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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXELON GENERATION ACQUISITIONS LLC, a Delaware limited liability company, Defendant Below – Appellant / Cross-Appellee, v. DEERE & COMPANY, a Delaware corporation, Plaintiff Below – Appellee / Cross-Appellant.	No. 28, 2017 On Appeal from the Superior Court in and for New Castle County The Honorable Mary M. Johnston C.A. No. N13C-07-330 **REDACTED PUBLIC COPY FILED MARCH 29, 2017**

CORRECTED OPENING BRIEF OF APPELLANT / CROSS-APPELLEE, EXELON GENERATION ACQUISITIONS LLC

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NATURE OF PROCEEDINGS

This is a breach of contract case concerning a Purchase Agreement executed by Exelon Generation Acquisitions LLC ("Exelon") and Deere & Company ("Deere") in August 2010. Pursuant to the Purchase Agreement, Deere sold all of its wind energy assets to Exelon. These assets included the Blissfield Wind Project ("Blissfield Project"), which the Purchase Agreement defined as "the wind project under development in Lenawee County, Michigan." A302, § 1.1.

As part of the Purchase Agreement, Exelon agreed to pay Deere a $14 million "Earn Out" if Exelon succeeded in bringing the Blissfield Project to commercial operation. But that never happened. In July 2011, antiwind activists were successful in having a zoning ordinance enacted that made further development of the Blissfield Project impossible. Prior to the execution of the Purchase Agreement, Deere knew that local opposition posed a substantial risk to the Blissfield Project. But, as Deere's then-head of project development testified, Deere did not fully disclose to Exelon the extent of this opposition or the likelihood that the Blissfield Project would be stymied. Given the unyielding opposition to wind farms among residents of Lenawee County, Exelon ultimately was forced to abandon the Blissfield Project in May 2012.

Meanwhile, in light of the opposition in Lenawee County, Exelon was also exploring the development of other wind farms in Michigan. Among the other assets acquired by Exelon from Deere was a power purchase agreement ("PPA") in which Consumers Energy ("Consumers"), a Michigan utility, had agreed to purchase the energy expected to be generated by the Blissfield Project. In 2011, Exelon negotiated with Consumers to amend the PPA so that it could be utilized in connection with wind projects located outside of Lenawee County. In exchange for the amendment, Consumers required Exelon to take on $16 million worth of new risk.

Exelon ultimately used the amended PPA at project called the Beebe Wind Farm ("Beebe"). Beebe is located in Gratiot County, Michigan, over 100 miles away from the Blissfield site. Deere had no role in developing Beebe. Exelon acquired it from a different developer—Nordex, a German manufacturer of wind turbines—that had no relationship to Deere. Importantly, the Beebe project had all permits in place and faced no community opposition. Exelon paid Nordex $10.3 million in exchange for the right to develop Beebe. Today, Beebe is operational and is selling its energy under the amended PPA.

The question in this case is whether, as a result of its development of Beebe, Exelon owes Deere the Earn Out that would have been due if the Blissfield Project

had been completed. Exelon's position is that no Earn Out is owed because the Blissfield Project never achieved commercial operation. Deere's argument boils down to the notion that it is entitled to the Earn Out because Exelon is now selling the energy produced by Beebe—a project that Deere had nothing to do with and that is not mentioned in the Purchase Agreement—using the amended PPA. But the amendments to the PPA did not alter the plain terms of the Purchase Agreement. Those terms unambiguously make the Earn Out contingent on whether the *Blissfield Project* reached commercial operation—not on whether any project using the PPA reached commercial operation.

The Superior Court nevertheless granted summary judgment for Deere. The Superior Court erroneously treated the entire PPA as incorporated by reference into the Purchase Agreement, and then exacerbated its error by finding that the amendments to the PPA somehow altered the definition of the Blissfield Project that appears in the Purchase Agreement. But even after the PPA was amended, the Purchase Agreement still provided that Deere would be owed an Earn Out only if the *Blissfield Project* met certain milestones and still defined the Blissfield Project as "the wind project under development in Lenawee County, Michigan." Because no wind project in Lenawee County exists or ever met the milestones, no Earn Out is owed. Accordingly, the Superior Court's judgment should be reversed.

SUMMARY OF ARGUMENT

1. The plain language of the Purchase Agreement establishes that no Earn Out is due. The Purchase Agreement provides that the Earn Out is payable "[a]t such time as . . . the Blissfield Wind Project achieves" certain milestones or commercial operation. A319, § 2.6(a). The Agreement defines the "Blissfield Wind Project" as "the wind project under development in Lenawee County, Michigan." A302, § 1.1. It is undisputed that no wind project in Lenawee County ever met the milestones or achieved commercial operation. Thus, no Earn Out payment is due.

2. The Purchase Agreement additionally specifies that no Earn Out will be due if Exelon reasonably abandons the Blissfield Project and describes the procedure that Exelon must follow to abandon a wind project. Exelon reasonably determined that a local zoning ordinance made further development of the Blissfield Project impossible. Exelon then followed the abandonment procedure specified in the Purchase Agreement. The Superior Court nevertheless held that Exelon "relocated" the Blissfield Project when it acquired Beebe. That is error for several reasons. First, Beebe was an entirely separate project initiated after Exelon acquired Deere's wind assets. Deere was completely uninvolved with Beebe. Exelon purchased Beebe from Nordex, a different developer, for $10.3 million.

Second, even after Exelon executed its agreement to acquire Beebe, it continued its efforts to develop the Blissfield Project. That is inconsistent with the Superior Court's erroneous notion that the Blissfield Project was "relocated" to Beebe. Third, Exelon lacked the power under the Purchase Agreement to relocate the Blissfield Project.

3. The Superior Court erred by relying on the incorporation-by-reference doctrine to overcome the plain language of the Purchase Agreement. The Superior Court's opinion rests entirely on the premise that the Purchase Agreement incorporates by reference the definition of "Commercial Operation Date" from the PPA. But that is irrelevant to the question of *which* project must achieve commercial operation in order to trigger the Earn Out. The plain language of the Purchase Agreement answers that question: It makes clear that Deere's entitlement to the Earn Out is tethered to *Blissfield Project*'s achievement of certain milestones, and it clearly defines the Blissfield Project as "the wind project under development in Lenawee County." Exelon's renegotiation of the PPA with Consumers did not change this provision of the Purchase Agreement, and incorporation by reference cannot be used to rewrite the clear definition of the Blissfield Project. To the extent the Superior Court believed that Deere was owed the Earn Out so long as the PPA was used, that is not what the Purchase

Agreement says. The payment of the Earn Out is tied to the fate of the *Blissfield Project*, not to the use of the PPA in connection with another project that Deere had no role in developing.

4. The Superior Court's holding that Deere is entitled to the Earn Out alters the parties' bargain in a manner inconsistent with their intent at the time of contracting. There is no reason to believe that the parties would have intended for Deere to receive the Earn Out in this case, given that Exelon was forced to abandon the Blissfield Project, spent $10.3 million to purchase a different wind farm that Deere had no role in developing, and then brought that different wind farm to commercial operation.

5. The Superior Court erroneously relied on extrinsic evidence to support its conclusion that Exelon "relocated" the Blissfield Project. As an initial matter, extrinsic evidence cannot be used to create ambiguity in an otherwise clear contract. In this case, the use of extrinsic evidence is unnecessary because the contract clearly did not allow Exelon to relocate the Blissfield Project. Moreover, the contract clearly specified an abandonment procedure, and Exelon complied with that procedure when abandoning Blissfield. In any event, the extrinsic evidence on which the Superior Court relied does not support the proposition that the Blissfield Project was relocated. Much of the evidence cited by the Superior

Court is simply irrelevant to the questions at issue in this case. At most, it creates an issue of fact, thereby making summary judgment inappropriate.

6. If this Court holds that Deere is entitled to the Earn Out, then Exelon should receive recoupment for the damages it suffered as a result of Deere's breach of the Purchase Agreement. As part of the agreement, Deere inaccurately warranted that it believed all permits for the Blissfield Project could be obtained in the ordinary course. Evidence showed that Deere's senior management did not believe the permits could be obtained. As a direct result of Deere's breach, Exelon incurred millions of dollars in costs that it could not reasonably have anticipated at the time the contract was signed. In light of this evidence, summary judgment was improper, and Exelon was entitled to proceed to trial regarding recoupment of these expenses.

STATEMENT OF FACTS

A. The Purchase Agreement Between Exelon and Deere

Exelon is an American company that generates electricity from sources including wind farms. In 2010, Exelon agreed to purchase all of the wind energy assets owned by Deere. Ex. B (Superior Court Opinion) at 4. The parties' agreement was memorialized in a Purchase Agreement dated August 30, 2010. The assets sold pursuant to the Purchase Agreement included three Michigan wind farms that were then being developed by Deere (together, "Michigan Wind Projects"), which included the Blissfield Project. A310, § 1.1 (Purchase Agreement). The assets also included several power purchase agreements. Ex. B at 4; A329, § 4.6; A670. A power purchase agreement is a contract between an energy producer and a utility company by which the utility agrees to purchase the energy generated at a particular plant. Ex. B at 4.

Four provisions of the Purchase Agreement are relevant here.

First, the Purchase Agreement specifically defined the Blissfield Project as follows:

> "Blissfield Wind Project" means the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts.

A302, § 1.1.

Second, the Purchase Agreement detailed how Exelon would compensate Deere. The base purchase price for all of Deere's wind assets was $860 million. A314, § 2.1(b). If the Blissfield Project later achieved certain milestones, Exelon additionally would pay Deere an "Earn Out" for that project:

> At such time as . . . the Blissfield Wind Project achieves Completion of Development and Commencement of Construction, [Exelon] shall deliver to [Deere] an amount equal to $14,000,000.

A319, § 2.6(a).

Third, the Purchase Agreement identified the milestones that would trigger the Earn Outs ("Milestones"):

> "Completion of Development and Commencement of Construction" for a particular Michigan Wind Project means the earlier of:
>
> (a) the date on which [five particular milestones relating to project development[1]] have been achieved . . . . or;
>
> (b) the Commercial Operation Date for such particular Michigan Wind Project.

A303-A304, § 1.1. The Agreement also specified that:

> "Commercial Operation Date" has, with respect to any Michigan Wind Project, the meaning set forth in the Michigan PPA related to such Michigan Wind Project.

A303, § 1.1.

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[1] In short, the milestones are (1) securing relevant permits, (2) securing turbine supply agreements, (3) securing interconnection agreements, (4) having a PPA in place, and (5) beginning construction. A303-A304, § 1.1.

Fourth, the Purchase Agreement delineated Exelon's responsibilities to Deere after the transaction closed. The Purchase Agreement provided that:

> From and after the Closing, [Exelon] shall continue the development of the three separate Michigan Wind Projects using all commercially reasonable efforts and Prudent Industry Practices . . . . Subject to the preceding sentence, the details and manner of such development efforts and the schedule therefor shall be within the sole discretion of [Exelon]. . . . In the event [Exelon] reasonably determines that continuing to proceed with any one or more of the Michigan Wind Projects would not be commercially reasonable and thereafter determines to permanently cease development of and abandon such Michigan Wind Project(s), [Exelon] shall so inform [Deere], including the reason therefor and thereafter [Exelon] shall have no further obligation to [Deere] in connection with such development.

A319, § 2.6(b).

Exelon made diligent efforts to develop all three Michigan Wind Projects. Two of those projects met the Milestones set forth in the Purchase Agreement. Exelon timely paid Deere the Earn Outs due for those projects. A643. Thus, to date, Exelon has paid Deere $918.6 million.[2] The question in this case is whether Exelon owes Deere an additional $14 million Earn Out in connection with the Blissfield Project. Pursuant to the Purchase Agreement's choice-of-law clause, A381, § 10.2, that question is governed by Delaware law.

[2] Exelon paid Deere an $860 million base price, $26 million in Earn Outs for the two Michigan Wind Projects that achieved commercial operation, and $32.6 million in purchase price adjustments. A643, A517.

B. Community Opposition to the Blissfield Project

In the Purchase Agreement, Deere warranted that it "reasonably believe[d] that all material Permits necessary for the development . . . of the Michigan Wind Projects (including material Permits with respect to applicable zoning and land use Laws) can be obtained in the ordinary course." A336, § 4.11(c)(iv). Deere's warranty was subject to representations that were made in the Purchase Agreement's Disclosure Schedules. A454, § 4.11(c)(iv).

Prior to the execution of the Purchase Agreement in August 2010, local activists in Riga Township, the town within Lenawee County where the Blissfield Project was to be sited, began a campaign against wind farms. A283-A284; A621-A622. In an internal memorandum prepared contemporaneously with the Disclosure Schedules, Deere noted there was "organized resistance" to wind farms in Lenawee County and that the vice chair of the local planning commission was "actively working with the opponents of" the Blissfield Project. A287. These facts were not mentioned in the Disclosure Schedules. Deere's then-head of wind project development testified that the Disclosure was not "fulsome" because Deere did not truly believe all permits could be obtained given the scope of community opposition in Lenawee County. A598; *see* A602.

Due in large part to the undisclosed "organized resistance" to wind farms, Riga Township ultimately passed a zoning ordinance that precluded development of the Blissfield Project in July 2011 — after the Purchase Agreement was executed. Ex. B at 5; A719.

C. Exelon Salvages the PPA

Among the assets Exelon purchased from Deere was the PPA. A329, § 4.6. The PPA was a contract in which Consumers agreed to purchase the power that was expected to be generated at the Blissfield Project. Ex. B at 4. The PPA and the Purchase Agreement are separate and distinct documents.

Given the community opposition to wind farms in Lenawee County, Exelon began negotiating with Consumers to amend the PPA so that it could be used in connection with a different wind project located elsewhere. A528. Exelon and Consumers ultimately agreed to amend the definition of "Plant Site" within the PPA to include wind farms in Gratiot County, Michigan. Ex. B at 5; A683; A689; *compare* A239, § 1 (original PPA defining "Plant Site" as "[t]he site upon which the Plant will be located in Lenawee County, Michigan"), *with* A541, ¶ 2 (amended PPA defining "Plant Site" as "[t]he site upon which the Plant will be located in Ionia County or Gratiot County, Michigan"). In exchange for this

amendment, Exelon agreed to take on $16 million worth of risk that had originally been allocated to Consumers. A683, A689.

D. Nordex Sells Beebe to Exelon for $10.3 Million

When researching potential locations for its new wind project, Exelon became interested in Beebe. Ex. B at 5. Beebe is located in Gratiot County, which is 100 miles from the Blissfield site. A548; A672. A company called Nordex had already undertaken significant efforts to develop Beebe, including securing the proper permits, land agreements, zoning, and interconnection agreements. A548-A550; A633; A600; A720. Deere was not involved in any way in the development of Beebe. In early 2012, Exelon purchased Beebe from Nordex for $10.3 million. Ex. B at 5; A547; A554; A720.

E. Exelon Abandons the Blissfield Project

Even as it negotiated for the rights to Beebe, however, Exelon continued to attempt to develop the Blissfield Project by exploring alternative locations in Lenawee County. Other townships were also opposed, however, making further development of the Blissfield Project impossible. In May 2012, as required by the Purchase Agreement, Exelon formally notified Deere it was abandoning the Blissfield Project. A563 (Notice of Abandonment); A719. All parties agree that Exelon's decision not to proceed with the project was reasonable. A645; A672.

F. The Superior Court Rules that Deere is Entitled to the Earn Out

Deere demanded to be paid the Earn Out for the Blissfield Project even though that Project was abandoned. When Exelon refused to pay, Deere sued Exelon and asserted claims for breach of contract, unjust enrichment, and breach of the implied covenant of good faith and fair dealing. Then-Judge Vaughn granted Exelon's motion to dismiss the unjust enrichment claim and the claim for breach of implied covenants. A566-A578. Judge Vaughn found that Deere's breach of contract claim had "sufficient merit to survive a motion to dismiss," A575, but he expressly noted "that the use of the power purchase agreement is not a triggering event for the earn-out," *id.*

Exelon then answered the complaint and filed two counterclaims—a claim for unjust enrichment and a defensive claim for recoupment in the event the Court determined that the Earn Out was due. Judge Vaughn denied Deere's motion to dismiss, allowing both of Exelon's counterclaims to proceed. A579-A589. Deere then moved for reargument with respect to the decision denying its motion to dismiss the unjust enrichment claim.

During the pendency of the motion for reargument, Judge Vaughn took his seat on this Court, and the Superior Court case was reassigned to Judge Mary M. Johnston. Judge Johnston granted Deere's motion for reargument and dismissed

Exelon's unjust enrichment counterclaim. Ex. C. Following that decision, only Deere's claim for breach of contract and Exelon's counterclaim for recoupment remained. After discovery on those claims, the parties filed cross-motions for summary judgment.

The Superior Court ultimately entered summary judgment in favor of Deere. Ex. B at 25. The Superior Court viewed the question of whether the Blissfield Project had been abandoned or relocated as the central issue in this case. *Id.* at 10, 14.

The Superior Court's holding rested on the theory that the Purchase Agreement incorporated the entire PPA by reference. The Court reasoned that, when Exelon and Consumers renegotiated the *PPA* to allow it to be used at Beebe, they implicitly "change[d] the project location" to which the *Purchase Agreement*'s Earn Out provision applied. *Id.* at 13. Disregarding the undisputed facts that (1) Exelon spent over $10 million to acquire Beebe from Nordex and (2) Deere had nothing at all to do with the development of Beebe, the Superior Court nevertheless concluded that "[t]he Blissfield Wind Project that was originally contemplated to be developed in Lenawee County is the same project that eventually was developed in Gratiot County." *Id.* at 16.

The Superior Court went on to deny Exelon's recoupment claim, which was based on Deere's failure to disclose the extent of local opposition to the Blissfield Project. The Court held that Exelon "failed to present any evidence demonstrating that the Seller's Disclosure was inaccurate or misleading." *Id.* at 20. Exelon timely appealed these two rulings. Deere noticed a cross-appeal as to the Superior Court's separate ruling on attorneys' fees.

ARGUMENT

I. DEERE IS NOT ENTITLED TO THE EARN OUT.

A. Question Presented

Did the Superior Court err in concluding that Exelon owes Deere a $14 million Earn Out payment in connection with the abandoned Blissfield Project, merely because Exelon materially renegotiated the PPA to allow its use in connection with a new development site Exelon acquired from a third party? Ex. A at 2; Ex. B at 8.

B. Scope of Review

This Court "review[s] a trial court's grant of summary judgment *de novo*. [It] also review[s] questions of contract interpretation *de novo*." *In re Viking Pump, Inc.*, 148 A.3d 633, 643-44 (Del. 2016) (footnote omitted). Summary judgment is granted only if the moving party shows that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law. Super. Ct. Civ. R. 56(c).

C. Merits of Argument

Deere does not dispute that Exelon reasonably discontinued development of the Blissfield Wind Project when local opposition made it impossible for that project to proceed. Nevertheless, the Superior Court awarded Deere a $14 million Earn Out because Exelon successfully brought Beebe—a project Exelon purchased

from a different developer, located in a different place—to commercial operation. The Superior Court's decision conflicts with the plain language of the Purchase Agreement and with the parties' reasonable expectations. It should be reversed.

1. The Plain Language of the Purchase Agreement Mandates Reversal.

The plain language of the Purchase Agreement requires this Court to reject Deere's contention that it is entitled to the Earn Out.

a) Under the Plain Language of the Purchase Agreement, the Earn Out Is Due Only if the "Blissfield Wind Project" Located in Lenawee County Meets the Milestones, and It Did Not.

Under the Purchase Agreement, the Earn Out payment would be due "[a]t such time as . . . the Blissfield Wind Project achieves Completion of Development and Commencement of Construction." A319, § 2.6(a). The "Blissfield Wind Project" is defined in the Purchase Agreement as "the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts." A302, § 1.1. This is an unambiguous definition. All parties agree that no wind project "in Lenawee County" ever achieved Completion of Development and Commencement of Construction. Thus, no Earn Out payment is due.

That should be the end of this case. When a contract "is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) (internal quotation marks omitted).

b) Under the Plain Language of the Purchase Agreement, Exelon Had "No Further Obligation" to Deere Once It Abandoned the Lenawee County Site.

i. Exelon Abandoned the Blissfield Project.

The plain language of the Purchase Agreement compels a ruling in Exelon's favor for a second independent reason. When negotiating the Purchase Agreement, the parties anticipated the possibility that unforeseen circumstances might make further development of one or more of the Michigan Wind Projects unreasonable. The Agreement provides:

> In the event [Exelon] reasonably determines that continuing to proceed with any one or more of the Michigan Wind Projects would not be commercially reasonable and thereafter determines to permanently cease development of and abandon such Michigan Wind Project(s), [Exelon] shall so inform [Deere], including the reason therefor and thereafter *[Exelon] shall have no further obligation to [Deere] in connection with such development*.

A319, § 2.6(b) (emphasis added).

In light of sustained community opposition to wind farms in Lenawee County, Exelon "reasonably determine[d] that continuing to proceed with [the Blissfield Project] would not be commercially reasonable"—exactly as contemplated by the Purchase Agreement. A319, § 2.6(b). Exelon "thereafter determine[d] to permanently cease development of and abandon" the Blissfield Project. A319, § 2.6(b). Exelon informed Deere of that decision and explained the reason. A563. Therefore, Exelon "ha[d] no further obligation" to Deere. A319, § 2.6(b). Under the plain language of the Purchase Agreement, no Earn Out is due.

Deere does not dispute that Exelon's decision to discontinue development in Lenawee County was commercially reasonable. A645; A672. Nor can Deere dispute that Exelon sent Deere a formal notice of abandonment that complied with the Purchase Agreement's requirements for such notices. A563. Under the plain language of the Purchase Agreement, the Blissfield Project was abandoned, and thus Exelon had "no further obligation to [Deere]." A319, § 2.6(b).

The Superior Court's contrary holding conflicts with the plain language of the abandonment provision by suggesting that some further step needed to be taken in order for Exelon to effectuate its abandonment of the Blissfield Project. Yet the contract does not provide for any further step. Any "interpretation that conflicts with the plain language of a contract is not reasonable." *Bank of N.Y. Mellon v.*

Commerzbank Capital Funding Trust II, 65 A.3d 539, 555 (Del. 2013). Exelon satisfied all of the contractual conditions for abandonment, and thus, under the contract, it had no further obligation to Deere. To hold otherwise would contravene the bedrock principle that "is not the function of a court" to "rewrit[e] the plain language of an otherwise valid contractual provision." *Ed Fine Oldsmobile, Inc. v. Diamond State Tel. Co.*, 494 A.2d 636, 638 (Del. 1985).

The Superior Court nevertheless held that the Blissfield Project was not abandoned, apparently motivated by the belief that "[t]he Blissfield Wind Project that originally was contemplated to be developed in Lewanee County is the same project that eventually was developed in Gratiot County." Ex. B at 16. That characterization cannot be squared with the undisputed facts. Beebe is 100 miles away from the abandoned Blissfield Project. The two wind farms involved different early-stage developers, different wind resources, different townships, different counties, different permits, different zoning, different landowners, different wind turbines, different wind turbine manufacturers, and different interconnections to the electric grid. The two projects were entirely different. Moreover, even as Exelon pursued the acquisition of Beebe, it continued trying to develop the Blissfield Project at other sites in Lenawee County. Thus, it was conceivable that both Beebe and the Blissfield Project might reach commercial

operation—demonstrating that the two projects could not have been one and the same. At the very least, Exelon introduced sufficient evidence to preclude summary judgment on the question of whether the two projects were the same.

ii. The Purchase Agreement Did Not Contemplate Relocation of the Blissfield Project.

Despite their many differences, the Superior Court concluded that the Blissfield and Beebe projects were one and the same. That conclusion was based on the erroneous premise that Exelon had the power under the Purchase Agreement to "change the project location" and did so by negotiating with Consumers for an amendment to the PPA. Ex. B at 16 ("The Blissfield PPA was amended and the project was relocated. The project was not abandoned."). But Exelon had no such power to relocate under the Purchase Agreement.

As the Superior Court expressly acknowledged, the Purchase Agreement said nothing about a right to relocate the Blissfield Wind Project. *Id.* at 12. Indeed, "the only reference to the project's location was in the Purchase Agreement's definition of the Blissfield Wind Project—'the wind project under development in Lenawee County.'" *Id.*

The Purchase Agreement gave Exelon no right to relocate the project. Instead, it required Exelon to proceed with the Blissfield Project as long as it was "commercially reasonable" to do so. A319, § 2.6(b). If Exelon determined that

further development would be unreasonable, the Purchase Agreement allowed Exelon to "permanently cease development of and abandon [the project]." A319, § 2.6(b). Thus, the Purchase Agreement gave Exelon only two options: it could develop the Blissfield Project or abandon it. Exelon had no power to relocate.

When interpreting contracts, Delaware courts employ the canon of *expressio unius est exclusio alterius*. This canon holds that, when several members of a class are expressly mentioned in a contract and others are not, then the absent class members were intended to be excluded. *See iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257, at *6 & n.59 (Del. Ch. July 29, 2016) (applying this canon to contract interpretation); *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (same). In this case, the fact that the Purchase Agreement expressly permits development or abandonment, but does not mention relocation, implies that relocation was not an available option under the contract.

In the Superior Court, Deere emphasized language from the Purchase Agreement providing that the "details and manner" of managing the Blissfield Project were committed to Exelon's discretion. A319, § 2.6(b); Ex. B at 9. According to Deere, this phrase implies that Exelon was free to relocate the

Blissfield Project. Deere's argument is belied by context. The Purchase Agreement provides:

> From and after the Closing, [Exelon] shall continue the development of the . . . Michigan Wind Projects using all commercially reasonable efforts and Prudent Industry Practices to, among other things, proceed with land acquisition, permitting, turbine purchase and construction agreements and interconnection arrangements . . . . Subject to the preceding sentence, the details and manner of such development efforts and the schedule therefor shall be within the sole discretion of [Exelon].

A319, § 2.6(b). Nothing in this language permitted Exelon to move the project. Under the interpretive canons of *ejusdem generis* and *noscitur a sociis*, the fact that all of the powers appearing on a list share certain characteristics suggests that powers which do not share those characteristics are not conferred by the contract. *See Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004) (applying *ejusdem generis* cannon when interpreting a contract); *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (discussing *noscitur a sociis* canon). In this case, all of the listed "details" over which Exelon had control involved *micro*-level, site-specific tasks (such as selecting which turbines to buy and how to secure site-specific permits). This suggests Exelon did not have discretion to alter the *macro*-level characteristics of the Blissfield Project (such as the County in which the project would be sited). This Court should reject Deere's suggestion that the relocation of a massive wind project to a different county 100

miles away is merely a "detail" over which Exelon had implicit control. Contracting parties do not hide elephants in mouse holes. If Deere and Exelon had intended for Exelon to have the power to move project, they would have said so expressly in the Purchase Agreement.

2. The Superior Court Erroneously Applied the Incorporation-By-Reference Doctrine.

The Superior Court held Deere was entitled to the Earn Out, notwithstanding the plain language of the Purchase Agreement. It reached that conclusion based on an erroneous application of the incorporation-by-reference doctrine. Specifically, the Superior Court found that (i) the Purchase Agreement's definition of "Commercial Operation Date" incorporated the definition of that term in the PPA, Ex. B at 10-11; (ii) the *entire* PPA was therefore incorporated by reference in the Purchase Agreement; (iii) Exelon and Consumers renegotiated the PPA to change the definition of "Plant Site" in the PPA to include wind farms in Gratiot County; and (iv) that change therefore entitled Deere to receive an Earn Out under the Purchase Agreement if a wind farm in Gratiot County reached commercial operation. *Id.* at 12-13.

The Superior Court's reasoning contravenes three well-established rules governing incorporation by reference. First, when parties specifically identify the portions of another contract to incorporate by reference, only those portions are

incorporated—not the entire other contract. Second, even when another contract is incorporated by reference in its entirety, it cannot override the plain language and specific definitions of the first contract. Third, incorporation by reference cannot be used to frustrate the parties' reasonable intent. These rules are essential to ensure predictability for contracting parties.

a) The Superior Court Ignored the Parties' Express Intent to Incorporate by Reference Only Three Definitions from the PPA.

The Superior Court erred in applying the incorporation-by-reference doctrine because it failed to apply the rule that when parties specifically identify particular provisions in another contract to incorporate by reference, only those specific provisions are incorporated. *State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. Ct. 1951). Instead, the Superior Court treated the entire PPA as incorporated by reference into the Purchase Agreement. The Superior Court flatly held that the "Blissfield PPA is incorporated by reference into the Purchase Agreement," Ex. B at 12, even though the parties chose to incorporate by reference only three terms from the PPA —"Commercial Operation Date," "Commercial Operation Milestone Date," and "Construction Start Milestone Date." *See* A303, A319, §§ 1.1, 2.6(a), 2.6(b).

In so holding, Superior Court cited *Hirst* for the proposition that, "[w]here a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties." Ex. B at 12 & n.13 (citing *Hirst*, 83 A.2d at 681). But the very next sentence in *Hirst* emphasizes the "well settled exceptions to th[e] rule" that a contract may be incorporated by reference. *Hirst*, 83 A.2d at 681. One such exception is that "an agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference." *Id.*; *see also Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2015 WL 590493, at *2 (Del. Super. Ct. Feb. 9, 2015) ("[O]utside provisions only will be incorporated by reference if they are specifically set forth or identified in the contract."); *cf. Leung v. Schuler*, 2000 Del. Ch. LEXIS 41, at *17 (Del. Ch. Feb. 29, 2000) (holding that "where a contract refers to another writing for a particular specified purpose, that other writing becomes part of the contract for the specified purpose only" and explaining that "if the contracting parties intended to incorporate the entire . . . [a]greement . . ., they could have explicitly so provided").

The Purchase Agreement incorporates the definition of "Commercial Operation Date" from the PPA—not the *entire* PPA. The term "Commercial Operation Date" does not define or limit the location of the facility.

The fact that the Purchase Agreement refers to the PPA for the definition of "Commercial Operation Date" does *not* mean that *other* provisions of the PPA—such as the definition of "Plant Site"—were *also* incorporated by reference into the Purchase Agreement. The Superior Court's holding to the contrary, which essentially amounts to incorporation *by inference*, cannot be squared with black letter principles of contract law. "[I]f a written contract refers to another writing for a particularly designated purpose, the other writing becomes a part of the contract only for the purpose specified." 17A CJS *Contracts* § 402 (2016); *see* 11 Richard A. Lord, *Williston on Contracts* § 30:25, at 312 (4th ed. 2012) ("[I]t is important to note that when incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for that purpose only, and should be treated as irrelevant for all other purposes.").

b) The Incorporation By Reference Doctrine Cannot Be Used to Override the Plain Terms of an Agreement.

Even if the PPA were incorporated into the Purchase Agreement in its entirety, the Superior Court's ruling in favor of Deere would still be erroneous. The PPA says nothing at all regarding the payment of an Earn Out. Only the

Purchase Agreement refers to an Earn Out, and it makes clear when an Earn Out is due: when "the *Blissfield Wind Project* achieves Completion of Development and Commencement of Construction." A319, § 2.6(a) (emphasis added). The PPA does not define the "Blissfield Wind Project." Indeed, it does not even contain the term. Only the Purchase Agreement defines "Blissfield Wind Project," and it specifically and unambiguously defines it as "the wind project under development in Lenawee County, Michigan." A302, § 1.1. Meanwhile, the PPA's definition of "Plant Site"—which Exelon and Consumers amended to include projects Gratiot County—does not appear in the Purchase Agreement.

Painting with a broad brush, the Superior Court reasoned that the "Purchase Agreement cannot be given its full meaning without referring to the Blissfield PPA." Ex. B at 13. But the meaning of the term "Blissfield Wind Project"—which is the key term in this case—*can* be "given its full meaning without referring to the Blissfield PPA." *Id.* The Blissfield Wind Project is a specifically defined term in the Purchase Agreement, and the definition provided has nothing to do with the PPA or any term contained within the PPA.

Under Delaware law, incorporation by reference cannot be used to import a definition for a particular term if the four corners of the original contract already contain a specific definition for that term. Thus, Delaware courts have held that

specific language in a sub-contract will prevail over other terms that are incorporated by reference from a master contract. *See, e.g.*, *E. Coast Plumbing & HVAC, Inc. v. Edge of the Woods, LP*, 2004 WL 2828286, at *3 (Del. Super. Ct. July 30, 2004) (holding that, "[e]ven if the contract documents had been incorporated by reference, . . . the specific terms of the subcontract prevail over any general terms of the contract" incorporated by reference); *see also* 1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 8:9, Westlaw (updated Dec. 2016) ("If there is a conflict between the parties' agreement and the arbitration rules incorporated by reference, the contract trumps the rules."). This principle follows from the canon that "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

Accordingly, the doctrine of incorporation by reference does not allow the Court to rewrite the definition of "Blissfield Wind Project," which is expressly defined in the Purchase Agreement, to mean any wind project that uses the PPA.

If it had wanted, Deere could have contracted for an Earn Out to accrue whenever any wind project using the PPA achieved the Milestones. Deere also could have contracted to define "Blissfield Wind Project" as any wind project that

makes use of the PPA. But it did not do so. Instead, the contract specifically defined the "Blissfield Wind Project" as a project located in Lenawee County, and that definition was never altered. Delaware courts will not imply terms that do not exist within the contract. *See ev3, Inc. v. Lesh*, 114 A.3d 527, 530 n.4 (Del. 2014); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). Deere should be bound by the contract it signed, not the contract it wishes it had signed. "The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations," as is the case here. *Caldera Props.-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2008 WL 3323926, at *12 (Del. Super. Ct. June 19, 2008) (internal quotation marks omitted).

c) The Superior Court's Holding Alters the Parties' Bargain in a Manner Inconsistent with Their Reasonable Intent.

"In construing a contract, the primary objective for any court is to give effect to the parties' intent." *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 936 (Del. 2004); *see Land-Lock, LLC v. Paradise Prop., LLC*, 963 A.2d 139, 2008 WL 5344062, at *3 (Del. 2008) (unpublished table decision) (emphasizing that contracts must be interpreted in a manner that is "consistent with the objective intent of the parties that drafted the contract"). Following this guiding principle, Delaware courts have long refused to apply incorporation by reference in a manner

that would frustrate the intent of the parties. For example, in *Falcon Steel Co. v. Weber Engineering Co.*, the Court of Chancery refused to read a contract as having incorporated another contract by reference because such a reading, while "theoretically possible," would create "an anomalous result" at odds with the parties' intent. 517 A.2d 281, 286 (Del. Ch. 1986). Delaware courts have interpreted *Falcon Steel* as having "refused to incorporate by reference terms which made a reasonable reading of the contract nonsensical" and as having looked to "the parties' reasonable intent" as the deciding factor in determining whether a contract has been incorporated by reference. *Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *4 (Del. Super. Ct. May 10, 1994); *see Green Plains*, 2015 WL 590493, at *2 ("The Court will not interpret a provision incorporated by reference that results in an 'anomalous' reading of the contract.").

The Superior Court's reasoning in this case results in exactly the kind of "anomalous" reading of the contract that frustrates the parties' reasonable intent. *Green Plains*, 2015 WL 590493, at *2. In purchasing the Blissfield Project, Exelon was compensating Deere for real estate rights needed to build the project and the site-specific development efforts Deere had undertaken with respect to such real estate, such as the acquisition of permits and the negotiation of an agreement to interconnect the wind farm with the electric grid. Accordingly,

Exelon agreed to pay an Earn Out only if those site-specific development efforts came to fruition.

Exelon was forced to abandon those development efforts when community opposition resulted in a zoning ordinance that made further development impossible. If Exelon had responded by scrapping both the Blissfield Project and the PPA, no one could argue that Deere is entitled to an Earn Out. But instead, Exelon tried to salvage the situation by materially amending the PPA so that it could be used for another wind project. That effort resulted in a substantially different economic bargain for Exelon. It incurred $16 million in risk that originally had been allocated to Consumers. A683, A689.

Exelon then spent $10.3 million to purchase another development site, Beebe, located 100 miles away from the Blissfield site. Deere did nothing at all to develop Beebe. Nordex obtained the permits for Beebe, and Nordex negotiated the land agreements. A548-A550; A633; A600; A720. As noted above, the "primary objective" for a court engaged in contract interpretation is "to give effect to the parties' intent." *Amkor Tech.,* 849 A.2d at 936. Given that Deere had nothing to do with Beebe, there is no reason why the parties would have intended for Deere to be paid an Earn Out for Exelon's success in bringing Beebe to commercial operation.

To the extent Deere feels it should be compensated because Exelon used the PPA, that is not the bargain the parties struck. As Judge Vaughn noted at the motion to dismiss stage, "the use of the power purchase agreement is not a triggering event for the earn-out." A575.[3] The Earn Out depended on whether the Blissfield Project was brought to commercial operation, not on whether the PPA was used—particularly when the PPA could be used only after Exelon took on an extra $16 million worth of risk.

Indeed, interpreting the parties' agreement to make the Earn Out turn on Exelon's use of the PPA would have frustrated *Deere*'s expectations under other circumstances. For example, if the Blissfield Wind Project had achieved the Milestones, Exelon would have been required to pay Deere the Earn Out regardless of whether Exelon used the PPA. Moreover, the Purchase Agreement contemplates the possibility that Exelon might sell the Blissfield Project and never

[3] The Superior Court was bound by this holding, which was law of the case. Its disregard of this prior holding by a different judge in the same case is another ground for reversal by this Court. *See Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 889, 894-95 (Del. 2015), *as revised* (Mar. 27, 2015) ("Under the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change."); *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.*, 1993 WL 54498, at *2 (Del. Super. Ct. Feb. 17, 1993) ("When a case involves a successor judge, as this case does, adherence to prior rulings becomes increasingly important. . . . Only in extraordinary situations should a successor judge depart from the established law of the case.").

use the PPA. Deere would still have been entitled to the Earn Out. A319, § 2.6(a). The Purchase Agreement also contemplates that if Consumers had become bankrupt, so that the PPA no longer had value, Exelon might still owe the Earn Out if the Blissfield Project achieved the Milestones. These hypothetical possibilities, which are spelled out in the Purchase Agreement, confirm that the parties understood the Earn Out to depend on whether the Blissfield Project achieves the Milestones, not on the use of the PPA. A member of Deere's in-house legal department, Jeff Karch, likewise confirmed that intent. When asked whether an Earn Out is due whenever the PPA is used, Mr. Karch said: "That particular language is not in this [Purchase] agreement." A668.

* * *

If allowed to stand, the Superior Court's loose invocation of incorporation by reference will create substantial uncertainty for contracting parties. Parties in complex commercial agreements often incorporate specific terms by reference from other agreements. But in doing so, they rely on the well-established principles that only the terms specifically referenced will be incorporated; such incorporation cannot be used to erase or create ambiguity around expressly defined terms in the first agreement; and incorporation cannot be used in a way that frustrates the intent of the parties. The Superior Court's theory of incorporation *by*

inference ignored all three of these principles, and, in so doing, destabilized Delaware contract law. The Superior Court's holding should be reversed.

3. The Superior Court's Reliance on Extrinsic Evidence Was Misplaced.

The Superior Court supported its holding by discussing extrinsic evidence purportedly demonstrating that Exelon viewed the acquisition of Beebe and renegotiation of the PPA as a "relocation" rather than an "abandonment" of the Blissfield Project. Ex. B at 13-14. As an initial matter, the fact that Exelon followed the procedure for project abandonment specified in the Purchase Agreement, *see supra* Section I(1)(b)(i), definitively refutes any notion that the Blissfield Project was "relocated." But even if that were not the case, Exelon's internal accounting is simply irrelevant to its contractual obligations. As discussed above, the amendment of the PPA did not change the Earn Out provision in the Purchase Agreement, and the Purchase Agreement did not allow Exelon to relocate the Blissfield Project. Given the clarity of the Purchase Agreement on these two points, the Superior Court's use of extrinsic evidence was inappropriate. This Court has held that when the language in a "contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." *Eagle Indus. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

In any event, however, the extrinsic materials the Superior Court relied upon do not have the significance that the Court imputed to them.

First, the Superior Court pointed to Exelon's accounting records near the time of abandonment. According to the Superior Court, "Exelon's internal accounting . . . suggests that the Blissfield Project was relocated and not abandoned" because Exelon's valuation of Beebe included the $14 million Earn Out. Ex. B at 15. But the way that Exelon chose to treat the Earn Out in its own accounting records is not relevant to the legal question of whether Exelon was obligated to pay the Earn Out. The parties' unexplained internal accounting records cannot be used to override the clear terms of the contract.

The Superior Court's holding to the contrary was based on sheer speculation. The Superior Court did not account for various alternate explanations of Exelon's accounting, such as the possibility that Exelon kept the Earn Out on the books solely in order to brace for a worst case scenario in which Deere sued over the Earn Out. [redacted] A530;

A644. At the very least, Deere's accounting records preclude summary judgment because they establish a fact-issue regarding whether the Earn Out was due.

Second, the Superior Court pointed to statements Exelon made while negotiating with Consumers for an amendment to the PPA. Ex. B at 13-14. During those negotiations, Exelon represented that it was "assessing the feasibility of moving the Project" to another location in Michigan. *Id.* Contrary to the Superior Court's holding, this statement does not speak to the issue of whether Exelon would be obligated to pay an Earn Out to Deere in connection with the commercial operation of a new site in a different location developed by a different company. The communications between Exelon and Consumers concerning potential amendments to the PPA have no bearing on the definition of the Blissfield Project in the Purchase Agreement between Exelon and Deere.

Third, the Superior Court found it relevant that Exelon bought out Great Lake Winds, LLC ("Great Lakes"), which was a co-developer of the Blissfield Project in Lenawee County. Ex. B at 14-15. According to the Superior Court, Exelon's decision to buy out Great Lakes "to avoid paying a development fee," which "evidences that the Blissfield Project was relocated, not abandoned." *Id.* at 14. There is no support for this conclusion. The PPA was signed by Blissfield Wind Energy LLC, which in turn was a co-venture between Deere and Great

Lakes. If Exelon had not bought out Great Lakes, then Great Lakes could have vetoed further development of Beebe, which would have rendered the PPA worthless. Exelon bought out Great Lakes so that it could avoid that outcome and pursue the Beebe opportunity alone. These facts have no relevance when determining whether Exelon owed Deere an Earn Out payment. If anything, they underscore that the acquisition of Beebe and the attendant amendments to the PPA reflected a different economic bargain than the one originally contemplated by the Purchase Agreement, and that Deere had no claim to the fruits of that different bargain.

II. IF THIS COURT HOLDS THAT DEERE IS OWED THE EARN OUT, EXELON SHOULD RECEIVE RECOUPMENT BECAUSE DEERE BREACHED THE PURCHASE AGREEMENT.

A. Question Presented

Did the Superior Court err in concluding that Deere's Disclosure was not inaccurate or misleading, when Deere omitted from that Disclosure information that was material to the extent of local opposition to the Blissfield Project and thus material to the likelihood of that project achieving commercial operation? Ex. A at 2; Ex. B at 8-9.

B. Scope of Review

This Court "review[s] a trial court's grant of summary judgment *de novo*." *Viking Pump*, 148 A.3d at 643-44. Summary judgment is granted only if the moving party shows that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law. Super. Ct. Civ. R. 56(c).

C. Merits of Argument

"Recoupment is a common-law, equitable doctrine that permits a defendant to assert a defensive claim aimed at reducing the amount of damages recoverable by a plaintiff." *TIFD III-X LLC v. Fruehauf Prod. Co., L.L.C.*, 883 A.2d 854, 859 (Del. Ch. 2004) (internal quotation marks omitted). "Such a defense is proper if it goes to the reduction of the plaintiff's damages for the reason that the plaintiff has

not complied with the cross obligations arising under the same contract." *Shuman v. Santora*, 1991 WL 18101, at *2 (Del. Super. Ct. Feb. 5, 1991).

Deere warranted to Exelon that it believed all permits necessary for the Blissfield Project could be obtained in the ordinary course. As detailed below, Deere knew this warranty was inaccurate. As a direct result of Deere's incorrect warranty, Exelon incurred millions of dollars in damages when it was forced to purchase a new wind farm. Thus, if the Earn Out is due, Deere's recovery should be reduced by the amount of damages that Deere's breach caused to Exelon.

1. Deere Breached the Purchase Agreement by Falsely Stating It Believed All Permits Could Be Obtained in the Ordinary Course.

Deere breached the Purchase Agreement when it represented to Exelon that, "except as set forth in . . . the Seller Disclosure Schedule, [Deere] reasonably believe[d] that all material Permits necessary for the development, construction, ownership, maintenance, use and/or operation of the Michigan Wind Projects . . . [could] be obtained in the ordinary course." A336, § 4.11(c)(iv).

Deere's Disclosure Schedule included two paragraphs that discussed the developing situation in Riga Township:

> [1] The Riga Township Planning Commission voted on August 2, 2010 to recommend to the Riga Township Board a 12-month moratorium on wind energy projects, which is scheduled to be considered by the Riga Township Board at its September 13, 2010 meeting. The moratorium, as currently proposed, would

> automatically expire upon approval of a wind energy zoning ordinance.
>
> [2] If 15% of the registered voters in a Michigan township sign a petition requesting a referendum within 30 days after a zoning ordinance is enacted in such township, the zoning ordinance would become subject to a referendum vote at the next scheduled election. Based on the level of resistance to the Blissfield Wind Project in Riga township there is a possibility that a zoning ordinance permitting the project would be put to a referendum.

A454, § 4.11(c)(iv). But an internal Deere memorandum prepared contemporaneously with the Disclosure Schedules includes the following *three*-paragraph assessment as to the level of resistance:

> [1] At the August 2, 2010 meeting of the Riga Planning Commission they voted 4-1 to recommend a 12 month moratorium on wind energy projects. As you are aware, this was presented to the Riga Township Board at their August 9, 2010 meeting. However, the board did not act on the suggestion and will consider it more at its Sept 13, 2010 meeting. The proposed moratorium would be for 6 months with the option to extent by an additional 6 months. It would automatically expire upon approval of a wind energy zoning ordinance.
>
> [2] During the last few months an organized resistance to wind farm [sic] has arisen in Riga Township. It has also become clear that the vice chair of the planning commission is actively working with the opponents of the project to prevent the wind projects in Riga from becoming a reality. He was successful in influencing his colleagues to support his motion for a 12 month moratorium.
>
> [3] All zoning ordinances in Michigan can become subject to a referendum vote at the next scheduled election subject to meeting the advanced notice requirements (3-4 months) to get on the ballot. A referendum is triggered if 15% of the registered voters in the township sign a petition requesting one within 30 days of an ordinance passing.

> Based on the level of resistance we have to this project I believe that we need to plan for a referendum, which means that the zoning ordinance will not be final until after the election.

A287. A comparison of Deere's Disclosure Schedule and Deere's internal memorandum demonstrates that Deere withheld material information regarding the scope of local resistance to the Blissfield Project. Tellingly, Deere's Disclosure Schedules did not include the information that appeared in the second paragraph of its internal memorandum. And it was that second paragraph that provided important details on the level of "organized resistance" in Lenawee County and noted that the vice chair of the local planning commission was "actively working with the opponents" of the Blissfield Project.

Deere argued in the Superior Court that the "Disclosure Schedules *fully* disclosed what Deere knew at the time about the actual level of resistance in Lenawee County." Deere Summary Judgment Brief, Dkt. No. 98, at 34 (emphasis added). That is not the case. As detailed above, Deere's Disclosure Schedule withheld material information and downplayed the level of resistance in Riga Township. A454. Instead of "fully disclos[ing]" the scope of local resistance, Deere instead concealed from Exelon the fact that the Blissfield Project that Exelon was purchasing might well turn out to be worthless.

Moreover, Mr. Drescher, the head of wind farm development at Deere, conceded in his deposition that the representations in Deere's Disclosure Schedule were not accurate. Mr. Drescher said that Deere "had actual knowledge that would not go to a reasonable belief that all material permits could easily or could be successfully obtained to construct the project. There was considerable doubt among the development team that that could occur." A602. Similarly, Mr. Arrington, an in-house lawyer for Deere who worked on wind-related issues, said that Deere had never before faced opposition "to the same degree" that it was facing in Michigan and that the level of opposition to the Blissfield Project was "relatively unique." A654. These statements alone should have been sufficient to defeat Deere's motion for summary judgment.

Notwithstanding these facts, the Superior Court held that Exelon "failed to present any evidence demonstrating that the [Deere's] Disclosure was inaccurate or misleading" and that Deere had disclosed "the level of [local] resistance." Ex. B at 23, 21. The Superior Court's holding is wrong and should be reversed.

2. Exelon Is Entitled to Recoupment as a Result of Deere's Breach.

As a result of Deere's false warranty, Exelon spent millions of dollars in development costs in connection with Beebe. These additional costs were the

direct result of Deere's breach, and could not have been anticipated by the parties. Exelon now requests recoupment of these costs.

In the Superior Court, Deere argued that Exelon's recoupment claim must fail as a matter of law. Ex. B at 9, 17-18. The Purchase Agreement provides that, "[f]rom and after the Closing, [Exelon] shall continue development" of the Blissfield Project. A319, § 2.6(b). The Purchase Agreement also provides that "the details and manner of . . . development efforts and the schedule therefor shall be within the sole discretion of [Exelon]." *Id.* From these provisions, Deere reasons that the Purchase Agreement assigns Exelon the burden of paying all post-closing costs.

This argument obfuscates the fact that Exelon did not get the benefit of the bargain. Deere's false warranties meant that Exelon had to buy another wind project, namely, Beebe, to make use of the PPA it purchased from Deere. Exelon did not contemplate having to buy another wind project for $10.3 million in order to use the PPA. Nor did it contemplate having to renegotiate the PPA by taking on $16 million in new risk. It would not have needed to do so if Deere had made accurate disclosures regarding the situation in Riga Township.

Judge Vaughn rejected Deere's arguments regarding recoupment when deciding the motion to dismiss, and this Court should reject them again now. As

Judge Vaughn explained, there are three elements of a recoupment claim: "[T]he defendant must show that (1) the claim arises out of the same transaction or occurrence as the plaintiff's suit; (2) the claim is purely a defensive set-off and does not seek affirmative recovery; and (3) both the primary damage claim and the recoupment claim involve the same litigants." A586. In this case, Exelon has satisfied all three elements. Having breached the Purchase Agreement, Deere cannot now rely on a different provision of that same contract for the argument that no damages are due. Thus, if Deere is entitled to the Earn Out, then Deere's recovery should be reduced by the amount of damages Exelon sustained due to Deere's breaches.

CONCLUSION

This Court should reverse the Superior Court's determination that Deere is entitled to the $14 million Earn Out. If this Court affirms that determination, it should hold that Exelon is entitled to recoupment of expenses.

Dated: March 16, 2017

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