AMERICAN ARBITRATION ASSOCIATION

THE CITY OF GAINESVILLE, FLORIDA, d/b/a GAINESVILLE REGIONAL UTILITIES, Claimant, v. GAINESVILLE RENEWABLE ENERGY CENTER, LLC, AMERICAN RENEWABLES, LLC, TYR ENERGY, LLC, TYR ENERGY, INC., ENERGY MANAGEMENT, INC., BAYCORP HOLDINGS LTD., STARWOOD ENERGY GROUP GLOBAL, LLC, STARWOOD ENERGY GROUP GLOBAL, INC., RON FAGEN, DIANE FAGEN, AND JOHN DOES NOS. 1-25, Respondents.	ICDR Case No. 50 198 T 00953 12

GAINESVILLE RENEWABLE ENERGY CENTER, LLC'S OPPOSITION TO GAINESVILLE REGIONAL UTILITIES' REQUEST FOR DISMISSAL

Introduction

Gainesville Renewable Energy Center, LLC ("GREC") submits this opposition to the Request for Dismissal of its Counterclaims by the City of Gainesville, Florida (the "City"), d/b/a Gainesville Regional Utilities ("GRU"). The City has publicly admitted that it is trying to force GREC to renegotiate the terms of the parties' thirty-year power purchase agreement ("PPA"). A key part of the City's re-negotiation strategy has been to subject GREC to this baseless arbitration. The essential facts supporting GREC's Counterclaims are indisputable on the record.

GRU now attempts to avoid liability under GREC's Counterclaims by asserting that all claims against it are barred by the litigation privilege. The litigation privilege is intended to promote open communication during a judicial proceeding, so that parties prosecuting or defending valid claims or serving as witnesses may do so without fear of being sued for what they say or do during the proceeding. This privilege does not immunize parties from liability for extortionate conduct and abuse of process.

Nor does any financial interest privilege bar GREC's Counterclaims against GRU. A party may avail itself of the financial interest privilege only if it used proper means to protect its financial interests, and only where a certain relationship exists between the business entity and the prospective contractual relationship at issue, neither of which is the case here.

As a last ditch effort, GRU argues in its Request for Dismissal that GREC fails to state a claim for any of its asserted Counterclaims. GRU's arguments have no merit as GREC has properly stated claims against GRU for abuse of process, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), and tortious interference with business relations.

GRU knew when it commenced this arbitration that it had no basis to assert any claims against GREC, let alone a breach of contract claim under the PPA. As set forth in GREC's Answering Statement, GRU's claim is fatally flawed for a number of reasons, including the fact that GRU's Right of First Offer ("ROFO") to purchase the 100-megawatt biomass power facility (the "Facility") is triggered only before GREC enters into a sale of the Facility (directly or indirectly), which did not happen here, and the fact that the PPA expressly precludes recovery of any damages other than "direct actual damages," which GRU has not and cannot allege it sustained.

Rather than seeking to enforce any legitimate rights, GRU is using its pretextual claim of entitlement to the Facility to coerce GREC into helping the City "address the dramatically different [economic] landscape" caused by a lowering of natural gas prices. GRU's unabashed objective is to force GREC to make unfavorable and unwarranted economic concessions under the PPA. Because GRU's clear abuse of process, unfair and deceptive tactics, and intentional interference with GREC's prospective business relations have caused substantial damages, GREC respectfully asks the Arbitrator to deny GRU's Request for Dismissal.

A. The Litigation Privilege Does Not Bar GREC's Counterclaim.

In asserting that the litigation privilege precludes GREC's Counterclaim, GRU focuses on the types of proceedings in which the privilege can be invoked (including arbitrations), and the causes of action to which the privilege can apply (claims based on common law and statute). *See* GRU's Request for Dismissal at 5. GRU's focus on the types of qualifying proceedings and claims ignores key considerations in applying the litigation privilege, including the timing and types of conduct this privilege protects in any such proceeding. The litigation privilege does not bar GREC's Counterclaims because (1) the privilege only protects an act occurring during the course of a proceeding "so long as the act has some relation to the proceeding," not the acts GREC challenges here; (2) the privilege protects against harm from necessary steps in the judicial process, not "sham" litigation and abuse of process as GREC alleges here; and (3) dismissal based on this privilege would be premature.

1. The Litigation Privilege Only Protects Acts Occurring During The Course Of A Proceeding, So Long As The Acts Have Some Relation To The Proceeding, Not The Misconduct GREC Challenges Here.

The Florida Supreme Court consistently describes the rationale for the litigation privilege in the context of actions occurring *during* judicial proceedings. *See, e.g., Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole,* 950 So.2d 380, 384 (Fla. 2004) ("It is the perceived necessity for candid and unrestrained communications *in those proceedings*, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule.") (emphasis added); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 608 (Fla. 1994) ("This absolute immunity resulted from the balancing of two competing interests: the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts *in the conduct of judicial proceedings*. . . . In balancing policy considerations, we find that absolute immunity

must be afforded to any act occurring *during the course of a judicial proceeding . . .*") (emphasis added).[1]

Accordingly, Florida courts refuse to apply the litigation privilege to preclude claims where allegations include conduct or communications before the litigation begins. For example, the litigation privilege did not bar a claim based on a letter sent prior to service of a complaint, even if the letter also was sent with the subsequent complaint. *See Trent v. Mortgage Elec. Registration. Sys., Inc.*, 618 F. Supp. 2d 1356, 1360 (M.D. Fla. 2007) (refusing to extend the litigation privilege to "pre-suit communications"); *see also Century Senior Servs. v. Consumer Health Benefit Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1265 (S.D. Fla. 2011) ("The immunity is not all-encompassing. . . . The litigation privilege protects only acts that take place during the course of a judicial proceeding, not those that take place before one begins.").

GREC alleges that GRU is improperly trying to force GREC to renegotiate the terms of the PPA. Even prior to filing its Demand, GRU sought to extract unwarranted and unreasonable concessions from GREC, publicly demanding that GREC renegotiate the terms of the PPA. *See* Answering Statement and Request for Dismissal by Gainesville Renewable Energy Center, LLC ("GREC's Answering Statement")[2] at 1 n.1, 15 n.4; GREC's Counterclaim at 26, 29. GREC further alleges that there has been "an ongoing and continuing slander" by GRU. GREC's Counterclaim at 26. Because GREC alleges acts that occurred outside this arbitration proceeding and acts that are not related to this proceeding, the litigation privilege is inapplicable.[3]

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[1] The Florida Supreme Court has declined to expressly address when the protections of the litigation privilege begin to apply. *See Echevarria,* 950 So.2d at 383 n.1; *see also Atico Int'l USA, Inc. v. LUV N' Care, Ltd.*, No. 09-60397, 2009 WL 2589148, at *3 n.5 (S.D. Fla. Aug. 19, 2009).

[2] GREC expressly incorporated its Answering Statement into its Counterclaim. *See* GREC's Counterclaim at 26.

[3] For this reason, the cases GRU cites involving application of the privilege to claims based on a party's actions only after a proceeding had begun and directly related to the proceeding are irrelevant. *See LatAm Inv., LLC v. Holland & Knight, LLP*, 88 So.3d 240, 242 (Fla. Dist. Ct. App. 2011) (action based on post-judgment efforts to collect on a judgment entered in federal court; it was "undisputed that the acts complained of here occurred during and were related to the judicial proceedings"); *Kidwell v. Gen. Motors Corp.*, 975 So. 2d 503, 504 (Fla. Dist. Ct. App. 2007) (allegations that during an arbitration hearing, the other party engaged in intentional misconduct, including lying under oath); *Am. Nat. Title & Escrow of Fla., Inc. v. The Guarantee Title & Trust Co.*, 748 So.2d 1054, 1055 (Fla. Dist. Ct. App. 1999) (allegations that defendants misused a court order appointing a receiver for collateral purposes).

2. **The Litigation Privilege Does Not Protect "Sham" Litigation And Abuse Of Process.**

Even if all of GREC's misconduct occurred during and was related to this proceeding, the litigation privilege would not apply given GREC's allegations that this arbitration is a sham. Courts routinely decline to apply the litigation privilege to protect baseless claims. "Litigation immunity will not immunize a party from liability for its pre-litigative and litigative activity if the underlying litigation is a 'sham.'" *Atico*, 2009 WL 2589148, at *3 (citations omitted).[4]

As set forth in GREC's Answering Statement, GRU's Demand and Amended Demand are objectively baseless, and nothing more than an attempt to obtain discovery from GREC and force GREC back to the bargaining table.[5] *See, e.g.*, GREC's Answering Statement at 3-4, 7-9, 17-24. GRU brought this arbitration without any realistic expectation of success on the merits but simply to continue to pressure GREC in order to extract better terms for the City under the PPA. This case is precisely the type of "sham" litigation to which the litigation privilege does not apply. *See Atico*, 2009 WL 2589148, at *3; *Paige*, 2011 WL 3505355, at *39.

Florida courts also have refused to apply the litigation privilege in cases involving allegations of malicious prosecution and abuse of judicial process, as distinct from defamation suits from which the litigation privilege originated. *See, e.g.*, *Johnson v. Libow*, 2012 WL 4068409 (Fla. Cir. Ct. Mar. 1, 2012) ("The purpose of the litigation privilege is not to preclude the tort of malicious prosecution. If one could raise the litigation privilege simply because a

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The other cases that GRU relies upon are factually inapposite because they involve application of the litigation privilege to claims based solely on the filing of a lawsuit with no assertion of abuse of process claims. *See Microsoft Corp. v. Big Boy Distrib. LLC*, 589 F. Supp. 2d 1308, 1322 (S.D. Fla. 2008) (litigation privilege barred tortious interference claim "to the extent this claim is predicated on Microsoft's conduct in pursuing its legal remedies through this lawsuit and another lawsuit . . . for related activities"); *Boca Inv. Group., Inc. v. Potash*, 835 So.2d 273, 274 (Fla. Dist. Ct. App. 2002) (litigation privilege barred tortious interference claim for damages "as a result of defendants' filing [of] three lawsuits").

[4] *See also Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, No. 5502-CS, 2011 WL 3505355, at *39 (Del. Ch. Aug. 8, 2011) (discussing the "'sham' litigation exception" to New York's litigation privilege).

[5] Since filing its Answering Statement, GREC has uncovered additional evidence that GRU filed this arbitration as a pretext. At a recent public meeting, one of the City Commissioners explained that the "entire point of the arbitration" is "to uncover information" from GREC: "That's the reason we're engaging in this process. To gain information in order to be able to make better decisions."

lawsuit was brought, then the action for malicious prosecution would be vitiated."); *American National Title & Escrow of Fla., Inc. v. The Guarantee Title & Trust Co.*, 810 So.2d 996, 997-98 (Fla. Dist. Ct. App. 2002) (litigation privilege did not protect defendant from allegations of abuse of process for an extortionate purpose); *see also Olson v. Johnson*, 961 So.2d 356, 357-58, 360-61 (Fla. Dist. Ct. App. 2007).

3. Dismissal Based On The Litigation Privilege Would Be Premature.

GRU's argument that GREC's Counterclaims should be dismissed based on the litigation privilege is flawed for the separate and independent reason that dismissal would be premature. "[L]itigation immunity is typically pleaded as an affirmative defense and then considered after the facts are developed by summary judgment or trial." *Eggitt v. Atlantic Credit & Fin., Inc.*, No. 09-000024AP-88B, 2010 WL 2892251, at *2 (Fla. Cir. Ct. June 23, 2010) (reversing trial court's order applying the litigation privilege); *see American National*, 810 So.2d at 998. For this reason, appellate courts have reversed dismissals based on the litigation privilege "to develop the record with respect to the applicability of the litigation immunity defense under the facts presented by th[e] action." *See, e.g.*, *Eggitt*, 2010 WL 2892251, at *2.

GRU seeks dismissal based solely on the Counterclaims, not at summary judgment after GREC has been afforded the right to discovery to refute the affirmative defense. As it is far from "clearly apparent" that the litigation privilege applies here, application of the privilege cannot be resolved at this stage of the proceedings to preclude GREC's Counterclaims. *See, e.g.*, *Eggitt*, 2010 WL 2892251, at *2.

B. No "Financial Interest Privilege" Bars GREC's Counterclaim for Tortious Interference.

GRU incorrectly claims that it is protected from GREC's Counterclaim for tortious interference because of a "financial interest privilege." *See* GRU's Request for Dismissal at 6-7. Under Florida law, a party may avail itself of the financial interest privilege only if it used proper means to protect its financial interests, and only where a certain relationship exists between the party and the prospective contractual relations at issue. As discussed below, GREC alleges

improper conduct by GRU, and GRU lacks the necessary relationship to fall within the limited scope of actions justified to protect one's financial interests. If GRU were correct that all actions taken to protect one's financial interests are immune from the claim of tortious interference, any entity could escape liability for tortious interference by asserting that its allegedly wrongful actions were done for this purpose. GRU's argument defies logic and mischaracterizes the law.

1. **No Privilege Protects Improper Conduct.**

In each case GRU relies upon to invoke the financial interest privilege, the court recognized that the privilege does not protect improper conduct. *See Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1321-22 (11th Cir. 1998) ("Florida law recognizes the principle that actions taken to safeguard or protect one's financial interest, *so long as improper means are not employed*, are privileged;" noting that there was no evidence of any "improper means in protecting this interest") (emphasis added); *Romika-USA, Inc. v. HSBC Bank USA, N.A.*, 514 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("*So long as the company does not engage in improper conduct*, it may take steps to protect its business interests without liability for tortious interference.") (emphasis added); *Networkip, LLC v. Spread Enters., Inc.*, 922 So.2d 355, 358 (Fla. Dist. Ct. App. 2006) ("No cause of action for intentional interference exists which is the *consequence of a rightful action*;" party could cancel a "contract pursuant to its terms to prevent further financial loss") (emphasis added); *Menendez* v. *Beech Acceptance Corp.*, 521 So.2d 178, 180 (Fla. Dist. Ct. App. 1988) (rejecting claim for interference with a contractual relationship absent evidence "to support the allegations of fraud, undue influence, or abuse of confidence" or other conduct engaged in for illegitimate purposes).

The Restatement of Torts specifically identifies the wrongful prosecution of civil suits as improper interference:

> Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries. The use of these weapons of inducement is ordinarily wrongful if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or

> threatens to institute litigation in bad faith, intending only to harass the third parties and not to bring his claim to definite adjudication. . . .

See Rest. 2d Torts § 767, cmt. c.

Because GREC alleges such bad faith litigation by GRU, its Counterclaim for intentional interference is outside the scope of the limited protection provided to actions properly taken to protect one's financial interests. *See, e.g.*, GREC's Answering Statement at 1 (GRU filed its Demand "not as an effort to enforce any legitimate rights under its thirty-year contract with [GREC], but rather as an opportunistic pretext to force GREC back to the bargaining table."); *id.* at 3 (noting "GRU's improper motives in initiating this arbitration against GREC"); GREC's Counterclaim at 26 (noting GRU's "unlawful claims" and "baseless Amended Demand"); *id.* at 29-30 (counterclaim for abuse of process).

2. GRU Lacks The Necessary Relationship To Invoke The Financial Interest Privilege.

Even assuming that GRU's alleged conduct were proper, which it was not, GRU lacks the necessary relationship to the prospective contractual relations with which it interfered to avail itself of the financial interest privilege. The Restatement of Torts describes the privilege as allowing interference with contractual relations only with respect to certain relationships:

> One who, *having a financial interest in the business of a third person* intentionally causes *that person* not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if [it]
>
> (a) does not employ wrongful means and
>
> (b) acts to protect [its] interest from being prejudiced by the relation.

Rest. 2d Torts § 769 (emphasis added).

The cases GRU relies upon for this privilege similarly involve relationships between the interfering party and the prospective contractual relations with which that party interferes. *See Johnson,* 162 F.3d at 1321-22 (parent company sought to procure a breach of contract between a third party and a company whose sole shareholder it owned; "a controlling stockholder of a corporation falls within the privilege when he interferes with a contract between the corporation

and a third person") (quoting *Ethyl Corp. v. Balter*, 386 So.2d 1220, 1225 (Fla. Dist. Ct. App. 1980), *rev. denied*, 392 So.2d 1371 (Fla.), *cert. denied*, 452 U.S. 955 (1981));[6] *see Romika-USA*, 514 F. Supp. 2d at 1338 ("Under Florida law, a claim for tortious interference cannot lie where the alleged interference is directed at a business relationship to which the defendant is a party."). Since GRU lacks a financial interest in either GREC or the entities with which it interfered to GREC's detriment, and since GRU was not the source of the business relationships with which it interfered, it cannot invoke the financial interest privilege.

C. GRU's Misconduct Gives Rise To Valid Counterclaims.

In its Counterclaims, GREC alleges all necessary elements for abuse of process, violation of Florida's Deceptive and Unfair Trade Practices Act, and tortious interference with business relations. For the reasons discussed below, GRU's Request for Dismissal for failure to state a claim should be denied.

1. GREC States A Valid Claim For Abuse Of Process.

To proceed with its abuse of process claim, GREC must allege that: (1) GRU made an illegal or improper use of process; (2) GRU had an ulterior motive or purpose in exercising such illegal or improper use of process; and (3) as a result of GRU's action, GREC suffered damage. *See Della-Donna v. Nova Univ., Inc.*, 512 So.2d 1051, 1055 (Fla. Dist. Ct. App. 1987). GREC asserts these elements in its Counterclaim. *See* GREC's Counterclaim, Count I, Abuse of Process ¶¶ 1-18. GRU argues that dismissal is appropriate because the filing of a lawsuit, even if done with an ulterior motive, is insufficient for an abuse of process claim. *See* GRU's Request for Dismissal at 8-9. The cases GRU relies upon do not support dismissal here.

Contrary to GRU's wishful thinking, GREC's allegations are far from limited to challenging GRU's filing of its Demand and Amended Demand. GREC describes "an ongoing

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[6] The *Johnson* court distinguished a case as not involving such an "ownership interest," *Yoder v. Shell Oil Co.*, 405 So.2d 743, 744 (Fla. Dist. Ct. App. 1981). *See* 162 F.3d at 1322 n.74. In *Yoder*, the court found reversible error in a jury instruction on the privilege, declaring that "it is clear that the privilege to interfere in a contract because of a financial interest is not unlimited....The better view is that it is necessary for the interfering party to have a financial interest in the business of the third party which is in the nature of an investment in order to justify the interference." 405 So.2d at 744.

and continuing slander" of GREC's title to the Facility based in part on GRU's continued assertions of a sale of the Facility and ROFO rights in respect of the entire ownership of the Facility. *See* GREC's Counterclaim at 26. Rather than properly using the process of arbitration to enforce any legitimate rights under the PPA, GREC alleges that GRU is using this process "as a leveraging device to force GREC back to the bargaining table [to renegotiate the terms of the PPA] despite the parties' existing agreement." *Id.* GREC specifically points to actions after the filing of the Demand: "As recently as mid-January, after the Demand was filed, one member of the Commission openly admitted to a witness that the City's true purpose is to 'renegotiate' the PPA as opposed to buy the Facility." *See id.* at 27 n.7; *see also* GREC's Counterclaim, Count I, Abuse of Process ¶ 9 (allegations of misconduct "[e]ven after filing the original demand"); *id.* ¶ 18 (allegations of damages from abuse of process in "filing the Amended Demand and in related dealings").

Moreover, GREC alleges throughout its Counterclaim that GRU is using the process of arbitration to achieve a collateral purpose, *i.e.*, to compel GREC to renegotiate the terms of the PPA, something that GREC is not legally required to do and for which the judicial process is not intended to accomplish, thus supporting GREC's claim for abuse of process. *See, e.g.*, *McMurray v. U-Haul Co., Inc.*, 425 So.2d 1208, 1209 n.1 (Fla. Dist. Ct. App. 1983) (abuse of process arises "when there has been a perversion of court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to do some collateral thing which could not legally and regularly be compelled to do.") (citing cases).

In *McMurray*, a case cited by GRU, the Florida Court of Appeals cited *Spellens v. Spellens*, 49 Cal.2d 210 (1957), for the proposition that allegations of subsequent misuse or perversion of duly issued process will support an abuse of process claim. 425 So.2d at 1209 n.1. The *Spellens* court instructed that allegations of improper purpose for an abuse of process claim "usually take[ ] the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of

process as a threat or a club," and thus allegations of "interfering with [a] property right, . . . not really to obtain possession of the property . . . but to coerce [the owner]" fell "squarely within these rules" for a valid abuse of process claim. 49 Cal.2d at 230-32 (emphasis omitted).

Similar to the allegations in *Spellens*, GREC alleges that GRU's actions in this arbitration are not to enforce its rights under the ROFO provision for a purchase of the Facility, but GRU is using the process as a threat to coerce GREC into changing the established terms of the PPA to GRU's benefit. GREC alleges that GRU's actions are in actuality "an opportunistic pretext to force GREC back to the bargaining table." GREC's Answering Statement at 1; *see also id.* at 4 (noting "GRU's desire to change the terms of the PPA, several years after signing the PPA and after GREC and third parties have relied on its terms to their detriment"). GREC alleges that GRU has and is acting "out of buyer's remorse, in an effort to wring contractual concessions to which it is not entitled." GREC's Counterclaim at 26. Just as the defendant in *Spellens* interfered with a property right when he did not really wish to obtain possession, GREC alleges that at the time GRU filed its Demand, it had no interest in purchasing the Facility as it requested. *See, e.g.*, GREC's Answering Statement at 23.

Because GREC alleges that it has been damaged by GRU's improper use of this arbitration to achieve its ulterior motives, GREC's claim of abuse of process must stand. *See Della-Donna*, 512 So.2d at 1055.

2. GREC States A Valid Claim For Violation Of Florida Deceptive And Unfair Trade Practices Act.

To proceed with its claim for violation of FDUTPA, GREC must allege: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *See Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. Dist. Ct. App. 2006). GRU argues that its challenged conduct was not "in the conduct of any trade or commerce" to fall within FDUTPA and GREC has suffered no actual damages.[7]

[7] GRU does not assert that the challenged conduct was not "deceptive" or "unfair," just that it was not in "trade or commerce." *See* GRU's Request for Dismissal at 9-11. Nor does GRU argue that allegations of causation are lacking. *See id.*

a. GREC Alleges Trade Or Commerce

"Trade or commerce" is defined under FDUTPA as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." Fla. Stat. § 501.203(8). Florida courts construe FDUTPA liberally and apply a broad interpretation of the phrase "trade or commerce." *See, e.g., Schauer v. Gen. Motors Acceptance Corp.*, 819 So.2d 809, 812 & n.2 (Fla. Dist. Ct. App. 2002); *Alvi Armani Med., Inc. v. Hennessey*, 629 F. Supp. 2d 1302, 1305 (S.D. Fla. 2008); *see also Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499 (Fla. Dist. Ct. App. 2001); *Zlotnick v. Premier Sales Group, Inc.*, 431 F. Supp. 2d 1290, 1294 (S.D. Fla. 2006).

Clearly GRU and GREC are engaged in "trade or commerce" within the meaning of FDUTPA, as demonstrated by the PPA and the parties' course of conduct since 2009. GRU's argument that "GREC, as a highly sophisticated developer of power plants, is hardly the type of consumer-entity contemplated under the FDUTPA" is completely irrelevant. *See* GRU's Request for Dismissal at 9. As GRU concedes, the statute protects businesses from "unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). GRU's unfair and deceptive acts in attempting to coerce GREC to make contractual concessions under the parties' thirty-year agreement violate FDUTPA.

b. GREC Alleges Actual Damages

GREC also sufficiently alleges recoverable damages from GRU's misconduct. *See* GREC's Counterclaim, Count II, Deceptive and Unfair Acts & Practices in Violation of the Florida Deceptive and Unfair Trade Practices Act ¶¶ 19-22; GREC's Counterclaim at 27-29. GREC's allegations of diminished value are one example of actual damages to support its FDUPTA Counterclaim. *See Smith v. W.M. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1339 (S.D. Fla. 2009) ("Florida courts have allowed diminished value to serve as 'actual damages' recoverable in a FDUTPA claim.") (quoting *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988, 990 (Fla. Dist. Ct. App. 2004)).

GREC also describes the tax benefits related to the Facility, which were a key consideration when negotiating and structuring the terms of the PPA. *See* GREC's Counterclaim at 27-28; *see also* GREC's Answering Statement at 6-7, 23. Due to GRU's unfair and deceptive acts, GREC has not been able to realize these "highly valuable" financial benefits. *See* GREC's Counterclaim at 27-28. For these reasons, GREC properly alleges recoverable damages to support its claim for violation of FDUTPA.

3. GREC States A Valid Claim For Tortious Interference With Business Relations.

To proceed with its claim for tortious interference with a business relationship, GREC must allege: (1) the existence of a business relationship; (2) GRU's knowledge of the relationship; (3) GRU's intentional and unjustified interference with the relationship; and (4) damage to GREC as a result of the interference. *Gossard v. Adia Servs., Inc.*, 723 So.2d 182, 184 (Fla. 1998). GREC alleges each of these elements. *See* GREC's Counterclaim, Count III, Tortious Interference with Business Relations ¶¶ 23-26; GREC's Counterclaim at 27-28.

a. GREC Alleges A Business Relationship

GRU argues that GREC fails to adequately allege the first element of its claim because conversations with tax equity investors were "preliminary discussions at best" and not actual and identifiable business relationships. *See* GRU's Request for Dismissal at 12. This argument is flawed because "[a] protected business relationship need not be evidenced by an enforceable contract." *Gossard*, 723 So.2d at 184 (citing *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985)). GREC alleges relationships with tax equity investors for specific tax equity transactions, with mention of conversations with them about their interests and noting the high value of such transactions. *See* GREC's Counterclaim at 27-28, 31. These alleged relationships are within the scope of those providing GREC with "prospective legal or contractual rights" that Florida courts allow to serve as the basis of tortious interference claims. *See C.A. Register v. Pierce*, 530 So.2d 990, 993 (Fla. Dist. Ct. App. 1988) ("the alleged business relationship must afford the plaintiff existing or prospective legal or contractual rights") (citation

omitted); *see also Gossard*, 723 So.2d at 184.

b. GREC Alleges Knowledge By GRU

Contrary to GRU's assertion, GREC alleges that GRU had knowledge of the business relationships with which it interfered. GREC asserts that GRU is "keenly aware" of the highly valuable tax benefits that surround the tax equity transactions with which it interfered and "has been well aware of GREC's plan to bring in tax equity investors." GREC's Counterclaim at 27-28, 31.

c. GREC Alleges Interference By GRU

GREC also sufficiently alleges that GRU intentionally interfered with GREC's business relationships with tax equity investors by purporting to assert ROFO rights and commencing the baseless arbitration. *See* GREC's Counterclaim at 27-28, 31. Although GRU argues that its interference is only "an indirect consequence," this amounts to a factual question and should not serve as a basis for dismissal before GREC has had the opportunity for discovery.

d. GREC Alleges Actual Damages

As discussed above, GREC alleges multiple damages, including actual damage in the form of diminished value. GREC also alleges that GRU's baseless arbitration claim has caused lost profits in the form of unconsummated tax equity transactions. *See* GREC's Counterclaim at 27-28. Damages in the form of lost profits are recoverable under tortious interference claims. *See, e.g.*, *Ordonez v. Icon Sky Holdings, LLC*, No. 10-60156, 2011 WL 3843890, at *7 (S.D. Fla. Aug. 30, 2011);[8] *Alphmed Pharms. Corp. v. Arriva Pharms., Inc.*, 432 F. Supp. 2d 1319, 1352 (S.D. Fla. 2006), *aff'd*, No. 06-13432, 2008 WL 4323711 (11th Cir. Sept. 23, 2008).

[8] In *Ordonez*, the plaintiff alleged that the defendants falsely accused her of infringement and threatened legal action, causing her to lose profits because professionals stopped requesting her for jobs and business contacts discontinued showcasing her. 2011 WL 3843890, at *7.

Conclusion

For the reasons discussed above, GREC respectfully requests that the Arbitrator deny GRU's Request for Dismissal of GREC's Counterclaim in its entirety.

GAINESVILLE RENEWABLE ENERGY CENTER, LLC,

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Dated: July 1, 2013

CERTIFICATE OF SERVICE

I, Josephine Deang Chin, certify that on this 1st day of July 2013, I caused a copy of the foregoing document to be served by electronic mail upon Claimant's counsel.

Josephine Deang Chin