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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXELON GENERATION ACQUISITIONS, LLC, a Delaware limited liability company,	:	No. 28, 2017
Defendant Below, Appellant/Cross-Appellee,	:	
v.	:	**REDACTED PUBLIC COPY FILED May 17, 2017**
DEERE & COMPANY, a Delaware corporation,	:	
Plaintiff Below, Appellee/Cross-Appellant.	:	

APPELLANT / CROSS-APPELLEE EXELON'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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SUMMARY OF ARGUMENT IN ANSWER TO CROSS-APPEAL

1. DENIED. The Superior Court correctly held that Deere is not entitled to attorneys' fees and costs, given that the indemnification provision of the Purchase Agreement evinces no "clear and unequivocal" intent to cover first-party claims.

ARGUMENT

I. ARGUMENT IN REPLY: DEERE IS NOT ENTITLED TO THE EARN OUT, AND DEERE'S ARGUMENT TO THE CONTRARY CONFLATES THE PURCHASE AGREEMENT AND THE PPA.

In all contract disputes, "the primary objective for any court is to give effect to the parties' intent." *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 936 (Del. 2004). It defies logic and common sense to imagine that the parties here intended that Deere would receive a $14 million Earn Out for successful development of the Blissfield Project if Exelon was in fact forced to abandon the development of the Lenawee County site it had purchased from Deere, acquire a new wind project (Beebe) for $10.3 million from a separate developer, and incur $16 million in new risks in exchange for the right to use an amended version of the PPA in connection with Beebe.

The only thread connecting the Blissfield Project to Beebe was the PPA. Accordingly, Deere has framed its case around the notion that, so long as Exelon used the PPA in *any* form with *any* project, Deere was entitled to the Earn Out. DOB at 43-44.[1] But, unfortunately for Deere, that is not what the Purchase Agreement says. The Earn Out is not triggered by the use of the PPA. It is

[1] The acronym "DOB" will refer to Deere's combined Answering Brief on Appeal and Opening Brief on Cross-Appeal. The acronym "EOB" will refer herein to Exelon's Corrected Opening Brief on Appeal.

triggered only if the project that Exelon acquired in the Purchase Agreement—the Blissfield Wind Project under development by Deere in Lenawee County—achieved Commercial Operation. And that never occurred because of implacable community opposition.

To be sure, "Exelon has employed the valuable Blissfield PPA and has derived a substantial benefit from its use." DOB at 7. But Exelon paid Deere substantial consideration to acquire the PPA. Indeed, Exelon estimated the aggregate value of the three PPAs for the Michigan Wind Projects at $60 million. A768. Thus, some $60 million of the total $860 million base price that Exelon paid to Deere was compensation for the three PPAs. Exelon, however, was only able to realize a benefit from the Blissfield PPA by acquiring an entirely different wind farm and taking on $16 million in new risks for the right to amend that PPA. Deere is not entitled to an Earn Out just because Exelon used the PPA after bringing another developer's project to fruition.

A. Under the Plain Language of the Purchase Agreement, No Earn Out Was Due Unless the Blissfield Project "in Lenawee County" Met the Milestones, and that Project Never Met the Milestones.

The Purchase Agreement provides that Exelon must pay the Earn Out if "the Blissfield Wind Project achieves Completion of Development and Commencement of Construction." A319, § 2.6(a). The "Blissfield Wind Project" is defined in the

Purchase Agreement as "the wind project under development in Lenawee County, Michigan." A302, § 1.1. Because no wind project in Lenawee County ever met the milestones necessary to trigger the Earn Out ("Milestones"),[2] no Earn Out is due. *See* A303-A304, § 1.1. Thus, the Superior Court should be reversed.

Deere's argument that Exelon was required to pay an Earn Out to Deere simply because it used the PPA—an assertion repeated again[3] and again[4] and again[5]—is contrary to the plain language of the Purchase Agreement. The Purchase Agreement and the PPA are separate contracts between separate parties. The PPA was executed in June 2010 by Consumers and Blissfield Wind Energy LLC; this document is a contract to sell power. The Purchase Agreement was executed in August 2010 by Deere and Exelon; this document is a contract in which Exelon purchased certain assets from Deere, including the PPA itself and a physical wind farm under development known as the Blissfield Project.

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[2] Either of two milestones could have triggered the Earn Out. First, the Blissfield Project could have achieved each of five listed conditions relating to project development. A303-A304, § 1.1. Second, the Blissfield Project could have achieved a Commercial Operation Date. A304, § 1.1; *see* EOB at 9.

[3] DOB at 40 ("[T]he bargain struck contemplated payment (*i.e.*, the Earn Out) when the milestone in the Purchase Agreement was met, and there is no dispute that ***Exelon met the milestone***." (emphasis added)).

[4] DOB at 45 ("Section 2.6 [of the Purchase Agreement] expressly contemplates paying Deere the Earn Out ***once Exelon fulfilled the requirements of the Michigan PPAs.***" (emphasis added)).

[5] DOB at 7, 24, 27, 43, 46.

The Purchase Agreement expressly ties the Earn Out payment to the physical wind farm's achievement of the Milestones—*not* to Exelon's use of the PPA. The Purchase Agreement clearly states that Exelon must pay the Earn Out if "***the Blissfield Wind Project*** achieves" the Milestones, which relate to the physical development and operation of the Blissfield Wind Project. A319, § 2.6(a) (emphasis added). The "Blissfield Wind Project" is a specifically defined term that identifies a particular wind project in Lenawee County, Michigan. The Purchase Agreement does not say that the Earn Out is due whenever ***any Exelon Project using the PPA*** achieves the Milestones.

For several reasons, this Court should reject Deere's attempt to ignore the express contractual language defining "Blissfield Wind Project" with reference to the specific project site that Deere began to develop and that Exelon purchased from Deere.

First, Deere's preferred reading would render certain contractual language superfluous by ignoring words in the Purchase Agreement's definition of "Blissfield Project." If Deere's reading of the contract were correct, there would have been no reason for the parties to include language referring to a particular project site when defining the term "Blissfield Project." Ignoring that express contractual language would violate Delaware law, which recognizes that

"[c]ontractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court." *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *judgment aff'd*, 945 A.2d 594 (Del. 2008).

Second, numerous courts have rejected the exact argument that Deere advances on appeal: that geographical contract language can be dismissed or ignored on the ground that it is "merely descriptive." *See, e.g., E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 976 (Colo. 2005) ("The McGinley contract clearly described an eighty acre portion of land. ***We cannot dismiss this language as merely descriptive of the character of McGinley's water right.*** . . . To consider such words as merely descriptive in nature would violate our well settled rule of construction that every part of a writing must be given effect.") (emphasis added); *Alfred Hofmann & Co. v. United States*, 329 F.2d 657, 660 (Ct. Cl. 1964) ("***There is no substantial merit in plaintiff's contention that the words 'MURFREESBORO TENN.' were merely descriptive of the general location of plaintiff's plant***. . . . It is too late in the day for anyone to claim that his subjective intent in making the contract was different from the provisions of the written contract.") (emphasis added).

Third, Deere itself has conceded that the phrase "under development in Lenawee County" has substantive content and thus cannot be "merely descriptive." Todd Davies was an in-house lawyer for Deere who was involved in drafting and negotiating the Purchase Agreement. A724-A725. In his deposition, Mr. Davies was asked whether he "believe[d] that the phrase 'under development in Lenawee County' is a substantive phrase as contrasted with merely descriptive." A726. Mr. Davies responded by saying "I think it's both." A726.

Fourth, the fact that the parties chose to define the "Blissfield Project" in relation to its specific geographic location makes sense and is consistent with the parties' reasonable expectations, given that location is paramount in the wind industry. This case itself is an apt example. When attempting to persuade Consumers to award it the PPA, Deere wrote that "Lenawee County was selected as the project location based upon several factors, including excellent wind resource for the region, favorable construction conditions, favorable landowners and local government, and community acceptance." A73.[6] These are all *site-specific* factors. Moreover, all parties agree that commercial operation of the

[6] As Deere's corporate designee Martin Wilkinson conceded in his deposition, a developer has to "have more than a PPA in order to make a [wind] project work." A747. A wind project is not defined by the PPA associated with that project, but rather by site-specific features such as wind resources, topography, grid interconnection, and community support.

Blissfield Project was later stymied by *site-specific* resistance in Lenawee County, where local activists successfully secured an anti-wind zoning ordinance. That made it impossible for the development of the Blissfield Project to proceed. Given these facts, Deere's claim that "Exelon offers no explanation for why the parties would condition payment of the Earn Out on a specific location" is absurd. DOB at 30. The contracting parties conditioned the Earn Out payment on the success of development at a specific location because Exelon was buying Deere's development efforts and good will at that specific location.

Deere repeatedly emphasizes in its brief that nothing in the plain language *required* Exelon to build the Blissfield Project on the specific site that Deere sold to Exelon. *See, e.g.*, DOB at 29, 30. But even if true (and it is not, see *infra* Section I.C.4), that argument misses the mark. Even if one can imagine some circumstance in which Exelon *could* have adjusted the location of the Blissfield Project in a way that would have preserved Deere's right to an Earn Out payment—for example, if Exelon had purchased land adjacent to the original development site to build a larger wind farm than had originally been anticipated—that is not what happened here. Exelon could not make use of Deere's development site *at all* because of community opposition. It therefore had to

abandon its development plans in Lenawee County altogether. And under those circumstances, the contract is clear that no Earn Out is owed.

B. Deere Erroneously Relies on the Incorporation-by-Reference Doctrine.

Having attempted to erase the site-specific definition of "Blissfield Wind Project" from the contract by claiming that it is "merely descriptive," Deere's next move is to argue that, in reality, the Earn Out provision is due whenever *any* Exelon wind project uses the PPA that was initially intended for use with the Blissfield Project. *See supra* page 4, notes 3-5. Never mind that Deere and Exelon could have negotiated for a provision making the Earn Out payment depend upon the use of the PPA, and that they did not do so. Never mind that the PPA itself says nothing at all about any Earn Out payment. And never mind that the PPA and the Purchase Agreement have entirely distinct contracting parties. Deere nevertheless asserts that the Purchase Agreement and PPA must be read together. Thus, according to Deere, it remained entitled to an Earn Out even when the PPA was amended—as a result of negotiations between Exelon and Consumers, in exchange for a significant transfer of risk to Exelon, and without any involvement by Deere—to be used with a different wind farm that Deere had no involvement in developing. DOB at 43-44.

Deere offers a six-step syllogism to explain why its interpretation should prevail. DOB at 26-28. The first two steps are not controversial. "[T]he Earn Out was due . . . when the Blissfield Project achieved 'Completion of Development and Commencement of Construction,'" and "Completion of Development and Commencement of Construction is satisfied by *either* reaching the five development milestones outlined in subsection (a)(i)-(v) of the definition, *or* achieving a Commercial Operation Date under subsection (b)." DOB at 26-27 (emphasis in original).

Deere's syllogism goes off the rails at step three. Exelon agrees that "the term 'Commercial Operation Date' is defined in the Purchase Agreement as having 'the meaning set forth in the Michigan PPA related to such Michigan Wind Project.'" DOB at 27. But Deere is wrong to conclude from the Purchase Agreement's incorporation by reference of a single term from the PPA—"Commercial Operation Date"—that "[t]he Earn Out for the Blissfield Project is thus tied directly to . . . the achievement of a Commercial Operation Date for the project associated with the Blissfield PPA." DOB at 27. Deere has just rewritten the Earn Out provision so that it is triggered by the Commercial Operation of *any project* selling power under the Blissfield PPA, instead of the achievement of Commercial Operation by the *Blissfield Project*. This makes no sense, because the

project selling power under the Blissfield PPA is not necessarily the same project as the "Blissfield Project" defined in the Purchase Agreement.

Nevertheless, Deere's conflation of the Purchase Agreement and the PPA allows it to go on in its steps five and six to argue that when "Exelon and Consumers amended the Blissfield PPA to change the definition of 'Plant Site'" so that the PPA could be used with a different project, Deere remained entitled to an Earn Out payment so long as the project using the PPA achieved a Commercial Operation Date. DOB at 27-28. The effect of this syllogism is to change the Earn Out payment from (1) a success fee connected to the Blissfield Wind Project that Deere had begun developing to (2) a payment owed so long as the PPA is used with any Exelon wind project, regardless of Deere's involvement with it.

The argument described above upends Delaware's incorporation-by-reference doctrine. Exelon's Opening Brief cited seven cases and three treatises describing that doctrine. Under Delaware law, when parties expressly incorporate by reference a single term from another contract, only that term is incorporated by reference—not the entire other contract. EOB at 26-28; *see Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2015 WL 590493, at *2 (Del. Super. Ct. Feb. 9, 2015). Here, the term from the PPA that is incorporated by reference into the Purchase Agreement—"Commercial Operation Date"—is

readily segregable from the rest of the PPA. It is defined in the PPA as the date on which the seller has [redacted]. A244-A245, § 3.2. Pasting that definition into the Purchase Agreement does not require that any other piece of the PPA also be incorporated into the Purchase Agreement—let alone make the Purchase Agreement's Earn Out payment depend upon use of the PPA.

Moreover, Delaware courts have indicated that the incorporation-by-reference doctrine cannot be used to override plain definitions in the original contract, EOB 28-31, or to alter the original contract in a manner inconsistent with the parties' reasonable intent, EOB at 31-35. Yet, as discussed above, Deere's argument does exactly that. The body of Deere's Answering Brief does not cite a single incorporation-by-reference case,[7] and yet boldly claims that Exelon has "misconstrue[d]" the law. DOB at 41, 43. Not so. As explained in Exelon's Opening Brief, Deere's novel interpretation of the incorporation-by-reference doctrine is unworkable and destabilizing. EOB 35-36. If credited, Deere's theory

[7] Deere does cite in a footnote to *State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. Ct. 1951). *See* DOB 43 n.20. As explained at length in Exelon's Opening Brief, EOB 26-27, *Black* is distinguishable from this case. Moreover, *Black* itself articulated several important exceptions to the incorporation-by-reference doctrine that Deere wholly ignores.

would lead to substantial uncertainty in Delaware—a jurisdiction respected for its ability to resolve commercial disputes in an orderly and predictable manner.

In sum, the Purchase Agreement means what it says. Because no project "in Lenawee County" ever met the Milestones, the Superior Court's opinion must be reversed.

C. It is Irrelevant Whether Exelon Was Permitted to Change the Project to Be Used with the PPA, and Exelon Did Not and Could Not Relocate the Blissfield Wind Project as Defined by the Purchase Agreement.

Deere argues at length that Beebe was merely a relocation of the Blissfield Project with a new name—entirely ignoring that Exelon purchased the Beebe Project for $10.3 million from a different developer, Nordex; that it was located in a different county; that it had different capacity than the Blissfield Project; that it had entirely different turbines and engineering; and, most notably, that Exelon continued to try to develop the Blissfield Project even as it also purchased and developed Beebe. Because Beebe and Blissfield were (according to Deere) one and the same, Deere was entitled to an Earn Out when Exelon achieved Commercial Operation at Beebe. Deere's argument fails for several reasons.

1. Repurposing the PPA Did Not "Relocate" the Blissfield Project.

First, Deere again is conflating the Purchase Agreement and the PPA. Deere's argument begins with the correct premise that Exelon was permitted to repurpose the PPA by amending the PPA's definition of "Plant Site." And Deere relies on extrinsic evidence consisting of communications between Exelon and Consumers in which Exelon tells Consumers that it wishes to do exactly that. DOB 36-39. But Deere then asserts that when Exelon changed the underlying project that would be used ***for the PPA***, it also necessarily relocated the project identified ***in the Purchase Agreement***. DOB at 42. That is a non-sequitur that results from conflating the two separate documents. The fact that Exelon repurposed the PPA for use at a new location does not mean that the Blissfield Project was relocated to that new location, or that Deere was entitled to an Earn Out when the project at the new location reached Commercial Operation. To the contrary, the PPA was amended so that it could be used in conjunction with a *different* project, and Exelon assumed $16 million in new risks in exchange for that amendment.

Thus, Deere's reliance on a long list of steps that Exelon took purportedly to "relocate" the Blissfield Project, *see* DOB 34-35, is misplaced. These steps all related to Exelon's negotiations with Consumers to repurpose *the PPA* so that it

could be used elsewhere—steps that Exelon took only because the Blissfield Project was proving difficult to develop due to local opposition.

2. Exelon Continued Trying to Develop the Blissfield Project Even After It Amended the PPA, Showing That the Amendment to the PPA Did Not "Relocate" the Blissfield Project.

Second, Deere's argument is disproved by the undisputed fact that, notwithstanding the opposition it faced in Lenawee County, Exelon continued trying to develop the Blissfield Project even after it amended the PPA so that it could be used in conjunction with a different project. EOB at 13, 21. Deere does not dispute the fact that, while negotiating with Nordex for the rights to Beebe, Exelon was also exploring ways to keep the Blissfield Project alive despite local resistance. *See* DOB at 35 n.16. The fact that both projects were being developed at the same time definitively refutes the Superior Court's holding that they are the "same" project. EOB Ex. B at 16.

Deere's only response to this argument is to note that "only one project could reach a Commercial Operation Date under the Blissfield PPA, which was inextricably tied to the Blissfield Project no matter where it was located." DOB at 35 n.16. This non-response does not grapple with the fact that, conceivably, both Beebe and the Blissfield Project might have reached Commercial Operation *under two different PPAs*—showing that the two were not one and the same.

Exelon did not formally abandon the Blissfield Project until *after* it signed the amendment to the PPA with Consumers. *See* DOB at 35. If the political dynamics in Lenawee County had suddenly changed, so that the Blissfield Project could have gone forward after all, Deere would have received an Earn Out payment when *that project* achieved commercial operation—regardless of whether it sold its power under the original PPA or through some other arrangement.

In attempting to meld the PPA and the Purchase Agreement, Deere argues that "the triggering events for the Earn Out require that the Blissfield PPA be used." DOB at 45. This claim is demonstrably false. There are several situations in which the Earn Out for the Blissfield Project would be due even if Exelon did not use the PPA that was originally connected with that project. For example, the Purchase Agreement provides that Exelon must pay the Earn Out if it sells the Blissfield Project before that project achieves the Milestones. A319, § 2.6(a). The Earn Out would be due even if the Blissfield Project was using a different PPA (or had lost its PPA) at the time of sale. Moreover, as explained above, the Earn Out would be due if a different power purchase agreement was acquired by Exelon and used at the Blissfield Project, and the Blissfield Project then achieved commercial operation. A319, § 2.6(a). Yet under Deere's interpretation, Exelon would owe no

Earn Out in that situation. That interpretation makes no sense and cannot be squared with the plain language of the Purchase Agreement.

3. Exelon Abandoned the Blissfield Project in the Manner Required by the Purchase Agreement, and Consequently Had No Further Obligation to Deere.

Third, Exelon did not relocate the Blissfield Project. Exelon abandoned it. The Purchase Agreement provides:

> In the event [Exelon] reasonably determines that continuing to proceed with any one or more of the Michigan Wind Projects would not be commercially reasonable and thereafter determines to permanently cease development of and abandon such Michigan Wind Project(s), [Exelon] shall so inform [Deere], including the reason therefor and thereafter *[Exelon] shall have no further obligation to [Deere] in connection with such development*.

A319, § 2.6(b) (emphasis added). According to this plain language, Exelon could affect an abandonment by (1) determining that further development would be unreasonable, (2) informing Deere of its decision to abandon, and (3) explaining its reason for abandonment to Deere. In this case, Exelon satisfied all three of these steps. First, Exelon reasonably determined that resistance in Lenawee County rendered further development of the Blissfield Project unreasonable—a factual proposition that Deere does not contest. A645; A672. Second, Exelon informed Deere of its decision to abandon the project. A563. Deere does not dispute that such notice was provided. Third, Exelon explained the reasons for its decision

within its Notice of Abandonment. A563. Deere does not dispute that reasons were given. Accordingly, the Blissfield Project was abandoned—and, under the express terms of the contract, that is fatal to Deere's claim that Exelon continued to have any obligation under the Purchase Agreement. A319, § 2.6(b).

In its Answering Brief, Deere does not contest the fact that Exelon took all three of the required steps to abandon the Blissfield Project.[8] Instead, Deere tries to ignore this fatal defect in its case by arguing that Exelon could not have abandoned the Blissfield Project because it had already taken several steps to develop the Beebe Project. DOB at 34-35. *But the same wind project cannot be both abandoned and relocated.* If the Blissfield Project was abandoned—and it was, as just explained, thereby extinguishing any further obligation of Exelon to Deere—then it could not have been relocated.

Although Deere does not dispute that the requirements for abandonment were satisfied, it nevertheless insinuates that the Notice of Abandonment was issued in bad faith. Exelon disputes Deere's contention that the Notice of Abandonment was designed to "avoid paying the Earn Out." DOB at 34. But even

[8] Deere states that Exelon's Notice of Abandonment "purportedly complied with the Purchase Agreement's requirements for such notices," DOB at 34, but Deere does not explain what it means by "purportedly." Deere has never argued that the Notice of Abandonment fails to comply with the requirements of the Purchase Agreement, and thus Deere has waived any such argument. Sup. Ct. R. 14(b)(vi)(A)(3).

if Exelon did craft the Notice of Abandonment for the sole purpose of avoiding the Earn Out, that would not change the outcome of this case. Exelon's subjective intent in abandoning the Project is legally irrelevant, as are Exelon's purported financial motives. The Purchase Agreement says that "no further obligation" is owed once a wind project is abandoned, and it sets express steps for abandoning a project. Nothing in the Purchase Agreement says that Exelon cannot abandon a project in order to avoid paying an Earn Out or that Exelon cannot abandon a project and repurpose its PPA. The only thing that matters under the terms of the Purchase Agreement is whether the three contractual conditions for abandonment are satisfied, and, in this case, Deere concedes that they were. Thus, the Blissfield Project was properly abandoned under the terms of the Purchase Agreement. And because that project was abandoned, it could not possibly have been relocated.

4. Exelon Could Not Have Relocated the Blissfield Project Outside of Lenawee County Even If It Had Wanted To Do So.

The Superior Court found that the Purchase Agreement does not expressly prohibit or allow relocation of the Blissfield Project. EOB Ex. B at 12. Delaware courts faced with contracts lacking express terms often resolve disputes by resorting to canons of construction such as *expressio unius*. As Exelon's Opening Brief explained, the Purchase Agreement expressly allowed for development and

abandonment but did not mention relocation; and under the *expressio unius* canon, the fact that a power to relocate is not explicitly conferred implies that no such power exists. EOB at 22-23.

Deere offers no substantive answer to Exelon's *expressio unius* argument. Instead, Deere's primary contention on appeal is that Exelon has improperly attempted to "imply terms and restrictions in the Purchase Agreement." DOB at 30. This argument is as curious as it is ironic. As explained above, the Superior Court held that the Purchase Agreement does not explicitly allow for relocation; thus, Deere's only path to victory is to establish that the Purchase Agreement contains an implied term permitting relocation. Indeed, much of Deere's brief is spent arguing that Exelon's purported power to relocate can be implied from Exelon's conferred power to develop the Blissfield Project at its "sole discretion." DOB at 31. In short, Deere faults Exelon for arguing in favor of an *implied* prohibition on relocation, but yet Deere itself argues in favor of an *implied* power to relocate.

In any event, Deere's arguments in favor of an implied power to relocate are unavailing. Deere's Answering Brief makes only one affirmative argument in favor of the implied power to relocate: according to Deere, the fact that Exelon was required to "develop the project using ***all*** commercially reasonable efforts and

was granted . . . 'sole discretion' in the development of the Project" must mean that Exelon had the right to relocate the project. DOB at 31. But when Exelon was forced to abandon Deere's development efforts in Lenawee County because of implacable community opposition, and then acquire a new development site from a third party in a different county more than one hundred miles away, that was not a "development of the Project;" it was an abandonment of the Project and an initiation of a different project. Exelon's "sole discretion" to do what is "commercially reasonable" with respect to the Blissfield Project does not mean that Beebe and Blissfield are one and the same. To the contrary, despite all of Exelon's commercially reasonable efforts in Lenawee County, the Blissfield Project could not be salvaged.

Moreover, Deere's reading of Exelon's "sole discretion" is vastly overbroad. Section 2.6 lists the specific development tasks over which Exelon had sole discretion. They include, for example, "permitting, turbine purchase and construction agreements and interconnection agreements." A319, § 2.6(b). Relocating the project to a new site is not on the list, and such a major modification is unlike any of the micro-level decisions that are specified in the contract. Accordingly, under basic canons of contract interpretation, Exelon did not possess the power to relocate the Blissfield Project.

Deere's final argument is that, ***under the terms of the PPA***, Exelon was permitted to use the PPA for a different project by amending the PPA's definition of "Plant Site." According to Deere, it follows that, ***under the terms of the Purchase Agreement***, Exelon was permitted to relocate the Blissfield Project. DOB at 42. This argument is a non sequitur that rests on yet another conflation of the PPA and the Purchase Agreement. The fact that Exelon had the power to amend the PPA with Consumers does not mean that Exelon had the power under the Purchase Agreement to relocate the Blissfield Project, because the PPA and the Purchase Agreement are separate contracts signed by separate parties.

5. The Superior Court Wrongly Relied on Extrinsic *Factual* Evidence to Resolve a Disputed *Legal* Question.

Deere relies heavily on a series of post-closing communications between Exelon and Consumers. But those communications do not help Deere. They concern the PPA, and in particular, whether the PPA could be amended so that it could be used in connection with a project located in counties other than Lenawee County. DOB at 37-38. "Relocating" the PPA is not the same as "relocating" the Blissfield Project. Communications about the former are not at all probative of the latter. Post-closing evidence regarding Exelon's internal accounting is also not probative of Exelon's legal rights under the contract. At summary judgment, inferences must be drawn in favor of the non-movant, and it is a fair inference that

Exelon's commercial team wanted to ensure profitability even if an Earn Out turned out to be owed. DOB at 38. Accounting for the possibility that such a payment might be made does not constitute an admission that Exelon was obligated to make it.

Moreover, all of this post-closing extrinsic evidence is irrelevant to the *legal* question of whether Exelon abandoned the Blissfield Project under the undisputed facts and to the *legal* question of whether Exelon was even permitted to relocate the Blissfield Project.

Deere states that "to determine whether Deere is entitled to a post-closing Earn Out, it is necessary to consider what happened post-closing." DOB at 36. That is obviously true, and Exelon therefore does not object to the use of post-closing evidence to determine whether any of the Michigan Wind Projects met the Milestones that would trigger the Earn Outs. But that is not the purpose for which the Superior Court used post-closing evidence or for which Deere relies on it. Instead, both the Superior Court and Deere use post-closing evidence in an effort to resolve the legal question of whether the Purchase Agreement permitted Exelon to relocate the Project. The answer to that legal question has nothing to do with post-closing events. Thus, the Superior Court's use of post-closing evidence for this purpose constitutes reversible error.

* * *

At bottom, Deere seeks to be paid an Earn Out even though its project could not be developed. But Deere has no reasonable expectation, let alone contractual right, to be paid for Exelon's success in bringing a different developer's project to commercial operation. Nor does it matter that Exelon obtained an amendment to the PPA to allow its use with that other project. The PPA was one of the many assets that Exelon acquired from Deere. Exelon was free to amend and use the PPA in whatever way it wished. The Earn Out depended upon the successful development of the Blissfield Project, not on the use of the PPA. This Court should reverse the Superior Court and hold Deere to the bargain it struck.

II. ARGUMENT IN REPLY: IF THIS COURT HOLDS THAT DEERE IS ENTITLED TO THE EARN OUT, EXELON SHOULD RECEIVE RECOUPMENT BECAUSE DEERE BREACHED THE PURCHASE AGREEMENT.

Deere warranted to Exelon that it believed all permits for the Blissfield Project could be obtained in the ordinary course. As explained in Exelon's Opening Brief, that warranty was misleading and inaccurate. In reality, senior Deere personnel knew that there were serious doubts about whether the permits could actually be obtained. Moreover, Deere's Disclosure Schedules withheld material information concerning the scope of resistance to the Blissfield Project. The Superior Court nonetheless held that "Deere adequately disclosed the issues surrounding obtaining the permits necessary for the development of the Blissfield Wind Project." EOB Ex. B at 21. That holding should be reversed.

A. Deere Warranted that It Believed All Permits for the Blissfield Project Could Be Obtained in the Ordinary Course.

Deere represented in the Purchase Agreement that, "except as set forth in . . . the Seller Disclosure Schedule, [Deere] reasonably believe[d] that all material Permits necessary for the development, construction, ownership, maintenance, use and/or operation of the Michigan Wind Projects . . . [could] be obtained in the ordinary course." A336, § 4.11(c)(iv). Deere now contends that the language "except as set forth in the Seller Disclosure Schedule" operates to "carve[] the

Blissfield Project out of [its] representation" that the permits for the Michigan Wind Projects could be obtained in the ordinary course. DOB 53. This argument is belied by the language of the Disclosure Schedules, which reads in full:

> 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 September 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 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 Wind Project in Riga township there is a possibility that a zoning ordinance permitting the project would be put to a referendum.

A454, § 4.11(c)(iv). Nothing in these Disclosure Schedules indicates a belief on Deere's part that the permits could not ultimately be obtained. The Disclosure Schedule merely (1) provides facts about the situation on the ground and (2) offers a single sentence of analysis—that "there is a possibility that a zoning ordinance permitting the project would be put to a referendum." *Id.* Nothing in the Disclosure Schedules modifies Deere's assertion that "all material Permits . . . [could] be obtained in the ordinary course." A336, § 4.11(c)(iv). Deere could have easily stated that the Blissfield Wind Project was entirely excepted from Section 4.11(c)(iv), but it did not do so.

B. Deere's Warranty Was Misleading and Inaccurate.

Two facts conclusively demonstrate that Deere did not actually believe its warranty that "all material Permits . . . [could] be obtained in the ordinary course." A336, § 4.11(c)(iv). First, senior personnel from Deere admitted in their depositions that Deere did not actually believe that this warranty was true. Second, Deere withheld material information when it drafted the Disclosure Schedules to the Purchase Agreement.

1. Deposition Testimony from Deere Personnel.

Senior personnel from Deere expressly admitted in their depositions that Deere knew that its warranties regarding the permits were false at the time they were made. Mr. Drescher, the head of wind farm development at Deere, conceded in his deposition that Deere "*had actual knowledge that would not go to a reasonable belief that all material permits could easily or could be successfully obtained to construct the project. There was considerable doubt among the development team that that could occur*." A602 (emphasis added). Similarly, Mr. Arrington, an in-house lawyer for Deere who worked on wind-related issues, said that Deere had never before faced opposition "to the same degree" that it was facing in Michigan and that the level of opposition to the Blissfield Project was "relatively unique." A654. In its Answering Brief, Deere does not contest the fact

that its employees knew that there were serious doubts about whether permits for the Blissfield Project could be obtained in the ordinary course. Instead, Deere argues only that Mr. Drescher's testimony is "irrelevant because Deere did not represent that it could obtain all material permits in the ordinary course." DOB at 52. For the reasons explained above, *see supra* Section II.A, that statement is incorrect.

2. Deere Withheld Material Information.

The language in Deere's Disclosure Schedules was adapted from language in an internal Deere memorandum that discussed the scope of resistance to wind farms in Lenawee County ("Duimering Memo"). As explained in Exelon's Opening Brief, EOB 41-43, Deere cherry-picked language from the Duimering Memo when crafting its Disclosure Schedules, retaining language that downplayed the severity of the resistance in Lenawee County while dropping language that provided critical on-the-ground details regarding the scope of the developing problem. The final version of Deere's Disclosure Schedules omitted material information suggesting that there was "organized resistance" in Lenawee County and that the vice chair of the local planning commission was "actively working with the opponents" of the Blissfield Project, even though that information had

been contained in the Duimering Memo. A287. *Compare* A454, § 4.11(c)(iv) (Disclosure Schedule), *with* A287 (Duimering Memo).

Deere does not dispute the fact that it omitted information from the Duimering Memo. Instead, Deere argues that this information was not technically "concealed" from Exelon because Deere's financial advisor sent the Duimering Memo to a few Exelon employees in an attachment to an email. DOB 51; *see* B115.

Both parties in this case are sophisticated commercial actors who understand that, in complex transactions like the one at issue here, the representations that actually appear in the deal documents are of paramount importance. As Chief Justice Strine has recognized, the text of a "Purchase Agreement serve[s] an important risk allocation function" by formally memorializing the parties' understanding of their agreement. *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *28 (Del. Ch. July 20, 2007), *judgment aff'd*, 945 A.2d 594 (Del. 2008) (unpublished table decision). Reducing the terms of an agreement to paper creates efficiency gains by enabling the parties to assess potential risks and liabilities based on objective, written warranties. It therefore comes as no surprise that Exelon and Deere expressly agreed that the warranties within the four corners of the Purchase Agreement would be enforceable even if, at

the time of contracting, one party possessed information suggesting that the other party had breached those warranties. Section 9.9 of the Purchase Agreement provides:

> The representations, warranties, covenants and agreements made herein . . . are intended among other things to allocate the economic cost and the risks inherent in the transactions contemplated hereby between the parties, and, accordingly, a party shall be entitled to the . . . remedies provided in this Agreement by reason of any breach of any such representation, warranty, covenant, or agreement by another party ***notwithstanding whether any employee, representative or agent of the party seeking to enforce a remedy knew or had reason to know of such breach.***

A380, § 9.9(a) (emphasis added). Thus, even if certain personnel at Exelon may have seen the Duimering Memo prior to the execution of the Purchase Agreement, that would not prevent Exelon from recovering. The fact of the matter is that Deere's disclosures regarding the permits for the Blissfield Project were incomplete and misleading. Whether some employees at Exelon knew that the disclosures were incomplete and misleading is legally irrelevant. Phrased differently, Deere cannot escape liability for providing misleading information in the formal Disclosure Schedules simply by pointing out that additional information was provided to a few Exelon employees through informal means.

Under Delaware law, Deere would be liable for breaching the Purchase Agreement even if Exelon knew at the time the Agreement was executed that Deere's representations were incomplete and misleading. Indeed,

> the extent or quality of [a party's] due diligence is not relevant to the determination of whether [the other party] breached its representations and warranties in the Agreement. ***To the extent [that a party] warranted a fact or circumstance to be true in the Agreement, [the other party was] entitled to rely upon the accuracy of the representation irregardless of what [its] due diligence may have . . . revealed.***

Interim Healthcare, Inc. v. Spherion Corp., 884 A.2d 513, 548 (Del. Super. Ct.), *judgment aff'd*, 886 A.2d 1278 (Del. 2005) (emphasis added). Delaware courts have clearly and repeatedly held that a "breach of contract claim is not dependent on a showing of justifiable reliance." *Cobalt Operating*, 2007 WL 2142926, at *28; *see Interim Healthcare*, 884 A.2d at 548; *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 127 (Del. Ch. 2003) (noting that it is "simply incorrect" that reliance is an element of breach of contract in Delaware). As Chief Justice Strine has explained, the cause of action for breach of contract does not include a reliance element because "[d]ue diligence is expensive and parties to contracts in the mergers and acquisitions arena often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business." *Cobalt Operating*, 2007 WL 2142926, at *28.

Deere's argument boil downs to the premise that it should be excused for making misleading warranties because certain Exelon employees knew or should have known that they were misleading. That is not the law. Exelon is entitled to recover because Deere made misleading representations; what Exelon knew about the extent of these breaches at the time the Purchase Agreement was executed is legally irrelevant.

C. Exelon Is Entitled to Recoupment.

Deere's final argument is that Exelon is not eligible for recoupment because Section 2.6(b) of the Purchase Agreement placed the burden for developing the Blissfield Project (including all unforeseen costs) on Exelon. DOB at 53; *see* A319, § 2.6(b). But Deere yet again obfuscates the fact that Exelon did not get the benefit of its bargain. Due to Deere's misleading warranties, Exelon was forced to buy Beebe in order to make use of the PPA that it had purchased from Deere. At the time of contracting, Exelon did not realize that it would have to spend $10.3 million on another wind project in order to use the PPA. Deere should not be heard to rely on contract language specifying that any post-closing costs would be borne by Exelon, given that Exelon never would have needed to pay those costs had Deere upheld its part of the bargain.

III. ARGUMENT IN ANSWER TO CROSS-APPEAL: DEERE IS NOT ENTITLED TO ATTORNEYS' FEES AND COSTS.

A. Question Presented

Did the Superior Court correctly hold that Deere is not entitled to attorneys' fees and costs? *See* DOB Ex. B at 1-4.[9]

B. Scope of Review

"This Court reviews the award or denial of attorneys' fees under exceptions to the American Rule for abuse of discretion." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005). "[T]he Superior Court's formulation of the appropriate legal standard" is reviewed *de novo. Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

C. Merits of Argument

This Court has indicated that "Delaware follows the 'American Rule,' which provides that each party is generally expected to pay its own attorneys' fees regardless of the outcome of the litigation." *Shawe v. Elting*, __ A.3d __ , 2017 WL 563180, at *5 (Del. Feb. 13, 2017). Delaware courts will "permit[] parties to

[9] Exelon does not dispute that Deere would be entitled to post-judgment interest in the event that this Court decides that Deere is entitled to the Earn Out. In the Superior Court, Deere argued that interest began accruing on June 11, 2012. Exelon argued—and the Superior Court found, see DOB Ex. B at 6—that interest began accruing on December 18, 2012. Deere does not challenge that finding in its Opening Brief on Cross-Appeal, and thus Deere has waived any argument that interest began accruing on June 11, 2012. Sup. Ct. R. 14(b)(vi)(A)(3).

avoid the American rule and to recover attorneys' fees from one another only when a statute or contract so provides." *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *1 (Del. Super. Ct. Mar. 29, 2012). As Deere concedes, DOB at 57-58, Delaware law presumes that each party shall bear its own fees and costs unless an agreement between the parties demonstrates a "clear and unequivocal" intent to displace that default rule. *TranSched*, 2012 WL 1415466, at *2; *see Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *44 (Del. Ch. May 13, 2013).

Deere contends that Section 9.2 of the Purchase Agreement evinces clear intent to depart from the American Rule. DOB 58; A376, § 9.2(a). The Superior Court correctly held that Section 9.2 evinces no such intent. DOB Ex. B at 1-4.

Section 9.2 of the Purchase Agreement is an indemnification provision that applies to third-party claims, not a fee-shifting provision that applies to first-party *inter se* claims. Section 9.2 provides that:

> [Exelon] shall ***indemnify, defend and hold harmless*** [Deere] and each is its Affiliates . . . from and against and all Losses incurred by any [Deere] Indemnified Party by reason of, arising out of, resulting from or relating to . . . any breach or nonperformance of any of the covenants or agreements of [Exelon] contained in this Agreement.

A376, § 9.2(a) (emphasis added). As an initial matter, the Superior Court correctly found that there is no express language in this Section providing that the losing

party must pay the prevailing party's attorneys' fees in the event of *inter se* litigation. DOB Ex. B at 3. In the absence of such language, there is no "clear and unequivocal" intent that such attorneys' fees will be covered. Under Delaware law, that should be the end of this dispute.

Deere nonetheless offers various creative readings of the Purchase Agreement in an attempt to bolster its contention that Exelon must pay Deere's attorneys' fees. But interpreting the Purchase Agreement's boilerplate indemnification provision in that manner would upset the longstanding presumption that standard indemnity clauses do not apply to *inter se* claims. As Chief Justice Strine has explained, such an outcome would allow boilerplate indemnity provisions to "swallow the American Rule." *Senior Housing*, 2013 WL 1955012, at *44.

The key language in Section 9.2 of the Purchase Agreement—"indemnify, defend and hold harmless"—contemplates third-party claims in which Deere suffers some loss as a result of litigation initiated by someone other than Exelon. A376, § 9.2(a). Indeed, the quoted language makes no sense in the context of *inter se* litigation between Exelon and Deere: Exelon could not "defend" Deere in a claim that Deere brings against Exelon, as Exelon itself would be the adverse party. *See Pinkert v. John J. Olivieri, P.A.*, 2001 WL 641737, at *6 (D. Del. May

24, 2001) (noting that defendants "cannot agree to 'defend, indemnify and hold [plaintiffs] harmless' from a lawsuit filed against the . . . defendants by plaintiffs themselves" (quoting contract)); *see also Canopy Corp. v. Symantec Corp.*, 395 F. Supp. 2d 1103, 1115 (D. Utah 2005) ("The use of the word 'defend' indicates that the parties intended the provision to apply only to third-party claims because the word would have no effect in a direct action between the parties. Obviously, in a direct action between the parties, neither party would be interested in . . . being defended by the other party.").

The phrase "indemnify, defend and hold harmless" is boilerplate language, and numerous Delaware courts have interpreted this exact phrase to bar the *inter se* recovery that Deere now seeks. *See, e.g.*, *Data Ctrs., LLC v. 1743 Holdings LLC*, 2015 WL 9464503, at *6 (Del. Super. Ct. Oct. 27, 2015) (interpreting contract language providing that appellant "indemnify, defend and hold harmless" appellee as "applying to third party claims only"); *Senior Housing*, 2013 WL 1955012, at *44-45 (interpreting language requiring project owners to "indemnify Manager . . . from, and defend [it] and hold [it] harmless" not to "cover[] fee-shifting" in *inter se* litigation (internal quotation marks omitted)); *TranSched*, 2012 WL 1415466, at *3 (interpreting language requiring Versyss to "indemnify and hold harmless [TranSched]" as evincing no clear intent to have "the indemnitor to pay the

indemnitee's attorneys' fees in the event of *inter se* litigation" (internal quotation marks omitted)); *St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 WL 139775, at *7 (Del. Super. Ct. Jan. 17, 2003) (similar); *see also Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165-66 & n.2 (Del. 1978) (similar).

The United States District Court for the District of Delaware has interpreted the phrase "indemnify, defend and hold harmless" in precisely the same way. *See, e.g.*, *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1134, 1143 (D. Del. 1996) (interpreting language requiring the purchaser to "indemnify, defend, and hold harmless" the seller as having been "intended to recompense [seller] for attorney's fees in actions brought by third parties"); *Pinkert*, 2001 WL 641737, at *6 (interpreting language requiring contractor to "'defend, indemnify, and hold Owner harmless'" as functioning solely to "protect plaintiffs from liability if they are sued by a third party" (quoting contract)); *see also Chase Manhattan Mortg. Corp. v. Advanta Corp.*, 2005 WL 2234608, at *22 (D. Del. Sept. 8, 2005) (similar).

Notwithstanding the deluge of precedents interpreting the exact language present in the Purchase Agreement not to apply to *inter se* claims, Deere contends that it is "beyond question" that Section 9.2 of the Purchase Agreement *does* apply

to first-party claims. DOB 58. Tellingly, Deere can marshal only a single unpublished case to support its reading of Section 9.2: *Henkel Corp. v. Innovative Brand Holdings, LLC*, 2013 WL 396245 (Del. Ch. Jan. 21, 2013). But even that reliance is misplaced, because *Henkel* did not analyze the question presented in this case. The indemnification clause at issue in *Henkel* required appellee to indemnify appellant and "hold [appellant] harmless." *Id.* at *3. Although the Court held that this language entitled appellant to recover its litigation costs, *id.* at *4, Innovative Brand apparently did not argue to the Superior Court that the phrase "indemnify and hold harmless" was limited to third-party claims. It is therefore unsurprising that the *Henkel* opinion did not cite (much less distinguish) any of the cases above—*TranSched*, *Elkay Manufacturing*, *DRR*, *Chase Manhattan*, or *Pinkert*. Moreover, *Henkel*'s holding regarding attorneys' fees has never been cited with approval by any court in any jurisdiction.

A close reading of the entire Purchase Agreement reveals that Deere's interpretation of the indemnification provision cannot be correct. In multiple Sections of the Purchase Agreement, the parties created true fee-shifting provisions by including express language providing that certain costs would be paid by the party that "is not the prevailing party." A318, § 2.5(d). For example, Section 2.5 provides procedures for resolving disputes concerning post-closing purchase price

adjustments. A318, § 2.5(d). That Section notes that, in the event that Deere objected to the price figures provided by Exelon, the parties could submit their dispute to an Auditor for resolution. According to the Purchase Agreement, "[t]he fees, costs, and expenses of the Auditor . . . shall be borne by the party which, in the conclusive judgment of the Auditor, ***is not the prevailing party***." A318, § 2.5(d) (emphasis added). Section 2.6 of the Purchase Agreement contains a similar fee-shifting agreement. That Section provides that, if the parties disputed whether the Milestones triggering the Earn Outs had been met with respect to a particular project, they could submit that dispute to the an Independent Engineer for resolution. A320, § 2.6(c). Section 2.6 provides that "[t]he fees, costs and expenses of the Independent Engineer . . . shall be borne by the party which, in the conclusive judgment of the Independent Engineer, ***is not the prevailing party***." A320, § 2.6(c) (emphasis added).

The phrase "prevailing party" is a "hallmark term of fee-shifting provisions." *TranSched*, 2012 WL 1415466, at *3 (internal quotation marks omitted). This "hallmark term" appears in both Sections 2.5 and 2.6 of the Purchase Agreement, demonstrating that the parties knew how to write *inter se* fee-shifting provisions. But the phrase "prevailing party" is conspicuously absent from the indemnification provision in Section 9.2. The fact that the parties chose to

include "prevailing party" language in Sections 2.5 and 2.6 but not in Section 9.2 conclusively establishes that Section 9.2 was not intended to function as a fee-shifting provision in *inter se* litigation. Indeed, under the canon of *expressio unius est exclusio alterius*, the fact that certain words are used in one provision of a contract but yet are excluded from another provision of the same contract implies that the parties did not intend those words to apply where they are absent. *See iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257, at *6 & n.59 (Del. Ch. July 29, 2016). Thus, as the Superior Court explained, "the parties' use of specific fee-shifting language in Section 2.6(c) and Section 2.5(d) of the Purchase Agreement, and their failure to include such language in Section 9.2 of the Purchase Agreement, indicates a lack of intent to create a clear and unequivocal agreement to shift fees in first-party actions." DOB Ex. B at 4.[10]

[10] If Deere's interpretation of the Purchase Agreement were credited, Section 9.2 would operate as a unilateral fee-shifting provision. For example, suppose that the Superior Court had concluded that Deere is not entitled to the Earn Out. In such a case, Exelon would be the prevailing party but yet Exelon would not be able to recover its attorneys' fees under Section 9.1 because Deere would not have breached any representation or warranty. A374-A375, § 9.1(a). Deere's strained reading of the Purchase Agreement creates a heads-I-win, tails-you-lose scenario in which Deere alone could benefit from fee-shifting. Deere fails to explain why the parties would have intended to create a unilateral fee-shifting provision. The most logical answer is that the parties intended no such thing—instead, each party was to bear its own costs.

In an attempt to wriggle free from the precedents cited above, Deere emphasizes certain language in the Purchase Agreement's definition of the term "Losses." The Purchase Agreement provides that "[Exelon] shall indemnify, defend and hold harmless [Deere] and each is its affiliates . . . from and against and all Losses." A376, § 9.2(a). The word "Losses" is in turn defined to

> mean[] and include[] any and all losses, liabilities, demands, claims, actions, causes of action, costs, obligations, damages, deficiencies, Taxes, penalties, fines or expenses, whether or not arising out of third party claims, including interests, penalties, reasonable attorneys' fees and expenses, court costs and all amounts paid in investigation, remediation, correcting a condition of noncompliance, defense or settlement of any of the foregoing.

A309, § 1.1. According to Deere, the language "whether or not arising out of third party claims" suggests that this indemnification provision was intended to apply to *inter se* claims for attorneys' fees. DOB 57-58.

Deere's argument might make sense if the indemnification provision were the only provision of the Purchase Agreement that used the term "Losses." But that is not the case. In various other Sections, the Purchase Agreement uses the term "Losses" to refer to costs that might be incurred during *inter se* litigation. For example, Section 4.12 of the Purchase Agreement provides that Deere had no knowledge of any environmental hazards that might "reasonably be expected to

result in material Losses." A338, § 4.12(a)(vii). As applied to section 4.12, the phrase "whether or not arising out of third party claims" makes sense.

But the key difference between Section 4.12 and Section 9.2 is that Section 9.2 imposes ***two*** requirements before a party can recover attorney's fees. First, the party must have incurred "Losses." A309, § 1.1. Second, those losses must derive from claims against Deere for which Exelon could "indemnify, defend, and hold [Deere] harmless." A376, § 9.2(a). In this case, Deere has not satisfied the second of these two conditions. Put differently, Exelon does not dispute that the definition of "Losses" can be read to cover *inter se* attorney's fees in the context of some provisions of the Purchase Agreement. But Exelon *does* dispute that the language of Section 9.2 is one of those provisions. As discussed above, it would make no sense for Exelon to "defend" Deere in a case in which Deere had sued Exelon. Deere's attempt to paper over the actual language of Section 9.2 and instead emphasize the language of the "Losses" definition is therefore unavailing.

Deere also argues that several provisions of Article IX support its contention that the indemnification provision was intended to apply to first-party claims. DOB at 60-61. For example, Deere suggests that Section 9.2 must be intended to capture *inter se* claims because third-party claims are addressed at length in Section 9.5. DOB 59; *see* A378-A380, § 9.5. This argument is a non sequitur.

The fact that Section 9.5 provides additional details regarding the procedures for third-party claims does not speak to the question of whether Section 9.2 allows for *inter se* claims.[11] Deere next reads Section 9.7—which it represents as stating that "there can be no punitive damages recoverable between the parties"—as making "clear that the indemnification provisions in Section 9.2 apply to both first-party litigation and third-party claims." DOB at 60. As an initial matter, Section 9.7 does not say that "there can be no punitive damages recoverable between the parties," DOB at 60; it actually says that "neither party hereto shall be liable to . . . *any Indemnified Party* for punitive damages." A380, § 9.7 (emphasis added). In any event, the fact that punitive damages are not recoverable under the contract is utterly irrelevant to the question of whether attorneys' fees are recoverable. Finally, Deere argues that it is entitled to indemnification because "Section 9.9 does not limit . . . indemnification solely to third-party claims arising from [a] breach." DOB at 61; *see* A380, § 9.9. Deere's argument here is that, because Section 9.9 is silent on the question of whether indemnification is permitted for first-party claims, it must be the case that such indemnification is permitted. This approach turns Delaware law on its head. It should go without saying that silence

[11] Deere's argument relating to Section 9.6 fails for a similar reason. DOB at 60; *see* A380, § 9.6. The fact that Article XI provides the exclusive remedy for breaches between the parties does not speak to the question of whether attorneys' fees are recoverable.

is insufficient to establish that the parties had a "clear and unequivocal intent" to depart from the American Rule.

* * *

Even if this Court does find some of Deere's arguments persuasive, those arguments would do little more than introduce an ambiguity into the language of Section 9.2. But the question in this case is not whether Section 9.2 might plausibly be interpreted as a fee-shifting agreement applicable to *inter se* litigation, but rather whether that Section evinces a "clear and unequivocal" intent to displace the American Rule. The fact that nearly a dozen Delaware opinions have interpreted identical language not to apply to *inter se* claims is sufficient to establish that this language does not show any such intent. Thus, the Superior Court's decision should be affirmed.

CONCLUSION

For the reasons explained above, Exelon respectfully requests that this Court reverse the Superior Court's determination that Deere is entitled to the Earn Out. If this Court affirms that determination, Exelon respectfully requests that this Court (1) reverse the Superior Court's determination that Exelon is not entitled to recoupment and (2) affirm the Superior Court's determination that Deere is not entitled to attorneys' fees and costs.

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