**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| DEERE & COMPANY, a Delaware corporation, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. N13C-07-330 MMJ CCLD |
| EXELON GENERATION ACQUISITIONS, LLC, a Delaware limited liability company, | ) | |
| Defendant. | ) | |

Submitted: April 1, 2016
Decided: June 2, 2016

Upon Deere & Company's Motion for Summary Judgment
**GRANTED**
Upon Exelon Generation Acquisitions, LLC's Motion for Summary Judgment
**DENIED**
Upon Deere & Company's Motion to Dismiss Defendant's Counterclaim
**GRANTED**

## MEMORANDUM OPINION

Peter J. Walsh, Jr., Esq. (argued), Matthew F. Davis, Esq., Jacob R. Kirkham, Esq., Potter Anderson & Corroon, LLP, Attorneys for Plaintiff

Geoffrey A. Kahn, Esq. (argued), Matthew A. White, Esq. (argued), David J. Margules, Esq., Ballard Spahr, LLP, Attorneys for Defendant

* Opinion was originally Filed Under Seal. The Confidential material contained herein has been redacted.

**JOHNSTON, J.**

## PROCEDURAL CONTEXT

Plaintiff Deere & Company brought this action against Defendant Exelon Generation Acquisitions, LLC seeking a declaratory judgment and damages for breach of the earn-out provision in the August 30, 2010 Purchase Agreement ("Purchase Agreement") between Deere and Exelon. The Complaint asserts claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.

On August 19, 2013, Exelon filed its Motion to Dismiss the Complaint. By Opinion dated March 7, 2014, the Court dismissed the implied covenant and unjust enrichment claims, leaving only the breach of contract claim.

On April 11, 2014, Exelon filed its Answer, Affirmative Defenses, and two Counterclaims against Deere: (1) recoupment of development costs for the relocation of the Blissfield Wind Project; and (2) unjust enrichment. On May 1, 2014, Deere filed its Motion to Dismiss Exelon's Counterclaims. By Opinion dated November 10, 2014, the Court denied Deere's Motion to Dismiss. The Court held:

> Deere relies upon *Deere v. Exelon*, this Court's March 7, 2014 opinion dismissing Deere's unjust enrichment claim because the Agreement governed the parties' relationship and the matter, the payment of the earn-out, in dispute.[1] Exelon's claim for unjust enrichment is substantially different from Deere's. In Deere, the matter in dispute was payment of the earn-out for completion of the

[1] *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2014 WL 904251, at *5 (Del. Super.).

> Blissfield Wind Project.[2] Payment of the earn-out is expressly addressed by the parties in Section 2.6(a)(iii) in the Agreement.[3] Here, the matter in dispute, the offset of any recovery by the expense Exelon allegedly incurred to complete the wind project in Gratiot County, is not addressed in the Agreement. The Agreement does not contain a provision addressing the parties' obligations in the event that the Blissfield Wind Project could not be developed in Lenawee County. I find that Exelon's unjust enrichment claim has sufficient merit to survive a motion to dismiss.[4]

On November 18, 2014, Deere filed its Motion for Reargument. Deere argued that that the Court misapprehended the facts underlying Exelon's claim and the purpose of Section 2.6(b) of the Purchase Agreement. Deere contended that the $10 million expended by Exelon in relocating the Blissfield Wind Project to Gratiot County was an expenditure contemplated by Section 2.6(b) and cannot be recovered under an unjust enrichment theory.

The Court granted Deere's Motion for Reargument and dismissed Exelon's counterclaim for unjust enrichment. The Court held:

> A determination must be made as to whether or not the Agreement applies to development of the project, including relocation from Lenawee County to Gratiot County. If the Agreement applies, the earn-out provision of Section 2.6(a) would be triggered and Section 2.6(b) would govern the expenses incurred by Exelon in relocating the Blissfield Wind Project to Gratiot County. If the Agreement does not apply, the Section 2.6(a) earn-out provision would not be triggered, and therefore, Exelon's unjust enrichment claim would not apply and would be rendered irrelevant.[5]

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[2] *Id.*
[3] *Id.* at *1.
[4] *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2014 WL 6674471, at *4 (Del. Super.).
[5] *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2015 WL 4399934, at *2 (Del. Super.).

On February 5, 2016, Exelon and Deere filed Cross Motions for Summary Judgment. Oral argument was heard on April 1, 2016.

## UNDISPUTED FACTS

On August 30, 2010, Deere and Exelon entered into a Purchase Agreement. Deere sold its entire wind energy business—including already-operating wind farms as well as wind farms at different stages of development—to Exelon for $860 million. The Purchase Agreement included an earn-out provision that provided for $40 million in potential additional payments if three projects, collectively known as the Michigan Wind Projects, achieved certain milestones. The project at issue in this case, the Blissfield Wind Project, involved a $14 million earn-out provision.

Among the assets included in the Purchase Agreement was the Power Purchase Agreement ("PPA") associated with the Blissfield Wind Project. A PPA is essential for the viability of a wind farm development project. It is a contract to buy the electricity generated by the wind farm and secures revenue for the project. The PPA associated with the Blissfield Wind Project provided a fixed-rate schedule for Consumers Energy Company ("Consumers") to purchase energy from the wind farm for twenty years.

The Purchase Agreement defined the Blissfield Wind Project as "the wind

project under development in Lenawee County, Michigan . . . with a nameplate capacity of 81 megawatts." While Deere and Exelon were negotiating the terms of the Purchase Agreement, resistance to the development of the Blissfield Wind Project began to surface in Riga Township, Lenawee County. On August 2, 2010, the Riga Planning Commission voted to recommend to the Riga Township Board a twelve-month moratorium on the development of wind farms.

On July 6, 2011, the Riga Township Board approved new zoning ordinances that, among other things, lowered sound limits and increased setbacks for new wind farms in the Township. On August 8, 2011, Exelon declared a *force majeure* event with respect to the development of the Blissfield Wind Project.

Having determined that the Blissfield Wind Project could not be developed in Lenawee County, Exelon sought to amend the Blissfield PPA in order to change the location from Lenawee County to a different county in Michigan. The Michigan Public Service Commission approved the proposed amendment to the Blissfield PPA, and stated: "To continue development of the project, the developer has planned a relocation of the project to either Ionia County or Gratiot County."

Exelon explored alternative sites for the development of a wind farm and ultimately acquired the development rights for Beebe Wind Farm, located in Gratiot County, Michigan. Exelon paid $10.3 million to purchase the project and acquire the rights to continue developing a wind farm at that site. Exelon

successfully developed a wind farm in Gratiot County, Michigan utilizing the amended Blissfield PPA. On December 28, 2012, pursuant to Section 3.2(d) of the Blissfield PPA, Exelon gave notice of its achievement of the "Commercial Operation Date." It is undisputed that the Commercial Operation Date, as defined by the Blissfield PPA, was achieved. However, the parties dispute the project for which this event was achieved.

The parties agree that the issues regarding the earn-out provision involve undisputed facts. Therefore, the Court will decide those issues as a matter of law. Exelon contends, however, that its counterclaim for recoupment involves questions of fact, thus precluding summary judgment. For example, Exelon argues that it is a disputed fact whether Deere reasonably believed that all material permits necessary for the development of the Blissfield Wind Project could be obtained in the ordinary course. Exelon contends that this dispute defeats Deere's summary judgment motion.

Deere argues that there are no genuine issues of material fact regarding Exelon's recoupment counterclaim. Deere contends that the plain language of the disclosure demonstrates that Deere did not represent to Exelon that it reasonably believed that all material permits could be obtained in the ordinary course. Further, Deere argues that the disclosure was reviewed and approved by Exelon. Accordingly, Deere argues, there are no genuine issues of material fact and

summary judgment should be denied against Exelon and granted in favor of Deere.

## STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[6] All facts are viewed in a light most favorable to the non-moving party.[7] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[8] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[9] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[10]

Where the parties have filed cross motions for summary judgment and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[11] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to

[6] Super. Ct. Civ. R. 56(c).
[7] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[8] Super. Ct. Civ. R. 56(c).
[9] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[10] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[11] Super. Ct. Civ. R. 56(h).

judgment as a matter of law.[12]

## ANALYSIS

### *Parties' Contentions*

Exelon claims that Deere did not achieve specified construction and development milestones under the Purchase Agreement for the Blissfield Wind Project. Exelon contends that the plain language of the Purchase Agreement defined the Blissfield Wind Project as "the wind project under development in Lenawee County, Michigan . . . with a nameplate capacity of 81 megawatts." Exelon argues that the Blissfield Wind Project was abandoned because it could not be completed in Lenawee County and that the Purchase Agreement did not permit relocation of the project. Therefore, Exelon argues, Deere did not meet the required milestones under the Purchase Agreement and is not entitled to the $14 million earn-out.

Alternatively, Exelon argues that if Deere is entitled to the earn-out, then Exelon is entitled to recoupment to reduce Deere's recovery by the amount of damages Exelon sustained as a result of Deere's breaches of the Purchase Agreement. Exelon alleges that Deere breached Section 4.11(c)(iv) of the Purchase Agreement by falsely representing that Deere reasonably believed that all

[12] *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *10 (Del. Super.).

material permits for the Blissfield Wind Project could be obtained in the ordinary course. Exelon also argues that Deere breached Section 6.3 of the Purchase Agreement by failing to provide adequate resources, and to otherwise take appropriate steps to continue development of the Blissfield Wind Project between the execution of the Purchase Agreement and the closing of the transaction.

Deere claims that it met the requisite milestones dictated by the Purchase Agreement and, therefore, is entitled to the $14 million earn-out associated with the Blissfield Wind Project. Deere argues that the Blissfield Wind Project was not required to be built and developed in a specific location. Rather, development decisions, including project location, were left to Exelon's sole discretion. Accordingly, Deere argues, the Blissfield Wind Project was properly relocated from Lenawee County to Gratiot County. Therefore, the Commercial Operation Date, as defined by the Blissfield PPA and incorporated by reference into the Purchase Agreement, was met.

Deere also contends that it is entitled to summary judgment on Exelon's counterclaim for recoupment because the Purchase Agreement requires Exelon to bear the post-closing costs for the development of the Blissfield Wind Project. Deere argues that it did not breach any representation or warranty in the Purchase Agreement that would support a claim for recoupment.

### *Entitlement to Earn-Out Under the Purchase Agreement*

Blissfield PPA Incorporated by Reference into the Purchase Agreement

In order to establish whether Deere is entitled to the $14 million earn-out, the Court must determine whether the Blissfield Wind Project was relocated or abandoned. If the project was abandoned and the wind project in Gratiot County is a new project, Exelon is not obligated to pay the earn-out. If the project was relocated, Deere is entitled to the earn-out. If Deere is entitled to the earn-out, Exelon asserts a recoupment claim.

The Court first looks to several definitions to understand the relationship between the Purchase Agreement and the Blissfield PPA, and the importance of the project's location. The Purchase Agreement defines the Blissfield Wind Project as "the wind project under development in Lenawee County, Michigan, by Blissfield Wind Energy, LLC, with a nameplate capacity of 81 megawatts." Section 2.6(a) of the Purchase Agreement provides that the $14 million earn-out was due to Deere when the Blissfield Wind Project achieved "Completion of Development and Commencement of Construction." Completion of Development and Commencement of Construction could be satisfied in either of two ways: (1) by reaching the five development milestones outlined in Sections 2.6(a)(i)–(v) of the Purchase Agreement; or (2) by achieving the Commercial Operation Date.

The term "Commercial Operation Date" in the Purchase Agreement refers to

and incorporates the definition of the same term in "the Michigan PPA related to such Michigan Wind Project." The Michigan PPA related to the Blissfield Wind Project is defined in the Purchase Agreement as "that certain Renewable Energy Purchase Agreement, dated as of June 21, 2010 (as amended, restated, modified, superseded or supplemented from time to time), between Consumers Energy Company and Blissfield Wind Energy, LLC." By the terms of the contract, each PPA is linked to a specific project. The PPA is defined by its date and the contracting parties—not the location of the project.

Section 2.6(b) of the Purchase Agreement provides that from the time of the closing and forward, Exelon must use commercially reasonable efforts to achieve the Commercial Operation Date. Section 2.6(b) states: "[T]he details and manner of such development efforts and the schedule therfor [sic] shall be within the sole discretion of Buyer [Exelon]."

Deere argues that after meeting resistance to the development of the Blissfield Wind Project in Lenawee County, in accordance with Section 2.6(b), Exelon exercised its discretion to relocate the project to Gratiot County. Deere claims that the Blissfield PPA was properly amended to allow this change of location so that the same PPA could be used in connection with the development of the Beebe Wind Farm in Gratiot County. Thus, Deere contends, the Blissfield Wind Project was relocated to Gratiot County and achieved the Commercial

Operation Date.

The Court finds that there is no provision in the Purchase Agreement or in the Blissfield PPA that either expressly prohibits or allows the relocation of the Blissfield Wind Project. At the time the Purchase Agreement was executed, the only reference to the project's location was in the Purchase Agreement's definition of the Blissfield Wind Project—"the wind project under development in Lenawee County, Michigan . . . ." As of that time, the reference to location was factually accurate—the Blissfield Wind Project was under development in Lenawee County.

The Blissfield PPA was amended and the location of the project was changed when development of the project was no longer feasible in Lenawee County. The Court finds unpersuasive Exelon's argument that the amendment of the PPA does not affect the Purchase Agreement. The Blissfield PPA is incorporated by reference into the Purchase Agreement. "Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties."[13]

Section 2.6(b) of the Purchase Agreement provides:

> From and after the closing, Buyer shall continue development of the three separate Michigan Wind Projects using all commercially reasonable efforts and Prudent Industry Practices . . . all intending to

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

> complete development and commence construction by the applicable Construction Start Milestone Date (*as defined in the applicable Michigan PPA*) and achieve commercial operation by the applicable Commercial Operation Milestone Date (*as defined in the applicable Michigan PPA*).[14]

The Blissfield PPA clearly is incorporated into Section 2.6. The Purchase Agreement cannot be given its full meaning without referring to the Blissfield PPA. Therefore, the amendment of the definition of term "Plant Site" in the Blissfield PPA to "Ionia County or Gratiot County, Michigan" reflects the ability of Exelon to change the project location. Following this amendment, Exelon proceeded with relocation and development of the project in Gratiot County.

Abandonment v. Relocation

Exelon argues that the Blissfield Wind Project was abandoned, not relocated. However, that position is contradicted by Exelon's actions and representations at the time it was seeking to amend the Blissfield PPA. On August 8, 2011, when development of the Blissfield Wind Project was no longer feasible in Lenawee County, Exelon declared a *force majeure* under the Purchase Agreement. Exelon's counsel advised Consumers that "[t]he Force Majeure event will continue unless and until these new regulations are repealed . . . or the Project is moved to an alternate location." In September 2011, Exelon stated that it "has identified a possible alternative site for the Project in a nearby county within

[14] Emphasis added.

Michigan and is currently assessing the feasibility of moving the Project to this location."

Exelon's contention that it abandoned the Blissfield Wind Project is further refuted by Exelon's efforts to buy out Great Lake Winds, LLC ("GLW") to avoid paying a development fee when the Blissfield Wind Project began development in Gratiot County. GLW was a co-developer of the Blissfield Wind Project in Lenawee County and was responsible for land acquisition and obtaining local support for the project. GLW was entitled to a $4 million development fee once the financing for the project was finalized and the project capital was obtained.

When Exelon was in the process of relocating the project to Gratiot County, Exelon management sought permission from Exelon's board to pay GLW up to $4 million to buy out GLW's ownership interest in the project. In their presentation to Exelon management, the Exelon project development team stated: "[L]egal review concluded that GLW will be due the development fee upon acquisition of . . . Beebe," that "GLW retains its right to invest in the project [in Gratiot County]," and that "eliminating [GLW's] option to invest has significant value by . . . retaining the entire investment for Exelon." If the project in Gratiot County were a new project, distinct from the Blissfield Wind Project, there would have been no value in buying out GLW's interest. GLW would not have been entitled to a $4 million development fee if the Blissfield Wind Project were abandoned. Exelon's

interest in buying out GLW evidences that the Blissfield Wind Project was relocated, not abandoned.

Exelon's internal accounting also suggests that the Blissfield Wind Project was relocated and not abandoned. In its valuation of the project in Gratiot County, Exelon included a "$14 million contingent payment to Deere." If the project were truly abandoned, no such payment would need to be accounted for as Deere would not be entitled to the earn-out.

In determining Deere's entitlement to the earn-out, it is proper for the Court to consider post-closing events and circumstances. These considerations inform the question of whether Exelon abandoned the project. Although Exelon contends that the Court may not consider post-closing evidence to make this determination, Delaware case law demonstrates that this contention is incorrect.

*Lazard Technology Partners, LLC v. Qinetiq North America Operations LLC*,[15] concerned an earn-out dispute arising from a merger.[16] The merger agreement provided for a $40 million payment upfront and entitled the seller to a $40 million earn-out if the company's revenue reached a certain level.[17] Therefore, in order to determine whether the seller was entitled to the earn-out, it was

[15] 114 A.3d 193 (Del. 2015).
[16] *Id*. at 193.
[17] *Id*.

necessary for the Court to examine the post-closing conduct of the parties.[18]

In the present case, the Purchase Agreement itself contemplates that post-closing events will determine whether the project was abandoned or relocated and whether it achieved the requisite milestones, thus entitling Deere to the earn-out. The Court properly may consider post-closing events as they relate to abandonment. In this context, the enumerated post-closing events are not the type of extrinsic evidence that may be considered only upon finding of contractual ambiguity. The Purchase Agreement is unambiguous in its terms relevant to this case. In order to resolve the parties' rights and obligations under the Purchase Agreement, the Court need not consider communications prior to the closing of the Purchase Agreement or any non-contractual discussions with third parties.

* * * *

The Purchase Agreement must be interpreted considering all provisions and documents that are incorporated by reference. The Blissfield Wind Project that originally was contemplated to be developed in Lenawee County is the same project that eventually was developed in Gratiot County. The Blissfield PPA was amended and the project was relocated. The project was not abandoned. The Commercial Operation Date under the amended Blissfield PPA was met. Therefore, Deere is entitled to the $14 million earn-out.

[18] *Id*. at 196.

***Entitlement to Recoupment***

Exelon contends that if the Court finds that Deere is entitled to the $14 million earn-out provision, then recoupment permits Exelon to reduce Deere's recovery by the amount of damages Exelon sustained as a result of Deere's breaches of the Purchase Agreement. Exelon argues that Deere committed two breaches of the Purchase Agreement. Exelon claims that Deere breached Section 4.11(c)(iv) "[b]y falsely representing that it reasonably believed that all material permits for the Blissfield Wind Project could be obtained in the ordinary course." Exelon also argues that Deere breached Section 6.3 of the Purchase Agreement by "failing to provide adequate resources and otherwise take appropriate steps to continue development of the Blissfield Wind Project" between the execution of the Purchase Agreement and the closing of the transaction.

Deere contends that summary judgment is appropriate because neither Deere nor Exelon has any damages under the Purchase Agreement, and damages are required to pursue a recoupment claim. Deere argues that the Purchase Agreement provides for an earn-out—not damages—that is not subject to an offset of costs. Section 2.6(b) states that Exelon was required to develop the Blissfield Wind Project using commercially reasonable efforts and that the manner of such development was within the sole discretion of Exelon. Accordingly, the amounts Exelon expended to develop the Blissfield Wind Project are classified as costs, not

damages. Deere contends that the Purchase Agreement does not permit Exelon to re-assign costs that it incurred in development. Deere argues that Exelon's theory of damages is contradicted by the plain terms of Section 2.6(b), which expressly place the costs of development on Exelon. Deere also argues that Exelon's recoupment claim must be rejected because Exelon has failed to show a material breach of Sections 4.11(c)(iv) and 6.3 of the Purchase Agreement.

"Recoupment is a common-law, equitable doctrine that permits a defendant to assert a defensive claim aimed at reducing the amount of damages recoverable by a Plaintiff."[19] In order to prevail on a claim for recoupment, a defendant must show "that the recoupment claim arises out of the same transaction or occurrence as the plaintiff's suit [and] the claim is purely a defensive set-off and does not seek an affirmative recovery from the plaintiff."[20] Additionally, "[b]oth the primary damages claim and the claim in recoupment must involve the same litigants."[21] "Such a defense is proper if it goes to the reduction of the plaintiff's damages for the reason that the plaintiff has not complied with the cross obligations arising under the same contract."[22] In order for Exelon to succeed on its recoupment claim, it must show that Deere breached the Purchase Agreement.

[19] *TIFD III–X LLC v. Fruehauf Prod. Co., L.L.C.*, 883 A.2d 854, 859 (Del. Ch. 2004).
[20] *Id*.
[21] *Id*.
[22] *Shuman v. Santora*, 1991 WL 18101, at *2 (Del. Super.).

Section 4.11(c)(iv)

Exelon alleges that Deere breached Section 4.11(c)(iv) of the Purchase Agreement "[b]y falsely representing that it reasonably believed that all material permits for the Blissfield Wind Project could be obtained in the ordinary course." Section 4.11(c)(iv) contains a representation by Deere that it is "continuing to obtain the permits necessary to develop, construct, own, maintain, use and operate the Michigan Wind Projects." However, this representation is limited, and Section 4.11(c)(iv) goes on to state:

> As of the date hereof [August 30, 2010], *except as set forth in Section 4.11(c)(iv) of the Seller Disclosure Schedule*, Seller reasonably believes that all material Permits necessary for the development, construction, ownership, maintenance, use and/or operation of the Michigan Wind Projects (including material Permits with respect to applicable zoning and land use laws) can be obtained in the ordinary course. Buyer acknowledges that not all such Permits required for the Michigan Wind Projects are known as of the date of this Agreement.[23]

In the Seller Disclosure Schedule, Deere informed Exelon of the exception noted in Section 4.11(c)(iv) of the Purchase Agreement:

> The Riga Township Planning Commission voted on August 2, 2010 to recommend to the Riga Township Board a 12-month moratorium on wind energy projects, which is scheduled to be considered by the Riga Township Board at its Spetember 13, 2010 meeting. The moratorium, as currently proposed, would automatically expire upon approval of a wind energy zoning ordinance.
>
> If 15% of the registered voters in a Michigan Township sign a petition

[23] Emphasis added.

> requesting a referendum within 30 days after a zoning ordinance is enacted in such Township, the zoning ordinance would become subject to a referendum vote at the next scheduled election. Based on the level of resistance to the Blissfield Project in Riga Township there is a possibility that a zoning ordinance permitting the project would be put to a referendum.

Exelon is correct in asserting that to the extent a party warrants a fact or circumstance to be true in the parties' agreement, the other party is entitled to rely upon the accuracy of the representation. However, Exelon has failed to present any evidence demonstrating that the Seller's Disclosure was inaccurate or misleading.

Exelon challenges the sufficiency of the disclosure and argues that whether Deere actually believed that "all material permits [could] be obtained in the ordinary course" is a question of fact that precludes the entry of summary judgment. The undisputed facts demonstrate that the disclosure sets forth the resistance in Riga Township as of the time that the Purchase Agreement was drafted and executed. "[T]he Court must interpret a contract in a manner that satisfies the 'reasonable expectations of the parties at the time they entered into the contract.'"[24] Section 4.11(c)(iv) of the Purchase Agreement clearly carved out an exception to the representations made regarding Deere's ability to obtain permits for the Michigan Wind Projects. Deere's disclosure to Exelon disclosed the

[24] *Dittrick v. Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007) (*quoting The Liquor Exch., Inc. v. Tsaganos*, 2004 WL 2694912, at *12 (Del. Ch.)).

existence of resistance in Lenawee County, the level of that resistance, and the possible negative outcomes that could affect the development of the Blissfield Wind Project.

Section 2.6(b) of the Purchase Agreement provides that after closing, Exelon was solely responsible for the development and associated costs of the Michigan Wind Projects. Exelon was informed about the increasing resistance in Riga Township and chose to continue with the project. Exelon exercised its discretion to expend funds to relocate the Blissfield Wind Project when development in Lenawee County was no longer possible. Exelon cannot now attempt to rewrite the contract to redistribute the risk.[25] Exelon's claimed damages are discretionary development costs, for which Exelon assumed the risk by executing the Purchase Agreement.

The Court finds that Deere did not breach Section 4.11(c)(iv) of the Purchase Agreement. Deere adequately disclosed the issues surrounding obtaining the permits necessary for the development of the Blissfield Wind Project. Exelon was on notice of the potential for community resistance. Exelon's claimed damages are discretionary development costs, not subject to recoupment.

[25] *See Delmarva Power & Light Co. v. ABB Power T & D Co.*, 2002 WL 840564, at *7 (Del. Super.) ("Delmarva could have easily remedied the deficiency, which they now are claiming, by explicitly excluding ABB's own negligence from the limitation provision. This was not done because it was clear under the terms of the contract that the ABB intended and Delmarva agreed, to limit ABB's exposure to the remedies set forth in the contract. Having made this judgment, which clearly in hindsight has proven unwise, Delmarva may not now attempt to rewrite the contract to again redistribute the risk previously negotiated.").

Section 6.3

Section 6.3 of the Purchase Agreement provides that from August 30, 2010 to December 9, 2010—the time between the execution of the Purchase Agreement and the closing—Deere would cause its wind energy company, John Deere Renewables, LLC ("JDR"), to conduct its "business and operations in the ordinary course of business consistent with past practice and consistent with Prudent Industry Practices . . . ." In order for Section 6.3 to be breached, the complained-of conduct must have occurred in the defined interim period. Exelon contends that Deere breached Section 6.3 of the Purchase Agreement by "failing to provide adequate resources and otherwise take appropriate steps to continue development of the Blissfield Wind Project" between the execution of the Purchase Agreement and the closing of the transaction.

Exelon alleges that Deere failed to retain land agents and local land use lawyers, and generally to make the expenditures necessary to develop the Blissfield Wind Project. Exelon also argues that Deere failed to engage in meaningful outreach activities in the first half of 2010, prior to the sale of its wind business to Exelon. These allegations relate primarily to Deere's conduct prior to signing the Purchase Agreement, and thus fall outside of the interim period covered by Section 6.3.

Exelon further contends that "Deere never treated Blissfield in the manner it

did other winds farms, and by the time of the Interim Period, whatever steps Exelon could encourage Deere to take were 'too little too late.'"[26] Exelon has failed to present any evidence or legal precedent supporting its contention that Deere had a contractual duty to conduct community outreach for the Blissfield Wind Project. Exelon has not alleged sufficient facts to establish a *prima facie* case that Deere failed to conduct its business and operations in the ordinary course of business consistent with past practice and consistent with Prudent Industry Practices.

Further, Exelon has failed to demonstrate that Deere's alleged conduct in breach of the Purchase Agreement occurred in the interim time period—August 30, 2010 to December 9, 2010—prescribed by Section 6.3. Therefore, the Court finds as a matter of law that Deere did not breach Section 6.3 of the Purchase Agreement. Exelon is not entitled to recoupment damages.

## CONCLUSION

The Purchase Agreement and incorporated amended Blissfield PPA, when considered together, permitted Exelon to relocate the Blissfield Wind Project to Gratiot County when development was no longer possible in Lenawee County. Exelon's actions and representations, at the time it was seeking to amend the

[26] Answering Brief of Defendant-Counterclaim Plaintiff Exelon Generation Acquisitions, LLC in Opposition to Plaintiff-Counterclaim Defendant Deere & Company's Motion for Summary Judgment, p. 43 (Trans. ID 58669865).

Blissfield PPA, evidence Exelon's intent to relocate the Blissfield Wind Project to Gratiot County, rather than to abandon the project. The Blissfield Wind Project was successfully developed in Gratiot County, and the Commercial Operation Date under the amended Blissfield PPA was met. Therefore, the Court finds that Deere is entitled to the $14 million earn-out.

Deere did not breach the Purchase Agreement. In accordance with Section 4.11(c)(iv) of the Purchase Agreement, Deere made adequate disclosures to place Exelon on notice of the resistance to the Blissfield Wind Project in Riga Township. Further, Exelon has failed to establish a *prima facie* case that during the interim period, Deere did not conduct its business and operations in the ordinary course of business. Thus, the Court finds that Deere did not breach Section 6.3 of the Purchase Agreement. Exelon's expenditures for relocating the project to Gratiot County are discretionary development costs. Exelon is not entitled to recoupment damages.

**THEREFORE**, Plaintiff Deere & Company's Motion for Summary Judgment is hereby **GRANTED**. Defendant Exelon Generation Acquisitions, LLC's Motion for Summary Judgment is hereby **DENIED**. Deere & Company's Motion to Dismiss Defendant's Counterclaim is hereby **GRANTED**.

**IT IS SO ORDERED.**

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