue in *Folsom* and *Minton* implicated no constitutional rights.

In *Guilbeau v. Par. of St. Landry*, 2008 WL 4948836, at *10 (W.D. La. Nov. 19, 2008), *aff'd*, 341 F. App'x 974 (5th Cir. 2009), plaintiff sought payment of a judgment for personal injuries sustained on a negligently-maintained road. Defendant sought to dismiss plaintiff's claims based upon La. R.S. 13:5109 and the language from *Minton* discussed above. Plaintiff responded that La. R.S. 13:5109(B)(2) was preempted by the Highway Safety Act of 1966, 23 U.S.C. § 402. The district court and this Court disagreed, finding the federal statute did not preempt state law. The district court, although finding the lack of payment to be "troubling" (*Id.* at 14), followed *Minton* and found that there was no right to mandate immediate payment of the judgment. *Id.* at p. 10.

Davis v. Cantrell, 2018 WL 6169255, at *5 (E.D. La. Nov. 26, 2018) also involved the government's non-payment of a tort judgment for personal injuries. As in *Minton*, and unlike the present case, the court did not grant defendant's motion to dismiss in its entirety. It found that plaintiff was entitled to assert an equal protection claim under the Fourteenth Amendment. Regardless, *Davis* is entirely inapposite, because, as the court noted, plaintiff did not seek to collect the judgment; rather, he challenged the manner in which the city had deviated from its ordinary procedure in

paying judgments in the order they were rendered. Citing *Minton* and *Freeman Decorating Co. v. Encuentro Las Americas Trade Corp.*, 352 F. App'x 921, 924 (5th Cir. 2009) (which relied on both *State of Louisiana ex rel. Folsom* and *Minton*), the court found that plaintiff had no right to payment of the personal injury at a particular time. *Id.* at 11. The court, however, explicitly noted that a federal court will enforce a state court judgment where, as here, a “federal interest is implicated.” *Id.*

The district court committed legal error by relying on cases that did not involve a constitutional right or involve an overriding federal interest in enforcing federal constitutional protections such as the Fifth Amendment right to just compensation. In addition, by finding these cases to be applicable, the district court must have accepted as true St. Bernard Port’s factual assertion made in its Motion that it had not in fact appropriated funds to pay the judgment.⁵ By considering facts that fell outside of the Complaint and its attachments, the district court erred in a manner that implicated its legal conclusions, as well.

D. State law does not—and cannot—immunize St. Bernard Port from its constitutional obligation to pay just compensation.

Under Louisiana law, takings judgments are treated differently from tort judgments. Unlike payment of tort judgments, the constitutional duty to pay just compensation for the taking of property is not discretionary. *See, e.g. Jazz Casino Co., L.L.C. v. Bridges*, 2016-1663 (La. 5/3/17), 223 So.3d 488; *Parish of St. Charles*

⁵ VDP timely objected to St. Bernard Port’s asserting facts not properly before the Court. ROA.72.

v. R.H. Creager, Inc., 10–180 (La. App. 5 Cir. 12/14/10), 55 So.3d 884, writ denied, 2011–0118 (La. 4/1/11), 60 So.3d 1250. Thus, local governmental authorities cannot use either La. Const. Art. XII, § 10(C) or La. R.S. 13:5109 to avoid their constitutional obligation to pay for expropriated property. *See Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349 (1936) (the just compensation clause “may not be evaded or impaired by any form of legislation”); *see also Bogorff v. Dep’t of Agriculture*, 191 So.3d 512, 516 (Fla. 4th DCA 2016) (rejecting the argument that statutes prohibiting payments of judgments absent appropriation of funds could trump the constitutional duty to pay just compensation, and clarifying that, while the government may “establish procedures for payment of its constitutional obligation, it does not have the luxury of avoiding it”).

For example, in *Parish of St. Charles v. R.H. Creager, Inc.*, 10–180 (La. App. 5 Cir. 12/14/10), 55 So.3d 884, writ denied, 2011–0118 (La. 4/1/11), 60 So.3d 1250, the Parish argued, as St. Bernard Port did here, that it could not be compelled to pay an expropriation judgment “unless the money for payment of the judgment has been specifically allocated.” *Id.* at 891. The court explicitly rejected this argument, holding that the trial court erred “by failing to consider that this matter does not involve a money judgment obtained against the Parish as the result of an action brought against the Parish in a tort or contract action;” rather it “results from an action taken pursuant to the Parish’s power of eminent domain.” *Id.* at 890. The court concluded that this distinction “requires a different analysis and outcome.” *Id.*

These authorities further confirm that the district court erred by relying upon a line of cases addressing the ability to collect upon state court tort judgments.

E. The district court erred by failing to provide VDP with an opportunity to amend its Complaint.

“[A] court ordinarily should not dismiss the complaint except after affording every opportunity to the plaintiff to state a claim upon which relief might be granted.” *Byrd v. Bates*, 220 F.2d 480, 482 (5th Cir. 1955); see also *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (recognizing that district courts commonly “afford plaintiffs at least one opportunity to cure pleading deficiencies”). In its Opposition to St. Bernard Port’s Motion to Dismiss, VDP stated its belief that its claims were adequately pleaded, but requested leave to amend if the Court disagreed. ROA. 91. The district court erred in summarily rejecting VDP’s request on grounds that amendment would be futile.

CONCLUSION

The Fifth Amendment does not leave payment of just compensation to the government's discretion to pay whenever it feels like it, if at all. St. Bernard Port's position that it can pay the just compensation awards whenever it wishes is a deprivation of VDP's constitutional right to certain payment of just compensation without unreasonable delay. As such, the district court's final judgment of dismissal with prejudice is not legally sound, does not withstand constitutional scrutiny, and should be reversed. This case should be remanded to the district court for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. In accordance with Fed. R. App. P. 32(g)(1), this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because

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- ☐ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 pt. Times New Roman.

/s/ W. Scott Hastings

W. Scott Hastings

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No. 19-30992

**In the United States Court of Appeals
for the Fifth Circuit**

**VIOLET DOCK PORT, INCORPORATED, L.L.C.,
Plaintiff – Appellant**

v.

**DREW M. HEAPHY, in his capacity as Executive Director of St. Bernard
Port, Harbor & Terminal District; ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT,
Defendants – Appellees**

**Appeal from the United States District Court for the Eastern District of Louisiana,
No. 19-CV-11586, the Hon. Ivan L.R. Lemelle, District Judge, presiding**

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New Orleans, this 3rd day of February, 2020.

/s/ W. Scott Hastings

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TAB 1

APPEAL,CLOSED

[Jump to Docket Table](#)

**U.S. District Court
Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 2:19-cv-11586-ILRL-DMD**

Violet Dock Port, Inc., L.L.C. v. Heaphy et al
Assigned to: Judge Ivan L.R. Lemelle
Referred to: Magistrate Judge Dana Douglas
Cause: 42:1983 Civil Rights Act

Date Filed: 07/09/2019
Date Terminated: 11/25/2019
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
07/09/2019	<u>1 (p.5)</u>	COMPLAINT against All Defendants (Filing fee \$ 400 receipt number 053L-7745044) filed by Violet Dock Port, Inc., L.L.C. (Attachments: # <u>1 (p.5)</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3 (p.31)</u> Civil Cover Sheet, # <u>4 (p.35)</u> Summons St. Bernard Port, # <u>5 (p.37)</u> Summons Heaphy)Attorney Randall A. Smith added to party Violet Dock Port, Inc., L.L.C.(pty:pla).(Smith, Randall) Modified text on 7/11/2019

		(jls). (Entered: 07/09/2019)
07/09/2019	2	Initial Case Assignment to Judge Ivan L.R. Lemelle and Magistrate Judge Dana Douglas. (cc) (Entered: 07/09/2019)
07/11/2019	<u>3 (p.31)</u>	Summons Issued as to Drew M. Heaphy and St. Bernard Port, Harbor & Terminal District. (Attachments: # <u>1 (p.5)</u> Summons)(jls) (Entered: 07/11/2019)
07/16/2019	<u>4 (p.35)</u>	SUMMONS Returned Executed; Drew M. Heaphy served on 7/15/2019, answer due 8/5/2019. (Smith, Randall) (Entered: 07/16/2019)
07/16/2019	<u>5 (p.37)</u>	SUMMONS Returned Executed; St. Bernard Port, Harbor & Terminal District served on 7/15/2019, answer due 8/5/2019. (Smith, Randall) (Entered: 07/16/2019)
08/02/2019	<u>6 (p.39)</u>	EXPARTE/CONSENT MOTION for Extension of Time to Answer re <u>1 (p.5)</u> Complaint, by Drew M. Heaphy, St. Bernard Port, Harbor & Terminal District. (Attachments: # <u>1 (p.5)</u> Proposed Order)Attorney James M. Garner added to party Drew M. Heaphy(pty:dft), Attorney James M. Garner added to party St. Bernard Port, Harbor & Terminal District(pty:dft).(Garner, James) (Entered: 08/02/2019)
08/05/2019	<u>7 (p.42)</u>	ORDER: IT IS ORDERED that the <u>6 (p.39)</u> motion is GRANTED. Defendants shall file responsive pleadings no later than August 26, 2019. Signed by Judge Ivan L.R. Lemelle on 08/05/2019. (am) (Entered: 08/05/2019)
08/26/2019	<u>8 (p.43)</u>	MOTION to Dismiss for Failure to State a Claim by Drew M. Heaphy, St. Bernard Port, Harbor & Terminal District. Motion(s) will be submitted on 9/11/2019. (Attachments: # <u>1 (p.5)</u> Memorandum in Support, # <u>2</u> Notice of Submission)(Garner, James) (Entered: 08/26/2019)
09/03/2019	<u>9 (p.69)</u>	RESPONSE/MEMORANDUM in Opposition filed by Violet Dock Port, Inc., L.L.C. re <u>8 (p.43)</u> MOTION to Dismiss for Failure to State a Claim . (Smith, Randall) (Entered: 09/03/2019)
09/06/2019	<u>10 (p.94)</u>	FILED IN ERROR--DISREGARD--Minute Entry for proceedings held before Magistrate Judge Dana Douglas: Scheduling Conference held on 9/6/2019. Final Pretrial Conference set for 4/27/2020 02:00 PM before Magistrate Judge Dana Douglas. Jury Trial set for 5/11/2020 08:30 AM before Magistrate Judge Dana Douglas. All discovery must be completed by 2/27/2020. (Attachments: # <u>1 (p.5)</u> Pretrial Notice Form) (cg) Modified on 9/6/2019 (cg). (Entered: 09/06/2019)
09/06/2019	11	Correction of Docket Entry by Clerk re <u>10 (p.94)</u> Scheduling Conference. Please DISREGARD this notice. It was filed into the wrong case. (cg) (Entered: 09/06/2019)
09/11/2019	<u>12 (p.107)</u>	EXPARTE/CONSENT MOTION for Leave to File <i>Reply Memorandum In Support of Defendants' Motion to Dismiss</i> by Drew M. Heaphy, St. Bernard Port, Harbor & Terminal District. (Attachments: # <u>1 (p.5)</u> Proposed Order, # <u>2</u> Proposed Pleading Reply Memorandum in Support of Motion to Dismiss)(Garner, James) (Entered: 09/11/2019)
09/13/2019	<u>13 (p.120)</u>	ORDER granting <u>12 (p.107)</u> Motion for Leave to File Reply. Signed by Judge Ivan L.R. Lemelle on 9/11/19. (ko) (Entered: 09/13/2019)
09/13/2019	<u>14 (p.121)</u>	REPLY to Response to Motion filed by Drew M. Heaphy, St. Bernard Port, Harbor & Terminal District re <u>8 (p.43)</u> MOTION to Dismiss for Failure to State a Claim . (ko) (Entered: 09/13/2019)
11/25/2019		

	<u>15</u> (p.131)	ORDER AND REASONS granting <u>8 (p.43)</u> Motion to Dismiss for Failure to State a Claim. Signed by Judge Ivan L.R. Lemelle on 11/23/19. (ko) (Entered: 11/25/2019)
11/25/2019	<u>16</u> (p.138)	JUDGMENT entered in favor of St. Bernard Port, Harbor & Terminal District, Drew M. Heaphy against Violet Dock Port, Inc., L.L.C. Signed by Judge Ivan L.R. Lemelle on 11/23/19.(ko) (Entered: 11/25/2019)
12/02/2019	<u>17</u> (p.139)	NOTICE OF APPEAL re <u>16 (p.138)</u> Judgment by Violet Dock Port, Inc., L.L.C. (Filing fee \$ 505, receipt number ALAEDC-8001944.) (Smith, Randall) Modified text/link on 12/3/2019 (pp). (Entered: 12/02/2019)
12/02/2019	<u>18</u> (p.140)	APPEAL TRANSCRIPT REQUEST by Violet Dock Port, Inc., L.L.C. re <u>17 (p.139)</u> Notice of Appeal. (Transcript is unnecessary for appeal purposes) (Smith, Randall) (Entered: 12/02/2019)

Violet Dock Port, Inc., L.L.C. v. Heaphy et al (2:19-cv-11586-ILRL-DMD)

TAB 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

VIOLET DOCK PORT, INC., L.L.C.

CIVIL ACTION NO. 19-CV-11586

versus

JUDGE IVAN L.R. LEMELLE

**MAGISTRATE JUDGE DANA
DOUGLAS**

**DREW M. HEAPHY, IN HIS
CAPACITY AS EXECUTIVE
DIRECTOR OF ST. BERNARD PORT,
HARBOR & TERMINAL DISTRICT,
AND ST. BERNARD PORT, HARBOR
& TERMINAL DISTRICT**

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Violet Dock Port, Inc., L.L.C. (“VDP”), appeals to the United States Court of Appeals for the Fifth Circuit from the final Judgment of dismissal with prejudice dated November 23, 2019 (entered November 25, 2019).

RESPECTFULLY SUBMITTED:

/s/ *Randall A. Smith*

RANDALL A. SMITH, T.A. (#2117)

L. TIFFANY HAWKINS (#20855)

MARY NELL BENNETT (#32339)

Of

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Counsel for Violet Dock Port, Inc., LLC

TAB 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VIOLET DOCK PORT INC., LLC

CIVIL ACTION

VERSUS

NO. 19-11586

DREW M. HEAPHY, IN HIS CAPACITY
AS EXECUTIVE DIRECTOR OF ST. BERNARD
PORT, HARBOR & TERMINAL, AND
ST. BERNARD PORT, HARBOR, & TERMINAL

SECTION "B"(3)

JUDGMENT

Entry of final judgment is proper because the Court dismissed plaintiff's claims against defendant with written reasons. Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that final judgment is hereby entered **DISMISSING WITH PREJUDICE** plaintiff's claims against defendant.

New Orleans, Louisiana this 23rd day of November 2019



SENIOR UNITED STATES DISTRICT JUDGE

TAB 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VIOLET DOCK PORT INC., LLC

CIVIL ACTION

VERSUS

NO. 19-11586

DREW M. HEAPHY, IN HIS CAPACITY
AS EXECUTIVE DIRECTOR OF ST. BERNARD
PORT, HARBOR & TERMINAL, AND
ST. BERNARD PORT, HARBOR, & TERMINAL

SECTION "B"(3)

ORDER AND REASONS

Defendants St. Bernard Port, Harbor & Terminal District ("St. Bernard Port") and Drew M. Heaphy, in his capacity as executive director of St. Bernard Port, filed a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6). Rec. Doc. 8. Violet Dock Port, Inc. ("Violet Dock") filed a response in opposition. Rec. Doc. 9. Defendant then sought, and was granted, leave to file a reply. Rec. Doc. 13. For the reasons discussed below,

IT IS ORDERED that the motion is **GRANTED** and plaintiff's claim is **DISMISSED WITH PREJUDICE**.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of St. Bernard Port's taking of Violet Dock's property. Defendant St. Bernard Port is a public corporation and political subdivision of the State of Louisiana and Drew Heaphy is its executive director. In December 2010, St. Bernard Port filed a state court petition for expropriation of Violet Dock's property along the Mississippi River in Violet, Louisiana, and deposited

\$16 million as estimated just compensation in the court's registry. Rec. Doc. 1 at 2; 1-1 at 4.

Violet Dock had constructed on the subject property a fully operational, private port facility with five steel and concrete docks, three of which were certified for providing services to Navy Military Sealift Command ships. Rec. Doc. 1-1 at 7. Violet Dock argued the \$16 million amount deposited by St. Bernard Port was insufficient and sought additional just compensation. Id. at 3. The state trial court sided with St. Bernard Port and awarded just compensation in the amount provided by St. Bernard Port, and the Louisiana Fourth Circuit Court of Appeal affirmed. Id. at 4.

The Louisiana Supreme Court subsequently reversed the just compensation award and remanded the matter to the Louisiana Fourth Circuit for a *de novo* determination of just compensation. Id. On remand on September 12, 2018, the Louisiana Fourth Circuit increased the trial court's award of just compensation to \$28,764,685.00 together with interest and attorneys' fees and remanded to the trial court for further proceedings. Id. On April 12, 2019 the trial court entered a Consent Judgment awarding plaintiff an additional sum of \$3,342,626.90 for attorneys' fees and costs, plus judicial interest from the date of the entry of the judgment until paid. Id. at 5.

On July 9, 2019 plaintiff filed the instant federal action under 42 U.S.C. § 1983 alleging violation of its Fifth Amendment

right to be paid just compensation for the taking of its property pursuant to the state courts' final judgments. Rec. Doc. 1 at 7. Plaintiff seeks \$21,609,508.33, which represents the amount due under the state courts' judgments after subtracting the \$16 million already paid by defendant, plus interest at a daily rate of \$2,298.06. Id. at 5.

LAW, ANALYSIS, AND FINDINGS

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff's complaint "must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Varela v. Gonzalez*, 773 F.3d 704, 707 (5th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). However, the court is not bound to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). When deciding whether a

plaintiff has met her burden, a court "accept[s] all well-pleaded factual allegations as true and interpret[s] the complaint in the light most favorable to the plaintiff, but '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements' cannot establish facial plausibility." *Snow Ingredients, Inc. v. SnowWizard, Inc.*, 833 F.3d 512, 520 (5th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

A. § 1983 Claims

"Section 1983 provides a cause of action when a person has been deprived of federal rights under color of state law". *Doe v. Dall. Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir.1998). "To state a § 1983 cause of action, a plaintiff must allege a violation of rights secured by the Constitution or by federal laws." *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 456 (5th Cir. 2010).

Plaintiff's § 1983 claim alleges a violation of its Fifth Amendment right to just compensation for the taking of its property. Rec. Doc. 1 at 7. There appears to be a contradiction between what was alleged in the complaint and what plaintiff claims in its opposition to defendant's motion. Plaintiff's complaint identifies the taking of its "seventy-five (75) acres of land and improvements, including five deep-water docks" without just compensation as the subject of its takings claim. Rec. Doc. 1 at 2. Yet, in its opposition, plaintiff indicates that the core issue

in the federal claim is only its entitlement to the state court's judgment. In an attempt to avoid preclusion, plaintiff clarifies that it is "not attempting to relitigate just compensation" and recognizes the state court's "just compensation award [a]s final and definitive." Rec. Doc. 9 at 20.

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

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

The Court further notes that the Supreme Court's recent opinion in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177, (2019) does not alter this ruling. *Knick* overruled the state-exhaustion requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to permit landowners to bring a Fifth Amendment claim under § 1983 as soon as a local government takes property without compensation. "[B]ecause the violation is complete at the time of the taking," the Court held that "pursuit of a remedy in federal court need not await any subsequent state action." *Knick* at 2177. Plaintiff contends that it should not be penalized for exhausting state court remedies while *Williamson* was still the law of the land. Rec. Doc. 9 at 10. The Court recognizes that if *Knick*s had been issued before the expropriation of plaintiff's property, plaintiff could have proceeded directly to federal court. Nevertheless, *Knick* does not convert § 1983 into a tool for collecting payment due on state court judgments that issued prior to initiation of the federal action.

Plaintiff concedes that its claims against Heaphy are based only upon his official capacity as executive director of the St. Bernard Port. The official capacity claims against Heaphy are

duplicative of claims against the St. Bernard Port. As such, the claims against Heaphy are also dismissed. *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001); *Winn v. New Orleans City*, 2014 WL 790870 (E.D. La. Feb. 26, 2014).

Finally, had instant § 1983 claims proceeded, the punitive damage claims against the St. Bernard Port and Heaphy in his official capacity would not survive beyond summary dismissal. See *Davis v. W. Cmty. Hosp.*, 755 F.2d 455, 459,467 (5th Cir. 1985); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099 (1985).

The Court also finds that granting leave to amend would be futile in this case, because additional facts would not remedy the legal insufficiency of plaintiff's claims.

New Orleans, Louisiana this 23rd day of November 2019


SENIOR UNITED STATES DISTRICT JUDGE

TAB 5

ST. BERNARD PORT, * NO. 2016-CA-0096
HARBOR & TERMINAL *
DISTRICT *
VERSUS * COURT OF APPEAL
VIOLET DOCK PORT, INC., * FOURTH CIRCUIT
LLC * STATE OF LOUISIANA
* * * * *

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0262
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., LLC

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0331
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT INC., LLC

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge
* * * * *

Judge Roland L. Belsome
* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge
Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

LOBRANO, J., DISSENTS WITH REASONS TO FOLLOW

JENKINS, J., DISSENTS

ON REMAND FROM THE LOUISIANA SUPREME COURT

September 12, 2018



James Michael Garner
Peter L. Hilbert, Jr.
Joshua Simon Force
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COUNSEL FOR *AMICI* PORT AUTHORITIES

AFFIRMED AS AMENDED AND REMANDED

This matter was remanded from the Louisiana Supreme Court for the determination of just compensation for the Violet Dock Port's expropriated property.¹ Over several years, St. Bernard Port ("the Port") negotiated with Violet Dock Port ("VDP") for the purchase of its property along the Mississippi River ("the Property"). After negotiations failed, the Port instituted expropriation proceedings pursuant to La. Const. art. I, §4.² The courts have determined that the taking of the Property was for a public purpose.³ Thus, in accordance with La. Const. art. I, §4(B)(1), VDP was due just compensation.

After a trial on the issue of just compensation, the trial court found that \$16,000,000 was just compensation for the expropriated property. In so finding,

¹ *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2017-0434 (La. 1/30/18) --So.3d--, 2018 WL 618831.

² La. Const. art. I, §4 reads in pertinent part:

Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

La. Const. Ann. art. I, § 4

³ *St. Bernard Port, supra*.

the trial court indicated it did not have the authority to “split the baby” and thus had to choose which party’s expert he was going to rely on. The trial court chose to adopt the valuation presented by the Port, which was the amount that had been deposited in the registry of the court. Reviewing that ruling under a manifest error/clearly wrong standard, this Court affirmed.⁴ The Supreme Court found that the trial court had made its ruling under an erroneous interpretation of the law. More specifically, the Supreme Court opined that the trial court was not bound by any one expert’s opinion in its entirety. Accordingly, this Court’s affirmation of just compensation was reversed. On remand, we have been directed to conduct a *de novo* review of the evidence in the record to arrive at a valuation of just compensation.

VDP has maintained throughout its appeals that the principles set forth by the Supreme Court in *State, Dept. of Highways v. Constant*, should guide the Court in determining just compensation.⁵ *Constant* recognized that the full extent of loss is not always satisfied by the market value analysis based upon comparable sales or other alternate methods that are used in place of fair market value. In *Constant*, the landowner was operating a marina business at the time that the highway department expropriated a portion of his land. The expropriated portion of land represented the entire loading and parking area of the business. It was established that the loading and parking area was indispensable to the landowner’s marina business. The Court noted that the property was unique because the barge slip and adjacent area was the only site available for the commercial loading of heavy

⁴ *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2016-96, 2016-262, 16-331 (La.App. 4 Cir. 12/14/16), 229 So.3d 626, *writ granted*, 2017-0434 (La. 5/26/17), 221 So. 3d 853, and *aff’d in part, rev’d in part*, 2017-0434 (La. 1/30/18).

⁵ *State, Dept. of Highways v. Constant*, 369 So.2d 699 (La.1979).

equipment servicing the oil industry. The Court reasoned that the property was unique in nature; and the loading and parking area was indispensable to the business's operations. Therefore, the loading and parking area had to be reproduced at another location to maintain the marina business. Accordingly, the Court found that awarding replacement value was the only way to fully compensate the landowner even though that amount exceeded the market value of the land.⁶

In accordance with *Constant*, if a landowner establishes that the location of the expropriated property or some physical feature of it is unique and indispensably related to the success of the landowner's business, just compensation requires the court to award replacement value. Since *Constant*, several courts considering those factors have determined that some landowners can only be fully compensated by replacement cost.⁷

Likewise here, the evidence elicited at trial established that: 1) the Property is unique due to its location and its improvements; and 2) the Property was indispensable to VDP's business. The Property is located in Violet, Louisiana and has one mile of frontage along the Mississippi River and similar frontage on St. Bernard Highway and Norfolk Southern railroad, which gives the site access over land, road, rail, and water. It is zoned industrial and is located on a straight, self-dredging bank line making it an ideal location for river navigation. The Port's Executive Director, Dr. Robert Scafidel testified that the other potential locations along the river in St. Bernard Parish were not as desirable for the Port because they

⁶ *Id.*

⁷ See, *State ex rel Dept. of Transp. and Dev. v. Wade*, 07-1385 (La. App. 3 Cir. 5/28/08), 984 So.2d 918, writ denied, 08-1896 (La. 12/12/08), 997 So.2d 561; *State, DOTD v. McKeithen*, 42,830 (La. App. 2 Cir. 2/20/08), 976 So.2d 832; *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.*, 427 So.2d 1304 (La. App. 1 Cir. 1983); and *Monroe Redevelopment Agency v. Kusin*, 398 So.2d 1159 (La. App. 2d Cir. 1981), writ denied, 405 So.2d 530 (La. 1981).

were positioned where the river bends, which would impede river traffic. He represented to the State that VDP's property presented a unique opportunity to greatly expand the Port's ability to handle bulk cargo.

Through the years, VDP had constructed a fully operational, private port facility with five steel and concrete docks. Three of the berths were certified by the Navy for lay berthing ocean-going ships. VDP had held contracts for providing services to the Navy for decades. To fulfill the needs of the Navy, VDP had renovated the Property by installing transformers, a potable water supply, six telephone lines per ship, and a boiler for steam necessary for the ships to be poised for immediate deployment. In addition to the mechanical support for the ships, VDP had also constructed landside improvements to comply with Navy specifications.

The Port highlighted the uniqueness of the Property in its application to the Louisiana Port Construction and Development Program.⁸ The Port wrote:

[t]he best attribute of this site is that it features three sturdy docks designed to berth some of the largest cargo ships in the world. These docks can be easily modified to support cargo handling operations similar to those currently taking place at the Chalmette Slip, such as ship or barge to truck or rail or to storage. The reverse movement is also available.

The application went on to state that:

[t]he opportunity to acquire three active docks on the Mississippi River with available uplands and access to highway and rail, for only \$14 million, is an opportunity that does not happen very often, if ever.⁹

Similarly, the Port's Strategic Business Plan stated that the Property "should be considered a national asset for transportation and manufacturing." The Port conceded that the site was one of the last major properties on the Mississippi River

⁸ In the application the Port was seeking State funding for the purchase of the Property.

⁹ At the time of the application, the Port thought VDP had accepted its offer of \$14 million.

that is suitable for cargo with highway, rail, and deep water access on a straight section of the river. Riverfront property is limited in St. Bernard Parish and property with these attributes is nonexistent. The Port relied on the uniqueness of the Property to secure a \$15,000,000 grant from the State and to support its public purpose argument.

Here, as in *Constant*, the Property was also indispensable for the operation of VDP's business. The appraisals in the record repeatedly recognized that the facility and business operations were highly specialized. That is further evident by the fact that the Port is now servicing the Navy contracts once held by VDP. The Port expropriated the Property because it is unique in nature and location. As a result of the expropriation VDP's business has ceased to exist. Thus, we find that the record supports a finding that the Property was unique in nature and location while also being indispensable to the landowners' business operations requiring just compensation to be calculated by assessing the replacement cost of the land and improvements.

At trial, VDP's experts presented reports and testimony suggesting that full replacement cost for the land and improvements would be \$73,148,000 without taking into account depreciation. Alternatively, if the land and improvements were to be depreciated, the replacement value would be \$50,930,000. Using numbers derived by the Port's experts, full replacement cost without depreciation amounts to \$41,084,000, and with depreciation the amount was determined to be \$28,764,685.¹⁰

¹⁰ The initial value was \$25,764,685, but after adjustments for omissions the value was increased to \$28,764,685.

The most significant reason for the vast discrepancy in the values is due to the experts' differing opinions on the highest and best use of the Property. VDP's experts' calculations were based on the Property being used as a multimodal bulk cargo facility, while the lower calculations were based on layberthing with a limited cargo operation. Multiple factors are considered when determining the highest and best use of land in an expropriation.¹¹ However, generally, "the current use of the property is presumed to be the highest and best use."¹²

The Port's expert appraiser, Bennett Oubre testified extensively as to his review of the appraisal reports offered by VDP's and the Port's experts. In reviewing the testimony regarding the rationale for the differing appraisals, we find Mr. Oubre's testimony realistically evaluated the character of the Property. Mr. Oubre acknowledged how specialized the Property was while also taking into account the attributes that were problematic. During his testimony, he explained various flaws within VDP's experts' appraisals. The most significant criticism Mr. Oubre had was the use of "extraordinary assumptions." Those "extraordinary assumptions" included zoning and permitting issues as well as the water depth of the docks and its proximity to non-industrial areas. Thus, his testimony supports the highest and best use of the Property to be the layberthing operations that VDP was using the Property for at the time of expropriation. We find his assessment of the condition of the property to be representative of and consistent with the

¹¹ According to the Supreme Court:

Factors which may be considered include: market demand; proximity to areas already developed in a compatible manner with the intended use; economic development in the area; specific plans of business and individuals, including action already taken to develop the land for that use; scarcity of the land available for that use; negotiations with buyers interested in the property taken for a particular use; absence of offers to buy the property made by the buyers who put it to the use urged; and the use to which the property was being put at the time of the taking.

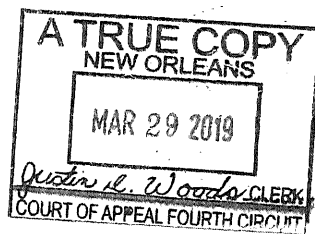
Exxon Pipeline Co. v. Hill, 2000-2535 (La. 5/15/01), 788 So.2d 1154, 1160.

¹² *Id.*

evidence presented as a whole.¹³ During his testimony, he relied on estimates from the Port's expert engineer, Patrick Flowers and his own appraisal of the land value to formulate a depreciated value of improvements of \$23,515,404 and land value of \$3,962,000. Although Mr. Oubre stated that in his opinion this valuation was high, we find it is a reasonable estimation for the purpose of determining just compensation. However, when valuing the improvements one of the docks had been omitted. Based on Dr. Ragas' valuation, the depreciated value of the omitted dock was \$667,406.

Using the estimates discussed above, we find the record supports an estimated replacement cost after depreciation, of \$28,764,685.¹⁴ Based on the record, we find this to be a credible and accurate valuation of the Property. Accordingly, the trial court's award of just compensation is increased to \$28,764,685, together with interest and attorneys' fees as provided for by law. The matter is remanded for further proceedings.

AFFIRMED AS AMENDED AND REMANDED



¹³ "The characteristics examined by the experts cannot be speculative and must consider the property in its use at the time of expropriation." *Exxon*, 2000-2535, p. 11, 788 So.2d at 1162.

¹⁴ This figure was arrived at by valuing the depreciated replacement cost of docks 1,2,4, and 5 (as per the Port's expert engineer, Dr. Flowers), plus land (\$3,962,000) at \$27,477,404; plus a depreciated value for dock 3 of \$667,406 (using Dr. Ragas' valuation); plus \$619,875, the depreciated replacement cost for site improvements.

TAB 6

34th JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 116860

DIV. "E" *C*

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

v.

VIOLET DOCK PORT, INC., LLC

FILED: APR 12 2019

/s/ Emily Carlin
DEPUTY CLERK

CONSENT JUDGMENT

NOW INTO COURT, through undersigned counsel, jointly come Defendant/Plaintiff-in-Reconvention, Violet Dock Port, Inc., LLC ("Violet Dock Port"), and Plaintiff/Defendant-in-Reconvention, St. Bernard Port, Harbor & Terminal District ("St. Bernard Port") (collectively, the "Parties").

Based upon the stipulation of the Parties as signified by their counsel's signatures below, following the remand instructions of the Fourth Circuit Court of Appeal in awarding additional just compensation in this case;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Violet Dock Port shall be awarded an additional sum of three million three-hundred and forty-two thousand six-hundred and twenty-six dollars and ninety cents (\$3,342,626.90) for its attorneys' fees, expert fees and costs incurred, plus judicial interest in accordance with Louisiana law, from this date until paid.

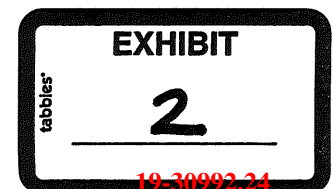
Chalmette, Louisiana this 12th day of April, 2019.

/S/Kim C. Jones

JUDGE

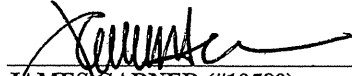
A TRUE COPY
Randy S. Nunez
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

By Emily A. Carlin
DEPUTY CLERK



Approved as to form and content:

Dated: April 9, 2019



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JOSHUA FORCE (#21975)
ASHLEY COKER (#30446)

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Approved as to form and content:

Dated: April 9, 2019



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