

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

GREEN PLAINS RENEWABLE)	
ENERGY INC., GREEN PLAINS)	
WOOD RIVER LLC, and GREEN)	
PLAINS FAIRMONT LLC,)	
)	
Plaintiffs,)	C.A. No. N14C-01-233 MMJ CCLD
)	
v.)	
)	
ETHANOL HOLDING COMPANY,)	
LLC,)	
)	
Defendant.		

Submitted: December 4, 2014
Decided: February 9, 2015

On Defendant's Motion to Dismiss
DENIED

OPINION

Richard L. Horwitz, Esquire, John A. Sensing, Esquire, Janine L. Hochberg, Esquire, Potter Anderson & Corroon LLP, Omri E. Praiss, Esquire (Argued), Joseph P. Conran, Esquire, Michael Degan, Esquire, Husch Blackwell LLP, Attorneys for Plaintiffs.

Steven Caponi, Esquire, Elizabeth Sloan, Esquire, Blank Rome LLP, John P. Passarelli, Esquire (Argued), Kutak Rock LLP, Attorneys for Defendant.

JOHNSTON, J.

PROCEDURAL CONTEXT

Plaintiffs Green Plains Renewable Energy Inc., Green Plains Wood River LLC, and Green Plains Fairmont LLC (collectively “Green Plains”) brought this action for declaratory judgment against Defendant Ethanol Holding Company LLC (“EHC”). Green Plains Renewable Energy Inc. is an Iowa corporation with its principal place of business in Omaha, Nebraska. Green Plains Wood River LLC, Green Plains Fairmont LLC, and EHC are all Delaware limited liability companies.

Green Plains seeks the Court’s interpretation and construction of certain provisions of the Asset Purchase Agreement (“APA”), which was entered into between Green Plains and EHC. Green Plains alleges that EHC assumed certain liabilities under the APA, which triggers two post-closing purchase price adjustments.

On March 24, 2014, EHC filed this Motion to Dismiss (“Motion”). EHC argues that the terms of the APA are unambiguous in providing that EHC did not assume the alleged liabilities. Oral argument was heard on December 4, 2014.

PLED FACTS

For purposes of this Motion, the Court will set forth the facts in the light most favorable to the non-moving party, Green Plains.

As of September 25, 2006, certain lenders, including First National Bank of Omaha (“FNB Omaha”), made loans to Buffalo Lake Energy LLC (“Buffalo

Lake”) and Pioneer Trail Energy LLC (“Pioneer Trail”). These loans enabled Buffalo Lake to become the owner and operator of assets relating to the production of fuel grade denatured ethanol near Fairmont, Minnesota. The loans also enabled Pioneer Trail to become the owner and operator of assets relating to the production of fuel grade denatured ethanol near Wood River, Nebraska.

Buffalo Lake and Pioneer Trail subsequently defaulted on their loans. Rather than having FNB Omaha and the other lenders foreclose on the assets, Buffalo Lake and Pioneer Trail agreed to convey assets to EHC. This conveyance was set forth in the Deed in Lieu of Foreclosure Agreement and Joint Escrow Instructions (“DILFA”) dated April 11, 2013.

EHC and its financial advisors then conducted a sale process. On November 1, 2013, EHC and Green Plains entered into the APA. Under the APA, Green Plains agreed to purchase assets from EHC, specifically the ethanol production assets transferred from Buffalo Lake and Pioneer Trail to EHC under the DILFA. Effective November 22, 2013, EHC and Green Plains entered into the Amendment to Asset Purchase Agreement (“Amendment”).¹

¹ The Court will collectively refer to the APA and the Amendment as “APA.”

ANALYSIS

Standard of Review

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”² The Court must accept as true all non-conclusory, well-plead allegations.³ Every reasonable factual inference will be drawn in favor of the non-moving party.⁴ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.⁵

Central Issue

The central issue that must be decided by the Court is whether EHC assumed certain liabilities pursuant to the terms of the APA. The Court’s ultimate decision is dependent upon resolution of: (1) whether the APA is integrated; and (2) whether the APA is ambiguous.

If the Court finds that the APA is integrated and unambiguous, then EHC will be entitled to have Green Plains’ Complaint dismissed. However, if the Court finds that the APA is either ambiguous or not fully integrated, then Green Plains will be entitled to discovery to determine whether EHC assumed liabilities under the APA.

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

⁴ *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

⁵ *Spence*, 396 A.2d at 968.

Contract Interpretation

Delaware courts interpret contract terms according to their plain ordinary meaning, unless there is an ambiguity.⁶ A contract provision is not rendered ambiguous simply because the parties do not agree on its proper construction.⁷ Rather, a contract is ambiguous only if the provision in controversy can be reasonably or fairly susceptible of different interpretations, or can have two or more different meanings.⁸

Absent some ambiguity, contract language will be given its ordinary and usual meaning.⁹ The Court will not attempt to “destroy or twist” contract language “under the guise of construing it.”¹⁰ Instead, the Court’s interpretation will be confined to the “four corners” of the contract.¹¹ As a result, extrinsic evidence will not be permitted to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.¹²

Delaware law also provides that it is “axiomatic that a contract may incorporate by reference provisions contained in some other instrument.”¹³ However, outside provisions only will be incorporated by reference if they are

⁶ *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

⁷ *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *5 (Del. Super.).

¹² *Eagle Indus., Inc. v. DeVilbliss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

¹³ *State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. 1951).

specifically set forth or identified in the contract.¹⁴ When a contract properly incorporates an outside provision by reference, the terms and conditions of that outside provision becomes part of the contract, and the two will be construed together as the agreement of the parties.¹⁵ The Court will not interpret a provision incorporated by reference that results in an “anomalous” reading of the contract.¹⁶

Relevant Contract Provisions

The relevant contract provisions for this Motion are contained in both the APA and DILFA. Section 1.01 of the APA, titled “Definitions,” provides in relevant part:

“Accounts Payable Amount” means the value of all liabilities assumed by the Seller that survive the Closing, whether current or noncurrent, as determined under GAAP.

* * *

“Accounts Receivable” means all amounts due to Buffalo Lake or Pioneer Trail for any reason as of the Closing Date that Seller has acquired in connection with the Deed In Lieu Closing.

* * *

“Deed In Lieu Assets” means, collectively, the Buffalo Lake Deed in Lieu Assets, the Pioneer Trail Deed in Lieu Assets and the Seller Deed in Lieu Assets.

¹⁴ *Id.*

¹⁵ *I.U. North America, Inc., v. A.I.U. Ins. Co.*, 896 A.2d 880, 886 (Del. Super. 2006).

¹⁶ *Falcon Steel Co. v. Weber Engineering Co., Inc.*, 517 A.2d 281, 286 (Del. Ch. 1986).

Section 2.02 of the APA, titled “Sale and Purchase of Purchased Assets;

Assumption of Certain Liabilities,” provides in relevant part:

(a) ***Purchased Assets***. Subject to the terms and conditions of this Agreement, at the Closing, Seller shall sell, convey, assign, transfer and deliver to the respective Buyer...and Buyers shall purchase from the Seller, (i) all of Seller’s right, title and interest in and to all of the Deed in Lieu Assets other than the Excluded Assets (all of such assets being collectively referred to as “Purchased Assets”), (ii) all Accounts Receivable, (iii) all Inventory and Materials, and (iv) all Spare Parts.

* * *

(b) ***Excluded Assets***. Notwithstanding any other provision of this Agreement to the contrary, the rights and assets described on [Schedule] 4.05 (collectively, the “Excluded Assets”) are expressly excluded from the sale and assignment to the Buyers...shall not constitute Purchased Assets and shall remain the property of the Seller after Closing Date.

* * *

(c) ***Assumed Liabilities***. At the Closing, Buyers shall assume and acquire from Seller (i) all Accounts Payable, (ii) the agreements, contracts, liabilities and obligations acquired, assumed or incurred by the Seller in connection with the Deed in Lieu Closing pursuant to the Deed in Lieu Documents, specifically, including the agreements, contracts, liabilities and obligations described on [Schedule] 8.05, and (iii) all liabilities incurred or accruing after the Closing Date which arise with respect to the Purchased Assets after the Closing Date (collectively as the “Assumed Liabilities”).

* * *

(d) ***Excluded Liabilities.*** Buyers shall not assume, acquire or be liable for, nor be deemed to have assumed, acquired or be liable for, any agreements, contracts, liabilities or obligations of Seller other than the Assumed Liabilities (all such agreements, contracts, liabilities or obligations not constituting Assumed Liabilities, collectively, the “Excluded Liabilities”). The Excluded Liabilities shall remain the exclusive responsibility of and shall be retained by Seller.

Section 2.03 of the APA, titled “Purchase Price and Closing Transactions,” provides the base price Green Plains agreed to pay EHC for the Purchased Assets and Assumed Liabilities. Section 2.03(c) states that the purchase price for the Accounts Receivable shall be “(i) due to the Buyers in the amount, if any, by which the Accounts Payable Amount exceeds the Accounts Receivable Amount (the “Shortfall Amount”), or (ii) due to the Seller in the amount, if any, by which the Accounts Receivable Amount exceeds the Amount Payable Amount (the “Excess Amount”).” In essence, Section 2.03(c) provides that the base purchase price will be adjusted by the Accounts Receivable Amount, either by adding the Excess Amount, or subtracting the Shortfall Amount.

Section 2.06 of the APA sets forth the detailed process governing how disputes about the calculation of a Shortfall or Excess Amount will be resolved. Section 2.06(d) provides in relevant part: “In the event a Shortfall Amount exists,

Seller shall remit the Shortfall Amount to Buyers within five (5) Business Days following the final determination of the Shortfall Amount....”

Section 4.05 of the APA, titled “Working Capital, Accounts Receivable, Accounts Payable and Inventory,” outlines what Green Plains acquired from EHC. The acquisitions are: Accounts Receivable, Accounts Payable, and Inventory and Raw Materials, that EHC acquired and assumed from Buffalo Lake and Pioneer Trail, “pursuant to the Deed in Lieu Documents in connection with the Deed in Lieu Closing....” Section 4.05 then references Schedule 4.05, which lists the Accounts Receivable and Accounts Payable that were not conveyed or assigned to Green Plains at the closing of the APA.

Section 8.05 of the APA, titled “Assumption of Obligations,” provides that Green Plains “shall have expressly assumed...the Assumed Liabilities (including, without limitation, the agreements, contracts, liabilities and obligations described on Schedule 8.05 hereto).”

Section 13.09 of the APA, titled “Entire Agreement,” is an integration clause that provides:

This Agreement contains the entire understanding among the Parties hereto with respect to the transactions contemplated hereby and supersedes and replaces all prior and contemporaneous agreements and understandings, oral or written, with regard to such transactions. All Exhibits, Annexes, and Schedules

hereto are expressly made a part of this Agreement as fully as though completely set forth herein.

The most relevant provision of the DILFA—to which Green Plains was not a party—is Section 24. Section 24 provides: “This Agreement and the other Deed in Lieu Documents (including all Exhibits and Schedules hereto and thereto) contain the entire agreement among Borrowers, Agents and the Lenders with respect to the subject matter hereof....”

The relevant exhibit referenced in Section 24 is Exhibit C, titled “Assignment of Contracts” (“Assignment of Contracts”). The Assignment of Contracts provides in relevant part: “[EHC] hereby accepts such assignment of [Buffalo Lake’s and Pioneer Trail’s] right, title, estate and interest in, to and under solely those Contracts that are set forth in Schedule I attached hereto.”

The most relevant portion of Schedule I is the last sentence, which appears at the end of the list of contracts referenced in the Assignment of Contracts. The sentence provides: “[EHC’s] acceptance of [Buffalo Lake’s and Pioneer Trail’s] assignment of the foregoing Contracts shall not constitute an assumption by [EHC] of the obligations thereunder.”

Parties’ Contentions

EHC contends that the APA unambiguously provides that EHC did not assume any liabilities that survived the closing. EHC asserts that the last sentence of Schedule I to the Assignment of Contracts of the DILFA affirmatively shows

that EHC never assumed any liabilities. Further, EHC claims that because EHC never assumed any liabilities, the Accounts Payable Amount was by definition zero, so there can be no Shortfall Amount owed to Green Plains.

EHC also asserts that the only way EHC could have assumed liabilities is if EHC had operated the Buffalo Lake and Pioneer Trail plants after the DILFA closing and prior to the APA closing. However, EHC argues that situation could not have occurred because the DILFA and APA were structured as a “table closing,” meaning the closings occurred simultaneously. Accordingly, EHC argues that the Shortfall Amount clause was included in the APA as a contingency, in the event Green Plains was unable to meet all conditions precedent for closing and EHC was required to actually operate the plants.

Green Plains contends that the APA is ambiguous. First, Green Plains asserts there is ambiguity as to whether EHC assumed liabilities that survived the closing. Green Plains argues that several provisions of the APA and DILFA show that EHC did in fact assume liabilities. Specifically, Green Plains points to: (1) APA Section 1.01’s definition of Accounts Payable Amount; (2) APA Section 2.02(c)’s reference to Green Plains acquiring the obligations EHC had acquired under the Deed in Lieu Agreement; (3) APA Section 2.03(c)’s definition of a Shortfall Amount; (4) APA Section 2.06’s instructions on how EHC would pay

Green Plains the Shortfall Amount; as well as (5) DILFA Section 8 and Schedule XI¹⁷; and (6) DILFA Section 12 and Schedule IX.¹⁸

Second, Green Plains asserts the APA is ambiguous as to whether EHC operated the plants prior to the APA closing. Specifically, Green Plains argues it is not reasonable to interpret the Shortfall Amount provisions as a contingency. Green Plains assumes, *arguendo*, that if it were unable to close on the APA—and EHC were forced to assume the liabilities and obligations necessary to operate the ethanol production facilities—the terms of Schedule I, the Assignment of Contracts, and the APA would remain exactly the same. Thus, Green Plains argues that EHC actually would be operating the plants, yet EHC still could rely on the language of Schedule I to disclaim the assumption of liabilities and obligations of the listed contracts.

Third, Green Plains asserts there is ambiguity over the definition of Accounts Payable Amount. Relying on its prior arguments, Green Plains argues

¹⁷ DILFA Section 8 provides in relevant part: “Except as otherwise expressly provided herein or in the Payment Schedule...all operating costs and accounts payable with respect to the Facilities...shall be the sole responsibility of and shall be the continuing obligations of [Buffalo Lake and Pioneer Trail].”

DILFA Schedule XI is the Payment Schedule and provides in relevant part that EHC will pay any Accounts Payable on behalf of Buffalo Lake and Pioneer Trail, and will assume the Federal Rural Electric Service Contract and Caterpillar Front Loader Installment Sales Contract.

¹⁸ DILFA Section 12 provides in relevant part that EHC would only be liable for the service contracts that described on Schedule IX, which were defined as the “Accepted Service Contracts.”

DILFA Schedule IX provides the list of Accepted Service Contracts.

that Accounts Payable Amount does not equal zero by definition. In addition, Green Plains argues that if Accounts Payable Amount is zero by definition, then Sections 2.03(c) and 2.06 of the APA would be rendered unnecessary and meaningless.

Green Plains also contends that the last sentence of Schedule I to the Assignment of Contracts was not properly incorporated by reference into the APA under Delaware law. Green Plains asserts that Schedule I was not properly identified in the DILFA to constitute a valid incorporation by reference into the APA. Green Plains also asserts that the last sentence of Schedule I was not present in the Assignment of Contracts that was executed by EHC, Buffalo Lake, and Pioneer Trail. Green Plains argues that that sentence was added at a later time, and was never disclosed to Green Plains prior to the APA closing on November 1, 2013.

Discussion

Schedule I

The last sentence of Schedule I of the Assignment of Contracts provides that EHC accepted the *assignment* of the listed contracts, but EHC did not assume the *obligations* of those contracts. It appears to the Court that the last sentence of Schedule I makes the APA internally inconsistent, particularly considering the

definitions and provisions of the APA that address the Shortfall Amount and its calculations.¹⁹

Green Plains asserts that on March 26, 2013—the day EHC, Buffalo Lake, and Pioneer Trail executed the Assignment of Contracts—Schedule I was completely blank. Nevertheless, on November 1, 2013—the day the APA was executed—Schedule I included the last sentence that disclaimed liability. Green Plains alleges that EHC inserted the last sentence of Schedule I at some point between March 26, 2013 and November 1, 2013, without notifying Green Plains.

The Court finds that the timing of the addition of the last sentence of Schedule I to the Assignment of Contracts presents a genuine issue of material fact at this stage of the proceedings.

Ambiguity

Green Plains' interpretation—that EHC assumed liabilities under the APA—is reasonable because several APA provisions expressly provide for EHC's assumption of liabilities. No APA provisions specifically state that EHC was only acting as a “pass-through” to facilitate the transaction.

At the same time, EHC's interpretation that EHC did not assume any liabilities is reasonable, given the simultaneous closings of the APA and DILFA. Further, EHC contends that it never operated the ethanol production facilities.

¹⁹ APA §§ 1.01 (Accounts Payable Amount), 2.02(c), 2.03, 8.05.

Viewing the plain language, the Court finds the APA is ambiguous as to whether EHC assumed liabilities because the APA is reasonably susceptible of different interpretations.

The Court also finds that the definition of Accounts Payable Amount is ambiguous. If EHC **did not** assume any liabilities under the APA, EHC's interpretation of Accounts Payable Amount equaling zero is reasonable. Alternatively, if EHC **did** assume liabilities under the APA, then Green Plains' interpretation for the potential of a Shortfall Amount is reasonable.

The Court finds that extrinsic evidence of the parties' intent is necessary to decide these issues of ambiguity. Extrinsic evidence of intent cannot be considered on a motion to dismiss.²⁰ Contract interpretation issues involving factual disputes, are more appropriately resolved through summary judgment, or at trial.

Integration Clause

Schedule I clearly was incorporated into the DILFA through Section 24. Section 24's identification of all schedules to the DILFA as being part of "the entire agreement" is sufficient to satisfy the incorporation by reference standard. The question remains whether the DILFA was incorporated by reference into the APA through Section 13.09's integration clause. Because this Motion to Dismiss

²⁰ See *Nicholas v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 83 A.3d 731 (Del. 2013) (holding that extrinsic evidence was necessary to determine the parties' intent in negotiating a settlement agreement, but it was a factual question that was inappropriate for resolution on a 12(b)(6) Motion to Dismiss).

is being decided on the basis of ambiguity, the DILFA integration issue need not be resolved.

CONCLUSION

Viewing the pleadings in the light most favorable to Green Plains, the Court finds that it is reasonably conceivable that Green Plains could succeed on the merits of its declaratory judgment action. The Court finds that the APA is ambiguous as to whether EHC assumed liabilities because the APA is reasonably susceptible of two different interpretations. Extrinsic evidence of the parties' intent must be fleshed out during discovery.

THEREFORE, Defendant Ethanol Holding Company, LLC's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston