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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.	**REDACTED PUBLIC VERSION** **Original Filed: April 11, 2017** No. 28, 2017 Case Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13C-07-330 MMJ CCLD

PLAINTIFF BELOW, APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS APPELLANT'S OPENING BRIEF ON CROSS APPEAL

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NATURE OF PROCEEDINGS

On August 30, 2010, plaintiff below-appellee/cross-appellant Deere & Company ("Deere") entered into a Purchase Agreement with defendant below-appellant/cross-appellee Exelon Generation Acquisitions, LLC ("Exelon"), pursuant to which Deere sold its wind energy business to Exelon (the "Purchase Agreement"). The business included over a dozen wind projects in development, but three such projects were unique. These three were unique because Deere had secured a power purchase agreement ("PPA") with Consumers Energy Company ("Consumers") in Michigan for each project, and was therefore assured that, once these three Michigan projects were operational, there would be a buyer for the energy produced.

In view of the value attributable to the PPAs, Deere and Exelon agreed in the Purchase Agreement to make an earn-out payment to Deere for each of the Michigan wind projects, which would be paid once a specified milestone was achieved (the "Earn Out").

This case is about Exelon's attempt to avoid payment of the Earn Out on one of those Michigan projects—the Blissfield Wind Project (the "Blissfield Project" or the "Project"). In the Purchase Agreement, the Blissfield Project is described as "the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts." A302. Blissfield Wind

Energy, LLC ("BWE") is the counterparty to the PPA associated with the Blissfield Project (the "Blissfield PPA").

Having encountered citizen-based opposition at the originally planned location in Lenawee County—opposition known to Exelon before signing the Purchase Agreement—Exelon relocated the Project and proceeded to successfully develop it using BWE and the Blissfield PPA. Along the way, it steadfastly asserted to third parties (including Consumers) that nothing prohibited a relocation of the Project. But when it came time to pay the Earn Out, Exelon's story changed. Instead of acknowledging the Earn Out obligation and paying it, Exelon claimed that it had "abandoned" the Project. The Superior Court was not fooled by this change in position.

The Superior Court considered Deere's claim for payment of the Earn Out on cross-motions for summary judgment. *See* Summary Judgment Opinion ("SJ Op."), attached to Exelon's Opening Appeal Brief as Exhibit B, at 7. Below, Exelon did not assert that any fact issues precluded the granting of summary judgment on that claim.[1] Accordingly, the Superior Court proceeded to analyze the terms of the Purchase Agreement and the Blissfield PPA in light of the undisputed facts. The

[1] *See* SJ Op. 6 ("The parties agree that the issues regarding the earn-out provision involved undisputed facts."); B360-61.

Court carefully considered Section 2.6(a) of the Purchase Agreement—the Earn Out provision—to determine whether the Project achieved "Completion of Development and Commencement of Construction," the triggering event for the Earn Out. Following the Purchase Agreement to the letter, the Court found that, by achieving a "Commercial Operation Date" (as defined in the Blissfield PPA), the terms of Section 2.6(a) were satisfied. SJ Op. 16. Indeed, it is undisputed that the Blissfield Project (now renamed by Exelon) met the payment milestone. The only real issue before the Superior Court was whether relocation of the Project to another county in Michigan somehow negated Exelon's Earn Out obligation. Significantly, in holding that the Earn Out was owed, the Superior Court considered the entirety of the Purchase Agreement and correctly observed that there was simply no language that prohibited a relocation of the Project.

As noted, before Deere commenced this action, Exelon was of the same view that there was no prohibition on relocation. The record is replete with representations made by Exelon to third parties (and even its own board of directors) that the Project was being relocated. In this respect, the Court properly rejected Exelon's attempt to suppress damning post-closing evidence of its continuing development efforts. *See* SJ Op. 13-16. As the Court properly recognized, "[i]n the present case, the Purchase Agreement itself contemplates that post-closing events will determine whether the project was abandoned or relocated and whether it

achieved the requisite milestones, thus entitling Deere to the earn-out." SJ Op. 16. Under the Purchase Agreement, Deere was entitled to the Earn Out because the Project achieved a Commercial Operation Date under the Blissfield PPA.

The Superior Court also properly rejected Exelon's recoupment claim, through which Exelon attempted to recoup the development fees and expenses incurred in relocating the Project. Exelon claimed that Deere breached a representation in the Purchase Agreement regarding the ability to obtain necessary permits for the Project because Deere did not adequately disclose community resistance to the Project. The Superior Court rejected that argument as well, finding that Deere in fact disclosed the potential for community resistance and that Exelon was on notice of that resistance. SJ Op. 21. In that regard, before the Purchase Agreement was even signed, Deere provided Exelon the very internal memorandum that Exelon now claims was concealed. Moreover, Exelon's attorneys commented on drafts of the disclosure describing the community resistance. The Superior Court also rejected Exelon's recoupment claim because Exelon's claimed "damages" are really "discretionary development costs, not subject to recoupment." SJ Op. 21.

Despite finding that Exelon was in breach of its obligation to pay the Earn Out under the Purchase Agreement, the Superior Court found in a separate ruling that Deere was not entitled to its fees and expenses for this litigation under the indemnification provisions of the Purchase Agreement. *See* Fee Opinion ("Fee

Op."), attached hereto as Exhibit B, at 4. Deere respectfully disagrees with the Superior Court's ruling because Section 9.2 of the Purchase Agreement clearly and unequivocally obligates Exelon to indemnify Deere for "any and all Losses" related to a breach or non-performance of the Purchase Agreement by Exelon. The definition of "Losses" in the Purchase Agreement contemplates the payment of attorneys' fees in first-party litigation. A309 ("Losses" defined to include "***any and all***" losses or claims "whether ***or not*** arising out of third party claims"). As explained below, other sections of the indemnification provision in the Purchase Agreement support Deere's position.

For the reasons explained herein, the Superior Court's ruling that (i) Exelon relocated, not abandoned, the Blissfield Project; (ii) the Blissfield Project achieved a Commercial Operation Date under the Blissfield PPA; (iii) Exelon is therefore required to pay to Deere the Earn Out; and (iv) Exelon is not entitled to recoup its development fees and expenses, should be affirmed. Also, for the reasons explained herein, the Superior Court's ruling that Deere is not entitled to its fees and expenses, including reasonable attorneys' fees, incurred in connection with this litigation should be reversed.

SUMMARY OF ARGUMENT

1. DENIED. Exelon's plain language argument, both here and below, ignores that the Purchase Agreement nowhere states that Exelon had to develop the Blissfield Project in Lenawee County. Rather, as the Superior Court correctly found, the definition of the "Blissfield Wind Project" in the Purchase Agreement was merely descriptive of the project "under development" in Lenawee County at the time the Purchase Agreement was signed. SJ Op. 12. But Exelon was free to relocate the Project and, in fact, did so. The relocated Project, using the Blissfield PPA and developed by BWE (the same legal entity Exelon acquired from Deere), achieved the Commercial Operation Date under the Blissfield PPA and thus triggered payment of the Earn Out. SJ Op. 16.

2. DENIED. Section 2.6(b) of the Purchase Agreement permitted Exelon to abandon the Blissfield Project if development costs rendered it commercially unreasonable. But Exelon did not abandon the Project; it relocated the Project without apprising Deere that it was doing so, and then, after Exelon had taken steps to relocate the Project using the valuable Blissfield PPA, falsely claimed an "abandonment." Based on overwhelming and indisputable evidence, the Superior Court correctly found that Exelon did not abandon the Project. SJ Op. 16.

3. DENIED. The Superior Court committed no error in enforcing the Purchase Agreement precisely as written by looking to the definition of Commercial

Operate Date in the Blissfield PPA. Exelon acknowledges, as it must, that the Purchase Agreement incorporates by reference the definition of "Commercial Operation Date" from the Blissfield PPA. The achievement of the Commercial Operation Date under the Blissfield PPA is the triggering event for payment of the Earn Out. And it is not disputed that the relocated Blissfield Project achieved a Commercial Operation Date under the Blissfield PPA. Reading the Purchase Agreement and Blissfield PPA in tandem and finding nothing inconsistent between the two, the Superior Court correctly concluded that the Earn Out was due.

4. DENIED. The Superior Court's holding that Deere is entitled to the Earn Out results in both parties achieving the benefit of the bargain they struck. Exelon agreed to make Earn Out payments for the three Michigan projects because of the value associated with those PPAs. Exelon has employed the valuable Blissfield PPA and has derived a substantial benefit from its use. Further, Exelon willingly assumed the risks (and rewards) of development costs and cannot be heard to complain of unforeseen expenses, having *never* suggested during development that it would be commercially unreasonable to proceed. Denying Deere the Earn Out, contrary to the plain language of the Purchase Agreement, would result in an unjust windfall to Exelon and would deprive Deere of the benefit of its bargain.

5. DENIED. The Superior Court properly considered Exelon's post-closing conduct in concluding that the Earn Out was due. As it did below, Exelon

misconstrues the Superior Court's reliance on Exelon's post-closing conduct, characterizing it as "extrinsic" evidence improperly considered to create ambiguity in the Purchase Agreement. The Superior Court saw through this argument. There is nothing ambiguous in the Purchase Agreement. Rather, the question before the Superior Court was whether, post-closing, the Project met the development milestone or was abandoned. Exelon urged the Superior Court to ignore evidence contradicting its "abandonment" story. The Superior Court correctly declined to do so. SJ Op. 16. Finally, to the extent Exelon now argues that this evidence creates a fact issue, it never made that argument below and it is thus waived. Sup. Ct. R. 8.

6. DENIED. Exelon is not entitled to recoupment. ***First***, its breach claim is belied by the plain language of the Purchase Agreement. Deere never warranted that "it believed all permits could be obtained in the ordinary course." Rather, it carved out an exception in a disclosure schedule—a schedule reviewed and approved by Exelon and its counsel. ***Second,*** contemporaneous documents show, and Exelon's Chief Development Officer admitted, that Deere shared its memorandum about community resistance with Exelon ***before*** the Purchase Agreement was finalized and signed. ***Third***, even if Exelon could prove a breach (it did not), the Purchase Agreement forecloses Exelon's recoupment claim because, as the Superior Court correctly concluded, the expenses Exelon seeks to recoup as "damages" are in fact development costs that Exelon expended in its sole discretion. SJ Op. 21.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Deere cross-appeals the Superior Court's ruling that Deere is not entitled to fees and expenses, including attorneys' fees, incurred in successfully prosecuting its entitlement to the Earn Out. The Superior Court erred in concluding that Section 9.2 in the Purchase Agreement applied to third-party claims only, not "first-party" claims between the contracting parties. The Superior Court misapprehended Section 9.2, and in particular the defined term "Losses." That definition makes clear that the indemnification provision applies to both first-party and third-party claims.

STATEMENT OF FACTS

A. Key Events Leading Up To The Purchase Agreement

1. Blissfield Wind Energy LLC

In 2009, Deere held all of its wind energy assets through a subsidiary, John Deere Renewables, LLC ("JDR"). In turn, JDR owned (in whole or in part) numerous subsidiary entities created to develop specific wind projects, including the entity at issue here—Blissfield Wind Energy, LLC ("BWE"). BWE was owned 50% by Deere and 50% by Deere's development partner, Great Lakes Wind, LLC ("Great Lakes"), and was the counterparty to the Blissfield PPA with Consumers. A269-70; B235. Through BWE, Deere and Great Lakes commenced the development of the Blissfield Project.

2. The BWE Power Purchase Agreement

In late 2009, Deere submitted a bid in response to a request for proposal from Consumers, an electric utility in Michigan. A33. Consumers was looking to award PPAs to renewable energy producers in Michigan. A PPA is a long-term contract between a producer of energy and a buyer (or off-taker), such as a utility company. Renewable energy PPAs are highly prized because they issue only when the off-taker has specific capacity needs, and thus assure a producer a long-term revenue

stream through the sale of energy from the project. SJ Op. 4; *see* Community Wind Toolbox, Chapter 13.[2]

In early 2010, Deere was awarded renewable PPAs for three Michigan-based development projects submitted to Consumers. Deere designated these projects: Michigan Wind 2, Harvest Wind II, and Blissfield (collectively the "Michigan Wind Projects"). A310; A230; B62.

On June 21, 2010, Consumers and BWE entered into the Blissfield PPA. A230. Pursuant to the Blissfield PPA, [redacted] A240-41. As an Exelon employee explained, Blissfield was in an "early" stage of development at the time the Blissfield PPA was executed (B226-27),[3] and—as of August 2010—only approximately half of the land needed to build the plant had been acquired. A594-95. As such, a recital to the Blissfield PPA describes the location of the plant as a "*preliminary* location south of Riga, Michigan 49276, Lenawee County with a nameplate capacity rating of 81 MW…." A234 (emphasis added). The Blissfield PPA could be amended by the parties. A268, §24.

[2] Available at http://www.windustry.org/community_wind_toolbox_13_power_purchase_agreement

[3] Doug Duimering, whose deposition testimony is cited here, is a former Deere employee and current Exelon employee. A618-19; A627.

3. Great Lakes Wind, LLC

BWE had a co-developer and co-owner in the Project—Great Lakes. Great Lakes, owned by local landowners in Lenawee County, was responsible for land acquisition and obtaining local support for the Project. On June 18, 2010, JDR, BWE and Great Lakes executed a development agreement (the "Development Agreement"). B46. The Development Agreement entitled Great Lakes to a development fee, once the financing for the Project was finalized and the Project capital was obtained. B52, §3.1(b).

B. Exelon's Awareness Of Resistance In Riga Township

In early 2010, Deere engaged in a strategic re-evaluation and subsequently decided to sell its wind energy business. Through its investment advisor (Goldman Sachs), Deere solicited potential buyers for JDR; Exelon emerged as the winning bidder. Thereafter, the parties and their advisors commenced work on the Purchase Agreement, pursuant to which Deere would sell all of its interests in JDR to Exelon. A292.

1. The Internal Deere Memorandum

In mid-August 2010, as drafts of the Purchase Agreement were being prepared and exchanged, Deere advised Exelon that the Project was being met with citizen-based resistance. Specifically, in early August, the Riga Township Planning Commission recommended a 12-month moratorium on wind energy projects. SJ

Op. 5. The development team at Deere prepared a memorandum, dated August 12, 2010, explaining the situation in Riga Township. A287; *see also* B115.

On August 20, 2010, Goldman Sachs sent this memorandum to key Exelon employees involved in negotiating the Purchase Agreement, including Carter Culver, Exelon's lead commercial attorney on the deal. B115; *see also* A760. As Kyle Crowley (another recipient of the memorandum and Exelon's Chief Development Officer) admitted, Deere shared this memorandum with Exelon *before* the Purchase Agreement was finalized and signed:

> Q: And is it fair to say that prior to the signing, Exelon was provided an internal Deere memo relating to the resistance being encountered in Riga Township?
>
> A: We saw the memo you showed earlier.

A766-67.[4]

2. Exelon's Counsel Reviews And Edits The Blissfield Schedule.

In the Purchase Agreement, Deere made representations concerning the viability of the Michigan Wind Projects. In view of the resistance in Riga Township (as explained in the Deere memorandum), Deere carved out an exception to its

[4] Incredibly, Exelon quotes this memorandum at length in its Opening Brief, asserting (erroneously) that Deere "***withheld***" and "***concealed***" this information. Exelon's Opening Appeal Brief ("EOB") at 43 (emphasis added). This assertion is demonstrably wrong and cannot be reconciled with the above-cited record evidence before the Superior Court.

representation concerning the ability to obtain permitting for the Project. As it did below, Exelon conveniently ignores the (emphasized) plain language of Section 4.11(c)(iv) of the Purchase Agreement:

> Seller is continuing to obtain the Permits necessary to develop, construct, own, maintain, use and operate the Michigan Wind Projects. As of the date hereof, ***except as set forth in Section 4.11(c)(iv) of the Seller Disclosure Schedule***, Seller reasonably believes that all material Permits necessary for the development, construction, ownership, maintenance, use and/or operation of the Michigan Wind Projects (including material Permits with respect to applicable zoning and land use Laws) can be obtained in the ordinary course. Buyer acknowledges that not all such Permits required for the Michigan Wind Projects are known as of the date of this Agreement.

A336 (emphasis added; underscoring in original).

Deere's lawyers (Skadden Arps) prepared a draft schedule—Seller Disclosure Schedule 4.11(c)(iv)—that summarized information from the Deere memorandum and provided it to Exelon's counsel. *See* B118. On August 19, 2010, Elizabeth Hanigan—Exelon's deal counsel—circulated her edits to Schedule 4.11(c)(iv), plainly evidencing her and Exelon's knowledge of the Deere memorandum and its contents. B120; B123. Thus, not only was Exelon privy to the memorandum, its deal counsel had a hand in preparing the Seller Disclosure Schedule that carved out an exception due to the known resistance. As the Superior Court correctly observed, "Section 4.11(c)(iv) of the Purchase Agreement clearly carved out an exception to

the representations made…[concerning] the Michigan Wind Projects," and "Exelon was on notice of the potential for community resistance." SJ Op. 20, 21.

C. Section 2.6 of the Purchase Agreement

On August 30, 2010, Deere and Exelon executed the Purchase Agreement. A292. Through the sale of JDR to Exelon, Deere sold approximately 18 separate wind projects in development. A394-95. Only *three* such projects came with potential Earn Out payments to Deere. A318-21, §2.6. This was not mere coincidence. Rather, as noted, Deere had secured PPAs with Consumers for each of the three Michigan Wind Projects, rendering each of those projects more valuable than projects without PPAs. As Exelon's Crowley testified concerning the significance of the PPAs, "I think it's what separated them from the rest of that development pipeline, absolutely." A765; *see also* B227.

1. Section 2.6(a) of the Purchase Agreement

As set forth in Section 2.6(a) of the Purchase Agreement, Exelon agreed to pay an Earn Out for each of the Michigan Wind Projects, at such time as the specific project achieved "Completion of Development and Commencement of Construction." A319. For the Blissfield Project, Section 2.6(a) specifies a payment of $14 million:

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

Id.

The Purchase Agreement defines the Blissfield Wind Project as "the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts." A302. Nowhere does the Purchase Agreement state or imply that the location of the Blissfield Project (or any of the Michigan Wind Projects) could not be changed or that a relocation would negate Exelon's obligation to pay the Earn Out.

Rather, the parties agreed to condition payment of the Earn Out on certain events referenced in the Michigan PPAs. As Section 2.6(a) states, the Earn Out payment for each of the Michigan Wind Projects is due when the project achieves "Completion of Development and Commencement of Construction." That definition is set forth in the Purchase Agreement and would occur at the earlier of either (a) all five development milestones outlined in subsection (a)(i)-(v) of the "Completion of Development and Commencement of Construction" definition, **or** (b) the "Commercial Operation Date for the particular Michigan Wind Project." A303-04. To determine the "Commercial Operation Date," the Purchase Agreement refers to "the meaning set forth in the Michigan PPA related to such Michigan Wind Project." A303. In turn, the Michigan PPA related to the Blissfield Project is defined in the Purchase Agreement as "that certain Renewable Energy Purchase

Agreement, dated as of June 21, 2010 (as amended, restated, modified, superseded or supplemented from time to time), between Consumers Energy Company and Blissfield Wind Energy, LLC." A309. Finally, Section 3.2 of the Blissfield PPA establishes the "Commercial Operation Date."

2. Section 2.6(b) of the Purchase Agreement

Section 2.6(b) of the Purchase Agreement establishes Exelon's obligations with respect the Michigan Wind Projects "from and after the Closing":

> (b) 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 to, among other things, proceed with land acquisition, permitting, turbine purchase and construction agreements and interconnection arrangements, all intending to complete development and commence construction such that the Michigan Wind Projects would commence construction by the applicable Construction Start Milestone Date (as defined in the applicable Michigan PPA) and achieve commercial operation by the applicable Commercial Operation Milestone Date (as defined in the applicable Michigan PPA). Subject to the preceding sentence, the details and manner of such development efforts and the schedule therfor [sic] shall be within the sole discretion of [Exelon]. [Exelon] shall keep Seller informed on a reasonable, periodic basis, but no less frequently than quarterly, regarding the development of each Michigan Wind Project. 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 Seller, including the reason therefor and thereafter Buyer shall have no further obligation to Seller in connection with such development; provided that if within three (3) years thereafter the Completion of Development and Commencement of Construction of a particular Michigan Wind Project (including, for the avoidance of doubt, the direct or indirect sale of such

> Michigan Wind Project prior to the Commercial Operation Milestone Date (as defined in the applicable Michigan PPA) to a Person engaged in the Business) occurs, then Buyer shall have the payment obligations set forth in this Section 2.6 with respect to such Michigan Wind Project.

A319.

Thus, following closing, Exelon was required to use "commercially reasonable" efforts to develop the Michigan Wind Projects at its sole expense and in its "sole discretion." As Exelon's in-house Lead Counsel for Exelon Wind testified, "a[s] the owner of John Deere Renewables, now Exelon Wind, Exelon owned the business, so it is responsible for bills that are due and so on." A706. The only circumstance in which Exelon would not owe an Earn Out for each of the Michigan Wind Projects is if Exelon determined that the particular project would not be "commercially reasonable," "permanently cease[d] development," and "abandon[ed]" the project. A319, §2.6(b).

D. The Closing And Absence Of Any Complaint Concerning Deere's Disclosures

The closing on the Purchase Agreement occurred on December 9, 2010. After the closing, Deere had no decision-making authority for the Michigan Wind Projects. Rather, pursuant to Section 2.6(b) of the Purchase Agreement, Exelon exercised complete control over all the wind assets acquired from Deere, including the Michigan Wind Projects. A764.

From the signing of the Purchase Agreement through closing, and for the ensuing several years, Exelon *never* so much as hinted that Deere purportedly had failed to provide complete information concerning the Project. A710-11, A718, A766-67. Rather, as Exelon Wind's in-house Lead Counsel reluctantly conceded, Exelon surfaced its breach/recoupment claim only after "Deere threatened to sue us on the earn-out." A718.

E. Exelon Proceeds To Relocate And Develop The Blissfield Project Without Declaring An "Abandonment."

Following the closing, Exelon proceeded to develop the Michigan Wind Projects, including the Blissfield Project in Lenawee County. On July 6, 2011, the Riga Township Board approved new zoning ordinances that, among other things, lowered sound limits and setbacks for new wind towers in the Township. A531.

On August 8, 2011, Exelon declared a *force majeure* event under the Blissfield PPA in response to the Riga Township zoning ordinance. *Id.* At that point, Exelon decided it could relocate the Project as a means of curing the *force majeure.* In a letter to Consumers declaring a *force majeure*, Exelon's counsel stated [redacted] (emphasis added).

In a follow up letter dated September 6, 2011, Exelon's counsel [redacted] B178; *see also* B181; B180; B238; B188.[5] Having concluded that a relocation was feasible (and obviously not prohibited by the Purchase Agreement or the Blissfield PPA), Exelon proposed changing the location of the plant site from Lenawee County to one of two other counties in Michigan (Iona or Gratiot).

On September 21, 2011, Exelon sent a draft consent letter to Consumers that stated [redacted] B174. Ultimately, Consumers took the position that changing the location of the Project required MPSC approval, and agreed to amend the definition of Plant Site in the PPA to allow the Project to be built in either Ionia County or Gratiot County, Michigan. B191.

[5] David Ronk, whose deposition testimony is cited here, is a Consumers employee and was involved in the drafting and negotiation of the Blissfield PPA and its amendment. A696; B234; B239.

On December 22, 2011, BWE and Consumers entered into amendment No. 1 to the Blissfield PPA. B191. The amendment altered the terms of the Blissfield PPA in only two respects: the definition of Plant Site was replaced to permit a location in either Ionia County or Gratiot County, and a replacement provision was included concerning compensation for a federal tax benefit.[6]

On January 9, 2012, Consumers sought approval from the MPSC for the Blissfield PPA Amendment. In its application, Consumers noted—as it had been advised by Exelon—that Exelon "has relocated its development plans to either Ionia County or Gratiot County, Michigan." A536. The MPSC Order approving the Amendment states that, "[t]o continue development of the project, the developer [Exelon] has planned a relocation of the project to either Ionia County or Gratiot County." A556. Thus, as presented to Consumers and the MPSC, the Blissfield Project was relocated, not "abandoned." Indeed, a representative of Consumers testified that he did not recall Exelon ever telling Consumers that it was abandoning the project associated with the Blissfield PPA. A685.

[6] The Blissfield PPA Amendment provided that if Exelon did not complete the Blissfield Project before the expiration of any renewable energy Production Tax Credits ("PTC") from the federal government, then Exelon would guarantee reimbursement to Consumers for those credits. This risk never came to fruition as the federal government has continued to renew the PTC and Exelon declared a Commercial Operation Date for the Blissfield Project in Gratiot County that satisfied the Blissfield PPA. *See* B239; A564.

F. Exelon Seeks Board Approval To Proceed With The Project.

In January 2012, Crowley (Exelon's Chief Development Officer) made a written presentation to Exelon's board of directors seeking approval to acquire, construct and place in service a wind project in Gratiot County referred to as the Beebe wind project. A546. The presentation states that the Blissfield Project, "one of the 3 Michigan projects with Renewal Energy Purchase Agreements (REPA) acquired from Deere and Company, cannot be built ***in the original location***" and notes the amendment to the Blissfield PPA with Consumers to "***change the project site***." A548 (emphasis added). The presentation further describes approval sought to buy out Great Lakes' 50% ownership interest in BWE [redacted] *Id.* In doing so, Exelon would avoid Great Lakes' [redacted] development fee and investment rights in the Project.[7] Management also sought approval to [redacted] A547. Finally, the presentation reveals that based on a total capital spend of [redacted], including the Earn Out payment to Deere, the Project would yield an internal rate of return of

[7] Of course, if (as Exelon contends) the Blissfield Project was "abandoned," there would be no reason to acquire Great Lakes' interest in the project to avoid a development fee, because Exelon would owe nothing to Great Lakes.

[redacted]. A549.[8] Thus, contrary to Exelon's assertion that it did not get the "benefit of its bargain," its own internal documents belie this story too.[9]

G. Exelon Acquires Beebe And Relocates The Blissfield Project.

In late January 2012, the MPSC approved the amendment to the Blissfield PPA. A555. The MPSC observed that the amendment "moves the location of the wind farm," but would not result in cost or rate increases. A556. After receiving MPSC approval for the Blissfield PPA Amendment, Exelon (through BWE) relocated the Project to a site in Gratiot County, Michigan. BWE acquired Beebe Renewable Energy, LLC and its assets in Gratiot County. B215. BWE developed the wind farm in Gratiot County and utilized the amended Blissfield PPA at that location. *Id.*; SJ Op. 5-6. Although Exelon would later change the name of BWE to Beebe Renewable Energy Holdings, LLC and then to Beebe Renewable Energy, LLC, (B219), in all other respects it is the same legal entity that Exelon purchased from Deere and is the counterparty to the Blissfield PPA. *See* A330; B235.

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[8] Nowhere in this presentation did Exelon consider that it had abandoned the Blissfield Project or that, by building in Gratiot County, it was building a different project.

[9] Exelon claims that "Deere was completely uninvolved with Beebe," therefore making it a different project. EOB 4. That claim is both misleading and irrelevant. It is misleading because Beebe was developed using BWE and the Blissfield PPA, both acquired from Deere, and it satisfied the requirements of the Blissfield PPA. It is irrelevant because, as explained above, Deere had no decision-making authority regarding development efforts post-closing, regardless of location. *See supra* 18.

Exelon's Board subsequently approved the foregoing development steps, and, on February 27, 2012, [redacted] B194.

H. Exelon Tells Deere It "Abandoned" The Blissfield Project.

In late April 2012, Exelon was internally celebrating its development progress on the Blissfield Project. B215 ("[redacted]"). Yet, just days later (on May 4, 2012), Exelon informed Deere by letter that it was "abandoning" the Blissfield Project. A563. The letter omitted any reference to the relocated Project. Exelon's claim of an abandonment was false and misleading, and designed to avoid payment of the Earn Out. Informal investigation by Deere revealed that Exelon had relocated the Project to a nearby Michigan county, using the same legal entity (BWE) and operating under the lucrative Blissfield PPA.

I. The Project Achieves A Commercial Operation Date.

On December 18, 2012, Exelon advised Consumers "in accordance with the notice requirements in paragraph 3.2(d)" of the Blissfield PPA, that such date constituted the "Commercial Operation Date" for the project associated with the Blissfield PPA. A565; *see also* SJ Op. 6 ("It is undisputed that the Commercial Operation Date, as defined in the Blissfield PPA, was achieved."). By achieving a Commercial Operation Date, Exelon triggered payment of the Earn Out under Section 2.6(a). Exelon, however, refused to pay the Earn Out.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THAT DEERE IS ENTITLED TO THE EARN OUT.

A. Question Presented

Did the Superior Court correctly find that Deere is entitled to the $14 million Earn Out payment in connection with the Blissfield Project, which Exelon relocated at its discretion and continued to develop using the Blissfield PPA, and for which it achieved a Commercial Operation Date? B265-75; B299-321; B333-39; B358-83, B414-19; SJ Op. 8-16; Order and Final Judgment ("Final Judgment"), attached hereto as Exhibit A, at ¶¶1, 2. (question presented below).

B. Scope of Review

This Court "review[s] a trial court's grant of summary judgment *de novo*." *In re Viking Pump, Inc.*, 148 A.3d 633, 643-44 (Del. 2016) (citation omitted). The parties filed cross-motions for summary judgment on Deere's breach of contract claim, such that the cross-motions were deemed "to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Super. Ct. Civ. R. 56(h); SJ Op. 6 ("The parties agree that the issues regarding the earn-out provision involve undisputed facts."); *see also* B360-61.

C. Merits of Argument

The Superior Court correctly found that Deere is entitled to payment of the $14 million Earn Out. SJ Op. 23-24. The Superior Court rejected Exelon's argument

that it had abandoned the Project, instead finding that "Exelon's actions and representations, at the time it was seeking to amend the Blissfield PPA, evidence Exelon's intent to relocate the Blissfield Wind Project…rather than to abandon [it]." *Id.* The Earn Out payment is thus due because the Project, which Exelon relocated and continued to develop using BWE and the Blissfield PPA, indisputably achieved the Commercial Operation Date in the Blissfield PPA—the triggering milestone under the Purchase Agreement. *Id.*

1. Deere Is Entitled To The Earn Out.

The Superior Court correctly found that Deere is entitled to payment of the Earn Out based on the plain language of the Purchase Agreement and the undisputed facts, thereby satisfying "the 'reasonable expectations of the parties at the time they entered into the contract.'" *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 83 (Del. Ch. 2013) (citation omitted). That result follows from these basic points—*none* of which can be disputed:

- ***First***, the Earn Out was due under Section 2.6(a) of the Purchase Agreement when the Blissfield Project achieved "Completion of Development and Commencement of Construction." A319; SJ Op. 10.
- ***Second***, Completion of Development and Commencement of Construction is satisfied by ***either*** reaching the five development milestones outlined in

subsection (a)(i)-(v) of the definition, ***or*** achieving a Commercial Operation Date under subsection (b). A303-04; SJ Op. 10.

- ***Third***, the term "Commercial Operation Date" is defined in the Purchase Agreement as having "the meaning set forth in the Michigan PPA related to such Michigan Wind Project." The Earn Out for the Blissfield Project is thus tied directly to the Blissfield PPA, and in particular, the achievement of a Commercial Operation Date for the project associated with the Blissfield PPA. A303; SJ Op. 10-11.
- ***Fourth***, the Michigan PPA related to the Blissfield Project is defined in the Purchase Agreement as "that certain Renewable Energy Purchase Agreement, dated as of June 21, 2010 (***as amended, restated, modified, superseded or supplemented from time to time***), between Consumers Energy Company and Blissfield Wind Energy, LLC"—in other words, the Blissfield PPA. A310; SJ Op. 11.
- ***Fifth***, Exelon and Consumers amended the Blissfield PPA to change the definition of "Plant Site" to allow the Project to be built in either Ionia County or Gratiot County, Michigan; and, in fact, Exelon relocated the Project to Gratiot County relying upon the "sole discretion" afforded it in Section 2.6(b) of the Purchase Agreement. SJ Op. 12-13; *See* A536; A531; B177; A555.

- ***Sixth***, and finally, the Blissfield Project (relocated to Gratiot County) achieved its Commercial Operation Date ***under the Blissfield PPA*** on December 18, 2012. SJ Op. 16; A565.

Accordingly, Exelon owes the Earn Out.

2. Each Of Exelon's Attempts To Skirt Its Payment Obligations Fails.

Exelon makes various arguments to avoid paying the Earn Out. First, Exelon claims that the description of the Project in the Purchase Agreement as being "under development" in Lenawee County required that it be developed in that county (and only in that county) for Deere to be entitled to the Earn Out. EOB 18-19. Second, despite considerable, undisputed evidence to the contrary, Exelon claims that it abandoned the Project being developed in Lenawee County and that the Purchase Agreement did not permit relocation of the Project to another county. EOB 19-25. Third, Exelon claims that the Superior Court committed legal error by relying on post-closing evidence that supports Deere's contention that Exelon relocated, not abandoned, the Blissfield Project and that the Earn Out is due. EOB 36-39. Each of these arguments fails on closer review.

a. Exelon's "Plain Language" Argument Reads Into The Purchase Agreement A Location Requirement That Does Not Exist.

Exelon claims that the plain language of the Purchase Agreement requires rejection of the Superior Court's finding that Deere is entitled to the Earn Out. EOB 18. But it cannot point to any language in the Purchase Agreement that supports this position. Rather, according to Exelon, because the definition of the Blissfield Project states that it is "under development" in Lenawee County, that must mean that the Project had to be built in Lenawee County and nowhere else.

As the Superior Court recognized, the definition of the Blissfield Project is only descriptive of the Project as it existed at the time the Purchase Agreement was executed. SJ Op. 12 ("As of [the time the Purchase Agreement was executed], the reference to location was factually accurate—the Blissfield Wind Project was under development in Lenawee County."); *see also* A594 (describing the "early stage" nature of the Project); B226-27 (same). And nothing in this definition—nor in any other provision in the Purchase Agreement—mandates that the Project be developed in Lenawee County or prohibits the Project from being relocated. *See* A302, "Blissfield Wind Project";[10] SJ Op. 12 ("The Court finds that there is no provision

[10] Notably, on the Development Projects disclosure schedule, the Blissfield Project is described as "to be located in Washtenaw County, Michigan," not Lenawee County. *See* A394.

in the Purchase Agreement or in the Blissfield PPA that either expressly prohibits or allows the relocation of the Blissfield Wind Project."). Indeed, Exelon offers no explanation for why the parties would condition payment of the Earn Out on a specific location, or for why relocating a project to another county would negate its Earn Out obligation. Exelon's argument that the Project must be developed in Lenawee County for Deere to receive the Earn Out was thus properly rejected by the Superior Court.

b. Exelon Was Permitted To Relocate The Blissfield Project.

Despite there being no express location requirement in the Purchase Agreement, Exelon argues that it had no right to relocate the Project from Lenawee County. EOB 22. Exelon claims the Purchase Agreement is unambiguous and clear on its face, but nevertheless relies on canons of contract interpretation (some, for the first time on appeal) to imply terms and restrictions in the Purchase Agreement. EOB 23-24. But "[r]ules of construction, such as *ejusdem generis*, should not be unnecessarily applied." *In re IAC/Interactive Corp.*, 948 A.2d 471, 496 (Del. Ch. 2008); *see also Robb v. Ramey Assocs., Inc.*, 14 A.2d 394, 396 (Del. Super. Ct. 1940) ("Great caution is required in the application of the [*expressio unius*] maxim. It is not a rule of universal application, but is to be applied only as an aid in arriving at intention, and not to defeat the apparent intention.") (internal citation omitted). Exelon's *implied* terms and restrictions should be rejected.

Relying on the interpretive canon of *expression unius est exclusion alterius*, Exelon contends that because the Purchase Agreement expressly permits development or abandonment of the Project, but makes no mention of "relocation," one must infer that "relocation" was not an available option under the agreement. EOB 23.

A fair reading of the whole Purchase Agreement actually supports the opposite. *See Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect…."). Nothing in the Purchase Agreement required Exelon to develop the Project at any specific location. And nothing in Section 2.6(b)—or in any section of the Purchase Agreement—restricted or limited Exelon's ability to change the location of the Project. Further, post-closing, Exelon was required to develop the Project using ***all*** commercially reasonable efforts and was granted the "sole discretion" in the development of the Project. A319, §2.6(b). This included "land acquisition," and other specifics. Thus, the parties clearly understood that once Deere handed the Project over to Exelon, the manner and specifics of the Project

would evolve, but so long as Exelon achieved a Commercial Operation Date, the Earn Out would be due.[11]

Exelon attempts to limit its own rights under the Purchase Agreement by relying on other interpretive canons—*ejusdem generis* and *noscitur a sociis*. EOB 24. These interpretive canons do not help Exelon. Exelon claims that under Section 2.6(b), the "relocation of a massive wind project to a different county 100 miles away" does not fall within the "details and manner" of the development efforts left to Exelon's sole discretion. EOB 24-25, 45. Yet, Exelon concedes that it could change the location of the Blissfield Project anywhere ***within*** Lenawee County. EOB 13 (claiming that "Exelon ***continued to attempt to develop*** the Blissfield Project by exploring ***alternative locations in Lenawee County***." (emphasis added)). Thus, according to Exelon's logic (which finds no support in the Purchase Agreement), it could move the "massive" Blissfield Project 40 miles from its preliminary location if it remained in Lenawee County, but could not move it 5 miles from its preliminary location if it crossed the county line. Exelon offers no explanation for its new-found concern for county lines.[12] When seeking to amend

[11] Moreover, the Blissfield PPA itself describes the location for the Project as "preliminary." A234.

[12] Exelon claims that the tasks enumerated in Section 2.6(b) (including land acquisition and interconnection arrangements) are "micro-level" tasks, while moving the county in which the project is located (*i.e.*, acquiring land in a different

the Blissfield PPA, it voiced no such concern and told Consumers that [redacted]. B178; B236.[13] Exelon's interpretation, which adds a restriction not found in the language of the Purchase Agreement, is "untenable." *Alpine Inv. Partners v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276, 1286 (Del. Ch. 2002).

The reality is that the development of the Project (including its location) was within Exelon's sole discretion, and if it achieved the specified milestone (as it did), the Earn Out was due.[14] For these reasons, any argument by Exelon that it was

county) is a "macro-level" task. EOB 24. Exelon draws no distinction between these tasks other than a county line. Its characterization should be rejected.

[13] Consumers was indifferent about the county to which Exelon chose to relocate the Project. B240.

[14] Also under Exelon's logic, it could have avoided the Earn Out by simply changing other aspects of the Blissfield Project described in the Purchase Agreement. For example, it could have transferred development of the Project to another legal entity or built the Project with a different capacity of megawatts. Such an absurd result is not what the parties intended and certainly not a result Deere would have accepted when it agreed to leave $40 million in consideration contingent on Exelon's development of the Michigan Wind Projects. *See Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisitions, LLC*, 2015 WL 6455367, at *18 (Del. Ch.), *aff'd in part, rev'd on other grounds*, 151 A.3d 450 (Del. 2016) ("The law will not enforce an unreasonable interpretation that produces an absurd result or one that no reasonable person would have accepted when entering the contract." (quotations omitted)).

required to develop the Project in Lenawee County finds no support in the Purchase Agreement and should be rejected.[15]

c. Exelon Did Not Abandon The Blissfield Project—It Relocated The Project (As It Was Permitted To Do) And Continued To Develop The Project At Its Discretion.

To avoid paying the Earn Out, Exelon would have this Court believe that it abandoned the Project because it sent Deere a notice of abandonment that purportedly complied with the Purchase Agreement's requirements for such notices. EOB 20. What Exelon does not tell the Court (and sought to suppress below as well) is that *before* Exelon provided its "notice" to Deere on May 4, 2012, it had already taken *all* of the following actions to relocate the Blissfield Project:

- Notified Consumers of a *force majeure* event (August 8, 2011);
- Identified alternative sites for the Blissfield Project (by September 1, 2011);
- Negotiated and executed an amendment to the Blissfield PPA with Consumers (by December 22, 2011);

[15] Deere also alleged, in the alternative, a claim for breach of the implied covenant of good faith and fair dealing, which the Superior Court dismissed. *See* Ex. C. If this Court finds that the parties failed to anticipate the relocation issue (an argument Exelon never raised below nor on appeal) and does not affirm the Superior Court's ruling on those grounds, then Deere respectfully requests that the Superior Court's order dismissing Deere's implied covenant claim be reversed, as Exelon's refusal to pay the Earn Out was unreasonable and arbitrary (*see Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400, 418-19 (Del. 2013), and that the Superior Court's summary judgment ruling be affirmed on the alternative basis that Exelon breached the implied covenant by relocating the Project and refusing to pay the Earn Out.

- Sought regulatory approval through Consumers for the Blissfield PPA Amendment (January 9, 2012);
- Sought internal board approval to pay Deere the Earn Out (January 24, 2012);
- Obtained internal board approval for the acquisition of the alternative site in Gratiot County (January 24, 2012);
- Obtained regulatory approval from the Michigan Public Service Commission for the Blissfield PPA Amendment (January 26, 2012);
- Bought out Great Lakes' interest in BWE, the legal entity with the rights to develop the Blissfield Project and the counterparty to the Blissfield PPA (February 27, 2012); and
- Completed acquisition of the alternative location site in Gratiot County (April 26, 2012).

B44. Thus, before Exelon gave any notice of a purported "abandonment," it had *already completed* relocating the Project to Gratiot County.[16] Exelon, therefore, was

[16] Exelon claims that after it acquired Beebe it continued trying to develop the Blissfield Project at other sites in Lenawee County making it conceivable that a Lenawee project and a Gratiot project might both reach commercial operation and thus demonstrating they could not be the same. EOB 21-22. Exelon's argument ignores that only one project could reach a Commercial Operation Date under the Blissfield PPA, which was inextricably tied to the Blissfield Project no matter where it was located. Exelon chose to relocate the Blissfield Project to Gratiot County. That it was may have been trying to develop another project unrelated to the Blissfield PPA or to BWE in Lenawee County is of no moment.

not relieved of its obligation to pay Deere the Earn Out based on its purported "abandonment" story.

i. The Court can consider post-closing evidence of Exelon's conduct that demonstrates that Exelon relocated, not abandoned, the Blissfield Project.

Exelon argues that this Court and the Superior Court should ignore the post-closing evidence of Exelon's development efforts because the Purchase Agreement is unambiguous. EOB 36. The argument makes no sense. As the Superior Court recognized, to determine whether Deere is entitled to a post-closing Earn Out, it is necessary to consider what happened post-closing. SJ Op. 15-16. This is settled Delaware law. *See Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations, LLC*, 114 A.3d 193, 196 (Del. 2015) (affirming Court of Chancery's interpretation of post-closing earn out and application to buyer's post-closing conduct); *Sheth v. Harland Fin. Sols., Inc.*, 2014 WL 4783017, at *1 (Del. Super. Ct.); *Aveta Inc. v. Cavallieri*, 23 A.3d 157, 164-65 (Del. Ch. 2010).

The Superior Court had to consider Exelon's post-closing conduct because Section 2.6(b) of the Purchase Agreement provides that whether the Earn Out is payable or not depends on Exelon's development efforts "[f]rom and after" the closing. A319. As the Superior Court concluded after considering the record, "Exelon's position is contradicted by Exelon's actions and representations at the time it was seeking to amend the Blissfield PPA." SJ Op. 13. For example, in

declaring a *force majeure* under the Blissfield PPA, Exelon wrote to Consumers about [redacted]." B177 (emphasis added); A531. And, in its application to the MPSC, Consumers noted—as it had been advised by Exelon—that Exelon "has relocated its development plans to either Ionia County or Gratiot County, Michigan." A536, ¶5. The MPSC Order approving the Amendment states that, "[t]o continue development of the project, the developer [Exelon] ***has planned a relocation of the project*** to either Ionia County or Gratiot County." A556; *see also supra* 19-21. Thus, as presented to Consumers and the MPSC, the Blissfield Project was relocated, not "abandoned."

Exelon's buyout of Great Lakes also belies its abandonment assertion. Exelon management told its own board that it was seeking approval to buy out Great Lakes [redacted] A548 [redacted]; B166-68 (stating that "[redacted]

[redacted]");[17] *see also* B231. The Development Agreement defined "the Project" for which the development fee would be owed as being co-developed as [redacted] B46, Recitals. If that project was in fact abandoned, why would Exelon pay [redacted] to avoid the development fee? If truly abandoned, Exelon would owe Great Lakes nothing.

Exelon's internal accounting for the Project reveals a similar story of contradictory positions. The January 24, 2012 presentation by Crowley, Exelon's Chief Development Officer, states that the economics of building in Gratiot County include both a [redacted] A553. [redacted] A549, n.1. If Exelon had truly abandoned the Project, then its internal accounting would not include costs or value attributable to the Blissfield Project in Lenawee County. By attributing cost and value acquired from the Project in Lenawee County to its valuation of the Project in Gratiot County, Exelon treats the two as one and the same.

[17] The January 5, 2011 date on this presentation (B166) is a typo. The presentation was prepared in January 2012. *See* B231.

Exelon claims that the Superior Court erred by finding that Exelon's accounting treatment "suggests that the Blissfield Project was relocated and not abandoned." EOB 37. Exelon argues that if its accounting treatment should be considered, [redacted] EOB 37-38. But in 2011, Deere was unaware of Exelon's development and relocation efforts. And, when Deere was presented with Exelon's abandonment letter, and later learned the truth, it promptly took action to obtain the Earn Out.

In sum, the Project was never in fact "abandoned"; on the other hand, the condition precedent to payment of the Earn Out was met long ago. The Superior Court correctly held that Exelon is required to pay the Earn Out.

ii. The purported differences between the Blissfield Project in Lenawee County and Gratiot County are irrelevant.

Exelon attempts to support its "abandonment" argument by listing "differences" between the Project under development in Lenawee County and the Project relocated to Gratiot County. EOB 21. Specifically, it points to differences with regard to "developers,…townships,…counties,…permits,…zoning,… landowners,…wind turbines…and…interconnections to the electric grid." *Id.* Again, this argument ignores the plain language of Section 2.6(b), which expressly states that "land acquisition, permitting, turbine purchase, and construction

agreements and interconnection arrangements" are all part of the "details and manner of such development efforts [that are]…within the sole discretion of [Exelon]." A319. Each area of purported difference is nothing more than an aspect of development left to Exelon's sole discretion. For example, nowhere does the Purchase Agreement specify what townships or counties the Blissfield Project must be built in, what permitting is required or must be obtained, which developers must participate in development, what zoning requirements are necessary, who the landowners must be or how the land is to be leased from them, which wind turbines must be used or how many, or what interconnection agreements must be obtained, from whom, or for what price. But the Blissfield Project is directly tied in the Purchase Agreement to the legal entity developing it (BWE) and the Blissfield PPA (*see* A302; A310), both of which continued with the relocated Project in Gratiot County.

It is not surprising that the specifics of a project in early development (at the time of sale) would change over time; indeed, the parties expressly so anticipated. But the bargain struck contemplated payment (*i.e.*, the Earn Out) when the milestone in the Purchase Agreement was met, and there is no dispute that Exelon met the milestone. A565. Thus, as the Superior Court found, for purposes of the Earn Out, the "Blissfield Wind Project that originally was contemplated to be developed in

Lenawee County is the same project that eventually was developed in Gratiot County." SJ Op. 16.

3. Exelon's Attacks On The Superior Court's Incorporation By Reference Analysis Is Nonsensical.

Exelon further challenges the Superior Court's finding that the Blissfield PPA was incorporated by reference into the Purchase Agreement as "destabiliz[ing] Delaware contract law." EOB 35-36. But Exelon misconstrues the Superior Court's ruling, which is non-controversial and plainly correct, and Delaware contract law remains on solid ground.

a. Exelon Misconstrues The Superior Court's Ruling.

Exelon first misconstrues the Superior Court's application of the incorporation by reference doctrine and the import of finding the Blissfield PPA incorporated by reference into Section 2.6 of the Purchase Agreement. The Superior Court did not find that the definition of "Blissfield Wind Project" in the Purchase Agreement was altered by the amendment to the term "Plant Site" in the Blissfield PPA. Rather, the Superior Court was analyzing the relationship between the Purchase Agreement and the Blissfield PPA and the importance, if any, of the Project's location. SJ Op. 10, 12.[18] As an initial matter, it is indisputable that the

[18] The Superior Court correctly observed that by the terms of the Purchase Agreement, each Michigan PPA is linked to a specific project by reference to the

drafters of the Purchase Agreement were aware of, and had in hand, the Michigan PPAs, and elected to tie the Earn Out to a development milestone in the PPAs.

In analyzing Section 2.6, the Superior Court looked to whether a provision in the Purchase Agreement or in the Blissfield PPA either prohibited or allowed the relocation of the Blissfield Project. SJ Op. 12.[19] The Superior Court found no such provision, and therefore concluded that because the Blissfield PPA and the Purchase Agreement must be read together, Exelon's amendment to the Blissfield PPA to change the Project location "reflects the ability of Exelon to change the project location." SJ Op. 13. In other words, it is additional evidence that Exelon was not prohibited (in either the Purchase Agreement or the Blissfield PPA) from changing the location of the Project, which it did. Exelon's "incorporation by *inference*" argument (EOB 35-36) therefore misses the point.

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date of the PPA and the contracting parties—not the location of the project. SJ Op. 11.

[19] Exelon argues that the Purchase Agreement "specifically defined the 'Blissfield Wind Project' as a project located in Lenawee County, and that definition was never altered." EOB 31. The Purchase Agreement in fact describes the Blissfield Wind Project as a project under development in Lenawee County, which the Superior Court correctly found was simply a reference to a location that was "factually accurate" at the time the Purchase Agreement was signed. SJ Op. 12.

b. Exelon Agrees That A Key Term—Commercial Operation Date—Is Incorporated By Reference Into The Purchase Agreement From The Blissfield PPA.

In building its "incorporation by inference" straw man, Exelon acknowledges that the term "Commercial Operation Date" is incorporated by reference into the Purchase Agreement from the Blissfield PPA. EOB 26. Exelon does not dispute that Section 2.6(a), which provides for the Earn Out, relies on the defined term "Completion of Development and Commencement of Construction." That defined term relies on the defined term "Commercial Operation Date." The defined term "Commercial Operation Date" in the Purchase Agreement incorporates the same term in "the Michigan PPA related to such Michigan Wind Project." A303. As such, it is necessary to then look to the meaning of Commercial Operation Date set forth in the applicable Michigan PPA—here, the Blissfield PPA (as amended, restated, modified, superseded or supplemented from time to time). A309.[20] The Earn Out for the Blissfield Project is thus tied directly to the Blissfield PPA, and in particular, the achievement of a Commercial Operation Date (defined in the Purchase Agreement by reference to the Blissfield PPA) for the project associated with the Blissfield PPA. There is no question that under the Blissfield PPA, the project in dispute (whether called the Blissfield Project or the Beebe project or

[20] *See State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. Ct. 1951) (explaining incorporation by reference doctrine).

something else) achieved a Commercial Operation Date and the Earn Out was triggered.

c. The Superior Court's Incorporation By Reference Analysis Supports The Parties' Reasonable Intent That The Earn Out Would Be Paid When Milestones Established In The Blissfield PPA Were Achieved.

Exelon argues that the Superior Court's application of the incorporation by reference doctrine frustrates the reasonable intent of the parties. EOB 31-35. "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). Exelon tries to discredit the Superior Court's decision by establishing that it was not the reasonable intent of the parties that payment of the Earn Out was dependent solely on whether the Blissfield PPA was used. But that is not what the Superior Court found. Rather, the Superior Court found that the Project was relocated, not abandoned; that nowhere did the Purchase Agreement prohibit relocation; and that the Commercial Operation Date under the Blissfield PPA was met, entitling Deere to the Earn Out. SJ Op. 16.[21]

[21] Exelon's argument that it is the law of the case that "the use of the power purchase agreement is not a triggering event for the earn-out" (EOB 34) is thus a red herring, as the Superior Court did not hold that simply using the Blissfield PPA triggered the Earn Out. Moreover, the Superior Court's summary judgment ruling is consistent with Judge Vaughn's motion to dismiss ruling, which found that there was support for "the contention that the project was 'relocated' rather than abandoned" and that

i. The plain language of the Purchase Agreement evidences the intent of the Earn Out was to compensate Deere as the Blissfield Project satisfied the Blissfield PPA.

In any event, it is evident from the plain language of the Purchase Agreement that the intent of the Earn Out was to compensate Deere as each Michigan Wind Project achieved operation. ***First***, Section 2.6(b) requires Exelon to "continue the development of the three separate Michigan Wind Projects…all *intending* to complete development…such that the Michigan Wind Projects would commence construction *by the applicable Construction Start Milestone Date (as defined in the applicable Michigan PPA*) and achieve commercial operation *by the applicable Commercial Operation Milestone Date (as defined in the applicable Michigan PPA)*. A319 (emphasis added). By specifically noting that the intent of that section is to satisfy the milestones of the Michigan PPAs, Section 2.6 expressly contemplates paying Deere the Earn Out once Exelon fulfilled the requirements of the Michigan PPAs.

Second, despite Exelon's arguments to the contrary (EOB 34-35), the triggering events for the Earn Out require that the Blissfield PPA be used. The Earn Out is triggered when Completion of Development and Commencement of

"the fact that the same power purchase agreement was used in amended form for the Gratiot County project has some tendency to support Deere's contentions." A575.

Construction is met, which can happen in one of two ways. Under subpart (a) of that definition, clause (iv) requires that "the Michigan PPA related to such Michigan Wind Project is in full force and effect, and no default by the applicable counterparties thereto exists thereunder that is continuing and is material to such Michigan Wind Project." A304. Under subpart (b) of the definition, the Earn Out is triggered when the Commercial Operation Date, which is defined by the relevant PPA, is achieved. Thus, there is no scenario where the PPA would be abandoned but Exelon would still owe the Earn Out.

Third, the Purchase Agreement refers to each of the Michigan PPAs "as amended, restated, modified, superseded or supplemented from time to time." A309-10. This language contemplated that the Blissfield PPA could be modified and still trigger payment of the Earn Out, once the "Completion" milestone was achieved. Here, there is no question that the Blissfield PPA is associated with the Blissfield Project, originally under development in Lenawee County and then relocated to Gratiot County by Exelon.

ii. Any cost or difficulty Exelon incurred in relocating the Blissfield Project is irrelevant under the Purchase Agreement.

Exelon also asserts that the Superior Court's incorporation by reference analysis frustrated the parties' intentions because Deere had nothing to do with the project that was developed in Gratiot County, such that the parties would not have

intended for Deere to be paid the Earn Out for Exelon bringing that project to commercial operation. EOB 32-33. Exelon claims that because it "salvaged" the Blissfield PPA and paid [redacted] to purchase the site in Gratiot County, Deere is not entitled to the Earn Out. *Id.* These arguments fail.

First, the costs Exelon incurred in developing or relocating the Project post-closing are irrelevant because, under Section 2.6(b), Exelon agreed to bear all costs of development post-closing. In turn, Exelon would of course reap the benefits of its investment.[22] As discussed above, Section 2.6(b) grants Exelon broad discretion to develop the Michigan Wind Projects and placed the burden of development, including the risk of additional, unforeseen costs, on Exelon. *Supra* 17-18. Thus, so long as Exelon believed that proceeding with development was "commercially reasonable" (which obviously it did), for purposes of the Earn Out, it made no difference what Exelon elected to spend. If Exelon wanted to spend extravagantly on turbines, for example, it was free to do so, but that would hardly serve as a basis to refuse to pay the Earn Out.

Second, Exelon fails to point out that the Project in Lenawee County was in the very early stages of development. A594-95; B226-27. The project site it

[22] Exelon projected that, based on a total capital spend of [redacted], including the Earn Out payment to Deere, the relocated Blissfield Project would yield an internal rate of return of [redacted] A549.

purchased in Gratiot County to relocate the Project was much farther along in the development process. A633. Exelon thus fails to take into account that it could have spent ***more*** at the Lenawee County site to reach the same level of development as the Gratiot County site, in which case its frustration argument would similarly fail. At bottom, the deal struck by Exelon is that its post-closing costs—and risks—were solely its responsibility.

Third, the purported additional "$16 million in risk" Exelon contends fundamentally changes the Blissfield PPA is a red herring. EOB 33.[23] The Purchase Agreement expressly incorporated the Michigan PPAs and expressly contemplated that Exelon could amend those PPAs in any way it saw fit without affecting Deere's right to receive the Earn Out. Thus, securing an amendment to the Blissfield PPA does not negate Exelon's obligation to pay the Earn Out.

[23] Moreover, the "additional risk" Exelon claims it bore concerned the federal renewable energy PTCs referenced above. *See supra* 21 n.6. As noted above, that "additional risk" never came to fruition, and Exelon never paid a penny to Consumers to guarantee those tax credits. *Id.*

II. DEERE DID NOT BREACH THE PURCHASE AGREEMENT, AND EXELON IS NOT ENTITLED TO RECOUPMENT.

A. Question Presented

Did the Superior Court correctly find that Deere did not breach the Purchase Agreement and, in any event, that Exelon did not incur any damages in relocating the Blissfield Project, such that Exelon's recoupment claim fails as a matter of law? B276-85; B342-51; B419-33; B447-52; SJ Op. 17-23; Final Judgment ¶1(c). (question presented below).

B. Scope of Review

This Court "review[s] a trial court's grant of summary judgment *de novo*." *In re Viking Pump, Inc.*, 148 A.3d 633, 643-44 (Del. 2016) (citation omitted).

C. Merits of Argument

Exelon's recoupment claim is a purely defensive set-off, available only if Deere is entitled to the Earn Out. *See TIFD III-X LLC v. Fruehauf Prod. Co., L.L.C.*, 883 A.2d 854, 859 (Del. Ch. 2004). But even so, Exelon must still establish a cognizable basis for the set-off—a breach by Deere of the Purchase Agreement. Exelon failed to make such a showing in the Superior Court because its disclosure claim—first raised years after-the-fact and only in response to Deere's claim for the Earn Out—was meritless and because the claim is barred by the Purchase Agreement. SJ Op. 19-21. The Superior Court correctly entered summary judgment in favor of Deere on Exelon's recoupment Counterclaim. *Id.* at 24.

1. Exelon's Recoupment Claim Should Be Rejected Because Exelon Has Failed To Show A Material Breach Of Section 4.11(c)(iv) Of The Purchase Agreement.

To have succeeded on its recoupment claim, Exelon must prove a material breach of the Purchase Agreement. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).[24] Exelon contends that Deere breached Section 4.11(c)(iv) of the Purchase Agreement, which states in pertinent part that "except as set forth in…the Seller Disclosure Schedule, [Deere] reasonably believes that all material Permits necessary for the development, construction, ownership, maintenance, use and/or operation of the Michigan Wind Projects…can be obtained in the ordinary course." A336. Exelon does not dispute that the Seller Disclosure Schedule includes two paragraphs that discussed the growing opposition in Riga Township, Lenawee County. EOB 41-42. Rather, it argues that the Seller Disclosure Schedule omits material information that was included in a contemporaneously prepared internal Deere memorandum, and further asserts that Deere concealed from Exelon the full scope of local resistance in Riga Township. *Id.* at 42-43. Exelon also cites deposition testimony from David Drescher, a former

[24] Exelon alleged below that Deere breached Sections 4.11(c)(iv) and 6.3 of the Purchase Agreement. In its Opening Brief, Exelon does not argue that Deere breached Section 6.3 of the Purchase Agreement. Exelon has thus waived any appeal of the Superior Court's finding that Deere did not breach Section 6.3 of the Purchase Agreement. Sup. Ct. R. 14(b)(vi)(A)(3).

Deere employee who transitioned to Exelon as part of the sale of JDR and is now retired, in which he stated that Deere did not have a reasonable belief that all material permits could be obtained to construct the Project in Lenawee County. EOB 44.[25] None of Exelon's arguments amounts to a breach by Deere of Section 4.11(c)(iv) of the Purchase Agreement, nor do they raise a factual dispute precluding the Superior Court's grant of summary judgment on this issue.

First, Exelon's claim that Deere omitted from the Seller Disclosure material information that was contained in its internal memorandum and therefore concealed that information from Exelon is disingenuous at best. EOB 43. As described above:[26]

- On August 20, 2010, Goldman Sachs sent the Deere memorandum to key Exelon employees involved in negotiating the Purchase Agreement. *See* B115; A760.
- Exelon's Chief Development Officer admitted that Deere shared this internal memorandum with Exelon ***before*** the Purchase Agreement was finalized and signed. A766-67.

[25] Drescher, who was Vice President, Wind Energy at JDR, reviewed and approved the language in the disclosure at the time it was being drafted. A289.

[26] *See supra* 12-15.

- Exelon's deal counsel was directly involved in revising and approving the Seller Disclosure Schedule before the Purchase Agreement was signed. B120, B123.

Exelon's contention that Deere "concealed" from Exelon material facts contained in the Deere memorandum before the Purchase Agreement is thus belied by the record evidence. As the Superior Court correctly observed, Deere did not breach Section 4.11(c)(iv) of the Purchase Agreement. SJ Op. 20, 21; *see also DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958-59 (Del. 2005) (finding that disclosure of material facts in negotiation documents, to buyer's negotiator, and in the disclosure schedules—which were clear exceptions to the representations and warranties in the contract—constituted adequate disclosure).

Second, Drescher's testimony is irrelevant because Deere did not represent that it could obtain all material permits in the ordinary course for the Project. Section 4.11(c)(iv) uses the word "except" to specifically carve out from the representation certain exceptions that Deere made in the Seller Disclosure Schedule. The word "except" is critical to a proper reading of Section 4.11(c)(iv) and cannot simply be ignored, as Exelon tries to do in relying on Drescher's testimony. The word "except" means "not including" or "other than." *See* Merriam-Webster, available at http://www.merriam-webster.com/dictionary/except. In Section 4.11(c)(iv), Deere was making a representation about obtaining material permits for the Michigan

Wind Projects ***except for*** the exclusions related to particular projects identified in the Seller Disclosure Schedule.[27] Because the Blissfield Project was carved out of the representation, Deere was *not* representing that it "reasonably believe[d]" that all material permits could be obtained in the ordinary course in connection with the Blissfield Project. To the contrary, it was flagging an exclusion, accurately stated (and reviewed by Exelon) in Disclosure Schedule 4.11(c)(iv). Thus, because Deere expressly carved the Blissfield Project out of the representation it was making as to the other Michigan Wind Projects, the testimony of Drescher that Exelon relies upon to claim that Deere doubted that the Project's permits could be obtained is irrelevant.

2. Exelon's Recoupment Claim Should Be Rejected Because It Is Barred By The Purchase Agreement.

Section 2.6(b) of the Purchase Agreement bars Exelon from any recovery under its recoupment theory because Section 2.6(b) placed the burden of developing the Michigan Wind Projects, including the risk of additional, unforeseen costs, on Exelon. A319. Yet in trying to salvage its recoupment claim, Exelon ignores that a successful recovery by Deere of the Earn Out means that the Superior Court also found (as it did) that the Purchase Agreement governs the relocation of the Blissfield

[27] Section 10.10 of the Purchase Agreement, entitled "Disclosure," makes clear that exceptions or qualifications to representations and warranties are set forth in the Seller Disclosure Schedule, both as to the specifically qualified representation or warranty as well as to all other applicable representations and warranties in the Purchase Agreement. A385.

Project to Gratiot County. The Superior Court correctly observed as much in its July 13, 2015 Opinion regarding Deere's motion for reargument to dismiss Exelon's unjust enrichment claim:

> A determination must be made as to whether or not the [Purchase] Agreement applies to development of the project, including relocation from Lenawee County to Gratiot County. **If the [Purchase] Agreement applies, the earn-out provision of Section 2.6(a) would be triggered and Section 2.6(b) would govern the expenses incurred by Exelon in relocating the Blissfield Project to Gratiot County**. If the [Purchase] Agreement does not apply, the Section 2.6(a) earn-out provision would not be triggered, and therefore, Exelon's unjust enrichment claim would not apply and would be rendered irrelevant.

EOB Ex. C at 5-6 (emphasis added).

What costs Exelon should incur was left entirely to its discretion, and limited only by the condition that Exelon was not required to incur commercially unreasonable costs. Exelon cannot decide that relocating the Project is a commercially reasonable effort, exercise its contractually provided discretion to incur the costs of that relocation voluntarily, and now seek to avoid the plain language of Section 2.6(b). As the Superior Court found, "Exelon's expenditures for relocating the project to Gratiot County are discretionary development costs." SJ Op. 24. Nowhere does the Purchase Agreement permit Exelon the right to foist its development costs on Deere as "damages." To permit Exelon to recover such costs as damages would amount to a wholesale re-writing of Section 2.6(b).

Further, to sustain a valid cause of action for breach of contract to support its recoupment claim, Exelon *must show* the resulting damage proximately caused by the purported breach. *VLIW Tech., LLC*, 840 A.2d at 612. Exelon cannot show that the costs of relocation are proximately caused by Deere because *Exelon chose* to incur those costs—they were not forced upon Exelon. And, by choosing to incur those costs, Exelon necessarily made the determination that it was commercially reasonable to do so. Therefore, by exercising its contractually provided discretion, Exelon is unable to show *any* "damages" proximately caused by Deere (which had no say whatsoever concerning the costs Exelon chose to expend).

For all of these reasons, the Superior Court correctly found that Exelon is not entitled to recoup its discretionary development costs incurred in moving the Blissfield Project from Lenawee County to Gratiot County. *See* SJ Op. 24.

III. DEERE IS ENTITLED TO AN AWARD OF FEES AND EXPENSES, INCLUDING REASONABLE ATTORNEYS FEES, INCURRED IN THIS LITIGATION.

A. Question Presented

Did the Superior Court err in finding that the indemnification provision in the Purchase Agreement applied to third-party claims only despite specific language in the Purchase Agreement that obligates Exelon to indemnify Deere in connection with Exelon's breach of the Purchase Agreement. B461-67; B474-85; B489; Final Judgment ¶3(b). (question presented below).

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo*." *In re Viking Pump, Inc.*, 148 A.3d at 644.

C. Merits of Argument

Exelon agreed in the Purchase Agreement in clear and unequivocal language to indemnify Deere for Losses, including reasonable attorneys' fees and expenses "whether ***or not*** arising out of third party claims," "by reason of, arising out of, resulting from or relating to" breaches or non-performance of the Purchase Agreement.[28] The Superior Court overlooked the emphasized language in the

[28] In its fee application below, Deere argued that the term "Losses" included outside counsel fees and expenses, expert witness fees, discovery vendor expenses, and travel expenses. B465-67. Exelon did not argue otherwise in its answering brief and therefore conceded that those expenses are included in the term "Losses" as defined in the Purchase Agreement. *See Wal-Mart Stores, Inc. v. Indiana Elec.*

Purchase Agreement in ruling that Deere was not entitled to its attorneys' fees and expenses. Deere respectfully submits that the Superior Court misapprehended the clear language of Section 9.2 of the Purchase Agreement and that its ruling should be reversed.

1. Section 9.2 Of The Purchase Agreement Covers Deere's Reasonable Attorneys' Fees And Expenses Incurred In This Litigation.

Section 9.2(a) of the Purchase Agreement expressly obligates Exelon to indemnify Deere for "any and all ***Losses***…by reason of, arising out of, resulting from or relating to:…(ii) any breach or nonperformance of any of the covenants or agreements of [Exelon] contained in this Agreement…." A376 (emphasis added). The Purchase Agreement defines "Losses" as follows:

> "Losses" means and includes any and all losses, liabilities, demands, claims, actions, causes of action, costs, obligations, damages, deficiencies, Taxes, penalties, fines or expenses, ***whether or not arising out of third party claims***, including interests, penalties, reasonable attorneys' fees and expenses, court costs and all amounts paid in investigation, remediation, correcting a condition of noncompliance, defense or settlement of any of the foregoing.

A309 (emphasis added).

Delaware law presumes that indemnity agreements do not require reimbursement for attorneys' fees incurred in substantive litigation between the

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Workers Pension Trust Fund IBEW, 95 A.3d 1264, 1281 (Del. 2014) (finding argument waived when not included in the party's brief).

parties to the agreement (*i.e.*, first-party litigation) unless the agreement provides "a clear and unequivocal articulation of that intent." *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *2 (Del. Super. Ct.). An intent to indemnify attorneys' fees and costs incurred in first-party litigation is established when the indemnification provision requires that one party indemnify the other party "from and against any Losses arising out of or resulting from…any failure…to perform or observe any term, provision, covenant, agreement or condition" under the controlling agreement. *Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245, at *3 (Del. Ch.).

Here, it is beyond question that Section 9.2 applies to litigation between Deere and Exelon. Like the indemnity provision at issue in *Henkel*, Section 9.2 provides in pertinent part that Exelon shall indemnify Deere for Losses incurred because of "any breach or nonperformance of any of the covenants or agreements of [Exelon] contained in this Agreement." A376. Moreover, the definition of "Losses" contemplates the payment of attorneys' fees in first-party litigation. A309 ("Losses" defined to include "***any and all***" losses or claims "whether ***or not*** arising out of third party claims" (emphasis added)).

2. Article IX As A Whole Reinforces That Section 9.2 Clearly Covers Deere's Reasonable Attorneys' Fees And Expenses; No Magic Language Is Necessary.

The Superior Court recognized that "no specific language…must be used in order for an indemnity provision to provide for recovery in first-party actions." Fee Op. 4 (citing *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *2 (Del. Super. Ct.)). In *TranSched*, the Superior Court observed that

> there is no definitive language that must be used or phrases that have been routinely held to allow for such recovery in first-party actions. Each provision is unique and must be decided under the facts of that particular case.

TranSched Sys. Ltd., 2012 WL 1415466, at *2; *see also id.* ("the Court cannot point litigants to bright-line language that will establish, in essence, a fee-shifting provision…."). The Superior Court in *TranSched* found that an indemnification provision did not apply to first-party litigation because it expressly referenced third-party actions and it contained a notice provision that would make no sense if it applied to a first-party action. *Id.* at *3.

Here, Section 9.2 of the Purchase Agreement neither expressly references solely third-party claims nor does it set forth the procedures for seeking indemnification for third-party claims. A separate section of the Purchase Agreement—Section 9.5, entitled "Third-Party Claims"—directly addresses the procedures for seeking indemnification for third-party claims. A378-79. Thus, the

concerns about procedures for third-party claims expressed in *TranSched* and the decisions it cites should be of no concern here. *See TranSched*, 2012 WL 1415466, at *2 (discussing decisions holding an indemnification provision applies only to third-party claims because of notice and selection of counsel language in the provision).

By placing the third-party claim procedures in a separate section, the drafters of the Purchase Agreement indicated that Section 9.2 covered both first-party litigation and third-party litigation. This conclusion is reinforced by the other sections of Article IX:

- Section 9.6 states that Article IX is the sole and exclusive remedy between Deere and Exelon. A380; *see Column Form Tech., Inc. v. Caraustar Indus., Inc.*, 2014 WL 2895507, at *8 (Del. Super. Ct.).
- Section 9.7 states that there can be no punitive damages recoverable between the parties, but punitive damages may be recovered if awarded "to a third party pursuant to a third-party claim." A380. Thus, Section 9.7 makes clear that the indemnification provisions in Section 9.2 apply to both first-party litigation and third-party claims.
- Section 9.9 addresses risk allocation amongst the parties and states that the indemnification provisions were intended to allocate the economic costs and risks of the transaction and that "a party shall be entitled to the indemnification

or other remedies provided in this Agreement by reason of any breach of any such representation, warranty, covenant or agreement by another party." Section 9.9 does not limit the indemnification solely to third-party claims arising from any such breach. A380.

The Superior Court found that Exelon breached the Purchase Agreement by failing to pay the Earn Out that it owed to Deere. Article IX and other provisions of the Purchase Agreement make clear that attorneys' fees are recoverable by the non-breaching party in litigation between Deere and Exelon.

3. Deere Respectfully Submits That The Superior Court's Reliance On *Chase Manhattan* And Sections 2.5(d) And 2.6(c) Of The Purchase Agreement Is Misplaced.

Despite this clear and unequivocal obligation to pay Deere's reasonable attorneys' fees and other expenses, the Superior Court found that the indemnification provision in the Purchase Agreement applied to third-party claims only, not "first-party" claims between the contracting parties. In so holding, the Superior Court neglected to address the defined term "Losses" in the Purchase Agreement and the other provisions of Article IX. Rather, the Superior Court relied generally on *Chase Manhattan Mortgage Corporation v. Advanta Corporation*, 2002 WL 2234608 (D. Del.) and also noted that two sections of the Purchase Agreement used "prevailing party" language not contained in the indemnification provision. Fee Op. 3-4.

The indemnification provision at issue in *Chase Manhattan*, however, did not contain the defined term "Losses" as defined in the Purchase Agreement, nor the other provisions of Article IX that make clear that Section 9.2 applies to both first-party and third-party claims. *See Chase Manhattan*, 2005 WL 2234608, at *22. Thus, without the controlling language at issue here, *Chase Manhattan* is not dispositive. See *TranSched*, 2012 WL 1415466, at *2 ("Each [indemnification] provision is unique and must be decided under the facts of that particular case.").

The "prevailing party" language used in other sections of the Purchase Agreement address an altogether different circumstance. A318-20, §§2.5(d), 2.6(c). Those sections address only the allocation of fees for a third-party auditor or engineer to decide a dispute between the parties over the Closing New Working Capital or Completion of Development and Commencement of Construction. Section 9.2 addresses the separate subject of indemnification, and plainly addresses making the non-breaching party whole for all "Losses" incurred as a result of non-performance by the breaching party. The term "prevailing party" is not required. *TranSched*, 2012 WL 1415466, at *2 ("[T]here is no definitive language that must be used or phrases that have been routinely held to allow for such recovery in first-party actions.").

In sum, Article IX of the Purchase Agreement covers indemnification for first-party litigation and third-party claims, and Section 9.2 specifically entitles Deere to

indemnification for its reasonable attorneys' fees and other expenses incurred in connection with this litigation. Thus, Deere respectfully submits that the Superior Court's ruling in which it denied Deere its fees and expenses should be reversed and Exelon should be required to pay such fees and expenses in accordance with Article IX.

CONCLUSION

For the foregoing reasons, Deere respectfully requests that this Court (i) affirm in all respects the Superior Court's rulings with respect to payment of the Earn Out, as set forth in the Summary Judgment Opinion and paragraphs 1 and 2 of the Final Judgment and (ii) reverse the Superior Court's ruling with respect to Deere's application for fees and expenses, as set forth in the Fee Opinion and paragraph 3(b) of the Final Judgment.

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