UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
BOARD OF SUPERVISORS, ET AL.	**MAGISTRATE-JUDGE: NOLAND**

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MOTION FOR TEMPORARY RESTRAINING ORDER AND, ALTERNATIVELY, INJUNCTIVE AND/OR EQUITABLE RELIEF

NOW INTO COURT comes Petitioner, Dr. Ivor van Heerden, who respectfully moves this Honorable Court for issuance of an immediate temporary restraining order and, in due course a preliminary and thereafter, permanent injunction directed to defendant, Board of Supervisors of Louisiana State University and A&M College, prohibiting said defendant from terminating and/or otherwise terminating plaintiff's employment, alternatively, ordering the immediate reinstatement of Dr. van Heerden to his position in the faculty ranks of LSU and, further enjoining this defendant, its agents, employees, and assigns from infringing upon Petitioner's rights under the United States and Louisiana Constitution, specifically, his rights to free speech and due process of laws, and under Federal law, specifically, 42 U.S.C. §1985, from further harassing or retaliating against Petitioner on account of his testimony in Congress, the Louisiana Legislature, Federal and State Courts and his previous reporting, complaining, and whistle-blowing activities regarding the systemic failure of the levee system during Hurricane Katrina, for the following reasons, to-wit:

1.

The original Petition for Declaratory, Injunctive, and Monetary Relief and Jury Demand was filed in the matter on February 10, 2010. Thereafter, the parties defendant removed this matter from State Court to this Court on March 5, 2010. In the original Petition, at paragraph 92, Petitioner

specifically requested equitable and/or injunctive relief.

2.

On August 18, 1992, Petitioner was hired by defendant LSU. Petitioner is a world renowned disaster science specialist and hurricane researcher.

3.

After his hire, Petitioner became Deputy Director of the LSU Hurricane Center and focused his research efforts on storm surge modeling.

4.

Pre-Katrina, Petitioner issued a number of warnings regarding the apocalyptic impact a direct hurricane hit would have on the Greater New Orleans, including the impacts of storm surge.

5.

Following Hurricane Katrina, Petitioner correctly determined the cause of the deluge as the failure of the levee system and the Corps of Engineers.

6.

Petitioner issued a number of statements to the state, national, and international press following Hurricane Katrina asserting that the failure of the levees caused the flooding and was the responsibility of the Corps of Engineers. In response, defendant LSU and its administrators engaged in a pattern and practice of threatening Petitioner and directly interfering with Petitioner's free speech rights. Petitioner disclosed these illegal activities to the media and, further, objected and opposed defendant LSU's repeated attempts to violate Petitioner's free speech rights.

7.

On November 2, 2005, Petitioner testified before the United States Congress regarding the cause of the Katrina flooding and the fault of the Corps of Engineers. He additionally provided

evidence, information, and testimony before the Louisiana Legislature, Federal and State Courts regarding the cause of the Katrina flooding and the fault of the Corps of Engineers.

8.

In May, 2006, Petitioner released for publication *The Storm*, a book authored by Petitioner, which reiterates that the Corps of Engineers bears responsibility for the Katrina flooding.

9.

At all times, Petitioner provided testimony and evidence to the State of Louisiana, the Louisiana Governor's Office, the United States Congress, and State and Federal Courts, all of which were conducting investigations, hearings, and inquiries into violations of Federal and State law, specifically, the legal fault on the part of the Corps of Engineers directly causing the levee breaches following Hurricane Katrina.

10.

Petitioner engaged in activity protected under La. R.S. 23:967.

11.

Following and on account of Petitioner's engagement in protected activity within the meaning and intent of La. R.S. 23:967, defendant LSU has subjected Petitioner to illegal reprisal consisting of, but not limited to, terminating his employment effective May 21, 2010, removing Petitioner from access to computer modeling, removing Petitioner from academia, and removing Petitioner from his research.

12.

Pursuant to Federal law and also pursuant to La. R.S. 23:967, this Court is afforded the ability to issue an injunction and, further, to order reinstatement of Petitioner and such affirmative relief as may be appropriate.

13.

Fed.R.Civ.P. Rule 65 further provides for the issuance of an injunction where there exists immediate and irreparable injury, loss, or damage resulting to Petitioner.

14.

Attached hereto and made part hereof is the Affidavit of Petitioner attesting to the facts and immediate and irreparable injury, loss, and damage pursuant to Fed.R.Civ.P. Rule 65.

15.

Petitioner shows that immediate and irreparable injury, loss, and damage will result before the adverse party can be heard in opposition. Specifically, the termination of Petitioner effective May 21, 2010, removes Petitioner from all access to hurricane computer modeling, even though Petitioner is one of only a handful of scientists in the State of Louisiana which the requisite skill, experience, and knowledge to produce accurate models and accurately predict the paths of impacting hurricanes, removes Petitioner from any ability to continue his vital research in this area, removes Petitioner from any ability to serve as an expert in his field, directly impacts Petitioner's ability to obtain any replacement employment, unquestionably and directly impacts Petitioner's reputation and standing as an international hurricane expert, has a chilling effect on academic freedoms, and defendant LSU's actions serves to chill and restrict Petitioner's free speech rights and the rights of others similarly situated to him, including the right to report, complain about, and protest unlawful activities by the government and its officials, and irreparably harms his reputation, including both his personal and professional reputation.

16.

Petitioner shows that the requested injunctive relief would not involve or compel the expenditure of public funds. Indeed, Petitioner's current position with defendant LSU remains

funded and has not be eliminated.

17.

Petitioner is entitled to and desires the issuance of a temporary restraining order and, in due course, a preliminary and thereafter a permanent injunction, directed to the defendant, Board of Supervisors of Louisiana State University and A&M College, prohibiting said defendant from terminating and/or otherwise terminating plaintiff's employment, alternatively, ordering the immediate reinstatement of Dr. van Heerden to his position in the faculty ranks of LSU and, further enjoining this defendant, its agents, employees, and assigns from infringing upon Petitioner's rights under the United States and Louisiana Constitution, specifically, his rights to free speech and due process of laws, and under Federal law, specifically, 42 U.S.C. §1985, from further harassing or retaliating against Petitioner on account of his testimony in Congress, the Louisiana Legislature, Federal and State Courts and his previous reporting, complaining, and whistle-blowing activities regarding the systemic failure of the levee system during Hurricane Katrina.

18.

Pursuant to La. R.S. 23:967, Petitioner is entitled to and desires an award of reasonable attorney's fees and all costs of these proceedings, in due course.

19.

Attached hereto and made part hereof is the certification by counsel as to the efforts made by undersigned counsel to contact the adverse party, defendant LSU.

20.

Attached hereto and made part hereof is Petitioner's Memorandum in Support of Motion for Injunctive Relief.

WHEREFORE, Plaintiff, Dr. Ivor van Heerden, prays after due proceedings are had that a

temporary restraining order and, in due course, a preliminary and thereafter permanent injunction directed to the defendant, Board of Supervisors of Louisiana State University and A&M College, prohibiting said defendant from terminating and/or otherwise terminating plaintiff's employment, alternatively, ordering the immediate reinstatement of Dr. van Heerden to his position in the faculty ranks of LSU and, further enjoining this defendant, its agents, employees, and assigns from infringing upon Petitioner's rights under the United States and Louisiana Constitution, specifically, his rights to free speech and due process of laws, and under Federal law, specifically, 42 U.S.C. §1985, from further harassing or retaliating against Petitioner on account of his testimony in Congress, the Louisiana Legislature, Federal and State Courts and his previous reporting, complaining, and whistle-blowing activities regarding the systemic failure of the levee system during Hurricane Katrina, and all such other relief to which he is entitled at law or in equity.

Respectfully submitted,

By: s/Jill L. Craft
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2010, I have served a copy of the above and foregoing Motion for Temporary Restraining Order and, Alternatively, Injunctive and/or Equitable Relief with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 9th day of April, 2010.

s/Jill L. Craft
Jill L. Craft

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
BOARD OF SUPERVISORS, ET AL.	**MAGISTRATE-JUDGE: NOLAND**

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VERIFICATION

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared:

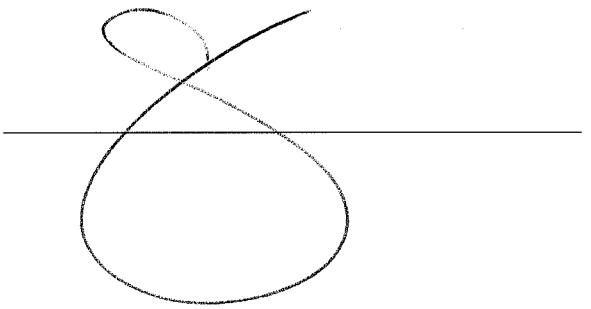
DR. IVOR van HEERDEN

a resident of the full age of majority of Livingston Parish, Louisiana, who upon being duly sworn did depose and state that he is the Plaintiff in the above and foregoing Motion for Injunctive and, Alternatively, Injunctive and/or Equitable Relief, that he has read same and all facts and allegations contained therein are true and correct.

Ivor Van Heerden

DR. IVOR van HEERDEN

SWORN TO AND SUBSCRIBED before me, Notary Public, this 9th day of April, 2010.



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
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AFFIDAVIT OF IRREPARABLE HARM

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public personally came and appeared:

Dr. Ivor van Heerden

a resident of the full age of majority of Livingston Parish, Louisiana, who upon being duly sworn did depose and state that:

-I began employment at LSU on August 18, 1992. I am an Associate Professor in the LSU Department of Civil and Environmental Engineering.

-I am a disaster science specialist and hurricane researcher. In 1998, following my affiliation with Dr. Marc Levitan, we worked diligently to establish the LSU Hurricane Center. I became Deputy Director of the LSU Hurricane Center with Dr. Levitan serving as Director.

-Since 1995, my position at LSU has been fully paid from state funds and starting in 2003, on an academic year basis.

-Until October, 2006, I conducted research and bore substantial teaching responsibilities. In October, 2006, Chairman Vyiadjis removed me from the classroom in retaliation for my speech regarding the causes of the post-Katrina flooding.

-Following Hurricane Katrina, I analyzed and researched the disaster in an attempt to determine the causes of the massive flooding in the Greater New Orleans area.

-I concluded, based on the evidence, the cause of the massive flooding was the catastrophic structural failure of barriers, including the levee system, that should have handled Hurricane Katrina with relative ease. I rejected the conclusion of the Corps of Engineers which attempted to blame the massive flooding on storm surge from Katrina. The Corps' conclusion was clearly erroneous.

-On September 21, 2005, an article appeared in the *Washington Post*, in which my public comments regarding the cause of the massive flooding was attributable to the Corps of Engineers.

-In October, 2005, I was appointed to head "Team Louisiana" whose mission was to investigate the causes of the extensive flooding and ensuing death and devastation post-Katrina. On October 12, 2005, I was quoted in the *Times-Picayune* questioning the Corps' conclusion that the levee failure was a result of storm surge.

-Indeed, in October, 2005, and repeatedly thereafter, I spoke publicly and often in local and national media criticizing the Corps for its levee and flood wall construction policies and designs and their responsibility for the massive flooding.

-On November 2, 2005, I testified before the United States Senate Committee on Homeland Security and Governmental Affairs. I testified that preliminary findings by the State of Louisiana Forensic Data Gathering Team are that in the case of the 17th Street Canal, London Avenue Canal, and Industrial Canal, levee collapse and flood breaching reflected unstable soil conditions and a lack of foundation support and water percolation seals, given the soft, porous, and highly organic nature of the soils.

-I also testified publicly that the failure of the levees was due to defective design which I characterized as "a geotechnical engineering failure" by the Corps. I also publicly testified that for the Corps "not to have given the residents the security of proper levees is inexcusable."

-On December 1, 2005, I was quoted in the *New York Times* with my conclusion that the "devastation of New Orleans was a disaster waiting to happen because of a significant flaw in levee design by the Army Corps of Engineers".

-On March 22, 2007, I was also quoted blaming the Corps in the *Washington Post.*

-Following my repeated public criticisms of the Corps, the Corps contacted LSU and insisted that I be silenced. Indeed, in October, 2005, Dr. Roy Dokka of the LSU Department of Civil and Environmental Engineering sent an angry email message to LSU administrators confirming that Corps officials had complained to him. In the Dokka email, he stated he was "greatly concerned" about "the deluge of irresponsible reports to the media being spewed by a small number of mainly non-tenure track faculty regarding what may or may not have caused flooding in New Orleans" and stated that I needed to be reined in. Thereafter, LSU Vice Chancellor Harold Silverman and Robert Twilley contacted the Louisiana Governor's office to prevent the Team Louisiana study from going forward under my leadership.

-Additionally, Silverman and LSU Vice Chancellor Michael Ruffner called me to a meeting at LSU and sternly admonished me for my public criticisms of the Corps. They directly told me my criticisms of the Corps jeopardized LSU's prospects for federal funding and accused me of lacking the expertise needed to comment on the Corps' engineering of the levees. They also warned me that LSU did not want to be associated with "placing blame" on the Corps.

-I was threatened and I memorialized this conversation with Silverman and Ruffner in an email on November 15, 2005.

-In May, 2006, my book entitled *The Storm* was released for publication. In my book, I wrote about the failed response by FEMA, other state agencies, and federal agencies. I also wrote that the Corps of Engineers made serious engineering mistakes which caused multiple breaches in the New Orleans levee system resulting in some 90% of the post-Katrina flooding in New Orleans.

-After several newspapers began writing about LSU's attempts to silence my speech, Ruffner wrote a letter to the *New York Times* in which he accused me of having "no professional credentials or training" to even discuss the engineering of the levees.

-Following Ruffner's letter, many people, members of the media, and LSU faculty were outraged. Dr. Levitan met with Ruffner regarding his letter and during that meeting, Ruffner again threatened me and accused me of causing problems with the LSU Hurricane Center and further, that if I were not longer part of the Center, things would be better for the Hurricane Center on campus.

-On October 15, 2006, Voyiadjis told me that there was a "new" personnel policy which would now govern my employment with LSU, that I would no longer be allowed to teach, I was only on a one-year appointment, and that I would be judged only on my research. I considered these actions a direct threat to me on account of my continued speech regarding the Corps' responsibility for the post-Katrina flooding.

-In late 2006, LSU Chancellor O'Keefe retaliated against me by refusing to support my nomination for the prestigious National Wetlands Award. Indeed, in emails circulated by O'Keefe, Keel, and Twilley, they agreed my nomination should not be supported as it might "justify" my "potentially misguided view of service/science" and that I had generated "negative reactions" which they should not give a "stamp of approval" to.

-In March, 2007, Twilley directly excluded me from the state's Science and Engineering Review Team ("SERT"). Also, on May 23, 2007, Twilley penned an email where he referred to taking a cyanide pill if he had been confused with me. Keel replied that "we need to be sure they know the difference between Ivor and the rest of LSU" and then inquired of Twilley whether he wanted the cyanide pill for me.

-In April, 2007, I was asked to serve as a expert witness in litigation against the Corps relating to MR-GO. I had previously publicly spoken about the Corps' defective design and maintenance of MR-GO which had produced a funnel effect exposing New Orleans to the brunt of a storm surge from Lake Borgne.

-In response, O'Keefe told the plaintiffs' lawyer that I would be fired if I testified against the Corps and that "they" didn't want "their people front and center in such politically charged conflicts, especially in a capacity that opposes the current Republican regime". Thereafter, LSU prohibited me from testifying as an expert witness which directly affected my reputation and standing in the community.

-I did, however, assist in the litigation as a non-testifying expert in the MR-Go litigation. On November 18, 2009, the United States District Court for the Eastern District of Louisiana determined

that the Corps was legally responsible for the catastrophic loss of human life and property in unprecedented proportions and that the Corps was negligent.

-In the summer, 2007, the approach of the hurricane season, LSU placed Twilley in charge of storm surge modeling for CERA to the exclusion of myself. When asked, Twilley advised Dr. Levitan that if I were associated with CERA, he would have been fired by LSU. On August 2, 2007, I requested of LSU access to computer resources for the Hurricane Center, which were effectively denied.

-I was again excluded from CERA in 2008 for no legitimate reason.

-Also in 2008, Twilley stated that I would be fired if I spoke to the media regarding surge modeling. Twilley further stated that he wanted nothing to do with me and stated that I was one of the "crazies".

-In September, 2008, Twilley ordered me to remove my independent data from the Hurricane Health Center webpage.

-On April, 9, 2009, Interim Dean David Constant presented me with a letter stating that my appointment at LSU would not renewed. Constant told me that my non-reappointment had nothing to do with my performance. Constant further stated that my discussions with the media were considered by LSU as speech by me as a private citizen.

-In terminating my employment, LSU did not follow its own policy and made the decision to terminate my employment without review and recommendation by the faculty as required by PS-36.

-I have been proposed for termination as a direct result of my speech about the Corps' responsibility for the post-Katrina flooding and devastation, my protesting and opposing the illegal stifling of my speech and academic freedom, and my testimony before public bodies regarding the Corps' illegal negligent conduct causing the post-Katrina devastation.

-Unless restrained, my employment with LSU will be terminated effective May 21, 2010.

-Unless a temporary restraining order and, thereafter, injunctive relief is issued barring my termination effective May 21, 2010, I have suffered and will suffer immediate and irreparable harm. Specifically, my termination effective May 21, 2010, removes me from all access to hurricane computer modeling, even though I am one of only a handful of scientists in the State of Louisiana with the requisite skill, experience, and knowledge to produce accurate models and accurately predict the paths of impacting hurricanes, removes me from any ability to continue my vital research in this area, removes me from any ability to serve as an expert in my field, directly impacts my ability to obtain any replacement employment, unquestionably and directly impacts my reputation and standing as an international hurricane expert, has a chilling effect on my academic freedoms and the academic freedoms of others at LSU, and defendant LSU's actions serves to chill and restrict my free speech rights and the rights of others similarly situated to me, including the right to report, complain about, and protest unlawful activities by the government and its officials, and irreparably harms my reputation, including both my personal and professional reputation.

-This Affidavit is made upon my personal knowledge.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 9 day of April, 2010.

Jill L. Craft, Bar Roll No. 20922

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
BOARD OF SUPERVISORS, ET AL.	**MAGISTRATE-JUDGE: NOLAND**

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ORDER

Upon consideration of the Motion for Temporary Restraining Order, and, Alternatively, Injunctive and/or Equitable Relief, attachments thereto, the record of these proceedings, the Verification and Affidavit of Irreparable Harm, the law, the evidence adduced, and because irreparable harm, injury, loss, or damage will occur;

IT IS ORDERED that a Temporary Restraining Order be and is hereby entered directed to the defendant, Board of Supervisors of Louisiana State University and A&M College, prohibiting said defendant from terminating and/or otherwise terminating plaintiff's employment, ordering the immediate reinstatement of Dr. van Heerden to his position in the faculty ranks of LSU and, further enjoining this defendant, its agents, employees, and assigns from infringing upon Petitioner's rights under the United States and Louisiana Constitution, specifically, his rights to free speech and due process of laws, and under Federal law, specifically, 42 U.S.C. §1985, from further harassing or retaliating against Petitioner on account of his testimony in Congress, the Louisiana Legislature, Federal and State Courts and his previous reporting, complaining, and whistle-blowing activities regarding the systemic failure of the levee system during Hurricane Katrina.

IT IS FURTHER ORDERED that security be fixed and set in the amount of $_____.

ORDER RENDERED at Baton Rouge, Louisiana, on the _____ day of _____, 2010,

at _____ o’clock _____.m.

_____

Honorable James J. Brady
Judge, United States District Court, Middle District of Louisiana

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
BOARD OF SUPERVISORS, ET AL.	**MAGISTRATE-JUDGE: NOLAND**

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that I have served a copy of the above and foregoing Motion, exhibits annexed thereto, and proposed Order upon

Board of Supervisors of Louisiana State University and A&M College
through its counsel of record,
Mr. Richard Zimmerman
445 North Boulevard, Suite 300
Baton Rouge, LA 70802
Fax: (225) 343-0630

via fax on this 9th day of April, 2010.

Baton Rouge, Louisiana, this 9th day of April, 2010.

Jill L. Craft

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. IVOR van HEERDEN	**CIVIL ACTION NO. 10-155**
VERSUS	**JUDGE: BRADY**
BOARD OF SUPERVISORS, ET AL.	**MAGISTRATE-JUDGE: NOLAND**

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MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, AND, ALTERNATIVELY, INJUNCTIVE AND/OR EQUITABLE RELIEF

MAY IT PLEASE THE COURT:

FACTS:

On August 18, 1992, Petitioner, Dr. van Heerden, was hired by defendant LSU. He is a world renowned disaster science specialist and hurricane researcher. After his hire, he became Deputy Director of the LSU Hurricane Center and focused his research efforts on storm surge modeling.

Pre-Katrina, Dr. van Heerden issued a number of warnings regarding the apocalyptic impact a direct hurricane hit would have on the Greater New Orleans, including the impacts of storm surge. Following Hurricane Katrina, Dr. van Heerden correctly determined the devastation was caused by the failure of the levee system and the Corps of Engineers.

Dr. van Heerden issued a number of statements to the state, national, and international press following Hurricane Katrina asserting that the failure of the levees caused the flooding and that the Corps of Engineers' illegal negligence was responsible. In response, defendant LSU and its administrators engaged in a pattern and practice of threatening Dr. van Heerden and directly interfering with his free speech rights. Dr. van Heerden disclosed these illegal activities to the media and, further, objected and opposed defendant LSU's repeated attempts to violate his free speech rights.

On November 2, 2005, Dr. van Heerden testified before the United States Congress regarding the cause of the Katrina flooding and the fault of the Corps of Engineers. He additionally provided evidence, information, and testimony before the Louisiana Legislature, Federal and State Courts regarding the cause of the Katrina flooding and the fault of the Corps of Engineers.

In May, 2006, Dr. van Heerden released for publication *The Storm*, a book authored by him, which reiterates that the Corps of Engineers bears responsibility for the Katrina flooding.

Dr. van Heerden provided testimony and evidence to the State of Louisiana, the Louisiana Governor's Office, the United States Congress, and State and Federal Courts, all of which were conducting investigations, hearings, and inquiries into violations of Federal and State law, specifically, the legal fault on the part of the Corps of Engineers directly causing the levee breaches following Hurricane Katrina. Dr. van Heerden's speech constituted activity protected under La. R.S. 23:967.

However, following his speech and protected activity, defendant LSU engaged in illegal retaliation/reprisal, ultimately terminating Dr. van Heerden's employment as a faculty member effective May 21, 2010. Defendant LSU additionally removed him from access to computer modeling, removed him from academia, and removed him from his ability to continue his vital and important research regarding hurricanes and their impact.

Dr. van Heerden, by request for Injunctive and/or Equitable Relief, seeks to maintain the status quo between the parties and restrain defendant LSU from illegally terminating his employment. Unless injunctive relief is entered in this matter, Dr. van Heerden will suffer and continue to suffer irreparable injury, loss, and damage.

LAW AND ARGUMENT:

REPRISAL

This matter arises under La. R.S. 23:967 which makes it illegal for an employer to engage in reprisal against its employee:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.
>
> * * *
>
> C. For the purposes of this Section, the following terms shall have the definitions ascribed below:
>
> (1) 'Reprisal' includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; . . .
>
> (2) 'Damages' include compensatory damages, back pay, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.

Dr. van Heerden directly disclosed to the public and the media the fact that LSU and its administrators were threatening him and directly interfering with his ability to speak out regarding the legal fault of the Corps causing the post-Katrina devastation. Indeed, he publicly spoke out against the repeated attempts by LSU to stifle his free speech, much of which was widely reported in the local and national media. He also directly objected to and opposed defendant LSU's repeated attempts to interfere with his rights of free speech - an employment act or practice which violates law.

On several occasions, Dr. van Heerden testified before public bodies, including the United States Congress and the Louisiana Legislature, in response to their inquiries into the causes of the massive destruction in the wake of Katrina.

It is clear Dr. van Heerden engaged in activity protected against "reprisal" under La. R.S. 23:967. Additionally, the Court in *Winkler v. T.L.C. Marine Services, Inc.*, 823 So.2d 351 (La. App. 1st Cir. 2002), specifically held that a federal law violation may serve as the predicate for relief under La. R.S. 23:967.

INJUNCTIVE RELIEF

1. Substantial likelihood of success on the merits

In order to obtain a preliminary injunction, Dr. van Heerden bears the burden of proving:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued: (3) that threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest.
>
> *EEOC v. Cosmair, Inc.*, 821 F.2d 1085. 1088 (5th Cir. 1987)

As set forth above, Dr. van Heerden shows that he has a substantial likelihood of success on the merits; that being he has been subjected to illegal retaliation/reprisal (including retaliatory harassment), and that his rights have been violated by LSU and its administrators.

Dr. van Heerden was clearly terminated, harassed, and targeted because he "opposed" actions by LSU administrators to silence him and stifle his speech regarding the cause of the massive post-Katrina flooding and those responsible for it. Indeed, on numerous occasions, LSU made it clear the reason for violating Dr. van Heerden's rights was on account of the relationship between LSU and the Corps, including the possible availability of federal dollars to LSU in the wake of Katrina.

LSU, through Interim Dean Constant, clearly confirmed that Dr. van Heerden's proposed termination had nothing to do with his job performance. Rather, leading up to his termination, LSU, through its administrators, repeatedly stated that Dr. van Heerden needed to be fired because of his speech against the Corps.

In analyzing a retaliation claim, the Court is guided by the recent Supreme Court rulings and those of the Fifth Circuit. The avenues of proof, since the Supreme Court decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), remain well-established.

In the mechanism of proof, the *Reeves* Court clearly reiterated:

> Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' . . . And in attempting to satisfy this burden, the plaintiff - once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision - **must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination**. . . That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination '**by showing that the employer's proffered explanation is unworthy of credence**.' . . . Moreover, although the presumption of discrimination 'drops out of the picture' once the defendant meets it burden of production. . . the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom. . . on the issue of whether the defendant's explanation is pretextual.'
>
> *Reeves*, 120 S.Ct. at 2106 (citations omitted; emphasis added)

Since the Supreme Court decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), the law is clear that a retaliation plaintiff need only show that retaliation was "a" motivating factor, and even if there were other factors motivating the decision, including legitimate ones, the plaintiff may still recover. The *Costa* Court made it clear that a plaintiff need not show that retaliation was the sole or only factor, only that it was "a" motivating factor. This analysis is known as the "mixed motive analysis." Even if the Court were to conclude that there were other motivations for LSU's actions or even actions likely to occur in the future, the fact that retaliation/reprisal is "a" motivation, mandates likelihood of success on the merits.

The Fifth Circuit in *Fabela v. Socorro Independent School District*, 329 F.3d 409 (5th Cir. 2003), reversed the grant of summary judgment in favor of the employer. *Fabela* involved a 1991

EEOC Charge serving as the basis for the plaintiff's 1997 termination - 6 years later. Notably, the 1991 EEOC Charge was settled between the parties. Clarifying the law, the *Fabela* Court held:

> A plaintiff alleging Title VII retaliation may establish her case for causation in one of two ways: she may either present direct evidence of retaliation, which is also know (sic) as the 'mixed-motive' method of proving retaliatory motivation; or she may provide circumstantial evidence creating a rebuttable presumption of retaliation. Citations omitted. Usually, in the context of a retaliation claim, the employer refrains from expressly stating that an impermissible criterion influenced his decision to expose the plaintiff to an adverse employment action, and so direct evidence of an employer's allegedly retaliatory intent is rarely available. As a result, we have long recognized the well-trod path by which a plaintiff may demonstrate retaliatory intent through the use of circumstantial evidence and the famed *McDonnell Douglas* burden-shifting framework. . . However, in the unusual instance where a plaintiff is able to support the elements of her claim with direct evidence of a retaliatory motive, the *McDonnell Douglas* framework does not apply. . . in such 'direct evidence' cases, once the plaintiff has submitted evidence that retaliation was **among the motives which prompted the adverse action**, the 'burden of proof shifts to the employer to establish by preponderance of evidence that the same decision would have been made regardless of the forbidden factor. . . The case at bar presents such a circumstance. This Court has defined 'direct evidence' as evidence which, 'if believed, proves the fact [in question] without inference or presumption. Citations omitted. In a Title VII context, direct evidence includes any statement or document which shows on its face that an improper criterion served as **a basis - not necessarily the sole basis, but *a* basis - for the adverse employment action.**
>
> *Fabela*, 414-415 (emphasis added)

In *Fierros*, the Court clarified direct evidence as follows:

> Apparently, the district court concluded that the affidavit evidence only Fierro's 'subjective belief' that a retaliatory motive was behind Arnold's decision to deny her the pay increase. But Fierros does not attest to her belief that Arnold had a retaliatory motive in her affidavit. She attests that Arnold made a statement to her admitting that he had a retaliatory motive. 'In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face.' *Portis v. First National Bank*, 34 F.3d 325, 329 (5th Cir. 1994); cf. *Rubenstein*, 218 F.3d at 402 (finding that a dean's testimony that he denied a professor a pay raise because the professor filed a discrimination suit against the university 'could be no more direct on the issue of retaliation'). Further, in Portis, we explicitly rejected the argument that the plaintiff's testimony regarding the employer's discriminatory statements was merely testimony 'regarding [the plaintiff's] subjective belief.' We noted that in contrast to testimony regarding subjective belief, **testimony regarding the employer's statements is direct evidence because it 'requires no additional inference to conclude that [the plaintiff] was [discriminated against].**
>
> *Fierros*, at 195 (emphasis added)

In this case, Dr. van Heerden shows that retaliation/reprisal was, indeed, "a" motivation, if not "the" motivation for his termination.

2. Substantial threat that Dr. van Heerden will suffer irreparable harm

If Petitioner's impending termination is not halted, he will continue to suffer irreparable harm. Dr. van Heerden is one of only a handful of surge modeling experts in the United States and, certainly, considered one of the leading experts in his field. His research, dependent upon access to computer modeling, remains not only cutting edge, but vital to the survival of coastal Louisiana during hurricane season. Specifically, Dr. van Heerden's work, directed not only at cause and effect, also targets all aspects of hurricane survival and recovery, including evacuations, transportation, supplies, precautions, and pre- and post-planning; and, very importantly for all aspects of coastal restoration, planning, and implementation.

Removing Dr. van Heerden from the faculty ranks, simply because he espouses and continues to espouse views "unpopular" to LSU because of its relationship to the Corps not only serves to directly silence Dr. van Heerden, but scores of other faculty members who would dare express an opinion or belief LSU may not like. This intrusion and chilling effect on Dr. van Heerden's clear rights to free speech and academic freedom not only represent direct irreparable harm to him, but serves a chill on the speech of others similarly situated to him.

As a matter of law, irreparable harm is presumed from violations of the civil rights statutes in accordance with *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *EEOC v. Cosmair,* at 1090; *Murry v. American Standard, Inc.*, 488 F.2d 529, 531 (5th Cir. 1973); *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981). Reversing the denial of a preliminary injunction, the Fifth Circuit in *Deerfield Medical Center v. City of Deerfield Beach, et al.*, 661 F.2d 328 (5th Cir. 1981), reiterated the obvious:

> It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); *Johnson v. Bergland*, 586 F.2d 993 (4th Cir. 1978); . . .
>
> *Deerfield Medical Center*, at 338

See also: *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 281 (5th Cir. 1996). In this case, Dr. van Heerden's speech and that of other LSU employees has clearly been "chilled" and stifled. The determination of the causes of the Katrina devastation is a matter of prominent public concern. Any action in retaliation for speaking out against the Corps and speaking about the causes of one of the worst disasters in this Country's history, cannot be allowed to stand.

Although this action does not involve Title VII retaliation, Louisiana's reprisal claims are analyzed in a similar manner. Along that vein, the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Company v. White*, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), made abundantly clear that the right to be free from retaliatory harassment and even a suspension **with pay** is clearly established:

> . . . throughout its history, Title VII has provided for injunctions to 'bar like discrimination in the future,' *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (internal quotation marks omitted), **an important form of relief. . . And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay**.
>
> *White*, 126 S.Ct. at 2417 (emphasis added)

Injunctions serve the dual purpose of not only maintaining the status quo between the parties to the litigation, but also to serve as a bar to like behavior in the future.

Also present in this case is the patent existence of partiality which the Court in *Vergie Lee Valley v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), found present, supporting its affirmance of the issuance of a preliminary injunction. The *Vergie Lee Valley* Court held:

> The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. . . The Supreme Court has consistently enforced this basic procedural right and held that decision makers are **constitutionally unacceptable** in the following circumstances: (1) where the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) where an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) when a judicial or quasi-judicial decision maker has the **dual role of investigating and adjudicating disputes and complaints**.
>
> *Vergie Lee Valley*, at 1052 (emphasis added)

Parsing through the evidence, the Court found the existence of irreparable injury on account of the irreversible biases existing among only a handful of Board members. Specifically, the *Vergie Lee Valley* Court cited as such evidence, the "prehearing protestations", the fact that two Board members had been "embarrassed publicly" by an investigation initiated by Ms. Cox and appeared "angry" and their opinions of Ms. Cox changed after the incident, the fact that Ms. Cox had uncovered another Board member's practice of self-dealing and initiated a federal investigation. *Vergie Lee Valley*, at 1054, 1055.

On account of the myriad of evidence regarding partiality, Dr. van Heerden shows the likelihood of irreparable harm.

3. The threatened injury outweighs any damage the injunction might cause to LSU and the injunction will not disserve the public interest

For the purposes of efficiency, prongs three and four of the injunction test are evaluated together in this instance. As noted by the *Vergie Lee Valley* Court, reinstating the superintendent "would not visit any substantial harm on the School Board, and indeed that **far greater harm to both Cox and the entire school system would result from allowing the unconstitutional [termination] to stand.**" *Vergie Lee Valley*, at 1056 (emphasis added). In this case, there would be no substantial harm imposed on LSU by the grant of injunctive relief, specifically relief designed to prohibit any further chill on the free speech rights of Petitioner and others, in addition to stopping

LSU from further violating Petitioner's rights.

The grant of injunctive relief maintains the status quo between the parties during the pendency of this litigation.

There exists no harm to the public interest by granting an injunction in this case. Indeed, the public interest would be surely undermined if the illegal actions of LSU are allowed to stand and LSU be empowered to terminate and/or take employment action against Petitioner and others merely because they did the right thing and exercised their rights of free speech and academic freedom. The untold impact not only on Dr. van Heerden, but also the LSU community and citizens of this State cannot be denied.

CONSPIRACY

Although LSU has not been directly sued for violations of 42 U.S.C. §1985, the Court may nonetheless rely upon violations of this Federal law in establishing a predicate for relief.

42 U.S.C. §1985 prohibits any form of intimidation against a person who testifies before a Federal Court, which provides, in pertinent part:

> . . . If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, and to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror. . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;. . .
>
> 42 U.S.C. Sect. 1985

The evidence presented shows that as a direct result of Dr. van Heerden's testimony in both Federal and State Courts, he was terminated effective May 21, 2010.

CONCLUSION:

Dr. van Heerden is entitled to issuance of the injunctive and equitable relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2010, I have served a copy of the above and foregoing Memorandum in Support of Motion for Temporary Restraining Order and, Alternatively, Injunctive and/or Equitable Relief with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 9th day of April, 2010.

s/Jill L. Craft
Jill L. Craft