

**LEGISTAR NO.**

**120811**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

**BAYCORP HOLDINGS LTD.;**  
**ENERGY MANAGEMENT, INC.;**  
**STARWOOD ENERGY GROUP**  
**GLOBAL, LLC; STARWOOD ENERGY**  
**GROUP GLOBAL, INC.; RONALD FAGEN;**  
**and DIANE FAGEN,**

**Plaintiffs,**

**v.**

**THE CITY OF GAINESVILLE, FLORIDA,**  
**d/b/a GAINESVILLE REGIONAL UTILITIES**

**Defendant.**

Case No. 13 CV 00024-SPM-GRJ

**COMPLAINT**

Baycorp Holdings Ltd.; Energy Management, Inc.; Starwood Energy Group Global, LLC; Starwood Energy Group Global, Inc.; Ronald Fagen; and Diane Fagen (collectively, the "Members"), by their undersigned attorneys, as and for their Complaint against defendant The City of Gainesville, Florida d/b/a Gainesville Regional Utilities ("GRU"), allege on their own knowledge or otherwise on information and belief:

**NATURE OF THE ACTION**

1. This is an action to enjoin, as to the Members, an arbitration proceeding that GRU brought before the American Arbitration Association ("AAA") entitled *The City of Gainesville, Florida d/b/a Gainesville Regional Utilities v. Gainesville Renewable Energy Center, LLC, et al.* (AAA Case No. 50 198 T 00953 12) (the "AAA Arbitration"). See GRU's Demand for Arbitration (Dec. 21, 2012) ("Arbitration Demand") (attached as Ex. A).

2. Parties cannot be forced into arbitration when they have never entered into any arbitration agreement. “Arbitration under the [FAA] is a matter of consent, not coercion . . .” *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989); *see also Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (citation omitted); *see also* Fla. Stat. § 682.03(4) (2012) (“On application the court may stay an arbitration proceeding commenced or about to be commenced, if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had . . .”).

3. Here, the Members never agreed to arbitrate GRU’s claims. The only party that agreed to arbitrate GRU’s claims is Gainesville Renewable Energy Center, LLC (“GREC”). Accordingly, the AAA Arbitration should be enjoined as to the Members and all other parties other than GREC. Moreover, because the Members and all parties other than GREC are not subject to AAA jurisdiction in connection with the AAA Arbitration, the Court should issue a declaratory judgment holding that GRU’s claims are only arbitrable as to GREC.

4. The AAA Arbitration arises out of the alleged breach of a Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility (“PPA”) (attached hereto as Ex. 1 to Arbitration Demand).

5. The PPA was signed by only two parties: GRU and GREC. Nevertheless, in the AAA Arbitration, GRU has sued not only GREC but also a number of non-GREC entities and

individuals, including the Members, for breach of contract. GRU seeks specific performance as a remedy for the alleged breach of the PPA.

6. The PPA provides no basis for GRU to drag anyone other than GREC into the AAA Arbitration. The Members are not parties to the PPA and the Members have never agreed to arbitrate any claims with GRU. For this reason alone, the Members and any other non-GREC parties cannot be made parties to the AAA Arbitration.

7. Moreover, pursuant to Section 26.3 of the PPA, GRU agreed that it would refrain from taking any action against GREC's members based upon the PPA. Specifically, GRU agreed that "no recourse" under the PPA would be had against GREC's members, and GRU expressly "waive[d]" and "release[d]" claims against GREC's members under the PPA. Thus, Section 26.3 serves as an additional, independent basis to bar GRU's claims against the Members in the AAA Arbitration.

8. As there is no basis for GRU to drag the Members into the AAA Arbitration, the Members requested that GRU voluntarily dismiss them from the AAA Arbitration. GRU declined to do so. Accordingly, the Members were forced to bring this action seeking: (1) a declaration that the claims GRU has asserted in the AAA Arbitration are not arbitrable as to any party other than GREC; and (2) an injunction preventing GRU from proceeding with the AAA Arbitration as to any party other than GREC.

**THE PARTIES**

9. Plaintiff BayCorp Holdings Ltd. is a Delaware corporation with its principal place of business at 1 New Hampshire Avenue, Portsmouth, New Hampshire 03801.

10. Plaintiff Energy Management, Inc. is a Massachusetts corporation with its principal place of business at 20 Park Plaza, Boston, Massachusetts 02116.

11. Plaintiff Starwood Energy Group Global, LLC is a Delaware limited liability company with its principal place of business at 591 West Putnam Avenue, Greenwich, Connecticut 06830. Starwood Energy Group Global, LLC is not a citizen of Florida and none of its members is a Florida citizen.

12. Plaintiff Starwood Energy Group Global, Inc. is a Delaware corporation with its principal place of business at 591 West Putnam Avenue, Greenwich, Connecticut 06830.

13. Plaintiffs Ronald and Diane Fagen are individuals who reside in Granite Falls, Minnesota 56241.

14. Defendant The City of Gainesville, Florida, is a municipal corporation of the state of Florida. Upon information and belief, Gainesville Regional Utilities is owned by, and is an agency of, The City of Gainesville.

**JURISDICTION AND VENUE**

15. The Court has subject matter jurisdiction over this lawsuit based on 28 U.S.C. § 1332, because the Members and GRU are citizens of different states and GRU's Arbitration Demand seeks specific performance of a right of first offer with a value in excess of \$75,000.

16. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(1) and (c)(2).

### **FACTUAL BACKGROUND**

#### **GRU AND GREC**

17. GRU is a multi-service public utility. Upon information and belief, GRU supplies approximately 93,000 retail and wholesale customers in the Gainesville region with electricity and other services.

18. GREC is a Delaware limited liability company. GREC was formed to construct and subsequently operate a biomass-fired power production facility in Alachua County, Florida (the "Facility"). GREC is 100% owned by GREC Intermediate Holdings, LLC, a Delaware limited liability company. GREC Intermediate Holdings, LLC is, in turn, 100% owned by GREC Holdings, LLC a Delaware limited liability company. Certain of the Members directly or indirectly own, or have directly or indirectly owned, interests in GREC Holdings, LLC.

#### **THE PPA**

19. In April 2009, GRU and GREC entered into the PPA. Under the PPA, GREC agreed to construct and operate the Facility. GRU, in turn, agreed to purchase all of the energy produced at the Facility for a 30-year period. Construction of the Facility is scheduled to be complete in the second half of 2013.

20. The only parties to the PPA are GRU and GREC. *See* Ex. 1 to Arbitration Demand at 1.

21. The PPA grants GRU a “Right of First Offer” to purchase the Facility under certain circumstances. Section 27.3 of the PPA reads in pertinent part:

Right of First Offer. [GREC] may not sell the Facility, either directly or indirectly through a change of control of [GREC] during the term of this Agreement unless [GREC] shall have complied with the following: prior to selling the Facility, [GREC] shall give notice to [GRU] of [GREC's] intent to sell the Facility and [GRU] shall have sixty (60) days from such notice to prepare an offer (the “First Offer”) to purchase the Facility. [GREC] shall negotiate in good faith exclusively with [GRU] for a minimum of thirty (30) days from receipt of the First Offer to attempt to reach agreement on the terms of a purchase. If the Parties cannot reach an agreement on sale terms within the thirty (30) days of receipt of the First Offer then [GREC] shall have three hundred sixty (360) days from the date of [GRU] delivering the First Offer to close on a sale of the Facility to an unaffiliated third party for a price and for terms that are no less than the price and no more onerous than the terms of the First Offer. . . . Notwithstanding anything to the contrary, a construction financing or tax equity financing with respect to the Facility shall not be deemed a change in control for purposes of this Section 27.3.

Ex. 1 to Arbitration Demand at 35.

22. The PPA provides that disputes between *GRU and GREC* under the PPA are to be submitted to arbitration pursuant to AAA Rules. Section 24.1 of the PPA provides:

Dispute Resolution Process. If either [GREC] or [GRU] believes it has a claim under this Agreement, the designated representative of the claimant shall initiate a claim by submitting such claim in writing, including a detailed description, to the designated representative of the other party, who shall review the claim and shall respond in writing of his findings and recommendations concerning the claim within a reasonable time period not to exceed thirty (30) days. If the claim is not resolved within such thirty (30) day period, the claimant may further pursue the claim by submitting the claim to arbitration pursuant to the Arbitration Procedure.

Ex. 1 to Arbitration Demand at 28. Section 24.2 further provides:

Arbitration Procedure. Any controversy, dispute or claim between [GREC] and [GRU] arising out of or relating to this Agreement, or the breach thereof, shall be settled finally and conclusively by arbitration according to the Rules of the American Arbitration Association then in effect, unless the parties otherwise agree . . . .

Ex. 1 to Arbitration Demand at 28-29.

23. Thus, under the PPA, only GRU and GREC are empowered to submit a claim to arbitration.

24. Moreover, in Section 26.3 of the PPA, GRU agreed that “no recourse” shall be had against GREC’s members under the PPA in *any* forum and that any claims against GREC’s members are “waive[d]” and “release[d]”:

No Recourse; Limited Liability. No recourse under or upon any obligation contained in this Agreement shall be had against BayCorp Holdings, Ltd., Energy Management, Inc., BayCorp Nacogdoches, LLC, EMI Nacogdoches, LLC, Tyr Energy, Inc., Tyr Biomass, LLC or any partner, member, manager, stockholder, director, officer or employee of [GREC]. [GRU] expressly waives and releases all right to assert liability under this Agreement against, or to satisfy any claim arising hereunder or thereunder against, any such person.

Ex. 1 to Arbitration Demand at 33. As a result of Section 26.3, the Members are exempt from liability under the PPA.

#### **GRU’S ALLEGATIONS IN THE AAA ARBITRATION**

25. On December 21, 2012, GRU filed its Arbitration Demand. Even though the Members did not sign the PPA and even though GRU agreed pursuant to Section 26.3 that it would not sue the Members under the PPA in any forum, GRU sued the Members in the AAA Arbitration for specific performance.



26. In its Arbitration Demand, GRU alleges that GREC and the Members breached Section 27.3 of the PPA by failing to give adequate notice to GRU of an alleged change in control at GREC and by failing to give GRU an opportunity to make a first offer for the Facility. Specifically, GRU alleges that unrelated changes in certain indirect, minority ownership interests in GREC, occurring at different times, constituted a change in control of GREC such that GRU's right to make a first offer under Section 27.3 was triggered. *See* Arbitration Demand, ¶¶12-20. According to GRU, "this transfer of control was accomplished without giving the required advance notice to GRU or affording GRU its Right of First Offer." *Id.* ¶ 23.

27. In the AAA Arbitration, GRU seeks the following relief from GREC and the Members: (1) a finding that Section 27.3 of the PPA was breached; (2) specific performance of Section 27.3, including GRU having the opportunity to make an offer to purchase the Facility; and (3) other relief "to put GRU in the position it would have been" had Section 27.3 not been breached.

28. Significantly, GRU does *not* allege that the Members were parties to the PPA or that GRU had entered into *any* agreement with the Members that provides for the arbitration of claims. In fact, GRU alleges no basis whatsoever for the arbitration of claims with the Members. Nor does GRU acknowledge its contractual agreement that "no recourse" under the PPA shall be had as against the Members.

29. After GRU filed its Arbitration Demand, counsel for the Members contacted GRU's counsel and asked GRU to dismiss all parties other than GREC from the Arbitration, citing the absence of agreement by those parties to arbitrate, in addition to the provisions in the

PPA barring arbitration against the Members and precluding GRU from seeking specific performance. GRU refused.

30. Accordingly, the Members have been forced to file this action for an injunction to enjoin the AAA Arbitration as to parties other than GREC and for a declaration that only GREC is subject to the jurisdiction of the AAA in connection with the AAA Arbitration.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

#### **(Preliminary and Permanent Injunction to Enjoin the AAA Arbitration against Members)**

31. The Members repeat and reallege the allegations of paragraphs 1 through 30 of the Complaint above, as if fully set forth herein.

32. Pursuant to the Federal Arbitration Act, federal common law, and/or Fla. Stat. § 682.03(4) (2012), this Court is empowered to enjoin the AAA Arbitration as to the Members because no agreement exists that would allow the AAA to arbitrate the claims GRU has asserted against the Members.

33. Because no agreement to arbitrate exists between the Members and GRU, and the Members do not consent to arbitration, the AAA is without jurisdiction over any dispute between the Members and GRU. As a result, the Members are entitled to an injunction prohibiting GRU from proceeding with the AAA Arbitration as to them. Absent injunctive relief, the Members will suffer irreparable harm.

**COUNT II**

**(Declaratory Judgment as to Non-Arbitrability as to Members)**

34. The Members repeat and reallege the allegations of paragraphs 1 through 33 of the Complaint above, as if fully set forth herein.

35. An actual and present controversy exists between GRU and the Members regarding whether GRU may maintain the AAA Arbitration against any party other than GREC.

36. Because no agreement to arbitrate exists between the Members and GRU, and the Members do not consent to arbitration, the dispute between the Members and GRU is not arbitrable. As a result, the Members request a declaration that the claims GRU has asserted against any individual or entity other than GREC in the AAA Arbitration are not arbitrable.

**Prayer for Relief**

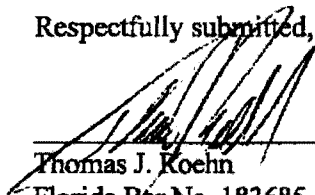
WHEREFORE, the Members are entitled to judgment against GRU:

- (i) preliminarily and permanently enjoining GRU from proceeding with the AAA Arbitration as to the Members or as to any individual or entity other than GREC;
- (ii) declaring that: (a) GRU is not entitled to proceed with the AAA Arbitration as to the Members or any other individual or entity other than GREC; (b) GREC's members are not parties to the PPA; and (c) GRU has released and waived all claims against the Members and any other of GREC's members and has no recourse against the Members or any other of GREC's members pursuant to Section 26.3 of the PPA;

- (iii) awarding the Members all attorneys' fees and other costs associated with this action; and
- (iv) awarding any other and further relief that the Court deems just and proper.

Dated: February 1, 2013

Respectfully submitted,



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