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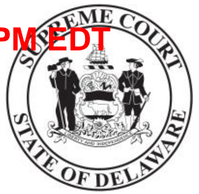

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXELON GENERATION ACQUISITIONS, LLC, a Delaware limited liability company, Defendant Below, Appellant / Cross-Appellee, v. DEERE & COMPANY, a Delaware corporation, Plaintiff Below, Appellee / Cross-Appellant.	No. 28, 2017 Case Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13C-07-330 MMJ CCLD

PLAINTIFF BELOW, CROSS APPELLANT'S
<u>REPLY BRIEF ON CROSS APPEAL</u>

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ARGUMENT

I. DEERE IS ENTITLED TO AN AWARD OF FEES AND EXPENSES INCURRED IN THIS LITIGATION.

"Each [indemnification] provision is unique and must be decided under the facts of that particular case." *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *2 (Del. Super. Ct.). "No specific language…must be used in order for an indemnity provision to provide for recovery in first-party actions." Fee Op. 4 (citing *TranSched*, 2012 WL 1415466, at *2).

Exelon does not want this Court to consider the unique and specific language of Article IX of the Purchase Agreement. Rather, in arguing that Deere is not entitled to its reasonable fees and expenses incurred in this litigation, Exelon attempts to lump the indemnification provision at issue here with indemnification provisions analyzed in other cases. But the indemnification provision in the Purchase Agreement is not the same as the indemnification provisions in the decisions upon which Exelon relies. The indemnification provision in the Purchase Agreement is different; it contains distinct sections and uses the defined term "Losses," which Exelon concedes can cover *inter se* attorneys' fees. Exelon's Answering Brief on Cross-Appeal ("EAB") at 42. Exelon's concession is not surprising given the plain language of the defined term "Losses." The term "Losses" includes "***any and all losses***…***whether or not arising out of third party claims***, including…reasonable attorneys' fees and expenses…." A309 (defined term "Losses") (emphasis added).

The emphasized language is key, as it makes clear that "Losses" covers any and all losses and includes reasonable attorneys' fees and expenses arising out of first-party claims. Deere respectfully submits that the Superior Court erred by failing to address the defined term "Losses" and other provisions in Article IX of the Purchase Agreement in its opinion below. For these reasons and as set forth in more detail below, the Superior Court's ruling on Deere's application for fees and expenses should be reversed.

1. Exelon's Blanket Reliance On A Boilerplate Phrase Ignores The Key Terms Of Article IX.

Exelon's principal argument is that the boilerplate phrase "indemnify, defend, and hold harmless" in Section 9.2 requires the Court to find that Section 9.2 (and, in fact, all of Article IX) applies only to third-party claims. *See* EAB 36-37. While "indemnify, defend, and hold harmless" is a boilerplate phrase, Article IX as a whole is not boilerplate. The Court should reject Exelon's plea to have this Court focus on a single boilerplate phrase instead of reviewing the plain language of multiple sections in Article IX. As explained in Deere's opening brief on this issue, Article IX contains various terms that make it fundamentally different from the indemnification provisions in the decisions on which Exelon relies and that make clear Deere is entitled to its fees and expenses incurred in this litigation.

a. The Defined Term "Losses"

Exelon does not dispute that the term "Losses" includes "***any and all losses***…***whether or not arising out of third party claims***, including…reasonable attorneys' fees and expenses…." A309 (defined term "Losses"). Indeed, Exelon concedes that "the definition of 'Losses' can be read to cover *inter se* attorneys' fees in the context of some provisions of the Purchase Agreement" but then maintains that Section 9.2 is not one of those provisions. EAB 42. But there is no limitation on, qualification, or revision to the defined term "Losses" for purposes of Section 9.2 anywhere in the Purchase Agreement. Simply put, Losses, as used in Section 9.2 and in any other section of the Purchase Agreement, means attorneys' fees and other expenses "whether or not arising out of third party claims." Exelon's selective application of when "Losses" covers fees in *inter se* litigation does not account for the key language "whether or not arising out of third-party claims."

With no limitation or qualification on the term "Losses," Exelon attempts to avoid its obligation under Section 9.2 by relying on the boilerplate "indemnify, defend, and hold harmless" language, saying that it imposes a second requirement before Deere can recover it's attorneys' fees. EAB 42. Exelon's argument fails for at least two reasons.

First, Exelon's obligation under the Purchase Agreement is to "indemnify, defend, and hold [Deere] harmless" from "any and all losses…***whether or not***

arising out of third party claims, including…reasonable attorneys' fees and expenses…." This language does not state that the losses must derive only from third-party claims, as Exelon suggests. EAB 41-42. Rather, this language obligates Exelon to "indemnify, defend, and hold [Deere] harmless" regardless of whether the claim is a first-party claim or a third-party claim.

Second, Exelon relies too much on the boilerplate term "defend." In the Delaware state decisions that Exelon cites, the courts do not hold that the term "defend" imposes a bright-line rule that attorneys' fees cannot be recovered in first-party litigation. Rather, the courts look to all of the language in the indemnification provision to determine its scope. *See, e.g.*, *Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC*, 2013 WL 1955012, at *45 (Del. Ch.) (declining to extend an indemnification provision to first-party claims not because of the phrase "indemnify…, defend [ ], and hold [ ] harmless" in the indemnification provision but because there was not specific language in the indemnification provision that made it applicable to first-party claims)[1]; *Data Centers, LLC v. 1743 Holdings LLC*, 2015 WL 9464503, at *6 (Del. Super. Ct.) (suggesting that despite the "indemnify, defend,

[1] Exelon cites to *Senior Housing Capital* for the proposition that "boilerplate indemnity provisions [would] 'swallow the American Rule'" if permitted to apply to *inter se* litigation. EAB 35. Article IX is far from a boilerplate indemnification provision, and awarding Deere its fees and expenses under this particular indemnification provision would not "swallow the American Rule" as Exelon suggests.

and hold harmless" phrase, other language could evidence an intent to extend the indemnification provision to first-party claims but finding no such language in the relevant provision); *see also TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *2 (Del. Super. Ct.) (no bright-line language).[2] And as none of the indemnification provisions in any of the decisions cited by Exelon have the express language that Losses are recoverable "whether or not arising out of third party claims" (or the other provisions of Article IX described below), none of those decisions (state or federal) are dispositive. *See TranSched*, 2012 WL 1415466, at *2 ("Each [indemnification] provision is unique and must be decided under the facts of that particular case.").[3]

In any event, the Superior Court has found an indemnification provision that contains the language "hold harmless, indemnify and defend" to cover attorneys' fees and expenses in first-party litigation. In *Harmony Mill Limited*

[2] The indemnification provisions at issue in the two other Delaware state decisions cited by Exelon (*Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160 (Del. 1978) and *St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 WL 139775 (Del. Super. Ct.)) are common in contractor/sub-contractor agreements and understood in that industry to apply to third-party claims only. *Oliver B. Cannon & Son, Inc.*, 394 A.2d at 1165 (finding that the indemnity clause "is a kind commonly found in construction contracts and is intended to protect the general contractor (and owner) from suits brought by third parties ...."); *St. Paul*, 2003 WL 139775, at *7 (same). That is not the case with the Purchase Agreement, which governed Exelon's purchase of Deere's wind assets.

[3] Exelon's suggestion that "a dozen Delaware opinions have interpreted ***identical*** language" (EAB 44) is highly inaccurate.

Partnership v. Magness, plaintiff brought breach of warranty claims under a sale agreement with defendants. The sale agreement included an indemnification provision that obligated defendants to "hold harmless, indemnify and defend" plaintiff against certain losses and damages, including reasonable attorneys' fees. *Id.*, 1990 WL 58149, at *2 (setting forth the full indemnification provision). The Superior Court found that plaintiff's "right to indemnification under the contract extends to 'all costs and expenses incurred prior to sellers cure thereof, including reasonable attorneys' fees related to any actions, suits or judgments incident to any of the foregoing.'" *Id.* at *6. The Superior Court therefore awarded plaintiff its reasonable attorneys' fees. *Id.*

b. Other Sections Of Article IX

As explained in Deere's opening brief on cross-appeal (DOB 60-61), other provisions in Article IX reinforce the conclusion that Section 9.2 covers both first-party and third-party claims. Exelon's attempts to dismiss these other sections of Article IX are unavailing:

- Section 9.5 of the Purchase Agreement—entitled "Third-Party Claims"—directly addresses the procedure for seeking indemnification for third-party claims. A378-79. Exelon suggests that "[t]he fact that Section 9.5 provides additional details regarding the procedures for third-party claims" is irrelevant. EAB 43. But Section 9.5 does not provide "additional details," it provides the only details

about procedures for third-party claims. Those details are ***not*** included in Section 9.2, making clear that Section 9.2 applies to both *inter se* litigation and third-party claims. Moreover, Section 9.5 refers to actions "commenced by a third party," which would be unnecessary language if Article IX covered only third-party claims.

- Section 9.6 states that Article IX is the sole and exclusive remedy between Deere and Exelon. Exelon attempts to dismiss the relevance of Section 9.6 with a footnote arguing that "[t]he fact that Article XI [sic] provides the exclusive remedy for breaches between the parties does not speak to the question of whether attorneys' fees are recoverable." EAB at 43 n.11. But that is precisely the question to which Section 9.6 speaks. *See Column Form Tech., Inc. v. Caraustar Indus., Inc.*, 2014 WL 2895507, at *8 (Del. Super. Ct.) (noting that the indemnification provision in *Henkel* applied to inter-party litigation because the agreement expressly provided that the indemnification provision was the parties' sole and exclusive remedy against one another).

- Section 9.7 states,

> **No Punitive Damages**. Notwithstanding anything to the contrary contained herein, neither party hereto shall be liable to or otherwise responsible to any Indemnified Party for punitive damages (other than punitive damages awarded to a third party pursuant to a third party claim) that arise out of or relate to this Agreement or the performance or breach hereof or any liability assumed hereunder.

A380. An "Indemnified Party" under the Purchase Agreement includes Exelon, Deere, and their respective affiliates, directors, managers, officers, and others. A308

("Indemnified Party"), A374 ("Buyer Indemnified Parties"), A376 ("Seller Indemnified Parties"). Thus, Section 9.7 provides that Deere and Exelon cannot recover punitive damages from each other except for punitive damages awarded to a third party pursuant to a third party claim. The third-party carve-out would be unnecessary if Article IX covered only third-party claims. It does not. Article IX (including Section 9.2) covers claims between Deere and Exelon.

- Section 9.9 addresses risk allocation amongst the parties and explicitly states that the indemnification provisions were intended to allocate the economic costs and risks of the transaction and that "a party shall be entitled to the indemnification or other remedies provided in this Agreement by reason of any breach of any such representation, warranty, covenant or agreement by another party." Section 9.9 does not limit the indemnification solely to third-party claims arising from any such breach. Exelon claims that such silence is irrelevant. EAB 43-44. But faced with the entirety of Article IX, as described above, Section 9.9 is just further evidence (albeit not necessary) that Article IX (including Section 9.2) applies to first-party and third-party claims.[4]

[4] Exelon suggests that Section 9.2 could not cover first-party claims because it would be a unilateral fee-shifting provision. EAB 40 n.10. Section 9.2 is not unilateral. It mirrors the indemnification provided by Deere to Exelon in Section 9.1. But in any event, Exelon appears to impose a mutuality requirement on Article IX for it to cover first-party claims. Exelon cites no case law in support of that argument, and not a single decision relied on by Exelon discusses or requires Exelon's "mutuality" condition. The decisions cited by Deere where the Court has found an

Finally, Exelon's reliance on the "prevailing party" language in Sections 2.5(d) and 2.6(c) is misplaced. There is no requirement that Section 9.2 of the Purchase Agreement use the term "prevailing party" for this Court to find that Section 9.2 covers Deere's reasonable attorneys' fees in this litigation. *TranSched*, 2012 WL 1415466, at *2 ("[T]here is no definitive language that must be used or phrases that have been routinely held to allow for such recovery in first-party actions."). Moreover, as explained in Deere's opening brief, the "prevailing party" language used in Sections 2.5(d) and 2.6(c) addresses an altogether different circumstance. A318-20, §§2.5(d), 2.6(c). Neither Section 2.5(d) nor 2.6(c) contemplated "Losses" or even the use of attorneys. Those sections address only the allocation of fees for a third-party auditor or engineer to decide a dispute between the parties over the Closing New Working Capital or Completion of Development and Commencement of Construction. Neither contemplate "Losses" absent a breach of the Purchase Agreement, which would require the parties to comply with Article IX as the sole and exclusive remedy between Deere and Exelon pursuant to Section 9.6. Section 9.2, on the other hand, addresses the separate subject of

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indemnification provision covers reasonable attorneys' fees in *inter se* litigation have not imposed a "mutuality" requirement. *See Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245, at *3 (Del. Ch.); *Harmony Mill*, 1990 WL 58149, at *6. Exelon's made-up "mutuality" requirement should not be used to rewrite the terms of the Purchase Agreement and deprive Deere of the indemnification to which it is entitled.

indemnification, and plainly addresses making the non-breaching party whole for all "Losses" incurred as a result of non-performance by the breaching party.

CONCLUSION

Article IX of the Purchase Agreement covers indemnification for first-party litigation and third-party claims, and Section 9.2 specifically entitles Deere to indemnification for its reasonable attorneys' fees and other expenses incurred in connection with this litigation. Thus, Deere respectfully requests that this Court reverse the Superior Court's ruling with respect to Deere's application for fees and expenses, as set forth in the Fee Opinion and paragraph 3(b) of the Final Judgment, and require Exelon to pay such fees and expenses in accordance with Article IX.

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