IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEAF INVENERGY COMPANY, a Cayman Islands exempt limited liability company,	)	
Plaintiff,	)	
v.	)	C.A. No. 11830-VCL
INVENERGY WIND LLC, a Delaware limited liability company,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

1. Defendant Invenergy Wind LLC (the "Company") is a Delaware limited liability company. Its business and affairs are governed by its Third Amended and Restated Limited Liability Company Agreement (the "LLC Agreement").

2. Plaintiff Leaf Invenergy Company ("Leaf") owns what are defined in the LLC Agreement as Series B Conversion Company Interests (the "Series B Interests"). As a holder of Series B Interests, Leaf holds the status of a Series B Non-Voting Investor Member, as that term is defined in the LLC Agreement.

3. Section 8.04 of the LLC Agreement (the "Series B Consent Provision") provides as follows:

> Without the prior written consent of (i) the Manager or (ii) the Required Series B Non-Voting Investor Members the Company shall not:

> (a) participate in or permit a Change of Control to occur unless the transaction giving rise to a Change of Control would provide the Series B Non-Voting Investor Members, as of the closing of such Change of Control, with cash proceeds equal to or more than their applicable Target Multiple . . . ; or
>
> (b) participate in or permit a Material Partial Sale, unless the transaction giving rise to the Material Partial Sale yields cash proceeds equal to or greater than the amount that would provide the Series B Non-Voting Investor Members, as of the closing of such Material Partial Sale, with cash proceeds equal to or more than their applicable Target Multiple to be paid upon such closing of the Material Partial Sale. . . .

4. Section 8.01(e) of the LLC Agreement defines Material Partial Sale as "sell (in one or more transactions within any period of twelve (12) consecutive months) assets of the Company or assets or equity of its Subsidiaries for value greater than the Material Partial Sale Threshold Amount."

5. On June 30, 2015, subsidiaries of the Company entered into agreements to sell assets which, if consummated, would constitute a Material Partial Sale (respectively, the "Terraform Agreements" and the "Terraform Transaction").

6. Effective September 24, 2015, Leaf became a Series B Non-Voting Investor Member and entitled to the rights provided by the Series B Consent Provision.

7. Effective December 16, 2015, the Terraform Transaction closed.

8. Leaf contends that the Company breached the Series B Consent Provision by engaging in the Terraform Transaction. Leaf has moved for judgment on the pleadings as to the question of liability for breach.

9. To engage in a Material Partial Sale in compliance with the plain language of the Series B Consent Provision, the Company was obligated to follow one of two paths. Under the first path, the Company could participate in or permit a Material Partial Sale if the Company obtained the prior written consent of both the Manager and the Required Series B Non-Voting Investor Members (the "Consent Path"). Under the second path, the Company could participate in or permit a Material Partial Sale without the required consents if the Material Partial Sale *both* (i) yielded cash proceeds equal to or greater than the amount that would provide the Series B Non-Voting Investor Members, as of the closing of such Material Partial Sale, with cash proceeds equal to or more than their applicable Target Multiple, *and* (ii) cash proceeds equal to or more than the applicable Target Multiple were paid upon closing (the "Payout Path").

10. The Company did not satisfy the Series B Consent Provision by obtaining the consent of the Required Series B Non-Voting Investor Members before the Terraform Transaction closed. The Company thus did not satisfy the Series B Consent Provision by following the Consent Path.

11. The Company did not satisfy the Series B Consent Provision by paying upon closing to Leaf cash proceeds equal to or more than its applicable Target Multiple. The Company thus did not satisfy the Series B Consent Provision by following the Payout Path.

12. Because the Company did not follow either the Consent Path or the Payout Path, it breached the plain language of the Series B Consent Provision.

13. The Company resists this conclusion by arguing that the definition of Material Partial Sale is ambiguous. According to the Company, "sell" in the context of the definition of Material Partial Sale could mean either "sell" or "agree to sell." The Company contends that if "sell" actually meant "agree to sell," then compliance with the Series B Consent Provision would be determined when the agreements were entered into. In this case, the Company observes that Leaf was not a Series B Member when the Terraform Agreements were signed on June 30, 2015. The Company believes it therefore had no obligation to comply with the Series B Consent Provision because Leaf was not yet a Series B Member. For present purposes, the Company says its reading is a reasonable one that warrants denying judgment on the pleadings.

14. In my view, the Company's alternative reading is not reasonable. Leaf has amassed extensive authority establishing that "sell" generally refers to the point when title passes to a new owner. In other words, it means closing. "Sell" can be

defined to include an "agreement to sell," and sometimes people use "sell" colloquially in that fashion. But these are the exceptions, not the rule.

15. Read in the context of the LLC Agreement as a whole, the plain meaning of "sell" for purposes of the definition of a Material Partial Sale refers to closing. For purposes of the Consent Path, this reading allows the Company to secure consent from a Series B Member at any time before closing. For purposes of the Payout Path, this reading recognizes that the critical event for the payment of proceeds is closing. It is true that the Series B Consent Provision includes the word "closing," which is arguably superfluous, but I believe it is a helpful addition from a drafting standpoint that clarifies at what point in time the proceeds are to be measured. It does not render the definition of Material Partial Sale ambiguous. It rather reinforces the focus on closing.

16. The Company has pointed to a notice obligation that is part of the different consent right established under Section 8.01. The definition of Material Partial Sale appears here, before being deployed in the Series B Consent Provision. The notice obligation refers to a prospective sale and, in my view, demonstrates that the drafters of the LLC Agreement were able to condition rights on prospective sales

17. Regardless, assuming the Company were correct, the Company and its counterparty entered into a new set of Terraform Agreements just before closing, after Leaf became a Series B Member. Those agreements contained integration clauses that

made them the operative agreements for purposes of the transaction. *See, e.g.*, *ev3, Inc. v. Lesh*, 114 A.3d 527, 532 (Del. 2014). Thus, even accepting the Company's reading of "sale" as meaning "agreement to sell," which I do not believe is reasonable, the "agreement to sell" in this case was replaced and re-established as on December 15, 2015, after Leaf became a Series B Member.

18. This order therefore grants Leaf's motion for judgment on the pleadings determining that the Company is liable for breaching the plain language of the Series B Consent Provision.

19. The Company has asserted an affirmative defense of unclean hands. That defense is wholly conclusory. The entirety of the allegations supporting the defense consists of the following: "Plaintiff's claims are barred by its own inequitable conduct." An affirmative defense "must be supported by pled facts" and a defendant cannot survive a motion pursuant to Court of Chancery Rule 12(c) based on "mere naked legal conclusions that do not plead facts supporting the viability of its affirmative defense." *Cypress Assocs., LLC. v. Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754, at *18 (Del. Ch. Jan. 17, 2007) (Strine, V.C.). The Company's lone, conclusory, and unsupported allegation does not plead an affirmative defense of unclean hands, any more than a single assertion that "Defendant is liable for breach of contract" would state a claim for relief. The allegation is therefore insufficient to warrant denial of the motion for judgment on the pleadings. *See*

generally 5 Charles Allan Wright, et al., *Federal Practice & Procedure* § 1274 (3d ed. 2016) ("The general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c)."); 61A Am. Jur. 2d *Pleading* § 270 ("[A] pleading that makes a conclusory statement and does not plead the specific facts required to support the affirmative defense fails to adequately raise the alleged affirmative defense, and the alleged affirmative defense fails as a matter of law.").

20. The Company has attempted to supplement its pleading with an affidavit and with statements in its brief, which is not permitted. Assuming for the sake of argument that the court were to consider these assertions, they at most establish a claim that is not sufficiently related to the breach of contract to warrant denying the motion for judgment on the pleadings. "Delaware courts are hesitant to apply unclean hands in cases involving a breach of contract." *Universal Enter. Gp., L.P. v. Duncan Petroleum Corp.*, 2014 WL 1760023, at *8 (Del. Ch. Apr. 29, 2014), *aff'd*, 99 A.3d 228 (Del. 2014). For the doctrine of unclean hands to apply, the "inequitable conduct must have an 'immediate and necessary' relation to the claims under which relief is sought." *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 523 (Del. Ch. 1998).

21. The harm to the Company ostensibly comes from Leaf being a Series B Member and therefore the Company having to comply with the Series B Consent Provision. The Company contends that Leaf exercised its conversion right on June 18,

2015, based on its alleged use of confidential information about the prospect of the Terraform Transaction. Two weeks later, on July 2, 2015, the Company informed Leaf of the Terraform Transaction. Four days after that, on July 6, 2015, the transaction documents were disclosed publicly. The Company did not accept Leaf as a Series B Member until September 24, 2015.

22. In light of this timeline, there is no causal connection between the alleged breach and Leaf's ability to become a member in time to obligate the Company to comply with the Series B Consent Provision in December 2015. Unclean hands is therefore not a bar to the clear contractual obligation established in the LLC Agreement. If the Company believes that it has a claim for breach of a confidentiality agreement, it can assert that claim and seek a remedy. The doctrine of unclean hands should not operate to give the Company an extra-contractual escape hatch from a clear contractual obligation.

23. This ruling does not determine the amount of damages to which Leaf is entitled for the Company's breach of the Series B Consent Provision. That issue will require further proceedings.

Vice Chancellor Laster
Dated: June 30, 2016