IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ENERGY FUTURE HOLDINGS CORP., *et al.*,	:	Case No. 14-10979 (CSS)
Debtors.	:	(Jointly Administered)
ENERGY FUTURE HOLDINGS CORP.,	:	Adv. Pro. No. 15-51386 (CSS)
Plaintiff,	:	
v.	:	
TEXAS TRANSMISSION INVESTMENT LLC,	:	
Defendant.	:	

TEXAS TRANSMISSION INVESTMENT LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Texas Transmission Investment LLC ("TTI") respectfully submits this memorandum of law in support of its motion to dismiss the Adversary Complaint (the "Complaint") in this action pursuant to Bankruptcy Rule 7012(b)(6).

PRELIMINARY STATEMENT[1]

Plaintiff Energy Future Holdings Corp. ("EFH") is a debtor seeking bankruptcy reorganization in this Court pursuant to Chapter 11 of the United States Bankruptcy Code. It also is the ultimate parent company of Oncor Electric Delivery Holdings LLC ("Oncor Holdings"), which owns 80.03% of the equity interests in non-debtor Oncor Electric Delivery Company LLC ("Oncor"). Oncor is an electric utility that serves customers in Texas.

Defendant TTI is a company created in 2008 by affiliates of OMERS Administration Corporation and GIC Special Investments Pte. Ltd. for the specific purpose of making a long-term investment for 19.75% of Oncor's equity interests.

In this action, EFH seeks to compel TTI to sell its Oncor equity interests to Ovation Acquisition I, L.L.C. ("OV1"), a non-debtor that plans to merge with EFH. EFH asserts that it may compel TTI to sell those Oncor equity interests pursuant to a "drag" provision in Oncor's Investor Rights Agreement ("IRA"). EFH further seeks to compel TTI's cooperation in OV1's subsequent planned initial public offering, which EFH contends is an "IPO Conversion" as defined in the IRA.

The IRA's drag provision is triggered and TTI can be forced to sell its Oncor equity interests ***only*** under the following circumstances, ***all of which must be met***: (i) receipt of a valid offer to purchase one of two types of Oncor equity interests – Oncor

[1] TTI does not consent to entry of final judgments and orders in this proceeding and disputes that this is a "core" proceeding. See Del. Bankr. L.R. 7012-1.

LLC Units or "IPO Units" (together defined in the IRA as "Drag Units"); (ii) payment to each Oncor Member (TTI and Oncor Holdings) of the same type and amount of consideration, at the same time, for their Oncor LLC Units or IPO Units; and (iii) a resulting "Change of Control" at Oncor. The Complaint does not and cannot allege facts sufficient to satisfy any – let alone all three – of the prerequisites to a drag right under the IRA.

First, Drag Units are not being sold. Currently, Oncor Holdings owns the controlling share of Oncor LLC Units. OV1 has not offered to purchase, and Oncor Holdings is not proposing to sell, any of those Oncor LLC Units. Therefore, no drag right based upon an offer to purchase such units has been triggered. Nor has OV1 offered to purchase the only other security that could trigger a drag sale – IPO Units, which units do not currently exist and will not be created in any of the contemplated transactions.

For IPO Units as defined in the IRA to exist, there must first be a valid "IPO Conversion." An IPO Conversion would require, among other things, that each Oncor Member receive stock in the "IPO Corporation" in exchange for its Oncor LLC Units, together with substantially equivalent governance and other rights to those the Oncor Member had with respect to its Oncor LLC Units. EFH and OV1 have not provided for Oncor Holdings or TTI to convert ***any*** Oncor LLC Units to IPO Units, much less to receive substantially equivalent economic and governance rights in that company – and they have no intention of doing so. Therefore, under OV1's offer, there will never be any IPO Units. Consequently, EFH has not received an offer to purchase a controlling number of Drag Units and cannot compel TTI to sell its minority equity interest in Oncor.

Second, TTI is being treated differently than the other Oncor Member, Oncor Holdings. Under the IRA, TTI may only be compelled to sell its minority interest in Oncor's equity if "each of the Members shall receive the same type and amount of consideration . . . at the same time, on a per Drag Unit basis" (language EFH completely omits from the Complaint but is the very definition of a drag sale[2]). Thus, TTI's rights and obligations under the drag provision are tethered to the rights and obligations of Oncor Holdings. But Oncor Holdings is not being asked to sell – or, frankly, do anything else with – its Oncor LLC Units. Because the two Oncor Members therefore will neither sell the same equity interests nor receive the same consideration at the same time or any other time, under the express terms of the IRA, TTI cannot be compelled to sell its Oncor LLC Units.

Third, for a "Change of Control" to occur as defined in the IRA, a person unrelated to Oncor Holdings must come to own more of the equity interests in Oncor than are currently owned by Oncor Holdings and its affiliates. As discussed above, Oncor Holdings is not selling ***any*** Oncor equity and will continue to own its controlling interest in Oncor after the proposed EFH-OV1 merger. Therefore, at the Oncor level, no "Change of Control" as defined in the IRA will take place.

In sum, none of the prerequisites to the exercise of EFH's right to compel a drag sale have been satisfied or will be satisfied – and the Complaint alleges no facts to the contrary. Plaintiff's claim that TTI has beached section 3.3 of the IRA therefore fails. (Given the glaring defects of the purported drag, it is not surprising that a "Minority Buy Out" is not a condition to EFH's plan of reorganization.)

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[2] See, e.g., Drag-Along Rights, Investopedia.com, http://www.investopedia.com/terms/d/dragalongrights.asp (last visited Nov. 11, 2015).

Finally, EFH worries that TTI "may" not cooperate with OV1's proposed "IPO Conversion Plan." That plan, however, does not provide for the conversion by any Oncor Member of its Oncor LLC Units to IPO Units and therefore is not an IPO Conversion as defined in the IRA. Accordingly, TTI has no duty under section 3.7 of the IRA to cooperate. Regardless, the Complaint does not and cannot allege TTI has done anything to interfere with OV1's planned public offering. Having failed to state a claim for breach of contract, Plaintiff's request for an award of specific performance (a remedy for breach) is not warranted or permissible under applicable law.

Courts consistently require strict compliance with contractual preconditions before permitting drag rights to be triggered, and have not hesitated to refuse to enforce such rights unless the contractual prerequisites have been met to the letter. See, e.g., Halpin v. Riverstone Nat'l, Inc., C.A. No. 9796-VCG, 2015 WL 854724, at *9 (Del. Ch. Feb. 26, 2015) (holding drag provision not implicated where "[t]he Company bargained for a right it did not exercise, and not the similar right it attempted to exercise"); Dawson v. Pittco Capital Partners, L.P., C.A. No. 3148-VCN, 2012 WL 1564805, at *20 (Del. Ch. Apr. 30, 2012) (granting declaratory judgment that drag provision had not been properly invoked).

TTI specifically bargained for the right to remain in its chosen long-term investment in Oncor unless and until certain clearly identified conditions were met. Those conditions have not been met and, according to EFH and OV1's public disclosures, will never be met. Consequently, this Court should dismiss the Complaint with prejudice.

FACTUAL BACKGROUND[3]

A. Oncor's Ownership Structure

Oncor, a limited liability company, is a rate-regulated transmission and distribution utility operating in Texas.[4] Since November 5, 2008, defendant TTI has directly owned 19.75% of Oncor's LLC Units. (Compl. ¶ 28.) Plaintiff EFH owns 100% of Energy Future Intermediate Holding Company LLC ("EFIH"), which, in turn, wholly owns Oncor Holdings, which, in its turn, ultimately owns 80.03% of Oncor's LLC Units. (Id. ¶ 29.) The remaining 0.22% equity interest in Oncor is owned by members of Oncor's management team. Oncor Members' ownership interests in Oncor are represented by "LLC Units." (IRA (Compl. Ex. A.) Ex. A.) A simplified corporate structure chart is shown below:

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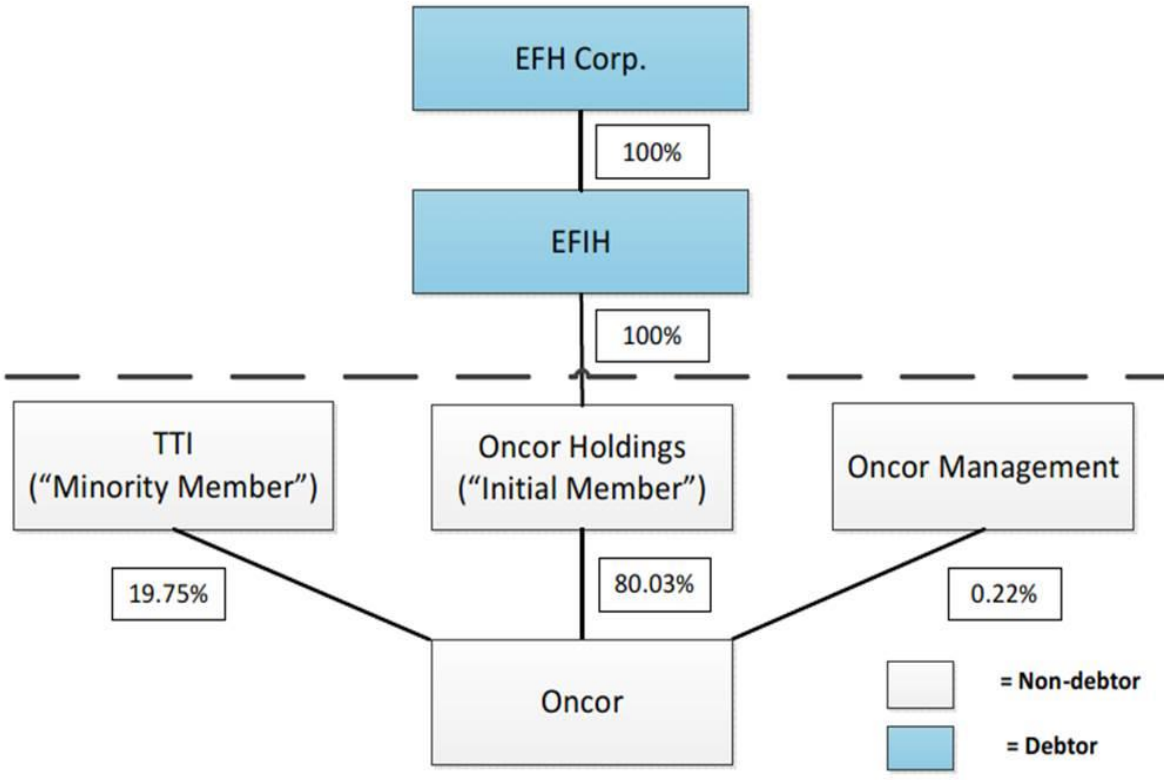
[3] The facts set forth herein are taken from the allegations of the Complaint, as supplemented by matters of public record and matters as to which the Court may take judicial notice. "[M]atters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned . . . may be considered by the district judge without converting the motion to one for summary judgment." 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 3d § 1357, at 376 (3d ed. 2004); see also Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004) (court may consider "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim").

[4] (See Disclosure Statement for the Fifth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, at 3-4, In re Energy Future Holdings Corp., No. 14-10979 (Bankr. D. Del. Sept. 21, 2015) (Docket No. 6124) (hereafter, the "Disclosure Statement"), attached to the accompanying transmittal declaration of Jason Liberi ("Trans. Decl.") as Exhibit 1.)



B. Oncor's Corporate Governance

Oncor and Oncor Holdings are "ring-fenced" from the debtors in these Chapter 11 cases. (Compl. ¶ 25.) The ring-fencing measures, expressed by a variety of "separateness undertakings" in Oncor's operating agreement, were implemented for a number of reasons, including to maintain Oncor's investment-grade credit rating. (Id. ¶ 24.)

C. Oncor's Investor Rights Agreement

Concurrent with TTI's investment in Oncor, Oncor, Plaintiff EFH, Oncor Holdings (the "Initial Member"), and TTI (the "Minority Member") entered into the IRA, dated as of November 5, 2008. (IRA (Compl. Ex. A).) Two provisions of the IRA are of

particular relevance to this proceeding: (i) the "drag" provision (section 3.3); and (ii) the "IPO Conversion" provision (section 3.7).[5]

Drag Right. Section 3.3 of the IRA provides that if EFH receives (1) an offer to purchase Oncor "LLC Units" or "IPO Units," as applicable, including such units belonging to TTI that (2) would result in a "Change of Control" of Oncor (taking into account all units being dragged), then EFH may send a "Required Sale Notice" to TTI requiring TTI to sell or otherwise transfer the same proportion of its own "Drag Units" (*i.e.*, Oncor LLC Units or IPO Units) to the proposed transferee. (IRA (Compl. Ex. A) § 3.3(a).)

The obligation of TTI to sell Drag Units pursuant to a Required Sale Notice is subject to the satisfaction of numerous conditions. For example, Section 3.3(a) of the IRA provides, in its entirety:

> Notwithstanding anything contained in this Article III to the contrary, but subject to Section 3.3(f), ***if*** (i) Parent,[6] ***EFH*** or its Subsidiaries (other than the Initial Member (or its Permitted Transferee(s)) ***receives an offer to purchase*** (an "EFH Sale Proposal") ***a number of LLC Units or IPO Units, as the case may be,*** held directly or indirectly by such entities and LLC Units or IPO Units, as the case may be, owned directly by Members other than the Initial Member (or its Permitted Transferee(s)) (the "EFH Drag Units") or (ii) if the Initial Member (or its Permitted Transferee(s)) receives an offer to purchase (an "Initial Member Sale Proposal") a number of LLC Units or IPO Units, as the case may be, including LLC Units or IPO Units, as the case may be, owned by Members other than the Initial Member (or its Permitted Transferee(s)) (the "Initial Member Drag Units" and together with the EFH Drag Units, the "Drag Units") ***such that the transaction would result in a Change of***

[5] As will be shown in the Argument section below, the IRA's "tag-along" provision (section 3.2) is also relevant to this proceeding.

[6] As defined in the IRA, "Parent" means Texas Energy Future Holdings Limited Partnership and any successor entity. (IRA (Compl. Ex. A) Ex. A.)

> ***Control***[7] (taking into account all LLC Units or IPO Units being "dragged") (each, a "Required Sale"), then EFH or the Initial Member (on its own behalf or on behalf of its Permitted Transferee(s)), as the case may be, may deliver a written notice (a "Required Sale Notice") with respect to such EFH Sale Proposal or Initial Member Sale Proposal at least twenty (20) Business Days prior to the anticipated closing date of such Required Sale to all Members (other than the Initial Member (or its Permitted Transferee(s))) requiring them to sell or otherwise Transfer their Drag Units to the proposed transferee in accordance with the provisions of this Section 3.3.

(IRA (Compl. Ex. A) § 3.3(a) (emphases added).)

> Section 3.3(d)(i) of the IRA provides:
>
> The obligations of the Members pursuant to this Section 3.3 are subject to the following conditions: (i) subject to Section 3.3(f), ***each of the Members shall receive the same type and amount of consideration*** (except in the case of a Required Sale in which the consideration received by the sellers or transferors consists of both cash and securities, to the extent that any Members other than the Minority Member and its Permitted Transferees agree to accept a disproportionate share of securities in order to allocate a greater portion of cash to the Minority Member and/or its Permitted Transferees due to restrictions described in clause (ii) immediately below on the ability of the Minority Member and/or its Permitted Transferees to hold such securities), ***at the same time, on a per Drag Unit basis***, and shall

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[7] The IRA defines "Change of Control" as:

> (i) the sale of all or substantially all of the assets of the Company [Oncor] or the IPO Corporation, as the case may be, to any Person (or group of Persons acting in concert), other than to a Related Entity or its Affiliates; or (ii) a merger, recapitalization or other sale by [Oncor] or the IPO Corporation, as the case may be, or a Related Entity or any of its Affiliates, to a Person (or group of Persons acting in concert) of equity interests that ***results in any Person*** (or group of Persons acting in concert) ***owning more of the equity interests of the Company*** [Oncor] (or any resulting entity after a merger) ***than the relevant Related Entity*** and its Affiliates.

(IRA (Compl. Ex. A) Ex. A (emphases added).) '"Related Entity' means the Initial Member [Oncor Holdings] or any current Affiliate of the Initial Member that directly holds a membership interest in the Company [Oncor] or the IPO Corporation following an IPO Conversion." (Id.)

> participate in such Required Sale ***on terms and conditions no less favorable in the aggregate than those offered to the other Members***.

(IRA (Compl. Ex. A) § 3.3(d)(i) (emphases added).)

IPO Conversion. Section 3.7 of the IRA sets forth procedures for a possible "IPO Conversion" of Oncor. That provision provides that all Members must cooperate in an IPO Conversion as defined in the IRA, including specifically by taking steps to "ensure that each Member receives shares of common stock (or other equity securities) or the right to receive shares of common stock (or other equity securities), and other rights in connection with such IPO Conversion substantially equivalent to, and in exchange for, its economic interest, governance, priority and other rights and privileges as such Member had with respect to its [Oncor] LLC Units prior to such IPO Conversion." (IRA (Compl. Ex. A) § 3.7(a).) The actions taken to create or prepare a suitable vehicle (defined in the IRA as an "IPO Corporation") "for the express purpose of an initial public offering of securities of such IPO Corporation for sale to the public in an IPO" are referred to as the "IPO Conversion." (IRA (Compl. Ex. A) § 3.7(a).) "IPO Units" are common equity interests in the "IPO Corporation." (IRA (Compl. Ex. A) Ex. A.)

D. The Debtors' Chapter 11 Cases

On April 29, 2014, Plaintiff EFH, together with certain of its direct and indirect subsidiaries (together, the "Debtors"), commenced Chapter 11 cases in this Court. Oncor and Oncor Holdings are not Chapter 11 debtors.

On August 10, 2015, EFH filed a third amended joint plan of reorganization (as subsequently amended, the "Plan")[8] and a disclosure statement for the Plan. At a high level, the Plan contemplates two sets of transactions: First, a deconsolidation or spin-off of reorganized Texas Competitive Holdings Company ("TCEH," an EFH subsidiary) with an intended tax treatment and, second, a series of transactions that will result in Purchasers[9] acquiring EFH's indirect economic interest in Oncor. (Compl. ¶ 6.)

As a condition to the Plan, the successor entity to EFH, referred to as OV1 or "New EFH," must be "taxed as a REIT within the meaning of section 856 of the [Internal Revenue Code]." (Disclosure Statement (Trans. Decl. Ex. 1) at 229.) The "final form" of the REIT has yet to be determined. (Id.) The Debtors have stressed, however, that the "implementation and/or consummation of the Minority Buy-Out [i.e., the forced sale of TTI's Oncor LLC Units sought to be compelled in this proceeding] shall ***not be a condition to Confirmation*** or Consummation [of the Plan]." (Id. at 107 (emphasis added).)

E. The EFH Merger Agreement

On August 9, 2015, EFH and EFIH entered into a Purchase Agreement and Agreement and Plan of Merger (the "EFH Merger Agreement") with two acquisition vehicles, OV1 and Ovation Acquisition II, L.L.C. ("OV2," and together with OV1, the "Purchasers"). The Purchasers are controlled by a consortium (the "Investor Group") of "certain TCEH unsecured creditors, an affiliate of Hunt Consolidated, Inc." and certain other investors designated by Hunt. (See Energy Future Holdings Corp., Current Report

[8] (See Fifth Amended Joint Plan of Reorganization of Energy Future Holdings Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, In re Energy Future Holdings Corp., No. 14-10979 (Bankr. D. Del. Sept. 21, 2015) (Docket No. 6122) (Trans. Decl. Ex. 2).)

[9] "Purchasers" is defined in the following section of this Factual Background.

(Form 8-K), at 3 (Aug. 10, 2015) (the "Form 8K," Trans. Decl. Ex. 3).) The Purchasers have arranged for a financing group to repay a portion of EFH's debts. (See EFH Merger Agreement (Compl. Ex. B) § 1.4.) The "Repayment Amount" does not depend on whether TTI's Oncor LLC Units are dragged. (See id.)

Prior to the merger, it is proposed that existing equity interests in EFH will be canceled and certain TCEH creditors will become the 100% equity owners of Reorganized EFH. (Disclosure Statement (Trans. Decl. Ex. 1) at 20-24.) Subsequently, Reorganized EFH will merge into OV1, with OV1 surviving.[10] (EFH Merger Agreement (Compl. Ex. B) at 4.) If TTI's minority interest in Oncor has been acquired by OV1, OV1 will contribute the Oncor LLC Units so acquired to Reorganized EFIH at that time.[11] (EFH Merger Agreement (Compl. Ex. B) at 5.)

Exhibit B to the EFH Merger Agreement sets forth a series of steps designed to enable OV1 to qualify as a REIT and later sell its shares to the public, which in the EFH Merger Agreement are referred to as the "IPO Conversion Plan." (EFH Merger Agreement (Compl. Ex. B) Ex. B.) Exhibit C to the EFH Merger Agreement is a form of offer letter (discussed in the following section) that OV1 and EFH have agreed shall serve as an offer to facilitate a Minority Buy-Out. (EFH Merger Agreement (Compl. Ex. B) Ex. C.)

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[10] The proposed transaction has been structured as an investment in OV1 rather than as an offer to purchase Oncor Holdings' LLC Units. The purchase of Oncor Holdings' LLC Units would require EFH to realize its large negative basis in the Oncor partnership. (See Omnibus Tax Memorandum, at 8 n.6, In re Energy Future Holdings Corp., No. 14-10979 (Bankr. D. Del. Oct. 1, 2014) (Docket No. 2296) (Trans. Decl. Ex. 4).)

[11] OV2, a wholly-owned Hunt subsidiary, plans to invest $250 million in Reorganized EFIH in exchange for an approximately 3.3% ownership interest in Reorganized EFIH. (EFH Merger Agreement (Compl. Ex. B) Parent Disclosure Letter § 1.6; Disclosure Statement (Trans. Decl. Ex. 1) at 108.)

In contrast to the proposed forced sale of TTI's Oncor LLC Units, at no point in any of the transactions described above will the other Oncor Member, Oncor Holdings, sell or convert its Oncor LLC Units.

F. EFH's Purported "Required Sale Notice"

On September 4, 2015, EFH sent TTI a letter styled as a "Required Sale Notice" (referred to herein as the "Notice") asserting that OV1's form of offer letter appended to the EFH Merger Agreement (the "Offer Letter") triggered EFH's right to compel a sale by TTI of its minority equity interests in Oncor under section 3.3 of the IRA. (Notice (Compl. Ex. D) at 1.) The Offer Letter purports to constitute:

> an offer to purchase (i) substantially all of the IPO Units in the IPO Corporation or, alternatively, the acquisition of substantially all of the LLC Units in Oncor held indirectly by EFH, which transactions will be implemented through, among other things, the purchase by the Investors of equity interests in the IPO Corporation and the cancellation and retirement of all of the existing equity interests in EFH (which is an integral element of the proposed transactions contemplated by the [EFH] Merger Agreement and the [Plan]), and (ii) all of the LLC Units in Oncor that are owned by [TTI and Oncor management]. The consummation of the transaction(s) as contemplated by this EFH Sale Proposal will result in a Change of Control.

(Offer Letter (Compl. Ex. C) at 2.)[12]

The Notice asserts that OV1 is the "IPO Corporation" as defined in the IRA. (Notice (Compl. Ex. D) at 2.) The Notice also identifies an "expected" purchase price for TTI's Oncor LLC Units of approximately $2.2 billion, "an amount that OV1 has indicated represents the same per unit equivalent price as is being paid by the Investors for the

[12] A complete copy of the Notice and appended Offer Letter is an exhibit to the transmittal declaration of Jason Liberi. (Offer Letter (Trans. Decl. Ex. 5).)

indirect ownership interests in Oncor to be acquired by them in connection with the transactions contemplated by the Merger Agreement." (Notice (Compl. Ex. D) at 3.)

On September 11, 2015, TTI sent EFH a letter stating that TTI does not believe the Offer Letter triggers EFH's rights under section 3.3 of the IRA. (Compl. ¶ 56.)

G. EFH's Complaint

On October 19, 2015, EFH filed the Complaint in this proceeding. The Complaint asserts a single cause of action against TTI for breach of contract, alleging that "TTI has breached the IRA and violated EFH's Drag-Along Rights under Section 3.3 by failing to agree to sell its membership interest in Oncor to Buyers on the terms and conditions set forth in the [Notice] and the Offer Letter." (Compl. ¶ 63.) As a remedy, EFH seeks "a judgment directing TTI to specifically perform all of its obligations under Article III of the IRA." (Id. ¶ 65.)

ARGUMENT

I. THE REQUIREMENTS TO COMPEL A DRAG SALE PURSUANT TO SECTION 3.3 OF THE INVESTOR RIGHTS AGREEMENT HAVE NOT BEEN SATISFIED

Plaintiff's Complaint fails to state a claim against TTI for breach of the IRA and should be dismissed. To state a claim for breach of contract under governing New York law,[13] a plaintiff must allege: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. See, e.g., Clearmont Prop., LLC v. Eisner, 872 N.Y.S.2d 725, 728 (N.Y. App. Div., 3rd Dep't 2009).

[13] The IRA is governed by New York law. (IRA (Compl. Ex. A) § 5.6(a).)

Under New York law, the interpretation of an unambiguous contract is a "matter of law for the court to decide."[14] VKK Corp. v. Nat'l Football League, 244 F.3d 114, 129 (2d Cir. 2001) (citations omitted). Whether a contract provision is ambiguous is also a question of law for the court. See, e.g., Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 178 (2d Cir. 2004) (citing W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990)). A contract is ambiguous only if "'the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" Goldman Sachs Grp., Inc. v. Almah LLC, 924 N.Y.S.2d 87, 90 (N.Y. App. Div., 1st Dep't 2011) (citation omitted); see also Memorandum Op., Computershare Trust Co. v. Energy Future Intermediate Holding Co. LLC, Adv. Pro. No. 14-50363 (CSS), at *7 (Bankr. D. Del. Oct. 28, 2015) (court "need not look 'outside the four corners' of a complete document to determine what the parties intended" (citing W.W.W. Assoc., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990))); accord Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.").

[14] "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." Neitzke v. Williams, 490 U.S. 319, 326 (1989). In order to avoid dismissal for failure to state a claim, a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). In other words, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Id. at 547. Although the Court must accept well-pleaded factual allegations as true, it is not required to accept unsupported conclusory allegations, nor is it bound by a legal conclusion couched as a factual allegation. See id. at 545. The Court also is not required to accept "false inferences." Id. at 545; accord Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997).

Drag agreements, like the provision at issue in this case, requiring shareholders to sell equivalent securities upon receipt of a purchase offer providing identical terms (on an equivalent per-share basis) to each shareholder are common in privately held companies. See In re Piece Goods Shops Co., 188 B.R. 778, 789 (Bankr. M.D.N.C. 1995); see also Memorandum Op. at *17-19, Fisher Scientific Int'l, Inc. v. Modrovich, No. H-03-0467 (S.D. Tex. Aug. 30, 2004) (Docket No. 163) (hereafter, "Fisher Scientific II") (noting that a contractual drag sale required the "same consideration . . . and the same terms and conditions" and holding that a purported sale notice "failed to comply with the Shareholders' Agreement, was invalid, and therefore imposed no obligation" on shareholder); Memorandum Op. at *5, Fisher Scientific Int'l, Inc. v. Modrovich, No. H-03-0467 (S.D. Tex. Sept. 8, 2004) (Docket No. 46) (hereafter, "Fisher Scientific I").[15]

The allegations of the Complaint and the unambiguous terms of the IRA show that Plaintiff's claim for breach of contract should be dismissed because: (i) EFH has not received an offer to purchase Oncor equity interests that could trigger EFH's right to compel a drag sale by TTI; and (ii) TTI has not breached any portion of the IRA.

A. OV1 Has Not Made a Valid Offer To Purchase Oncor LLC Units or IPO Units from Each Member

A valid offer to purchase equity interests from each shareholder of a target company is the initial and most fundamental prerequisite to any drag sale, and is an express requirement under section 3.3(a) of the IRA. (IRA (Compl. Ex. A) § 3.3(a).) Here, the IRA requires an offer to purchase "a number of LLC Units or IPO Units, as the case may be, held directly or indirectly by [EFH or its subsidiaries], and LLC Units or IPO

[15] Copies of the Fisher Scientific I and Fisher Scientific II decisions are attached to the Transmittal Declaration of Jason Liberi as Exhibits 6 and 7, respectively.

Units, as the case may be, held by Members other than [Oncor Holdings]." (Id.) OV1's purported offer does not satisfy this fundamental requirement.

1. OV1 Is Not Purchasing Oncor Holdings' Oncor LLC Units

None of the transactions contemplated by the EFH Merger Agreement or the Plan involve the purchase of Oncor Holdings' LLC Units pursuant to section 3.3(a) of the IRA. Rather, as Plaintiff noted in its SEC filing the day the EFH Merger Agreement was executed, OV1's offer is "to purchase substantially all of the outstanding IPO Units . . . in the IPO Corporation" (i.e., OV1 itself). (See Form 8-K (Trans. Decl. Ex. 3) at 6.)

Indeed, the Offer Letter appended to the Notice does not purport to be an offer to purchase the Oncor LLC Units currently owned by Oncor Holdings. The Offer Letter states that it is an offer to purchase IPO Units (which this memorandum addresses in the following section) or, "alternatively, the acquisition of substantially all of the LLC Units in Oncor held indirectly by EFH[.]" (Offer Letter (Compl. Ex. C) at 2.) While the Offer Letter is not entirely clear as to what steps OV1 believes accomplish the "acquisition" of Oncor LLC Units held indirectly by EFH,[16] an indirect acquisition of control over Oncor Holdings' LLC Units is ***not*** the purchase of LLC Units the IRA requires in order to trigger EFH's drag right. Section 3.3 of the IRA only gives EFH the right to compel a drag sale in the event it receives an actual offer to "***purchase*** . . . LLC Units or IPO Units." (IRA (Compl. Ex. A) § 3.3(a) (emphasis added).) Under plain English, an offer to merge with EFH and acquire Reorganized EFIH stock, even if resulting in an

[16] OV1 has offered to merge with EFH and thereby acquire 100% of the equity of Reorganized EFIH (by virtue of the cancellation of the existing equity of EFH, and OV1's ultimate acquisition of 100% of the equity of Reorganized EFIH via the merger) and indirect control over EFIH's interest in Oncor Holdings and Oncor Holdings' LLC Units. (EFH Merger Agreement (Compl. Ex. B) at 4.)

indirect "acquisition" of Oncor Holdings' Oncor LLC Units, simply is not an offer ***to purchase*** Oncor LLC Units.[17] See, e.g., Small Bus. Bodyguard Inc. v. House of Moxie, Inc., No. 14-cv-7170(CM), 2015 WL 1290897, at *2 (S.D.N.Y. Mar. 20, 2015) ("'words and phrases . . . should be given their plain meaning'" (citation omitted)).[18]

That the IRA's drag provision requires an offer to purchase actual Oncor LLC Units or IPO Units is reinforced by comparing the language of the drag provision in section 3.3 of the IRA to the broader language of the tag-along provision found in section 3.2 of the IRA.[19] That portion of the IRA provides that, "[i]n the event that EFH or any of

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[17] In a stock sale, "the acquiring corporation purchases some or all of ***the target's shares*** owned by the individual shareholders of the target in exchange for cash, securities, or other consideration." See 1 Eleanor M. Fox & Byron E. Fox, Corporate Acquisitions and Mergers § 5A.01 (2015) (emphasis added).

[18] Moreover, restrictions on shareholders' rights to manage their shares as they wish should be interpreted narrowly. See, e.g., Globe Slicing Mach. Co. v. Hasner, 333 F.2d 413, 415-16 (2d Cir. 1964) (finding right of first refusal did not apply to shares transferred to a shareholder's executor upon the shareholder's death because the first refusal provision did not clearly indicate an intent to apply to testamentary transfers).

[19] The IRA's "tag-along" provision (section 3.2) provided TTI with the opportunity, during the first seven years of its investment, to participate in any proposed "sale or other Transfer of all or any number of the LLC Units or IPO Units, as the case may be" on the "same economic terms and conditions and on other terms and conditions no less advantageous in the aggregate" as those proposed by a third-party transferee. (IRA (Compl. Ex. A) § 3.2(a).) Section 3.2(h) of the IRA clarified that (subject to certain other conditions) the tag-along right would be triggered if EFH proposed to "Transfer LLC Units or IPO Units, as the case may be, indirectly, through a Transfer of equity interests in a Subsidiary of EFH the sole or principal asset of which is such LLC Units or IPO Units." (Id. § 3.2(h).) The word "Transfer" is defined in the IRA to mean:

> any direct or indirect transfer, sale, gift, assignment, exchange, mortgage, pledge, hypothecation, encumbrance or any other disposition (whether voluntary or involuntary, by operation of Law, pursuant to judicial process or otherwise) of any LLC Units (or any interest (pecuniary or otherwise) therein or rights thereto). In the event that any Member that is a corporation, partnership, limited liability company or other legal entity (other than an individual, trust or estate) ceases to be controlled by the Person controlling such Member or a Permitted Transferee thereof, such event shall be deemed to constitute a "Transfer" subject to the restrictions on Transfer contained or referenced herein.

(IRA (Compl. Ex. A) Ex. A.)

its Subsidiaries proposes to Transfer LLC Units or IPO Units, as the case may be, indirectly, through a Transfer of equity interests in a Subsidiary of EFH the sole or principal asset of which is such LLC Units or IPO Units," then (subject to certain other conditions), TTI has a "tag-along right" to transfer its own corresponding units to the proposed transferor. (IRA (Compl. Ex. A) § 3.2(h).) That provision, in other words, expressly contemplates an indirect ***transfer*** of Oncor membership interests through the purchase of "upstairs equity," while section 3.3 (the drag provision) does not. See Barclays Capital Inc. v. Giddens (In re Lehman Bros. Inc.), 478 B.R. 570, 589 (S.D.N.Y. 2012) (applying principle of contract construction requiring "presumption of consistent usage (unless otherwise indicated) of words used in the same paragraph"), aff'd sub nom. In re Lehman Bros. Holdings Inc., 761 F.3d 303 (2d Cir. 2014), aff'd, 590 F. App'x 92 (2d Cir. 2015).

Further, as the word Transfer is defined in the IRA to include offers to purchase resulting in the indirect acquisition of Oncor LLC Units,[20] had the parties intended for any "Transfer" (e.g., offers resulting in the indirect acquisition of Oncor LLC Units) to trigger the drag-along right in section 3.3 of the IRA, the provision would have covered offers to "Transfer" LLC Units or IPO Units, rather than only offers to "purchase" such units.[21] See GPIF-I Equity Co. v. HDG Mansur Inv. Servs., Inc., No. 13 CIV.

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[20] "Transfer" is broadly defined in the IRA to include "any direct or indirect transfer, sale . . . or any other disposition . . . of any LLC Units." (IRA (Compl. Ex. A) Ex. A.)

[21] The meaningful distinction between "purchase" and the broader term "Transfer" is further supported by comparing section 3.3(a)(i) of the IRA, which governs offers made to EFH (referred to in the IRA as an "EFH Sale Proposal"), with section 3.3(a)(ii), which governs offers made to Oncor Holdings (referred to as an "Initial Member Sale Proposal"). (IRA (Compl. Ex. A) § 3.3(a).) The EFH Sale Proposal provision refers to an offer to purchase units "held directly or indirectly by [EFH]," whereas the Initial Member Sale Proposal omits the reference to "held directly or indirectly." (IRA (Compl. Ex. A) § 3.3(a).) The "held *(cont'd)*

547(CM), 2013 WL 3989041, at *3 (S.D.N.Y. Aug. 1, 2013) ("Under settled principles of contract construction – notably the presumptions of consistent usage and meaningful variation, which follow from the duty to construe the contract as a whole rather than in isolated provisions, see Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 567-69 (1995) – the parties' use of different language to describe the base off which the two types of fees would be calculated means that the 'aggregate amount of financing' is not the same thing as the 'aggregate gross purchase price.'").

Moreover, it would make no sense for the IRA to require TTI to sell its Oncor LLC Units upon the making of an offer to indirectly acquire Oncor Holdings' LLC Units through an offer to purchase shares in EFH – an entity whose equity is several steps structurally subordinated to the equity of Oncor and not equivalent to Oncor LLC Units. Had an investment in a levered holding company been sufficient to trigger a required sale of TTI's non-equivalent Oncor LLC Units, the IRA would have at least provided valuation guidance. See, e.g., Natwest USA Credit Corp. v. Alco Standard Corp., 858 F. Supp. 401, 413 (S.D.N.Y. 1994) ("A contract must be construed, if possible, to avoid an interpretation that will result in an absurdity, an injustice or have an inequitable or unusual result." (Applying New York law).) Nevertheless, OV1 has unilaterally decided to offer TTI an amount of money equal to the EFH debt it intends to help repay (see Offer Letter (Trans.

(cont'd from previous page)

directly or indirectly" clause is not necessary in describing an offer to purchase Oncor LLC Units that is directed to Oncor Holdings, as such units would always be held directly by Oncor Holdings. By contrast, offers to purchase Oncor LLC Units directed to EFH would necessarily involve the purchase of units held "indirectly" by EFH, as such units are directly held by Oncor Holdings. It is not surprising that an offer could be directed to EFH, as a parent can direct the actions of a wholly-owned subsidiary. See, e.g., In re Teleglobe Commc'ns Corp., 493 F.3d 345, 370-71 (3d Cir. 2007), as amended (Oct. 12, 2007) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72 (1984)).

Decl. Ex. 5)), without attempting to make any showing that that consideration bears any relation to the value of TTI's and Oncor Holdings' Oncor LLC Units.

Accordingly, the Notice and Offer Letter do not evince an "offer . . . to purchase" Oncor Holdings' LLC Units (Compl. Ex. A at § 3.3(a)) and no drag sale can be compelled on that basis.

2. OV1 Is Not Purchasing "IPO Units"

Plaintiff's assertion that OV1 has made an offer to purchase "substantially all of the IPO Units in the IPO Corporation" (Notice (Compl. Ex. D) at 2) is similarly refuted by the plain language of the IRA. As defined in the IRA, "IPO Units" are common equity interests in an "IPO Corporation," which is a "suitable vehicle created or prepared for an offering" of the stock of the IPO Corporation to the public following an "IPO Conversion." (IRA (Compl. Ex. A) § 3.7(a).) Here, notwithstanding the labels used in the EFH Merger Agreement (see EFH Merger Agreement (Compl. Ex. B) at Recitals & Ex. B (referring to an "IPO Conversion Plan")), that agreement does not provide for an IPO Conversion to occur as that term is defined in the IRA, as no Oncor Member will possess (much less sell) IPO Units.

Simply because there is a public offering contemplated by OV1 (which EFH and its successor OV1 can do at any time) does not render it an "IPO Conversion" as defined in the IRA. An IPO Conversion as defined in the IRA requires "that each Member receive[] shares of common stock (or other equity securities) or the right to receive shares of common stock (or other equity securities), and other rights in connection with such IPO Conversion substantially equivalent to, and in exchange for, its economic interest, governance, priority and other rights and privileges as such Member had with respect to its [Oncor] LLC Units prior to such IPO Conversion." (IRA (Compl. Ex. A) § 3.7(a).)

While the series of transactions proposed by the Purchasers appear designed to allow OV1 to sell its shares to the public, neither TTI nor Oncor Holdings have ever been offered "shares of common stock (or other equity securities) or the right to receive shares of common stock (or other equity securities)" (IRA (Compl. Ex. A) § 3.7(a)) in OV1. Nor have any steps been taken to provide either Member with rights "substantially equivalent to, and in exchange for, its economic interest, governance, priority and other rights and privileges" such Member has with respect to its Oncor LLC Units. (Id.) Accordingly, as there has not been and, pursuant to the EFH Merger Agreement, will never be an IPO Conversion as defined in the IRA, OV1 is not an IPO Corporation and its shares are not IPO Units.

Plaintiff's Complaint therefore rests on an incorrect legal conclusion couched as a factual allegation – that EFH has received a valid offer to purchase "IPO Units." See Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A., 244 F.R.D. 204, 213 (S.D.N.Y. 2007) ("[a]t the motion to dismiss stage, where a plaintiff's 'factual allegations or legal conclusions are flatly contradicted by documentary evidence, they are not presumed to be true, or even accorded favorable inference[,]' in the context of a breach of contract action" (quoting Taussig v. Clipper Grp., L.P., 787 N.Y.S.2d 10, 11 (N.Y. App. Div., 1st Dep't 2004))); accord In re NextMedia Grp., Inc., 440 B.R. 76, 79-80 (Bankr. D. Del. 2010) (holding that creditor forfeited right to payment under Asset Purchase Agreement because creditor failed to perform express condition precedent), aff'd sub nom. CBS Outdoor Inc. v. NextMedia Grp. Inc. (In re NextMedia Grp. Inc.), Civ. No. 10-1109-SLR, 2011 WL 4711997 (D. Del. Oct. 6, 2011). Because a necessary precondition to an IPO Conversion has not occurred and EFH therefore has not received a valid offer to

purchase IPO Units, no drag sale can be compelled on that basis. See Levista, Inc. v. Ranbaxy Pharm., Inc., No. 09 CV 0569 SJF ARL, 2010 WL 5067843, at *4 (E.D.N.Y. Dec. 2, 2010) (dismissing breach of contract claim where plaintiff "failed to allege facts plausibly suggesting that defendant failed to perform its obligations under the parties agreement, or that plaintiff performed its own obligations thereunder"), aff'd, 450 F. App'x 54 (2d Cir. 2011); see also Syracuse v. Loomis Armored US, LLC, No. 5:11-CV-00744 MAD, 2012 WL 88332, at *5 (N.D.N.Y. Jan. 11, 2012) (failure to allege plaintiff's own performance under the contract "sufficient to warrant dismissal of its breach of contract causes of action").

B. OV1 Has Not Offered Each Member the Same Type and Amount of Consideration

Plaintiff's breach of contract claim should be dismissed for the separate and additional reason that the Offer Letter does not provide for TTI to receive "the same type and amount of consideration . . ., at the same time, on a per Drag Unit basis, and [to] participate in such Required Sale on terms and conditions no less favorable in the aggregate than those offered to the other Members," as required to trigger the drag provisions of the IRA. (IRA (Compl. Ex. A) § 3.3(d)(i).)

In addition to numerous other defects, Plaintiff EFH does not and cannot allege that TTI will receive the same type and amount of consideration for its Oncor LLC Units as Oncor Holdings will receive for either its Oncor LLC Units (which it is not selling) or any "IPO Units" (which it will never own), much less at the same time.[22] Indeed, EFH's Complaint fails even to mention this prerequisite to its right to compel a

[22] To survive a motion to dismiss, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

drag sale. (See Compl. ¶¶ 36, 50 (defining "Conditions Precedent to EFH's Drag-Along Rights" without reference to section 3.3(d)(i)'s "same type and amount of consideration" requirement).)

As shown above, Oncor's Initial Member Oncor Holdings is not selling ***any*** Oncor equity and will continue to own its controlling interest in Oncor after the proposed EFH-OV1 merger. Nonetheless, EFH and OV1 contend that Oncor's Minority Member TTI must sell its Oncor LLC Units unwillingly on terms completely untethered to Oncor Holdings. On the face of the "offer," the two Oncor Members will not receive the same type of consideration, much less on the same terms or at the same time. Nothing in the IRA permits a drag sale in such a scenario. See, e.g., Fisher Scientific II, Memorandum Op. at 17-31 (defective sale notice "failed to comply with the Shareholders' Agreement, was invalid, and therefore imposed no obligation" on shareholder).

C. No Requisite "Change of Control" Will Occur

EFH's claim that TTI has breached section 3.3 of the IRA by failing to tender its Oncor LLC Units to OV1 fails for the separate and final reason that the transactions contemplated by OV1's Offer Letter will not result in a Change of Control at Oncor, as they must to trigger EFH's right to compel a drag sale. (See IRA (Compl. Ex. A) § 3.3(a).)

The term "Change of Control" has a specific meaning in the IRA, and is appropriately tied to the legal entity at which the Members own the interests. For a "Change of Control" to have occurred, others must own more of the equity interest of Oncor than "the relevant Related Entity and its Affiliates." (IRA (Compl. Ex. A) Ex. A.) "Related Entity," means "***the Initial Member*** [Oncor Holdings] or any current or future

Affiliate of [Oncor Holdings] that ***directly*** holds a membership interest in [Oncor]." (Id. (emphases added).)[23]

As shown above, Oncor Holdings is not selling any Oncor LLC Units and will continue to hold all of its Oncor LLC Units following the consummation of the planned EFH-OV1 Merger. Indeed, OV1's Offer Letter itself demonstrates that Oncor Holdings will continue to own its Oncor LLC Units,[24] which represent 80.03% of the equity interests in Oncor. (See Offer Letter (Compl. Ex. C.) at 2 ("This letter . . . represents an offer to purchase . . . all of the LLC Units in Oncor that are owned by members of Oncor ***other than Oncor Holdings***." (Emphasis added).)) Consequently, no person or persons will own "more of the equity interests of [Oncor]" (Compl. ¶ 36 n.2) than Oncor Holdings and no "Change of Control" as defined in the IRA will occur. Because this additional prerequisite for a drag sale (IRA (Compl. Ex. A) § 3.3(a)) has not been satisfied, TTI cannot be forced to sell its Oncor LLC Units.

II. TTI HAS NO DUTY TO COOPERATE WITH OV1'S PROPOSED IPO, BUT HAS DONE NOTHING TO INTERVERE WITH IT

As shown above, the planned public offering of OV1 is not an "IPO Conversion" as defined in the IRA. Regardless, Plaintiff EFH has failed to allege any facts

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[23] In its Complaint, EFH alleges that the term means a "sale by [Oncor] . . . to a Person (or group of Persons acting in concert) of equity interests that results in any Person (or group of Persons acting in concert) owning more of the equity interests of [Oncor] . . . than [certain affiliates of EFH]." (Compl. ¶ 36 n.2 (purporting to quote IRA (Compl. Ex. A) Ex. A) (bracketed language in original).) The bracketed language at the end of that quote omits crucial language, however. In reality, for a Change of Control to occur, a Person must come to own more of the equity interests in Oncor than a "Related Entity," defined in the IRA as ***Oncor Holdings*** or Oncor Holdings' affiliates. (IRA (Compl. Ex. A) Ex. A).

[24] Oncor is, and remains during every step of what EFH has labeled as its "IPO Conversion Plan," a limited liability company. (EFH Merger Agreement (Compl. Ex. B) Ex. B.) The notion that any person, by virtue of acquiring common stock in OV1, will come to own more Oncor LLC Units than Oncor Holdings is entirely without merit.

showing TTI has failed to "cooperate" in even that possible offering.[25] Having identified what it believes to be TTI's obligation to cooperate (Compl. ¶ 39), Plaintiff asserts that "TTI may attempt to frustrate the sale of Oncor to [Purchasers] by refusing to cooperate with the IPO Conversion Plan[.]" (Id. ¶ 46.) The only stated basis for that allegation is that TTI does not believe the steps for OV1's planned reorganization (i.e., what the EFH Merger Agreement calls an "IPO Conversion Plan") constitute an "IPO Conversion." (Compl. ¶¶ 55-58.) That argument is a non sequitur.

Assuming that Plaintiff intended to assert a claim for anticipatory breach of contract, EFH has failed to state such a claim. Under New York law, anticipatory breach of contract requires an unequivocal statement that a party does not intend to perform its contractual duties. See, e.g., Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 705 N.E.2d 656, 659 (N.Y. 1998). Anticipatory breach of a contract may take one

[25] Plaintiff asserts that "[g]iven the special nature of ***an ownership interest in*** Oncor, ***its*** critical importance to Debtors' Plan, and the express [specific performance] terms of [s]ection 3.8 of the IRA, EFH has no adequate remedy at law for TTI's breaches of the IRA." (Compl. ¶ 64 (emphasis added); see also id. ¶ 5 ("A key element of Debtors' proposed plan of reorganization is the sale of ***their*** ownership interest in Oncor." (Emphasis added.)).) Whatever the importance of "an ownership interest" in Oncor may be to the Debtors' Plan as a general matter, ***TTI's LLC Units*** are not of critical importance to the Debtors' Plan. Plaintiff and Purchasers have repeatedly represented to this Court that the purchase of TTI's LLC Units is not a condition to the Plan. (See, e.g., EFH Merger Agreement (Compl. Ex. B) § 1.6 ("For the avoidance of doubt, the occurrence of the acquisition of the Minority Interest, the Minority Interest Contribution and the EFIH Parent Issuance are not requirements for, or a condition to, the consummation and closing of the First Closing Date Transactions."); Disclosure Statement (Trans. Decl. Ex. 1) at 107 ("For the avoidance of doubt, implementation and/or consummation of the Minority Buy-Out shall not be a condition to Confirmation or Consummation."); Exhibit WKB-7 — Purchasers' Narrative Statement Concerning Minority Interest Acquisition Contingency Plans, at 4, In re: Control No. 45188 (Pub. Util. Comm. Tex. Oct. 15, 2015) (Docket No. 102) (Trans. Decl. Ex. 8) at 4 ("If Purchasers are unable to obtain [TTI's minority equity interest in Oncor] pursuant to the drag-along provisions of the Investor Rights Agreement, they plan to close the Transaction and implement the proposed restructuring in accordance with the Merger Agreement.").) Accordingly, Plaintiff is judicially estopped from asserting either that the failure to drag TTI's Oncor LLC Units, or TTI's position that the purported Notice and Offer Letter are defective, could somehow "block the Sale and scuttle [the] Debtors' Plan." (Compl. ¶ 59.)

of two forms. First, the repudiating party may state before its performance is due that it does not intend to perform its contractual duties. See O'Connor v. Sleasman, 830 N.Y.S.2d 377, 379 (N.Y. App. Div., 3d Dep't 2007); Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp., 747 N.Y.S.2d 468, 475 (N.Y. App. Div., 1st Dep't 2002). Second, the repudiating party may make a voluntary affirmative act that makes it impossible for that party to perform its duties under the contract without committing a breach. See Computer Possibilities Unlimited, 747 N.Y.S. 2d at 475. Because EFH has alleged neither, its claim for alleged breach of the "cooperation" clause of section 3.7 of the IRA should be dismissed.[26] See id.

III. EFH IS NOT ENTITLED TO SPECIFIC PERFORMANCE

Specific performance is a remedy for breach of contract, not a claim. See, e.g., Cotter v. Newark Hous. Auth., No. 09-2347 (JAG), 2010 WL 1049930, at *5 (D.N.J. Mar. 17, 2010) ("Specific performance may not stand as a claim, independent from a breach of contract claim."), aff'd, 422 F. App'x 95 (3d Cir. 2011); Five Star Dev. Resort Cmtys., LLC v. iStar RC Paradise Valley LLC, No. 09 Civ. 2085(LTS), 2010 WL 2697137, at *4 (S.D.N.Y. July 6, 2010) (same, collecting cases).

Where a party seeking specific performance of a drag provision fails to show that a minority interest holder has breached its shareholder agreement, specific performance is not available as a remedy. See Halpin v. Riverstone Nat'l, Inc., No. CV

[26] To be clear, as far as TTI is concerned, Plaintiff and OV1 can do what they wish with respect to EFH's approximately 80% indirect ownership interest in Oncor. But the Notice and Offer Letter do not constitute an offer that can force TTI to sell its Oncor LLC Units unwillingly. See, e.g., Fisher Scientific II, Memorandum Op. at 19-20 (dismissing claims with respect to shareholders' agreement and proposed drag transaction where proposed sale was not a bona fide offer and "did not comport with material requirements" of the shareholders' agreement).

9796-VCG, 2015 WL 854724, at *5 (Del. Ch. Feb. 26, 2015) ("Specific performance is 'an equitable remedy designed to protect a party's expectations under a contract by compelling the other party to perform its agreed upon obligation." (quoting West Willow-Bay Court, LLC v. Robino-Bay Court Plaza LLC, C.A. No. 2742-VCN, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007), and refusing to compel performance of drag sale)). For the reasons set forth above, no "IPO Conversion" has occurred and no offer has been made to purchase Oncor LLC Units from Oncor Holdings. Moreover, because Plaintiff has not alleged facts that show TTI breached any of its obligations under sections 3.3 or 3.7 of the IRA, specific performance is not available as a remedy.

CONCLUSION

For the reasons set forth above, the Court should dismiss the Complaint with prejudice, and grant TTI such other relief as is just.

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