THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INVENERGY SOLAR DEVELOPMENT LLC, Plaintiff, Counterclaim Defendant, v. GONERGY CARIBBEAN SARL and YAZID AKSAS, Defendants, Counterclaim Plaintiffs.	)	C.A. No. 5455-VCP

MEMORANDUM OPINION

Submitted: July 28, 2011
Decided: November 28, 2011

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PARSONS, Vice Chancellor.

This action involves a challenge to the decision by a purchaser to terminate a share purchase agreement and related consulting services agreement based on the purchaser's contention that certain conditions precedent to closing those agreements had not been met by the seller. In support of its decision to terminate the transaction, purchaser brought an action for declaratory judgment and injunctive relief in this Court, seeking a determination that it properly terminated the share purchase and consulting services agreements and was entitled to the return of its down payment on the purchase price from escrow. In response to purchaser's complaint, seller counterclaimed for breach of the agreements, among other things, and sought to recover from purchaser damages in the form of the full purchase price, as well as unpaid "Development Fees" as provided for under the consulting services agreement.

With regard to seller's counterclaim, purchaser has moved for partial summary judgment on the issue of whether seller is entitled to any Development Fees under the consulting services agreement. The resolution of this motion turns on basic issues of contract interpretation. If, as purchaser claims, the consulting services agreement unambiguously provides that the Development Fees are contingent upon the actual development of the projects, and that the development of the projects is subject to the full and plenary discretion of the purchaser, then summary judgment for purchaser on this issue is appropriate. If, however, seller can show that the agreements are ambiguous as to the contingent nature of the Development Fees or purchaser's discretion to develop the contemplated projects, then summary judgment must be denied.

For the reasons stated in this Memorandum Opinion, I find that the agreements between the parties unambiguously provide that the Development Fees are contingent on the commencement of actual development of the projects and that the purchaser was under no obligation to develop the projects. Therefore, I grant purchaser's motion for partial summary judgment on this issue and hold that seller is not entitled to any Development Fees as a result of purchaser's decision to terminate the transaction.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Invenergy Solar Development LLC ("Invenergy"), is a Delaware limited liability company with its principal place of business in Chicago, Illinois. Invenergy and its affiliates develop, own, and operate renewable and other clean energy generation facilities in North America and Europe.

Defendant, Yazid Aksas, is a French citizen residing in San Francisco, California. Aksas has a Master's in Business Administration from Stanford University and a Master's in Law and Accounting from the London School of Economics. Aksas is a career entrepreneur and the founder and sole shareholder of defendant Gonergy Caribbean SARL ("Gonergy").

Defendant, Gonergy, is a limited liability company incorporated under the laws of France. Gonergy's principal place of business is Lamentin, Martinique. Gonergy's

assets are comprised of building-integrated and ground-mounted photovoltaic (solar) development power projects on the Caribbean island of Martinique.[1]

B. Facts[2]

1. Pre-Agreement Background

After developing an interest in investing in solar energy production, Aksas founded Gonergy in August 2008. Through his research, Aksas determined that the French Caribbean, particularly the island of Martinique, would be a lucrative place to invest. At the time, the French government was incentivizing the development of solar energy projects on the island, with the eventual goal of obtaining 50% of the island's energy from renewable sources by 2020. Setting his sights on solar energy development on Martinique, Aksas set about establishing a presence on the island, opening an office, hiring employees, and identifying and leasing locations on which he planned to develop solar energy projects.

By the summer of 2009, Aksas decided that he needed a strategic partner to help fund the continued development and eventual construction of his solar energy projects. To that end, Aksas hired Ty Jagerson, a broker, to introduce him to potential strategic partners. Jagerson introduced Aksas to various investors interested in Gonergy's projects, including Invenergy. In July 2009, Invenergy began discussing with Aksas a

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1 Because Aksas is the sole shareholder of Gonergy, I refer to Aksas and Gonergy collectively as "Aksas."

2 Unless otherwise noted, the facts set forth in this Memorandum Opinion are undisputed and taken from the pleadings, admissions, and affidavits submitted to the Court. Where the parties disagree as to a fact relevant to this case, I draw all reasonable inferences in favor of Aksas, as the non-moving party.

possible investment in Gonergy and, in August 2009, the parties executed a term sheet. Aksas claims he chose Invenergy as Gonergy's strategic partner because of its experience in the industry and its desire to move quickly to close on a deal.

Following execution of the term sheet, Invenergy continued its due diligence regarding Gonergy and its projects. In October 2009, Invenergy prepared and presented Aksas and Gonergy with a draft Share Sale and Purchase Agreement (the "SPA"), as well as a draft Consulting Services Agreement (the "CSA"). In January 2010, the parties executed the final versions of both of those agreements (the "Agreements"). The CSA became effective on January 1, 2010, and the SPA was scheduled to close on April 21, 2010.

2. The Agreements

a. The Share Sale and Purchase Agreement

Under the terms of the SPA, Invenergy would receive 100% of the shares of Gonergy in exchange for $725,000, which would be held in escrow pending completion of the deal.[3] The SPA also provided that, if Invenergy terminated the deal before the closing, it would pay Aksas a termination fee of $100,000 as reasonable compensation for "among other things, [his] expenses and management time in pursuing the transactions and for lost opportunity costs."[4]

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[3] SPA §§ 2.2-2.3. Copies of the SPA and CSA are attached as Exhibits A and B, respectively, of the Complaint.

[4] SPA § 8.

The SPA contains several other relevant provisions. For example, SPA § 9.1 provides that the SPA is governed by Delaware law. In addition, SPA § 10.3 contains a standard integration clause, which provides that "[e]xcept for the [CSA] . . . and the Escrow Agreement, there are no other agreements, oral or written, with respect to the subject matter hereof" and that the SPA represents "the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement . . . ."

b. The Consulting Services Agreement

The parties executed the final version of the CSA on January 1, 2010. The CSA retained Aksas as a consultant for the development of the projects[5] and entitled Aksas to a monthly fee of $10,000 for his services, plus reasonable expenses.[6] Under CSA § 2.1, the monthly consulting services agreement was set to expire on January 1, 2013, unless extended by agreement of the parties. If Aksas was terminated before that time, but after completion of the SPA, he would be entitled to a termination fee of "$5,000 multiplied by the number of months (but in no case more than twelve (12) months) remaining before the termination date" on January 1, 2013.[7]

In addition to the consulting fees provided for under CSA § 3.1.1, and central to the dispute here, § 3.1.3 provided that Aksas was to be paid "Development Fees" of $250,000 "per megawatt of installed solar energy capacity," prorated for partial

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5 CSA § 1.1.

6 CSA §§ 3.1.1-3.1.2.

7 CSA § 2.2.

megawatts. Under § 3.1.3.1, these Development Fees would be paid upon the earlier of (1) "the first draw of construction financing for the respective Project or phase thereof," or (2) "the commencement of installation of the solar modules of the respective Project or phase thereof by Client [Invenergy] or its assignee(s) or affiliate(s)." Furthermore, under CSA § 3.1.3.2, the Development Fees were "applicable to all the Projects developed by the Client or its assignees or affiliates in Martinique for five (5) years from [January 1, 2010]," even if Invenergy "sells or otherwise transfers any Project to a third party." The same section further provided that it "shall survive any termination or expiration of the [CSA] for five (5) years from [January 1, 2010,] provided, however, that 3.1.3.2 shall not survive termination in the event [the CSA] is terminated prior to the Completion (defined therein) of the Share Purchase Agreement."[8]

CSA § 11 provided for the contract to be governed by Illinois law. As with the SPA, the CSA contained a merger clause, § 15, which provided that the CSA "together with Exhibits A-C entered into pursuant to this Contract, contains the entire agreement between the Parties hereto with respect to the subject matter hereof."[9]

3. Aksas notifies Invenergy of the possibility of further curtailments

After the CSA was executed, Aksas began developing the projects on Invenergy's behalf, hiring and paying contractors and other professionals for that purpose. Aksas

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[8] "Completion" is defined under SPA § 1.1 as "the completion of the sale and purchase of the Shares in accordance with the terms hereof and Article 4."

[9] Ex. A of the CSA is the "Consultant Services" Agreement, Ex. B is a description of the projects, and Ex. C is the Security Agreement between the parties.

claims that, although he paid these expenses, he did so for the benefit, and at the direction, of Invenergy.

On or about March 10, 2010, Aksas sent Invenergy certain determinations by the Martinique electric utility ("Martinique EDF") indicating "that the first five Gonergy projects would be subject to as much as 2100 to 2320 hours of annual disconnection from the Martinique electric grid."[10] Invenergy predicts the consequence of these curtailments will be dire and expects them "to last for many years into the future and account for more than 50% of the total expected operating hours for the Gonergy projects and, hence, 50% of the expected project revenues without compensation to Gonergy."[11] Invenergy alleges that the Martinique EDF determinations rendered the projects economically nonviable, and, therefore, that the determinations constituted a material adverse change ("MAC") under the SPA.[12] On April 20, 2010, Invenergy provided written notice to Aksas that it

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10 Compl. ¶ 12. While no evidence has been provided as to the actual determinations of the Martinique EDF Gonergy and Invenergy received, Gonergy does not deny its receipt of such determinations or, evidently, Invenergy's assertions as to their content. The parties do dispute, however, the effect those determinations will have on the overall viability of the projects. For the purposes of this Memorandum Opinion, the actual effect of the determinations is immaterial. Instead, I simply note the existence of the disagreement, without attempting to resolve it, to put in context the motivations for Invenergy's later refusal to complete the SPA transaction based on its invocation of the material adverse change ("MAC") clause in SPA § 3.1.4.

11 *Id.*

12 *Id.* at ¶ 13; SPA § 3.1.4.

was exercising its right to terminate the SPA based on the MAC clause, and the deal was terminated.[13]

C. Procedural History

Following its written notice to Aksas terminating the transaction on April 20, 2010, Invenergy filed a verified complaint in this Court on May 4, 2010, seeking declaratory judgments on four counts. Specifically, Invenergy sought declarations that: (1) the Martinique EDF's curtailment determinations constituted a MAC under the SPA; (2) it rightfully terminated the SPA on April 21, 2010, because Aksas and Gonergy failed to satisfy certain conditions precedent, including the absence of a MAC and the production of an updated K-bis excerpt; (3) Invenergy validly terminated the CSA and was not obligated to pay Aksas any monthly consulting fees or Development Fees under the Agreements; and (4) Aksas has breached and continues to breach the SPA by failing to instruct the escrow agent to return $625,000 of the purchase price to Invenergy and distribute the remaining $100,000 termination fee to Aksas and Gonergy. Invenergy further requested that the Court order Aksas to instruct the escrow agent to release the funds in that manner.

On June 8, 2010, Aksas filed an answer denying all the counts in the Complaint and asserting various defenses. Aksas also counterclaimed against Invenergy for

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[13] Invenergy asserted, as an additional ground for terminating the SPA, that Gonergy had failed to provide Invenergy with an "updated K-bis excerpt from the Companies and Commercial Registry" indicating that Gonergy had transformed itself into a "simplified company by shares" as required under SPA § 3.1.1(a). As the Court understands it, an "extrait K-bis" is the French equivalent to an American certificate of incorporation. Because these claims are irrelevant to the disposition of Invenergy's pending motion, I do not discuss them further here.

breaches of the SPA and the CSA. As relief, he requested compensatory damages and specific performance of the CSA and sought to estop Invenergy from refusing to close and perform under the Agreements. In addition, Aksas sought declaratory judgments finding, among other things, that: (1) a MAC did not occur; (2) Invenergy breached the SPA by failing to cooperate in effecting the corporate transformation of Gonergy; and (3) Invenergy is not entitled to a distribution of the purchase price currently being held in escrow.

Invenergy replied to the counterclaim on June 28, 2010, denying all claims. Discovery commenced promptly thereafter and, on March 14, 2011, Invenergy moved for partial summary judgment on the issue of whether it was required to pay Development Fees to Aksas under the CSA. The Court heard argument on that motion on July 28, 2011.

D. Parties' Contentions

Invenergy's motion for partial summary judgment centers on the single issue of whether Aksas is entitled to consequential damages in the form of lost Development Fees under CSA § 3.1.3 as a result of Invenergy's alleged breach of the Agreements and its failure to consummate the transaction.

In moving for summary judgment, Invenergy contends that, regardless of whether its termination of the SPA was wrongful, Aksas is not entitled to Development Fees because the terms of the CSA unambiguously provide that the Development Fees under § 3.1.3 are contingent upon the actual commencement of development of the projects. According to Invenergy, because it had full and plenary discretion to decide whether to

build the projects and because, in fact, none of the projects were developed, Aksas is not entitled to any Development Fees. In addition, Invenergy argues that the liquidated damages provision under CSA § 2.2 unambiguously limits the damages Aksas may recover in the event the CSA is prematurely terminated and the limitation of liability provision under CSA § 20 expressly prohibits Aksas from recovering consequential damages.

In opposition, Aksas asserts that the Development Fees were part of the purchase price of the overall deal, and, therefore, he is entitled to recover as damages the entire benefit of the bargain he expected to receive under the SPA and CSA. That would include the stated purchase price, the Development Fees, and other expenses incurred at the direction of Invenergy. According to Aksas, "had Invenergy not wrongfully terminated the parties' contracts, [he] would have received the $725,000 contract price along with the development fees which were also part of the purchase price."[14] Aksas also argues that the terms of the CSA obligated Invenergy to build, or at least attempt to build, the projects. Alternatively, Aksas contends that Invenergy was obligated to build the projects and pay the related Development Fees based on the implied covenant of good faith and fair dealing or the doctrine of equitable estoppel. Finally, Aksas opposes Invenergy's motion on the ground that, at the very least, the terms of the CSA are ambiguous and inconsistent and, therefore, his ability to recover the Development Fees cannot be resolved on summary judgment.

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[14] Defs.' Ans. Br. 10.

II. ANALYSIS

1. Standard for Summary Judgment

Under Delaware law, "[s]ummary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[15] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[16] Furthermore, summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[17] The Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[18]

a. The Underlying Dispute

The basic dispute underlying Invenergy's motion is whether Aksas may recover damages in the form of Development Fees as a result of Invenergy's decision to terminate the Agreements. Citing Delaware and Illinois law, Aksas claims that the proper measure

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15 *Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

16 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

17 *Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

18 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

of damages in this action is the amount that would place him in the same position he would have been if Invenergy had closed on the deal and purchased the 100% interest in Gonergy contemplated by the SPA. According to Aksas, this amount includes not only the purchase price under SPA § 2.2, but the Development Fees under CSA § 3.1.3, as well as reimbursement for other expenses he incurred at the direction of Invenergy.[19]

The Development Fees at issue here are provided for in CSA § 3.1.3. Because the CSA is governed by Illinois law, I apply Illinois law to Aksas's counterclaims. Under Illinois law, to recover expectation damages in the form of lost profits in a breach of contract action, a plaintiff must prove (1) the amount of loss within a reasonable degree of certainty, (2) that the defendant's wrongful act resulted in the loss, and (3) that the claimed lost profits were reasonably within the contemplation of the defendant when it made the contract.[20] In other words, "[t]he general principle is that the nonbreaching party to the contract may be entitled to the profits it would have gained had the breaching party performed."[21]

b. Invenergy's Burden on Summary Judgment

To prevail on its motion for partial summary judgment, Invenergy must show that on the undisputed facts of record, it is entitled to a judgment as a matter of law. Invenergy contends it has met that burden and demonstrated that Aksas may not recover

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19 Defs.' Ans. Br. 10 ("[H]ad Invenergy not wrongfully terminated the parties' contracts, [Aksas] would have received the $725,000 contract price along with the development fees which were also part of the purchase price.").

20 *Royal's Reconditioning Corp. v. Royal*, 689 N.E.2d 237, 239-40 (Ill. App. 1997).

21 *Id.*

his claimed Development Fees because (1) those fees were not part of the purchase price, and (2) Invenergy was not obligated to develop any of the projects referenced in the CSA.

Whether Invenergy's arguments are correct turns on questions of contract interpretation. It is well settled in Delaware that summary judgment may be appropriate when the issue presented is one of contractual interpretation and "the dispute centers on the proper interpretation of an unambiguous contract."[22] In other words, "the threshold inquiry when presented with a contract dispute on a motion for summary judgment is whether the contract is ambiguous."[23] Under Illinois law, a contract is considered unambiguous where it is only susceptible to one meaning.[24] Therefore, to prevail on its motion for summary judgment, Invenergy must show that the plain language of the Agreements is unambiguous in providing that the Development Fees were contingent on the actual development of the projects and that Invenergy was under no obligation to develop the projects. Because I conclude that the contracts are unambiguous in these

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22 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

23 *United Rentals, Inc. v. RAM Hldgs., Inc*., 937 A.2d 810, 830 (Del. Ch. 2007).

24 *Gallagher v. Lenart*, 874 N.E.2d 43, 58 (Ill. 2007) ("If the language of the contract is susceptible to more than one meaning, it is ambiguous."). Furthermore, I note that, to the extent the SPA is governed by Delaware law, the relevant rules of contract interpretation are identical. *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.").

respects, I conclude that Aksas will not be able to prove that Invenergy's breach resulted in the loss of Development Fees and, therefore, Invenergy is entitled to summary judgment on that issue.

2. The Development Fees Are Not Part of the Purchase Price

Turning now to the Agreements, I find that the plain language of both CSA § 3.1.3 and SPA § 2.2 cannot reasonably be read to support Aksas's position. Rather, those provisions unambiguously comport with the conclusion that the purchase price of the transaction was a total of $725,000 and does not include Development Fees.

Beginning with CSA § 3.1.3, which governs the Development Fees, neither it nor any of its subsections contain a single reference to the purchase price of Gonergy. Instead, to the extent § 3.1.3 mentions the SPA at all, it is only to state that the terms of CSA § 3.1.3.2, which makes the Development Fees applicable to all projects developed by Invenergy, its affiliates, or assignees for the five years following the effective date of the CSA, "shall not survive the termination [of the CSA] in the event th[e] [CSA] is terminated prior to the Completion . . . of the Share Purchase Agreement."[25] In that regard, § 3.1.3.2 plainly and unambiguously indicates that Development Fees will not be payable if the parties do not close on the SPA.

The operative terms of CSA § 3.1.3 provide that Development Fees shall be payable "per megawatt of *installed* solar energy capacity"[26] and that payment will be due upon either (1) the first draw of construction financing or (2) the commencement of

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[25] CSA § 3.1.3.2.

[26] CSA § 3.1.3 (emphasis added).

installation of solar modules.[27] This language clearly conveys that the parties intended for the Development Fees to be contingent upon the actual commencement of development of the projects and that the fees would not become due until one of the specific events laid out in § 3.1.3.1 occurred. Nothing suggests that Development Fees were intended to be part of the purchase price of Gonergy that was due on closing. Moreover, in the same breath in which he claims the parties intended the Development Fees to be part of the purchase price, Aksas himself admits that the Development Fees were structured "to motivate [him] to continue to successfully develop the Projects."[28] As a result, I do not find that the provisions of the CSA support an interpretation of the Agreements that would make the Development Fees a part of the purchase price. Instead, the only reasonable interpretation of those provisions is that the Development Fees only would be due if and when construction financing was drawn for the projects or Invenergy commenced installation of solar modules.

SPA § 2.2 supports the same conclusion. That section states that "[t]he purchase price to be paid by the Purchaser to the Seller as consideration for the purchase of 100% of the shares of the Company (the 'Shares') shall be USD $725,000 . . . (the 'Purchase Price')." Again, nothing in § 2.2 references Development Fees. Thus, I find that the only reasonable interpretation of that provision is that the total purchase price for 100% of Gonergy's shares was $725,000.

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27 CSA § 3.1.3.1.

28 Defs.' Ans. Br. 6.

To the extent Aksas alleges that the parties structured the purchase price of the deal in the way he claims in order to achieve certain tax benefits, the unambiguous language of the Agreements and their merger clauses belie that assertion.[29] Aksas further asserts that the relevant Agreements guaranteed him Development Fees for at least thirty megawatts ("MW_{AC}") of solar energy capacity.[30] Under the terms of the CSA, that level of development would have entitled Aksas to *at least* €7,500,000 in Development Fees. To accept Aksas's argument that the Development Fees were part of the purchase price, however, this Court also would have to find that the parties agreed to place the overwhelming majority of the purchase price in the CSA. That agreement, however, is essentially an employment contract, in contrast to the SPA, which governs the actual sale of Gonergy. Moreover, there is no explicit reference in either document to the €7,500,000 figure or the total value of the transaction contemplated by the parties.[31]

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29 *See* Defs.' Ans. Br. 6 ("[P]art of the purchase price of the Projects, however were placed in the Consulting Agreement for tax reasons . . . ."); *see also Barille v. Sears Roebuck & Co.*, 682 N.E.2d 118, 123 (Ill. App. 1997) ("The language of this merger clause is unambiguous. Since the contract was intended to be the complete and exclusive statement of the agreement between the parties, is specific and is complete on its face, it supersedes all proposals, oral or written, and all other communication between the parties, as clearly stated therein, which cannot be used to contradict the agreement.").

30 Defs.' Ans. Br. 6.

31 *See Wright v. Chicago Title Ins. Co.*, 554 N.E.2d 511, 514 (Ill. App. 1990) ("The rights of parties to a contract are limited by the terms expressed in the contract; a court will not rewrite a contract to suit one of the parties, but will enforce the terms as written. There is a strong presumption against provisions that easily could have been included in the contract but were not. Thus, where a contract is clear and unambiguous, a court will not add terms simply to reach a more equitable agreement.").

Therefore, I reject such an interpretation of the Agreements as unreasonable and contrary to their plain language.

3. Invenergy Was Not Obligated to Develop the Projects

Alternatively, Aksas contends that the Agreements unambiguously obligated Invenergy to develop the projects. According to Aksas, the CSA is written in a way that "anyone who reads it [would] conclude [Invenergy] [is] going to build these projects" and that Aksas chose to sell Gonergy to Invenergy in reliance on Invenergy's promise to develop the projects.[32] Such a construction would guarantee that Aksas would receive the Development Fees for his efforts in setting up the projects.

In support of this interpretation of the CSA, Aksas relies on language in various clauses that provide that Invenergy or Aksas "shall" or "will" work to develop the projects as reflecting an obligation on Invenergy's part to do so.[33] When viewed in the overall context of the CSA, however, the plain language of the sections Aksas relies on does not support such a conclusion.[34]

To begin, the Preamble to Exhibit A of the CSA explicitly states that although Invenergy's "ultimate goal is to develop a minimum of 30 MW_{AC} of PV Projects . . . . the Parties acknowledge and agree that this goal is contingent upon many factors outside the

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32 Hr'g Tr. 35.

33 Defs.' Ans. Br. 11-12; CSA § 9.2; CSA Ex. A §§ 6-8.

34 *See Gallagher v. Lenart*, 874 N.E.2d 43, 58 (Ill. 2007) ("[B]ecause words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others. The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself.") (internal citations omitted).

direct control of the Parties, and that neither Party shall be liable or responsible for failure to reach such goal." That sentence strongly suggests that both parties understood that the projects might not be developed. Furthermore, because the payment of Development Fees to Aksas was conditioned on development of the projects, this sentence also implies that the parties recognized the possibility that Aksas would not receive any Development Fees.

Moreover, each of the sections of the CSA referenced by Aksas clearly was intended to provide a benefit to Invenergy, rather than impose an obligation. For example, CSA § 9.2, the noncompete clause, states that "[Aksas] hereby acknowledges [Invenergy] has invested, and will continue to invest, substantial resources to develop the Projects, and that such investment would be adversely affected should [Aksas] compete with [Invenergy's] interests." While this section may evidence an *intent* on the part of Invenergy to develop the projects, it does not require Invenergy to do so. To the contrary, the primary import of CSA § 9.2 is to prohibit Aksas from competing against Invenergy's interest. Likewise, the sections of Exhibit A to the CSA referenced in Aksas's brief all describe *Aksas's* obligations under the CSA to support the development of the projects, rather than a commitment by Invenergy to develop them.[35] This focus on

[35] *See* CSA Ex. A § 6 ("The Consultant shall use commercially reasonable efforts to obtain the necessary approvals and authorization necessary for each Project to interconnect to the grid."), § 7 ("The Consultant shall use commercially reasonable efforts to continue to develop and maintain solid working relationships with the key local stakeholders for each Project or phase thereof including landowners and community leaders."), § 8 ("The Consultant understands and acknowledges that it is Client's desire that the rights, authorizations and agreements shall remain valid for a sufficient period of time in order for the Client

the obligations of Aksas, as opposed to Invenergy, makes sense, because the CSA is essentially an employment agreement between the parties that specifies the particular duties of Aksas in assisting with the development of the projects.

a. The Implied Covenant of Good Faith and Fair Dealing Does Not Support Aksas's Claim for Development Fees

Under Illinois law, the implied duty of good faith and fair dealing is implied in every contract.[36] Although the duty itself does not give rise to a freestanding cause of action,[37] the implied covenant acts to "guide the construction of contracts without creating independent duties for the contracting parties."[38] The purpose of implying the covenant into every contract is "to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract."[39]

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to have sufficient time to start material construction works and to benefit from the full twenty (20) year period of the EDF power purchase agreement once each Project or phase thereof, is commissioned. . . . The Consultant recognizes that the Projects will be financed by the Client through non-recourse project financing loan agreements.").

36 *Gore v. Ind. Ins. Co.*, 876 N.E.2d 156, 161 (Ill. App. 2007).

37 *Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 914 (Ill. App. 2004).

38 *United Airlines, Inc. v. Good Taste, Inc.*, 982 P.2d 1259, 1263 (Alaska 1999) (construing Illinois law).

39 *Gore*, 876 N.E.2d at 161.

The covenant does not modify the express terms of the contract.[40] Instead, the covenant "is essentially used to determine the intent of the parties where a contract is susceptible to two conflicting constructions,"[41] or where "one party is given broad discretion in performing its obligations."[42] When applying the covenant to the construction of a contract, however, "where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. This good-faith principle is used only as a construction aid in determining the intent of the contracting parties."[43]

The implied covenant often is implicated in situations where one of the contracting parties has been given broad discretion in performing under the contract.[44] In such instances, the implied duty acts as a "limitation on the exercise of discretion vested in one of the parties to a contract."[45] As described by the Appellate Court of Illinois in *Dayan v. McDonald's Corp.*,[46] the "party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously,

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40 *N. Trust Co. v. VIII S. Mich. Assoc.*, 657 N.E.2d 1095, 1104 (Ill. App. 1995).

41 *Id.*

42 *Gore*, 876 N.E.2d at 161.

43 *Mid-W. Energy Consultants, Inc.*, 815 N.E.2d at 914-15 (internal quotation marks omitted).

44 *Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 971 (Ill. App. 1984).

45 *Id.* at 972.

46 466 N.E.2d 958 (Ill. App. 1984).

or in a manner inconsistent with the reasonable expectations of the parties." To that end, the Court noted that

> [w]here a party acts with improper motive, be it a desire to extricate himself from a contractual obligation by refusing to bring about a condition precedent or a desire to deprive an employee of reasonably anticipated benefits through termination, that party is exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and therefore is acting in bad faith.[47]

Here, Aksas argues that, even if the Court finds that the Agreements did not expressly obligate Invenergy to develop the projects, the implied covenant of good faith and fair dealing would "support[] the argument that Invenergy had a good faith obligation to build or at least attempt to build the Projects."[48] Viewing this argument broadly for purposes of summary judgment, it appears to have two aspects. First, based on the implied covenant of good faith and fair dealing, Aksas suggests that the Agreements implicitly obligated Invenergy to at least attempt to develop the projects. Second, Aksas asserts that, even if Invenergy was vested with discretion as to whether to develop the projects, by not developing the projects, it acted in bad faith and, therefore, violated the implied covenant.

On the first point, for the reasons discussed *supra*, I conclude that the only reasonable construction of the Agreements is that they do not impose an obligation on the

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47 *Id.* at 972; *see also Abbott v. Amoco Oil Co.*, 619 N.E.2d 789, 799 (Ill. App. 1993) ("Thus, as with the implied covenant claim under the [other contracts], the dealers must sufficiently allege bad faith or unfairness on the part of Amoco in order to show a breach of the implied covenant of good faith and fair dealing.").

48 Defs.' Ans. Br. 13.

part of Invenergy, express or implicit, to develop the projects. Thus, this portion of Aksas's claim must fail on the merits. Under Illinois law, even where a contract is susceptible to two different meanings, the Court is required to adopt the interpretation that avoids the imputation of bad faith to one of the contracting parties when determining whether there was a breach of the implied covenant.[49] In this case, the Agreements are susceptible to only one reasonable interpretation on this issue: that they did not obligate Invenergy to develop the projects.

Moreover, to the extent Invenergy had a duty to exercise its discretion in good faith in determining whether to develop the projects, I find that Invenergy adduced credible and competent evidence in support of its motion showing that it had a reasonable basis for not pursuing the projects. Invenergy claims it did not develop the projects because the determinations of the Martinique EDF made the projects economically nonviable. Indeed, Aksas does not seriously contest Invenergy's motivations for foregoing development of the projects. Under Illinois law, "[p]arties to a contract are not each other's fiduciaries. Even where a contract expressly states that a party agrees to use its 'best efforts' on behalf of the other . . . that party is not required to ignore its own interests."[50] Therefore, because the alleged economic nonviability of the projects was a reasonable basis for Invenergy, in its discretion, to refuse to develop them, Aksas had the

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[49] *See Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 914-15 (Ill. App. 2004).

[50] *Id.* at 915 (internal citations omitted).

burden of coming forward with specific facts showing that this basis was only a pretext or that Invenergy otherwise failed to act in good faith.

In considering the second aspect of Aksas's argument, I first observe that his Counterclaim never expressly mentions a claim for breach of the implied covenant of good faith and fair dealing.[51] While that alone might be problematic, I also note that, in response to Invenergy's motion for partial summary judgment on the Development Fees issue, Aksas has made nothing but a few conclusory allegations to support his argument based on the implied covenant. In his Answering Brief, Aksas states only that in the proper exercise of its discretion, Invenergy was required to at least attempt to develop the projects, and that it "could not have refused arbitrarily or in bad faith to pursue the Projects."[52] Beyond that, Aksas merely asserts that the "plenary record upon completion of discovery will fully establish . . . [that] Invenergy had no valid basis upon which to terminate the [Agreements]."[53] Rule 56(e) makes clear, however, that at the summary judgment stage such conclusory allegations and hopes, without more, are too little, too late.[54]

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51 *See id.* at 916 ("In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion.").

52 Defs.' Ans. Br. 13-14.

53 *Id.* at 14.

54 Court of Chancery Rule 56(e) provides, in pertinent part, that: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

Accordingly, I find that the implied covenant of good faith and fair dealing does not support Aksas's claim for Development Fees.

b. Aksas Is Not Entitled to Development Fees on the Basis of Equitable Estoppel

Aksas also has not made a sufficient showing to survive Invenergy's motion for summary judgment on his claim that Invenergy was obligated to pay the Development Fees under a theory of equitable estoppel. Under Illinois law, "equitable estoppel is a doctrine that is invoked to prevent fraud and injustice. The test that is employed is whether, considering all the circumstances of the particular case, conscious and honest dealing require that the defendant be estopped."[55] To prove equitable estoppel, the claiming party must show

> reliance by one party on the word or conduct of another so that the party changes his position and subsequently suffers harm. It arises whenever one by his conduct, affirmative or negative, intentionally or through culpable negligence, induces another to believe and have confidence in certain material facts, and the latter having the right to do so, relies and acts thereon, and is as a reasonable and inevitable consequence, mislead to his injury. Estoppel must be proven by clear, unequivocal evidence. Although an intent to mislead is not required, the reliance must be reasonable. Furthermore, to claim reliance on the conduct of another, the party must have acted without knowledge of the truth of the

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trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *See Tafeen v. Homestore, Inc.*, 2004 WL 1043721, at *1 (Del. Ch. Apr. 27, 2004) ("'[I]t is well settled that where the opponent of summary judgment has the burden of proof at trial, he must show specific facts demonstrating a plausible ground for his claim, and cannot rely merely upon allegations in the pleadings or conclusory assertions in affidavits' in order to avoid summary judgment being granted in favor of the proponent of the motion.").

[55] *Carey v. City of Rockford*, 480 N.E.2d 164, 165 (Ill. App. 1985).

> matter relied upon. Finally, the conduct of the person seeking the benefit of the doctrine may be scrutinized.[56]

As discussed *supra*, Invenergy did not make any affirmative guarantees in the Agreements that it would develop the projects, and the terms of the Agreements represent the entire understanding between the parties. In addition, Aksas's entitlement to Development Fees depends on whether Invenergy actually went forward with a project. Yet, there is no evidence that that ever occurred or that Invenergy made a representation to Aksas that it would develop a particular project upon which Aksas reasonably relied. Thus, Aksas has failed to produce sufficient evidence from which the Court reasonably could infer that it might be able to show by clear and convincing evidence that Invenergy should be equitably estopped from denying liability as to Aksas's claim for Development Fees.

Moreover, to the extent that Aksas claims that Invenergy induced him "to move forward and continue to make expenditures" in developing the projects and should be equitably estopped from arguing otherwise, Aksas will have a full and fair opportunity to prove any such reliance damages at trial. Those claims, however, do not relate to the Development Fees contemplated under the CSA. Therefore, they are outside the scope of Invenergy's pending motion for partial summary judgment and provide no basis for denying that motion.

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[56] *Gary-Wheaton Bank v. Meyer*, 473 N.E.2d 548, 554-55 (Ill. App. 1984).

4. There Is No Ambiguity or Inconsistency Among § 3.1.3.2, § 20, and § 2.2 of the CSA

Aksas asserts that the limitation of liability provisions of the CSA are ambiguous and inconsistent with each other and with other, more specific provisions of the CSA. Therefore, he urges this Court to look to the intent of the parties and consider extrinsic evidence surrounding the CSA to interpret that agreement. Having found no ambiguity or inconsistency among these provisions, I also reject this aspect of Aksas's argument.

a. CSA § 2.2 is not inconsistent with § 3.1.3.2

Aksas first argues that the liquidated damages provision of § 2.2 is inconsistent with § 3.1.3.2. Section 2.2 states that

> Notwithstanding Section 2.1, the Client [Invenergy] may terminate this Contract at any time by giving thirty (30) days written notice to the Consultant [Aksas]. If Client terminates this Contract prior to the third (3rd) anniversary of the Effective Date for any reason (other than Consultant's material uncured breach of this Contract or termination of this Contract prior to the Completion (as defined therein) of the Share Purchase Agreement), then Client shall pay Consultant a termination fee equal to $5,000 multiplied by the number of months (but in no case more than twelve (12) months) remaining between the termination date and the third (3rd) anniversary of the Effective Date. Such termination fee shall be due and payable within five (5) business days after the effective date of termination.

Aksas claims that this provision, which purports to limit him to, at most, a $60,000 termination fee, is inconsistent with CSA § 3.1.3.2.

Section 3.1.3.2 provides that Invenergy still must pay Aksas Development Fees for five years after the Effective Date of the CSA, even if, in certain circumstances,

Invenergy terminated Aksas as a consultant before the expiration of that period. Specifically, the section provides that:

> The Development Fee shall be applicable to all the Projects developed by the Client or its assignees or affiliates in Martinique for five (5) years from the Effective Date. The Development Fee shall apply to the Projects regardless of whether Client sells or otherwise transfers any Project to a third party. Client's obligation to pay Development Fees shall not be subject to a right of offset. This Section 3.1.3.2 shall survive any termination or expiration of this Agreement for five (5) years from the Effective Date provided, however, that 3.1.3.2 shall not survive termination in the event this Contract is terminated prior to the Completion (as defined therein) of the Share Purchase Agreement.

There is no inconsistency between CSA §§ 2.2 and 3.1.3.2. Section 2.2 applies to the monthly consulting arrangement under CSA § 3.1.1, which obligates Invenergy to pay Aksas $10,000 a month for three years to help develop the projects. Far from being inconsistent with § 2.2, § 3.1.3.2 relates to a different subject, the Development Fees, and provides Aksas with added protection. Specifically, the section requires Invenergy to pay Development Fees to Aksas if Invenergy, its affiliates, or its assignees develop the contemplated projects at any time during the five year period following the effective date of the CSA. Read together, § 2.2 provides Aksas with immediate liquidated damages in lieu of his monthly consulting fee under CSA § 3.1.1 and § 3.1.3.2 provides him with a continuing entitlement to receive Development Fees in certain circumstances for five years. Hence, § 3.1.3.2 provides security for Aksas by preventing Invenergy from eluding its obligation to pay Development Fees to Aksas by selling or transferring the

projects or delaying development of the projects until after the expiration of the CSA or the termination of Aksas as a consultant.

As discussed *supra*, however, CSA § 3.1.3.2 does not require that Invenergy develop any projects. Thus, even accepting Aksas's own interpretation of §§ 2.2 and 3.1.3.2, they would not entitle him to Development Fees in the circumstances of this case. According to Aksas, these two sections together entitle him to the liquidated damages provided for in § 2.2, "as well as the Development Fees of €250,000 per megawatt for the next five years."[57] But, Aksas has not presented any evidence that Invenergy has caused any megawatts to be generated or plans to develop a project to generate megawatts in Martinique in the near future. Thus, the total value of the Development Fees owed to Aksas would be zero, even if the Court were to ignore the important fact that Invenergy terminated the CSA before the Completion of the SPA.

b. CSA § 20 is not inconsistent with § 3.1.3.2 or § 2.2

Aksas further asserts that the limitation of liability clause under CSA § 20 is inconsistent with § 3.1.3.2 because the Development Fees are not consequential or extra-contractual damages, but rather are general contractual damages that result as a natural and probable consequence of Invenergy's breach. Because I already have determined that Invenergy was not contractually obligated to pay any Development Fees, this argument necessarily fails.

Likewise, Aksas strains to find an inconsistency between CSA § 20 and CSA § 2.2. Section 2.2 provides a specific method for calculating liquidated damages for

[57] Defs.' Ans. Br. 18.

Aksas in the event Invenergy terminates the CSA within the first three years. Payment of these liquidated damages is a general contractual obligation owed by Invenergy to Aksas; therefore, it is not affected by the provision in § 20(A) disclaiming liability for "indirect, incidental, consequential, special or exemplary damages." To the extent § 20(B) purports to limit the aggregate damages recoverable by Aksas, it is irrelevant to his claim for Development Fees, because I have determined for the reasons discussed previously that Aksas has no right to such fees. Nothing in CSA § 20 supports a contrary conclusion.[58]

5. CSA § 20 Is Not Substantively Unconscionable

Aksas's final contention that CSA § 20 is substantively unconscionable amounts to nothing more than a desperate attempt at a "do over" on the contract and merits only brief discussion. Aksas asserts that § 20 "is not commercially reasonable since it limits Invenergy's liability to $0 rather than the several million dollars in development fees that Mr. Aksas reasonably expected to receive."[59] This is incorrect as a matter of fact and law. In the terms of the facts, Invenergy's "liability" for terminating the Agreements is not $0, a point that Aksas repeatedly acknowledged throughout his brief. Invenergy agreed to various liquidated damages provisions to compensate Aksas for his time, efforts, and lost opportunities in pursuing a deal with Invenergy. For example, Invenergy does not even contest that Aksas is entitled to the $100,000 termination fee under the

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[58] With regard to Aksas's more general claims for damages, I express no opinion as to whether § 20 is inconsistent with the liquidated damages provision of § 2.2, because that question is beyond the scope of Invenergy's pending motion for partial summary judgment.

[59] Defs.' Ans. Br. 23.

SPA.[60] Regarding his legal rights, although Aksas might believe he is entitled to millions of dollars for his efforts, he did not negotiate contractual terms to that effect and, presumably, could have, if that truly had been the parties' actual intent. Moreover, Aksas has not adduced evidence that even arguably would support a reasonable inference that the terms on which the parties did agree were unconscionable given the riskiness and speculative nature of the deal.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I find that the Consulting Services Agreement and Share Sale and Purchase Agreements unambiguously indicate that the contemplated Development Fees are contingent upon the commencement of the actual development of the projects and that Invenergy was under no obligation to develop the projects. Therefore, I grant Invenergy's motion for partial summary judgment and hold that Aksas is not entitled to contractual or consequential damages in the form of lost Development Fees under either the SPA or the CSA related to Invenergy's termination of the transaction.

IT IS SO ORDERED.

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[60] *See* SPA § 8 (providing a $100,000 termination fee "to compensate [Aksas] for, among other things, its expenses and management time in pursuing the transactions and *for lost opportunity costs*.") (emphasis added).