AMERICAN ARBITRATION ASSOCIATION

Gainesville Renewable Energy Center, LLC, Claimant, v. The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities Respondent.	AAA Case No. 01-16-0000-8157

GRU'S MOTION TO DISMISS GREC'S COUNT 4
FOR INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS

Paula W. Hinton
Lisa A Cottle
Richard T. McCarty
Matthew D. Tanner
Winston & Strawn LLP
1111 Louisiana Street, 25th Floor
Houston, Texas 77002
Tel: 713-651-2600
Fax: 713-651-2700
phinton@winston.com
lcottle@winston.com
rmccarty@winston.com
mtanner@winston.com

Counsel for The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities

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Pursuant to R-33 of the American Arbitration Association's (the "AAA") Rules for Commercial Arbitration and the Tribunal's Procedural Orders Nos. 6, 8, and 9, Respondent The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities ("GRU") hereby submits this Motion to Dismiss ("Motion") Claimant Gainesville Renewable Energy Center, LLC's ("GREC") Count 4 for Intentional Interference with Business Relations. In this Motion, GRU requests the that Tribunal dismiss GREC's Count 4 with prejudice because either (1) GREC failed to satisfy the notice requirements of Section 768.28 of the Florida Statutes, or (2) GRU is entitled to judgment on the pleadings because GREC's Count 4 fails to state a cause of action for intentional interference with business relations.[1]

I. Statement of the Case

On March 10, 2016, GREC instituted this arbitration by submitting an Arbitration Demand to the AAA. GREC's Arbitration Demand sought declaratory relief that GRU would breach the Parties' Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility ("PPA") (**Ex. R1 to GRU's Response and Amended Counterclaim**), by holding GREC accountable to perform contractually required annual Planned Maintenance at GREC's biomass-fueled electric power production facility (the "Facility")[2] near Gainesville, Florida. On March 29, 2016, GRU filed a Response and Counterclaim alleging, *inter alia*, that GREC's repeated and unequivocal assertions that it would not conduct Planned Maintenance in 2016 constituted an anticipatory breach of the

[1] GRU is also moving for partial summary judgment against GREC's Count 4 because there is no genuine issue of material fact that (i) GRU lacked knowledge of any of GREC's refinancing relationships and that (ii) GRU's actions in sending and not retracting the Dispute Notice Letter to Union Bank were justified.

[2] Except as otherwise specified herein, initially capitalized terms have the meanings set forth in the PPA.

PPA's material requirement that GREC conduct such Planned Maintenance every year to ensure the Facility's long-term reliability.

GREC's breach of this material obligation of the PPA and GRU's allegations thereof triggered further contractual obligations outside the context of the ongoing arbitration dispute. Specifically, pursuant to the Section 4(c) of the Consent and Agreement ("Consent") between GRU, GREC, and Union Bank, N.A. as Collateral Agent for GREC's Lenders, GRU was obligated to notify Union Bank of GREC's Seller Event of Default, which occurred on March 30, 2016. *See* PPA, Consent § 4(c), **Ex. R1 to GRU's Response and Amended Counterclaim**. In compliance with that obligation, GRU issued a Default Notice Letter to Union Bank on March 31, 2016 (**Exhibit 28 to GREC's Amended Demand**). GRU's Default Notice Letter applied the plain language of the Consent and the PPA to inform the Collateral Agent that GREC's unilateral, extra-contractual actions had placed the PPA at risk of termination.

In a subsequent effort to avoid the consequences of its own failure to comply with the PPA, GREC twice accused GRU of bad faith and demanded that GRU retract the Default Notice Letter. *See* Gordon Letter to Bielarski (April 11, 2016) (**Exhibit 29 to GREC's Amended Demand**); Gordon Letter to Bielarski (April 18, 2016) (**Exhibit 30 to GREC's Amended Demand**). Despite these letters' vague threats to hold GRU responsible for the "financial damages" caused by the Default Notice Letter, GRU's position in this litigation is that GREC's refusal to perform Planned Maintenance in 2016 constituted a default of a material obligation and, therefore, a Seller Event of Default. Thus, notice was required to be given to the Collateral Agent pursuant to the terms of the Consent.

On June 7, 2016, without first submitting a notice of claim as required by Section 768.28 of the Florida Statutes, GREC submitted an Amended Arbitration Demand alleging, inter alia, that

GRU had intentionally interfered with GREC's business relations with its "lenders and prospective lenders" by sending the Default Notice Letter. GREC Amended Demand ¶ 181. GREC alleged that it had "business relationships with its lenders, including Union Bank, N.A." and that GRU was aware of GREC's "business relations with its lenders." *Id.* ¶¶ 179–80. GREC alleged without support or specifics that it had been "damaged by GRU's intentional interference with GREC's business relationships, including, but not limited to, its ongoing lending relationship and by delaying and now halting GRU's efforts to refinance hundreds of millions of dollars of construction debt at favorable rates depriving GREC of the benefits of such refinancing and damaging GREC's ability to refinance in the future, in a manner that could result in damages in excess of $100 million." *Id.* ¶ 182.

GRU has identified numerous legal, procedural, and factual flaws in GREC's Count 4 for Intentional Interference with Business Relations. GRU submitted a series of 33 Letters to the Tribunal requesting leave to file this Motion to Dismiss and several other Motions for Summary Judgment. Upon determining that GRU's requested motions were likely to dispose of or narrow the issues in the case, the Tribunal granted GRU leave to pursue the two prongs of this Motion to Dismiss in Procedural Orders Nos. 6 and 9, respectively.

II. GREC's Count 4 Should Be Dismissed Because GREC Failed to Give Proper Notice Pursuant to Section 768.28 of the Florida Statutes

This first prong of GRU's Motion to Dismiss GREC's Count 4 derives from GREC's failure to satisfy the statutory notice requirements set forth in FLA. STAT. § 768.28. GREC failed to provide GRU with notice of GREC's tort claim, and GREC failed to allege compliance with Section 768.28's notice requirements in its Amended Demand.

GRU, as a Floridian municipal corporation, is entitled to sovereign immunity from claims arising from tort. Because of this governmental immunity, GREC is only permitted to bring claims

in tort against GRU to the extent that the Florida Legislature has consented to being sued. The Florida Legislature provided limited consent in Section 768.28 of the Florida Statutes, which provides: "In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, ***but only to the extent specified in this act***." FLA. STAT. § 768.28(1) (emphasis added). Florida courts have explained that the extent of this waiver is to be strictly construed. *Metropolitan Dade Cty. v. Reyes,* 688 So. 2d 311, 313 (Fla. 1996) ("In interpreting legislative waivers of sovereign immunity, we have repeatedly stated that we must strictly construe such waivers.").

In exchange for consenting to suits in tort, the Florida Legislature established a strict requirement that litigants provide notice in writing prior to instituting a lawsuit involving the waiver of sovereign immunity. *See Maynard v. State, Dep't of Corr.*, 864 So. 2d 1232, 1234 (Fla. 1st DCA 2004) ("[A]s an aspect of the sovereign immunity waiver, the section 768.28(6)(a) notice provision is strictly construed, with strict compliance being required."). The notice requirement, which applies in this case, provides:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency . . . within 3 years after such claim accrues and . . . the appropriate agency denies the claim in writing . . . .

FLA. STAT. § 768.28(6)(a). The Florida Statutes further specify that "the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are ***conditions precedent to maintaining an action***." *Id.* § 768.28(6)(b) (emphasis added).[3] Thus, "[a]n action may not be instituted on a claim against the State or one of its agencies unless the claimant presents the claim

[3] The notice requirement also requires that the claimant provide "a federal identification number if the claimant is not an individual." FLA. STAT. § 768.28(6)(c). It is undisputed that GREC has not provided GRU with a federal identification number in satisfaction of this clear statutory requirement.

in writing to the appropriate agency." *Cunningham v. Florida Dep't of Children & Families*, 782 So. 2d 913, 915 (Fla. 1st DCA 2001).

The notice provision of Section 768.28 is designed "to provide the State and its agencies sufficient notice of claims filed against them and time to investigate and respond to those claims." *Cunningham*, 782 So. 2d at 915 (citing *Dade Cty. v. Reyes*, 688 So. 2d at 313). Although the form of the written notice may vary, "at a minimum, the written notification must contain language notifying the agency of a claim; that is, a demand for compensation for an injury." *Smart v. Monge*, 667 So. 2d 957, 959 (Fla. 2d DCA 1996). The notice must do more than just identify the incident. *Id.* (affirming dismissal with prejudice for failing to comply with Section 768.28(6) despite the existence of letter identifying the underlying incident because that letter contained no language demanding compensation for an injury). The claim must be "a demand for something due as a right." *Mrowczynski v. Vizenthal*, 445 So. 2d 1099, 1101 (Fla. 4th DCA 1984).

Not only must a would-be plaintiff give notice of its claim, the claimant must also affirmatively plead compliance with the notice requirement in its complaint. *Levine v. Dade Cty. Sch. Bd.*, 442 So. 2d 210, 213 (Fla. 1983) ("Under section 768.28(6), not only must the notice be given before a suit may be maintained, but also the complaint must contain an allegation of such notice."). Failure to plead compliance with Section 768.28(6) is a basis for dismissal of the complaint. *See Hutchins v. Mills*, 363 So. 2d 818, 821 (Fla. 1st DCA 1978) (affirming dismissal "because appellant failed to plead a compliance with F.S. 768.28(6) which is in the nature of a condition precedent and which must be pleaded by appellant in order to state a cause of action").

In this case, GREC completely failed to satisfy the statutory notice requirements of Section 768.28(6). GREC did not provide GRU with the required notice, and GREC did not plead

compliance with Section 768.28. GREC's Count 4 for intentional interference with business relations is statutorily deficient and should be dismissed.

GREC's letters to GRU of April 11, 2016 (**Ex. 29 to GREC's Amended Demand**), and April 18, 2016 (**Ex. 30 to GREC's Amended Demand**), demanded that GRU retract its Default Notice Letter but did not state a claim as contemplated by Section 768.28 of the Florida Statutes. GREC's letters contain neither a demand for something due as a right (*see Mrowczynski*, 445 So. 2d at 1101) nor a demand for compensation for an injury (*see Smart*, 667 So. 2d at 959). In fact, ***GREC repeatedly admits that there has been no injury*** (*see, e.g.*, GREC Amended Demand at ¶ 182 (alleging that GRU's interference "***could*** result in damages" (emphasis added))). Thus, in GREC's letter there was no definitive notice of a claim—GREC does not even allege that these letters constituted notice under Section 24.1 of the PPA,[4] much less a statutory notice in compliance with Section 768.28(6) of the Florida Statutes.

GREC's failure to provide the statutorily required notice letter violated the clear statutory requirements for the waiver of sovereign liability for tort actions. GRU's first notice that GREC maintained it had a cognizable claim for intentional interference with business relations and was seeking up to $100 million in compensation was upon GREC's June 7, 2016 Amended Demand. Moreover, GREC's Amended Demand does not plead compliance with Section 768.28(6), nor could it. GREC's Count 4 should be dismissed.

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[4] As part of GREC's failed Motion to Dismiss GRU's Misreporting Claim (filed Aug. 29, 2016), GREC defended its failure to comply with Section 24.1 of the PPA, which establishes a contractual notice letter requirement for dispute resolution purposes. GREC did not deny that it failed to send any notice regarding Count 4—rather, it simply maintained that no notice was required because GREC had already sent letters regarding contract causes of action. *See* GREC Motion to Dismiss, at 17; GREC's 8.21.16 Letter to Arbitrator Brewer, at 3. Thus, GREC has tacitly acknowledged that it failed to send any notice letter for its tort claim and suggests that this tort claim arises out of the same circumstances as the contract claims (which, of course, reinforces GRU's summary judgment arguments as to Section 26.1's Limitation on Liability and GREC's improper assertion of a contractual claim as a tort).

III. GRU Is Entitled to Judgment on the Pleadings Because GREC's Count 4 Fails to State a Cause of Action for Intentional Interference with Business Relations

The second prong of GRU's Motion to Dismiss GREC's Count 4 concerns the substance, or lack thereof, of GREC's allegations of intentional interference with business relations. Even if GREC is determined to have satisfied the conditions precedent set forth in the preceding section, which GREC did not, GRU is nevertheless entitled to a judgment on the pleadings because GREC has failed to state a cause of action for intentional interference with business relations. Specifically, (i) GREC failed to allege a sufficient business relationship under Florida law, (ii) GREC failed to plead relationships with identifiable entities, (iii) GREC failed to allege GRU possessed sufficient knowledge of such a relationship, (iv) GREC failed to plead direct interference, (v) GREC improperly pleaded interference where GRU was a party to a relationship, and (vi) GREC failed to properly allege any breach of a business relationship or any specific damage.

GREC alleges in Count 4 of its Amended Demand that GRU intentionally interfered with GREC's business relations. Specifically, GREC alleges that GRU interfered with business relationships relating to refinancing of its Facility. However, GREC fails to properly allege all the required elements of a cause of action for intentional interference with business relations.

A. Law of Judgment on the Pleadings

Pursuant to Florida Rule of Civil Procedure 1.140(b)(6), a party may move to dismiss on the basis that a pleading fails to state a cause of action. Under Florida Rule of Civil Procedure 1.110, a pleading "must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." After the pleadings have closed, a defendant may bring a motion to dismiss for failure to state a cause of action as a motion for judgment on the pleadings pursuant to Florida Rule of Civil Procedure 1.140(c) and 1.140(h)(2).

B. Law of Intentional Interference with Business Relations

Under Florida law, to sustain a claim of tortious interference with business relations, a plaintiff must prove all of the following: "'(1) the existence of a business relationship . . . (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.'" *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994) (quoting *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985)). The business relationship that must exist as an element of the tort is not simply a communication with another business, or informal or initial discussions, or even offers to refinance; rather, "[a]n action for tortious interference with a prospective business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement ***which in all probability would have been completed if the defendant had not interfered***." *ISS Cleaning Servs. Grp., Inc. v. Cosby*, 745 So. 2d 460, 462 (Fla. 4th DCA 1999) (emphasis added). Similarly, the knowledge element requires "knowledge of ***that*** relationship." *Ferris v. Southern Fla. Stadium Corp.*, 926 So. 2d 399, 401 (Fla. 3d DCA 2006) (emphasis added). The business relationship must also be with an identifiable entity, not a broad category of potential counterparties. *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 (11th Cir. 1999) (affirming dismissal because a "business relationship" requires "a relationship with a particular party, and not just a relationship with the general business community"). The interference must be direct, and must be made by someone who is a third party. *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1294 (11th Cir. 2001). Additionally, courts applying Florida law have explained that "[a]n integral element of a claim of tortious interference with a business relationship requires proof of damage to the plaintiff as a result of the breach of the relationship." *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994). GREC has failed to properly plead a cause of action for intentional

interference for business relations because it fails to comply with each of these requirements of Florida law.

C. GREC's Ever Changing Theories of Its Intentional Interference Count

GREC's allegations of intentional interference have proven themselves mercurial. As pleaded, GREC alleges "GRU intentionally and without justification interfered with GREC's business relations with its ***lenders and prospective lenders*** under a refinancing." GREC Amended Demand ¶ 181 (emphasis added).[5] GREC confirmed this understanding of its Count 4 in an October 7, 2016 Letter to the Tribunal in which GREC reiterated that its "intentional interference count alleges that GRU interfered with GREC's business relations with its lenders and prospective lenders in refinancing efforts." Phelan Letter to Brewer (Oct. 7, 2016), at 5. Now, however, in both GREC's Reply in Support of Its Motion to Bifurcate and GREC's Opposition to GRU's Rule 33 Request for Leave, GREC has attempted to change its allegations to claim that GRU interfered with GREC's relationship with its "placement agent" or "financial advisor," MUFG, whom GREC alleges was helping "to put the refinancing together." Notably, the pleadings make no mention of MUFG, or a placement agent, or even a financial advisor (other than a transient mention of an unidentified financial advisor in **Exhibit 30 to GREC's Amended Demand**). Instead, the pleadings only refer to interference with ***lenders*** or prospective ***lenders***. No reasonable reading of GREC's pleadings would identify a cause of action for interference with a placement agent.

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[5] *See also* GREC's Amended Demand ¶ 179 ("GREC has business relationships with its ***lenders***, including Union Bank, N.A."); *id.* ¶ 180 ("GRU is aware of GREC's business relations with its ***lenders*** . . . ."); *id.* ¶ 156 ("GRU deliberately provided inaccurate information to GREC's ***lender*** in the Default Notice . . . ."); *id.* ¶ 158 ("[GREC] demanded that GRU cease its interference with GREC's existing and prospective ***lending*** relationships . . . ."); *id.* ¶ 170 ("GRU's actions in breach of its contractual obligations include . . . GRU's sending an alleged notice of Seller Event of Default to GREC's ***lender*** . . . ."); *id.* at 35 (GREC asked the Tribunal to "[g]rant injunctive and other equitable relief to GREC barring GRU from further interference with GREC's relations with ***lenders***, potential ***lenders***, and other third parties such as rating agencies and potential investors.") (emphasis added throughout).

Nevertheless, GREC's intentional interference claims exhibit significant shortcomings that require dismissal with prejudice, regardless of which of GREC's theories is considered. Clearly, GRU had done nothing relating to GREC's refinancing and none of the alleged interference took place. GREC's wild claim of "damages in excess of $100 million" only highlights the purely speculative nature of GREC's allegations.

D. GREC Fails to Plead the Ultimate Facts Required to Establish Intentional Interference with Business Relations

Specifically, GREC's Amended Demand fails to properly plead the following ultimate facts to establish the required elements of intentional interference with business relations:

- GREC has not pleaded that GREC has business relationships as to refinancing that are "evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *See ISS Cleaning Servs.*, 745 So. 2d at 462.

- GREC has not pleaded the details of "the actual and identifiable understanding[s] or agreement[s] which in all probability would have been completed if the defendant had not interfered." *See id.*

- GREC has not pleaded who GREC's purported lenders are (other than Union Bank, N.A.). *See Dunn*, 193 F.3d at 1191.

- GREC has not pleaded that GRU had knowledge of business relationships as to refinancing that are "evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered," rather than mere awareness that GREC had a bank. *See ISS Cleaning Servs.*, 745 So. 2d at 462; *Ferris*, 926 So. 2d at 1191.

- GREC has not pleaded that GRU's alleged interference caused a "breach of the relationship" (*i.e.*, the causation of the breach), that such interference was direct, and that interference was from a third party. *See Ethan Allen*, 647 So. 2d at 814; *Ernie Haire Ford*, 260 F.3d at 1294.

- GREC has not pleaded how, specifically, GREC has been damaged by GRU's alleged intentional interference. GRU does not seek a specific calculation of damages but, rather, ultimate facts regarding the current financing terms available to GREC and the financing terms that were prospectively available to GREC through "an actual and identifiable understanding or agreement which in all probability would have been completed if [GRU] had not [allegedly] interfered." *See ISS Cleaning Servs.*, 745 So. 2d at 462; *Worldwide Primates*, 26 F.3d at 1091.

GRU will address each of these shortcomings in GREC's Count 4 in turn.

1. GREC Failed to Allege an Actionable Business Relationship with Attendant Legal Rights

The first required element of an intentional interference claim is the existence of a business relationship. GREC failed to set forth detail as to this relationship, making only the conclusory statement that "GREC has business relationships with its lenders, including Union Bank, N.A." GREC Amended Demand, at ¶ 179.

GREC fails to sufficiently allege a business relationship as required by Florida law, *i.e.*, a "business relationship" that is "evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *ISS Cleaning Servs.*, 745 So. 2d at 462. The pleadings must address that there was an agreement or understanding with legal rights, and that the agreement would have been completed if not for the alleged interference. *Register v. Pierce*, 530 So. 2d 990, 993 (Fla. 1st DCA 1988) (affirming dismissal in part because the plaintiff failed to plead the existence of a business relationship that afforded it "legal rights that [had] been substantively damaged due to [the defendant]'s alleged conduct"); *see also Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1287 (M.D. Fla. 2002) (stating that the test for whether a business relationship has been properly pleaded "is whether the parties' understanding would have been completed if the defendant had not interfered"). Nowhere does GREC allege that there existed a business relationship with legal rights as to refinancing or that there was an agreement or understanding that would have been completed if not for GRU's alleged interference. GREC simply alleges that "GREC has business relationships with its lenders, including Union Bank, N.A." GREC Amended Demand, ¶ 179.

Additionally, GREC's allegations of interference with its prospective lenders are impermissibly speculative. Florida courts have repeatedly held that it is not sufficient to allege a

speculative hope for future business, as GREC does here. *In re Maxxim Med. Grp., Inc.*, 434 B.R. 660, 689 (Bankr. M.D. Fla. 2010); *see also St. Johns River Water Mgmt. Dist. v. Fernberg Geological Servs., Inc.*, 784 So. 2d 500, 505 (Fla. 5th DCA 2001) ("The speculative hope of future business is not sufficient to sustain the tort of interference with a business relationship."). GREC does not plead interference with any specific prospective lenders, likely because GREC had not yet contracted with, or even contacted, any such lenders. Instead, GREC alleges that GRU's actions prevented GREC from entering the refinancing market with a viable refinancing proposal. *See* GREC Bifurcation Reply, at 7 n.5. However, under Florida law, "no cause of action exists for tortious interference with a business's relationship to the community at large." *Ethan Allen*, 647 So. 2d at 815. Thus, GREC's suggestions that GRU interfered with its business relations with prospective lenders for refinancing its debt, all of whom were merely representatives of the general banking community at the time of GRU's alleged interference, are insufficient to state a cause of action for tortious interference. GREC Amended Demand, at ¶ 181. GREC may not rely upon prospective relationships—GREC must present relationships with legal rights.

Even if GREC's alleged relationship with MUFG, GREC's alleged placement agent and/or financial advisor, is considered instead of GREC's relationships with its lenders and prospective lenders, GREC has still failed to plead the existence of a business relationship with legal rights as to refinancing or an agreement or understanding that would have been completed if not for GRU's alleged interference. In fact, GREC's recent statements have only further shown that GREC had no agreements or understandings in place, and that there was no breach of any agreement or understanding (*i.e.*, no breach of a business relationship). In GREC's Reply in Support of Its Motion to Bifurcate, GREC admitted that it had no business relationship with lenders with attendant legal rights, explaining, "This is because GRU's interference—including its threat to

terminate the PPA—prevented GREC from getting to the point of having a refinancing proposal with which the ultimate lenders could proceed." GREC Bifurcation Reply, at 7 n.5.

GREC has now repeatedly admitted that there was no business relationship that was evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered. *See ISS Cleaning Servs.*, 745 So. 2d at 462. Thus, GREC fails to establish the required elements of intentional interference with business relations under Florida law because ***GREC has admitted that it never had an identifiable understanding or agreement granting GREC a legal right to refinance its debt***. *See, e.g., Waste Servs., Inc. v. Waste Mgmt., Inc.*, 283 F. App'x 702, 707 (11th Cir. 2008) (affirming a finding that the alleged interference with informal financing discussions, which never produced a formal financing commitment, could not support a claim for tortious interference with a prospective business relationship). GREC's pleadings are therefore deficient and fail to state a cause of action for intentional interference with business relations.

2. GREC Failed to Allege an Actionable Business Relationship with Any Identifiable Entity Other than Union Bank

As part of the business relationship element, GREC must also plead that there was a business relationship between GREC and ***an identifiable entity***. *Dunn*, 193 F.3d at 1191. Accordingly, GREC cannot plead generally that it had "business relationships" with its "lenders" but fail to name particular parties with which it had those business relationships. But, that is precisely what GREC has done in its Amended Demand. GREC alleges, "GREC has business relationships with its lenders, including Union Bank, N.A." GREC Amended Demand, ¶ 179. GREC similarly refers to "lenders" or "prospective lenders" elsewhere in its Amended Demand, but completely fails to identify the counterparties in its purported business relationships. *See, e.g.*, GREC Amended Demand, ¶¶ 158, 180–81. Other than Union Bank, N.A., GREC fails to identify

any other lenders participating in any business relationships with attendant legal rights and, as explained above, as to Union Bank, GREC still fails to plead the existence of a business relationship with legal rights as to refinancing. Because GREC fails to identify the lenders with which it allegedly had business relationships that were interfered with, GREC's Count 4 fails on this point for all lenders other than Union Bank.

This fault in GREC's pleadings is particularly evident in light of GREC's repeated admissions that that it had no refinancing relationships with lenders and that there was no interference with lenders. *See* GREC's Bifurcation Reply, at 5–7 ("[T]he relationship that GRU interfered with was GREC's business relationship *with MUFG*, the placement agent, not the ultimate lenders."). Thus, GREC has admitted that it had no actionable relationships with refinancing lenders. But, even if GREC's allegation of interference is considered to relate to its relationship with its "financial advisor," the Count still fails because the pleadings (including the exhibits) never identify GREC's financial advisor. Still, even if it is assumed that GREC's pleadings properly identified its financial advisor as MUFG, GREC's pleadings are still insufficient to state a cause of action. GREC's relationship with MUFG is not an ***actionable*** business relationship because it does not impart to GREC any attendant legal rights to refinance its debt. Thus, regardless of GREC's theory, it has failed to plead an actionable business relationship with any entity other than Union Bank, N.A.

3. GREC Failed to Allege GRU's Knowledge of a Business Relationship with Attendant Legal Rights

As a corollary to GREC's failure to properly allege an actionable business relationship with attendant legal rights—*i.e.*, a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if GRU had not

allegedly interfered—GREC also fails to properly allege that GRU had knowledge of such a business relationship.

In their entirety, GREC's allegations with respect to GRU's knowledge comprise an insufficient pair of conclusory statements. GREC claims (1) that "GRU was well aware that GREC was seeking to refinance hundreds of millions of dollars in construction loans, as contemplated by the PPA," GREC Amended Demand, at 3, and (2) "GRU is aware of GREC's business relations with its lenders, and understands the importance of these relations to GREC in terms of GREC's ability to finance and refinance the Facility," *id.* ¶ 180. Neither allegation sufficiently alleges that GRU had knowledge of any business relationship that was evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if GRU had not allegedly interfered.

The knowledge element refers specifically to knowledge of the ***actionable business relationship***, not just any relationship GREC may have with prospective lenders. *Ferris*, 926 So. 2d at 401. GREC does not allege that GRU had any knowledge of any refinancing efforts by GREC that had reached the stage of being an actual and identifiable understanding or agreement with attendant or sufficient legal rights. Indeed, GREC has repeatedly admitted that no such relationships existed. *See, e.g.*, GREC Bifurcation Reply, at 7 n.5 ("This is because GRU's interference—including its threat to terminate the PPA—prevented GREC from getting to the point of having a refinancing proposal with which the ultimate lenders could proceed.").

Similarly, GREC does not plead that GRU had knowledge of GREC's relationship with MUFG as "placement agent" and/or "financial advisor." To be sure, GREC's relationship with MUFG was also not an actionable business relationship with attendant legal rights. Thus, the

knowledge element is entirely absent from GREC's pleadings, regardless of which GREC theory is considered, and as such, GREC's Count 4 must be dismissed.

4. GREC Failed to Allege Direct Interference from a Third-Party

GREC's allegations of intentional interference also fail because GREC has not pleaded direct interference on the part of a third-party to the allegedly obstructed agreement. At best, GREC's Amended Demand alleges indirect interference with GREC's lending relationships. And to the extent GRU is alleged to have interfered with GREC's relationship with Union Bank, GRU is not a third-party to that relationship, and therefore, GRU cannot commit the alleged tort.

Applying Florida law, courts have explained that, "[t]o be actionable, 'the interference must be direct; conduct that has only indirect consequences on the plaintiff will not support a claim of tortious interference.'" *Allied Portables, LLC v. Youmans*, Case No. 2:15-cv-294, 2015 WL 6813669, at *7 (M.D. Fla. Nov. 6, 2015) (quoting *Astro Tel, Inc. v. Verizon Florida, LLC*, 979 F. Supp. 2d 1284, 1297 (M.D. Fla. 2013)). Here, again, GREC fails, as it does not allege direct interference as to the other or prospective lenders. GREC alleges only that GRU sent the Default Notice Letter to Union Bank. GREC Amended Demand, at ¶ 181. GREC alleges generally that it has been damaged, but GREC fails to state how GRU interfered with anyone other than Union Bank. *See id.* ¶ 182. GREC does not explain how, or even if, the other lenders ever learned of the Default Notice Letter. At best, GREC alleges that any interference was merely an indirect consequence of the Default Notice, not a direct interference. Thus, GREC presents no allegation of direct interference in its pleadings with any lender other than Union Bank.

Moreover, by its recent attempts to refocus its Count 4 onto MUFG, GREC has admitted that there was no direct interference with any lender and that GREC did not have any actionable business relationships with any of the lenders upon which GRU could interfere. *See* GREC Bifurcation Reply, at 5-7. GREC has stated, "GRU apparently believes that GREC's claim

concerns GRU's interference with the business relationship between GREC and the ultimate lenders, *i.e.*, the lenders who would have participated in the refinancing that GREC was seeking to accomplish. This is not the case." *Id.* at 5. GREC went on to explain that GRU's arguments regarding interference with GREC's lenders "fail because the relationship that GRU interfered with was GREC's business relationship *with MUFG*, the placement agent, not the ultimate lenders." *Id.* at 6. Finally, GREC admitted that there was no business relationship that was evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered, admitting that GRU's alleged interference "prevented GREC from getting to the point of having a refinancing proposal with which the ultimate lenders could proceed." *Id.* at 7 n.5. Accordingly, GREC admits that (1) it had no actionable relationships with its lenders and that (2) there could therefore have been no direct interference with any such lenders.

GREC attempts to plead direct interference with conclusory language labeling GRU's Default Notice Letter "another deliberate, frivolous, and reckless effort by GRU to exert improper 'leverage' over GREC, this time by directly interfering with GREC's financing and refinancing efforts." GREC Amended Demand ¶ 150. Aside from being one of a number of obvious and inflammatory attempts to try this case in the court of public opinion, GREC's language as pleaded, which relates only to the Default Notice Letter, relates only to Union Bank. Yet even as to Union Bank, GREC fails to establish an actionable business relationship as to refinancing. Instead, GREC states that it never even possessed a refinancing proposal, but, as explained above, that does not meet the standard for pleading intentional interference with business relations under Florida law.

To the extent GREC relies upon interference with its alleged relationship with MUFG, there was no direct interference with MUFG. GREC complains of the Default Notice Letter as the source of the interference, but that letter was sent to Union Bank, the Collateral Agent, not to MUFG. *See* Default Notice Letter to Union Bank (Mar. 31, 2016) (**Exhibit 28 to GREC's Amended Demand**). There was no direct interference. Similarly, GREC cannot argue that GRU's refusal to retract the contractually required Default Notice Letter was a direct interference, as that was an act of omission, not an act of commission that would constitute a direct interference. *See Security Title Guarantee Corp. of Baltimore v. McDill Columbus Corp.*, 543 So. 2d 852, 855 (Fla. 2d DCA 1989) (no interference when defendant's alleged interference was passive, namely refusal to execute a release when asked to do so).

Moreover, as to Union Bank, Florida law holds that a claim for interference will not lie where the alleged interfering party is not a stranger to the alleged business relationship. *Romika-USA, Inc. v. HSBC Bank USA, N.A.*, 514 F. Supp. 2d 1334, 1338 (S.D. Fla. 2007); *see also Astro Tel*, 979 F. Supp. 2d at 1297. Thus, to the extent that GREC alleges that any portion of the tort relates to the existing relationship between Union Bank and GREC for the original financing of the construction loans for the Facility, GRU cannot be held to interfere because it was a party to the relationship. Specifically, GRU is a party to the Consent and Agreement among GREC, Union Bank, and GRU. *See* PPA, Consent, at 1, **Ex. R1 to GRU's Response and Amended Counterclaim**. Indeed, it was pursuant to Section 4 of this Consent that GRU sent the Dispute Notice Letter to Union Bank, which GREC now claims as the basis for its claim of tortious interference. *See id.* § 4(c). Moreover, the Consent dictates that even payments made by GRU to GREC under the PPA are to be made directly to the Collateral Agent (Union Bank). *See id.* § 6. Accordingly, to the extent that GREC alleges interference with any existing lending relationship

with Union Bank, the Consent makes GRU a party to that relationship with certain rights and responsibilities. Under Florida law, GREC may not allege that GRU intentionally interfered with its own three-party relationship. *See Genet Co. v. Annheuser-Busch, Inc.*, 498 So. 2d 683, 684 (Fla. Dist. Ct. App. 1986) (holding that an action contemplated by an agreement establishing a three-way business relationship cannot form the basis for a cause of action for tortious interference). Thus, GREC's pleadings present no allegation of direct interference by a third-party under any of the various interpretations of its tort claim.

5. GREC Failed to Allege a Breach of a Relationship or Proof of Damages

GREC's Count 4 is further deficient because GREC does not allege a breach of the relationship with which GRU has allegedly interfered and GREC does not adequately plead proof of damage. Courts applying Florida law have explained that "[a]n integral element of a claim of tortious interference with a business relationship requires ***proof of damage*** to the plaintiff as a ***result of the breach of the relationship***." *Worldwide Primates*, 26 F.3d at 1091 (emphasis added). Similarly, courts dismiss allegations of intentional interference with a business relationship when the plaintiff fails to allege that there has been a breach of the relationship. *Certainteed Corp. v. Davis*, No. 6:08-cv-1827, 2009 WL 2605258, at *3 (M.D. Fla. Aug. 21, 2009) (holding further that a mere fear of a breach of a business relationship is insufficient). Contrary to this established law, GREC's allegations of damage are baseless, speculative, and wholly inadequate.

GREC pleads only that it ***could be damaged*** as a result of differences in financing terms, but GREC fails to allege a breach of any business relationship. GREC certainly does not allege that a breach in its relationship with Union Bank has occurred as a result of GRU's alleged interference. Instead, GREC makes only the following highly speculative pleading: "GREC has been damaged by GRU's intentional interference with GREC's business relationships . . . damaging GREC's ability to ***refinance in the future***, in a manner that ***could result in damages*** in

excess of $100 million." GREC Amended Demand ¶ 182 (emphasis added). Relying purely on speculation, GREC never pleads that it has suffered a breach or damage—principally because neither has occurred.

As to GREC's lenders, GREC not only fails to plead a breach of any lending relationship, GREC never even actually pleads the existence of any such actionable business relationships, i.e., a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if GRU had not allegedly interfered. GREC alleges that GRU's alleged interference may "delay[] and now halt[] GREC's efforts to refinance," but GREC fails to allege any established relationship with legal rights, or any actual breach of a relationship. GREC Amended Demand ¶ 182.

Further, to properly state a claim for tortious interference, GREC needed to have pleaded that GRU's Default Notice resulted in the breach of a business relationship. *See Worldwide Primates*, 26 F.3d at 1091. GREC consistently alleges that GRU's Default Notice Letter resulted in the termination of refinancing efforts; however, GREC has never pleaded that its business relationship with its financial advisor, MUFG, has been breached. Thus, even under GREC's new theory, no actionable damages have accrued.

As to GREC's allegations of damages, GREC does no more than vaguely state that it could be damaged in an amount exceeding $100 million. GREC fails to allege actual damages in any manner sufficient to elevate its claim above the level of wild speculation. In fact, GREC has repeatedly acknowledged that it was not damaged at all:

- "After liability is determined, GREC can seek refinancing, the facts as to which will provide evidence relevant to the damage caused by GRU's interference." GREC Bifurcation Motion, at 11 (Sept. 22, 2016).
- "GRU's interference prevented GREC from approaching the lenders in the first place." GREC Opposition to GRU Rule 33 Letter, at 6 (Nov. 2, 2016).

Thus, GREC has admitted that it has no evidence of damages, and it needs a liability determination first so that it can seek refinancing so that it can have such evidence. GREC's nonexistent damages evidence cannot save its purely speculative Count 4 from dismissal.

IV. Conclusion

GREC has clearly failed to state a cause of action upon which relief may be granted under Florida law. GREC woefully failed to plead all the required elements of a claim of intentional interference with ongoing or prospective business relations. Specifically, GREC failed to allege a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if GRU had not allegedly interfered. GREC failed to plead that there was a business relationship between GREC and an identifiable entity, as to all lenders but Union Bank (but as to Union Bank, GREC has admitted there is no relationship sufficient to sustain the tort). Because GREC failed to properly allege a business relationship with attendant legal rights, it also failed to properly allege knowledge by GRU of such relationships. GREC failed to plead that GRU directly interfered with any business relationship. Finally, GREC failed to allege any specific damage or any breach of a business relationship. For all of these reasons, GREC failed to properly state a cause of action for intentional interference with business relations.

Taking each of the necessary elements of tortious interference with business relations in turn:

1. The existence of a business relationship: GREC failed to plead the existence of a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if GRU had not interfered as alleged;
2. Knowledge of that relationship on the part of the defendant: GREC failed to plead knowledge of that relationship on the part of the GRU;

3. An intentional and unjustified interference with that relationship by the defendant: GREC failed to plead direct, intentional, and unjustified interference with any business relationship by GRU; and
4. Damage to the plaintiff as a result of the breach of that relationship: GREC failed to plead it suffered damage as a result of the breach of that relationship.

Thus, as pleaded, GREC's Count 4 for intentional interference with business relations suffers from multiple incurable deficiencies. To the extent GREC attempts to morph its Count 4 to refer to GREC's placement agent, the Count is entirely unsupported by the pleadings, yet, even as modified, GREC's Count 4 remains wholly incapable of stating a cause of action for intentional interference with business relations. Thus, no matter which of GREC's theories is considered, dismissal with prejudice remains the inescapable end of GREC's shape-shifting tort.

For the reasons set forth herein, GRU respectfully requests that the Court grant GRU judgment on the pleadings and dismiss GREC's Count 4 for intentional interference with business relations with prejudice.

Date: December 16, 2016

/s/ Paula W. Hinton

Paula W. Hinton
Lisa A. Cottle
Richard T. McCarty
Matthew D. Tanner
WINSTON & STRAWN LLP
1111 Louisiana Street, 25th Floor
Houston, Texas 77002
Tel: 713-651-2600
Fax: 713-651-2700
phinton@winston.com
lcottle@winston.com
rmccarty@winston.com
mtanner@winston.com

Counsel for The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities

CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record are being served this 16th day of December 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton
Paula W. Hinton