SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** IAS MOTION 54EFM

Justice

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INDECK ENERGY SERVICES, INC.,

Plaintiff,

- v -

MERCED CAPITAL, L.P., MERCED PARTNERS III, L.P., MERCED HALYARD VENTURES, LLC, CARSON BAY ENERGY HOLDINGS IV, LLC,

Defendants.

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INDEX NO. 652171/2014

POST-TRIAL DECISION

Confidentially agreements are ubiquitous in the business world, greasing the wheels of complex investments where parties are wary of a potential competitor stealing their know-how and doing the deal itself. The failure to enforce such agreements would stifle investment and foreclose potential fruitful partnerships.

This case presents a brazen example of a party flouting a confidentiality agreement and stealing a lucrative investment opportunity. In 2013, the parties entered into a confidentiality agreement to facilitate their negotiations over defendants' potential investment in plaintiff's energy project. That agreement expressly prohibited defendants from using plaintiff's confidential information to independently pursue a similar energy project and prohibited defendants from hiring plaintiff's employees. They did both.

Defendants' motives and actions here, at least at the outset, were understandable, albeit certainly wrongful. Yet, what transpired in the years that followed, and particularly during the latter stages of this litigation, is staggering. It is a tale of highly competent

OTHER ORDER – NON-MOTION

industry players seeking to game the legal system, thinking they could either get away with their breaches or be held liable in an amount far less than what they really gained from their illicit actions. While the market was hot, they delayed developing and marketing the investment, thinking they could fool plaintiff and the court into thinking it was really worthless and that there was no demand. They fooled no one. Making matters worse, the market significantly deteriorated while they were stalling, leading to the value of the opportunity they stole materially depreciating.

New York law computes lost profits as of the date of the breach without regard to the benefit of hindsight about how the market in fact behaved. Defendants' litigation strategy was thus destined to fail.

At the time of breach, the market was hot. But for defendants' dilatory and evasive actions, they probably would have made a lot of money. It follows that plaintiff, a firm with more preexisting expertise in this area, would have made at least as much money. Plaintiff will recover the substantial value of the investment at the time of breach, leaving defendants with a double dose of regret. Because of their conduct and by virtue of their own choices, they will pay a hefty judgment and will have lost out on the opportunity to maximize the value of the investment for themselves.[1]

[1] Defendants and their representatives, charitably put, attempted to mislead the court on multiple occasions. The court will address some of those instances mostly for context. Serious discovery abuses were also revealed during trial (many of which were similar to those that resulted in sanctions in the related Illinois litigation). The withheld evidence corroborates the otherwise significant quantum of proof of defendants' efforts to hide the truth about their marketing efforts. Defendants' conduct was likely sanctionable as well, and though sanctions will not be imposed at this time, the misconduct will certainly be taken into account if defendants continue to violate court orders.

Background & Procedural History

Plaintiff Indeck Energy Services, Inc. (Indeck) owns and operates power plants. In 2012, Indeck began developing natural gas peaker power plants in an area known as the Electric Reliability Council of Texas (ERCOT). Peaker power plants only run when demand for electricity is particularly high such that the market's usual sources of power are insufficient to meet demand, for instance, during the summer in Texas. By meeting energy demand during periods of scarcity, peaker plants are able to charge particularly high rates. Because demand for peak energy and the market price for such energy vary significantly, business is volatile. Coupled with the fact that the plants may earn no money outside of peak demand, it is easy to see why a peaker plant can be a lucrative but risky venture.

In 2012 and 2013, the peaker-power-plant market was attractive. To succeed, a firm needed significant expertise in both engineering and the ERCOT regulatory environment. Indeck had both. It had a team of four employees who worked on these projects, the two most critical ones being Karl Dahlstrom and Chris DePodesta. After paying $71,000 to evaluate peaker plant sites near Houston, Texas, Indeck's team identified a site in Wharton County.

Indeck then contemplated working with another firm on this project. At a minimum, Indeck needed to purchase a turbine, which could cost tens of millions of dollars and was essential to operations. A subsidiary of defendant Merced Capital L.P. (collectively with the other defendants, Merced), Carson Bay Energy Holdings IV, LLC (Carson Bay), owned two such turbines. Indeck and Merced were interested in a possible sale of Carson Bay's

turbines to Indcek and possibly an investment by one of Merced's funds, Merced Partners III, L.P., in the plant. Indeck, of course, was concerned about revealing the details of its plans and, most significantly, of losing its "first mover" advantage. After all, there is only so much demand for peak energy in a given market, and the first to market will capitalize on the opportunity and make it harder to induce investments in subsequent plants. Thus, as a condition of their negotiations, Indeck insisted that Merced sign a confidentiality agreement.

On March 5, 2013, Indeck and Carson Bay executed a Mutual Confidentiality Agreement (Dkt. 475 [the MCA]). Paragraph 2 of the MCA prohibited use of Indeck's confidential information to develop similar projects (*see id.* at 3). Paragraph 5 prohibited engaging or hiring Indeck's employees for two years (*see id.* at 4). Though Carson Bay is the only defendant signatory to the MCA, the parties agreed that its affiliates, the other defendants, were bound by the MCA (*see id.* at 3).

Dahlstrom and DePodesta then conducted negotiations on behalf of Indeck with Merced. While doing so, they were unhappy with their role at Indeck and secretly devised a plan to quit and form their own company, non-party Halyard Energy Ventures LLC (HEV), with which they would develop the project with Merced instead of on behalf of Indeck. Merced knew about their plans and welcomed them. After reaching an agreement on terms with Merced, DePodesta and Dahlstrom respectively resigned from Indeck on November 1 and November 4, 2013. Both lied about their future intentions. They formed HEV on November 6, 2013. Merced and HEV formed an LLC, Merced Halyard Ventures, LLC (MHV), to develop their project. The very same day, on November 6, the parties

executed an agreement providing that HEV would manage MHV. In other words, Merced hired Dahlstrom and DePodesta to run the very project that they had been negotiating with Indeck. And they did so using Indeck's confidential information. Indeck found out and commenced litigation. Complying with a contractual forum selection clause, Indeck sued Dahlstrom and DePodesta in an Illinois state court (the Illinois Action).

On July 15, 2014, in conformity with the MCA's New York forum selection clause, Indeck commenced this action against Merced, asserting breach of the MCA and related tort and quasi-contract claims. Discovery, which was coordinated with the Illinois Action, was completed in 2016. In February 2018, Indeck was awarded summary judgment on liability on its claim for breach of the MCA and its non-contractual claims were dismissed (Dkt. 327 [the SJ Decision]).[2]

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[2] Because liability has been established there is no need to rehash those relevant facts here. The SJ Decision specifically addresses the contractual provisions at issue (*see id.* at 2-4), their meaning (*see id.* at 7-9), why there is no question of fact that Merced breached the MCA (*see id.* at 9-11), why Indeck could not recover additional damages on its other causes of action (*see id.* at 12), and why Indeck's damages may include its lost profits (*see id.* at 12 n 10). There was significant motion practice after summary judgment, including Merced's motion challenging the court's ruling that Indeck can recover its lost profits. That motion was denied by order dated November 20, 2018 (Dkt. 372; *see* Dkt. 375 [11/20/18 Tr.]). Additional rulings were made during the May 1, 2019 pre-trial conference (*see* Dkt. 457). Familiarity with these rulings is assumed. During the course of summary judgment and subsequent motion practice, Merced consistently claimed that the project had no value and that there was no investor interest in it. This was false. As discussed, there is no question that Merced was, with the exception of a standstill due to this litigation, and including after trial, actively pitching the project to investors. The primary reason there has yet to be investment in the project is that Merced decided that it did not want investment to occur until after this litigation concluded, thereby attempting to give the impression that no one was really interested. Merced is curating the demand to minimize a lost profits awards, hoping to profit after the case. After all, what is the point of making money on the deal during the case if such money would be disgorged? The incentives here are obvious. To facilitate its deception, and in violation of multiple court orders, Merced withheld communications with investors evidencing their negotiations. While such actions could warrant sanctions, it suffices for now that they merely reinforce the court's conclusions about the actual value of the project.

A four-day bench trial on damages was conducted between May 13 and May 16, 2019 (*see* Dkts. 467-470 [Tr.]). The parties' post-trial briefing was fully submitted on September 20, 2019. Based on the evidence, Indeck is entitled to recover damages from Merced in the amount of $15,794,000 plus pre-judgment interest from July 15, 2014.

Findings of Fact & Conclusions of Law

Legal Standard

Damages for breach of contract "are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed" (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992]). Because Merced promised not to use Indeck's confidential information or hire its employees to develop a competing project, "the proper measure of damages is the net profit of which (Indeck) was deprived by reason of (Merced's) improper competition" (*Pencom Sys., Inc. v Shapiro*, 193 AD2d 561 [1st Dept 1993]; *see Earth Alterations, LLC v Farrell*, 21 AD3d 873, 874 [2d Dept 2005]). These "damages must correspond to the amount which (Indeck) would have made except for (Merced's) wrong" and "not the profits or revenues actually received or earned by (Merced)" (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018]).

Where, as here, the lost profits turn on the valuation of a business or investment opportunity, the valuation must be determined as of the date of the breach (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 11 [1st Dept 2008], citing *Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971]; *see Cole v Macklowe*, 64 AD3d 480 [1st Dept 2009] ["since the breach involved the deprivation of an item with a determinable market value, the market

value at the time of the breach is the measure of damages"]; *see also LG Capital Funding, LLC v CardioGenics Holdings, Inc.*, 787 Fed Appx 2, 3 [2d Cir 2019], citing *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 196 [2d Cir 2003] ["We have consistently stated that New York's rule for measuring contract damages by the value of the item at the time of the breach is eminently sensible and actually takes expected lost future profits into account. We have also noted that **New York courts have rejected awards based on what the actual economic conditions and performance were in light of hindsight**"] [emphasis added]). And where, "as here, that value cannot be readily discerned at the time of breach, the factfinder may determine 'hypothetical market value' based on expert testimony" (*Credit Suisse First Bos. v Utrecht-Am. Fin. Co.*, 84 AD3d 579, 580 [1st Dept 2011]). The value as of some later date, such as the date of trial, is irrelevant (*Kaminsky*, 59 AD3d at 12 ["evidence of the subsequent market value of the shares was simply not germane"]; *see CF HY LLC v Hudson Yards LLC*, 2013 WL 12185838, at *1 [Sup Ct, NY County Dec. 4, 2013] [determining property value as of date of sale], *motion to vacate denied*, 2014 WL 201471 ["The basis for Singer's motion is the recent sale of a nearby property. This recent sale is irrelevant. … a sale in 2013 or 2014 has no bearing on assessing the fair market value of a property in 2011, when the state of the market was very different"], *affd* 124 AD3d 490 [1st Dept 2015]). Markets move both up and down. A plaintiff is not entitled to a windfall if the market increased; likewise, a defendant is not entitled to effectively mitigate its damages by relying on a market downturn (*see Simon*, 28 NY2d at 146). Value must be determined as of the date of breach. Moreover, as in all breach of contract actions, 9% pre-judgment interest is mandatory and accrues from the

date of breach (CPLR 5001[a]-[b], 5004; *see NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]).

Summary of Conclusions

The court must determine the damages Indeck incurred as a result of Merced's breaches. Indeck claims that it should recover five categories of damages: (1) the profits it would have earned on its peaker energy project based on the value of Merced's project, Halyard Wharton (the Wharton Project); (2) an equal amount of lost profits on another project, Halyard Henderson (the Henderson Project); (3) management fees earned by Dahlstrom and DePodesta; (4) out-of-pocket expenses to hire new employees and retain the rest of the team after Dahlstrom and DePodesta left; and (5) attorneys' fees. Indeck is only entitled to recover damages in the first and fifth categories.[3]

Lost profits on the Wharton Project were clearly within the contemplation of the parties. Dahlstrom and DePodesta going to work for Merced and losing the value of the

[3] Paragraph 8 of the MCA provides that the prevailing party in this action shall recover its reasonable attorneys' fees and costs (Dkt. 475 at 5). The parties stipulated that the amount of recoverable fees and costs would be determined after the court decided who is the prevailing party (Dkt. 460). Indeck is the prevailing party. Indeck shall file a motion seeking its reasonable attorneys' fees and costs incurred in this action, which shall be supported with all of the legal bills and billing records and affirmations of counsel setting forth why the amounts sought are reasonable. For the avoidance of doubt, that the court dismissed most of the causes of action as duplicative on summary judgment does not mean that Indeck should only recover a fraction of its fees. That will not happen. The court's focus, of course, will be on the reasonableness of the fees sought based on the fact that this case was always really about the MCA (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]). Some of the legal fees will likely relate to discovery in the Illinois Action since discovery was coordinated. The court expects the parties' approach to this issue to be reasonable, and not based on an extreme view that all or none of those fees are recoverable. The parties are encouraged to meet and confer to attempt to resolve the fee application, which may be significant given that five years of litigation has resulted in a judgment, inclusive of interest, that will exceed $20 million.

peaker energy plant that Indeck would have developed were exactly the harms that the MCA was meant to prevent. The Wharton Project was similar enough to Indeck's proposed project such that its value is a reliable proxy for the value Indeck would have realized had the opportunity not been seized by Merced. Such value must be determined as of no later than March 5, 2015, when the MCA's restrictions expired. Post-2015 **evidence** is of minimal import, as analysis turns on the state of the market at the time of the breach between 2013 and 2015. Consequently, a substantial portion of the evidence Merced relies on in urging for a lower valuation based on recent downturns in the peak energy market is entirely inapposite. Hindsight is irrelevant. Likewise, any waning investor interest due to recent market conditions (assuming, of course, that such interest is based on an actual market downturn and not on Merced's strategic decision to delay the project to feign its worthlessness) is of no moment.[4]

For the appropriate time period, the parties largely agree on the state of the market, the relevant variables that should be considered, and that a discounted cash flow (DCF) analysis is a reliable method of determining value. Indeck's expert's DCF analysis is based on Merced's internal documents and projections made in the ordinary course of business (as opposed to those used to pitch investors), which are inputs of the highest caliber. The main points of contention are the soundness of the assumptions upon which the DCF model is based.

[4] This obviates the need to resolve countless disputed facts about what has been happening with the project since 2015.

Assessment of the evidence and an evaluation of witnesses' credibility at trial compels the conclusion that Indeck's expert's model's assumptions are sound and its conclusions persuasive. Merced's contention that a DCF model is inherently speculative in this context is rejected because such a model is regularly relied on by market participants in the ordinary course of business when investing in peaker energy plants. If the projections are a good enough basis for sophisticated parties to invest significant amounts of real money, they are good enough for assessment of damages too. Indeck's DCF model is thus a reliable indicator of the Wharton Project's value.

Indeck, however, cannot recover the value of the Henderson Project, regardless of how similar it would have been, because Indeck did not convince the court that Merced's breaches resulted in the loss of multiple projects. It is entirely unclear if the market could have sustained multiple new peaker energy projects. After all, if that were so, Indeck's "first mover" argument would make little sense. Indeed, if two projects were viable, Indeck could have successfully developed another project alongside the Wharton Project.

Moreover, Indeck is not entitled to any out-of-pocket damages because doing so would provide duplicative recovery. If Dahlstrom and DePodesta did not leave and had Indeck developed the project itself, Indeck would have had to pay their salaries instead of paying retention bonuses to other employees. It is speculative how much more Dahlstrom and DePodesta would have garnered as the project progressed relative to how much Indeck paid to retain and hire others, and presumably, Dahlstrom and DePodesta would have been handsomely rewarded had the projected succeeded – a necessary supposition given that the damages award is based on the assumption that Indeck would have earned a significant

profit on the project. Indeck does not account for these costs. Declining to award Indeck its out-of-pocket expenses makes the lost-profits awards more reflective of the true net amount that Indeck lost.

Finally, in awarding Indeck the benefit of its bargain, there is no basis to require disgorgement of management fees that Merced paid Dahlstrom and DePodesta. Disgorgement is not a proper breach-of-contract remedy here. While there might otherwise be a basis to award such amounts under the causes of action that were previously dismissed as duplicative, as with the out-of-pocket costs, awarding both the lost value of project plus these amounts would impermissibly award a double recovery.[5]

Defendants deprived Indeck of the ability to earn a profit on its contemplated project. A lost-profits award based on the value of the Wharton Project gives Indeck the benefit of the bargain that defendants denied it.

Causation

Before turning to valuation, it is first necessary to address whether Indeck's lost profits were caused by Merced (*see* SJ Decision at 11-12 n 9). Based on the evidence, they were. There is no question that Merced used Dahlstrom and DePodesta's expertise and the confidential information that they misappropriated from Indeck to gain a first mover advantage over Indeck in developing their energy project (*see id.* at 5-6, 10-11). The evidence at trial corroborated this fact (*see* Dkt. 470 [Tr. at 555-57] [Vroege admitting

[5] Revisiting the court's duplication holding, contrary to Indeck's contention, is unwarranted, because even if those claims proceeded to trial the court would not have awarded any additional damages.

Merced "got the idea" to develop the plant from Dahlstrom and DePodesta"]). Indeck's lost profits on the project it lost to Merced were caused by Merced's breach because they are "directly traceable to the breach" and "not remote or the result of other intervening causes" (*Kenford Co. v Erie County*, 67 NY2d 257, 261 [1986]). The whole point of the MCA was to prevent Merced from stealing Indeck's employees and confidential information so that Indeck would not lose the ability to be the first mover on its project. Parties entering into these sorts of confidentiality agreements do so for the express purpose of protecting their investment. The trial testimony explaining that this is true in the ERCOT market was persuasive.

For these reasons, Indeck's lost profits were "fairly within the contemplation of the parties to the contract at the time it was made" (*id.*), directly flowed from the breach, and are "the direct and immediate fruits of the contract" (*Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 806 [2014]; *accord Age Group, Ltd. v Martha Stewart Living Omnimedia, Inc.*, 160 AD3d 498 [1st Dept 2018]; *see RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 469 [1st Dept 2015] [lost profits may be recovered where "plaintiff plausibly alleges that ARC's breach of the confidentiality agreement caused plaintiff to lose its deal with WWP"]). Indeck, thus, has proven causation.

Moreover, for the fifth time, the court finds that Indeck's lost profits are not speculative (Dkt. 673 at 5 [recounting four prior rulings]). It is well settled that proof of damages "does not require absolute certainty" damages "resulting from the loss of future profits are often an approximation," and the "law does not require that they be determined with mathematical precision" (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 403 [1993]).

Rather, the law "requires only that damages be capable of measurement based upon known reliable factors without undue speculation" (*id.*; *see Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 88-89 [1st Dept 2012] [A "degree of uncertainty is to be expected in assessing lost profits. When the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied recovery of substantial damages, although, of course, the plaintiff must show a stable foundation for a reasonable estimate of damages. An estimate of lost profits incurred through a breach of contract necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection. It is always the breaching party . . . who must shoulder the burden of the uncertainty regarding the amount of damages"]). Courts have consistently found DCF models based on reliable inputs and assumptions, such as the ones here, to be a reliable approximation of a party's lost profits.

Indeck's DCF Valuation

Having found that Indeck's damages are limited to lost profits on its project and that such profits are best calculated based on the value of the Wharton Project, the court turns to the parties' disputes over Indeck's valuation of the Wharton Project.

Indeck retained Mark Kubow to prepare a DCF analysis of the Wharton Project. His expert report, dated October 16, 2015, was stipulated into evidence (Dkt. 476 [the Kubow Report]).[6] He also testified at trial (*see* Dkt. 467 [Tr. at 62]). The court finds

[6] Kubow's rebuttal report, dated February 5, 2016, is also in evidence (Dkt. 478 [the Kubow Rebuttal Report]). It contains slight revisions to his assumptions about interest rates and funding structures. The court's analysis is focused on Kubow's original 2015 report and his 2016 rebuttal

Kubow to be highly qualified to opine on the value of a peaker energy plant in the ERCOT market based on his extensive professional experience in that market, which continues to this day. He clearly knows that market and understands valuation.

Kubow's report is comprehensive and well-reasoned. Courts routinely use DCF models in valuation proceedings (*Verition Partners Master Fund Ltd. v Aruba Networks, Inc.*, 210 A3d 128, 136 [Del 2019]; *see Lippe v Bairnco Corp.*, 288 BR 678, 689 [SDNY 2003] ["Many authorities recognize that the most reliable method for determining the value of a business is the (DCF) method], *affd* 99 F Appx 274 [2d Cir 2004]).[7] As there is no public data on contemporaneous sales of similar projects, the most appropriate method of ascertaining the project's value is with a DCF analysis (*see Dell, Inc. v Magnetar Global Event Driven Master Fund Ltd.*, 177 A3d 1, 35 [Del 2017] ["a DCF analysis can provide the court with a helpful data point about the price a sale process would have produced had there been a robust sale process involving willing buyers with thorough information and the time to make a bid"]). It is undisputed that actual industry participants rely on DCF analyses in the ordinary course of business to value similar energy projects prior to

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report. To be sure, Kubow also submitted supplemental reports based on updated information about the ERCOT market and the status of the project. Indeck maintains that post-2015 events are irrelevant and only addressed them to rebut Merced's argument in case the court found to the contrary.

[7] *See In re PetSmart, Inc.*, 2017 WL 2303599, at *32 [Del Ch May 26, 2017] ["A proper DCF analysis follows a well-defined sequence: First, one estimates the values of future cash flows for a discrete period, based, where possible, on contemporaneous management projections. Then, the value of the entity attributable to cash flows expected after the end of the discrete period must be estimated to produce a so-called terminal value, preferably [by] using a perpetual growth model. Finally, the value of the cash flows for the discrete period and the terminal value must be discounted back using the capital asset pricing model or 'CAPM'"]).

investing (Dkt. 467 [Tr. at 84] [Q: "Why was it that you chose the (DCF) model to value this project?"; A: "It's pretty much the industry go-to for valuing projects. Pretty much everything I do in my business, and have always done in the industry, utilizes a (DCF) model"]). Kubow testified that he does DCF analysis "pretty much every day" in connection with "every" one of his acquisitions (*id.*). He testified that pretty "much everything we do in my business revolves around a (DCF) model" and that he uses DCF model when his own "money is at stake" (*id.* at 85). Specifically, Kubow has employed DCF analysis in connection with more than $800 million of investments (*id.*). The court finds, based on Kubow's credible testimony and the wealth of caselaw, that a DCF model is the most appropriate method of valuing the Wharton Project.

In constructing his model, Kubow explained:

> Because of the long-term nature of the assets (typically thirty years or more), power asset valuation models often utilize specific cash flows for the initial years of a project and then multiples of EBITDA to determine the terminal or exit value in the valuation. In the industry, it is also very common for assets to be bought and sold at different times in their life cycle. Often the entity developing a power plant is not a long-term owner of the power plant, but rather takes it through the development process and through its early operational period and then sells it. Similarly, there are entities that prefer the lower risk of assets that operate under a (purchase power agreement [PPA])[8] rather than investing in assets that are exposed to the fluctuations of

[8] A PPA is an agreement between a power provider and a purchaser of electricity (such as a utility) to provide energy at a given volume and/or price, thereby guaranteeing revenue for the power provider (*see* Dkt. 469 [Tr. at 401-02]). At trial, Merced tried to disclaim the reliability of the model due to its assumption of a PPA. But as Indeck explains:

> Lednicky criticized the assumption that Defendants could have received a PPA contract to sell electricity. Tr. 624:15-22. However, Dahlstrom and DePodesta made that assumption in the regular course of their business by drawing on their expertise in the industry with the assistance of consulting firms, and Kubow – who Lednicky agreed was "perhaps" much more knowledgeable in the industry than he

> the commodity markets. In this case, I am combining the valuation approaches to include a DCF model to value the opportunity by assuming the sale of the asset after development and two years of operation at a typical industry multiple of EBITDA for power plants with a PPA.
> …
>
> The defendants would be considered developers and, as such, would typically seek to extract value from their ability to choose an attractive market for a power plant, find an optimal physical site to locate the power plant, choose the appropriate technology for the power plant, secure optimal financing for both debt and equity for the power plant, choose the entity to construct the power plant, secure a power purchase agreement for the power plant, and build an operating team to start-up and run the facility. As a developer, and consistent with the assumptions from its own model, Merced Halyard would plan to spend their own capital to perform the development activities and then rely on outside third-party capital or a Limited Partner ("LP") to fund the construction and early operations of the project. There are many structures deployed in the industry to accomplish this type of split and to structure the economics of the various parties. The Merced Halyard model contemplates a structure in which the LP invests 100% of the equity capital to complete the construction of the power plant after financial close and receives 80% of the cash flow from the project until such time as the LP has received a full return of its capital along with a 10% after-tax return on the LP's invested capital. Once that has occurred the cash flows from the project change and from that time forward the LP receives 10% of the cash flow from the project and Merced Halyard as the General Partner ("GP") would receive 90% of the cash flow from the project.
>
> It is my opinion that this is a reasonable structure to assume for a developer seeking to partner with a capital provider to purchase a power plant. Accordingly, this structure has been used as the basis for the valuation of the Merced Halyard project and by extension the damages to (Indeck) (Kubow Report at 6-7).
>
> Of course, as with any model, it is critical to ensure not only that the model itself is

sound but that the model's inputs are reliable (*City Trading Fund v Nye*, 59 Misc 3d 477,

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> was – endorsed that assumption as reasonable. *Id.* at 624:23-626:19 (Dkt. 611 at 33 [citations in original]).

The court agrees that the assumption that a PPA would have been procured is reasonable.

495 [Sup Ct, NY County 2018] ["The first key to a reliable DCF analysis is the availability of reliable projections of future expected cash flows, preferably derived from contemporaneous management projections prepared in the ordinary course of business"] [collecting cases], *affd* 171 AD3d 508 [1st Dept 2019]; *see Dell*, 177 A3d at 37-38 ["Although widely considered the best tool for valuing companies when there is no credible market information and no market check, DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps"]).

The crux of Kubow's model, and a major reason the court finds it persuasive, is that it is based on Merced's contemporaneous internal projections made in the ordinary course of business (*ACP Master, Ltd. v Sprint Corp.*, 2017 WL 3421142, at *31 [Del Ch July 21, 2017] ["Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of the company's operations. When management projections are made in the ordinary course of business, they are generally deemed reliable"], *affd* 184 A3d 1291 [Del 2018]). Relying on Merced's internal projections and sanity checked based on his professional experience, Kubow made the following assumptions: (1) the project would use Carson Bay's two GE 7FA.03 turbines, each with a market value of $14 million and which are more outdated and inefficient than turbines being produced by GE, Siemens, and Mitsubishi, thereby lowering the value of the project; (2) the balance of the overall project costs would be $131.9 million; (3) the project's commitments would be fulfilled such that it could proceed prior to December 31, 2015 and could be completed and in commercial

operation by January 1, 2017; (4) the project required additional developments costs of $3 million, to be paid for by the general partner; (5) the project would receive a 15-year PPA at a price of $4.75 per kW-mo and reimbursement for variable costs at a rate of $2.25/MWh; (6) the project would be financed with senior debt at an interest rate of Libor plus 450 basis points, totaling $99.2 million and thereby representing 80% of the project's total capital, which would then amortize for the 15 year duration of the PPA, that during the construction period the debt would fund pro-rata with equity at an 80/20 ratio, and that Libor would be hedged for the life of the project at 4% resulting in a project debt rate of 8.5%; (7) fixed operating costs would be $5 million in 2017 and increase annually by 2%; (8) distributions would be taxed at a 35% rate; (9) an appropriate discount rate is 15.8%, which is based on work performed by The Brattle Group analyzing the cost of new entry into a comparable market (PJM) plus a 2% risk premium based on factors unique to the ERCOT market; and (10) the project would be sold within two years of commencing operations (i.e., by the end of 2018) and the sale price would be nine times EBITDA (*see* Kubow Report at 7-10).

Kubow's rebuttal report persuasively defends these assumptions, only conceding, regarding his sixth assumption, that the interest rate during construction should be assumed to be Libor plus 200 basis points with a 25% floating Libor rate at 1% and 75% hedged Libor at 4%, resulting in a rate of 5.3%, and that pari passu funding creates nonsymmetric debt draws – these modified assumptions resulting in the total interest during construction being $3,434,000 – and that the Libor hedge results in an effective interest rate of 7.75% (*see* Kubow Rebuttal Report at 13).

On this basis, Kubow projected (1) that EBITA for 2017 would be $17.5 million and $17,912,000 in 2018; (2) that cash available for distributions to the partners would be $5,254,000 in 2017 and $7,942,000 in 2018; (3) a sale price, on January 1, 2019, of $161,207,000 (nine times the 2018 EBITA);[9] (4) that after the sale, based on the repayment of debt and funds available for distribution, on a post-tax basis, the net present value of the project is $15,794,000 (Kubow Report at 11-12; *see* Kubow Rebuttal Report at 14).[10]

The court rejects Merced's critiques of Kubow's assumptions, which are based on and often identical to Merced's own internal assumptions (*see ACP*, 2017 WL 3421142, at *31; *see also Sir Speedy, Inc. v L & P Graphics, Inc.*, 957 F2d 1033, 1038 [2d Cir 1992] ["In estimating damages, a claimant may rely on reports and projections made by the wrongdoer itself"]). Merced did not present any evidence to suggest that, at the time they were made, those assumptions were unreasonable. To the contrary, the evidence showed that, in 2013, Merced very much believed it could make a profit of up to $40 million on an investment of $5-10 million (*see* Dkt. 469 [Tr. at 459-62]).

To be sure, it is undisputed that in the years since the assumptions were made, the world unfolded differently. That is unremarkable. The reasonableness of a model's assumptions must be made based on the as-of date, and not based on hindsight.

[9] It seems this calculation is understated by $1,000.

[10] After recalculating based on his revised assumptions, the value decreased from $17,054,000 to $15,794,000.

Merced did not present credible evidence that any ERCOT market participant would have found its own assumptions unreasonable in 2015. Merced could have presented a witness to testify to that effect if it were so. The absence of such evidence is telling.

Merced's experts' testimony and reports are not probative or credible. Merced simply presented testimony that, using the benefits of hindsight, the court should find that the assumptions made in 2015 were unreasonable. The court does not find that compelling. On the contrary, the court found Kubow's testimony on the reliability of his assumptions far more credible than the testimony of Merced's experts.

Had Merced not cynically delayed development, there is no reason to believe that it would not have been able to complete the project in 2017 and lock in a PPA based on then-prevailing rates, such that it could sell the project in 2019 based on those guaranteed rates notwithstanding current peak energy prices. Moreover, in 2017, there was a significant market opening due to the retirement of old coal plants that made procurement of a PPA all the more plausible (*see* Dkt. 468 [Tr. at 190-91]). By delaying production, Merced must live with that foregone opportunity. But that does not change the value of the project in 2015, when Merced could have, if it had wanted to, expeditiously proceeded with development given the market's then-positive outlook. Had Indeck had the opportunity to develop the project, it would not have had reason to delay the process; thus, it would have been able to complete and sell it to investors before the market downturn.

Predicting energy prices, of course, is difficult. The point of a PPA though is to lock in prices and hedge against uncertainty. While a PPA can limit a project's upside, locking in value is key to procuring investment. While one might wonder how it is possible

to predict, in 2015, that energy prices over the next 15 years would average $4.75 per kW mo, a PPA makes that divination academic. Consequently, the court need not, in assessing the persuasiveness of Kubow's DCF model, actually decide if a particular energy forecast is reasonable, but only that such a forecast would have been acceptable to a PPA counterparty. Kubow's testimony to that effect is credible. Merced's expert's testimony to the contrary is unpersuasive.

Indeed, virtually all of the testimony of Merced's experts is rejected. Arthur Cobb has no experience whatsoever in the ERCOT market and has never before valued a power generation project, either in his professional career or as an expert (Dkt. 470 [Tr. at 704]). Therefore, aside from his critiques being unpersuasive, there is no reason to believe he has a better understating of the nuances of valuing a peaker energy project than Kubow. The disparate quality of their reports and testimony makes that quite apparent.

The evidence in this case showed the ERCOT market to be niche. That is precisely why Dahlstrom and DePodesta's know-how was so valuable. Merced did not proffer a current market participant in the ERCOT market with comparable experience valuing energy projects. Surely there is some banker or consultant that could have drawn on considerable expertise in the private sector to attack Kubow's analysis. The best Merced could do is proffer experts to make hindsight criticisms. And the decision to proffer Cobb--a valuation generalist that lacks actual industry knowledge--speaks volumes. The most critical of Kubow's assumptions concern bespoke features of the ERCOT market, such as the drivers of peak energy prices in that region and the factors potential purchasers assess when valuing a project. Cobb is not qualified to opine on any of these issues.

Lynn Lednicky's account is also unreliable. The way in which he gathered information for his analysis seriously calls into question the soundness of his approach. Remarkably, rather than conduct his own due diligence into the circumstances of the project to test Kubow's assumptions, Lednicky confined the universe of factual information to that provided to him by Merced's counsel (Dkt. 470 [Tr. at 606]). This resulted in fundamental errors that would have been easily avoided had he actually vetted the information given to him. For instance, he made the erroneous assumption that Merced only used public information to develop its project (*see id.* at 606-07). While that fallacy is perhaps understandable prior to the issue having been litigated, Lednicky loses credibility by having refused to correct that assumption after both this court and the Illinois court held to the contrary based on indisputable evidence (*see id.* at 609). Lednicky, at least, now appears to concede that information given to him by Dahlstrom and DePodesta, who have repeatedly flouted court orders in both cases, is not particularly reliable (*see id.* at 610 ["If I were starting over, I might do diligence differently"]). Lednicky also admitted that he was focused on the value of the project in 2013, when it would have been worth less than when it was more developed in 2015 (*see id.* at 610-11). Additionally, unlike Kubow, Lednicky is not a current ERCOT market participant and he has not valued a power plant since 2012 (*see id.* at 612).[11]

[11] There are numerous other instances of Lednicky providing questionable answers to what should be basic questions for an expert in this area. Two are telling. First, Lednicky materially misstates a key assumption of fair market valuation by ignoring that such valuation assumes unmotivated arms' length parties (*DFC Global Corp. v Muirfield Value Partners, L.P.*, 172 A3d 346, 369 [Del 2017] ["fair market value of a company is what it would sell for when there is a willing buyer and

Merced's additional arguments about Kubow's model are unpersuasive. Indeck carried its burden of showing that, based on the preponderance of the credible evidence, the assumptions and methodology of Kubow's DCF model are sound. The court, therefore,

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willing seller **without any compulsion** to buy"] [emphasis added]; *see Plaza Hotel Assocs. v Wellington Assocs., Inc.*, 37 NY2d 273, 277 [1975] ["the market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell"]). Lednicky erroneously focuses on "motivated" parties, such as Dahlstrom and DePodesta, who are willing to take less in a fire sale, and thus offers made in such a condition are not reflective actual market value as opposed to distressed value (e.g., a foreclosure) (Dkt. 470 [Tr. at 634]). Second, Lednicky claims that the Scotiabank sale process was typical and thorough (*see id.* at 635.). It was not. He ignored the undisputed testimony of Seth Keller, the Scotiabank employee who conducted that process, who admitted that the sale process was halted due to this litigation (*see* Dkt. 469 [Tr. at 413-16]) and the clear evidence that Merced made the decision to wait out the litigation before actually trying to obtain investment (Dkt. 537 at 2 [admitting that decision was made to delay marketing until "verdict is reached in the litigation"]; *see* Dkt. 468 [Tr. at 233] [holding this admission is admissible hearsay exception]; *see also id.* at 311 [Q: "Does this refresh your recollection that George Wang specifically told you to stop all communication with AJ until your litigations had concluded?" A: "Yes"]). Expressions of value during the pendency of litigation likely understate the actual value of the project (*see Nexbank, SSB v Soffer*, 2015 WL 458287, at *3 [Sup Ct, NY County Feb. 3, 2015] ["If a prospective purchaser knows … that defendants are currently suing plaintiff over its right to sell to another purchaser based on an allegedly enforceable term sheet, the prospective purchaser will either opt out of the sale or the terms of the sale will be impacted"], *affd* 144 AD3d 457 [1st Dept 2016]). It does not take a finance expert to understand this dynamic. If, as here, an expert disputes or overlooks such obvious, material issues, the court will discount the testimony accordingly.

The court also disregards the testimony of Hendrik Vroege, the Merced partner who oversaw the project. Vroege previously submitted affidavits that fairly suggested that Merced tried to market the project but failed due to market conditions rather than the pendency of the litigation (Dkt. 353 at 2 [October 2018 affidavit averring Merced "recently attempted to renew (marketing) efforts with Scotiabank, but have yet to receive any interest in the project from prospective investors or purchasers"]). However, Keller credibly testified that Scotiabank stopped marketing the project in April 2018 due to this litigation and would not and did not continue while litigation was pending (Dkt. 469 [Tr. at 422-25]). Vroege surely was aware of Scotiabank's position since he was the partner in charge of the project. Yet, Vroege tried to persuade this court that the project had no value because no one was interested without disclosing the reasons there was no interest. Vroege knew that the only reason the project had no active investor interest was because the litigation--and not actual lack of market interest in this type of project--put the marketing on hold. This obfuscation renders him untrustworthy and his testimony materially incredible. As on summary judgment, Merced's contentions about the project's value are both disingenuous and belied by the facts (*see* SJ Decision at 11 n 9).

agrees with Kubow's conclusion that, in 2015, the value of the Wharton Project to Indeck would have been $15,794,000.

Mitigation

The court rejects Merced's argument that Indeck failed to sufficiently attempt to mitigate its damages (*see Holy Props. Ltd., L.P. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 [1995] ["The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury"]). Merced did not carry its "burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages" (*LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 [1st Dept 2007]). On the contrary, the record reflects that as soon as Dahlstrom and DePodesta left, Indeck spent a significant amount of money trying to replace them, but that it was not able to successfully develop the contemplated project after Dahlstrom and DePodesta took the opportunity to Merced. These reasonable efforts at mitigation foreclose Merced's defense (*see id.* at 108 ["if plaintiff reasonably made such diligent efforts to mitigate, it does not matter if, in retrospect, another, better means of limiting the financial injury was possible"]).

Collateral Estoppel

Nothing in the Illinois Action precludes awarding Indeck its lost profits here (*see* Dkt. 457 [5/1/19 Tr. at 4-5]). Indeck prevailed in the Illinois Action, where Dahlstrom and DePodesta were held liable for their actions (*see* Dkt. 653 at 88-92). That the Illinois court did not award Indeck its lost profits does not preclude this court from doing so because,

under Illinois law, the pendency of the appeal from the Illinois judgment precludes application of collateral estoppel (*Ballweg v City of Springfield*, 499 NE2d 1373, 1375 [Ill 1986]; *see Village of Lombard v Metallo*, 2013 WL 1681490, at *8 [Ill App Ct Apr. 17, 2013] ["In Illinois, finality requires that the potential for appellate review be exhausted"]).[12]

In any event, Dahlstrom and DePodesta's discovery abuses, for which they were sanctioned in the Illinois Action (Dkt. 609 at 10-12; Dkt. 610 at 27-29), preclude application of collateral estoppel (*see Sornberger v City of Knoxville, Ill.*, 434 F3d 1006, 1023 [7th Cir 2006] [Under Illinois law, even "when the technical conditions of the doctrine are met, collateral estoppel must not be applied to preclude an issue **unless it is clear that no unfairness results to the party being estopped**"] [emphasis added]; *King v Goldsmith*, 897 F2d 885, 887 [7th Cir 1990]).[13] Applying collateral estoppel would be

[12] Preclusion is governed by the law of the jurisdiction that issued the judgment (*Bruno v Bruno*, 83 AD3d 165, 169 [1st Dept 2011], citing *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 204 [1985]). Recent procedural developments in the Illinois Action have only potentially broadened the scope of Indeck's victory and further undermine defendants' reliance on collateral estoppel (*see* Dkts. 675, 679).

[13] Additionally, the issues in the Illinois Action were not identical. Significantly, the fiduciary duties that Dahlstrom and DePodesta owed Indeck as their employer ended when they left the company (*see* Dkt. 653 at 87). Thus, their use of the confidential information was of particular importance to the analysis in the Illinois Action (*see id.* at 85). Here, by contrast, the MCA separately prohibited Merced from working with them after they left Indeck. The Illinois court's valuation statements were thus not necessary to the decision given the court's findings about the utility of the confidential information (*Talarico v Dunlap*, 685 NE2d 325, 328 [Ill 1997] ["For collateral estoppel to apply, a decision on the issue **must have been necessary** for the judgment in the first litigation, and the person to be bound must have actually litigated the issue in the first suit"] [emphasis added]; *see In re McCarthy Bros. Co./Clark Bridge*, 83 F3d 821, 833 [7th Cir 1996] ["The law is replete with examples of the unreliability of unnecessary findings, such as the law of collateral estoppel and the principle that dicta is not binding in subsequent cases"]). The

manifestly unfair as defendants (both here and in the Illinois Action) committed discovery violations and hid the project's value. Merced repeatedly misrepresented the level of investor interest in its project. Emails were withheld, both here and in the Illinois Action, that would have clearly shown that Merced's contentions about the status of the project were false. Based on the far more complete record that came to light before trial in this action (and in the stipulated post-trial deposition), no reasonable finder of fact could conclude that Indeck's lost profits were speculative. Merced cannot benefit from the litigation misconduct of its agents in the Illinois Action.[14] Holding to contrary would be unjust. It would reward--indeed incentivize--discovery misconduct and obfuscation (*see Buechel v Bain*, 97 NY2d 295, 304 [2001] [collateral estoppel does not apply if a party did not have a "full and **fair**" opportunity to litigate] [emphasis added]).

Interest

An award of 9% pre-judgment interest on Indeck's breach of contract claim is mandatory (*NML*, 17 NY3d at 258). CPLR 5001(b) provides that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that

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evidence at trial established that the two of them were critical to Merced's development efforts and that Indeck losing them to the very rival bound by the MCA materially impeded Indeck's ability to develop its project. Thus, regardless of the import of the confidential information, Merced would still have been held liable even if its breach was limited to their engagement of Dahlstrom and DePodesta.

[14] Merced's argument that Dahlstrom and DePodesta were no longer its agents due to termination of their management agreement in November 2018 (*see* Dkt. 631) was yet another deception. Post-termination emails reveal that Dahlstrom and DePodesta continued to market the project for Merced in 2019 – and that they kept doing so even after the trial (*see* Dkts. 604, 606, 607). The "termination" was, in part, undoubtedly concocted to bolster Merced's failed attempt to preclude evidence on hearsay grounds (i.e., due to a lack of agency).

interest upon damages incurred thereafter shall be computed from the date incurred," but that "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (*see Grosz v Serge Sabarsky, Inc.*, 24 AD3d 264, 267 [1st Dept 2005]). Merced continuously breached the MCA between mid-2013 and March 5, 2015. Indeck proposes that interest run from March 5, 2014. Merced argues that a more appropriate date would be July 15, 2014, when this action was commenced (*see Delulio v 320-57 Corp.*, 99 AD2d 253, 255 [1st Dept 1984]).[15] The court agrees with Merced, not only based on the commencement of this action, but also because the breaches appear to have begun closer to July 2013 than to March of that year, making July 15, 2014 a more reasonable intermediate date.

Accordingly, it is

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $15,794,000 plus 9% pre-judgment interest from July 15, 2014 to the date judgment is entered; and it is further

ORDERED that plaintiff's claim for attorneys' fees is hereby severed and shall continue; and it is further

ORDERED that within two weeks of the entry of this decision, the parties shall meet and confer in good faith to attempt to reach an agreement on the reasonable attorneys' fees and expenses that should be award to plaintiff; and it is further

[15] Indeck appears to recognize that using the filing date is reasonable here (Dkt. 611 at 45 n 10).

ORDERED that if the parties do not reach an agreement, within one month of the entry of this decision, plaintiff shall move by order to show cause for an award of reasonable attorneys' fees and expenses.

DATE: 10/15/2020

JENNIFER G. SCHECTER, JSC