IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT, IN AND
FOR MANATEE COUNTY, FLORIDA

75th STREET LLC,

Plaintiff-Counterclaim Defendant,

vs. No.: 2012-CA-001965

JESSICA LEBOFF, MS. MANNERS
CHILDCARE, INC. and LEARNING
UNLIMITED SCHOOL, INC,

Defendants-Counterclaim Plaintiffs.

PLAINTIFF-COUNTERCLAIM DEFENDANT 75TH STREET'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT ON DEFENDANT-COUNTERCLAIM PLAINTIFFS' COUNTERCLAIMS

Plaintiff-Counterclaim Defendant 75th Street LLC, (hereinafter "Plaintiff" or "75th Street") hereby moves for dismissal with prejudice and / or summary judgment in its favor on each counterclaim asserted by Defendant-Counterclaim Plaintiff Jessica LeBoff ("Defendant LeBoff"), Ms. Manners Childcare, Inc. and Learning Unlimited School, Inc. (collectively, "Defendants"). For the reasons stated herein, Defendants utterly fail to properly allege and / or prove virtually every element necessary to sustain each of their claims.

STATEMENT OF FACTS

Since 2011, and at all times relevant to this action, 75th Street has owned several buildings located at 75th Street West and 22nd Avenue West in Bradenton, Florida. These buildings are located in an otherwise residential area approximately half a mile east of Palma Sola Bay. These buildings share a parking lot and driveway ("75th Street

Plaza") and are further described in the Affidavit of Habibollah Shobeiri, Attached hereto as Exhibit A.

Defendant LeBoff is the headmistress of several different school businesses operating in Bradenton, Florida and is the sole owner of each other Defendant in this action. LeBoff Depo. at 5:6-24. Defendant LeBoff's relationship with 75th Street began when she leased one of two small buildings known as the Portables. LeBoff Depo. at 7:15-21. Defendant LeBoff was not satisfied with those accommodations and frequently quarreled with the headmistress who occupied a larger nearby building known as the School building. As its name implies, the School building was better designed than any other building at 75th Street Plaza for use as a facility accommodating young children. Defendant LeBoff began sending disparaging correspondence regarding the other headmistress and suggested that the situation in the 75th Street Plaza would improve if 75th Street instead leased the School building to Defendants. See, e.g. April 28, 2011 Email from Jessica LeBoff to Karim Shobeiri, Attached Hereto as Exhibit B.

In Spring 2011, Defendant LeBoff and the managing member of 75th Street Plaza began discussing the possible lease of the School building for Defendant'(s) operation(s). Defendant LeBoff proffered the language from another lease she had with a previous landlord as the model for the form of the lease of the School building to Defendants. Although Defendant LeBoff has paralegal training, neither party retained counsel for the purpose of negotiating the lease terms for the School building. In a Lease dated June 16, 2011, 75th Street agreed to lease, and Defendant LeBoff agreed to rent, the School building located at 2015 75th Street West, Bradenton, FL 34209 for a period of ten years which commenced on August 1, 2011, when Defendant LeBoff began her K-5 school

operation at that location.

Before the ink was dry on the School building lease, Defendant LeBoff approached the managing member of 75th Street in a tearful panic and informed him that Benderson/Buffalo-Marine, the landlord of her other business, a preschool, had just exercised an option to terminate her lease with only 90 days notice. 75th Street began negotiating with Defendant LeBoff to renovate the Church building so that Defendant LeBoff could lease that space and relocate her preschool. During the course of negotiations, 75th Street spent substantial sums of time and money on preliminary work to renovate the Church building to Defendant LeBoff's specifications. Among other things, 75th Street commissioned a traffic study, began the administrative permitting process, and hired an architecture and engineering company to prepare building plans. Although negotiations continued, Defendant LeBoff became increasingly intransigent in late September 2011.

Although Defendant LeBoff's conduct was inexplicable to 75th Street at that time, Plaintiff has since discovered that on September 28, 2011, an article appeared in the Bradenton Herald reporting that the Richard Milburn Academy ("Milburn") was going to be shut down. See Milburn Academy Shutdown Would be Third in Florida, Attached Hereto as Exhibit C-A. Milburn occupied a building then owned by Peerage Properties LLC, and located at 6210 17th Avenue West in Bradenton, Florida. ("Peerage Building") Defendant LeBoff had long coveted this building due to its suitability for young children and the fact that its square footage and layout would allow it to accommodate all of Defendant LeBoff's operations under one roof. On October 5, 2011, Defendant LeBoff telephoned Vincent Crisci, referred to the Bradenton Herald article, and indicated an

interest in leasing the Peerage Building. Defendant LeBoff then visited the Peerage Building, took the liberty of creating a "list of repairs," and again contacted Crisci on October 15, 2011, this time requesting a lease that would encompass each Defendant as co-lessees. See Affidavit of Vincent Crisci, Attached Hereto as Exhibit C.

Upon receiving a draft lease, Defendant LeBoff quickly returned the lease without any negotiation, redline, or revision. In this lease, Defendant LeBoff personally guaranteed the performance of each other Defendant. On November 15, 2011, Defendant LeBoff began relocating both of her school operations to the Peerage Building, including her K-5 operation then located at the 75th Street School building pursuant to the binding and executory 10 year lease. On November 21, 2011, Defendant LeBoff sent a letter to parents that jubilantly announced the relocation. This letter vacillates between blaming Defendant LeBoff's itinerancy on both the preschool landlord, Benderson/Buffalo-Marine, and the K-5 landlord, 75th Street, and paints 75th Street's managing member as a fugitive who "stopped the process . . . and left the country." The letter describes the coveted Peerage Building as follows:

> We found a free standing building that is not in a shopping plaza and [which] will be perfect for both schools. The rooms are much larger; there is room for separate playgrounds by age, a large activity center for lunch and after school students and a basketball court. We are very excited that we will be able to offer much more to your children!

Nowhere in the letter does Defendant LeBoff (d/b/a/ Miss Manners) acknowledge that she decided to renege on a ten year lease before the ink was dry on the contract she herself wrote. See November 21, 2011 LeBoff Letter, Attached hereto as Exhibit D.

Meanwhile, back at 75th Street Plaza, and throughout October 2011, LeBoff continued to feign negotiations with the managing member for terms for the Church

building, and 75th Street continued to spend money for preliminary work for the contemplated build out of the Church building. During these negotiations Defendant LeBoff never mentioned that she was already making plans to vacate the School building and to relocate all of her school operations to the coveted Peerage Building. Defendant LeBoff also failed to mention that she was receiving a $60,000 payoff from Benderson/Buffalo-Marine to agree to vacate her preschool premises. LeBoff Depo. at 27:12-29:8, 51:4-12. At the end of October 2011, the parties had still not reached an agreement on the terms for the Church building lease and build-out. At the end of October, the managing member of 75th Street traveled overseas on a pre-planned business trip. When he returned in late November 2011 he discovered that Defendant LeBoff was no longer operating any school in any of the buildings owned by 75th Street. Defendants inexplicably failed to pay the December 2011 rent and related lease expenses for November 2011 and December 2011. Despite repeated informal attempts to contact Defendant LeBoff during the first two weeks of December 2011 to discuss the situation, and subsequent formal demands pursuant to the applicable lease provision, Defendants have refused and continue to refuse to pay the rent due under the lease through the present day. 75th Street has had great difficulty re-leasing the premises, which remain vacant. The vacancy created by Defendant LeBoff's decision to walk out on her lease just four months into a ten year lease has caused substantial losses to 75th Street.

Indignant that 75th Street has acted to protect its legal rights, Defendant LeBoff has concocted a version of events in which she alleges that 75th Street agreed to rent the Church building without documenting that agreement in a lease, "doubled the rent" without justification, and "tortiously interfered" with her "reputation as a stable school"

by forcing her to move into a larger, less expensive, and better located building which she had long coveted. Although it was Defendant LeBoff who disappeared from 75th Street Plaza like a thief in the night, she now has the temerity to insinuate that 75th Street's managing member traveled overseas for the purpose of rendering himself unavailable for further negotiations on the Church lease.[1] It is bad enough that LeBoff allowed 75th Street to spend time and money pursuing the Church building lease negotiations even when she intended to relocate elsewhere, but instead of leaving well enough alone, she has now lodged legally and factually unfounded claims against 75th Street arising out of the negotiations she herself scuttled. It is simply fanciful to assert that 75th Street's managing member was so cowed by Defendant LeBoff that he fled the country to avoid dealing with her and then to turn around and assert that the same individual is responsible for interfering with Defendant LeBoff's relationships with her students.

Even if the Court gives Defendant LeBoff the benefit of the doubt, and assumes that Defendant LeBoff panicked because she needed to find a new location for her preschool, the Court cannot excuse Defendant LeBoff's additional decision to dishonor her lease, nor should it go one step further and entertain any of her counterclaims. LeBoff utterly fails to point to any written document whatsoever that formally obligates 75th Street to facilitate any build out or relocation, given that the parties never reached an agreement for the lease of the Church building. Any assertion that LeBoff would have refused the School building lease without assurances that she would be granted a lease on the Church building is belied by the fact that LeBoff utterly fails to show that she was given any such assurance. Indeed, Defendant LeBoff had little reason to demand such

[1] In any event, LeBoff conspicuously fails to point to any lease provision that requires her commercial landlord to be "accessible" to her for sham negotiations.

assurances, because on June 16, 2011 when the School building lease was executed, LeBoff thought she would be allowed to remain at the Benderson/Buffalo-Marine location for another year, providing her ample time to complete negotiate any second lease she needed (at 75th Street Plaza or elsewhere) and perform any necessary renovation.

It was only Defendant LeBoff's receipt of the wholly unexpected lease termination notice from Benderson/Buffalo-Marine and not any action by 75th Street that created her predicament. Defendant LeBoff then found a solution whereby she could consolidate her entire operation at a coveted location at a reduced rent without awaiting the build-out of the Church building. Defendant LeBoff's decision is perhaps understandable, but the inescapable fact is that Defendant LeBoff freely chose to breach her lease with 75th Street without justification. She has made her bed and now she must lay in it even if she now finds it too small. If Defendant LeBoff did not want to be in the position of being sued and concocting counterclaims she should have either continued negotiations with 75th Street or found an alternative location for her preschool while honoring her lease commitment to 75th Street.

LEGAL STANDARD

Counsel defers to Judge Klein of the Fourth District Court of Appeal in *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So. 2d 1105, 1108 (Fla. App., 2000):

> In urging that we should reverse, Martin cites far more cases on the standard of review for summary judgments than it does on the substantive issue of whether there was tortious interference with a contract. Although we expect the parties in every case to address the standard of review, when that standard is so well established as it is for review of summary judgments, it is only necessary to cite one case, not nine as has been done here. Counsel's preoccupation with summary judgment cases probably stems from the popular misconception among the trial bar and bench that

> summary judgments are routinely reversed by appellate courts. Although it is true that, generally speaking, issues of negligence cannot be resolved on summary judgment, commercial litigation is another matter. Where a claim such as this one is filed, and after full discovery there is no evidence to support the allegations and there are thus no genuine issues of material fact, summary judgment should be granted. A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict.

All that is left to add is that even assuming the allegations in Defendants' Counterclaims are true, they are not entitled to any of the relief that they seek. This motion is thus a hybrid motion to dismiss and for summary judgment which attacks both the legal sufficiency and factual proof of the claims asserted by Defendants.

FRAUD IN THE INDUCEMENT

Count I Should be Dismissed Because Defendants Fail to Plead Fraud with Particularity as Required by the Florida Rules of Civil Procedure

Florida Rule of Civil Procedure 1.120(b) states that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." Throughout twelve pages of their operative pleadings, however, Defendants utterly fail to allege - particularly or even generally - any statement made by 75th Street. Nor do Defendants come close to showing that any statement by 75th Street was material, false, and relied upon by Plaintiffs in entering into the lease of the School building. In order for a claim of fraud in the inducement to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla.R.Civ.P. 1.120(b), including who made the false statement, the substance of the false statement, the time frame in which it was made, and the context in which the statement was made. *Bankers Mutual Capital Corporation v. United States Fidelity and Guaranty Company*, 784 So.2d 485, 490 (Fla. 4th DCA 2001).

Count I Should be Dismissed Because Defendants' Factual Claims Cannot Trump the Statute of Frauds.

As discussed infra, Defendants' main problem in this case is that they impermissibly attempt to rely on alleged oral representations to vary the terms of a written document. In *Canell v. Arcola Hous*ing, 65 So.2d 849 (Fla. 1953), the Plaintiffs claimed that the seller of parcels of land orally promised to install beach facilities which would augment the value of their lots. The Court held:

> While it is contended by plaintiffs that they are suing for damages for fraud and deceit, such an action under the circumstances of this case is simply an attempt in an indirect manner to obtain damages for breach of the contract. Since the provision in the statute prohibiting any action to be brought on an oral contract within the statute includes actions based indirectly on the contract, 'an action for damages cannot be maintained on the ground of fraud in refusing to perform the contract, even though the defendant at the time of the making of the oral contract may have had no intention of performing it.' 25 R.C.L. 691. See also Dung v. Parker, 52 N.Y. 494. Although some courts have reached the contrary conclusion, 49 Am.Jur. p. 841; 23 Am.Jur. p. 889; anno. 104 A.L.R. 1420, we think that on the facts of the case under consideration the rule quoted above is best calculated to uphold the theory upon which the statute of frauds is founded, in accord with the principle that so long as the statute can be made to effectuate its purposes, courts should be reluctant to take cases from its protection. Yates v. Ball, 132 Fla. 132, 181 So. 341.

This Court should similarly reject Defendants' claim.

Count I is Subject to Dismissal and/or Summary Judgment Because Plaintiff Fails to Plead and Prove Essential Elements of the Cause of Action

The essential elements of common-law fraud are: (1) a false statement of fact; (2) known by the person making the statement to be false at the time it was made; (3) made for the purpose of inducing another to act in reliance thereon; (4) action by the other person in reliance on the correctness of the statement; and (5) resulting damage to the other person. *Gandy v. Trans World Computer Tech. Group*, 787 So.2d 116, 118 (Fla. 2nd DCA 2001). Here, Defendants fail to plead and prove each element of the cause of

action. Plaintiff conspicuously fails to allege, for example, that 75th Street had another plan for the Church building at the time 75th Street supposedly promised it to Defendant LeBoff. As discussed elsewhere, Defendants also fail to show that they were damaged by their own itinerance.

Plaintiff incredibly asserts that 75th Street unreasonably refused to lease the Church building after it had supposedly committed itself to do so, only to incur over two years of vacancy. However, Plaintiff LeBoff admitted at deposition that (1) she lacked anything besides an alleged and undocumented verbal commitment to lease the Church building, (2) the parties could not reach mutually acceptable terms for the Church lease and build-out, (3) 75th Street had no other prospective tenants during the negotiations, and (4) was guilty of nothing more than hard bargaining. LeBoff Depo. at 52:25-56:8.

BREACH OF CONTRACT

The Written Lease Controls Under the Parol Evidence Rule

Over a century ago, the Supreme Court noted that it "is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." *Northern Assurance v. Grand View*, 183 U.S. 308, 318 (1902). Yet that is exactly what Defendant LeBoff is attempting to do here: show, through her own testimony, that she was party to "a two-part contract consisting of the Lease for the [School building] and an agreement to supplement the Lease to facilitate Tenants having two schools located on one property located in the same shopping center at 2207 75th Street West, Bradenton, Florida, on or before August 2012." Defendant's Counterclaims at 27.

The problem with Defendant LeBoff's theory of the case is that it is contradicted by the both the lease, other documents, and the sequence of events. The parol evidence rule was developed precisely because Defendant LeBoff is not the first litigant to use such vexatious tactics. Litigants frequently attempt to reinterpret contacts when events do not unfold to their liking or previously friendly relations take a turn for the worse. It is precisely because memories are convenient and documents do not lie that courts apply the parol evidence rule to protect contracting parties. As the Supreme Court stated:

> 'When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.'
>
> The rule is thus expressed by Starkie, Ev. 9th Am. ed. 587:
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> 'It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.' citing Starkie, Ev. 9th Am. ed. 587.

In this case, the facts show that there is no reason, equitable or otherwise, to depart from the parol evidence rule to allow Defendant LeBoff's incredible claim that the parties originally bound themselves to a lease on the Church building as well as the School building.

Defendants may seize upon a unilateral letter drafted by Defendant LeBoff on April 28, 2011, order to show that the parties reached an understanding on the Church building. However, this letter actually shows that the parties did *not* reach an agreement on the Church building, in April 2011 or at any time thereafter. The letter begins: "I have read over the lease agreement and it is unfortunately not what we agreed to." April 28, 2011 Email from Jessica LeBoff to Karim Shobeiri, Attached Hereto as Exhibit B. After some haggling, it continues "I provided a copy of my commercial lease which has a breakdown of everything that is included in the lease agreement." *Id.* Defendant LeBoff further elaborates on her dissatisfaction with the price before announcing a unilateral intention of "renting the entire property once the build out is complete." *Id.* She concludes the letter by stating that she is "positive we can come to an agreement with regard to the lease and be able to move forward and complete this property . . ." and then disparages the current tenant. *Id.* It is clear that this communication is part of the back and forth between parties negotiating at arms length who did not agree upon anything until June 16, 2011, and at that time only agreed on a lease for the School building.

The impetus for the renewed negotiations over a potential lease of the Church building was Benderson/Buffalo-Marine's exercise of their early entry option and their 90 day notice to LeBoff. This had not yet occurred on June 16, 2011, when the parties signed the School lease, nor had it occurred by August 1, 2011, when Defendant LeBoff moved her K-5 operation into the newly leased School building. The notice was issued only on August 18, 2011. Although the need for an eventual move to the Church building was foreseeable to LeBoff, essential terms, such as move-in date, assumption of renovation costs, and rent amounts were never agreed to by the parties. Moreover any

mention of the Church building is absent from the written June 16, 2011 lease agreement. Defendant LeBoff instead seizes upon a fleeting reference to a "supplemental agreement" to suggest that the parties agreed to an entirely separate lease. The relevant passage reads in full:

> That the Lessor hereby lets to the Lessee and the Lessee hereby hires from the Lessor the following premises:
>
> Approximately 7,300 square feet of space located at 2015 75th Street West, Bradenton, FL 34209 ("Demised Premises") for a term of ten (10) years to commence on the 1st day of August, 2011, or to commence on the date the Lessee opens for business, whichever is sooner; within a reasonable time thereafter, Lessor and Lessee shall enter into a supplemental agreement prepared by Lessor which affirms the date that the premises were made available and the date upon which the original term of said Lease shall expire.

The language clearly refers to only one building and one commencement date. The "supplemental agreement" language was requested by Defendant LeBoff in order to give her the prerogative to start operations prior to August 1, 2011, if she found herself in the position to do so. It had no impact on the parties' actual conduct because Defendant LeBoff in any event began her operations in the School building on August 1, 2011.[2] Defendant LeBoff thus fails to show that the parties ever agreed to a lease on the Church building.

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[2] Even in the event of an ambiguity in the contract, the doctrine of *contra proferentem* applies to Defendant LeBoff because she proffered the form contract for the lease. The Florida state law doctrine of *contra proferentem* holds that ambiguous contracts must be construed against their drafters. *Billings v. Unum Life Insurance*, 459 F.3d 1088, 1091 (11th Cir. 2006). Defendant LeBoff provided the language for the lease, further foreclosing her attempt to use parol evidence to interpret any ambiguous contract term.

Defendants' Claim is Barred by the Statute of Frauds

Florida Statute 725.01 reads:

> No action shall be brought . . . for any lease thereof for a period longer than 1 year, or upon any agreement that is not to be performed within the space of 1 year from the making thereof . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

Here, Defendant LeBoff admitted at deposition that no memorandum of 75th Street's alleged promise exists:

> "Q. Are you saying. Are you saying there's some evidence that you have that Mr. Shobeiri at any time agreed on a specific rent on this additional space? A That was done with the two witnesses that witnessed his signing. It was a meeting in my office. Q Are there any documents that reflect that? A No. It was a verbal contract."

LeBoff Depo. at 27:5-11. She later elaborated:

> Q I'm a little confused. The filings that you've made so far indicate both that the plaintiff is in breach for not entering into a supplemental agreement and also that a supplemental agreement was executed. Can you tell me which one is true? A There was no supplemental agreement executed except for a verbal. Q In Paragraph 15 of your counterclaim you talk about -- allege that the plaintiff attempted to double the rent. Again, could you explain exactly what you mean by that? A We had agreed to a cap of $18,000. That was the total amount for rental of the property. Once Benderson Development gave me notice that I had to be out within 90 days, he changed the terms. It was almost $24,000 in addition -- yeah, added on, and then he also wanted that to be triple net. Q So when you say you agreed, you meant verbally agreed? A I didn't agree to the doubling of the rent. This was done with the witnesses when we reviewed the lease. It was a four-party meeting, sitting down. It was agreed upon, the terms and the conditions. After Benderson served their notice, he changed those terms and conditions. Q That agreement that you just referred to, was that ever in writing, executed by the parties? A No Q So it was verbal. A It was verbal.

LeBoff Depo. at 34:22-36:1. Because Defendants admit that the contemplated lease term was for longer than one year, Defendants' Response to RFA 14, their claim(s) are barred by the statute of frauds.

The Lease's Merger Clause Further Forecloses Defendants' Claim

Defendant LeBoff is specifically foreclosed by the merger clause in the June 16, 2011 lease from introducing parol evidence about any representation by 75th Street:

> NEGOTIATION AND EXECUTION
>
> . . .
>
> NEITHER PARTY HAS MADE ANY REPRESENTATIONS OR PROMISES EXCEPT AS HEREIN CONTAINED, AND NO MODIFICATION OF ANY PROVISION HEREOF SHALL BE VALID UNLESS IN WRITING AND SIGNED BY THE PARTIES HERETO

This merger clause is very similar to the clause which was upheld in *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290 (11th Cir. 1998), which read:

> This Agreement contains the entire Agreement between [Telesat] and [JEJ]. There are no other agreements or understandings stated or implied except as are contained herein. It is hereby further understood that any changes, modifications or alterations of this Agreement shall be in writing and executed by all parties hereto.

The Court held that "When a contract contains such a merger clause, the agreement is deemed to be 'integrated,' such that evidence of prior or contemporaneous agreements shall not be admitted to contradict the terms of the contract." *Johnson, Id*. at 1309. The Court in Johnson also cited *Chase Manhattan Bank v. Rood*, 698 F.2d 435, 436 (11th Cir. 1983) for the proposition that in Florida "evidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid

contract."[3] The Court explained that "this rule applies when the parties intend that a written contract incorporate their final and complete agreement. One way to demonstrate such intent is through the use of a merger clause." *Id*., at 1390, *citing* E. Allan Farnsworth, Contracts § 7.3, at 476 (2d ed. 1990). The court ultimately held that "JEJ's claim is reduced to a claim that the mileage guarantee was an oral agreement that should be used in interpreting the written agreement. As such, the claim is barred by the parol evidence rule." *Id*. at 1309.

Although *Johnson* noted exceptions to the parol evidence rule, it also noted that:

> The party submitting parol evidence under this exception, however, carries a heavy burden of proof. See Healy v. Atwater, 269 So.2d 753, 755 (Fla. 3d DCA 1972). The inducement exception "requires the [oral] agreement to be shown by evidence that is clear, precise, and indubitable; that it shall be found that the witnesses are credible, that they distinctly remember the facts to which they testify, and that they narrate the details exactly and that their statements are true." Mallard, 164 So. at 678 (emphasis added); see also Rood, 698 F.2d at 438. As the trial judge noted, in applying the inducement exception, "we do not believe that, when the existence of the contemporaneous oral agreement rests solely on a credibility choice between two witnesses, the proof of that accord is 'clear, precise, and indubitable.' " Rood, 698 F.2d at 438 n. 4 (quoting Mallard, 164 So. at 678).

In this case, Defendants' proof is anything but "clear, precise, and indubitable," it is utterly lacking. Defendants' position on this issue is neither factually sympathetic nor legally compelling.

As shown above, Defendant LeBoff's transparently post-hoc interpretation of the lease was concocted for litigation purposes, is belied by her own documents, correspondence, and testimony, and is foreclosed by black letter law. Although Defendant LeBoff complains about everything from rental amounts to travel schedules,

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[3] The *Johnson* Court also noted that "more fundamentally, JEJ gave no consideration in exchange for the mileage guarantee, and thus no contract was formed." *Id*. at 1310. LeBoff likewise fails to allege any additional consideration that was paid for the alleged agreement to lease the Church building.

she conspicuously fails to allege that 75th Street breached a single provision of the 19-page June 16, 2011 lease that she herself drafted and edited.

TORTIOUS INTERFERENCE

Count III Should be Dismissed Because Defendants Fail to Allege and Prove Facts Showing Each Element of Tortious Interference

According to the Florida Supreme Court, four elements are required to establish a case of tortuous interference with a business relationship. The elements are "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla.1985). As shown below, Defendants fail to adequately allege, much less prove, each element.

Count III Should be Dismissed Because Plaintiff Fails to Allege and Prove Any Particular Contractual Relationship With Which Defendants Interfered

A party may not claim tortious interference when the relationship that is allegedly tortiously interfered with is terminable at will. *Perez v. Rivero*, 534 So.2d 914, 916 (Fla. 3d DCA 1988). Based upon the allegations in Defendants' Counterclaims, students had no obligation to continue attending Defendants' programs. In fact, Defendants' contracts indicate that parents may remove their children from Defendants' programs on a mere two weeks' notice, and Defendants may suspend or expel students for a wide variety of reasons which ultimately appear to rest within the substantial discretion of Defendant LeBoff. See Student Handbook, Attached Hereto as Exhibit E. Under these circumstances, Defendants cannot claim any relationship susceptible of tortious

interference, particularly when Defendants utterly fail to allege or prove that any particular student withdrew from Defendants' programs as a result of any act by Plaintiffs.

Nor can Defendants rely on the theory that any reputational harm impaired Plaintiff's ability to recruit new students from the general public. *Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489, 496 (Fla. 2nd DCA 1987) (rejecting "advantageous business relationship with the community" theory), *accord, Ethan Allen v. Georgetown Manor*, 647 So.2d 812 (Fla. 1994) (holding that there is no protectable interest in a general relationship with former customers).

Plaintiff's only possible claim, then, is that Defendants interfered with an expectancy that Plaintiff's relationship with certain customers would continue. As stated previously, this does not give rise to a claim for tortuous interference. *Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252 (Fla. 3rd DCA 1993). Even if Defendants could rely on such a theory, they have neither pled nor proven that any such relationships lapsed due to Plaintiff's conduct.

The Court Should Dismiss Count III Because Plaintiff Fails to Allege that Plaintiff Acted Intentionally and Unjustifiably

In *Chicago Title Insurance v. Alday-Donalson Title*, 832 So.2d 810, 814 (2nd DCA 2002), Second District Court of Appeal held that "[i]n considering the element of causation, Florida courts have held that the plaintiff must plead and prove that the defendant manifested a specific intent to interfere with the business relationship." Plaintiff fails to show any intent by 75th Street to interfere with Defendants relationship any students. Even a party who actually obtains business from a customer who is already under contract does not tortuously interfere absent evidence that the alleged tortfeasor specifically intended to induce a breach of the original contract. *Chicago Title, id.* In

this case, Defendants alleged conduct - hard bargaining on a commercial lease that Defendants needed in order to service their students - is even farther afield. In order to survive a motion to dismiss, a tortuous interference count must allege that the defendant both knew of the contract and actively solicited the breach. S*ee, e.g. Southeastern Integrated Medical v. North Florida Women's Physicians*, 50 So.3d 21 (5th DCA 2010). The gravamen of Defendant LeBoff's claim is that 75th Street did not move ahead with the lease on the Church building quickly enough to satisfy LeBoff's business needs, even though 75th Street had supposedly already agreed to the lease. However, Defendant LeBoff's sudden need for an expedited build-out of the Church building did not arise until after the School building lease was negotiated and signed. LeBoff Depo. at 26:7-10 ("We moved forward. Instead of having a one-year period until October 31st, 2012 to build out the 2209 building, we were moving forward with building it out within the 90-day period.")

Even assuming that 75th Street had an obligation to move forward with the lease and build-out of the Church building at all, much less on LeBoff's changing schedule, any failure to move forward simply cannot support a claim for tortious interference unless Defendant LeBoff can plead and prove that 75th Street was acting with the intent of damaging her reputation or relationship with parents, rather than for a proper economic motive. *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So. 2d 1105 (Fla. 4th DCA 2000) In fact, LeBoff's repeated assertions that 75th Street derailed the negotiations by insisting on a high rent foreclose her assertion that 75th Street acted with the intent of hampering her business rather than maximizing its own revenues. See, e.g. LeBoff Counterclaim at 15 ("Landlord failed and/or refused to act in good faith by unilaterally

raising rent, by almost double the amount the parties originally agreed upon."), LeBoff Depo. at 55:2-3 ("Because I could service more children, all of a sudden he wanted more money.") and 46:11-12 ("I informed him I would not pay additional rent."), November 21, 2011 LeBoff Letter ("The landlord was in the process of building out the church building, but stopped in the process because I would not agree to his new rental terms for the entire property and left the country.")

Plaintiff is Entitled to Summary Judgment on Count III Because Defendant Fails to Prove or Even Plead that Defendant had any Contact Whatsoever with Any Parent or Student Dealing with Defendant

Defendants fail to show that 75th Street or any of its agents had more than incidental contact with any of Defendants' pupils or parents. Absent such contact, Defendants cannot sustain a claim for tortious interference. 75th Street rents buildings and is not presently engaged in any education business. Because 75th Street had no interest in Defendant' business it had no reason to interfere, which would only jeopardize Defendants' revenues and ability to pay rent on the School building lease. Because 75th Street had negotiated a satisfactory 10 year lease just months prior, and, unlike LeBoff, experienced no adverse material change, it had every incentive to maintain a good atmosphere at 75th Street Plaza. Defendant LeBoff even admits that 75th Street was not seeking, for example, to induce LeBoff to move so that they could accommodate a more lucrative tenant. LeBoff Depo at 56:4-8. It is very telling that as discussed above, LeBoff demanded a payoff to move from her old location. 75th Street is not the only commercial landlord, it would seem, that LeBoff blamed for her predicament.

Plaintiff is Entitled to Summary Judgment on Count III Because Defendant Fails to Prove or Even Plead that Plaintiff Caused Any Actual Harm or Loss to Defendants

Defendants fail to show that any wrongful action by Plaintiff caused Defendant to lose any students. Plaintiff fails to plead the fourth element for tortuous interference, as required by *Tamiami*: damage to the plaintiff as a result of the breach of the relationship. Defendants fail to plead any reduction in profits or revenues, or even that it lost a single student due to Plaintiff's actions. Instead, Defendants merely plead that "Tenants' reputation as a stable private school was damaged." The record is utterly devoid of any evidence that (1) Defendants had a "stable" reputation, (2) that the inability to relocate Defendants' second operation to the 75th Street location damaged any "stable" reputation, or (3) that any damage to that reputation caused Defendants to lose students or revenues. In fact, Defendants fail to even allege such facts in their Counterclaim Complaint. Indeed, if Defendants ever enjoyed a "stable" reputation that was later tarnished it was because (1) Defendants' previous landlord exercised the early termination option and (2) Defendant LeBoff unilaterally decided to relocate one of her operations for the third time in the space of one calendar year. Even Ms. Manners' preschool children would likely understand the wrongfulness of Defendant LeBoff's decision to break her promise to 75th Street to lease the School building for ten years.

In this case, even assuming that Defendants' conclusory allegation their "stable" reputation has been tarnished is adequately pled and supported in the record, Plaintiff fails to adequately plead that any wrongful act by Plaintiff, as opposed to Defendant LeBoff's own conduct,[4] the conduct of third parties, economic conditions, competition

[4] Of course, Defendant LeBoff's conduct caused severe economic harm to 75th Street, but that is another matter for another motion.

from other schools, or other unrelated factors actually caused any actual loss. In fact, there appears to be no loss at all because LeBoff estimates that she currently has 95 students in her K-5 program which is very close to the absolute capacity of the School building according to the June 16, 2011 lease. LeBoff Depo. at 51:18-23. 75th Street's lawful decision to negotiate at arms length with Defendant LeBoff in order to reach commercially acceptable terms for the lease cannot be the basis for a tortious interference claim. *Networkip, LLC v. Spread Enterprises, Inc.*, 922 So.2d 355, 358 (Fla. 3rd DCA 2006) ("No cause of action for intentional interference exists which is the consequence of a rightful action.")

ATTORNEY FEES

In their WHEREFORE paragraph, Defendants inexplicably request attorney fees. Counterclaims at 12. Under the American Rule, attorney fees are not available unless a specific statute or contract provision provides otherwise. Defendants assert only three common law claims and fail to cite a single statute in their entire pleading. Although the June 16, 2011 lease provides for collection costs, they are only available to the Lessor (75th Street) and are "deemed to be additional rent." June 16, 2011 lease at 43. Due to Defendant LeBoff's legal training and front-seat role in negotiating the lease, she is bound strictly to its terms. See Note 2, Supra. Because Defendants' attorney fee request is utterly without basis, it should be stricken from the pleadings and counsel should be sanctioned.

CONCLUSION

WHEREFORE, Plaintiff-Counterclaim Defendant 75th Street respectfully requests that this Honorable Court either dismiss with prejudice or grant summary judgment in favor of Plaintiff on each of Defendant-Counterclaim Plaintiff's Counterclaims, strike Defendants' attorney fee request, and award costs to 75th Street.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael Beltran, certify that a true and correct copy of the foregoing was electronically filed on system of the Twelfth Judicial Circuit Court in and for Manatee County, Florida, and served on Daniel Anderson, Counsel for Defendants-Counterclaim Plaintiffs, by email at danderson@floridalawpartners.com and on this the 30th day of January, 2014.

/s/Michael Paul Beltran
Michael Paul Beltran