

ORIGINAL

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

SCANNED
3RD CIRCUIT COURT OF APPEAL

DOCKET NUMBER 14 01109-CA

MEYER & ASSOCIATES, INC.
Plaintiff/Appellee

VERSUS

THE COUSHATTA TRIBE OF LOUISIANA
Defendant/Appellant

ORIGINAL BRIEF ON BEHALF OF APPELLANT
THE COUSHATTA TRIBE OF LOUISIANA

RELATIVE TO THE FOLLOWING JUDGMENTS AND RULINGS
BY THE 14TH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
CIVIL SUIT NO. 2006-002683, DIV. "B"

HONORABLE CLAYTON J. DAVIS, PRESIDING

- (1) October 11, 2013 Judgment on Plaintiff's Motion for Summary Judgment (Liability and Damages);
 - (2) October 7, 2013 Judgment on Plaintiff's Motion for Partial Summary Judgment Re: Fraud; Motion for Partial Summary Judgment Re: Costs; and Motion for Summary Judgment;
 - (3) October 3, 2013 Ruling on Issues of Breach of Contract, Breach of Fiduciary Duty and Stipulated Damages (to the extent this is considered a "Judgment");
 - (4) March 3, 2014, Judgment in favor of Plaintiff and against the Coushatta Tribe in the amount of Ten Million Nine Hundred Thousand Two Hundred Fifty (\$10,998,250.00) Dollars for the reasons reflected in the Court's February 19, 2014 Ruling; and
 - (5) The Coushatta Tribe received the Notice of Judgment on March 6, 2014, and on March 20, 2014 timely filed a Motion for New Trial; and on March 31, 2014, the Court handwrote "denied" on the proposed Order. The Coushatta Tribe did not receive a formal Notice from the Clerk of Court, only a conformed copy.
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I. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is based upon La. Const. art. 5 § 10 and La. C.C.P. art. 2081, *et seq.* in that this is an Appeal to the Court of Appeal, Third Circuit, from the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana.

II. ASSIGNMENTS OF ERROR

- A. The Trial Court committed legal error in its interpretation of the contracts between the Coushatta Tribe of Louisiana ("Coushatta Tribe") and Meyer and Associates, Inc. ("Meyer") and in its calculation of damages since there is no Termination Fee or penalty owed such that Meyer's claim should be dismissed.
- B. The Trial Court committed legal error when it failed to find that the stipulated damages, or penalty for breach, were against public policy such that Meyer's claim should be dismissed.
- C. The Trial Court committed legal error (both substantively and procedurally) when it summarily dismissed, in Chambers, without any motion being filed, pending and noticed, without any additional evidence being offered, and without any additional hearing being held, all of the Coushatta Tribe's claims and affirmative defenses during the Pre-Trial Conference (12 days before the Jury Trial was scheduled to begin) under the auspices that the Trial Court was granting a previously denied Motion for Summary Judgment such that the Trial Court should be reversed and this matter remanded for a Jury Trial on all issues if Meyer's claim is not dismissed.
- D. The Trial Court committed legal error when it awarded Meyer damages because any purported failure to perform by the Coushatta Tribe was: (1) caused by Meyer's own bad faith and (2) was justified by a valid excuse such that Meyer's claim should be dismissed.
- E. Assuming *arguendo* that Meyer is entitled to damages, the Trial Court

committed legal error when it awarded Meyer judicial interest from June 8, 2005 in violation of applicable law such that the Trial Court should be reversed.

F. The Trial Court committed legal error when it did not properly compute the "Reimbursable Expenses" and double counted Meyer's expenses such that the Trial Court should be reversed.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Trial Court committed legal error in its interpretation of the contracts between the Coushatta Tribe and Meyer and its calculation of damages since there is no Termination Fee or penalty owed such that Meyer's claim should be dismissed.

B. Whether the Trial Court committed legal error when it failed to find that the stipulated damages, or penalty for breach, were against public policy such that Meyer's claim should be dismissed.

C. Whether the Trial Court committed legal error (both substantively and procedurally) when it summarily dismissed, in Chambers, without a new motion being filed, pending and noticed, without any additional evidence being offered, and without any additional hearing being held, all of the Coushatta Tribe's claims and affirmative defenses during the Pre-Trial Conference (12 days before the Jury Trial was scheduled to begin) under the auspices that the Trial Court was granting a previously denied Motion for Summary Judgment such that the Trial Court should be reversed and this matter remanded for a Jury Trial on all issues if Meyer's claim is not dismissed.

D. Whether the Trial Court committed legal error when it awarded Meyer damages because any purported failure to perform by the Coushatta Tribe was: (1) caused by Meyer's own bad faith and (2) was justified by valid excuse such that Meyer's claim should be dismissed.

E. Whether the Trial Court committed legal error when it awarded Meyer

judicial interest from June 8, 2005 in violation of applicable law such that the Trial Court should be reversed.

F. Whether the Trial committed legal error when it did not properly compute the “Reimbursable Expenses” and double counted Meyer’s expenses such that the Trial Court should be reversed.

IV. STATEMENT OF THE CASE

A. Factual Background.

This case is about contracts. The contracts were so complex and convoluted that they fooled the leaders of the Coushatta Tribe and they caused the Trial Court to commit reversible error. Hopefully, this Court will not make that same mistake. A review of these contracts will highlight Meyer’s manipulations and misrepresentations throughout the Project.

Meyer is a small civil engineering group (R. Vol. 10, p. 2353) that handles civil engineering construction projects like commercial buildings. It is not an electrical engineering firm and it is **not** and was **not** capable of developing and implementing a Power Plant Project (“Power Project”, “Power Plant” or “Project”). (R. Vol. 10, p. 2353). It is undisputed that Meyer had never developed or implemented a Power Plant. The development of a Power Plant is a very complex undertaking which involves many moving parts. (R. Vol. 10, p. 2354). The failure of any part means the Project fails. Meyer may have been an adequate civil engineering firm for other work of the Coushatta Tribe, but it had no experience and expertise in electrical power generation and it should **not** have lead the Coushatta Tribe to believe it could develop a Power Plant.

Since Meyer did not have the necessary experience and expertise to develop a Power Plant, he brought in other individuals and companies with varied degrees of experience in electrical Power Plants and power generation. Meyer called the group of individuals its “Power Team Consortium”, “Power Developer Team”, and

other similar titles. Richard Meyer, the principal of Meyer, claimed to have worked eighteen (18) hours a day, seven (7) days a week as the “orchestra leader.” (R. Vol. 28, pp. 6902-6903). Meyer admitted there are no documents to support that claim. Id. Unfortunately, Meyer’s orchestra could not play a complete tune (the “Project”) without playing more off-key notes (the “misrepresentations” and “breaches”) than not.

Meyer’s inability to fully understand and implement the Power Plant was best summed up by Joseph Rogers with Energy Resource Group. Mr. Rogers prepared a summary for one of the potential power purchasers, Louisiana Electric Power Association (“LEPA”). He told LEPA, after performing an analysis and study on the proposed Power Project, that:

“I’m not sure that the full breadth of this modified project concept has been fully absorbed by Meyer and their client.” (R. Vol. 11, p. 2725) (*emphasis added*).

Meyer essentially took more than \$8.4 million dollars to be on a “learning curve” about electrical Power Plant Projects at the expense of the Coushatta Tribe. During the Project, numerous misrepresentations were made and numerous fiduciary duties, contractual duties, the Code of Conduct of Professional Engineers and the Code of Ethics for Professional Engineers, were all breached by Meyer while pursuing a Project that had little chance, if any, of ever becoming a reality. Meyer said whatever he thought he had to say to advance the Project. (R. Vol. 27, p. 6702). Meyer took the Coushatta Tribe’s money, but didn’t pay all of his Team claiming to be out of money in Phase 1, when that was not the case. (R. Vol. 27, p. 6673).

Over a short period of time, Meyer had developed a working relationship with certain Tribal Council Members. One of those Tribal Council Members had read in an Indian Country Today magazine that there was a pending Energy Bill which would provide funding to Native American Tribes to build Power Plants on

their Trust Property. That Tribal Council Member went to Richard Meyer and asked if Meyer could assist them in **exploring the possibility of developing a Power Plant**. Rather than referring the Coughatta Tribe to a company which had the necessary experience and expertise, Meyer seized the opportunity to do it itself. **Meyer knew he could subcontract the actual work and make millions of dollars. In undertaking a Project which had little chance of success, Meyer would make millions of dollars along the way. If, by chance, the Power Project became viable, Meyer stood to make enormous sums of money for many years to come.** Rather than remain as a General Consultant ("GC") and advisor for limited pay as it was in the existing capital improvement projects for the Coughatta Tribe, Meyer manipulated the opportunity to have the Coughatta Tribe finance the Project with no risks to Meyer.

A Concept Stage Benchmark Feasibility Study was orchestrated by Meyer in May of 2002. (R. Evidence Vol. 14, pp. 3304-3346). The study did **not** indicate that a Power Project was feasible, yet Meyer used it to "sell" the Project to the Tribal Council. In a December 17, 2002 presentation to the Tribal Council, **Meyer told the Tribal Council that it would be feasible.** (R. Vol. 11, p. 2546). In that presentation, Meyer misrepresented the findings of the Feasibility Study in many ways. The misrepresentations are discussed in detail below and should have precluded summary judgment.

Simultaneously with the December 17, 2002 presentation to the Tribal Council, Meyer prepared and presented the Tribal Council with Resolution 2003-04 which was adopted by the Tribal Council on January 14, 2003. (R. Evidence, Vol. 5, pp. 1031-1038). The Resolution funded \$3,375,000.00 to explore the feasibility of a Power Plant and it expresses what the Tribal Council understood to be limitations on its exposure to Meyer who was to explore the **possibility of developing a Power Program**. Of particular importance to the Tribal Council was

a specified return of investment criteria and **the fact that the Tribal Council could stop the project activity** and not execute any final agreements. (R. Evidence Vol. 5, p. 1037-1038). Of equal importance to the Tribal Council was a provision that appropriate and **reasonable Termination Provisions that are generally consistent with the Standards of the Power Industry for Development Programs of this type would be included in all agreements to be executed by the Coushatta Tribe.** (R. Evidence Vol. 5, P. 1038). Meyer, by a manipulation of a series of documents, tried to eviscerate those two (2) important provisions in the complex and convoluted Work Authorizations that it prepared and presented to the Tribal Council in its attempt to remove the Tribal Council's ability to stop the project and to potentially hold the Coushatta Tribe responsible for an enormous Termination Fee or penalty.

Fortunately for the Coushatta Tribe, **that Termination Fee or penalty does not apply as will be hereinafter demonstrated.** Counsel for Meyer admitted at a hearing that **Meyer was only seeking the Termination Fee.** "That's the only damages that we're entitled to... and we've made that clear." (R. Vol. 28, p. 6863). **Accordingly, if the Termination Fee doesn't apply, Meyer has no evidence of damages, and this matter can be reversed, rendered and dismissed.** In the alternative, it is respectfully submitted that for the reasons hereinafter set forth, the Motion for Summary Judgment was improperly granted, is substantively deficient and is procedurally deficient, and Meyer was not entitled to summary judgment as a matter of law such that this Court should reverse and remand to the Trial Court for a Jury Trial on all issues if Meyer's claim is not dismissed by this Court.

The Tribal Council passed Resolution No. 2003-04 in early 2003 which provided for up to \$3,375,000 to fund further investigation into the Power Project (Phase 2). (R. Evidence Vol. 5, pp. 1031-1038). At the end of Phase 2, Meyer was to provide all of his work product so that the Coushatta Tribe could have it

reviewed by a “Big 3 Accounting Firm.” If the Coughatta Tribe decided to go forward with the Project, its principal investment was to be limited to an additional \$10,000,000 of equity investment. (R. Evidence Vol. 2, pp. 441-452). Meyer assured the Coughatta Tribe that its initial \$3,375,000 could be counted as equity in the Project. The remainder of the approximate \$650 million dollar estimated cost of the Project was to come from non-recourse loans under the Indian Energy Act or from grants.¹ At no time did the Coughatta Tribe commit to pay or invest more than \$13,375,000. Yet, the Coughatta Tribe had paid \$8.4 million plus to Meyer before suit was filed, and has wrongfully been cast in Judgment for 95% of the money left under outstanding Work Authorizations (\$5,163,250) plus a contractual termination penalty (\$5,440,000), plus “expenses” of \$395,000, plus attorneys’ fees of \$5,585,573, plus court costs of \$57,662.34 and judicial interest on all of those amounts.

As the “pitching” of the Power Project to the Coughatta Tribe progressed, Meyer continued to make the plant larger and more grandiose in order to justify more fees and expenses. Soon, the original limited budget amount of \$3,375,000 had ballooned to the full \$13,375,000. At the same time, the terms of the Agreements which Meyer prepared and had the Coughatta Tribe sign became more and more onerous on the Coughatta Tribe. Meyer’s position as the Coughatta Tribe’s engineer and his position of trust with three (3) of the Council Members (Chairman Lovelin Poncho and Council Members William Worfel and Leonard Battise) allowed him to convince these Members that the Project was feasible. Moving forward, Meyer excluded the other two Council Members from meetings.

In the spring of 2005, Chairman Poncho decided not to run for re-election.

¹ Meyer never made any investigation into the funding of the Project. There was never any communication with the Federal Government that was allegedly going to guarantee the loans.

Meyer took advantage of that fact and prepared and presented for execution Work Authorization #3, which contained even more onerous provisions. Work Authorization #3 moved the venue for any litigation from Allen Parish to Calcasieu Parish and attempted to increase the penalty on the Coushatta Tribe for early termination.

In June 2005, the Coushatta Tribe, through its newly-elected Council, began the task of reviewing existing projects, which included the Power Project. Shortly after the election, Meyer scheduled a meeting with potential Offtakers at the Coushatta Casino at the expense of the Coushatta Tribe (hotel accommodation, golf, meals, etc.). When the Tribal Council learned there was to be a meeting that they knew nothing about, one Tribal Council Member canceled the hotel reservations.² **Meyer then wrote to the potential Offtakers and explained that the meeting had been postponed due to a change in management at the Casino, that it was appropriate to postpone the meeting, and that it would be rescheduled.** Meyer never rescheduled that meeting. Nevertheless, Meyer has now claimed that the “cancellation” of that meeting was a breach of the Power Project Agreements, and that the Coushatta Tribe owes millions of dollars in penalty.

In his new position, Tribal Chairman Sickey called in department heads and questioned them about ongoing projects. **The Tribal Council minutes reflect that Chairman Sickey told the General Manager of the Casino that the Tribal Council wanted to put all Meyer projects at the Casino on hold for the time being, but he was told that there were not any Casino projects ongoing at the time.** Again, Meyer now claims that this was a breach for which it should be paid millions of dollars in penalty.

Meyer finally met with the Tribal Council in August 2005. At that meeting,

² It is not clear whether the meeting was actually going to take place, as Meyer only had two (2) positive responses to the invitation to attend.

Meyer told the Tribal Council that it could replace William Worfel, who had resigned from the Tribal Council, as the Authorized Representative (“AR”) on the Power Project. The Tribal Council replaced Worfel in a Resolution in October 2005, and made Chairman Sickey the Authorized Representative, retroactive to June 2005. Meyer now claims that this was a breach of the Agreements, even though **Meyer later told one of the potential Offtakers that the appointment of Chairman Sickey was appropriate and showed the Tribal Council’s support for the Project.**³ **The Members of the Tribal Council never spoke with any of the potential Offtakers and did nothing to derail the Project.** Yet, the Trial Court apparently found that the Coushatta Tribe breached the Agreements with Meyer and awarded substantial damages, penalty, and attorneys’ fees.

The Project was defined by a series of “Work Authorizations” (“WA”) prepared by Meyer. WA#1 was signed on January 14, 2003, the same date that Meyer had the Tribal Council adopt Resolution 2003-04 which Meyer had prepared and presented to it. That Resolution capsulizes the Coushatta Tribe’s understanding of the Project. WA#1 authorized preliminary investigation.

The primary focus in this case is WA#2 which was signed in May 2004, ostensibly because the Project scope increased with the potential participation of LEPA.⁴ This Work Authorization defined Phase 2 tasks and “deliverables,” and it increased the penalty for early termination. The penalty became “95% of the remaining unbilled aggregate amount of all fees authorized under all active Work Authorizations at the time of termination including remaining lump sum amounts

³ Apparently this is the “breach” that the Trial Court latched onto, as it determined that judicial interest should run from June 8, 2005. It is not clear how one can retroactively breach a contract.

⁴ Dr. Tabors testified that the increased penalty as the job was closer to the end made no sense.

authorized, plus one-third (1/3) of the Developer's Fee calculated by multiplying 400 megawatts by the compensation unit price defined in SC5."⁵ The Developer's Fee went from one based solely on Meyer obtaining binding Power Sale Agreements to one that was one-third (1/3) guaranteed if the Coughatta Tribe sold the Project, leased it, or terminated an active Work Authorization. **The penalty was not related in any way to Meyer's expected lost profits, yet this was the penalty awarded by the Trial Court. The Trial Court failed to understand the provisions of WA#2 which showed that no Termination Fee or penalty was owed.**

In March, 2005 WA#3 was signed by three (3) of the Council Members. It dragged a number of Phase 3 tasks back into Phase 2 (which had already been completed with the delivery of "Firm Proposals") so that Meyer could argue, as it has, entitlement to a larger Termination Fee or penalty if the Project was canceled. The Coughatta Tribe continued to be interested in the project, but it could never get any information about Meyer's work. WA#3 also increased the termination penalty from the 1/3 in WA#2 to 1/2 of the 400 megawatt calculation, attempting to increase the penalty by almost \$2 million dollars under Meyer's calculations.⁶ **The Trial Court found that the increased penalty was purely punitive and rejected it, awarding the termination penalty which was wrongfully/improperly calculated under WA#2.**⁷

B. Procedural Background.

⁵ The proper calculation of this penalty is an Appeal issue discussed more fully below. **The calculation shows that no Termination Fee or penalty is owed to Meyer.**

⁶ Meyer is seeking this increased penalty (approximately \$2.0 million dollars) in its Answer to the Appeal as the Trial Court only awarded the penalty from WA #2. **There is no Termination Penalty owed under either WA #2 or WA #3.**

⁷ Inexplicably, the Trial Court awarded the Reimbursable Expenses as calculated under WA #3.

This suit was filed by Meyer on April 21, 2006. For a number of years, the case languished because the Coushatta Tribe was precluded from obtaining Meyer's work product. During that time, the Coushatta Tribe effectively had no right to document discovery. Therefore, no depositions were taken at that time and there was no Trial date set.

After the Coushatta Tribe filed a Motion to Compel, the Trial Court allowed the Coushatta Tribe's expert, Dr. Richard Tabors, to review Meyer's work product files. That inspection was limited to three 8-hour days and Dr. Tabors was not allowed to take notes or make any copies. Finally, in late 2012, Meyer produced its files, and relatively contemporaneously, filed a number of Motions for Summary Judgment (regarding the claims of fraud and the recovery of expenses) and the Coushatta Tribe responded with cross motions on a number of issues. The Trial Court delayed hearing these motions until September 13, 2013. On January 16, 2013 the Trial Court issued a Pre-Trial Order which provided for a Jury Trial date of October 15, 2013.

Shortly before the scheduled Jury Trial was to have occurred, **at a hearing on September 13, 2013** (with a formal Judgment on October 7, 2013), **the Trial Court denied Meyer's Motions for Summary Judgment.** (R. Vol. 22, pp. 5398-99, 5427). **On October 11, 2013, the Trial Court signed a Judgment that reversed its earlier Ruling and Judgment (even though no new motions had been filed, no hearing had been noticed, no new evidence was presented and no new hearing had taken place).** (R. Vol. 22, pp. 5438-39). That Judgment summarily dismissed all of the Coushatta Tribe's claims and affirmative defenses, except for one affirmative defense. The Trial Court set a Bench Trial date of January 21, 2014 on the issue of whether the stipulated penalties were against public policy. The result of that Trial was a Judgment in favor of Meyer in the

amount of \$10,998,250.00, plus judicial interest and attorneys' fees. (R. Vol. 24, pp. 5861-5868, 5869-5872). The Trial Court fixed a hearing on the attorneys' fees for June 10, 2014. At the conclusion of the hearing, the Trial Court awarded Meyer attorney's fees in accordance with a March 22, 2012 Contingency Fee Agreement Meyer had signed with its Attorney. The Trial Court ordered that the Coushatta Tribe pay Meyer \$5,585,573.00 in attorney's fees for two (2) years of work. The impropriety of the attorney fee award is before this Court in companion Appeal Docket No. 14 01114-CA.

V. ARGUMENT

ASSIGNMENT OF ERROR NO. 1

The Trial Court committed legal error in its interpretation of the contracts between the Coushatta Tribe and Meyer and in its calculation of damages since there is no Termination Fee or penalty owed such that Meyer's claim should be dismissed.

The amounts paid by the Coushatta Tribe to Meyer were not generally disputed. Defense Exhibit No. 11 (R. Evidence Vol. 14, pp. 3294-3300) contains Dr. Tabor's summary and shows a figure of **\$8,403,852** paid by the Coushatta Tribe to Meyer. The Coushatta Tribe expected Meyer to call Ralph Stephens, his expert on damages, but inexplicably he was not called.⁸ If Stephens had been called, the Coushatta Tribe would have cross-examined him on his calculations and on the contract provisions discussed herein.

The Coushatta Tribe's Counsel went through Meyer's computer printouts of those expenses at Trial. Please see Defense Exhibit No. 10. (R. Vol. 27, pp. 6667-6684). Those expenses totaled \$5,387,239.96 (**and included direct payments to Richard Meyer's company, PDM&A, of \$1,399,930.63, which represented**

⁸ The Trial Court may draw an adverse presumption from this failure to call a witness with information that was relevant to the case. See e.g. Roth v. New Hotel Monteloene, L.L.C., 07-0549 (La. App. 4th Cir. 1/30/08); 978 So.2d 1008, 1012, quoting Gurley v. Schwegmann Supermarkets, Inc., et al, 617 So.2d 41, 44 (La. App. 4 Cir. 1993).

profits skimmed off and not an expense). Richard Meyer confirmed those payments at Trial. (R. Vol. 27, pp. 6667-6684). Dr. Tabors' analysis estimated **\$1,119,050 as the maximum remaining net income to Meyer.** Dr. Tabors testified that his calculations erred in favor of Meyer. (R. Vol. 28, pp. 6934-6935). That calculation was un rebutted.

The Trial Court granted damages even though Meyer did not prove entitlement to any actual damages. Meyer sought damages under WA #3. The Trial Court rejected that request because the increased penalties had no relation to Meyer's potential lost profits:

"Work Authorization # 3's Termination provisions, entered into on the eve of Tribal elections and further in time from LEPA's addition to the project, was more likely than not a penalty related solely to 'bulletproofing' the project." (R. Vol. 24 p. 5867, n. 4).

The Trial Court also found that the Termination Fee or penalty of WA#2 was penal in nature (i.e., disconnected from any possible lost profits), but apparently excused it because the scope of the Project allegedly increased between WA#1 and WA#2. (R. Vol. 24, pp. 5864-5865). Dr. Tabors testified that a sponsoring party (the Coughatta Tribe in this case) had no reason to agree to a higher penalty as the Project progressed.

Without any discussion of Dr. Tabor's calculations that the most Meyer could have expected to gross for the remaining work was about \$1.1 million dollars, the Trial Court moved directly to the calculation of the Termination Fee penalty.⁹ **The Trial Court made no factual finding regarding Meyer's possible lost profits or its actual damages.** Meyer did not prove any damages at Trial. In fact, there are millions of dollars that Meyer received that are unaccounted for. This is in addition to the \$1,399,930 profit that Richard Meyer received through his

⁹ Dr. Tabors provided the only testimony about Meyer's possible lost profits and his testimony was un rebutted.

company, PDM&A. Meyer's case was based solely on the assumption that the Termination Fee would be enforced.¹⁰ "Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived." La. C.C. art. 1995. During the Trial, the Trial Judge seemed to understand the need for a comparison of actual damages and stipulated penalties:

"I don't know how many times I have to say this, but under 2012, under the analysis of stipulated damages, if it's so unreasonable and there's a lack of connection between the amount of the stipulated damage, 12 and a half million dollars, and actual damages to Meyer, then I can find that the stipulated amount is – it violates public policy...and is not reasonable. So I have to understand what the damage to Meyer was."
(R. Vol. 28, pp. 6930-6931) (*emphasis added*).

Meyer did not call a witness to attempt to quantify any business loss. It was, therefore, legal error for the Trial Court to find that Meyer was precluded "from pursuing other opportunities that likely would have been available" and that Meyer "undoubtedly suffered through the allegations of fraud," since there was no proof of such damages. Please see Ruling. (R. Vol. 24, p. 5865). In fact, the testimony established that Meyer was doing more than \$400 million dollars in other work. (R. Vol. 27, p. 6720). Business losses cannot be speculative. State, DOTD v. Caroline Atkins Crawford Business Trusts, 538 So.2d 1078 (La. App. 3d Cir. 1989).

The Trial Court had nothing to analyze regarding Meyer's lost profits through the end of Phase 2 (the relevant contract period) except for the unrebutted testimony of Dr. Tabors. Meyer put on evidence of its income and costs, **and the Coushatta Tribe showed that millions of dollars had been made by Meyer and that millions of dollars were unaccounted for.** Meyer put on no evidence of his remaining expenses for Phase 2, and, therefore, proved no loss of profits.

A. There is no Termination Fee or penalty owed to Meyer.

¹⁰ Counsel for Meyer admitted at Trial that Meyer was only seeking the Termination Fee. "That's the only damages that we're entitled to-and we've made that clear." (R. Vol. 28, p. 6863).

As previously indicated, Meyer's case was based solely on the assumption that the Termination Fee or penalty would be enforced. Counsel for Meyer admitted at Trial that Meyer was only seeking the Termination Fee (R. Vol. 28, p. 6863). As such, we need to closely examine the language dealing with the Termination Fee or penalty. A review of the various aspects of the Termination Fee or penalty exposes the Trial Court's error. WA#2, Paragraph SC17, (R. Evidence Vol. 13, pp. 3132-3133) describes the conditions under which Termination Fee and penalty is owed and provides the parameters for the calculation. **Meyer had to prove each condition to get the Termination Penalty.** First, the penalty provision in SC17 only applies if the Coughatta Tribe terminates, sells, or leases the Project, or if the Coughatta Tribe cancels any Work Authorizations prior to the time there are binding Power Purchase Agreements. **The Coughatta Tribe did not terminate, sell, or lease the Project, and none of the Work Authorizations were canceled. Based on that first condition alone, Meyer was not entitled to any Termination Fee or penalty and he had been paid for the work already performed.**

Second, as stated in SC17, Meyer could only recover the Termination Fee and penalty if it had:

“an active Preliminary Agreement (such as executed Memorandums of Understanding)(MOU) with a Power Offtaker representing at least 140 MW of current demand or 160 MW of projected average demand at 2015 in place and effective under a executed MOU with Phase 2 work ongoing and underway.”

Meyer offered no evidence that this second condition was satisfied. All of the Preliminary Agreements (Memoranda of Understanding and Letters of Intent) in place on June 8, 2005 (the date the Trial Court found a breach) with any potential Offtakers do not specify the megawatts of power demand. Those in effect on June 8, 2005 were Valley Electric's MOU, (R. Evidence Vol. 7, pp.1677-1679), and LEPA's LOI, (R. Evidence Vol.7, pp.1685-1688). Therefore, **Meyer**

was not entitled to the Termination Fee and penalty since there is no active Preliminary Agreement with a potential Offtaker representing at least 140 MW of current demand or 160 MW of projected average demand at 2015 in place and effective. Meyer did not satisfy this second condition.

Third, Meyer failed to prove the “remaining unbilled aggregate amount of all fees authorized under all active Work Authorizations at the time of termination.” Meyer did not call Ralph Stephens, his damage expert, to testify at the Trial on January 21, 2014.¹¹ Since damages were at issue, and because Meyer was not granted summary judgment on the issue of damages, Meyer could not rely on Stephens’ expert Affidavit and should have called him live to testify. **Meyer did not satisfy this third condition.**

Fourth, Meyer was not entitled to the Termination penalty because there were **no Power Purchase Agreements in effect, nor had the Project proceeded to financing.** SC17 provides:

“Moreover, the CTOL shall also pay, as part of the Termination Fee, to [Meyer] as a **penalty** and/or supplemental fee due to success interruption by the Coushatta Tribe and/or other considerations, to [Meyer] at the time of Project Termination including either Project Sale, Assignment or Lease of the Project to any other party or the termination of any GC Work Authorization, an additional amount equal to **one-third (1/3) of the Developer Services Compensation as presented herein at Article SC5 with the MW basis being 400 MW times the compensation unit price defined at said Article SC5.**”¹² (*emphasis added*)

Under Article SC5, it is clear that Meyer will only be compensated under SC5 when there is “plant capacity actually funded for development or on the basis of binding Offtaker Power Purchase Agreements (PPA’s) duly executed by the Offtakers...which PPA’s would support funding and actual development whether

¹¹ Post-Trial, the Coushatta Tribe argued that there should have been an adverse presumption due to the failure to call this witness.

¹² The agreement uses the word “**penalty**”, and punitive penalties in contracts are against public policy, according to the interpretations of La. C.C. art. 2011 and La. C.C. art. 2012.

developed or not.” Since there was no plant capacity actually funded, and since there were no binding Offtaker Power Purchase Agreements executed, then Meyer’s compensation under SC5 is \$0.00. The calculation of the Termination Fee would be one-third (1/3) of 400 MW x \$0.00 x \$40,800 = \$0.00. **Meyer did not satisfy this fourth condition.** It was error for the Trial Court to award Meyer \$5,440,000.00 for this portion of the penalty. Since there is no Termination Fee or penalty owed to Meyer, it is respectfully submitted that this Court should reverse and dismiss Meyer’s claim.

ASSIGNMENT OF ERROR NO. 2

The Trial Court erred when it failed to find that the stipulated damages, or penalty for breach, were against public policy such that Meyer’s claim should be dismissed.

The Coushatta Tribe filed an Exception of No Right of Action and/or No Cause of Action and alleged that the stipulated termination penalty was against public policy. (R. Vol. 15, p. 3733). The Exceptions were based on the notion that Louisiana law allows stipulated or liquidated damage provisions in contracts as long as they are not punitive. Support for the Exceptions can be found in La. C.C. art. 2011 and La. C.C. art. 2012. The Coushatta Tribe also made this allegation in its Third Amended Answer, Affirmative Defenses, and Reconventional Demand. (R. Vol. 22, pp. 5434-5437).

A. There was no proof of actual damages or lost profits.

At Trial, Meyer called Prof. Patrick Martin as an expert on contracts. Prof. Martin explained how the Trial Court should analyze the validity of the termination fee or penalty. **“So you need to know what damages would arise from a breach in the first instance. See, you’ve got to look at the underlying contract and what would arise from a breach.”** (R. Vol. 29, p. 7058)(*emphasis added*). From this explanation by Prof. Martin, one would see if the actual damages are in a range with the stipulated damages. The “underlying contract”

would be found in WA #2, since the Trial Court rejected WA #3. This Agreement described the work to be performed and the cost to the Coushatta Tribe. Meyer's damages would be reflected in his lost profits in the event he was not able to complete Phase 2. **"That starting point would be the actual damages from the breach, and that's – that's what they were measuring."** (R. Vol. 29, pp. 7058-7066)(*emphasis added*). **Again, one must know Meyer's lost profits for Phase 2 to be able to see if the stipulated damages are in that "range."** **The Ruling of the Trial Court contains no such analysis.** The Trial Court made no comparison of the difference between the possible \$1.1 million Meyer could have earned which is its lost profits (if it had finished its work) and the actual amount awarded by the Trial Court. This failure to follow the law and analysis requires a reversal of that decision.

Prof. Martin assumed that the Coushatta Tribe had committed to construct the Power Plant and that the Project would succeed. Even though he was Meyer's "contract expert," he was not aware of the provision in Resolution 2003-04 (Defendant's Exhibit #3 Evidence Vol. 13, pp. 3094-3101) that gave the Coushatta Tribe the right to decide not to move forward with the Project.

"I don't have any opinion on that. I don't know whether that was their understanding with Mr. Meyer or not." (R. Vol. 29, p. 7072).

In fact, Prof. Martin admitted that Meyer's only risk was that he wouldn't get paid.

(Court) "But how is that a risk? What's the risk?"

(Martin) The risk is that he doesn't get paid his compensation upon the fulfillment of the contract.

(Court) But that's – that's a chance; that's not a risk. He has nothing. He's not risking anything when he's entering into that contract; because he doesn't have any – he may not get paid for his time. He may – he – because he doesn't have any money in the deal. ... "[B]ut a future fee and an overriding royalty is not a risk in the sense of "I'm risking something to go into this deal. To enter this contract with this Coushatta Tribe, I've got – I'm risking something...." (R. Vol. 29, pp. 7075-7076).

Meyer's losses must be related to the work it had contracted to do and the

money that it was to be paid for that work. Anything beyond that is a speculative guess. The Coughatta Tribe never agreed to build this Power Plant, so Meyer had no reasonable expectation that it would be paid for building the Power Plant. Similarly, Meyer has no reasonable expectation of getting one-third (or 50%) of the fee that it would have received as a bonus simply because the Coughatta Tribe (according to the Trial Court) decided to stop the project a few months early. Meyer should not be able to get a windfall as a result of the Coughatta Tribe's reasonable request for information, **which is permissible under Tribal Council Resolution 2003-04**, which Resolution was prepared and presented by Meyer and was incorporated into each Work Authorization.

B. The Ever Increasing Termination Fee.

At Trial, Meyer and his team could never give a reason for the increasing Termination Fee or penalty that made any logical sense. According to Richard Meyer, the penalty increased over time because the Project got bigger. Yet, every time the Project got bigger, Meyer immediately increased his fees. At the beginning of the Project, Meyer's maximum compensation was \$3,375,000. By the end of the Project, Meyer's maximum compensation could be \$13,375,000 and it also attempted to claim an enormous Termination Fee or penalty, which is not owed and which exceeded the Coughatta Tribe's budgeted amount. Richard Meyer was questioned at Trial about the reasons for the increase in the Termination Fee or penalty. He originally claimed that it was because the Project got larger. (R. Vol. 27, p. 6603-6604). When confronted with an earlier Affidavit that he had given, Meyer had to admit that the increased penalty was designed to prevent the Coughatta Tribe from getting out of the contract. (R. Vol. 27, pp. 6700-6701). Meyer tried to distance himself from his prior sworn testimony ("**I thought it might help then**"). (R. Vol. 27, p. 6702)(*emphasis added*).

Again, as the Project got larger, the claimed penalty owed to Meyer got larger. There was no logical reason for the Coushatta Tribe to increase the Termination Fee or penalty (other than as a tool to prevent the Coushatta Tribe from terminating the Project) as it related to Meyer's expected profits.¹³

La. C.C. art. 2012 provides that the Trial Court may only uphold penalties that are reasonable:

"Stipulated damages may not be modified by the Court unless they are so manifestly unreasonable as to be contrary to public policy."

This means that the Trial Court in this case must determine whether a damage penalty (approximately treble the entire remaining budget) is appropriate, keeping in mind that Meyer did not do the work it would have taken to earn the remaining amount of the budget. Similarly, La. C.C. art. 2011 provides for a reduction in stipulated damages where there has been a partial performance:

"Stipulated damages for nonperformance may be reduced in proportion to the benefit derived by the obligee from any partial performance."

This means that the partial performance should reduce the stipulated penalty.

Stipulated damages related to actual damages have been allowed, while those that are penal in nature (like Meyer's penalty) have been limited or rejected. For example, in Coffman Homes, L.L.C. v. Sutherland, 10-178 (La. App. 5 Cir. 2/15/11); 60 So.3d 52, a contractor's contract in a home construction agreement contained a \$20,000 penalty provision. The owners had agreed to have the plaintiff build their house, but later changed their minds. The Court found that the penalty was significantly less than the contractor's expected profit, and, therefore, enforceable. Coffman Homes, L.L.C. v. Sutherland, 10-178 (La. App. 5 Cir. 2/15/11); 60 So. 3d 52, 59, reh'g denied (Apr. 14, 2011), *writ denied*, 11-10111 (La. 6/24/11); 64 So. 3d 223. As the Court can see, the penalty represented only a

¹³ Chairman Poncho and the two (2) Council Members signed any document Meyer presented without question which is a clear sign of their trust in Meyer.

portion of the contractor's expected profit from a contract to build a house. In the instant case, **the Coughatta Tribe had only agreed to the first level of exploring the feasibility of the Project and had not committed to build the Power Plant.** Meyer had no reasonable expectation of receiving a fee based on the construction cost of a Power Plant that may or may not have been built. The Trial Court attempted to distinguish Coffman, by stating that Meyer had suffered damage "undoubtedly" when it was sued. (R. Vol. 24, p. 5865). Yet, at Trial, Meyer put on no evidence or witnesses that the company had suffered any particular damage or that Meyer was precluded from working on any particular project. Meyer was paid \$8.4 million plus over a few years. There was no evidence that it was not fully compensated for the limited work that it performed.

Prior La. C.C. art. 2117 was replaced by the current version of La. C.C. art. 2005 and the phrase "penal clause" was replaced with "stipulated damages." The intent is to fix the damages caused by nonperformance of the obligation and acts to encourage performance. Such a clause, however, is **not** a vehicle for recovery of punitive damages, as opposed to compensatory damages. Philippi v. Viguerie, 606 So.2d 577 (La.App. 5 Cir.1992); *writ denied*, 609 So.2d 226 (La.1992). While Meyer can argue that it would have earned the remaining money in the budget, less expenses, it certainly cannot argue that the penalty has any relation to its expected lost profits for the work in Phase 2. Again, WA#2 uses the word "**penalty.**"

Stipulated damages may be modified by the Court if they are so manifestly unreasonable as to be contrary to public policy. La. C.C. art. 2012. In Carney, et al v. Boles, 25,905 (La.App.2 Cir.9/21/94), 643 So.2d 339, *writ denied*, 94-2592 (La.12/16/94), 648 So.2d 391, the Second Circuit explained that stipulated damages should reasonably approximate the damages suffered by the obligee and not be penal:

“Further, the Court must determine the reasonableness of the amount of stipulated damages by inquiring whether the parties attempted to approximate actual damages in confecting the stipulated damages provision of the agreement.” *Id.*, citing American Leasing Company of Monroe, Inc. v. Lannon E. Miller & Son, General Contracting, Inc., et al 469 So.2d 325 (La. App. 2 Cir. 1985) (*emphasis added*).

Also, Comment (c) to La. C.C. art. 2005 states that “[a] **stipulated damages clause is given effect if the Court deems it to be a true approximation of actual damages.**” (*emphasis added*).

Comment (d) to La. C.C. art. 2009 explain how the Coushatta Tribe may challenge the reasonableness of the stipulated damages. In this case, the amount of Meyer’s maximum remaining expected profit was the remaining budget amount (\$4,971,147), minus what Meyer had to pay to other contractors.¹⁴ Dr. Tabors gave a reasonable valuation of Meyer’s remaining possible net income (which was distinguished from, and are greater than, profits) at **\$1,119,050**. This testimony was un rebutted. Even Meyer admitted that he might not have made a profit on Phase 2. (R. Vol. 27, p. 6715). **The amount awarded by the Trial Court is almost ten times that amount and represents a violation of public policy.**

In Mobley v. Mobley, 37,364 (La. App. 2 Cir. 8/20/03); 852 So. 2d 1136, 1139-40, the Court discussed the burden of proof. In that case, Mr. Mobley had been prohibited by the Trial Court from putting on evidence of actual damages to use a benchmark for the stipulated damages. The Appellate Court found error and remanded the case for an evidentiary hearing on actual damages.

The Trial Court in this case failed to conduct a proper analysis. The only number it had to work with was the number put forth by the Coushatta Tribe, **\$1,119,050**. Meyer did not put on any evidence of potential lost profits from the money remaining in the budget. **The stipulated damages or penalty has no**

¹⁴ In fact, in his deposition Richard Meyer stated that he had paid others about \$1.5 million dollars, which would necessarily come out of his expected profits. (R. Vol. 28, p. 6881).

relation to Meyer's actual possible lost profits.

The Trial Court summed it up:

“wait a minute; you know, in this case, we can figure out what you’ve really lost, and there’s – you can’t have an actual loss of profit of a million and a half and expect to recover 12 million, not here.” (R. Vol. 26, p. 6440)(*emphasis added*).

The Trial Court should have rejected the stipulated damages and penalty as punitive and against public policy, under La. C.C. art. 2011 and La. C.C. art. 2012.

It is respectfully submitted that this Court should reverse and dismiss Meyer's claim.

ASSIGNMENT OF ERROR NO. 3

The Trial Court committed legal error (both substantively and procedurally) when it summarily dismissed, in Chambers, without a new motion being filed, pending and noticed, without any additional evidence being offered, and without an additional hearing being held, all of the Coushatta Tribe's claims and affirmative defenses during the Pre-Trial Conference (12 days before the Jury Trial was scheduled to begin) under the auspices that the Trial Court was granting a previously denied Motion for Summary Judgment such that the Trial Court should be reversed and this matter remanded for a Jury Trial on all issues if Meyer's claim is not dismissed.

On October 11, 2013 the Trial Court executed a Judgment memorializing its actions during the October 3, 2013 Pre-Trial Conference when the Trial Court announced that it was going to prevent the Jury Trial scheduled twelve (12) days later by dismissing all of the Coushatta Tribe's claims and affirmative defenses with the exception of the La. C.C. art. 2012 defense under the auspices of granting the previously denied Motion for Summary Judgment. The Trial Court prevented the La. C.C. art. 2012 defense from going to the Jury and held a Bench Trial on that issue. **The Trial Court's action was an impermissible departure from proper judicial proceedings and is legal error.** It is improper for the Trial Court to deprive a litigant of its right to a Jury Trial just days before Trial, during the Pre-Trial Conference, by granting the previously denied Motion for Summary Judgment, when no new motions were filed, no new evidence was offered and no

new hearing was noticed and held. At an absolute minimum, the Trial Court's actions are procedurally defective and must be reversed.

In addition to the procedural deficiencies that require reversal of the Trial Court's October 3, 2013 Ruling and October 11, 2013 Judgment, Meyer simply was not entitled to summary judgment. **There are numerous genuine issues of material fact that required Meyer's Motion for Summary Judgment be denied.¹⁵ Moreover, Meyer was not entitled to Judgment as a matter of law.**

The Trial Court determined all issues of the Coushatta Tribe's liability in favor of Meyer and dismissed all of the Coushatta Tribe's claims and affirmative defenses in Chambers with no new motion pending and no new evidence, and without a new hearing. In particular, and for the reasons more fully explained below, this legal error warrants reversal of the Trial Court because:

(1) there are numerous genuine issues of material fact that require denial of Meyer's Motion for Summary Judgment; (2) Meyer is not entitled to summary judgment as a matter of law; and (3) the numerous procedural deficiencies require reversal of the Trial Court's granting of summary judgment.

Each of these errors **independently** require reversal of the Trial Court's Judgment and remand for further proceedings.

A. After proper application of the summary judgment standard, this Court must reverse the Trial Court's October 3, 2013 Ruling and October 11, 2013 Judgment and deny Meyer's Motion for Summary Judgment.

The Louisiana Supreme Court has determined that "appellate courts must review summary judgments *de novo*, using the same criteria that govern the trial Court's consideration of whether summary judgment is appropriate. Supreme Services and Specialty Co. Inc. v. Sonny Greer, Inc., et al, 06-1827 (La. 5/22/07); 958 So.2d 634, 638; see also, La. C.C.P. art. 966. **At the summary judgment stage, the Trial Court cannot make credibility determinations; must not**

¹⁵ The Trial Court had already denied this very same Motion for Summary Judgment in its September 24, 2013 Ruling and October 7, 2013 Judgment. (R. Vol. 22, pp. 5398-5399; 5427-5428).

attempt to evaluate persuasiveness of competing scientific studies; must draw inferences from facts which are most favorable to the party opposing the motion; and should be granted only when the evidence presented, including admissible expert opinion evidence, establishes there is no genuine issue of material fact in dispute (*emphasis added*). MSOF Corp., et al v. Exxon Corporation, et al, 04-0988 (La. App. 1 Cir. 12/22/05); 934 So.2d 708, 720 *citing* Independent Fire Ins. Co., et al. v. Sunbeam Corporation, et al, 99-2181, (La 2/29/00); 755 So.2d 226. The Trial Court failed to correctly apply the above approach when it improperly granted Meyer's Motion for Summary Judgment. "The likelihood that a party will be unable to prove his allegations upon Trial on the merits does not constitute a basis for rendering a summary judgment." Chargois v. Trip-L-Quik, et al, 441 So.2d 45, 47-48 (La. App. 3 Cir. 1983). **"A Motion for Summary Judgment is rarely appropriate for a determination based on subjective facts, such as intent, motive, malice, knowledge, or good faith."** Baldwin v. Bd. of Supervisors for University of La. System, et al, 06-0961 (La. App. 1 Cir. 5/4/07); 961 So.2d 418, 422 (*emphasis added*).

In the instant case, there is a litany of genuine issues of material fact that preclude summary judgment.

B. Meyer's Motion for Summary Judgment must be denied because the Trial Court failed to recognize there are numerous genuine issues of material fact that prevent summary judgment.

"[S]ummary judgments are only intended to decide legal issues." Reily, et al v. State, et al, 03-580 (La. App. 3 Cir. 12/17/03); 864 So.2d 223, 228. The Trial Court's conclusion was based on non-established facts and must be reversed. Id.

The Trial Court erred when it dismissed **all** of the Coushatta Tribe's claims against Meyer including the Coushatta Tribe's claims that Meyer made numerous misrepresentations; Meyer breached its fiduciary duties; Meyer made numerous

suppressions of the truth regarding the Power Project and Meyer breached its contract(s)/Work Authorizations with the Coughatta Tribe. (R. Vol. 4, pp. 863-875; Vol. 5-6, pp. 1237-1253; Vol. 13, pp. 3048-3052; Vol. 22, pp. 5434-5437).

These claims have merit. The evidence offered by the Coughatta Tribe establishes that Meyer was in possession of documents that indicated that the Power Project was never really feasible. As the Coughatta Tribe's engineer and as required by the contracts, Meyer was obligated to properly advise the Coughatta Tribe that the Power Project should not move forward. Instead, Meyer withheld and suppressed these facts and even urged the Coughatta Tribe to move forward with the Power Project. In so doing, Meyer was attempting to "lock" the Coughatta Tribe into the Power Project where it was able to bill the Coughatta Tribe in excess of \$8.4 million for a project that had little chance of ever happening. **Meyer tried to have it both ways. It was paid handsomely to explore a Project that likely had little chance of success and, if the Project did go forward, it was going to be paid enormous sums of money.** At an absolute minimum, reasonable persons would not all agree, based on the evidence offered and admitted at the hearing, that all material facts should be determined in favor of Meyer. Therefore, summary judgment should have been denied with this case going to a Jury.

In addition to the claims that the Coughatta Tribe should have been allowed to present to a Jury, many of the Coughatta Tribe's affirmative defenses are ripe with questions of fact, including questions regarding the parties' intent, state of mind, knowledge, and motives regarding: (1) the Coughatta Tribe Power Project; (2) Meyer's alleged work on the Power Project; and (3) the contract/Work Authorizations at issue. In particular, the Coughatta Tribe raised the following affirmative defenses which were dismissed:

(1) Meyer failed to perform under the Power Project contract; (2) Lack or failure of consideration; (3) Nullity of the Power Project contract under 25 U.S.C. §81 *et.*

seq.; (4) Meyer breached the Power Project contract; (5) Meyer breached its fiduciary duties owed to the Coughatta Tribe;¹⁶ (6) Fraud; (7) Error; (8) Mistake; (9) Estoppel; (10) Extinguishment; and (11) Negligent and/or grossly negligent misrepresentations.

The Trial Court dismissed all of those affirmative defenses without a Motion for Summary Judgment pending, noticed and heard. This was improper. **To say there were no genuine issues of fact regarding all of the Coughatta Tribe's claims and affirmative defenses is reversible error.**

The genuine issues of material fact in this case also include numerous factual disputes regarding the technical aspects of the Power Project. The Coughatta Tribe offered the expert testimony of Richard Tabors, Ph.D. in opposition to Meyer's Motion for Summary Judgment. (R. Vol. 21, pp. 5023-5074). He is one of the leading minds in his areas of expertise. (R. Vol. 21, pp. 5023; 5043-5065). He has served both as a member of the teaching faculty and as the director of research laboratories both at Harvard University and Massachusetts Institute of Technology (MIT). (R. Vol. 21, p. 5023, ¶¶ 1-4). Dr. Tabors is literally one of the most qualified individuals in the world to offer opinions regarding the Power Project and its feasibility. (R. Vol. 21, pp. 5023; 5043-5065). As can be seen in Dr. Tabors' November 12, 2012 (R. Evidence Vol. 3-4, pp. 585-859) and November 16, 2012 (R. Evidence Vol. 4, pp. 865-883) Affidavits which are incorporated herein by reference, Dr. Tabors offers numerous insights into the Power Project and Meyer's actions and conduct, including the following:

- (1) Dr. Tabors provided a very detailed description of Meyer's misrepresentations, omissions, and suppressions of the truth during all stages of the Project, based on the written correspondence, reports and presentation materials Meyer provided to the Tribe.

¹⁶ The dismissal of the Coughatta Tribe's breach of fiduciary claim is not only contrary to law and in the face of genuine issues of material fact, **it is also contrary to the Trial Court's previous September 27, 2013 Judgment specifically finding that Meyer owed the Coughatta Tribe a fiduciary duty.** (R. Vol. 22, pp. 5403-5404). Meyer's actions and conduct clearly violate this fiduciary duty.

- (2) Dr. Tabor explained that Meyer's misrepresentations, failures to disclose, and suppressions of the truth involved material facts about the feasibility, benefits, and risks of the Project.¹⁷
- (3) Meyer improperly double billed the Coushatta Tribe for work done by "Subconsultant Specialists," where said work was previously paid for by the Coushatta Tribe and Meyer improperly billed for this work again as a "Reimbursable Expense" years later while this litigation was ongoing. (R. Vol. 21, pp. 5068-5071, ¶¶ 10-23);
- (4) Meyer improperly billed the Coushatta Tribe for fees and expenses that were contingent on the completion of the Project years later while this litigation was ongoing. (R. Vol. 21, pp. 5071-5072, ¶¶ 24-25; 33-35);
- (5) Meyer agreed to perform certain "fuel procurement" work in SFI WA#1, where Meyer billed and the Coushatta Tribe paid \$565,500. Meyer then "subbed" this work out to the Milligan Group for \$72,352.61. Then Meyer improperly billed the Coushatta Tribe for the \$72,352.61 that Meyer paid its "subconsultant" – for work the Coushatta Tribe already paid \$565,500 for. (R. Vol. 21, pp. 5071-5072, ¶¶ 26-32; 33-35);
- (6) Meyer paid large amounts of money that did not advance the Project and were not in the best interests of the Tribe and should not have been incurred. (R. Vol. 21, pp. 5072-5074, ¶¶ 36-42).

Dr. Tabors' opinions above and those additional opinions contained in the Affidavits (which are incorporated by reference) preclude summary judgment in this matter. (R. Vol. 21, pp. 5023-5074). The Trial Court should have denied Meyer's Motion for Summary Judgment based on Dr. Tabors' Affidavits alone. Its failure to do so constitutes legal error and must be reversed.

"If a party submits expert opinion evidence in opposition to a Motion for Summary Judgment that would be admissible under *Daubert* (and the other applicable evidentiary rules), and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial court should deny the motion and let the issue be decided at Trial [by the Jury]." MSOF Corp., et al v. Exxon Corporation, et al, 04-0988 (La. App. 1 Cir. 12/22/05); 934 So.2d 708, 720.

Either the Trial Court ignored Dr. Tabors' opinions or improperly usurped the Jury's responsibility during the summary judgment stage. It is improper for a Trial Court to assess the persuasiveness of an expert's opinions on summary

¹⁷ Chairman Lovelin Poncho, who was also Chairman during the Power Project, testified that **Meyer never fully explained the risks, status and feasibility of the Power Project.** (R. Vol. 21, pp. 5020-5021). Chairman Poncho further testified that **if he would have been properly advised, he never would have signed the contracts and work authorizations for the Power Project.** (R. Vol. 21, p. 5021)(*emphasis added*).

judgment. Willis v. Medders, 00-2507 (La. 12/8/00); 775 So.2d 1049, 1051.

“[W]hen the party opposing the summary judgment motion submits expert opinion evidence that would be admissible and that is sufficient to allow a reasonable juror to conclude the expert’s opinion on a material fact more likely than not is true, the court should deny the summary judgment motion.” Id.

There are also numerous genuine issues of material fact regarding the applicability of (and Meyer’s non-compliance with) numerous contractual provisions contained in the Project’s contracts/Work Authorizations.

The Coughatta Tribe offered documents and expert testimony concerning Meyer’s failures and breaches of the above contracts and, in particular, the contractual provisions cited above. Dr. Tabors’ Affidavits are incorporated herein by reference and discussed in detail above. (R. Vol. 21, pp. 5023-5074). For example, Article 14 of the Agreement for Professional Services ("General Agreement") (R. Vol. 18-19, pp. 4283-4316) required Meyer to provide the Coughatta Tribe with a thirty (30) day written notice of any action it contends constitutes a breach of the contract. (R. Vol. 18, pp. 4312-4313). There is no evidence that Meyer did this because he did not.

The factual questions at the heart of whether the above contractual provisions apply are certainly material to the resolution of this suit. The Coughatta Tribe presented evidence demonstrating that Meyer breached the above contractual provisions and that certain provisions did not apply. Likewise, Meyer failed to offer evidence that the Power Project was in the position required to trigger the contractual provisions governing the application of the Termination Fee (assuming a breach by the Coughatta Tribe – which is denied). At worst, there is a sufficient dispute regarding these facts to preclude summary judgment. **“Summary judgment is seldom appropriate when there is a question of what was intended by certain provisions of a contract.”** Chargois v. Trip-L-Quik, et al, 441 So.2d 45, 47-48 (La. App. 3 Cir. 1983) (*emphasis added*). The Trial Court

either ignored the evidence offered by the Coushatta Tribe or the Trial Court improperly evaluated and weighed the merits of evidence offered by the parties. In either event, Meyer's Motion for Summary Judgment was improperly granted.

Resolution of many of the material facts in this case requires a determination of the parties' intent, knowledge and state of mind. This in and of itself precludes summary judgment¹⁸. "A Motion for Summary Judgment is rarely appropriate for a determination based on subjective facts, such as intent, motive, malice, knowledge, or good faith." Baldwin v. Bd. of Supervisors for University of La. System, et al, 06-0961 (La. App. 1 Cir. 5/4/07); 961 So.2d 418, 422. This Court has previously determined that summary judgment was not appropriate when it is necessary to determine a party's intent. Chargois v. Trip-L-Quik, et al, 441 So.2d 45, 48 (La. App. 3 Cir. 1983). The reasonableness (or lack thereof) of Meyer's actions and conduct from the inception of the Project and throughout are at issue in this case and form a material part of the Coushatta Tribe's claims and defenses. "Further, issues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment." Baldwin v. Bd of Supervisors for University of La. System, et al, 06-0961 (La. App. 1 Cir. 5/4/07); 961 So.2d 418 at 422. Accordingly, this matter should be remanded for a Jury Trial on all issues if Meyer's claim is not dismissed.

C. Meyer's Motion for Summary Judgment lacks merit and must be denied as a matter of law.

In addition to the plethora of genuine issues of material fact discussed above, **Meyer simply is not entitled to Judgment as a matter of law.** The evidence

¹⁸ If credibility were a proper consideration for summary judgment it would not bode well for Meyer. At Bench Trial during cross-examination, Richard Meyer admitted to signing an Affidavit that he did not agree with because "I [Richard Meyer] **thought it might help.**" (R. Vol. 27, p. 6702) (*emphasis added*).

offered by the Coushatta Tribe in connection with its opposition to Meyer's Motion for Summary Judgment demonstrates that the Coushatta Tribe's claims and affirmative defenses have merit and would have been recognized if the Coushatta Tribe was given an opportunity to present these matters to a Jury. Meyer misrepresented, either intentionally or gross negligently, the feasibility, benefits, and risks of the Project during all aspects of the Project, all while receiving excessive compensation for very little work.¹⁹ (R. Vol. 21, pp. 5023-5074). On September 27, 2013, the **Trial Court even recognized that Meyer owed fiduciary duties to the Coushatta Tribe** when it granted the Coushatta Tribe's Motion for Partial Summary Judgment. (R. Vol. 10, pp. 2338-2436; R. Vol. 22, pp. 5403-5404). Meyer's actions and conduct were a breach of its contract with the Coushatta Tribe and a breach of its fiduciary duties. **Meyer was not entitled to Judgment as a matter of law.** Therefore, this case should be remanded for a Jury Trial on all issues.

D. The Trial Court committed legal error when it ignored the undisputed evidence confirming that Meyer approved the very actions the Trial Court found to be breaches and, at a minimum, this evidence creates genuine issues of material fact that preclude summary judgment.

The "breaches" found by the Trial Court never occurred and/or were approved in advance by Meyer such that it condoned the action and is estopped from claiming a breach. The reality is none of those listed by the Trial Court constituted breaches by the Coushatta Tribe or they were excused by Meyer. The Trial Court simply listed the purported "breaches" argued by Meyer taking that issue away from a Jury's determination.²⁰ The Trial Court ignored and completely disregarded Meyer's conduct, both in terms of its breaches and failures during the

¹⁹ The evidence suggests that Meyer's misrepresentations were intentional. (R. Vol. 21, pp. 5023-5074).

²⁰ **The Trial Court rejected these alleged breaches when it originally and properly denied Meyer's Motion for Summary Judgment.**

Project and its agreement with and confirmation/approval of the actions taken by the Coushatta Tribe. For example, on February 7, 2006, a date long after the Trial Court determined that there were breaches, Meyer told the Offtakers, in writing, that his contract with the Tribe remained valid and enforceable. (R. Vol. 21, pp. 5116-5118). Meyer further stated, in writing, in its February 7, 2006 correspondence, that the replacement of William Worfel as the Authorized Representative was appropriate and in accord with his contract with the Tribe. (R. Vol. 21, pp. 5116-5118).

E. The Trial Court committed legal error when it deprived the Coushatta Tribe of its right to a Jury Trial, in Chambers, during the Pre-Trial Conference (12 days before the Jury Trial was scheduled to begin) without a new motion being filed and pending before the Court, without any additional evidence being presented and without any additional hearing being noticed and held, under the auspices of granting a previously denied Motion for Summary Judgment.

The Trial Court violated the Coushatta Tribe's fundamental right to a Trial by Jury under the auspices of granting a previously denied Motion for Summary Judgment. For the reasons discussed above and those presented herein, **the Trial Court committed legal error in numerous respects when it issued this Ruling, in Chambers, with no new motion filed and pending, no new evidence presented, and no new hearing.** In essence, there was no procedural vehicle pending giving the Trial Court the authority to take such action. The Trial Court's actions were in disregard to the applicable procedure, contrary to the standards for granting summary judgment, and erroneously deprived the Coushatta Tribe of its right to a Jury Trial.

F. The October 3, 2013 Ruling and October 11, 2013 Judgment must be reversed because the Trial Court disregarded and failed to follow the mandatory procedural requirements of Louisiana law for summary judgment.

On August 30, 2013, Meyer filed a Motion for Summary Judgment requesting that the Trial Court hold that:

“(1) the Tribe breached the valid and binding contracts with Meyer; (2) Meyer is

owed stipulated damages in the amount of \$12,902,339.65; and (3) Meyer is entitled to judicial interest on that amount from June 8, 2005, until paid and is owed all of his attorney's fees incurred in this suit." (R. Vol. 18-19 pp. 4261-4699).

The Trial Court issued its Ruling on September 24, 2013 stating that "there are genuine issues of material fact regarding the Work Authorizations, whether Meyer breached its fiduciary duty owed to the Tribe, specifically on the issue of Meyer's compensation and the Coushatta Tribe's expenses under the contract." (R. Vol. 22, p. 5398-5399)(*emphasis added*). A Judgment was signed on October 7, 2013 that denied all three Motions for Summary Judgment filed by Meyer that were before the Trial Court. Thereafter, the parties moved forward with preparing for the Jury Trial until the Pre-Trial Conference which was held on October 3, 2013. The Coushatta Tribe's Counsel showed up for the Pre-Trial Conference prepared to discuss the logistics of the Jury Trial that was scheduled to begin twelve (12) days later, on October 15, 2013. The Trial Judge then indicated that he would be issuing a "revised" Ruling later that day that the Coushatta Tribe breached its contract with Meyer and that all of the Coushatta Tribe's claims and affirmative defenses were dismissed, except the "Article 2012 defense", **which the Trial Court explained was a legal issue that did not need to go to the Jury.** The Trial Judge then excused the Coushatta Tribe's Counsel from Chambers and requested Counsel for Meyer to remain for a discussion. It is unknown what was discussed. That same day (less than two hours after the Pre-Trial Conference), the Trial Court issued its October 3, 2013 Ruling via e-mail. The Trial Court later signed a Judgment on October 11, 2013 that:

- (1)"there being no genuine issues of material fact that the [Coushatta Tribe] breached the Power Project contract, Plaintiff's Motion for Summary Judgment (liability and damages) is GRANTED, and the Tribe's claim based on breach of fiduciary duty is dismissed;" and
- (2)dismissed all of the Coushatta Tribe's claims and affirmative defenses (except the La. C.C. art. 2012 issue).

This October 3rd Ruling and October 11th Judgment are in direct

contrast with the Trial Court's previous denial of Meyer's Motion for Summary Judgment in the September 24th Ruling and October 7, 2013 Judgment. (R. Vol. 22, pp. 5420-5421; 5427-5428; 5438-5439; 5398-5399).

The Trial Court is **not** legally permitted to grant a previously denied Motion for Summary Judgment with no new motion being filed and noticed, no new evidence being presented, and no additional hearing being held. Smith, et al v. Brooks, et al, 96-1085 (La. App. 3 Cir. 2/5/97); 689 So.2d 544, 547. Meyer never filed a motion that could have resulted in the October 3rd Ruling or the October 11th Judgment between the September 24th Ruling and the October 3rd Pre-Trial Conference. In fact, neither party filed a single motion on any issue during this time period.

This Court has consistently recognized that any Judgment rendered without a procedural vehicle pending before the Trial Court must be vacated and remanded for a Trial on the Merits as to all issues. Id.; see also Williams v. Howard, et al, 598 So.2d 1300, 1302 (La. App. 3 Cir. 1992). The same rationale applies in this case. If Meyer wanted the Trial Court to reconsider its denied Motion for Summary Judgment, it was required to file a new motion and present additional evidence for the Trial Court to consider at a new hearing. John v. Gourmet Pizzas, Inc., 00-0749 (La. App. 4 Cir. 1/31/01); 778 So.2d 1223, 1224-25. **Meyer did not file a new motion and the Trial Court was without a procedural vehicle pending to issue the October 3rd Ruling and the October 11th Judgment.**

The Trial Court also erroneously disregarded numerous specific procedural rules applicable to Motions for Summary Judgment including the provisions of the Louisiana Code of Civil Procedure and the Louisiana Uniform District Court Rules. The Trial Court, in derogation of the Coushatta Tribe's right to a Jury Trial in this case, completely and erroneously disregarded the mandatory procedural requirements before summary judgment can be issued. Therefore, this matter

should be remanded for a Jury Trial on all issues if Meyer's claim is not dismissed.

ASSIGNMENT OF ERROR NO. 4

The Trial Court committed legal error when it awarded Meyer damages because any purported failure to perform by the Coushatta Tribe was: (1) caused by Meyer's own bad faith and (2) was justified by a valid excuse such that Meyer's claim should be dismissed.

The Trial Court erred when it awarded Meyer damages in the amount of \$10,998,250. (R. Vol. 24, pp. 5869-5872). The Coushatta Tribe was improperly denied the opportunity to present its claims and affirmative defenses to a Jury. The Trial Court eliminated a Jury Trial on this matter and solely allowed a "Bench Trial" on the limited issue of whether the termination provision of the contract between Meyer and the Coushatta Tribe violated public policy. (R. Vol. 22, pp. 5438-5439). As shown above, the Trial Court erred in this "Article 2012 analysis." Moreover, the Trial Court erred when it failed to consider Meyer's bad faith prior to its award of damages. La. C.C. art. 2003. Likewise, the Trial Court failed to consider whether the Coushatta Tribe has a valid justification for its purported failure to perform. La. C.C. art. 2008.²¹

A. The Trial Court failed to consider Meyer's bad faith.

The Trial Court's last minute efforts to "streamline" the issues for the "Bench Trial" resulted in many of the legal errors discussed herein. The Coushatta Tribe's claims against Meyer have merit. The Coushatta Tribe offered evidence of documents that were in possession of Meyer during the Project indicating that: (1) the Project had little to no chance of success; (2) Meyer was aware of this fact; (3) Meyer used the Project and its relationship of confidence with the Coushatta Tribe as an opportunity to extract millions of dollars from the Coushatta Tribe. (R. Vol.

²¹ The only potential failures to perform found by the Trial Court are those listed in the Trial Court's October 3, 2013 Ruling. (R. Vol. 22, pp. 5420-5421). Each of those "breaches" and the lack of merit regarding each "breach" are discussed above. That argument is incorporated by reference.

21, pp. 5011-5128). La. C.C. art. 2003 provides that:

An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.

This evidence offered by the Coushatta Tribe in its opposition to Meyer's Motion for Summary Judgment (discussed above) is more than sufficient for a trier of fact to conclude that La. C.C. art. 2003 prohibits Meyer from recovering damages. This evidence, along with additional evidence and testimony, would have been offered at Trial if the Trial Court had given the Coushatta Tribe of Louisiana the opportunity to present it. Meyer's conduct during the Project demonstrates its bad faith, precluding an award of damages. La. C.C. art. 2003.

B. The Trial Court failed to recognize that any purported breach was justified by a valid excuse.

Under La. C.C. art. 2008, if the Coushatta Tribe was justified by a valid excuse for taking any of the actions listed by the Trial Court in its October 3, 2013 Ruling, Meyer was **not** entitled to stipulated damages. (R. Vol. 22, pp. 5420-5421). La. C.C. art. 2008 provides as follows:

An obligor whose failure to perform the principal obligation is justified by a valid excuse is also relieved of liability for stipulated damages.

There was ample evidence presented supporting the conclusion that the Coushatta Tribe was justified in taking the actions listed by the Trial Court in its October 3rd Ruling. (R. Vol. 21, pp. 5011-5128). The Coushatta Tribe incorporates its discussion above of each "purported breach" by reference in this section to the Coushatta Tribe's Trial briefs. Meyer is precluded from damages because the Coushatta Tribe had a good reason (i.e. was justified by a valid excuse) for taking each of the actions the Trial Court found to be a purported breach. La. C.C. art.

2008. Therefore, Meyer's claim should be dismissed.

ASSIGNMENT OF ERROR NO. 5

Assuming *arguendo* that Meyer was entitled to damages, the Trial Court committed legal error when it awarded Meyer judicial interest from June 8, 2005 in violation of applicable law such that the Trial Court should be reversed.

A. The Trial Court failed to analyze when the alleged damage occurred.

On March 3, 2014, the Trial Court executed a Judgment awarding Meyer "the amount of \$10,998,250 together with judicial interest from June 8, 2005..." (R. Vol. 24, pp. 5869-5872). Damages for delay in performance are measured by the interest on that sum from the time it is due. La. C.C. art. 2000. **The Trial Court failed to perform a proper analysis of when judicial interest should have started running.** Resolution of this issue requires an analysis of several considerations:

(1) whether and when Meyer put the Coushatta Tribe in default; (2) when the amount owed became due; and (3) whether the amount owed is liquidated or unliquidated.

Preis v. Preis, 95-352 (La. App. 3 Cir. 12/6/95); 664 So.2d 860; City of New Orleans v. United Gas Pipe Line Company, 517 So.2d 145 (La. App. 4 Cir. 1988), see also, 6 La. Civ. L. § 9.7. The Trial Court failed to perform this analysis.

B. The Judgment amount is an unliquidated debt.

In this case, even assuming the Trial Court was correct in all other respects (which is vehemently denied), the March 3, 2014 Judgment amount is an "unliquidated debt." It took a Trial and testimony of numerous witnesses, including experts, in order for the Trial Court to determine the amount of damages Meyer was entitled to be awarded – and even then Meyer was not awarded the amount of damages it claimed it was owed. The Coushatta Tribe would have had no idea of what amount to pay until the Trial Court issued the March 3, 2014 Judgment. **There can be no question that this purported debt was unliquidated. As such,**

interest cannot run until Meyer's claim becomes certain and liquidated through a Judgment. White v. Rimmer & Garrett, Inc., 360 So.2d 914, 919 (La. App. 3 Cir. 1978); City of New Orleans v. United Gas Pipe Line Company, 517 So.2d 145; Alexander v. Burroughs Corporation, 359 So.2d 607; 614 (La. 1978), see also, 6 La. Civ. L. § 9.7. Even assuming *arguendo* damages should have been awarded to Meyer, legal interest should not have started running until the date the Judgment was signed on March 3, 2014.

C. There is no evidence to support June 8, 2005 as the date judicial interest should begin to run.

Even if this Court somehow concluded that the "debt" was liquidated, there was no testimony or other evidence offered at the "Bench Trial" to support June 8, 2005 as the date judicial interest should begin to run. (R. Vol. 26-30, pp. 6423-7306). Therefore, even if liquidated, interest is required to run from the date of judicial demand. Elston v. Montgomery, 46-262 (La. App. 2 Cir. 5/18/11); 70 So.3d 824, 835, see also, 6 La. Civ. L. § 9.7.

It is very important that the Court correct the Trial Court and recognize that the Judgment amount is an unliquidated debt and that judicial interest cannot start until the date the Judgment was signed on March 3, 2014. Using the \$10,998,250 amount incorrectly awarded by the Trial Court, this legal error results in \$5,644,437.5 in improper judicial interest which should be reversed.²²

ASSIGNMENT OF ERROR NO. 6

The Trial Court committed legal error when it did not properly compute the "Reimbursable Expenses" and double counted Meyer's expenses such that the Trial Court should be reversed.

A. The Trial Court should have limited Reimbursable Expense to those found in WA #2.

²² This amount is the difference between the judicial interest accumulated from June 8, 2005 (which would be \$5,974,686.32) instead of from the correct date of March 3, 2014 (which would be \$330,248.82). These amounts are the judicial interest through December 1, 2014.

The Trial Court found that WA#3 was entered into for reasons unrelated to Meyer's possible lost profits. Therefore, the Trial Court should have also limited Meyer's "Reimbursable Expenses" to those found in WA#2 not WA#3.

B. The Trial Court erroneously increased that amount to more than the maximum budget.

The Coughatta Tribe agreed to pay a maximum of \$13,375,000 for the Power Project under WA#2. The Ruling of February 19, 2014 erroneously increased that amount to more than the maximum budget.

C. The Trial Court improperly calculated the Reimbursable Expenses.

Presumably, the \$395,000 (which should have been \$175,000) in expenses would have come out of the budget if those expenses had been paid to Meyer before the litigation. Therefore, Meyer got 95% of those expenses on the "unpaid" side of the calculation, and then got the full amount of \$395,000 on top of that. This was legal error. Moreover, even if this Court corrects the error, and uses the \$175,000 figure from WA#2, Meyer failed to offer any evidence that it incurred \$175,000 of expenses that fall within the definition of "Reimbursable Expenses" in the contract such that there should have been no award of expenses.

VI. CONCLUSION

It is respectfully submitted that the Trial Court committed legal error in its interpretation of the contracts. Meyer limited its claim for damages to the Termination Fee or penalty. **No Termination Fee or penalty is owed.** This matter should be reversed and Meyer's claim dismissed by this Court.

The Trial Court also committed legal error when it failed to find that the stipulated penalty was not against public policy such that Meyer's claim should be dismissed by this Court.

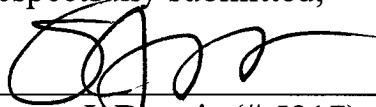
The Trial Court committed legal error, both substantively and procedurally, in granting the Motion for Summary Judgment. There are many genuine issues of

material fact which preclude the granting of the Motion for Summary Judgment. Meyer is not entitled to a summary judgment as a matter of law. Additionally, the Trial Court committed procedural error in granting the Motion for Summary Judgment. For any of these reasons, this matter should be remanded for a Jury Trial on all issues if Meyer still has a damage claim following this Appeal.

It is also respectfully submitted that the Trial Court committed legal error when it awarded Meyer damages because the purported failure to perform by the Coushatta Tribe was caused by (1) Meyer's own bad faith and (2) was justified by a valid excuse. As such, Meyer's claim should be dismissed by this Court.

Assuming arguendo that Meyer was entitled to damages, the Trial Court committed legal error when it awarded Meyer judicial interest from June 8, 2005 in violation of applicable law. This Court should reverse with a finding that legal interest did not begin to run until March 3, 2014 when the Judgment was entered. It is also respectfully submitted that the Trial Court committed legal error when it did not properly compute the Reimbursable Expenses and double counted Meyer's expenses. This Court should reverse that Judgment.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT/APPELLANT
THE COUSHATTA TRIBE OF LOUISIANA

VII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been provided to the following by United States mail, postage prepaid and properly addressed:

Hon. Clayton J. Davis
District Judge
Calcasieu Parish Courthouse
P.O. Box 3210
Lake Charles, LA 70602-3210
phone (337) 437-3530
fax (337) 437-3332
e-mail cdavis@14jdc.org

Mr. Michael Reese Davis
Mr. Tim P. Hartdegen
HYMEL, DAVIS & PETERSON
10602 Coursey Boulevard
Baton Rouge, LA 70816
Phone (225) 298-8118
Fax (225) 298-8119
e-mail mdavis@hymeldavis.com

Lafayette, Louisiana, this 2nd day of February, 2015.



Steven J. Dupuis

VIII. APPENDICES

- (1) October 11, 2013 Judgment on Plaintiff's Motion for Summary Judgment (Liability and Damages);
- (2) October 7, 2013 Judgment on Plaintiff's Motion for Partial Summary Judgment Re: Fraud; Motion for Partial Summary Judgment Re: Costs; and Motion for Summary Judgment;
- (3) October 3, 2013 Ruling on Issues of Breach of Contract, Breach of Fiduciary Duty and Stipulated Damages (to the extent this is considered a "Judgment");
- (4) March 3, 2014, Judgment in favor of Plaintiff and against the Coushatta Tribe in the amount of Ten Million Nine Hundred Thousand Two Hundred Fifty (\$10,998,250.00) Dollars for the reasons reflected in the Court's February 19, 2014 Ruling; and
- (5) The Coushatta Tribe received the Notice of Judgment on March 6, 2014, and on March 20, 2014 timely filed a Motion for New Trial.; and on March 31, 2014, the Court handwrote "denied" on the proposed Order. The Coushatta Tribe did not receive a formal Notice from the Clerk of Court, only a conformed copy.

BN

06-2683

MEYER & ASSOCIATES, INC.

SUIT NO. 2006-002683 - DIV. "B"

VERSUS

14TH JUDICIAL DISTRICT COURT

PARISH OF CALCASIEU

COUSHATTA TRIBE OF LOUISIANA

STATE OF LOUISIANA

JUDGMENT

This matter came before the Court on September 13, 2013 on Plaintiff's *Motion for Summary Judgment (Liability and Damages)*.

Michael Reese Davis on behalf of plaintiff, Meyer & Associates, Inc. and defendant-in-reconvention, Richard T. Meyer; and

Charles Elliot and Aaron Green on behalf of defendant, Coushatta Tribe of Louisiana.

After considering the parties' pleadings, evidence, exhibits, argument of counsel, the law, and after further consideration of the parties' arguments and filings, and for revised written reasons assigned on October 3, 2013,

IT IS ORDERED, ADJUDGED, AND DECREED that there being no genuine issue of material fact that the Coushatta Tribe of Louisiana (the "Tribe") breached the Power Project contract, Plaintiff's Motion for Summary Judgment (Liability and Damages) is **GRANTED**, and the Tribe's claim based on breach of fiduciary duty is dismissed;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Tribe shall amend its pleadings to allege La. Civ. Code article 2012 as an affirmative defense within 15 days to procedurally join all remaining issues; and, all other affirmative defenses are **DISMISSED**;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims in reconvention against Richard T. Meyer, individually, are **DISMISSED**;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court, on January 21, 2013, shall try the issue of whether the stipulated damages set forth in Plaintiff's Motion for Summary Judgment are so manifestly unreasonable as to be contrary to public policy such that the Court should modify them pursuant to La. Civ. Code Art. 2012.

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The Court will, in addition, determine the amount of attorney fees, if any, to which Plaintiff is entitled under the contractual provisions.

JUDGMENT READ AND SIGNED this 11th day of October, 2013, in Lake Charles, Louisiana.



Honorable Clayton Davis, Judge
14th Judicial District Court

PLEASE NOTIFY:

Michael Reese Davis
HYMEL DAVIS & PETERSEN
10602 Coursey Boulevard
Baton Rouge, Louisiana 70816

And,

Charles Elliott
Aaron Green
VILAR & ELLIOTT, LLC
3709 Masonic Drive
Alexandria, LA 71315

MEYER & ASSOCIATES, INC.

SUIT NO. 2006-002683 - DIV. "B"

VERSUS

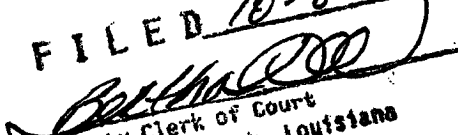
14TH JUDICIAL DISTRICT COURT 

PARISH OF CALCASIEU

COUSHATTA TRIBE OF LOUISIANA

STATE OF LOUISIANA

JUDGMENT

FILED 10-8-13

Deputy Clerk of Court
Calcasieu Parish, Louisiana


This matter came before the Court on September 13, 2013 on Plaintiff's Motion for Partial Summary Judgment Re: Fraud; Motion for Partial Summary Judgment Re: Costs; and Motion for Summary Judgment.

Present in Court were:

Michael Reese Davis on behalf of plaintiff, Meyer & Associates, Inc. and defendant-in-reconvention, Richard T. Meyer; and

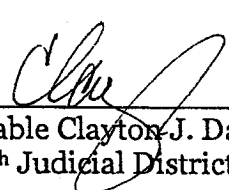
Charles Elliot and Aaron Green on behalf of defendant, Coushatta Tribe of Louisiana.

After considering the parties' pleadings, evidence, exhibits, argument of counsel, the law, after having taken the matter under advisement, and for written reasons assigned in September 24, 2013,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Partial Summary Judgment Re: Fraud is **GRANTED IN PART** ~~the Court finding that the Interim & Definitive Supplemental Agreement of January 14, 2003 and Work Authorization No. 1 are valid and binding and there is no issue of material fact concerning any vices of consent to the agreements;~~ 

The remainder of the Motion for Partial Summary Judgment Re: Fraud is **DENIED IN PART**, the Court finding material issues of fact; the Motion for Partial Summary Judgment Re: Expenses is **DENIED**, and the Motion for Partial Summary Judgment is **DENIED**.

JUDGMENT READ AND SIGNED this 7 day of Oct, 2013, in Lake Charles, Louisiana.


Honorable Clayton J. Davis, Judge
14th Judicial District Court

SCANNED

OCT 23 2013

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Filing Date: 10/08/2013 12:00 AM

Case Number: 2006-002683

Document Name: JUDGMENT

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Submitted by:

Michael Reese Davis
HYMEL DAVIS & PETERSEN
10602 Coursey Boulevard
Baton Rouge, Louisiana 70816

PLEASE NOTIFY:

Michael Reese Davis
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MEYER & ASSOCIATES, INC.

VS. NO. 2006-2683

COUSHATTA TRIBE OF LOUISIANA

FILED: OCT 03 2013

14TH JUDICIAL DISTRICT COURT

PARISH OF CALCASIEU

STATE OF LOUISIANA

William H. Henson
CLERK OF COURT

**RULING ON ISSUES OF BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY
AND STIPULATED DAMAGES**

Pursuant to discussion with counsel at the pretrial conference on October 3, 2013, and after further review of the pleadings, exhibits, memoranda and arguments of counsel, the Court issues the following revised ruling.

There exists no genuine issue of material fact but that the Tribe breached the Power Project contract by, among other things, halting all Richard Meyer projects at its June 14, 2005 council meeting; cancelling a June 29-30, 2005 meeting of involved parties; terminating Worfel as the Tribe's authorized representative, announcing to Tribe members in a written communication of September 17, 2005 that the Power Project was "suspicious" and heavily criticizing past dealings with Richard Meyer; and suing Meyer in Tribal Court for an accounting in 2006. Some these acts individually would be breaches. Viewed as a whole, it is undeniable that after the election of a new council in June of 2005, the council, and thus the Tribe, had no intention of proceeding with the Power Project or with Meyer & Associates in any fashion.

The Court has reconsidered the issue of Meyer's alleged breach of fiduciary duty to the Tribe. For the same reasons previously given to grant summary judgment in favor of Meyer on the issue of fraud, the Court now grants summary judgment in favor of Meyer dismissing the Tribe's claim based on breach of fiduciary duty.

The remaining issue concerns the termination fee provision under the Power Project contract. The Tribe has argued that this provision violates La. Civ. Code art. 2012; however, the Tribe has not raised art. 2012/violation of public policy as an affirmative defense to Meyer's claim for damages under the contract. The Tribe is ordered to do so within the next 15 days to procedurally join this issue. Whether or not art. 2012 applies is a legal issue. The Court will decide this, and if art. 2012 applies, the Court will determine the amount, if any, to award as stipulated/liquidated damages. Meyer is limiting its damage claim to the contractual termination fee provision.

Judgment rendered in Chambers this 3 day of Oct., 2013.

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First MORTGAGOR
THE COUSHATTA TRIBE OF LOUISIANA

First MORTGAGEE
MEYER & ASSOCIATES INC

Index Type : MORTGAGES
Type of Document : JUDGMENT

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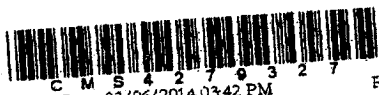
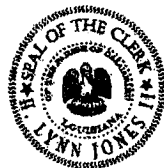
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MEYER & ASSOCIATES, INC.

SUIT NO. 2006-002683 - DIV. "B"

VERSUS

14TH JUDICIAL DISTRICT COURT

COUSHATTA TRIBE OF LOUISIANA

PARISH OF CALCASIEU

STATE OF LOUISIANA

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JUDGMENT

This matter came before the Court for La. Civ. Code Article 2012 Trial on January 21, 22, and 23, 2014. Present in Court were:

Michael Reese Davis of **HYMEL DAVIS & PETERSEN, LLC** on behalf of plaintiff, Meyer & Associates, Inc.; and,

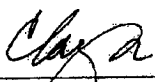
Charles D. Elliot and **Aaron L. Green** of **VILAR & ELLIOTT, LLC** on behalf of defendant, Coushatta Tribe of Louisiana.

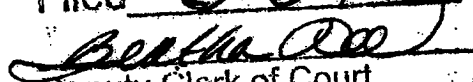
After considering the parties' pleadings, memoranda, exhibits, testimony of witnesses, argument of counsel, the law, and for written reasons assigned in a Ruling on February 19, 2014,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is rendered in favor of Plaintiff, Meyer & Associates, Inc., against Defendant, The Coushatta Tribe of Louisiana, in the amount of **\$10,998,250** together with judicial interest from June 8, 2005 until paid, attorney's fees, and all costs of this proceeding.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the amount of attorney's fees and costs to be awarded to Plaintiff, Meyer & Associates, Inc., will be determined by agreement of the parties or in a future proceeding with the Court.

JUDGMENT READ AND SIGNED this 3 day of ^{March} ~~February~~, 2014, in Lake Charles, Louisiana.


Honorable Clayton J. Davis, Judge
14th Judicial District Court

Filed 3-3-14

Deputy Clerk of Court
Calcasieu Parish, Louisiana

Submitted by:

Michael Reese Davis
HYMEL DAVIS & PETERSEN
10602 Coursey Boulevard
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CLERK OF COURT
CALCASIEU PARISH
2014 MAR 3 AM 1:15



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