**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

CASE NO.: 502024CA001964- XXXA-MB (AA)

EB5 UNITED, LLC, a Washington limited liability company, EB5 UNITED OKEECHOBEE, LLC, a Delaware limited liability company, and EB5U FL, LLC, a Delaware limited liability company,

Plaintiffs,

v.

EB5AN, LLC, a Florida limited liability company,

Defendant.
_______________________________________/

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant, EB5AN, LLC ("EB5AN"), respectfully moves this Court, pursuant to Fla. R. of Civ. P. 1.140(b)(6), to dismiss the Complaint for failure to state a claim. Attempting to scapegoat EB5AN for its own shortcomings and that of its project, Plaintiffs have framed an ill-conceived defamation case based nearly entirely on EB5AN's opinions. But opinions are not actionable and do not give rise to defamation claims. The Complaint should therefore be dismissed. As grounds for this Motion, EB5AN states:

I. BACKGROUND

Plaintiffs' Largely Ill-Conceived Project

The facts of this case are straightforward. Plaintiffs are a regional center under the EB-5 Program, which means that they actively seek out foreign investors to fund various projects. Complaint, ¶¶ 21–22. One such project is the Lakewood Estates and Villas at

Lakefront (the "Lakefront Project"). *Id*., ¶ 23. The Lakefront Project is a residential and commercial development in Okeechobee, Florida. *Id*. The Lakefront Project is being developed by Okeechobee Community Developers, LLC (the "Developer"), a non-party to this action.

The Lakefront Project does not appear to be attracting a significant number of EB-5 investors given it has been on the market since October 2022, which is atypical of compelling rural EB-5 projects in the market today. There are likely many reasons for the Lakefront Project's apparent lack of success thus far, including, among other things, its remote location and marketing to only a small segment of the population. Where many people emigrate to Florida because of its beaches, upscale shopping, corporate headquarters, and healthcare excellence, the Lakefront Project is nowhere near those attractions. And the published financials related to the Lakefront Project, including the deemed land value, appear to be grossly overinflated. While not all inclusive, these examples suggest a development project in distress and dependent on EB-5 investment that it is struggling to attract. Promising its investors a project of "Exceptional Family Living" and a "vibrant community with strong values and all the amenities and services a beautiful family needs,"[1] Plaintiffs have much to lose if their Lakefront Project fails. Enter EB5AN, one of Plaintiffs' biggest and most successful competitors.

<u>EB5AN's Exceptional Reputation</u>

Like Plaintiffs, EB5AN is a government-authorized EB-5 regional center operator. Founded in 2013, EB5AN is also a global investment fund manager with offices in the

[1] https://lakefrontestatesfl.com/, last visited on 3/28/2024.

United States and abroad.[2] EB5AN is one of a select few in the EB-5 industry to have successfully closed and funded over 15 EB-5 transactions representing *billions in project development*, with a perfect track record for both project immigration approvals and project development execution. In fact, EB5AN proudly maintains a 100% USCIS project approval rate, which means that all the EB-5 regional center project investment funds it sponsors and serves as the manager for have received project approval from United States Citizenship and Immigration Services.[3]

<u>EB5AN's Commitment to Investment Transparency</u>

EB5AN, like most high achievers, keeps itself abreast of the activities of its competitors. As part of its corporate due diligence or as requested by others in the industry, EB5AN compiles reports summarizing, critiquing, backgrounding, and/or commenting upon projects undertaken by other EB-5 regional centers. These reports and EB5AN's attention to activities and details within the EB-5 industry, reflected by the heading prominently displayed on its website, "Committed to Investment Transparency," sets EB5AN apart from its competitors, including Plaintiffs.[4]

Many EB-5 investors lack experience making large private U.S. investments; an EB-5 investment is often the largest sum they have or will invest in such an investment. Reviewing the complicated and nuanced EB-5 project offering documents such as the private placement memorandum is difficult. Identifying potential areas of concern and/or additional diligence questions that a highly experienced private investor would quickly uncover is often not possible for a foreign national EB-5 investor who has minimal or no

[2] https://eb5visainvestments.com/overview-history/, last visited on 3/28/24.
[3] *Id*.
[4] https://eb5visainvestments.com/ last visited on 3/28/24.

experience reviewing private U.S. investment offerings. Many rely on the opinions of industry experts such as EB5AN.

<u>Plaintiffs' Targeting of EB5AN as its Scapegoat</u>

One such critiquing report, which Plaintiffs identify in the Complaint as the EB5AN Summary and which is titled "Lakefront EB5 United Project Summary Comments" (hereinafter, "Project Summary Comments" or "Summary Comments"), was prepared by EB5AN to remark upon Plaintiffs' Lakefront Project. As discussed below, the Project Summary Comments is comprised almost entirely of EB5AN's impressions, views, and beliefs concerning the viability and practicality of the Lakefront Project.

Much like investors revere the opinions of leading private investment firms concerning investment opportunities, those within the EB-5 investment industry respect EB5AN's opinions about current industry events and EB-5 projects being undertaken by other regional centers.

Seizing on an opportunity to sully the reputation of a successful competitor while, at the same time, extricating itself from the disappointments of its own projects and fundraising efforts, Plaintiffs have taken to litigation to try to even the playing field. Their poorly conceived lawsuit takes aim at EB5AN's constitutionally protected opinions about the Lakefront Project, portraying those opinions as statements of fact and shoehorning them into a defamation and tortious interference case.

Significant to the weakness of its case, Plaintiffs did not attach the Project Summary Comments to their Complaint, electing instead to paraphrase, sometimes misleadingly, EB5AN's statements. Indeed, as we point out below, nearly every one of the allegedly defamatory statements Plaintiffs reproduce in the Complaint <u>are not contained in the</u>

Summary Comments. Worse, Plaintiffs omit key facts presented in the Summary Comments and attempt to synopsize EB5AN's critique by excluding important context to try to make it appear sinister when it is not.

As if that were not bad enough, Plaintiffs infuse the Complaint with inflammatory rhetoric, such as accusing EB5AN of engaging in "blood sport" and "unethical" business practices and creating a "checklist of lies," all in an attempt to portray EB5AN in an unfavorable light before the Court. In short, Plaintiffs, incapable of outperforming EB5AN in the global marketplace, have turned to litigation libel as an alternative strategy to try to gain a competitive advantage.

II. LEGAL STANDARDS

A. Attaching Document Upon Which Action May Be Brought

Florida Rule of Civil Procedure 1.130 provides that documents on which an action may be brought, or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. "One of the ways to reach a failure to attach a necessary exhibit is by motion to dismiss." *Safeco Ins. Co. v. Ware*, 401 So. 2d 1129, 1130 (Fla. 4th DCA 1981) (citing Trawick, Florida Practice & Procedures 6–15 (1980)). "In the case of a complaint based on a written instrument it does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the pleading in question." *Id.*; *Diaz v. Bell MicroProducts-Future Tech, Inc.*, 43 So. 3d 138, 139–40 (Fla. 3d DCA 2010).

B. <u>Considering Documents Incorporated by Reference in Complaint</u>

In ruling on a motion to dismiss, a trial court is generally limited to the four corners of the complaint and its incorporated attachments. *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) (citing *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.,* 861 So. 2d 74, 76 (Fla. 4th DCA 2003)). "But where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *Id.* (citing *Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011) (rejecting the argument that trial court erred by considering contents of settlement agreement attached to motion to dismiss: "[I]n this case, the complaint refers to the settlement agreement. … Accordingly, since the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature of the claim being alleged")).

C. <u>Defamation</u>

The elements of a defamation claim include:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Rapp v. Jews for Jesus, Inc., 944 So. 2d 460, 464–65 (Fla. 4th DCA 2006); *Ozyesilpinar v. Reach PLC,* 365 So. 3d 453, 459 (Fla. 3d DCA 2023); *Hay v. Independent Newspapers, Inc*., 450 So. 2d 293, 294–95 (Fla. 2d DCA 1984).

"[A] publication must be considered in its totality." *Byrd v. Hustler Magazine, Inc*., 433 So. 2d 593, 595 (Fla. 4th DCA 1981). "The court must consider all the words used, not merely a particular phrase or sentence." *Id*. (citing *Information Control Corp. v. Genesis One Computer Corp*., 611 F.2d 781, 784 (9th Cir.1980)).

A statement is defamatory if it "tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated … exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation." *Markle v. Markle*, 2024 WL 1075339 at *5 (M.D. Fla. 2024) (citing *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108–1109 (Fla. 2008)). True statements, statements that are not readily capable of being proven false, and statements of pure opinion, however, are protected from defamation actions by the First Amendment. *Id*. (citing *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018)); *Town of Sewall's Point v. Rhodes*, 852 So. 2d 949, 950 (Fla. 4th DCA 2003).

A statement is pure opinion when it is "commentary or opinion based on facts that are set forth in the subject publication or which are otherwise known or available to the reader or listener." *Ozyesilpinar*, *supra,* at 459 (citing *Skupin v. Hemisphere Media Grp., Inc*., 314 So. 3d 353, 356 (Fla. 3d DCA 2020)); *Scott v. Busch*, 907 So. 2d 662, 667–668 (Fla. 5th DCA 2005).

By contrast, a statement is mixed opinion "when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication." *Id*. (citing *Stembridge v. Mintz*, 652 So. 2d 444, 446 (Fla. 3d DCA 1995) (quoting *From v. Tallahassee Democrat, Inc*., 400 So. 2d 52, 57 (Fla. 1st DCA 1981)). In other words, for a statement to be mixed opinion, the communicator's statement must imply that "a concealed or undisclosed set of defamatory facts would confirm" the statement. *Id*. (citing *Hay, supra*, at 295).

A plaintiff "must specify what false statement or statements" caused its injuries. *Hill Nissan, Inc. v. Jenkins Nissan, Inc*., 2012 WL 13106337, at *2 (M.D. Fla. Aug. 2012). And the element of falsity is only met "if the publication is substantially and materially false." *Markle, supra* (citing *Smith v. Cuban Am. Nat'l Found*., 731 So.2d 702, 707 (Fla. 3d DCA 1999) ("falsity only exists if the publication is substantially and materially false, not just if it is technically false")).

Whether a statement is one of fact or opinion is a question of law, subject to d*e novo* review. *Town of Sewall's Point, supra*, at 950 (citing *Morse, supra*, at 922; *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA 1986)). Accordingly, courts routinely dismiss complaints purporting to assert defamation claims where they are predicated on pure opinion. *See, e.g*., *Ozyesilpinar*, *supra* (affirming dismissal with prejudice of defamation claim based on pure opinion); *Jews for Jesus, supra* (affirming dismissal of defamation claim based on finding that a publication was not defamatory as a matter of law); *Skupin v. Hemisphere Media Group, Inc*., 314 So. 3d 353 (Fla. 3d DCA 2020) (affirming dismissal of defamation claim where reports "amount to no more than an expression of opinion and commentary").

D. <u>Tortious Interference with Business Relationship</u>

In order to maintain a claim for tortious interference with a business relationship, a plaintiff must allege a) the existence of a business relationship; b) knowledge of the relationship on the part of the defendant; c) an intentional and unjustified interference with the relationship; and d) damage to the plaintiff as a result of the tortious interference with the relationship. *See Realauction.com, LLC v. Grant St. Group, Inc.*, 82 So. 3d 1056, 1058 (Fla. 4th DCA 2011).

"Competition for business is not *per se* actionable interference even though it is intentional." *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980). "If the privilege to protect or further one's legitimate economic situation is present, the concomitant presence or malice or ill will, and the expression thereof, is not actionable as tortious interference." *Id. (*citing *Ethyl Corp. v. Balther,* 386 So. 2d 1220 (Fla. 3d DCA 1980)). Although the privilege to interfere is generally an affirmative defense, in deciding a motion to dismiss, courts may consider an affirmative defense that appears on the face of the complaint. See Fla. R. of Civ. P. 1.110(d) ("Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)").

In *Jay v. Mobley*, 783 So. 2d 297 (Fla. 4th DCA 2001), the Fourth DCA affirmed the dismissal of a tortious interference with business relationship claim against a competitor. The court explained:

> The tort of tortious interference teeters between two competing values—the desire to protect the reasonable expectations of the parties to a business relationship on the one hand, and the need to avoid excessive restrictions on freedom of competition on the other. … Florida "recognizes competition between competitors, and if there is an interference with a non-exclusive right this is a privileged interference."

Id. at 299 (citations omitted).

A claim for tortious interference must "identify the customers who were the subject of the alleged interference." *Bortell v. White Mountains Ins. Group, Ltd*., 2 So. 3d 1041, 1048 (Fla. 4th DCA 2009). A cause of action will not lie on the ground that the defendant interfered with a relationship between the plaintiff and the public at large. *Id*. (dismissing tortious interference claim based on the allegation defendant interfered with plaintiff's "book of business").

III. ARGUMENT

A. <u>Plaintiffs Fail to State a Cause of Action Because They Did Not Attach the Allegedly Defamatory Publication to the Complaint</u>.

The basis for Plaintiffs' defamation claim, Count I, is the written Project Summary Comments prepared by EB5AN to summarize, critique, and viewpoint a project undertaken by another EB-5 regional center. Complaint, ¶¶ 68–73. But Plaintiffs did not attach a copy of the Summary Comments to its Complaint. Because Count I for defamation is "based on a written instrument," it does not state a cause of action because the instrument, *i.e*., the Summary Comments, or even the relied upon portions thereof, is not attached to the Complaint. Count I should therefore be dismissed. *See Safeco Ins., supra; Diaz, supra*.

B. <u>The Alleged Defamatory Statements in the EB5AN Summary Comments Are Pure Opinion, Hyperbole, and/or Otherwise Not Actionable</u>.

Notwithstanding Plaintiffs' failure to state a cause of action for defamation by refusing to attach the Project Summary Comments to the Complaint, the publications upon which they rely constitute pure opinion that cannot form the basis for a defamation claim.

Initially, because the Project Summary Comments is the basis of, and impliedly incorporated by reference into, the Complaint, EB5AN attaches a complete copy of it as **Exhibit 1** to this Motion. *See One Call, supra* (holding that on a motion to dismiss, the court may consider documents impliedly referenced in a complaint). Additionally, because

Plaintiffs allege that the Summary Comments were prepared based on "investment terms and other pertinent information" contained in the Private Placement Memorandum for the Lakefront Project ("PPM")—see Complaint, ¶¶ 34, 40—that document is referenced as **Exhibit 2** to this Motion so that the Court may "review the terms of that [document] to determine the nature of the claim being alleged." *See Veal, supra*.[5]

Further, as explained below, most of the statements about which Plaintiffs complain do not actually appear in the Summary Comments, but rather consist of Plaintiffs' mischaracterized summations of EB5AN's statements. This deceptive rewording violates "[t]he general rule in Florida … that allegedly defamatory words should be set out in the complaint for the purpose of fixing the character of the alleged libelous publication as being libel as per se." *Edward L. Nezelek, Inc. v. Sunbeam Television Corp*., 413 So. 2d 51, 55 (Fla. 3d DCA 1982) (distinguishing slander cases where defamatory words need not be set out verbatim); *see Rendon v. Bloomberg, L.P*., 403 F. Supp. 3d 1269 (S.D. Fla. 2019) (holding, for purposes of pre-suit notice under Fla. Stat. § 770.01, where suit arises from printed article, "the law is clear that the best possible notice consists of direct quotes because they are available to the plaintiff at the time of the article's publication").

And where Plaintiffs do reproduce EB5AN's statements, they often fail to provide important context, thus preventing consideration of the publication "in its totality." *See Byrd, supra*. In other words, by reproducing "merely a particular phrase or sentence," Plaintiffs have prevented the Court from considering "all the words used." *Id*.

[5] Because the PPM is designated "confidential," we are not attaching it to this Motion. A copy will be furnished privately to the Court at or in connection with its consideration of this Motion.

Most telling about the nature of the document and why Plaintiffs decided not to attach it to the Complaint is its title, prominently appearing at the top of the first page, "Lakefront EB5 United Project Summary Comments." (emphasis added). A "comment," by definition, is "an observation or remark expressing an opinion or attitude."[6] Because the reader is immediately informed that what follows in the Summary Comments are EB5AN's "opinions or attitudes" toward the Lakefront Project, Plaintiffs cannot sustain a claim for defamation. At the very least, each of the complained-about statements should be viewed with the understanding that EB5AN is "commenting" upon, or providing its viewpoint and impressions about, the Lakefront Project, and thus any doubts concerning whether or not the statements are inactionable opinions as opposed to actionable statements of fact should be resolved in EB5AN's favor.

With the above framework in mind, we address each of the allegedly defamatory statements in turn, with paragraph references to the Complaint, as follows:

***Headings* (¶ 41)**

Plaintiffs allege that the headings in the Summary Comments "contain false statements." Complaint, ¶ 41. But the headings contain only short phrases, not statements. Where allegedly defamatory statements must be viewed in their entirety and in their full context, the headings of the Summary Comments alone do not give rise to and cannot form the basis for a defamation claim.

[6] https://www.merriam-webster.com/dictionary/comment#:~:text=%3A%20an%20observation%20or%20remark%20expressing,%3A%20a%20judgment%20expressed%20indirectly.

Land value and projected value of completed non-residential components are inaccurate and not properly documented **(¶ 42(a))**

This statement, like most that follow, are Plaintiffs' paraphrases rather than words literally appearing in the Summary Comments. Examination of the actual words used by EB5AN "in their totality," *see Byrd, supra*, which appear on the first page of the Summary Comments, reflects pure opinion *based on facts that are set forth in the subject publication*:

- **Misleading Valuations/Equity**
  - The equity of the project, the land purchase, is listed at $16M, and yet the "value" of the land in the offering materials is listed as $100M? The land was purchased in 2021 … How did vacant land increase 600%+ in three years in the middle of nowhere in the center of the state of Florida? Where is the supporting appraisal for this, and which comparable(s) are listed? Seems completely unrealistic and deceptive.
  - The projected value of the completed non-residential components of the project (the community center, amenities, etc.) is listed at $200M with no supporting documentation. Again, where is this coming from?

Specifically, the Summary Comments set forth numerous facts, including the land purchase price, the value of the land in the offering materials, the year the land was purchased, the percentage increase between the two values, the projected value set forth in the offering materials, and the location of the land. From those facts, EB5AN formed an opinion, namely, that the valuation "seems completely unrealistic and deceptive." This statement is not actionable. *See Ozyesilpinar*, *supra,* at 459 ("Because the content of the published articles is based on documented facts in the form of Appellant's own admissions, the trial court correctly characterized the articles' content as pure opinion and thus protected speech").

Moreover, as explained above, Plaintiffs acknowledge that the Project Summary Comments were formulated based on "investment terms for the Lakefront Project as well as other pertinent information contained" in their PPM. See Complaint, ¶¶ 34, 40. Thus, even if the facts from which EB5AN formed its opinions concerning valuations were not set forth in the Summary Comments, Plaintiffs made them "available to the reader" through the PPM, and EB5AN's statements are therefore inactionable opinion. *See Ozyesilpinar*, *supra,* at 459.

Plaintiffs may argue that the above statement is mixed opinion. But nowhere does EB5AN "imply that a concealed or undisclosed set of defamatory facts would confirm" the statement. *Id*. Indeed, as explained above, the facts forming the opinion were fully disclosed in the Summary Comments and otherwise available to the reader in the PPM.

the valuations for the land and for the non-residential components of the Project are "insane" **(¶ 42(b))**

As above, Plaintiffs' paraphrasing is misleadingly out of context. The full statement to which they refer appears on page 4 of the Project Summary Comments:

- **Outstanding Diligence Items**
  - Appraisals supporting the insane valuations listed for both the land and for the non-residential components of the project

For numerous reasons, this statement also cannot serve as a basis for a defamation claim.

First, the context, "outstanding diligence items," suggests to the reader that the land valuations should be diligently verified by obtaining appraisals. In other words, facts available to the reader, *i.e.,* land appraisals, will ultimately bear upon EB5AN's opinion that the valuations are "insane."

Second, just as with the prior statements, the facts upon which EB5AN's opinion is based, listed above, are set forth in the Summary Comments.

Further, "a defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of fact or rhetorical hyperbole that cannot be interpreted as stating actual facts about an individual." *Akai Custom Guns, LLC v. KKM*

Precision, Inc., 2023 WL 8449374 at *13 (S.D. Fla. 2023) (citing *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990); *Keller v. Miami Herald Publ'g Co*., 778 F.2d 711, 717 (11th Cir. 1985) ("[A] publication, to be actionable, must be false and consist of a statement of fact")). In *Akai*, for example, the court explained:

> Here, the statements that Plaintiffs, in threatening a lawsuit against Defendants, were perpetrating a scam or a public opinion fraud cannot be the basis for Plaintiffs' defamation claims against SCI because these statements represent non-literal assertions of fact and rhetorical hyperbole. The Court notes that the words themselves ("scam" and "public opinion fraud") do not have precise meanings. … Just as the Supreme Court found in *Bresler* that the term "blackmail" could not support a defamation action given the circumstances of that case because of the term's imprecise meaning and hyperbolic nature, here too the Court cannot find the terms "scam" or "public opinion fraud" capable of maintaining Plaintiffs' defamation claims. Indeed, the lack of precision makes the two assertions incapable of being proven true or false. … Put differently, these statements cannot be the basis for liability in a defamation action because they cannot be provable as false.

2023 WL 8449374 at *13.

Here, EB5AN's expression of the land valuations as "insane" cannot be the basis for Plaintiffs' defamation claim because it is a non-literal assertion of fact and rhetorical hyperbole. In other words, the statement is "incapable of being proven true or false." *See id.*[7]

Moreover, EB5AN's expression of the land valuations as "insane" is rank constitutionally protected speech. *See, e.g.*, *DeMoya v. Walsh*, 441 So. 2d 1120 (Fla. 3d

[7] In *Akai*, the court reasoned that where the defendants stated that the plaintiffs are "perpetrating a scam," plaintiffs "are left to imagine how exactly they would prove this statement to be false." *Id*. Here, Plaintiffs would similarly not be able to prove as false the statement that its valuations are "insane."

DCA 1983) ("Appellee's characterization of his government co-worker as a 'raving maniac' and 'raving idiot' … may have been personally insulting, but did not constitute actionable slander") (citing *Wetzel v. Gulf Oil Corp.*, 455 F.2d 857 (9th Cir.1972) (calling plaintiff "nuts" and "crazy" in context of and in response to plaintiff's demand that a gas station pay for costs incurred when an attendant at defendant's gas station allegedly added the wrong fluid in place of brake fluid considered to be non-actionable expression of pure opinion based on the disclosed facts); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666, 667 n.1 (Fla. 3d DCA 1981) (article characterizing accusations made by plaintiff as "almost paranoid" considered to be expression of pure opinion entitled to absolute constitutional protection)).

***the Project is in an undesirable and economically depressed area* (¶ 42(c))**

Just like the statements referenced above, this one does not appear in the Project Summary Comments. In context, the first page of the Summary Comments states:

- **Terrible Location**
  - The best quote of the PPM is that the project is "strategically located in the center of Florida right above Lake Okeechobee." There is nothing strategic about this unless you want to be living in the center of the state, as far away as possible from any shopping, beaches, healthcare, or other amenities, and want the cheapest land possible in the state and want to be neighbors with low-income mobile home parks.

Little needs to be said to demonstrate that none of what EB5AN stated is defamatory. EB5AN quoted the PPM and merely offered its own countering viewpoint based on publicly known information, *i.e.*, the location of the Lakefront Project.

***the Project primarily caters to Orthodox Jews that constitute a very small market that is price sensitive* (¶ 42(d))**

Once again, this statement does not appear in the Project Summary Comments. The first page of the Summary Comments states:

- Success of the project depends on selling homes only to members of the Orthodox Jewish community … a very tiny targeted market that is price sensitive … No other buyers are going to be buying here since no one wants to be the odd person out in a community that is 95% Orthodox Jewish.

Notably, there are no facts contained in this statement. It merely represents EB5AN's opinion that the Lakefront Project's success depends on selling homes to the Orthodox Jewish community. That opinion is based on Plaintiffs' targeting, ubiquitously evident in the PPM, Exhibit 2, and on the Lakefront Project's website, of the Jewish community, as reflected most obviously by the popup appearance of the following image immediately upon landing on the Lakefront Project's homepage:

See https://lakefrontestatesfl.com/. References to the Jewish community also appear throughout the website, *e.g*., "Va'ad Harabunim," "Shul + Mikvah," "Cheder + Yeshiva + Kollel," and "Hatzolah + Chaverim." *See id*. EB5AN is lawfully entitled to express its opinion, based on facts Plaintiffs themselves readily made available to the reader, that the success of the Lakefront Project depends upon selling homes to this small segment of the population because, among other things, others unaffiliated with the Jewish community are unlikely to want to reside there.

> ***the regional center authorizing the EB-5 investments for the Project and its manager have engaged in criminal activity* (¶ 42(e))**

For several reasons, this is the most deceptive of Plaintiffs' characterizations of the statements in the Summary Comments. The statement actually reads:

- **Florida EB-5 Investments, LLC, as the Regional Center**
  - This is a troubled regional center managed by the infamous Marty Cummins—pretty much he will rent his regional center to almost anyone for a fee, and over the years, many of his projects have failed and have had SEC investigations, theft of investor funds, etc.
  - https://casetext.com/brief/securities-and-exchange-commission-v-eb5-asset-manager-llc-et-al_memorandum-of-law-in-support-re-motion-for-asset-freeze-and-other-relief

To begin with, none of the Plaintiffs are referenced in this statement. Rather, EB5AN's comments are directed to non-party Florida EB-5 Investments, LLC, and its manager, Marty Cummins. EB5AN even distinguished Plaintiffs from these third parties, stating immediately below the above reproduction, "[t]he RC is not owned or controlled by [Plaintiff] EB5 United." Therefore, even assuming, *arguendo*, Plaintiffs are complaining about false statements of fact, they are not actionable by these Plaintiffs. *See Reed v. Chamblee*, 2023 WL 6292578 at *9 (M.D. Fla. 2023) ("Florida law requires that any alleged defamation must be 'of and concerning' the plaintiff. … In other words, a statement must be 'specifically directed at the plaintiff' to be actionable," citing *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 805 (Fla. 1st DCA 1997)).

Regardless, nowhere in the Summary Comments appear the words "criminal activity." Plaintiffs' representation of EB5AN's comments to the contrary is intended solely to infuse the Complaint with inflammatory and false rhetoric.

Moreover, the statements that do appear in the Summary Comments—including that other projects sponsored by third parties Florida EB-5 Investments, LLC and Cummins have had serious issues—appear with a link to a legal memorandum filed by the SEC in support of an asset freeze of an individual previously affiliated with those third parties. Thus, EB5AN formed and expressed its opinion of those third parties based on a disclosed public document. These statements cannot, therefore, support a claim for defamation.

there is a conflict of interest and the regional center owners will do what's best for them and not for the EB-5 investors in the fund **(¶ 42(f))**

As above, these statements are not "of and concerning" any of the Plaintiffs, particularly where EB5AN states in context that "[t]he RC is not owned or controlled by [Plaintiff] EB5 United." They are therefore not actionable. *See Reed, supra; Thomas, supra*.

Like the complained-of comment that the Lakefront Project's land valuations are "insane," EB5AN's expression that the regional center's owners "will do what's best for them and not for the EB-5 investors in the fund" cannot be the basis for Plaintiffs' defamation claim because it is a non-literal assertion of fact and rhetorical hyperbole "incapable of being proven true or false." *See Akia, supra.*

there is significant financial exposure **(¶ 42(g))**

While EB5AN's Summary Comments do not use these words (just as they do not use almost all of the phrases Plaintiffs attribute to it), whether a project is financially exposed, including whether the exposure is significant, are matters of opinion upon which industry experts might disagree. Because EB5AN's view is "incapable of being proven false" and is otherwise not "substantially and materially false," this statement cannot, as a matter of law, be the subject of a claim for defamation. *See Markle, supra; Rapp, supra.*

Additionally, EB5AN set forth a full page of facts substantiating its viewpoint, beginning with the following (for brevity, we do not reproduce here the full page of facts):

- **Loan Agreement**
  - The EB-5 loan is not senior and will probably never become senior, so inferior EB-5 loan collateral is a significant risk for investors.

  - The project is sold to investors as "EB-5 is a senior loan with lots of equity," but when you actually double click and read the materials, there is already a very expensive senior mortgage loan (9.99%, with a maturity date of April 2024 with one optional extension for one year). There is also a separate CDD bond that is also senior to EB-5 for another $50M, so EB-5 is really a second mortgage behind all $100M of the senior loans.

Tellingly, Plaintiffs do not challenge the accuracy of any of the numerous facts listed under this heading and which led to EB5AN's opinion concerning the Lakefront Project's financial exposure.

***the Completion Guaranty is worthless* (¶ 42(h))**

The Summary Comments document states:

- **Weak Completion Guaranty**
  - No time period within which the project must be completed by, and this guaranty only talks about "continued advances" being made along with the Senior Lenders and subject to the Senior Lenders … In other words, the Senior Lenders must agree for the EB-5 lender to be obligated to continue spending (any amount of money, on any time period) toward the construction. In summary, this guaranty is pretty much worthless in terms of making sure the entire project gets completed within a set period of time, as the construction is house by house, and not a single structure as well.

Plaintiffs take issue with EB5AN's statement that the guaranty is worthless, but that was a conclusion reached after quoting from the PPM and explaining its meaning. In other words, EB5AN provided the facts, which Plaintiffs apparently do not dispute, and its own opinion/conclusion based on said facts. While Plaintiffs may disagree, they cannot *disprove* EB5AN's opinion that the Completion Guaranty is worthless.

***EB-5 investors will receive unequal treatment* (¶ 42(i))**

The full statement in the Summary Comments reads:

- **Directly Sourced Investors Effectively Get a 3.25% Return**
    - The borrower thinks they can find some of the EB-5 investors to join the project, and for any investor(s) they find, they get a 3.0% reduction in the interest rate … So effectively this means unequal treatment for different investors in the project and really showcases just how risky this project is

Plaintiffs' synopsis is misleading because it omits the reasoned basis for EB5AN's opinion. In proper context, the statement is not defamatory.

***EB5 United did a large, similar EB-5 loan to an ultra-high-end condominium/hotel project in Puerto Rico that failed and went into bankruptcy* (¶ 42(j))**

"Failure" in the context of measuring investment success is a matter of opinion. And the opinion that Plaintiffs' Puerto Rico project failed is based on information readily available to the reader and thus not actionable defamation.

C. <u>Plaintiffs' Tortious Interference Claim Fails Because It Fails to Identify a Business Relationship with which EB5AN Allegedly Interfered and EB5AN was Otherwise Privileged to Interfere</u>.

Plaintiffs' claim for tortious interference with "a business relationship" is based solely upon "interference with Plaintiffs' relationship with agents and existing and potential investors in the Project." Complaint, ¶ 91. But while the Complaint alleges that several investors have withdrawn their investments and potential investors are questioning the project and delaying their investments, see ¶¶ 59–60, it does not identify any specific investor whose relationship with Plaintiffs EB5AN interfered. Because a tortious interference claim cannot be predicated on interference with the public at large or, as in *Bortell, supra*, a "book of business," Count II fails to state a cause of action and should be dismissed.

Further, Plaintiffs allege that EB5AN is their competitor. Complaint, ¶ 38. Therefore, they admit that EB5AN was privileged to interfere to protect its legitimate business interests. *See Wackenhut, supra*.

Plaintiffs may refer to comments EB5AN allegedly made to their "long-standing partner," Florida licensed immigration attorney Marcelle Bastide Poirier, referenced in ¶ 54 of the Complaint, as the basis for a tortious interference claim. However, they do not allege that their relationship with Ms. Poirier was severed.

Moreover, it is reasonable for EB5AN to expect that Ms. Poirer would refer her EB-5 investor clients to any EB-5 regional centers believed to be developing successful projects and that she would not be beholden to any specific EB-5 regional center because of certain biases or inappropriate financial interests. Therefore, EB5AN was competitively privileged to question Ms. Poirier about why she appeared to be referring her clients almost exclusively to Plaintiffs and not at all to EB5AN.

IV. CONCLUSION

Evaluating the Project Summary Comments in their totality, rather than phrases Plaintiffs created, reflects that the alleged defamatory statements consist entirely of inactionable opinions. There are no relationships Plaintiffs identify that were interfered with by EB5AN, which were otherwise competitively privileged to interfere. The Complaint should therefore be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 1, 2024, I served the foregoing document on Carlos F. Gonzalez, Esq., Carlos F. Gonzalez, P.A., *Attorneys for Plaintiff*s, 7600 Red Road, Suite 307, South Miami, FL 33143, cfg@carlosfgonzalez.com and service@carlosfgonzalez.com.

By: /s/ Matthew S. Nelles
Matthew S. Nelles

EXHIBIT “1”

Lakefront EB5 United Project Summary Comments

- **Misleading Valuations/Equity**
  - The equity of the project, the land purchase, is listed at $16M, and yet the "value" of the land in the offering materials is listed as $100M? The land was purchased in 2021 … How did vacant land increase 600%+ in three years in the middle of nowhere in the center of the state of Florida? Where is the supporting appraisal for this, and which comparable(s) are listed? Seems completely unrealistic and deceptive.
  - The projected value of the completed non-residential components of the project (the community center, amenities, etc.) is listed at $200M with no supporting documentation. Again, where is this coming from?

- **Terrible Location**
  - The best quote of the PPM is that the project is "strategically located in the center of Florida right above Lake Okeechobee." There is nothing strategic about this unless you want to be living in the center of the state, as far away as possible from any shopping, beaches, healthcare, or other amenities, and want the cheapest land possible in the state and want to be neighbors with low-income mobile home parks.
  - Success of the project depends on selling homes only to members of the Orthodox Jewish community … a very tiny targeted market that is price sensitive … No other buyers are going to be buying here since no one wants to be the odd person out in a community that is 95% Orthodox Jewish.

- **Florida EB-5 Investments, LLC, as the Regional Center**
  - This is a troubled regional center managed by the infamous Marty Cummins—pretty much he will rent his regional center to almost anyone for a fee, and over the years, many of his projects have failed and have had SEC investigations, theft of investor funds, etc.
  - https://casetext.com/brief/securities-and-exchange-commission-v-eb5-asset-manager-llc-et-al_memorandum-of-law-in-support-re-motion-for-asset-freeze-and-other-relief
  - The RC is not owned or controlled by EB5 United, and there is a fee per investor of $5K to start and then $2.5K after a certain number of investors—this just further increases the cost/risk of the project.
  - Costs the NCE/investors higher fees to rent the license.
  - Less control if something goes wrong / responding to USCIS.
  - Conflict of interest (RC owners will do what's best for them and not for the EB-5 investors in the fund).

- **Loan Agreement**
  - The EB-5 loan is not senior and will probably never become senior, so inferior EB-5 loan collateral is a significant risk for investors.

- The project is sold to investors as “EB-5 is a senior loan with lots of equity,” but when you actually double click and read the materials, there is already a very expensive senior mortgage loan (9.99%, with a maturity date of April 2024 with one optional extension for one year). There is also a separate CDD bond that is also senior to EB-5 for another $50M, so EB-5 is really a second mortgage behind all $100M of the senior loans.
- What’s even worse is that there is no pledge securing the EB-5 loan, like a traditional mortgage; there is just a “second mortgage.” But that second mortgage is completely subordinated to the senior loan and CDD bond—this means that if there is a default on the EB-5 loan, the EB-5 lender cannot take any action until the senior loans are paid first … In reality, this was done so that the borrower could essentially never lose their equity to the EB-5 fund under any situation … This is very high risk for EB-5 investors since they effectively have no security for the EB-5 loan until all of the senior financing is paid first, and the borrower can take up to another $100M of other debt that can become senior.
- The most likely outcome is there are other loans that are senior to EB-5 throughout the period when the EB-5 loan is outstanding and remains at risk.
- Promoted as “senior loan,” but the reality is that $50M must be raised first and the current senior loan completely repaid before the EB-5 loan becomes senior.
- The borrower can take on additional financing up to another $100M that can all be senior to the EB-5 loan, even if the current senior loan is repaid—essentially, this means that the EB-5 loan is never going to be senior,
- The 7% total EB-5 loan interest rate, which is higher than most other projects, indicates higher risk, plus 3.5% of this is paid out of future cash flows—basically, they are admitting that the project can’t afford to pay this loan current so the only way they can take the EB-5 loan funds is to promise to pay the interest if/when future homes are sold … not a good sign for project feasibility (and future repayment of EB-5 investment principal) that they cannot even pay normal current interest on the EB-5 construction loan
- Separately, they are charging the borrower up to $440K for marketing under an “Expense Budget,” which seems extremely high—never seen a budget like that for an EB-5 raise.
- The borrower can terminate the offering and stop the loan if less than $25M is raised and made available in the first 12 months.
- The senior loan is expensive at 9.990% and has a maturity date of April 30, 2024, with only a single one-year extension … If the project can’t get refinanced or raise enough EB-5 loan funds to retire the senior by April 2025, it would face a default and potential complete loss of capital for EB-5 investors.

  - The legal structure chart is very confusing, with way too many entities and related parties across the structure—seems like a very “family-oriented” developer without traditional corporate controls.

- **Misleading Loan Term**
  - Three-year initial term with 4 individual one-year extensions, so really seven years in total with an escalating interest rate (higher rates indicate higher investment/non-payment risk)

- **Weak I-526E Approval Refund Guaranty**
  - The I-526E Approval Refund Guaranty is completely subordinated to multiple senior loans … meaning that if any Senior Lender does not approve, then any denied investor will not be able to be paid by the Guarantor … which means repayment because of an I-526E denial is unlikely to happen since there is no reason a Senior Lender would ever voluntarily consent to their collateral shrinking.

- **Weak Completion Guaranty**
  - No time period within which the project must be completed by, and this guaranty only talks about “continued advances” being made along with the Senior Lenders and subject to the Senior Lenders … In other words, the Senior Lenders must agree for the EB-5 lender to be obligated to continue spending (any amount of money, on any time period) toward the construction. In summary, this guaranty is pretty much worthless in terms of making sure the entire project gets completed within a set period of time, as the construction is house by house, and not a single structure as well.

- **No Preferred Return Concept and Uncommon Delaware LLC Structure**
  - The company charges individual EB-5 investors $145 per month (~$2K per year).
  - The NCE removes nearly all the interest revenue from the EB-5 loan as a management fee first, and then each investor pays their fees. When making a distribution, the NCE distributes any remaining funds (which are likely close to $0) to EB-5 investors.
  - In a more traditional investment structure, investors are paid their preferred return first, and then any remaining funds after the investors are fully paid are allocated to the manager of the NCE (this is how nearly all institutional investment partnerships are structured).

- **Directly Sourced Investors Effectively Get a 3.25% Return**
  - The borrower thinks they can find some of the EB-5 investors to join the project, and for any investor(s) they find, they get a 3.0% reduction in the interest rate … So effectively this means unequal treatment for different investors in the project and really showcases just how risky this project is

for the borrower to have to want to go out and find investors at such a steeply discounted interest rate

- **Prior EB5 United Four Seasons Puerto Rico Bankruptcy**
  - Sponsor did a large, similar EB-5 loan to an ultra-high-end condominium/hotel project in Puerto Rico that failed and went into bankruptcy.

- **Outstanding Diligence Items**
  - Appraisals supporting the insane valuations listed for both the land and for the non-residential components of the project
  - Proof of home sales to date and recognized sales and margins and construction timelines

EXHIBIT 2

"PRIVATE PLACEMENT MEMORANDUM –
NOT ATTACHED TO PUBLIC FILING"