

SECOND CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

DOCKET NO: CW-55301

ETC TIGER PIPELINE, LLC

Respondent

VERSUS

DT MIDSTREAM, INC. AND DTM LOUISIANA GATHERING, LLC

Applicants

**AMICUS BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF THE
APPLICANTS' APPLICATION FOR WRIT OF REVIEW**

A CIVIL ACTION

FORTY-SECOND JUDICIAL DISTRICT COURT,
PARISH OF DESOTO, DOCKET NO. 83,903,
HONORABLE NICHOLAS E. GASPER, PRESIDING

Respectfully Submitted:

JEFF LANDRY
ATTORNEY GENERAL

Warren B. Bates, Jr. (39796)
Ryan M. Seidemann, Ph.D. (28991)
Assistant Attorneys General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel.: 225-326-6000
Fax.: 225-326-6099
E-mails: batesw@ag.louisiana.gov
seidemannr@ag.louisiana.gov

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
STATEMENT PURSUANT TO RULE 2-12.11	1
ARGUMENT	2
I. Petrochemical Transport in Louisiana is an Indispensable Component of the State's and the Nation's Energy and Economic Security and Cannot be Held Hostage by Industry Disagreements	2
II. The Judgment Below is Erroneous Because it Authorizes Parties to Contract in a Manner that is Contrary to Law and Because it is an Incorrect Interpretation of the Disputed Servitude Agreement	4
CONCLUSION.....	8
VERIFICATION OF SERVICE.....	10

TABLE OF AUTHORITIES

Jurisprudence

<i>Brady v. Pirner,</i> 18-0556 (La.App. 4 Cir. 12/5/18), 261 So.3d 867	4
<i>Fairbanks v. Tulane Univ.,</i> 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983	4
<i>Faulk v. Union Pacific Railroad Company,</i> 2014-1598 (La. 6/30/15), 172 So.3d 1034	6-7
<i>In re Succession of Brown,</i> 2010-1394 (La.App. 3 Cir. 6/29/11), 69 So.3d 1211	6
<i>King v. Strohe,</i> 1995-656 (La.App. 3 Cir. 5/8/96), 673 So.2d 1329	6
<i>Silverman v. Mike Rogers Drilling Co., Inc.,</i> 45,119 (La.App. 2 Cir. 4/14/10), 34 So.2d 1099.....	4

Louisiana Civil Code

La. C.C. art. 640.....	6
La. C.C. art. 642.....	8
La. C.C. art. 645.....	6
La. C.C. art. 1901	4
La. C.C. art. 1918	4
La. C.C. art. 1927	4
La. C.C. art. 1966	4
La. C.C. art. 1971	4
La. C.C. art. 3537	4

Secondary Sources

Drew Broach, <i>This map shows all of Louisiana's major oil and gas pipelines; what's one more?</i> , NOLA.COM/THE TIMES PICAYUNE, February 9, 2017	2
Kenneth P. Green and Taylor Jackson, <i>Safety in Transportation of Oil and Gas: Pipelines or Rail?</i> , FRASER RESEARCH BULLETIN (2015).....	2

Ron Santini, <i>Oil, Gasoline, and Natural Gas Pipelines</i> , Energy Industry Applications of GIS (2017)	2
---	---

The INGAA Foundation, Inc., GUIDANCE DOCUMENTS FOR CONSTRUCTION - NATURAL GAS PIPELINE CROSSING GUIDELINES (2013)	3
---	---

SUMMARY OF ARGUMENT

This amicus brief in support of DT Midstream, Inc.’s, and DTM Louisiana Gathering, LLC’s (hereafter jointly referred to as “DTM”) application for writ of review arises from the State of Louisiana’s interest in facilitating and supporting commerce and competition in the energy sector and ensuring Louisiana’s primacy in the United States as the nation’s hub of oil and gas production, transportation, and processing. At the court below, the Forty-Second Judicial District erred when it held that the “exclusive” nature of ETC Tiger Pipeline, LLC’s (hereinafter “ETC”) servitude meant that no other pipeline could traverse—even in an admittedly safe manner—its pipeline across the servient estate.

The State of Louisiana (referred to herein as “the State”) submits that public policy favors DTM’s position in this case and the State is uniquely situated to provide a global perspective to this issue not otherwise available from the parties. More importantly, however, the State has an interest in the consistent and precise interpretation of the Louisiana Civil Code. In particular, the court below departed from basic civil law concepts regarding servitude functionality in addition to both misinterpreting ETC’s servitude agreement and allowing such misinterpreted contract terms to supersede basic law. The combination of improperly interpreting the law, providing primacy to a contract over existing law, and the public policy implications of this decision will have far-reaching consequences for Louisiana’s energy sector and, indeed, perhaps for the nation’s energy independence.

STATEMENT PURSUANT TO RULE 2-12.11

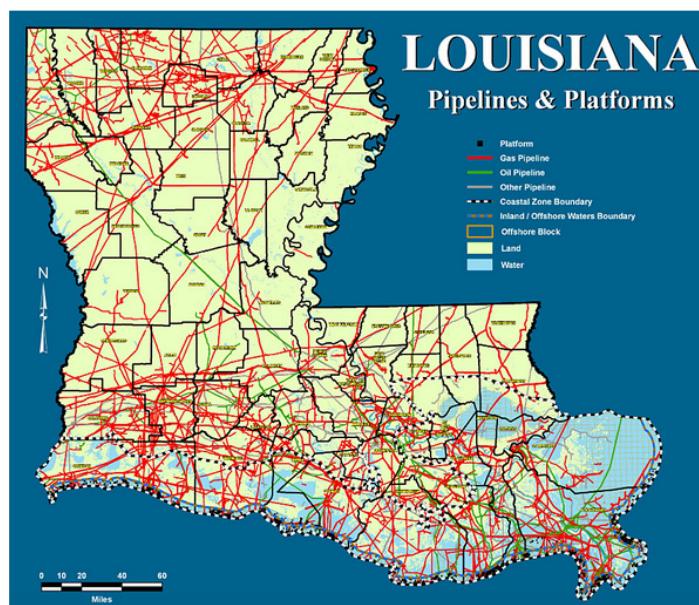
The undersigned affirm that they have read the briefs of all parties filed with this Court in this matter. Moreover, because of the State’s unique position as a lessor and lessee, dominant and servient estate holder, regulatory entity, and economic development driver, it brings a perspective to this Court to assist in its decision

making process on an important matter of civil law and contract interpretation as well as natural resources law.

ARGUMENT

I. Petrochemical Transport in Louisiana is an Indispensable Component of the State's and the Nation's Energy and Economic Security and Cannot be Held Hostage by Industry Disagreements.

Pipelines are the critical infrastructure veins and arteries that allow Louisiana's energy sector lifeblood—oil and gas—to be transported around and across the State in a safe, efficient, and cost-effective manner.¹ Indeed, a simple glance at an infrastructure map of Louisiana demonstrates that these vessels crisscross the State in every region, often necessitating traverses of existing pipelines, waterways, roads, and utilities.²



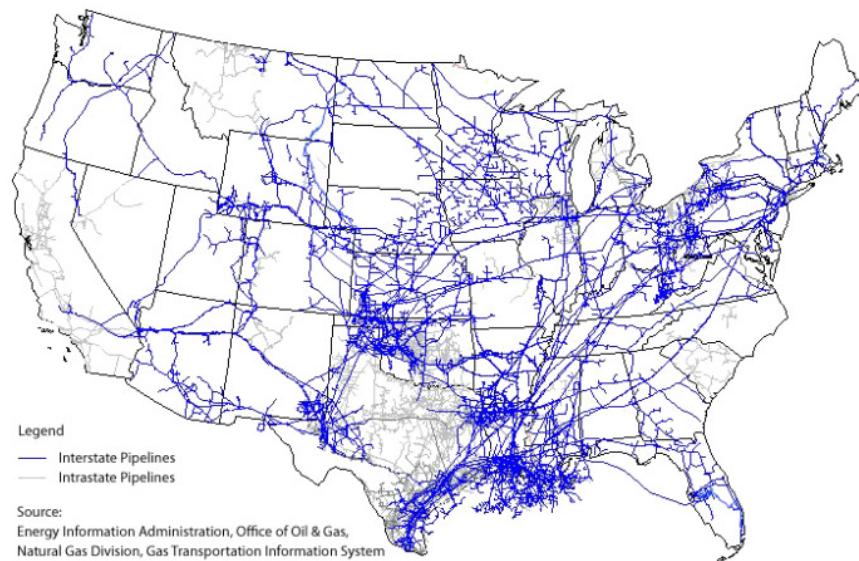
As is demonstrated in the second image,³ *infra*, not only is transporting oil and gas a critical business and economic driver in Louisiana, but Louisiana's

¹ Kenneth P. Green and Taylor Jackson, *Safety in Transportation of Oil and Gas: Pipelines or Rail?*, FRASER RESEARCH BULLETIN (2015) (available online at <https://www.fraserinstitute.org/sites/default/files/safety-in-the-transportation-of-oil-and-gas-pipelines-or-rail-rev2.pdf>) (last accessed May 20, 2023) (concluding that pipeline transport of oil and gas is safer than other methods).

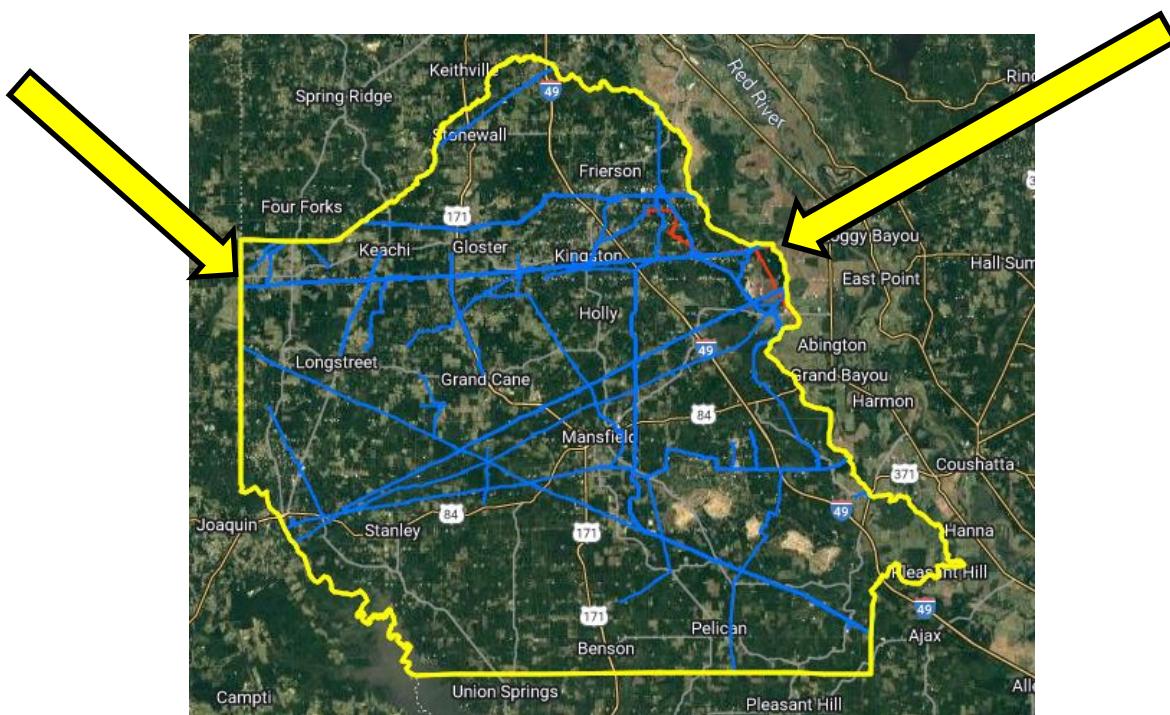
² Image excerpted from Drew Broach, *This map shows all of Louisiana's major oil and gas pipelines; what's one more?*, NOLA.COM/THE TIMES PICAYUNE, February 9, 2017 (available at https://www.nola.com/news/environment/this-map-shows-all-of-louisianas-major-oil-and-gas-pipelines-whats-one-more/article_b70a1d90-b6dc-52ff-8018-d1f3d7ac8000.html) (last accessed May 19, 2023).

³ Image excerpted from Ron Santini, *Oil, Gasoline, and Natural Gas Pipelines*, Energy Industry Applications of GIS (2017) (available online at: <https://www.e-education.psu.edu/geog469/node/224>) (last accessed May 19, 2023).

situation as the hub of the United States' energy industry means that, as a matter of policy, the subject of this dispute is significant for the entire country.



On a local level, ETC's existing pipeline is no exception to the reality that such lines cross and intersect on a regular basis. As seen in the image below,⁴ at least ten crossings and intersections of the ETC pipeline (indicated by arrows) that is the subject of this dispute are visible in DeSoto Parish alone.



In a very simple and very real sense, pipeline crossings occur regularly and are a necessary part of the transport of petrochemical products.⁵ Thus, it is

⁴ Image created using National Pipeline Mapping System Public Viewer hosted by the U.S. Pipeline and Hazardous Materials Safety Administration (available online at: <https://pvnpms.phmsa.dot.gov/PublicViewer/>) (last accessed May 19, 2023).

⁵ The INGAA Foundation, Inc., GUIDANCE DOCUMENTS FOR CONSTRUCTION - NATURAL GAS PIPELINE CROSSING GUIDELINES (2013) at 5 (available online at <http://efaidnbmnnibpcajpcgclefindmkaj/><https://ingaa.org/wp->

particularly concerning that the court below dismissed this commonplace activities in favor of a strained interpretation of the Louisiana law of servitudes and contracts.⁶

In so doing, the court countenanced a dispute between industry participants in a manner that stifles competition and potentially establishes a precedent that could make it nigh impossible (or at least cost-prohibitive) to bring many energy products to market. Public policy favors such crossings. As is demonstrated in the next section, the law allows for such crossings and, indeed, the disputed servitude agreement authorizes such crossings. The perplexing holding below disrupts the applicable legal and policy schemes and it cannot be allowed to stand.

II. The Judgment Below is Erroneous Because it Authorizes Parties to Contract in a Manner that is Contrary to Law and Because it is an Incorrect Interpretation of the Disputed Servitude Agreement.

Generally, a contract is the law between the parties unless it is contrary to the law or public morals.⁷ Contracts that are contrary to public policy or the law are unenforceable.⁸ There are four elements required for confection of a valid contract under Louisiana law: (1) the capacity to contract; (2) mutual consent; (3) a certain object; and (4) lawful cause.⁹ In this case there can be no good faith dispute as to the validity of either ETC's or DTM's servitude agreements on any of these components. Yet, ETC asserts that its contract precludes the lawful object of a third party, DTM, to simply cross its existing servitude. While the language of the agreement controls, this strained interpretation of a fragment of the agreement's language—if given the effect concluded by the court below—renders ETC's contract unlawful and thus unenforceable.

<content/uploads/2013/07/20405.pdf>) (last accessed May 20, 2023) (noting that "...the construction of pipeline crossings occurs on a regular basis.")

⁶ In fairness to the district court, even it recognized that this interpretation would likely have detrimental, far-reaching impacts. Reasons at 3.

⁷ La. C.C. art. 1901.

⁸ La. C.C. art. 3537; *Silverman v. Mike Rogers Drilling Co., Inc.*, 45,119 (La.App. 2 Cir. 4/14/10), 34 So.2d 1099, 1103.

⁹ See *Brady v. Pirner*, 18-0556 (La. App. 4 Cir. 12/5/18), 261 So.3d 867, 875 (quoting *Fairbanks v. Tulane Univ.*, 98-1228 (La. App. 4 Cir. 3/31/99), 731 So.2d 983, 986); La. C.C. arts. 1918, 1927, 1966 and 1971.

The interpretation that ETC and the district court have placed on the servitude agreement at the heart of this case causes the ETC contract to facially contravene existing law. This violation of existing law comes from the assertion that a servitude created by contract can contain terms that abrogate basic precepts of the law of dismemberments of ownership. Simply, Louisiana predial servitude law contains no provision creating an “exclusive” servitude in the manner asserted in this case. Indeed, the Civil Code contemplates the opposite: multiple predial servitudes existing on the same servient estate as long as there is no *direct* interference of subsequent servitudes on prior ones.

In this case, the district court correctly found that there was no actual interference with ETC’s servitude by the granting of DTM’s servitude.¹⁰ Simply, the servitudes occupy different planes in a three dimensional space. Moreover, DTM’s willingness to implement all necessary safety precautions to ensure the protection of ETC’s overlying pipeline¹¹ is precisely consistent with the concept of multiple servitudes on a single servient estate. At the location in question, the ETC pipeline is in the same corridor as three other pipelines. The pipeline corridor contains a pipeline owned and operated by Williams Companies, Inc. (“Williams”), Clearfork Midstream (“Clearfork”), and ETC’s parent company. The four pipelines in this corridor run adjacent and parallel to one another. DTM cleared the crossings of Williams’ and Clearfork’s pipelines through ordinary channels. The same outcome did not occur as to a crossing of ETC’s pipeline.

Where ETC’s argument and the district court’s judgment goes awry is in the interpretation of the term “exclusive” in ETC’s servitude agreement. ETC represents that its servitude is a right of use.¹² This right of use confers upon ETC a specified

¹⁰ Reasons at 2-3.

¹¹ *Id.* at 3 (“This court believes that, with proper cooperation, DTM can undertake the needed steps to comply with all safety requirements of ETC.”).

¹² Affidavit of Mark Vedral, DTM’s Appendices at 056-058.

use of an estate less than full enjoyment (*i.e.*, the *usus*, but not the *abusus* or the *fructus*; a dismemberment of ownership). Furthermore, a right of use may only confer an advantage that may be established by a predial servitude.¹³ A right of use is regulated by application of the laws governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude.¹⁴ In this case, the right of use—like a predial servitude for a pipeline right-of-way—does not burden the entirety of the servient estate either horizontally or vertically and thus requires a precise property description.¹⁵

ETC’s interpretation of the term “exclusive” in its servitude agreement as meaning that *no* other servitudes could safely and without a burden to ETC cross its pipeline is contrary to law and could not have been what the grantor understood as the object of the contract.¹⁶ A plain reading of the servitude agreement demonstrates that the grantor intended to create a servitude for one pipeline to ETC. That document states that, “in no event shall Grantee, its successor or assigns be permitted to maintain more than one (1) pipeline in this servitude....”¹⁷ The Louisiana Supreme Court has recognized that a right of use servitude is a limited personal servitude that does not give its holder the exclusive use of the land to which the servitude is subject.¹⁸ Indeed, the *Faulk* case is particularly relevant to this matter, as it also involved crossings of existing servitudes. In *Faulk*, the Court held that landowners who had granted servitudes to railroads for passage over their land had the right, at the very least, to cross over the tracks when not in use by the railroads to reach their property on the other side.¹⁹ This interpretation of the law is crucial to this matter. In *Faulk*, the crossings occurred *directly on the servitude*. In this case, the crossing

¹³ La. C.C. art. 640.

¹⁴ La. C.C. art. 645.

¹⁵ See *King v. Strohe*, 1995-656 (La.App. 3 Cir. 5/8/96), 673 So.2d 1329.

¹⁶ See *In re Succession of Brown*, 2010-1394 (La.App. 3 Cir. 6/29/11), 69 So.3d 1211.

¹⁷ DTM’s Appendices at 070.

¹⁸ *Faulk v. Union Pacific Railroad Company*, 2014-1598 (La. 6/30/15), 172 So.3d 1034.

¹⁹ *Id.*

is merely theoretical. DTM's pipeline will never touch ETC's pipeline but will be buried approximately 19 feet beneath the bottom of one ETC pipeline and 25 feet beneath the bottom of the other ETC pipeline. Accordingly, the disputed action here is not even as disruptive as that authorized by the *Faulk* Court. The two servitudes here are wholly separate and are rights that a servient estate holder can absolutely grant without running afoul of either dominant estate's rights.

This myopic interpretation of ETC's servitude agreement is contrary Louisiana Supreme Court decision and public policy as asserted above. Additionally, crossing the servitude is allowed within the language of ETC's own agreement.²⁰ The servitude agreement language errs on the side of allowing the grantor to use the servitude for any and all purposes not inconsistent with the purposes set forth in the agreement. In other words, as long as DTM's pipeline does not actually disturb ETC's pipeline and reasonable and necessary construction procedures are followed, under the plain language of ETC's agreement, DTM can cross ETC's servitude. A contrary interpretation renders the agreement unenforceable.

Here, ETC and the district court interpreted the servitude agreement as "exclusive" in the sense that the relevant language limits any other party from traversing (elsewhere in space) the existing servitude even though the new traversal does not interfere with the existing servitude's use. Moreover, ETC's agreement contains the following language:

Grantor's uses may include but shall not limited to right to cross the servitude and to construct roads, highways and bridges across it and the right to erect, install and construct over and across the servitude and such other similar facilities which Grantor may desire....²¹

Furthermore, other provisions in the servitude agreement allow for crossings, utilities, and other encroachments to be made upon the land. The agreement states that the Grantor shall have the right at all reasonable times to cross the servitude and

²⁰ DTM's Appendices at 070.

²¹ DTM's Appendices at 070.

that the Grantor may assign this right to his agents, employees, successors and assigns.²² Such language authorizes the servient estate holder to assign crossing rights to any other party.

In other words, ETC's specified use does not confer upon it the full and exclusive enjoyment of the servient estate. Such exclusive rights would constitute full ownership rather than a dismemberment thereof. ETC is not the full owner of the servitude's land area. It has a right to traverse the land, and to construct, maintain, and transport natural gas within its pipeline.²³ This reality means that ETC's assertion that no one can cross its servitude by any means rings hollow. Such an interpretation of the agreement is clearly contrary to law (by converting a dismemberment of ownership to full ownership) and public policy (by stifling competition and limiting the ability to transport gas in Louisiana harming the public). Accordingly, given ETC's construction, the limiting language is unenforceable. A right of use only includes the rights contemplated or necessary to enjoyment at the time of its creation as well as rights that may later become necessary.²⁴ Indeed, as the third image, *supra*, demonstrates, ETC itself has not construed its servitude rights along other portions of this pipeline in the same way. The latter reality belies the narrow construction of ETC's agreement at the proposed DTM crossing. ETC has allowed crossings elsewhere; just not here. Such a construction violates the law.

CONCLUSION

WHEREFORE, the State prays that this Court grant DTM's writ application and overturn the erroneous judgment below.

²² DTM's Appendices at 068-074.

²³ *Id.*

²⁴ La. C.C. art. 642.

Respectfully Submitted:

JEFF LANDRY

ATTORNEY GENERAL

By:

Warren B. Bates, Jr. (39796)

Ryan M. Seidemann, Ph.D. (28991)

Assistant Attorneys General

Louisiana Department of Justice

1885 North Third Street

Baton Rouge, LA 70802

Tel.: 225-326-6000

Fax.: 225-326-6099

E-mails: batesw@ag.louisiana.gov

seidemannr@ag.louisiana.gov

Counsel for Amici, the State of Louisiana

VERIFICATION OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary public, personally appeared

WARREN B. BATES, JR.

who, after being duly sworn, did state that he is an attorney for the *Amicus Curiae*, the State of Louisiana, and that a copy of the Motion to File *Amicus* Brief and *Amicus* Brief was served upon the following via electronic mail, properly addressed, this 21st day of May, 2023.

John T. Kalmbach, Esq.
W. Drew Burnham, Esq.
J. Bert Babington, Esq.
Cook, Yancey, King & Galloway
333 Texas Street, Suite 1700
P.O. Box 22260
Shreveport, LA 71120-2260
john.kalmbach@cookyancey.com
drew.burnham@cookyancey.com
bert.babington@cookyancey.com

Leland G. Horton, Esq.
Ashley G. Gable, Esq.
Bradley Murchison Kelly & Shea
401 Edwards Street, Suite 1000
Shreveport, LA 71101
lhorton@bradleyfirm.com
agable@bradleyfirm.com

C. Lawrence Orlansky, Esq.
Nicholas J. Wehlen, Esq.
Faith Flugence, Esq.
Stone Pigman Walther Wittmann
909 Poydras Street, Suite 3150
New Orleans, LA 70112
lorlansky@stonepigman.com
nwehlen@stonepigman.com
fflugence@stonepigman.com

Hon. Nicholas E. Gasper
Forty-Second Judicial District Court
101 Texas Street
P.O. Box 1206
Mansfield, LA 71052
ssmith@42jdc.com

SWORN AND SUBSCRIBED before me, Notary Public, on this 21st day of May, 2023.

Ryan M. Seidemann, Ph.D.
Notary Public

My commission expires at death.

