**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 IN PART DEFENDANT INVENERGY WIND LLC'S MOTION FOR LEAVE TO AMEND ITS ANSWER TO ASSERT ADDITIONAL AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

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

2. Section 8.04 of the LLC Agreement (the "Series B Consent Provision") provides that the Company shall not "participate in or permit a Material Partial Sale" without the consent of the Required Series B Non-Voting Investor Members unless the Series B Non-Voting Investor Members receive "cash proceeds equal to or more than their applicable Target Multiple, with such Target Multiple to be paid upon such closing of the Material Partial Sale."

3. On June 30, 2015, subsidiaries of the Company entered into an agreement to sell assets which, if consummated, would constitute a Material Partial Sale. The parties refer to this transaction as the "TerraForm Transaction." On September 24, 2015, Leaf became a Series B Non-Voting Investor Member. On December 16, 2015, the TerraForm Transaction closed. The Company did not obtain the consent of the Required Series B Non-Voting Investor Members, and the Series B Non-Voting Investor Members did not receive "cash proceeds equal to or more than their applicable Target Multiple . . . to be paid upon such closing of the Material Partial Sale."

4. On December 21, 2015, Leaf filed this lawsuit. Count I of Leaf's complaint contended that the closing of the TerraForm Transaction breached the Series B Consent Provision.

5. On December 28, 2015, the Company invoked its right under Section 11.09 of the LLC Agreement to call Leaf's member interest in the Company.

6. On the same day, Leaf notified the Company that it was electing is right under Section 11.09 of the LLC Agreement to put its shares to the Company.

7. On February 11, 2016, the Company filed its answer and affirmative defenses. The answers and affirmative defenses did not assert any defenses or raise any claims based on the put-call process.

8. On April 19, 2016, Leaf moved for partial judgment on the pleadings as to Count I of its complaint. The Company did not respond to Leaf's motion by stating that it would seek to amend its answer, much less by doing so.

9. On May 31, 2016, the Company filed its opposition brief. Leaf did not seek to amend its answer.

10. On June 21, 2016, Leaf filed its reply brief. After being served with the reply brief, the Company did not seek leave to amend its answer.

11. On June 30, 2016, this court issued an order granting Leaf's motion for partial judgment on the pleadings. The court ruled that the Company had violated the Series B Consent Right and rejected the Company's defense of unclean hands.

12. On July 8, 2016, the Company moved for leave to amend its answer (the "First Motion to Amend"). Through the First Motion to Amend, the Company sought to supplement the allegations in its answer in support of an affirmative defense of unclean hands. By order dated August 4, 2016, the court denied the First Motion to Amend.

13. Eight days later, on August 12, 2106, the Company filed a second motion for leave to amend its answer (the "Second Motion to Amend"). This time, the Company sought leave to assert five new affirmative defenses and a two-count counterclaim.

14. The first of the Company's five new affirmative defenses is titled "Put Election." It contends that Leaf's claims are barred as a result of exercising the put, which the Company says constitutes an election of remedies. The Company also contends that any claims Leaf has will be barred because at the end of the put-call process, the parties are required to agree to a transaction containing mutual releases.

a. This affirmative defense comes too late. The Company knew all of the facts necessary to make this argument when it filed its answer eight months ago. The Company could have raised this affirmative defense at any point before the court ruled on

the motion for partial judgment on the pleadings. To allow the Company to raise this affirmative defense now would be to encourage parties to hold back arguments and theories for *seriatim* presentation to the court, thereby wasting party and litigant resources.

b. Separately, amending the answer to assert this affirmative defense would be futile. The Company's breach of the Series B Consent Right occurred before the Company exercised its call. Leaf's right to damages therefore arose prior in time, and having previously breached the LLC Agreement in a material way, the Company cannot rely on the call right to foreclose Leaf's right to damages. *See E. Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at *4–5 (Del. Super. Apr. 7, 1987), *aff'd*, 540 A.2d 1088 (Del. 1988).

c. Amending the answer to assert this affirmative defense would be futile for a separate reason: The doctrine of election of remedies only applies where the competing remedies are "irreconcilably inconsistent." *Sannini v. Casscells*, 401 A.2d 927, 931 (Del. 1979). The put-call process determines the fair market value of Leaf's interest at the time of the exercise of the put-call right. The amount to which Leaf is entitled is determined by multiplying the Fair Market Value of the Company, as defined in the LLC Agreement, by Leaf's 2.3% interest. The LLC Agreement defines the Fair Market Value of the Company as "the amount that could be obtained from an arm's length willing buyer (not a current employee or Executive Officer) for 100% of the Company Interests." The put-call process thus determines the going concern value of the Company and Leaf's proportionate share of that value. This litigation seeks to establish a

damages remedy for a breach of the Series B Consent Right. Those are different things, and they are not irreconcilably inconsistent. Leaf could receive Fair Market Value for its 2.3% interest in the Company through the put-call process and then recover any incremental value to which it is entitled for breach of its consent right through this proceeding.

d. The Company has suggested that the exchange of mutual releases at the conclusion of the put-call process will moot this litigation. That is not a reasonable reading of the put-call provisions. The put provision states only that the closing of the put-call process "in all cases shall be subject to customary closing conditions and deliveries, including the execution of mutual releases." As noted, the purpose of the put-call process is to determine Leaf's proportionate share of the Fair Market Value of the Company; it does not afford value to the legal claims possessed at the member level by members such as Leaf. If the release provision were read to extinguish pending claims, then the Company could take steps to drive down the value of a member's interest before exercising the call right. The put-call process would generate a lower fair market value because of the Company's actions, and the Company could act with impunity because of the prospect of a release once the lower fair market value had been determined. In my view, that is an unreasonable reading. A reasonable reading of the abbreviated language regarding mutual releases is that in a situation like this one, the releases would contemplate a carve-out for member-level claims that would not be encompassed in the put-call valuation, such as the claims in this case. That is efficient, because in that settling, the put-call process would establish the baseline value of the purchased interests,

leaving any pending litigation free to focus only on any incremental value afforded by the claims.

15. The second of the Company's five new affirmative defenses is titled "No Material Damages." It contends that the TerraForm Transaction was a good deal for Leaf such that Leaf was not harmed by the TerraForm Transaction and did not have grounds to withhold its consent. Amending the answer to include this affirmative defense is futile because Leaf must prove damages as an element of its claim for breach of contract. *VLIW Tech., LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003). It is unnecessary to restate an element of a claim for breach of contract as an affirmative defense.

16. The third of the Company's five new affirmative defenses is titled "Failure of Condition Precedent." This affirmative defense contends that "[e]ven if Leaf were entitled to damages, Leaf is not entitled to receive the Target Multiple it seeks as its damages." For the same reasons as the first affirmative defense, this one comes too late. Amending the answer to include it would be futile because Leaf must prove damages as an element of its claim for breach of contract. *Id.* It is unnecessary to attempt to recast arguments about the scope of damages in the form of an affirmative defense.

17. The fourth of the Company's five new affirmative defenses is titled "Acquiescence." In substance, the Company claims that Leaf's failure to take steps to block the TerraForm Transaction constituted acquiescence and barred its right to any remedy for breach. For the same reasons as the first affirmative defense, this one comes too late. Amending the answer to include it would be futile, because a party is not required to seek injunctive relief, which is the exception not the rule. A preliminary

injunction is an "extraordinary remedy" that is "granted only sparingly." *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 203 (Del. Ch. 2002) (citations omitted); *see Emerald P'rs v. Berlin*, 726 A.2d 1215, 1227 & n.18 (Del. 1999). In this case, Leaf was not obligated to seek a preliminary injunction. The Company was free to proceed with the TerraForm Transaction as long as the Company paid Leaf its Target Multiple. The Company could also choose to engage in the transaction if it regarded the payment of damages as a form of efficient breach. *See E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445–46 (Del. 1996). Leaf clearly communicated to the Company that it believed the TerraForm Transaction required its consent and that if the deal closed, then Leaf would be entitled to damages. The Company chose to proceed. Under the circumstances, Leaf was not required to seek pre-closing relief. Rather, it was the Company that assumed the risk of a post-closing remedy.

18. The fifth of the Company's five new affirmative defenses is titled "Unjust Enrichment." This affirmative defense asserts that Leaf will be unjustly enriched if it receives damages for the breach of the Series B Consent Provision. For the same reasons as the first affirmative defense, this one comes too late. Amending the answer to include it would be futile, because it is another way of arguing that Leaf cannot prove any damages.

19. The Company seeks leave to assert two counterclaims, one for a declaratory judgment and the other for specific performance. The two counts are redundant in that both seek to enforce the put-call provisions of the LLC Agreement, one through a declaratory judgment and the other through an award of specific performance.

20. In substance, the counterclaims assert two theories. The first alleges that Leaf exercised its put after the Company exercised its call, then refused to proceed further with the put-call process after this court granted partial judgment on the pleadings. The Company contends that the put is irrevocable and that it is entitled to enforce the put-call procedure. Leave to assert this theory is granted. The facts giving rise to the Company's claim to enforce the put-call process did not arise until after this court granted partial judgment on the pleadings.

21. Leave to assert this theory is denied, however, to the extent the Company contends that the mutual releases contemplated by the put-call process will encompass Leaf's claim for breach of the Series B Consent Right or otherwise terminate this litigation. That claim is futile. As discussed previously in the context of the second of the Company's five new affirmative defenses, the abbreviated language regarding releases cannot be read to encompass separate member-level claims that would not be valued as part of the determination of a member's proportionate share of the Fair Market Value of the Company or, if valued, would reduce the value of that interest.

22. The second theory in the counterclaims is that Leaf acted in bad faith by (i) demanding a grossly inflated price for its interest when it exercised its put right, (ii) refusing to negotiate in good faith, and (iii) causing its appraiser to provide a biased and inaccurate appraisal. Leave is denied as to the first two aspects of this theory. The Company could have asserted any claim it had about Leaf's initial demand when it filed its answer, and the counterclaims contain minimal allegations supporting a bad faith demand. The counterclaims do not contain any non-conclusory allegations about Leaf

failing to negotiate in good faith. The counterclaims merely state that "Leaf then refused to negotiate in good faith."

23. The counterclaims do, however, provide factual allegations supporting a theory that Leaf caused its appraiser to provide a biased and inaccurate appraisal. Those facts arose in April 2016, when the parties exchanged and began critiquing each other's appraisals. Although this occurred before the court granted partial judgment on the pleadings, those facts did not relate to Count I of Leaf's complaint, and the court would not have considered them when issuing its June 30th order granting Leaf's motion for partial judgment on the pleadings. Consequently, granting leave as to this aspect of the counterclaims will not encourage the *seriatim* presentation of arguments to the court.

24. To the extent the Second Motion to Amend seeks to assert additional affirmative defenses, it is DENIED. To the extent the Second Motion to Amend seeks to assert counterclaims, it is GRANTED IN PART to the extent set forth above.

Vice Chancellor Laster
Dated: October 10, 2016