UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

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| LAURENCE L. LAMBERT, d/b/a<br>LAURENCE L. LAMBERT &<br>ASSOCIATES, ENGINEERS | CIVIL ACTION NO. 04-2192 |
| VERSUS | SECTION: "L" |
| CITY OF KENNER, LOUISIANA<br>DEPARTMENT OF TRANSPORTATION<br>AND DEVELOPMENT, and THE<br>REGIONAL PLANNING COMMISSION<br>FOR JEFFERSON, ORLEANS,<br>PLAQUEMINES, ST. BERNARD,<br>AND ST. TAMMANY PARISHES | MAGISTRATE (1) |

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**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT:

Defendant, the Regional Planning Commission for Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes ("RPC"), respectfully submits its Memorandum in Support of Motion for Summary Judgment seeking dismissal of the RPC from the above captioned suit by Plaintiff, Laurence L. Lambert d/b/a Laurence L. Lambert & Associates, Engineers ("Lambert") pursuant to Fed. R. Civ. P. 56.

## INTRODUCTION

Plaintiff, Laurence L. Lambert ("Lambert"), filed this suit against the City of Kenner ("Kenner"), the Louisiana Department of Transportation and Development ("DOTD"), and the Regional Planning Commission for Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes ("RPC"). Lambert asserted a claim against Kenner for breach of contract, and a claim against DOTD for intentional interference with a contract. In his Complaint, Laurence Lambert sets

forth only one cause of action against RPC, for Intentional Interference with Contract. See, Complaint, Exhibit A hereto, Count 3, pp. 14-15.

As discussed *infra*, and demonstrated by the attached pleadings, depositions and affidavits, RPC will show that Plaintiff has not properly pled and cannot support a cause of action for intentional interference with contract against RPC under Louisiana law, and that this suit is time-barred under the applicable Louisiana one year prescriptive period. Therefore, RPC should be dismissed from this suit on summary judgment. On January 6, 2005, this Court issued its Order and Reasons granting defendant DOTD's Motion to Dismiss Plaintiff's Complaint on grounds of sovereign immunity. RPC will also demonstrate that the Court's reasoning applies equally to the RPC, mandating its dismissal from this suit on grounds of sovereign immunity.

## STATEMENT OF THE CASE

### Facts

In 1986, plaintiff, Laurence L. Lambert, contracted with the City of Kenner to perform certain engineering and design work in connection with a proposed airport access road to be located along the levee at the western boundary of the City of Kenner from Airline Highway to the Loyola Interchange at I-10, including the design of a tunnel under the east-west runway at the New Orleans International Airport. See, Contract with the City of Kenner dated October 8, 1986 and amended May 4, 1988 ("Original Engineering Agreement"), Exhibit D hereto.

The Original Engineering Agreement divided the Project into two stages. Stage 1 was for design and engineering services for construction of the tunnel beneath the east-west runway. Stage 2 was for design and engineering services for construction of the remainder of the north-south roadway to be located along the levee at the western boundary of the City of Kenner from Airline

Highway to the Loyola Interchange at I-10. Each stage was divided into three phases: Preliminary, Design and Bidding ("PBD"), Construction and As-Built. See, Original Engineering Agreement, Exhibit D. Kenner obtained funding for Stage 1, Phase 1 of the project (PBD for the tunnel) and authorized Laurence Lambert to perform only that phase. Lambert did the preliminary and design phase of the tunnel (but not the bidding portion of that phase). He did not do the construction or as built phases. Deposition of Laurence Lambert, Exhibit J hereto, at p. 53. He prepared construction plans for the tunnel and turned them in to the City of Kenner. Deposition of Laurence Lambert at p. 53-4.

The Regional Planning Commission for Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes ("RPC") was not a party to the Original Engineering Agreement between the City of Kenner and Laurence Lambert. Deposition of Walter R. Brooks, Executive director of the RPC, Exhibit K hereto, p. 18; Affidavit of Walter R. Brooks, Exhibit L hereto, at paragraph 2. The RPC was merely referenced in the contract as providing the federal aid funding.[1] Deposition of Walter R. Brooks, p. 18. The first time Walter Brooks saw the contract was in connection with this litigation, a week and a half before his deposition.[2] Deposition of Walter R. Brooks, p. 18. The contract was for construction design, which covered preliminary engineering and final design for the tunnel, with

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1 The RPC's purpose is to provide technical and financial assistance to Jefferson, Orleans, Plaquemines, St. Bernard and St. Tammany parishes and coordinate the federal aid highway and massive transit programs. Deposition of Walter R. Brooks, p. 8. The RPC was not involved in the design or the concept of the roadway or the tunnel, but only with the funding aspects of that project. Deposition of Walter R. Brooks, p. 11.

2 Walter Brooks knew only that Laurence Lambert had a contract relating to the tunnel of the north-south road. He never saw anything that said Lambert had the project for the entire system. Deposition of Walter R. Brooks, p. 19. RPC was not involved in the decision making that went on between DOTD and Kenner or between Kenner and Laurence Lambert. The federal aid funding was for the tunnel. Deposition of Walter R. Brooks, p. 20.

which the RPC is never involved.[3] Deposition of Walter R. Brooks, p. 18, 20; Affidavit of Walter R. Brooks, Exhibit L hereto, at paragraph 8.

Apparently, in 1991, in order to secure federal funding for the Project, Kenner entered into a City-State Agreement with DOTD which provided that DOTD would undertake the Bidding and Construction Phases of Stage 1, the tunnel. DOTD awarded the tunnel construction work to Boh Brothers, Inc., which completed approximately 835 feet of the tunnel, Phase 1 of the Project, in 1992. No more has done on the Project, which was halted for lack of funding.

On July 7, 1992, Laurence Lambert filed a federal lawsuit against Kenner, DOTD and Boh Brothers seeking $261,629.00 in damages for copyright infringement, breach of contract and other theories due to their alleged use of the Plaintiff's tunnel design without full payment, captioned *Laurence L. Lambert d/b/a/ Laurence L. Lambert & Associates, Engineers v. The City of Kenner and the Louisiana Department of Transportation and Development,* United States Eastern District, No. CA 92-2287 (Judge Livaudais). See, Complaint in CA 92-2287, Exhibit E hereto. Laurence Lambert was paid the agreed upon fixed fee of $360,000.00 for the preliminary, design and bidding (PBD) Phase of Stage 1. However, he claimed he was entitled to an additional $261,629.00 for modifications he had to make to the design to comply with FAA regulations. *Id*. Kenner asserted in the lawsuit a counter claim against Lambert for negligent design of the tunnel and breach of the Original Engineering Agreement, and also filed a separate state court suit for damages for negligent

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3 RPC is never involved in preliminary engineering, construction engineering or design. Deposition of Walter R. Brooks, p. 12. They have an agreement with the DOTD to that effect, and the Federal Highway Administration will not allow the RPC to contract for or do design work. Deposition of Walter R. Brooks, p. 13. If and when an agreement is made to go forward with design and construction, the State DOTD enters the agreement with the local sponsor. RPC is not a signatory to those documents, because they are not an operating entity, they have no implementation authority, and are not staffed to do design work. Deposition of Walter R. Brooks, p. 12-13; Affidavit of Walter R. Brooks, paragraph 8.

design and breach of the Original Engineering Agreement. The RPC was not a party to or in any way involved in those lawsuits. Deposition of Walter R. Brooks, p. 20-22, 111; Affidavit of Walter R. Brooks, paragraph 4.

Plaintiff entered into an agreement with the City of Kenner and DOTD to settle the federal lawsuit. Pursuant to the settlement, the Original Engineering Agreement was modified by the Compromise, Release and Settlement Agreement of August 22, 1994 and the Receipt, Release and Settlement Agreement of December 16, 1994, (the "Revised Engineering Agreement") Exhibit F hereto. The RPC was not a party to that suit, nor was it involved in the settlement agreement. Deposition of Laurence Lambert at p. 111. The RPC had no knowledge of the terms of the settlement, the Revised Engineering Agreement or the contractual relations between Lambert and the City of Kenner.[4]

Plaintiff claims that under the terms of the settlement ("Revised Engineering Agreement,") the Original Engineering Agreement was left as a valid enforceable contract between the Plaintiff and Kenner, with some modifications. The Revised Engineering Agreement allegedly provides that Kenner was obligated to have the Plaintiff perform the remaining engineering and design work on the 1986 Project. According to the terms of the Original Agreement, Exhibit D, this Project was limited to a proposed north-south airport access road to be located along the levee at the western boundary of the City of Kenner from Airline Highway to the Loyola Interchange at I-10. Laurence Lambert's services set forth in the contract were for construction design, which covered preliminary

4 The RPC was not in any way involved in the settlement or the Revised Engineering Agreement and had no knowledge of its terms. Affidavit of Walter R. Brooks, paragraph 5. Walter Brooks heard there was some litigation going on in the 1990's, but he really did not know anything about it and still doesn't know. Deposition of Walter R. Brooks, p. 20-21. He was not aware that Kenner agreed to hire or continue Laurence Lambert's contract for any further engineering work. Deposition of Walter R. Brooks, p. 21. He doesn't know anything about the contractual relationships between Kenner and Laurence Lambert. Deposition of Walter R.

engineering and final design. Deposition of Walter R. Brooks, p. 18, 20. The Project, including engineering and design of the specific roadway covered by the Original Agreement, was halted and has not been reinstated.

In 1998, the RPC and parish presidents sought appropriations under the new federal TEA-21 bill, the Transportation Equity Act for the 21st Century, for a package of 16 projects with improvements to help the Port of New Orleans serve the business parks on the Earhart corridor. Deposition of Walter R. Brooks, p. 25. As one part of the program, they identified completion of a Kenner north-south roadway. Deposition of Walter R. Brooks, p. 26. The City of Kenner was not involved, it was Brooks' decision as the chief transportation planner to include the roadway. Deposition of Walter R. Brooks, p. 26-27. They ultimately received funds earmarked for the 16 projects, one of which was for a north-south roadway. Deposition of Walter R. Brooks, p. 27.

Thereafter, neither Kenner nor Jefferson Parish championed the project, and did not approach the RPC to complete the project. After four and a half years of funds building up for the project, over 5 million dollars would be rescinded by the federal government if nothing were done. RPC wanted to know if a north-south roadway was still needed. Deposition of Walter R. Brooks, p. 31-32. Brooks called a meeting with the state, Kenner and Jefferson Parish to see what should be done. Deposition of Walter R. Brooks, p. 32.

The DOTD wished to back up and do a feasibility study to try and find out what, if anything, would justify a future federal investment in the corridor. Deposition of Walter R. Brooks, p. 32. The DOTD instructed RPC that the first step would have to be a feasibility study to find a purpose and need. Deposition of Walter R. Brooks, p. 51. This study was required by the federal government,

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Brooks, p. 22.

because it had been so long since anything had been done on the project. Deposition of Walter R. Brooks, p. 81-82. Then there would have to be an environmental study, and a look at the cost and the possibility of obtaining matching funds. Deposition of Walter R. Brooks, p. 51.

According to Federal Highway Administration (FHWA) rules and regulations, there must be a feasibility study and an environmental study performed **prior** to commencing any engineering work. Affidavit of Walter R. Brooks, Exhibit L, paragraph 8. Further, to avoid conflicts of interest, t**he federal government requires separation between the firms that do the feasibility studies and the engineering work.** Deposition of Walter R. Brooks, p. 54; Affidavit of Walter R. Brooks, Exhibit L, paragraph 20.

The FHWA has a 6 step sequential process, requiring a feasibility study first, and authorization is required from FHWA and state DOTD for each step. Deposition of Walter R. Brooks, p. 59. The RPC is only involved in the first 3 steps, feasibility, environmental and funding. Deposition of Walter R. Brooks, p. 59-60. The state DOTD takes over after that. Deposition of Walter R. Brooks, p. 60. Only after the first three steps are complete may any design or engineering work begin, and that is the DOTD's and not the RPC's job. Deposition of Walter R. Brooks, p. 51-52.

There was a written contract dated April 10, 2002 between DOTD and RPC for obtaining the feasibility study. Pursuant to this contract, the RPC was required to advertise for a Request for Qualifications for a feasibility study. Affidavit of Walter R. Brooks, paragraph 6. The RPC was prohibited from awarding any engineering contracts in connection with the feasibility study. After RPC received the contract, they prepared to find a consultant. Deposition of Walter R. Brooks, p. 64.

The City of Kenner was invited to participate in the selection process of a consultant for the feasibility study, but declined to do so. Deposition of Walter R. Brooks, p. 57-58.

The RPC has a consultant selection process that has been reviewed and approved by the state. Deposition of Walter R. Brooks, p. 66. The RPC Transportation Policy Committee will review the bids, identify the top three firms and make a recommendation to the Metropolitan Planning Organization ("MPO"), which is the official entity that awards the contracts. Deposition of Walter R. Brooks, p. 68. Approval of the Transportation Policy Committee's recommendation to the MPO requires a simple majority vote by the 41 members. If the MPO accepts the recommendation, they send a summary of the consultant selection process to the DOTD for their review and approval. Deposition of Walter R. Brooks, p. 68-69. After DOTD approval, the RPC can execute the contract.

In the instant case, the RPC advertised for bids for the feasibility study in the New Orleans Times Picayune and the Daily Journal on April 17 & 22, 2002. Affidavit of Walter R. Brooks, at paragraph 9. Plaintiff Laurence Lambert, who had been retired since 1995, did not bid on the project. Deposition of Laurence Lambert at p. 13.[5] The RPC recommended Richard Lambert's firm[6] to do the feasibility study because they had the strongest team and the highest score. Deposition of Walter R. Brooks, p. 69. Richard Lambert had a traffic group, as well as an environmental attorney

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5 Laurence Lambert does not know what the mandate of the RPC is, nor has he ever done business with the RPC. Deposition of Laurence Lambert at p. 102. He has never submitted a proposal in response to a request for qualifications to the RPC, nor has he asked to be placed on the RPC consultant mailing list. Deposition of Laurence Lambert at p. 103. He has never visited the RPC website where they advertise upcoming studies. Deposition of Laurence Lambert at p. 103. He does not subscribe to or read professional journals for job listings. Deposition of Laurence Lambert at p. 103. He has never heard of the MPO, Metropolitan Planning Organization. Deposition of Laurence Lambert at p. 104. It has been over ten years since he was under contract with a state or federal agency. Deposition of Laurence Lambert at p. 104. He is not familiar with the latest requirements for contracts with state and federal agencies because he has not had such a contract in the past 10 years. Deposition of Laurence Lambert at p. 115.

6 Richard Lambert is Laurence Lambert's brother; however, to defendant's knowledge they have never

who was a member of the American Planning Association, who had a great deal of experience in land use. *Id*.

Although invited to participate in the selection process, the City of Kenner did not do so. Deposition of Walter R. Brooks, p. 57-58. The City of Kenner did not in any way influence the RPC to hire Richard Lambert or not to hire Laurence Lambert. Deposition of Walter R. Brooks, p. 136; Affidavit of Walter Brooks, Exhibit L, at paragraph 13. Aaron Broussard, the former mayor of Kenner, did not in any way influence the RPC to hire Richard Lambert or not to hire Laurence Lambert. Affidavit of Walter Brooks, Exhibit L, at paragraph 13. Nor did RPC induce Kenner to breach any contract. Affidavit of Walter Brooks, Exhibit L, at paragraph 13. Kenner played no role in the selection of Richard Lambert. Deposition of Walter R. Brooks, p. 136; Affidavit of Walter R. Brooks, paragraph 14.

The RPC had to get approval both from the state DOTD and the federal FHWA and obtain local matching funds before proceeding to obtain a contract with Richard Lambert. Deposition of Walter R. Brooks, p.75-76. The City of Kenner agreed to provide $40,000.00 in matching funds for the feasibility study. Deposition of Walter R. Brooks, p. 77. RPC then signed the contract with Richard Lambert. The City of Kenner was not a party to the contract. Deposition of Walter R. Brooks, p. 139-140.

RPC contract No. 36-0155 K N/S (Federal Highway Administration (FHWA) contract No. HP-3602(501), Louisiana Department of Transportation and Development contract No. 700-36-0155), Exhibit G hereto, was awarded on November 18, 2002 to Richard C. Lambert Consultants, L.L.C. for a feasibility study of conceptual alternatives for proposed master plans for the City of

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worked together.

Kenner and Louis Armstrong New Orleans International Airport. RPC Contract No. 36-0155 K N/S, Exhibit G hereto.[7]

This Contract did not entail engineering or design work relating to the roadway described in the 1986 project: it was a planning study. Affidavit of Walter Brooks, Exhibit L, at paragraph 8. As set forth in the Contract between Richard Lambert and the RPC: "Land use development and changes in proposed master plans for the City of Kenner and the Louis Armstrong New Orleans International Airport require that an overall Feasibility Study be performed to re-establish the overall purpose and need for the [North-South Roadway], including alternative alignments and connections to existing and proposed major traffic generators," some of which did not use Laurence Lambert's tunnel or the originally proposed roadway. Deposition of Walter R. Brooks, p. 81, 83; RPC Contract No. 36-0155 K N/S, Exhibit G hereto, Scope of Work. The scope of the work was "basically a feasibility study to figure out what, if anything we would do in the corridor and what would justify a federal investment." Deposition of Walter R. Brooks, p. 79. The feasibility study was not project design, the project design occurs subsequently and is always done by DOTD, which may or may not permit the local authority to contract it out. Deposition of Walter R. Brooks, p. 89. "We [RPC] never get to that level." Deposition of Walter R. Brooks, p. 89; Affidavit of Walter Brooks, Exhibit L, at paragraph 8.

As a result of his work, Richard Lambert made a presentation to the stakeholders, including Kenner, the airport, the state and the RPC, discussing eight alternative routes and plans for a roadway. Deposition of Walter R. Brooks, p. 114-115. Some of the routes would not have used the existing tunnel. Deposition of Walter R. Brooks, p. 117. Alternative 7, Figure I on page 22 and

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7 This was a completely separate project from the original 1986 project, which was identified in the 1994 settlement agreement as: State Project 742-06-48, Federal Aid Project No. NOAD-M-0087 (001).

Alternative 8, Figure J on page 24 in the Feasibility Study, Exhibit I hereto, show alternative routes for the North-South Roadway that do not use the existing tunnel. Moreover, some of the routes did not call for a roadway located along the levee at the western boundary of the City of Kenner from Airline Highway to the Loyola Interchange at I-10, which was the roadway specified in the Original Engineering Agreement. As plaintiff admitted in his deposition, t**he feasibility study shows routes that were alternative to the ones in his contract.** Deposition of Laurence Lambert at p. 90-92.[8]

Lambert presented his final report with an engineering stamp. Brooks told him it was unacceptable for a planning document and to take it back and remove the stamp. Deposition of Walter R. Brooks, p. 126-7, 132. RPC does not do engineering work and they do not accept plans that are stamped by engineers. Deposition of Walter R. Brooks, p. 126. "[T]he work that we do is not engineering design; and, therefore, no stamped plans are accepted by this agency." Deposition of Walter R. Brooks, p. 130. "[T]he Regional Planning Commission is not involved in project-level design. We don't do preliminary engineering, and we don't do construction engineering. We do planning.[9] And that's what Richard Lambert was hired to do, planning." Deposition of Walter R. Brooks, p. 131. There was no preliminary engineering work in the report, there are no engineering plans in the report. It was a planning study, "he didn't do any design work." Deposition of Walter R.

8 Page 22, Figure I of Richard Lambert's Feasibility Study is a proposed new tunnel that is different from Laurence Lambert's tunnel. Deposition of Laurence Lambert at p. 120-21. The proposed north-south runway that it would go under, which would be entirely in St. Charles Parish, did not exist when he did his tunnel project in 1986. Deposition of Laurence Lambert at p. 121-122. Laurence admitted that it completely bypasses the tunnel that he was involved with in the 1980's. Deposition of Laurence Lambert at p. 122. The original project connected to I-10, but the preferred alternative did not connect to I-10, rather to a proposed northern airport terminal that has not yet been built. Deposition of Laurence Lambert at p. 123.

9 Transportation planners are different from engineers, not all planning includes engineering, and planners do not have to be licensed or certified. Deposition of Laurence Lambert at p. 106.

Brooks, p. 127-128, 133.[10] Richard Lambert took the engineering stamp off his final report of October 25, 2004. Deposition of Walter R. Brooks, p. 133.

In his final report, the Feasibility Study dated October 25, 2004, Exhibit H hereto, Lambert suggested 8 alternatives, and recommended one. Deposition of Walter R. Brooks, p. 133-134. The Feasibility Study identified Alternative 8, which did not use the existing tunnel, as the preferred alternative. See, Feasibility Study, pp. 69-70. The preferred alternative would entail the expansion of Aberdeen Street and transferring the existing tunnel to the Airport for its internal use, which would coincide with the Airport's plans to build a new runway and relocate cargo activities to the north side of the airport. In return, the Airport would transfer ownership of the access road. *Id.*

A decision as to which alternative to use has still not been made. The state and the RPC are waiting for the airport to complete their Master Plan and do a more thorough review of the Feasibility Study. Deposition of Walter R. Brooks, p. 134.

**Proceedings Below**

On August 4, 2004, plaintiff filed this suit against the City of Kenner ("Kenner"), the Louisiana Department of Transportation and Development ("DOTD"), and the Regional Planning Commission for Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes ("RPC"). See, Complaint, Exhibit A hereto. Plaintiff, who has long been retired as an engineer, claimed the contract for the Feasibility Study between RPC and his brother Richard called for engineering and

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10 Richard Lambert requested permission from the DOTD to move on to the environmental, engineering and design work. A May 16, 2003 letter from DOTD to Richard Lambert, Exhibit I hereto, states: "In your letter of May 8, 2003 you requested authorization to move into the environmental and design phases of the referenced project. After discussing your request with FHWA, we are unable to approve your request for the following reasons: One, our original agreement with RPC is only for planning and planning-related environmental work for this project; two, consultants for all engineering design contracts are selected by DOTD." Deposition of Laurence Lambert at p. 127-128.

design work on the remaining phases of the 1986 Project, which plaintiff was allegedly entitled to perform under the Revised Engineering Agreement. Plaintiff claims that Kenner breached the Revised Engineering Agreement and that he is entitled to cancel the contract and receive liquidated damages from Kenner of $1,148,446.00. Furthermore, the Plaintiff claims that both DOTD and RPC are liable for damages for intentional interference with plaintiff's contract with the City of Kenner. Defendant RPC filed its Answer and Affirmative Defenses, Exhibit B hereto.

Defendant RPC has now filed the instant Motion for Summary Judgment seeking dismissal of plaintiff's suit against RPC. As discussed *infra*, and demonstrated by the attached pleadings, depositions and affidavits, RPC will show that plaintiff has not properly pled and cannot support a cause of action for intentional interference with contract against RPC, and that his suit is time barred under the applicable Louisiana one year prescriptive period. On January 6, 2005, this Court issued its Order and Reasons granting defendant DOTD's Motion to Dismiss Plaintiff's Complaint on grounds of sovereign immunity. RPC will also demonstrate herein that the Court's reasoning applies equally to the RPC, mandating its dismissal from this suit. Therefore, Plaintiff's suit against RPC should be dismissed.

## LAW AND ARGUMENT

### I. STANDARDS FOR SUMMARY JUDGMENT.

Summary judgment "is a procedural device for the prompt and expeditious disposition of a controversy without a trial. … The purpose of summary judgment is to eliminate trial in cases in which it is unnecessary and would only cause delay and expense." 73 Am. Jur. 2d, *Summary Judgment,* § 1 (citations omitted.) Summary judgment "is also a useful device for unmasking frivolous claims and putting a swift end to meritless litigation because it allows the court to move

beyond the allegations in the pleadings and analyze the evidence to ascertain whether there is a need for a trial." *Id*.

Fed. R. Civ. P. Rule 56 "contemplates an inquiry in advance of trial as to whether there is a genuine issue, and may be invoked for the purpose of striking sham claims and defenses that obstruct a prompt determination of the truth." 73 Am. Jur. 2d, *Summary Judgment*, § 1. The summary judgment rule is designed to eliminate the necessity of a formal trial where questions of law are involved "and a fatal weakness in the claim of a party is exposed." *Id*., citing Fed. R. Civ. P. Rule 56(c); *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001).

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747, 750 -751 (5th Cir. 2005).

When a Motion for Summary judgment is made and properly supported, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. Rule 56(e).

Under the foregoing standards, plaintiff's suit against the RPC must be dismissed.

**II. PLAINTIFF'S SUIT AGAINST RPC FOR INTENTIONAL INTERFERENCE WITH CONTRACT SHOULD BE DISMISSED ON SUMMARY JUDGMENT.**

In his Complaint, Laurence Lambert set forth only one cause of action against RPC- for Intentional Interference with Contract. See, Complaint, Exhibit A hereto, Count 3, pp. 14-15. In Count 3, plaintiff alleges that RPC knew of the existence of the Kenner Agreement and the Revised Engineering Agreement. Complaint, paragraph 67. Plaintiff admits that RPC was not a party to the Revised Engineering Agreement. Complaint, paragraph 68.

Plaintiff alleges that: "RPC knew that hiring another engineer to perform engineering services on a remaining part of the project would breach the Revised Engineering Agreement." Complaint, paragraph 70. Further, plaintiff alleges that "RPC had no reason to believe that the Revised Engineering Agreement was terminated," Complaint, paragraph 71, and that "RPC induced Kenner to breach the Revised Engineering Agreement." Complaint, paragraph 72. The foregoing allegations are the only ones specific to RPC. Notably, there are no allegations against any officer of RPC, and only RPC was made defendant.

As discussed in detail *infra*, the foregoing allegations do not support a claim under Louisiana law on tortious interference with contract, which recognizes a cause of action within the limited confines of a *corporate officer's* duty to refrain from intentional and unjustified interference with a contractual relationship *between the officer's corporation* and the plaintiff. See, *Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc.,* 949 F.2d 1384, 1387-91 (5th Cir. 1991)(discussing *9 to 5 Fashions v. Spurney,* 538 So.2d 228 (La. 1989). To the contrary, in the instant case, plaintiff has filed suit against the RPC only and not an officer or director of the RPC. Furthermore, there is no contract or other protected interest between the RPC and plaintiff. The contract at issue is the Revised Engineering Agreement between plaintiff, Kenner and DOTD, to which RPC was not a party.

As demonstrated by the attached pleadings, depositions and affidavits, plaintiff cannot amend his Complaint to correct these defects. After almost a year of discovery, plaintiff has not been able to name a single officer or director of the RPC with any knowledge of the existence of the Revised Engineering Agreement. Nor does plaintiff have any evidence to meet his burden to prove *any* of the five elements set forth by the Louisiana Supreme Court in *9 to 5 Fashions v. Spurney* of a claim for intentional interference with contract. Finally, plaintiff's claim is clearly time barred under the applicable Louisiana one year prescriptive period. Plaintiff's sole cause of action against the RPC cannot be maintained, and this suit should be dismissed on summary judgment.

**A. APPLICABLE LAW ON INTENTIONAL INTERFERENCE WITH CONTRACT.**

A federal court, in the exercise of its diversity jurisdiction, is required to apply the substantive law of the state in which it is sitting. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1937); *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n,* 783 F.2d 1234, 1240 (5th Cir. 1986) (federal court must apply the substantive law of the forum state in a diversity action). Therefore, this Court must look to Louisiana law on intentional interference with contract.

Historically, a cause of action for tortious interference with contract was not available in Louisiana. *Spillway Investments, L.L.C. v. Pilot Travel Centers, LLC*, 2004 WL 2988491, 7-8 (E.D. La. 2004), citing *Kline v. Eubanks,* 109 La. 241, 33 So. 211 (1902). In 1989, the Louisiana Supreme Court recognized a cause of action for tortious interference with contract within the limited confines of a *corporate officer's* duty to refrain from intentional and unjustified interference with a contractual relationship *between his employer and a third party*. *Southern Service Corp. v. Tidy Bldg. Services, Inc.,* 2004 WL 2784909, 6-7 (E.D. La. 2004) (emphasis added), citing *Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc.,* 949 F.2d 1384, 1387-91 (5th Cir. 1991)(discussing *9 to 5*

*Fashions v. Spurney,* 538 So.2d 228 (La. 1989)).

The Fifth Circuit, federal district courts in Louisiana, and various Louisiana courts of appeal since *9 to 5 Fashions* have "uniformly recognized the narrowness of Louisiana's tortious interference action." *Southern Service Corp. supra, quoting Egrov, Puchinsky, Afanasiev & Juring v. Terriberry, Carroll & Yancey,* 183 F.3d 453, 457 (5th Cir. 1999); *see America's Favorite Chicken Co. v. Cajun Enter.,* 130 F.3d 180, 184 (5th Cir. 1997); *Am. Waste & Pollution Control,* 949 F.2d at 1386-87; *Oreck Holdings, L.L.C. v. Euro-Pro Corp.,* 2002 WL 59405, at 2 (E.D. La. Jan. 15, 2002); *White v. White,* 641 So.2d 538, 541 (La. App. 3d Cir. 1994). Even the Louisiana appellate courts which have purported to expand the cause of action have done so only within the limited confines of *9 to 5 Fashions. Southern Service Corp. supra, citing Egrov,* 183 F.3d at 457 (citations omitted).

In *9 to 5 Fashions, Inc. v. Spurney,* the Louisiana Supreme Court allowed for the first time a cause of action against a corporate *officer* to be maintained for tortious interference with contract. Interpreting *9 to 5 Fashions,* the Louisiana Courts of Appeal have correctly determined that a cause of action for tortious interference with contract cannot be maintained against a corporate entity defendant, but rather only against an officer of that corporation. *See, e.g., Technical Control Systems, Inc. v. Green,* 2001-0955 (La. App. 3 Cir. 2/27/02); 809 So.2d 1204, 1206-1209, *writ denied,* 2002-0962 (La. 5/31/02); 817 So.2d 100 (no cause of action against corporate entity defendant); *Spears v. American Legion Hosp.,* 00-865 (La. App. 3 Cir. 1/31/01), 780 So.2d 493 (no cause of action when defendant is not a corporate officer); *Accredited Sur. and Cas. Co. v. McElveen,* 93-678 (La. App. 3 Cir. 2/2/94), 631 So.2d 563 (no expansion of *Spurney* to non-corporate officers), *writ denied,* 95-0915 (La. 5/20/94), 637 So.2d 483, *cert. denied,* 513 U.S. 963, 115 S.Ct. 424, 130 L.Ed.2d 338 (1994); *White v. White,* 93-1389 (La. App. 3 Cir. 6/15/94), 641 So.2d 538, *writs denied,* 94-2456, 94-

2467 (La. 12/19/94), 648 So.2d 402 (no cause of action for tortious interference with contract where the defendant was not a corporate officer). *Cf. Neel v. Citrus Lands of Louisiana, Inc.,* 629 So.2d 1299 (La. App. 4 Cir. 1993). This Court, in *Spillway Investments, L.L.C. v. Pilot Travel Centers, LLC*, 2004 WL 2988491, 7-8 (E.D. La. 2004), recognized those decisions and held that a plaintiff had no cause of action against an individual defendant who was not a corporate officer of any party to the contract.

Further, the courts have appropriately recognized that under *9-5 Fashions*, there must be a contract between the plaintiff and defendant. As the Court observed in *Matrix Essential, Inc. v. Emporium Drug Mart, Inc.*, 756 F. Supp. 280, 284 (W.D. La. 1991), *aff'd,* 988 F.2d 587 (5th Cir. 1993):

> If anything, the *9 to 5* opinion recognized only an action wherein a corporate officer causes *his own corporation* to breach a contract between *his own corporation* and the plaintiff. *Id.* at 234. Clearly, there was never any contract between plaintiff and defendant in this case. Accordingly, we dismiss this claim under Rule 12(b)(6).

*Matrix Essential, Inc.,* 756 F. Supp. at 284 (emphasis in original.)

In *9 to 5 Fashions v. Spurney*, the Louisiana Supreme Court stated the elements which must be proved to maintain this limited cause of action against a corporate officer:

> (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

*Am. Waste & Pollution Control,* 949 F.2d at 1387, citing *9 to 5 Fashions v. Spurney,* 538 So.2d at 234.

As discussed in detail *infra*, plaintiff in this case has not properly pled and has no evidence to

sustain any of the five elements of *9 to 5 Fashions, Inc. v. Spurney* for a cause of action for intentional interference with contract; therefore, the case must be dismissed.

## B. PLAINTIFF CANNOT MAINTAIN A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST RPC.

### 1. Plaintiff has not pled and cannot support any allegations against any officer of the RPC.

Plaintiff's allegations do not support a claim against RPC for intentional interference with contract. First, plaintiff has named as defendant only the RPC. Again, correctly interpreting *9 to 5 Fashions, Inc. v. Spurney,* the Louisiana Courts of Appeal have determined that a cause of action for tortious interference with contract cannot be maintained against a corporate entity defendant, but rather only against an *officer* of that corporation. *See, e.g., Technical Control Systems, Inc. v. Green*, 2001-0955 (La. App. 3 Cir. 2/27/02); 809 So.2d 1204, 1206-1209 (no cause of action against corporate entity defendant), and numerous cases cited *supra*. For that reason alone, the case against RPC should be dismissed.

Moreover, the attached depositions and evidence show that, even were plaintiff allowed to amend his Complaint to add an officer of the RPC as defendant at this late date, he cannot meet his burden to prove that any officer of the RPC even knew of plaintiff's Revised Engineering Agreement with the City of Kenner, much less induced Kenner to breach that contract with plaintiff.

In his Answers to RPC's Interrogatories, plaintiff was unable to identify anyone at the RPC that allegedly induced Kenner to breach the Revised Engineering Agreement, and stated that future discovery was required. See, Plaintiff's Answers to RPC's Interrogatories, Exhibit C hereto, Response to Interrogatory 4. Further in his Answers, plaintiff named Aaron Broussard, the former Mayor of Kenner, as a possible member of the RPC with knowledge that hiring Laurence Lambert would allegedly breach the Revised Engineering Agreement, and stated that further discovery was required. Answers to RPC's Interrogatories, Exhibit 4 hereto, Response to Interrogatory 5.

When questioned in his deposition which officer of the RPC may have induced Kenner to breach its contract with plaintiff, plaintiff was unsure but speculated that Aaron Broussard, the former Mayor of Kenner, was a member of the RPC and knew about the contract. "It could be Mr. Broussard, he was aware of the settlement agreement, he was aware of the work, and as far as I know he's on the RPC, maybe even the chairman elect. I don't know." Deposition of Laurence Lambert at p. 107.

> Q. "Well, are you saying that Aaron Broussard induced the City of Kenner to breach the contract with you?
>
> A. I don't know if he specifically did.
>
> Q. Can you identify anybody at the Regional Planning Commission that induced Kenner to breach the revised engineering agreement?
>
> A. Other than him right off he should have known it all, he was a party to the '94 agreement and anybody that looks at this knows that this is an engineering study.

Deposition of Laurence Lambert, Exhibit J, at pp. 107-8.

However, **Aaron Broussard was not an officer of the RPC** when the contract was bid and signed. To the contrary, as demonstrated by the official RPC letterhead on the November 6, 2002 letter from Walter Brooks to Richard Lambert, the Officers of the RPC in 2002, when the contract with Richard Lambert was bid and signed, were Charles M. Ponstein (Chairman), Tim Coulon (1st Vice Chairman), Eddie L. Sapir (2nd Vice Chairman), Benny G. Rousselle (Secretary) and Kevin Davis (Treasurer). See, Affidavit of Walter Brooks, Exhibit L hereto, and attached letter of November 6, 2002. Broussard was not an officer of the RPC in 2002,[11] and plaintiff has not named

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11 In 2002, in his capacity as Jefferson Parish Council Chairman, Aaron Broussard, along with 40 other representatives from Jefferson Parish, Orleans Parish, Plaquemines Parish, St. Bernard Parish, St. Tammany Parish and the state DOTD, were members of the RPC, but not officers or directors. The only involvement that the regular members of the RPC had in relation to the selection of Richard Lambert as a consultant was to approve by a simple majority the Transportation Policy Committee's recommendation to the MPO board.

and cannot name any *officer* of the RPC that induced the RPC to breach a contract with Laurence Lambert.

This suit was filed in August of 2004, plaintiff has had approximately one year to conduct discovery. Further, the scheduling order requires all pre-trial motions to be filed, set and heard before September 23rd. Yet, at this late date, plaintiff still has been unable to name any officer of the RPC that allegedly knew of the Revised Engineering Agreement or allegedly induced Kenner to breach the Revised Engineering Agreement. Plaintiff cannot amend his Complaint to name as defendant any officer of the RPC as having committed the tort of intentional interference with contract, and has no evidence to support such a claim. And, any such suit would be a personal suit against the officer, and not against the RPC. For that reason alone, the suit against RPC should be dismissed.

**2. The elements set forth in *9 to 5 Fashions v. Spurney* are not and cannot be met.**

Furthermore, plaintiff cannot meet its burden to prove the five elements required to recover on a claim of tortious interference with contract, which include: (1) the existence of a contract or a legally protected interest between the plaintiff and the *officer's corporation*; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer. *Am. Waste & Pollution Control,* 949 F.2d at 1387, citing *9 to 5 Fashions v. Spurney,* 538 So.2d at 234.

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Aaron Brossard did not in any manner influence the RPC not to award the contract to Laurence Lambert. Affidavit of Walter Brooks at paragraph 13. The City of Kenner, which was not a member of the RPC and did not participate in the selection process at all, did not influence the decision. Affidavit of Walter Brooks at paragraph 14. Walter Brooks had no knowledge that the award of this contract to Richard Lambert could possibly violate the terms of any agreement between the City of Kenner and Laurence Lambert. Affidavit of Walter R. Brooks at paragraph 12. Laurence Lambert did not even submit a bid. Affidavit of Walter R. Brooks

**(a) A contract or legally protected interest between the plaintiff and the corporation.**

*9-5 Fashions v Spurney* involved a plaintiff's claims that a corporate officer induced his own corporation to breach a contract *between the plaintiff and the officer's corporation*. In this case, there is no contract or protected interest between Laurence Lambert and the RPC. The RPC was not a party to the Original Agreement, the first federal lawsuit, the settlement agreement or the Revised Engineering Agreement. Laurence Lambert, of course, was not a party to the RPC agreement with Richard Lambert. There was no contract between plaintiff and the RPC and that is fatal to a claim of intentional interference with contract. See, *Matrix Essential, Inc. v. Emporium Drug Mart, Inc.*, 756 F. Supp. 280, 284 (W.D. La. 1991). Plaintiff's claim that the RPC induced *Kenner* to breach its contract with plaintiff do not fit within the facts or rationale of *9-5 Fashions v Spurney,* and the suit must be dismissed.

**(b) The corporate officer's knowledge of the contract.**

Even if *9-5 Fashions v Spurney* could be extended to a situation where a corporate officer induced a breach of contract between a plaintiff and an unrelated party, it is undisputed in this case that no officers of RPC had knowledge of the terms of the Revised Engineering Agreement between Laurence Lambert and the City of Kenner. RPC was not a party to the lawsuit, and plaintiff admits that the RPC was not involved in the settlement that led to the Revised Engineering Agreement. Deposition of Laurence Lambert at p. 111. Walter Brooks, Executive Director of the RPC, testified that he had not even seen the Original Engineering Agreement until shortly before his deposition in this case. Deposition of Walter R. Brooks, p. 18. He was not aware that Kenner agreed to hire or continue Laurence Lambert's contract for any further engineering work. Deposition of Walter R.

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at paragraph 10.

Brooks, p. 21. He didn't know anything about the contractual relationships between Kenner and Laurence Lambert. Deposition of Walter R. Brooks, p. 22.

**(3) The officer's intentional inducement or causation of the corporation to breach the contract**.

Again assuming that *9-5 Fashions v Spurney* could be extended to a situation where a corporate officer induced a breach of contract between a plaintiff and a third party, which RPC denies, there is also absolutely no evidence that anyone at the RPC **intentionally induced** Kenner to breach its contract with plaintiff, if such breach even occurred. Negligence will not suffice. *9 to 5 Fashions, Inc. v. Spurney,* 538 So.2d at 235.[12] Plaintiff has no evidence to show knowledge, much less intentional behavior. Walter Brooks didn't know anything about the contractual relationships between Kenner and Laurence Lambert. Deposition of Walter R. Brooks, p. 22. Kenner was invited to participate in the selection of a consultant to perform the feasibility study, and chose not to become involved. Deposition of Walter R. Brooks, p. 57-58.

**(4) Absence of justification on the part of the officer.**

The obligation that the RPC had to the DOTD and the FHWA in connection with Federal Highway Administration (FHWA) contract No. HP-3602(501) and Louisiana Department of Transportation and Development contract No. 700-36-0155 **required** the Regional Planning Commission to publicly bid the feasibility study contained in RPC contract No. 36-0155 K N/S. Affidavit of Walter R. Brooks, Exhibit L hereto, at paragraph 6.

Neither Kenner nor Aaron Broussard informed RPC of the remote possibility that the contract

12 The Court in *9 to 5 Fashions* did not find the corporate officer liable because it concluded that he had not acted intentionally to interfere with the contract. The defendant's conduct was more akin to negligence, which the court held was not actionable. *9 to 5 Fashions, Inc. v. Spurney,* 538 So.2d at 235.

for the feasibility study should be awarded to Laurence Lambert, and in no way did they influence the decision. Affidavit of Walter R. Brooks, paragraph 13. Kenner was invited to participate in the selection of a consultant to perform the feasibility study, and chose not to become involved. Deposition of Walter R. Brooks, p. 57-58. Walter Books didn't know anything about the contractual relationships between Kenner and Laurence Lambert. Deposition of Walter R. Brooks, p. 22. RPC was therefore justified in following its bidding and selection procedure approved by the State.

Further, according to the RPC's present understanding, Laurence Lambert claims that he is entitled to do all engineering and design work for the original 1986 Project and that the contract between the RPC and Richard Lambert was for engineering and design work for that Project. To the contrary, this was a planning and feasibility study, and did not encompass engineering and/or design work. Deposition of Walter R. Brooks, p. 89, 103; Affidavit of Walter R. Brooks, paragraph 8. DOTD, and not RPC, contracts with the companies that do engineering and design work. Deposition of Walter R. Brooks, p. 59-60; Affidavit of Walter R. Brooks, paragraph 8. Pursuant to FHWA rules and regulations on conflicts of interest, there must be separation between companies that perform feasibility studies and companies that do the engineering and design work. Deposition of Walter R. Brooks, p. 54; Affidavit of Walter R. Brooks, paragraph 20. **Had Laurence Lambert been hired to perform the feasibility study, then he could not have performed any engineering and design work on the final project.** Affidavit of Walter R. Brooks, paragraph 20.

In sum, under Louisiana law relating to the tort of intentional interference with contract, plaintiff cannot maintain this claim against the RPC. There are no other grounds alleged in the Complaint for liability of the RPC in this matter, and this suit must be dismissed.

## C. PLAINTIFF'S SUIT IS TIME-BARRED UNDER THE APPLICABLE LOUISIANA ONE YEAR LIMITATIONS PERIOD.

In Louisiana, LSA-C.C. art. 3492 provides for a one year prescriptive period for tort claims. This article provides, in pertinent part: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." *Id*.

The one year tort prescriptive period in article 3492 applies to claims for tortious interference with contract. See, *Hartman* v. *Greene*, 193 La. 234, 190 So. 390, (1939) *certiorari denied* 60 S.Ct. 180, 308 U.S. 612, 84 L.Ed. 512 (overruled on other grounds) (one who encourages breach of contract if liable at all for damages is liable for a tort but not for breach of contract); *Scott v. City of New Orleans*, 2004-0414 (La. App. 4 Cir. 2004); 888 So.2d 318 (One year limitations period under article 3492 applied to cause of action for tortious interference with contract.)

In the instant case, the pertinent dates are as follows:

1. The RPC advertised for bids for the feasibility study in the New Orleans Times Picayune and the Daily Journal on April 17 & 22, 2002. See, Affidavit of Walter R. Brooks, Exhibit L, at paragraph 9.

2. RPC contract No. 36-0155 K N/S (Federal Highway Administration (FHWA) contract No. HP-3602(501), Louisiana Department of Transportation and Development contract No. 700-36-0155), Exhibit G hereto, was awarded to Richard C. Lambert Consultants, L.L.C., on November 18, 2002. See, RPC Contract No. 36-0155 K N/S, Exhibit G hereto.

3. Plaintiff filed this suit against the City of Kenner ("Kenner"), the Louisiana Department of Transportation and Development ("DOTD"), and the Regional Planning Commission for Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes ("RPC") on August 4, 2004. See, Complaint, Exhibit A hereto.

The alleged injury or damage in this case was sustained on November 18, 2002, the date that the contract was awarded to Richard C. Lambert Consultants, and under LSA-C.C. art. 3492 prescription began to accrue at latest on that date. Plaintiff also had constructive notice of the alleged breach of the Revised Engineering Agreement even prior to that date, because the

advertisement for bids was published as a legal notice in the Times Picayune on April 17 and 22, 2002. Plaintiff's suit against the RPC filed on August 4, 2004 was not timely filed within the applicable Louisiana one year prescriptive period, and should be dismissed.

**II. THE ELEVENTH AMENDMENT BARS THIS SUIT.**

On January 6, 2005, this Court issued its Order and Reasons granting defendant DOTD's Motion to Dismiss Plaintiff's Complaint on grounds of sovereign immunity. RPC will demonstrate herein that the Court's reasoning applies equally to the RPC, mandating its dismissal from this suit. RPC meets the elements set forth by the Fifth Circuit in *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991). As discussed *infra*, RPC should be treated as an arm of the state for Eleventh Amendment immunity purposes, and Plaintiff's suit against it should be dismissed.

**A. APPLICABLE LAW**

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment has been interpreted to bar suits brought in federal courts by a state's own citizens or citizens of another State. *Employees of the Dept. of Pub. Health & Welfare v. Dept. of Pub. Health & Welfare*, 411 U.S. 279, 280, 93 S.Ct. 1614, 1616 (1973); *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355 (1974); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890). A state or an arm of the state is immune from suit pursuant to the Eleventh Amendment unless it waives its immunity or there has been a congressional abrogation of the states' immunity. *Id.*

Eleventh Amendment immunity extends to arms of the state when "the state is the real, substantial party in interest." *Pennhurst*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984). The Supreme Court has stated "[t]he general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed 2d 15 (1963)).

The State of Louisiana has not waived its Eleventh Amendment immunity from suit in federal court. Louisiana has only waived its sovereign immunity as to suit in state court. Louisiana Constitution Article XII § 10 provides that "[n]either the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property." Additionally, La. R.S. 13:5106(A) provides: "[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." This statute expressly limits the state's constitutional waiver of immunity to suits filed in a Louisiana state court.

The United States Supreme Court has held that "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Pennhurst*, 465 U.S. 89, 100, n.9, 104 Ct. 900, 907 n.9 (1984) (citing *Florida Department of Health v. Florida Nursing Home Assn.* 450 U.S. 147, 150, 101 S.Ct. 1032,1034, 67 L.Ed.2d. 132 (1981)). The Fifth Circuit has consistently followed this reasoning, citing La. R.S. 13:5106(A) and finding that Louisiana has not waived its sovereign immunity from suits filed in federal court. *Delahoussaye*, 937 F.2d at 147.

A state does not waive its Eleventh Amendment immunity merely by participating in joint federal-state public aid programs. *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L. Ed. 2d 662 (1974). And, Congress has not specifically conditioned the states' participation in Federal Highway Administration funding programs upon the states' consent to federal jurisdiction of waiver of Eleventh Amendment immunity.

**B. RPC MUST BE DEEMED AN ARM OF THE STATE FOR ELEVENTH AMENDMENT IMMUNITY PURPOSES.**

As this Court noted in its prior Order and Reasons, the Fifth Circuit has set forth several factors to be used in determining whether an entity is an arm of the state for Eleventh Amendment immunity purposes:

(1) whether the state statutes and case law characterize the agency as an arm of the state;

(2) the source of the funds for the entity;

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to state-wide problems;

(5) whether the entity has authority to sue and be sued in its own name; [and]

(6) whether the entity has the right to hold and use property.

*Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 ($5^{th}$ Cir. 1991) [citing *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131 ($5^{th}$ Cir. 1986) (quoting *Clark v. Tarrant County*, *Texas*, 798 F.2d 736, 744 ($5^{th}$ Cir. 1986))].

Based on the foregoing factors, RPC should be treated as an arm of the state for Eleventh Amendment immunity purposes, and Plaintiff's suit against it should be dismissed.

**1. State Statutes and Caselaw.**

There are no reported cases deciding whether or not a Regional Planning Commission is an

arm of the state for Eleventh Amendment Immunity purposes.[13] As for state statutes, LSA-R.S. 33:131, entitled "Creation of regional planning areas," provides for the creation of regional multi-parish planning commissions. LSA-R.S. 33:140.61 provides for the creation of State Planning and Development Districts, with the following statement of purpose:

> The legislature finds that problems of growth and development in urban and rural regions of the state so transcend the boundary lines of local government units that no single unit can plan for their solution without affecting other units in the region; that various multi-parish planning activities conducted under various laws of the United States are being conducted in an uncoordinated manner; that intergovernmental cooperation on a regional basis is an effective means of pooling the resources of local government to approach common problems; and that the assistance of the state is needed to make the most effective use of local, state, federal, and private programs in serving the citizens of such urban and rural regions.
>
> It is the purpose of this Subpart to facilitate intergovernmental cooperation and to insure the orderly and harmonious coordination of state, federal, and local comprehensive planning and development programs for the solutions and resolution of economic, social, physical, and governmental problems of the state and its citizens by providing for the creation and recognition of regional planning and development commissions.

LSA-R.S. 33:140.61

The RPC for Jefferson, Orleans, Plaquemines, St. Bernard and St. Tammany Parishes (District 1) was specifically created by the legislature in LSA-R.S. 33:140.62, entitled "Designation of Regions," as follows:

> A. The development districts for the state designated and established by the governor in Executive Order No. 27 of 1973 are hereby continued as follows:
>
> (1) District #1, composed of the parishes of Jefferson, Orleans, Plaquemines, St. Bernard and St. Tammany.

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13 Although there are no cases deciding whether or not a Regional Planning Commission is an arm of the state for Eleventh Amendment Immunity purposes, at least one case has determined that regional planning commission duties constitute an exercise of "legislative discretion." See, *Melancon v. Police Jury of Lafayette,* 301 So.2d 715 (La. App. 3d Cir. 1974).

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LSA-R.S. 33:140.62

The Louisiana Supreme Court has held that " '[i]f the office is created by the legislature, or is established in the first instance by the constitution, it is a state office.'" *Voisin's Oyster House v. Guidry*, 799 F.2d 183, 186 (5th Cir. 1986) (quoting *Mullins v. Louisiana*, 387 So.2d 1151, 1152 (La. 1980)). Therefore, because the RPC was created by the legislature, it is a state office.

**2. Source of Funding**

"Because an important goal of the Eleventh Amendment is the protection of state treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." *Delahoussaye*, 937 F.2d at 147 (quoting *McDonald v. Bd. of Miss. Levee Comm'rs*, 832 F. 2d 901, 907 (5th Cir. 1987). La. Const. Art. XII § 10(C) provides that "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." The RPC is not a political subdivision, therefore any judgment against it would have to be paid by the state.[14]

Regarding the source of RPC funding, in addition to funding from local governments provided for in LSA-R.S. 33:134, LSA-R.S. 33:135(7) provides that the regional planning commissions shall "Accept and receive, in furtherance of its functions, funds, grants, and services from the federal government or its agencies, **from departments, agencies and instrumentalities of state**, parish, municipal or local government, or from private and civic sources." Further, as set forth in LSA-R.S. 33:139, regional planning commissions may request and accept grants of funds or

14 In the twenty years that undersigned Counsel has represented the RPC, there have been no judgments against the RPC. See also, Affidavit of Walter R. Brooks, paragraph 21.

services from the state government or any of its agencies. Accordingly, the RPC does receive funding from the State.

RPC receives state funding and any judgment against it would have to be paid by the state, therefore those factors are met for purposes of immunity.

**3. State Wide Problems**

Next, the RPC is clearly concerned with state-wide, as opposed to merely local, problems. Not only does it manage planning for a five Parish area, including Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany Parishes, it must also coordinate, cooperate and harmonize with the planning activities of state and federal agencies. LSA-R.S. 33:135, relating to the general powers and duties of regional planning commissions, provides that regional planning commissions must coordinate, cooperate and harmonize with the planning activities of federal, state, parish, municipal and other local agencies within the area. Further, the RPC, as a regional planning commission in an urbanized area with a population in excess of one million, is authorized to provide services involving state highways, which it must coordinate with the Louisiana Department of Transportation and Development. LSA-R.S. 33:135.3.

The RPC's concern with state-wide problems indicates that it should be considered an arm of the state.

**4. Autonomy**

Regarding the degree of autonomy, again, the RPC is required to coordinate and cooperate with the planning activities of state, local and federal agencies. LSA-R.S. 33:135, LSA-R.S. 33:135.3. Further, pursuant to LSA-R.S. 39:21(3), which governs the powers, duties and functions of the State Department of Administration, Regional Planning Commissions are governed by the

State Department of Administration, which must "Review current programming and future planning of all municipal and regional planning commissions. All municipal and regional planning commissions shall file certified copies of all plans or amended plans with the division of administration." LSA-R.S. 39:21(3). Further, the Department of Administration provides a program of planning standards, LSA-R.S. 39:21(4), and provides the statistics to provide a common source for all state planning. LSA-R.S. 39:21(5). The Department must "[a]dvise the governor, as well as other public officials and state boards and commissions, with respect to long-range planning proposals" LSA-R.S. 39:21(11); "represent the state of Louisiana on matter related to long-range planning," LSA-R.S. 39:21(12) and act as "liaison with other administrative agencies of the state to facilitate planning coordination." LSA-R.S. 39:21(13).

Walter Brooks, the Executive Director of the RPC, provided an explanation of the RPC's purpose, functions and duties in his deposition, demonstrating that it is not an autonomous entity. "The Regional Planning Commission provides technical and financial assistance to the parishes, and it coordinates the federal aid highway and massive transit programs for this region." Deposition of Walter R. Brooks, p. 8. The parishes have their own plans and master plans. Deposition of Walter R. Brooks, p. 14. The RPC has responsibility for the federal aid network and coordinates federal aid funding. Their job is to work with the DOTD and the parishes to select projects and set priorities on which projects receive federal aid funding. The RPC is a coordinating and research entity. Deposition of Walter R. Brooks, p. 14. The RPC is not an operating entity and has no implementation authority. Deposition of Walter R. Brooks, p. 12-13.

In this case, the RPC was acting pursuant to a contract with the DOTD directing RPC to obtain the feasibility study. Affidavit of Walter R. Brooks, paragraph 6. The RPC is not

autonomous, but rather is subject to control by the State Department of Administration and the DOTD, indicating that it should be considered an arm of the state.

**5. Capacity to Sue and Hold Property**

Defendant has found no specific provisions of law authorizing Regional Planning Commissions to sue and be sued, or to hold and use property. In all the years of its existence, the RPC has never filed a lawsuit against anyone. Affidavit of Walter R. Brooks at paragraph 21. Nor has anyone ever obtained a Judgment against the RPC. *Id*. These factors also indicate that the RPC should be considered an arm of the state.

In sum, RPC meets all of the Fifth Circuit's factors for determining whether a government entity is an arm of the state for Eleventh Amendment immunity purposes. RPC is part of the executive branch of state government and is subject to control by the State Department of Administration and the DOTD. Any judgment against it would necessarily be paid by the state. The RPC is an arm of the state and is entitled to Eleventh Amendment immunity.

**CONCLUSION**

Plaintiff has not pled and cannot meet the requisite elements of a cause of action for intentional interference with contract against the Regional Planning Commission under Louisiana law. Louisiana's limited cause of action for intentional interference with contract is limited to claims against *officers* of corporations who wrongfully induce a breach of a contract between a plaintiff and the *officer's corporation*. Such suits cannot be maintained against corporate entities, but rather are strictly limited to corporate officers, and in this case plaintiff has not sued and cannot name any officer of RPC who has committed a tort. Further, there must be a contract between the corporate officer's corporation and the plaintiff, and in this case plaintiff had no contractual relationship at all

with the RPC. None of the other elements set forth for this cause of action by the Louisiana Supreme Court in *9 to 5 Fashions v. Spurney* have been met.

The attached pleadings, depositions and affidavits demonstrate that plaintiff has not pled and cannot meet the elements for recovery under a theory of intentional interference with contract, and that amendment of the Complaint would be futile. Further, plaintiff's claim for intentional interference with contract is time barred under Louisiana's one year prescriptive period. Plaintiff's only stated cause of action against the Regional Planning Commission was for intentional interference with contract, therefore this suit should be dismissed.

Additionally, the law and evidence shows that the RPC is an arm of the state of Louisiana that is immune from suit in federal court under the Eleventh Amendment to the United States Constitution. The RPC has not waived its immunity from suit in federal court and Congress has not abrogated RPC's immunity from suit in federal court for the type of claims asserted by Plaintiff.

Wherefore, defendant, Regional Planning Commission, respectfully urges this Court to grant its Motion for Summary Judgment and dismiss RPC from this matter with prejudice, casting all costs to plaintiff, Laurence L. Lambert.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the above and foregoing pleadings have been served upon all counsel of record:

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via U. S. Mail, First Class, postage prepaid and properly addressed this _____ day of August, 2005.

____________________________________

ERNEST A. BURGUIÈRES