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 DENYING MOTION FOR ENTRY OF AN ORDER AND FINAL JUDGMENT

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 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, in relevant part, as follows:

> Without the prior written consent of (i) the Manager and (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 with such Target Multiple to be paid upon such closing of the Material Partial Sale.

3. By order dated June 30, 2016, this court held that the Company violated the Series B Consent Provision by entering into what the parties refer to as the "TerraForm Transaction." Dkt. 39 (the "Liability Order"). The Liability Order explained:

> 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").

Id. ¶ 9 (emphasis in original). When engaging in the TerraForm Transaction, the Company did not satisfy the Series B Consent Provision by following the Consent Path. *Id.* ¶ 10. The Company also did not satisfy the Series B Consent Provision by following the Payout Path. *Id.* ¶ 11. The Liability Order did not determine an amount of damages, observing that the issue of damages "will require further proceedings." *Id.* ¶ 23.

4. Leaf seeks an order quantifying the amount of its damages. Leaf styled its filing as a "Motion for Entry of an Order and Final Judgment." Dkt. 45. The Company objects to the form of the motion, contending that the Liability Order contemplated "further proceedings" and that the motion is not a procedurally appropriate vehicle for

determining damages. In substance, the motion seeks a determination as a matter of law as to the damages to which Leaf is entitled for breach of contract. To the extent that can be accomplished here, the motion is an appropriate procedural vehicle for seeking that determination. It is one legitimate form of the "further proceedings" that the Liability Order contemplated.

5. "[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*. This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001); *see PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL 3974167, at *7 (Del. Ch. Aug. 8, 2014), *aff'd*, 132 A.3d 1108 (Del. 2015). The components of expectation damages include

> (a) the loss in the value to [the injured party] of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that [the injured party] has avoided by not having to perform.

RESTATEMENT (SECOND) OF CONTRACTS § 347. "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Id.* cmt. a.

6. Leaf contends that under the Series B Consent Provision, Leaf expected to be paid in cash "upon closing of the Material Partial Sale" an amount equal to or more than its "applicable Target Multiple." Section 1.01 of the LLC Agreement defines "Target Multiple" as "an amount, in exchange for [Leaf's] entire Company Interest, equal to what [Leaf] would need to receive for [its] Percentage Interest to yield a cash on cash internal rate of return to [Leaf] with regard to [its] investment in Series B-2 Notes of at least the following: . . . [a]fter December 22, 2014 but on or prior to December 22, 2015: 23%." Leaf has performed the mathematical calculation contemplated by the LLC Agreement and incorporated a tax-related distribution of $3,910,000 that Leaf received in January 2016. Dkt. 45 ¶¶ 2 n.1, 6–10. The calculation results in a Target Multiple of $126,110,576. *Id.* ¶ 10. The Company disagrees with one aspect of Leaf's calculation, but Leaf has shown that it calculated the figure correctly, and the Company has not offered an alternative calculation. Thus, if Leaf had an expectation that it would receive its Target Multiple upon the closing of a Material Partial Sale, then full expectancy damages would result in an award of $126,110,576. Leaf has not identified "any other loss, including incidental or consequential loss, caused by the breach," and neither side has identified "any cost or other loss that [Leaf] has avoided by not having to perform." RESTATEMENT (SECOND) OF CONTRACTS § 347.

7. The problem with this analysis is that the Series B Consent Right does not explicitly entitle Leaf to $126 million if its consent to a Material Partial Sale is not obtained. The Payment Path instead establishes a scenario in which the Company does

not have to obtain Leaf's consent. The Company did not follow the Payment Path, so that exception does not apply.

8. It is not necessarily the case that a party suffers quantifiable damages from the violation of a consent right. "Consent rights are commonly viewed as protective devices meant to shield the holder of the right against being harmed by a new transaction that is adverse to its interests." *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *18 (Del. Ch. Dec. 4, 2013) (Strine, C.). A consent right does not give the holder "an opportunity to coerce value" from its counterparty or to withhold consent "in circumstances where [the holder of the consent right] believed that the transaction it was being asked to consent to was highly beneficial." *Id.* A court may award only nominal damages if the violation of the consent right did not inflict any harm on or benefitted the plaintiff. *See id.*; *Zimmerman v. Crothall*, 62 A.3d 676, 713 (Del. Ch. 2013).

9. The current procedural posture and the record submitted in connection with the motion are inadequate to determine the amount of damages that Leaf suffered. The *Fletcher* decision considered a variety of factors in determining the remedy for breach of a consent right. The parties have not yet addressed several of those factors, and this court is not in a position to make factual findings regarding them.

10. It is not necessarily true that, as in *Fletcher*, Leaf's damages will be limited to a monetary recovery of what a hypothetical negotiation might have generated as a payment for Leaf's consent. The *Fletcher* court constructed that type of damages award, but the consent provision in that case lacked a monetary figure that provided an indication of a party's expectancy, and there does not appear to have been extrinsic

evidence that the parties had engaged in discussions regarding a monetary figure. The facts in *Fletcher* strongly indicated that the holder of the consent right would have been compelled as a business matter to agree to a waiver. The company proposing the transaction faced insolvency if the deal did not go forward, the investor holding the consent right had invested so heavily in the company that its own solvency was at risk if the company failed, there were other parties with greater leverage over the outcome of the transaction, the consent right applied only to a small piece of the transaction, and there were viable ways to structure around the consent right. *See* 2013 WL 6327997, at *1, *3, *18, *19–25. As yet there is no indication that similar factors hold true in the current case.

11. It is possible that the court might adopt a remedy after trial comparable to what was awarded in *Fletcher.* It is also possible that the court could conclude after trial that Leaf is entitled to the Target Multiple as a measure of expectancy damages. A more developed record may show that although the Payment Path was drafted as an exception to the requirement to obtain Leaf's consent, and although it was not drafted as a liquidated damages provision, it nevertheless operated to create a clear set of contractual expectations for Leaf. Those expectations envisioned two possible outcomes. One resulted from the Consent Path, where Leaf either would consent to the Material Partial Sale, or the transaction would not happen. The other resulted from the Payment Path, where the Company could proceed with a Material Partial Sale and Leaf would receive its Target Multiple. Because the Company closed the TerraForm Transaction without following either path, the parties now find themselves in a situation where a Material

Partial Sale has happened. No one is suggesting unwinding the transaction. If Leaf proved that its expectancy was that it would receive its Target Multiple, than the Target Multiple could provide the proper measure of damages.

12. This order rejects one of the arguments that the Company has advanced against a potential damages award. According to the Company, because Leaf did not seek injunctive relief before the closing of the TerraForm Transaction, Leaf should not now be entitled to damages. Dkt. 62 at 26–27. 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 Partners v. Berlin*, 726 A.2d 1215, 1227 & n.18 (Del. 1999). An injunction will not issue where a monetary remedy is available, such as a case like this one where the operative contract points to a measure of damages. *See Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 948 (Del. 2005) (describing denial of preliminary injunction for breach of contract where monetary damages provided an adequate remedy).

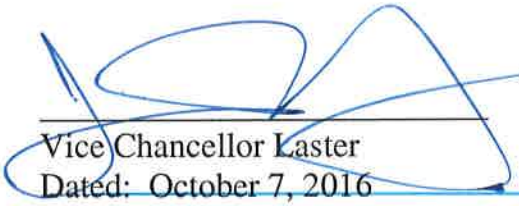
13. In this case, Leaf was not obligated to seek a preliminary injunction. The Company was free to proceed with the TerraForm Transaction as long as the Company paid Leaf its Target Multiple. The Company also could choose to engage in the transaction if it regarded the payment of damages as a form of 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 its Target Multiple. 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.

14. This order also rejects the Company's reliance on a put-call procedure found in Section 11.09 of the LLC Agreement. After the TerraForm Transaction closed, the Company initiated the procedure by exercising its call right. In response, Leaf exercised its put right. The Company argues that Leaf's responsive exercise of its put right constitutes an election of remedies that renders this litigation moot, because the completion of a sale pursuant to the put-call process would include a release encompassing this litigation.

15. The put-call process does not moot this litigation because the Company's breach occurred before the Company exercised its call right. 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. *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). If Leaf had initiated the put-call process before the Company's breach, then the doctrine of election of remedies might apply. The put-call process also does not function to moot this litigation because at present, there is a divergence between the remedy that the put-call right would generate (the fair market value of Leaf's interest) and the remedy that this litigation would generate (an award of damages for breach of the Series B Consent Right). For the doctrine of election of remedies to apply, the remedies must be "irreconcilably inconsistent." *Sannini v. Casscells*, 401 A.2d 927, 931 (Del. 1979.) Here, they are not.

16. The motion for entry of an order and final judgment is DENIED.



Vice Chancellor Laster
Dated: October 7, 2016