UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRIREME ENERGY HOLDINGS, INC.; and TRIREME ENERGY DEVELOPMENT, LLC,

Plaintiffs,

v.

INNOGY RENEWABLES US LLC; CASSADAGA WIND LLC; and INNOGY SE,

Defendants.

20-cv-5015 (VEC)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNTS ONE, TWO, THREE, AND FIVE OF THE SECOND AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

PRELIMINARY STATEMENT

As this District has recognized, the Covid-19 pandemic is and has been a "crisis."[1] It resulted in the President of the United States declaring a national emergency and the Governor of New York ordering restrictive measures throughout the state.[2] Those effects were wide-ranging and continue to this day. Just last month, the Chief Judge of this Court issued new rules governing access to this District's facilities and requiring an extensive screening process for entry.[3] Plaintiffs certainly do not contest the need for such procedures in the face of unique circumstances. Plaintiffs, further, have made no attempt to use a public health emergency for personal profit.

Defendants, however, have a different approach. Since the initial complaint was filed, Defendants took a series of cynical steps to profit from the pandemic. They deliberately delayed meeting bargained-for contractual milestones in an effort to reap an unjustified $69.7 million windfall at Plaintiffs' expense. By manipulating, in bad faith, the construction schedule for the "Cassadaga Project" (a wind farm development in upstate New York begun by Plaintiffs and sold to Defendants), Defendants are attempting to pocket for themselves a valuable economic asset (tax credits) that was agreed and understood should be paid over to Plaintiffs.

Defendants' behavior is wrong, and it is the basis for the new claims, based on new facts, alleged in the Second Amended Complaint (the "SAC"). In brief:

For many years, Plaintiffs (together, "Trireme") developed electrical-generation wind farms around the United States. In 2017, Trireme sold its portfolio of development projects to Defendant Innogy Renewables US LLC (together with Defendant Innogy SE, "Innogy"). Under

---

1 2020-21 Phased Re-entry Plan (Covid-19) for the Southern District of New York, published Feb. 11, 2021. https://www.nysd.uscourts.gov/sites/default/files/2021-02/Public%20Phased%20Plan%202.11.21%20final.pdf.

2 *In Re Coronavirus/Covid-19 Pandemic*, Amended Standing Order M10-468, Feb. 9, 2021.

3 *Id.*

the parties' agreement (the "Merger Agreement"), Innogy paid $50 million up front and agreed to make additional "Milestone Payments" to Trireme when individual projects were completed.

Under that arrangement, Innogy agreed to pay Trireme a $69.7 million Milestone Payment if the Cassadaga Project began commercial operation by December 31, 2020. The parties agreed on that deadline because, under then-current IRS guidance, Innogy needed to complete the project by December 31, 2020, to obtain the full amount of renewable energy tax credits available under Section 45 of the Internal Revenue Code. Both parties understood the deadline as stated in the Merger Agreement to mean the tax credit expiration date—the project simply would not have made economic sense for either party without these tax credits.

Because of the Covid-19 pandemic, the IRS in May 2020 extended the applicable deadline by one year. Based on this unforeseeable change (the "Pandemic Adjustment"), Innogy will be able to obtain the anticipated tax credits—and maximize its return on investment in the Cassadaga Project—***without*** completing the wind farm by December 31, 2020, as contracted. Taking advantage of this change, Innogy abused its discretion by moving the commercial operation date of the Cassadaga Project by a mere ***two months***—from December 31, 2020 to March 5, 2021. Based on that two-month change of schedule, Innogy circumvented the Cassadaga Project Milestone Payment and, on January 1, 2021, orchestrated a $69.7 million windfall.

Innogy's manipulation of the schedule gives rise to the three new claims pleaded in the SAC: (i) breach of the duty of good faith and fair dealing for bad faith delay of commercial operation; (ii) unjust enrichment; and (ii) reformation. These new claims are based on facts that did not exist at the time the original complaint was filed. Defendants' arguments against the new claims ignore this basic change of circumstance and are internally inconsistent. Defendants also advance improper arguments based on unpleaded, unsworn, and unsupported factual assertions in

their brief. This only underscores the lack of merit to their legal position. Under established standards applicable to motions to dismiss, it was wrong for Defendants to submit such material, and their assertions cannot be considered by the Court.

Finally, it is important to note that no matter how the Court resolves Defendants' various motions, its decision will not resolve this litigation. Defendants have not moved to dismiss Plaintiffs' breach of contract claim, and the case will continue in any event.

STATEMENT OF FACTS

In 2017, Trireme sold Innogy the development rights to a large wind farm in upstate New York. SAC ¶ 2. Before that transaction, Trireme owned EverPower Wind Holdings, Inc. ("EverPower"), a renewable energy company founded in 2002. *Id.* ¶ 3. EverPower developed, owned, and operated large-scale wind farms throughout the United States. *Id.*

In December 2017, Trireme executed an agreement to sell all its assets. *Id.* ¶ 4. It sold seven operational power-generation facilities to Blackrock in a transaction involving about $650 million in enterprise value. *Id.* Trireme also sold EverPower's portfolio of development projects to Innogy, with the mutual understanding and expectation that Innogy would complete the development of as many of those projects as practicable and that Innogy would benefit from the tax credits associated with the generation of renewable energy, among other things. *Id.* ¶ 5. Trireme would benefit too through an "earn out" agreement under which it would be paid when projects began commercial operation. *Id.*

Given the complexity of developing renewable-energy projects, Trireme and Innogy understood that Innogy might not realize the full potential value of some or all of the development projects that Innogy acquired. *Id.* ¶ 6. In addition, by 2017, the federal government had begun phasing out its renewable energy tax credits, which also impacted the potential value of Trireme's development projects. *Id.* Innogy thus agreed to pay Trireme $50 million plus certain additional

payments upon completion of the projects. *Id.* ¶ 7.

The most valuable development project in Trireme's portfolio involved the construction of a 125.5-megawatt wind farm in upstate New York, the Cassadaga Project. *Id.* ¶ 8. At the time of the sale, Trireme had already invested millions of dollars in the Cassadaga Project, and the project was slated to begin operation in only three more years—and potentially sooner. *Id.*

Under then-current federal laws, regulations, and IRS guidance, the Cassadaga Project would generate significant tax credits (and achieve its highest potential return on investment) if the wind farm began operation ***no later than*** December 31, 2020. *Id.* ¶ 9. Innogy thus agreed to pay Trireme a Milestone Payment of $69.7 million if the Cassadaga Project began commercial operation by that date. *Id.* At the time of the agreement, the project was on schedule, and Innogy had incentive to complete the project on time. *Id.* Indeed, it would have been economically irrational for Innogy to delay completion of the project until after December 31, 2020. *Id.*

The rules regarding so-called "Production Tax Credits" ("PTC's") were a basic assumption of the parties' contract. *Id.* ¶ 10. Most critically, the parties understood and framed their agreement against one basic regulatory rule:

- If the Cassadaga Project began commercial operation by December 31, 2020, it would qualify for substantial PTC's—potentially $120 million or more; but
- If the project began commercial operation on January 1, 2021 or later, it would qualify for ***no*** tax credits.

Id. This regime was well understood and discussed between the parties. *Id.* ¶ 11. Indeed, it was a cornerstone of the agreement. *Id.* Trireme was comfortable agreeing to tie its right to receive a Milestone Payment to the December 31, 2020 deadline because that date was a specific proxy of the date the project's right to tax credits expired. *Id.* Under the framework by which the parties' bargain was made, if the Cassadaga Project reached commercial operation by December 31, 2020 (as it was expected, and on schedule, to do):

- Innogy would net approximately $50 million—around $120 million in tax credits less the $69.7 million Milestone Payment; and
- Trireme would receive the $69.7 million Milestone Payment.

Id. As negotiated, agreed, and understood, the parties' deal made economic sense and was fair: both sides would benefit if the project were completed on time—by December 31, 2020. *Id.* ¶ 12. If the deadline were missed by so much as a day, however, both sides would get nothing. *Id.*

Unfortunately, in 2020, a series of events unfolded that were unforeseeable at the time of the parties' 2017 transaction. *Id.* ¶ 14. As a result of the Covid-19 pandemic and related economic disruption, the IRS issued the "Pandemic Adjustment" in May 2020 and effectively extended by a full year the deadline, for tax-credit purposes, to complete the Cassadaga Project. *Id.* ¶ 15. The Pandemic Adjustment was issued, explicitly, because of the extraordinary national health emergency facing the nation. Here is Section 1 of IRS Notice 2020-41, entitled "Purpose":

SECTION 1. PURPOSE

This notice modifies the prior Internal Revenue Service (IRS) notices[1] addressing the beginning of construction requirement for both the production tax credit for renewable energy facilities under section 45 of the Internal Revenue Code (Code) and the investment tax credit for energy property under § 48. In response to the Coronavirus Disease 2019 (COVID-19) pandemic, this notice provides that the Continuity Safe Harbor provided and extended by the prior IRS notices is further extended for projects that began construction in either calendar year 2016 or 2017. This notice also provides a 3½ Month Safe Harbor for services or property paid for by the taxpayer on or after September 16, 2019 and received by October 15, 2020.

Under this revised guidance, Innogy's ability to obtain tax credits for the Cassadaga Project would not be affected if Innogy failed to begin commercial operation by December 31, 2020, as initially understood by the parties. *Id.* (The Cassadaga Project is covered by the Pandemic Adjustment because the project began construction in 2016.)

The new IRS guidance undermined the parties' basic bargain entirely in Innogy's favor. *Id.* ¶ 16. If Innogy delayed the project so it did not begin commercial operation until 2021, it would reap an enormous windfall, as it would keep all of the tax credits yet owe Trireme nothing. *Id.*

Not surprisingly, once the IRS changed the rules, Innogy manipulated the schedule to take all the tax credits for itself. *Id.* ¶ 17. Although previously on schedule, and although capable of beginning operation by December 31, 2020, Innogy decided in late September 2020 to delay commercial operation of the Cassadaga Project until March 5, 2021. *Id.* By doing so, Innogy put in place a plan to circumvent in bad faith its contractual obligation to pay the Milestone Payment of $69.7 million to Trireme—notwithstanding that the planned two-month delay would not materially affect the value of the Cassadaga Project for Innogy. *Id.*

As of December 31, 2020, Innogy had not yet begun commercial operation of the Cassadaga Project, although it could have done so. *Id.* ¶ 18. Innogy thus breached its duty of good faith and fair dealing by abusing its discretion under the parties' agreement and has been unjustly enriched at Trireme's expense. *Id.*

Innogy's failure to begin commercial operation by December 31, 2020 was not its first attempt to circumvent its obligation to pay the Milestone Payments in the Merger Agreement. *Id.* ¶ 71. The Merger Agreement provided for a separate Milestone Payment date of October 1, 2019, where Innogy would owe $69.7 million if the Cassadaga Project had achieved, among other things,

issuance of the Article X Certificate by the New York State Board on Electric Generation Siting and the Environment (the "Siting Board"). *Id.* ¶¶ 39-40. Section 7.6(a) of the Merger Agreement specified that Innogy must use commercially reasonable efforts to achieve these conditions and meet this deadline. *Id.* ¶¶ 42, 99; *see also* Decl. of John C. Treat ("JCT Decl."), Ex. 1, Section 7.6(a).

To achieve these conditions, Innogy needed to complete the standard process set forth in Article X of New York's Public Service Law—a process for private developers to apply for and receive the permits necessary to complete development projects. *Id.* ¶ 72. On January 17, 2018, the Siting Board issued a conditional certificate authorizing the construction and operation of the Cassadaga Project. *Id.* ¶ 73. However, upon taking control of the Project in June 2018, Innogy, through Cassadaga Wind LLC, then delayed submitting its first Wetlands Mitigation Plan with the Siting Board until June 21, 2019, and delayed submitting its first "final" wetland and stream impact drawings, site plans, and construction details until June 28, 2019—submitting both ***18 months*** after the Siting Board's certificate. *Id.* ¶¶ 77-81. Innogy then failed to submit the next step, the Final Mitigation Plan, by mid-July 2019, as it had estimated—instead delaying until September 20, 2019. *Id.* ¶¶ 84-88. This final submission came less than ***three weeks*** before the Milestone Payment date—far too late for the Siting Board to approve the filings prior to the deadline. *Id.* ¶¶ 90-93. Compounding these actions was Innogy's decision to remove the Cassadaga Project's original development team from key leadership positions and replace these team members with less experienced people who had no historical knowledge of the Project and no knowledge of the efforts made by Trireme to develop the Project up to that point. *Id.* ¶¶ 97-98.

Therefore, although the Article X process did not pose any unique or unreasonable challenges, and Innogy had the reasonable ability to fulfill these conditions far in advance of

October 1, 2019, Innogy through Cassadaga Wind failed to do so. *Id.* ¶¶ 83, 97.

PROCEDURAL HISTORY

Plaintiffs filed their original complaint on June 30, 2020, and a First Amended Complaint on July 14, 2020. *See* Dkt 1, 9. Defendants moved to dismiss some but not all of the claims pleaded in those initial pleadings. *See* Dkt. 16. While that motion was *sub judice*, events giving rise to additional causes of action transpired. Thus, on January 13, 2021, the parties stipulated to the filing of the Second Amended Complaint. *See* Dkt. 42. The Court then terminated the open motion as moot and set a schedule for Defendants' motion to dismiss the SAC. *See* Dkt. 42, 46.

ARGUMENT

A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief," as well as a demand for the relief sought and the basis for jurisdiction. Fed. R. Civ. P. 8(a). A well-pleaded complaint does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P. 12(b)(6). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In weighing a motion to dismiss for failure to state a claim, courts "accept as true the factual allegations of the complaint, and construe all reasonable interferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009)). Two initial points flow directly from this familiar, basic framework.

First: Defendants' motion is a ***pleading motion***. The only relevant question under Rule 12(b)(6) is whether Plaintiffs have adequately pleaded various causes of action.

Second: The Court should ignore—if not strike—the unsupported factual assertions in the

preliminary statement of Defendants' brief. It is improper and prejudicial for Defendants to include such matter and the Court must disregard it. *See, e.g.*, *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (reversing lower court's grant of a motion to dismiss where "the court improperly relied on extra-complaint information"). Of course, Plaintiffs dispute Defendants' assertions about what they supposedly "negotiated" or "agreed," and what was or was not beyond their control. Defendants may attempt to support such assertions through actual evidence at trial, but they have no place in a motion to dismiss.

With this background, Plaintiffs turn to the specific causes of action in the SAC.

I. TRIREME ADEQUATELY PLEADS BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Under New York law, every contract contains an implicit covenant of good faith and fair dealing. *Spinelli v. Nat'l Football League*, 903 F.3d 185, 205 (2d Cir. 2018). To state a cause of action for breach of the implied covenant, a plaintiff must first allege the existence of a contract. *House of Diamonds v. Borgioni, LLC*, 737 F. Supp. 2d 162, 170 (S.D.N.Y. 2010) (quoting *Dweck Law Firm, L.L.P. v. Mann*, 340 F. Supp. 2d 353, 358 (S.D.N.Y. 2004)). A plaintiff must also "allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Id.* A party violates the implied covenant where it engages in conduct that undermines "the right of the other party to enjoy the fruits of the contract" or "violate[s] the other party's presumed or reasonable intentions." *Spinelli*, 903 F.3d at 205 (citation omitted). If a contract contemplates discretion, there is an underlying "promise not to act arbitrarily or irrationally in exercising that discretion." *Id.* (quoting *Fishoff v. Coty Inc.*, 634 F.3d 647, 653 (2d Cir. 2011)).

The SAC sufficiently alleges that Innogy breached the covenant of good faith and fair dealing. Trireme alleges the existence of a valid and enforceable contract between the parties.

SAC ¶ 34; *see House of Diamonds*, 737 F. Supp. 2d at 170. Trireme also alleges that Innogy withheld the benefits of the Merger Agreement from Trireme, undermining Trireme's right to enjoy the fruits of its bargain and violating Trireme's presumed and reasonable intentions. *See Spinelli*, 903 F.3d at 205. The Merger Agreement contemplated that Innogy would pay Trireme $69.7 million if the Cassadaga Project achieved commercial operation by December 31, 2020. Both parties understood that, due to then-existing IRS guidance, Innogy had substantial economic incentive to achieve commercial operation by that date, ***or not at all***.[4] SAC ¶¶ 41, 45-60. However, after the IRS issued the Pandemic Adjustment, Innogy ***in bad faith*** undermined Trireme's right to receive the Milestone Payment and violated Trireme's reasonable intentions by pushing the commercial operation date until after the December 31, 2020 Milestone Payment date. *Id.* ¶¶ 61-69.

The SAC also alleges that Innogy acted arbitrarily and capriciously in exercising its contractual discretion as to the schedule for developing the project. *See Vista Outdoor Inc. v. Reeves Family Trust*, 234 F. Supp. 3d 558, 563-65 (S.D.N.Y. 2017) (granting summary judgment on a breach of the implied covenant claim where defendants engaged in transactions to artificially inflate a company's value to meet performance targets in a Purchase Agreement and receive contractual earnout payments); *Pleiades Publ'g, Inc. v. Springer Sci. + Bus. Media LLC*, 117 A.D.3d 636, 637 (1st Dep't 2014) (affirming denial of a motion to dismiss a breach of the implied covenant claim where defendant exercised its discretion under the contract to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of the agreement, and benefit itself at

[4] The "commercially reasonable efforts" clause set a baseline for Innogy's level of effort—not its schedule. Innogy agreed that it would not simply abandon the project, depriving Trireme of its expected Milestone Payment without ***any*** effort. At a minimum, Innogy agreed to use commercially reasonable efforts and at least try, in a commercially reasonable manner, to complete the project. Innogy's economic self-interest—to obtain the tax credits—set the projected ***timeline*** for the project.

plaintiff's expense). Because the parties understood that the safe harbor deadline created substantial incentive for Innogy to achieve commercial operation by December 31, 2020, the Merger Agreement provides no other "deadline" for completion of the project. Instead, the agreement gives Innogy "sole discretion" to determine the details, manner, and schedule for the project's development. *See* JCT Decl., Ex. 1, Section 7.6(a). Although Innogy had a duty to exercise that discretion in good faith (*see Spinelli*, 903 F.3d at 205), after the IRS undermined the fundamental premise of the parties' bargain in response to the Covid-19 pandemic, Innogy abused this discretion by pushing back the Cassadaga Project's commercial operation date ***for Innogy's sole benefit***. SAC ¶¶ 124-127. Innogy still could have reasonably achieved commercial operation by December 31, 2020. *Id.* ¶¶ 64, 67. Instead, it chose to circumvent its $69.7 million Milestone Payment obligation and destroy Trireme's right to the fruits of the Merger Agreement. *See Pleiades Publ'g*, 117 A.D.3d at 637. In doing so, Innogy abused its discretion and breached its duty of good faith and fair dealing.

A. Trireme's Good Faith and Fair Dealing Claim Is Not Duplicative.

Innogy argues that Trireme's breach of the implied covenant claim is duplicative of the breach of contract claim pleaded in Count Four. *See* Defs.' Br., at 6-8. Innogy is wrong because Trireme's claim "is based on allegations different than those underlying the accompanying breach of contract claim." *Ruiz v. Liberty Mut. Fire Ins. Co.*, No. 19 CV 4399 (VB), 2019 WL 7293377, at *2 (S.D.N.Y. Dec. 30, 2019) (citation omitted) (breach of the implied covenant claim survived dismissal where plaintiff alleged that defendant breached an insurance policy and also that defendant acted with bad faith).

Trireme's contract claim alleges that Innogy ***first*** breached the Merger Agreement by, among other things, failing to exercise commercially reasonable efforts, and, as a result, missing the October 1, 2019 Milestone Payment date. *See* SAC ¶ 156; *see also id.* ¶¶ 71-105 (describing

Innogy's failure to exercise commercially reasonable efforts prior to the October 1, 2019 Milestone Payment date). Trireme's good faith and fair dealing claim is based on different facts. It alleges that Innogy ***later*** exercised its discretion in bad faith by delaying commercial operation of the Cassadaga Project until after December 31, 2020. *See id.* ¶¶ 124-128; *see also id.* ¶¶ 61-69 (describing Innogy's bad faith exercise of discretion). The two claims do not overlap as to any material allegations. *See Ruiz*, 2019 WL 7293377, at *2 ("a claim that defendant has breached the duty of good faith can only survive a motion to dismiss if it is based on allegations that differ from those underlying an accompanying breach of contract claim."). Indeed, it is impossible that the two claims overlap. The first breach was complete in October 2019, months before the pandemic hit. The second breach arose only after the IRS issued the Pandemic Adjustment in May 2020 and Innogy decided (apparently in September 2020) to delay the start of the Cassadaga Project's commercial operation. SAC ¶ 17.

To invent overlapping allegations, Innogy notes that both claims allege the same amount of damages—$69.7 million. *See* Defs.' Br., at 8 (citing *Underdog Trucking, LLC v. Verizon Servs. Corp.*, No. 09 CIV 8918 DLC, 2010 WL 2900048, at *6 (S.D.N.Y. July 20, 2010)). But Innogy misses the point. It breached ***two separate*** contractual obligations to pay Trireme on ***two separate*** occasions. Although the amount of both payments was the same, Innogy cannot arbitrarily combine the two factually unrelated breaches into one. *See, e.g.*, *Sobel v. Major Energy Servs., LLC*, No. 19 Civ. 8290 (PGG) (DCF), 2020 WL 5362357, at *8-9 (S.D.N.Y. Sept. 8, 2020) (denying motion to dismiss breach of implied covenant claim although plaintiff sought the same amount of damages in connection with breach of contract claim, because the claims did not rely on the same factual allegations).

Innogy's citations do not support its position. In *Underdog Trucking*, Judge Cote dismissed

a good faith and fair dealing claim based on two specific alleged breaches that were "encompassed by the breach of contract claim." No. 09 CIV 8918 DLC, 2010 WL 2900048, at *6 (S.D.N.Y. July 20, 2010). In *CSI Inv. Partners II, L.P. v. Cendant Corp.*, Judge Batts dismissed an implied covenant claim that "re-allege[d]" facts pleaded in support of the underlying breach of contract claim. 507 F. Supp. 2d 384, 425 (S.D.N.Y. 2007). Nothing like that is the case here. As the *CSI* decision recognizes, an implied covenant claim should only be dismissed as duplicative if "is also the predicate for breach of covenant of an express provision of the underlying contract." *Id.* (citation omitted). Trireme makes no such allegation here and its implied covenant claim is not based on breach of a specific clause of the underlying Master Agreement; rather it turns on Innogy's bad faith effort to deprive Trireme of the benefit of its bargain.

Innogy next argues that Trireme's good faith and fair dealing claim merely reframes Trireme's allegations that Innogy failed to exercise commercially reasonable efforts before the October 1, 2019 Milestone Payment date. *See* Defs.' Br., at 8. Innogy argues that this rule applies even if plaintiff alleges that defendant failed to use commercially reasonable efforts in bad faith. *See* Defs.' Br., at 7-8. In making these points, Innogy completely misunderstands Trireme's allegations and its cited authorities do not apply, because Trireme does not allege that Innogy failed to use commercially reasonable efforts in bad faith.[5] Instead, as explained, the SAC alleges that Innogy failed to use commercially reasonable efforts at one point, and then acted in bad faith at a ***separate time***.

[5] For example, in *LiDestri Foods, Inc. v. 7-Eleven, Inc.*, plaintiff alleged that 7-Eleven breached the implied covenant by failing to make commercially reasonable efforts to generate greater demand for tea. No. 17-CV-6146-FPG, 2018 WL 1428250, at *5 (W.D.N.Y. Mar. 22, 2018). Similarly, in *Washington v. Kellwood Co.*, the complaint alleged that defendant breached the implied covenant by failing to use "best efforts, or even reasonable efforts, to generate profits." No. 05 Civ. 10034(DAB), 2009 WL 855652, at *6 (S.D.N.Y. Mar. 24, 2009). The SAC does not have this sort of overlap of allegations—and that difference is why Trireme has adequately pleaded a claim for breach of the implied covenant.

Nor are these two standards legally the same, although Innogy conflates them. The commercially reasonable efforts clause merely sets the floor for Innogy's efforts to complete the Cassadaga Project. *See Holland Loader Co. v. FLSmidth A/S*, 313 F. Supp. 3d 447, 473 (S.D.N.Y. 2018) ("compliance with a 'commercially reasonable efforts' clause requires at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one's business interests," *i.e.*, bad faith). The implied duty of good faith and fair dealing imposes a separate—and entirely independent—standard of conduct. Even if Innogy satisfied its minimal requirement to use commercially reasonable efforts in developing the project, Innogy ***still*** would not be permitted to abuse its discretion or deprive Trireme of the fruits of its bargain. *See Pleiades Publ'g*, 117 A.D.3d at 637 (affirming denial of a motion to dismiss a breach of the implied covenant claim where defendant exercised its discretion under the contract to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of the agreement, and benefit itself at plaintiff's expense); *see also Bank of China v. Chan*, 937 F.2d 780, 789 (2d Cir. 1991) (a party acts in bad faith when it "acts so directly to impair the value of the contract for another party that it may be assumed that they are inconsistent with the intent of the parties"); *Vista Outdoor*, 234 F. Supp. 3d at 566-67 ("The terms of the Purchase Agreement are therefore no bar to [plaintiff's claim] because the agreement leaves the issue to the parties' discretion, which is bounded by the covenant of good faith and fair dealing").

For example, Innogy might have completed the Cassadaga Project by June 30, 2020—six months ahead of schedule. This may well have satisfied the commercially reasonable efforts clause. Nevertheless, Innogy still could have breached its duty of good faith and fair dealing, perhaps by purposely allowing the wind farm to stand idle until January 1, 2021 to avoid the $69.7 million Milestone Payment. While potentially ***commercially reasonable***, such conduct would

breach the duty of good faith and fair dealing. The two standards are independent. Although the timing of this example is hypothetical, the breach is no different from that alleged in the SAC. Regardless of whether it used commercially reasonable efforts, Innogy abused its discretion and breached the duty of good faith and fair dealing. *See* SAC ¶¶ 61-69.

B. Trireme's Good Faith and Fair Dealing Claim Is Consistent with the Terms of the Merger Agreement.

Innogy also argues that the good faith and fair dealing claim seeks to impose an obligation the parties did not include in their agreement. *See* Defs.' Br., at 9-10. Innogy relies on wildly inapposite cases and its argument is, once again, wide of the mark.[6]

Trireme does not seek to imply covenants into a subject where the Merger Agreement contains an express covenant regarding that subject. *Contrast Hartford Fire Ins. Co.*, 723 F. Supp. at 991 (governing indenture "expressly authorized" the challenged conduct). Rather, Section 7.6(a) of the Merger Agreement provides that Innogy must use commercially reasonable efforts to develop the Cassadaga Project, and imposes no other obligations. *See* JCT Decl., Ex. 1, Sec. 7.6(a). By contrast, the duty of good faith and fair dealing is implied in every contract, and it is ***that duty*** that Trireme seeks to enforce. *See House of Diamonds*, 737 F. Supp. 2d at 170. As discussed above, despite Innogy's efforts to conflate them, Innogy's breach of that duty is independent of its obligations under the commercially reasonable efforts clause of Section 7.6(a).

II. TRIREME ADEQUATELY ALLEGES A REFORMATION CLAIM

The SAC sets forth a classic reformation claim. It alleges that the parties reached an

---

[6] In *Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc.*, Judge Sweet refused to use the implied covenant to prevent a corporate merger when the relevant document provided: "Nothing contained in this Indenture or in any of the Securities shall prevent any consolidation or merger of the Company." 723 F. Supp. 976, 991 (S.D.N.Y. 1989). Similarly, in *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, Judge Walker held that a leveraged buyout did not violate any implied covenants in a bond indenture that granted the company "broad discretion in the management of its affairs." 716 F. Supp. 1504, 1519 (S.D.N.Y. 1989). The other case Innogy cites, *Integra FX3X Fund, L.P. v. Deutsche Bank, A.G.*, is irrelevant because the complaint in that case did not even include a claim for breach of the implied covenant. No. 14-CV-8400 (JPO), 2016 WL 1169514, at *3 (S.D.N.Y. Mar. 22, 2016).

agreement but that the written document does not adequately reflect the parties' actual and intended deal. This only became a problem when the IRS issued the Pandemic Adjustment and Innogy saw an opportunity to grab the value of all the tax credits for itself. The claim is not that the parties did not foresee the future. The claim is that the Master Agreement did not reflect the parties' bargain and that Innogy has manipulated that mutual mistake to its advantage. This claim is based squarely on existing New York law.

"[I]n order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon." *Walker v. Walker*, 67 A.D.3d 1373, 1374-75 (4th Dep't 2009) (citation omitted). The doctrine of mutual mistake depends on the idea that "the agreement, as expressed, in some material respect, does not represent the meeting of the minds of the parties." *Gould v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 N.Y.2d 446, 453 (1993) (internal citations omitted). "The mutual mistake must exist at the time the contract is entered into and must be substantial." *Id.* "The proponent of reformation must demonstrate in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Winmar Co. v. Tchrs. Ins. & Annuity Ass'n of Am.*, 870 F. Supp. 524, 535 (S.D.N.Y. 1994) (citation omitted). Trireme meets all of these requirements. It alleges that the Merger Agreement does not represent the parties' meeting of the minds because they used December 31, 2020, as a proxy for the safe-harbor deadline for renewable-energy tax credits. The mistake is simply that: writing "December 31, 2020" instead of "the day the tax credits expire." *See* SAC ¶¶ 142-51. Trireme thus states a claim for reformation.

Innogy's primary argument is, itself, based on another mistake. Innogy argues that

Trireme's reformation claim is based on a change in law (*see* Defs.' Br., at 12-13), but that is just not what Trireme contends. Instead, Trireme alleges a mutual mistake in memorializing the parties' true agreement—using a specific date as a proxy for the safe-harbor deadline. This mistake goes to the parties' fundamental bargain: that the deal embodied in the Merger Agreement would ***not make economic sense*** for either party if the Cassadaga Project achieved commercial operation after the IRS safe harbor deadline, *i.e.*, December 31, 2020. *See* SAC ¶¶ 142-45. The parties did not intend to allocate the risk that the deadline might be extended—with Innogy receiving a $69.7 million benefit if it was. Rather, the parties specifically intended to allocate the risk that Innogy might not begin commercial operation before the safe-harbor deadline—substantially reducing the value of the project. *See id.* ¶¶ 144-47.

New York courts have allowed reformation claims in analogous situations, where the parties were mistaken as to the contract's ***fundamental bargain***. *See, e.g.*, *Winmar*, 870 F. Supp. at 536-37 (denying a summary judgment motion on issue of mutual mistake where plaintiff signed the contract in the mistaken belief that a provision was drafted to act as a ceiling on liability in the event the agreement was terminated, since the provision was facially contradictory); *Gould*, 81 N.Y.2d at 453 (holding there was a mutual mistake where "a misconception concerning a critical aspect of petitioner's employment pervade[d] the entire transaction," thus the discussions and actions of both parties were premised on a mutual mistake as to the issue that petitioner was only a probational employee); *Cnty. of Orange v. Grier*, 30 A.D.3d 556, 557 (2d Dep't 2006) (upholding summary judgment on rescission claim where both parties mistakenly believed that plaintiff owned the two tax lots at issue)[7]; *Mahon v. N.Y.C. Health & Hosps. Corp.*, 303 A.D.2d 725 (2d Dep't

[7] Innogy correctly notes that the claims of reformation and rescission are predicated on the same grounds. *See Goldberg v. Mfrs. Life Ins. Co.*, 242 A.D.2d 175, 179 (1st Dep't 1998).

2003) (none of the parties considered the impact of a potential Medicaid lien in negotiating a settlement, thus there was no true meeting of the minds with respect to the amount of damages).

Innogy also argues that using the December 31, 2020 date as a proxy for the expiration of the renewable energy tax credits could not have been a mistake because the parties discussed future changes in tax law yet did not include a provision accounting for an extension of the safe-harbor deadline. *See* Defs.' Br., at 13-14. To begin with, this argument is improper. It is the classic type of fact-based argument that is inappropriate on a motion to dismiss. Innogy is free to make this argument at trial, but not now, when the allegations in the complaint are presumed to be true. *See Anderson News, L.L.C.*, 680 F.3d at 185.

In any event, the evidence contradicts Innogy's alternate facts (and Trireme's allegations certainly satisfy the low bar of plausibility that applies on this motion). Because the tax credits were a critical element of the transaction, the parties agreed to adjust pricing if the tax credits were reduced or phased out early. *See* SAC ¶ 59. Although equally important, the parties never contemplated or discussed an ***extension*** of the tax credit. *Id.* This is not surprising or implausible because nobody in 2017 contemplated the possibility of an unprecedented global pandemic and its potential impact. It is thus understandable that the parties agreed to adjust pricing for an early reduction or phase out of tax credits, while intending not to adjust pricing for an extension.

Because Trireme plausibly alleges that the parties' mutual mistake about the expiration of the safe harbor "pervade[d] the entire transaction," Trireme adequately alleges a claim for reformation. *See* SAC ¶¶ 145-147; *Gould*, 81 N.Y.2d at 453.

III. TRIREME ADEQUATELY PLEADS UNJUST ENRICHMENT

Trireme's primary case is that the parties understood and agreed that Innogy would complete the Cassadaga Project by December 31, 2020, and that both parties would benefit from the resulting tax credits. Neither party contemplated delaying completion until after that date, as

doing so would have cost both sides tens of millions of dollars. Thus, Trireme's basic theory—reflected in its claims for breach of the implied covenant and reformation—is based on Innogy's breach of the parties' actual agreement. In the alternative, and to the extent Innogy argues that no agreement governs the completion date and its relation to the sharing of tax credits, Trireme is entitled to proceed under a theory of unjust enrichment.

To state a cause of action for unjust enrichment, a plaintiff must allege that (1) the defendant was enriched; (2) at plaintiff's expense; and (3) "it is against equity and good conscience to permit [defendant] to retain what is sought to be recovered." *Cruz v. McAneney*, 31 A.D.3d 54, 59 (2d Dep't 2006) (citation omitted).

The SAC satisfies the pleading requirements. Innogy was enriched by delaying commercial operation of the Cassadaga Project. Because of the unanticipated change in IRS guidance, Innogy will obtain the full value of the Cassadaga Project without paying the full price. *See* SAC ¶¶ 138-39. Innogy's windfall comes at Trireme's expense. Innogy improperly manipulated the Project's commercial operation date to retain the rights to the Project while paying Trireme only a fraction of its true value. *See id.* ¶¶ 5-7. Equity and good conscience demand that Innogy pay for the benefit it received. The parties obviously could not control or affect the risk of a global pandemic or the IRS' decision to extend guidelines as a result, and they did not agree to place that uncontrollable risk on Trireme alone. Innogy seeks a windfall based on risks the parties never contemplated or allocated, and over which they had no control. *See id.*

Innogy argues that the Merger Agreement bars Trireme's unjust enrichment claim, because a plaintiff generally may not seek damages in a quasi contract action "where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Clark-Fitzpatrick, Inc. v. Long Is. R.R.*

Co., 70 N.Y.2d 382, 389 (1987). However, "[a]lthough the existence of a valid and enforceable contract generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract. . . ." *Goldman v. Simon Prop. Grp., Inc.*, 58 A.D.3d 208, 220 (2d Dep't 2008) (citations omitted); *see also Snitovsky v. Forest Hills Orthopedic Grp., P.C.*, 44 A.D.3d 845, 846 (2d Dep't 2007) ("Contrary to the defendant's contention, these equitable causes of action need not be dismissed because there existed a written agreement between the parties."). A plaintiff may proceed with an unjust enrichment claim where the dispute is "sufficiently outside the terms of the contract." *EUA Cogenex Corp. v. N. Rockland Cent. Sch. Dist.*, 124 F. Supp. 2d 861, 874 (S.D.N.Y. 2000).

This is precisely Trireme's point. The gravamen of the SAC is that Innogy did a bad thing: following the issuance of the Pandemic Adjustment by the IRS, it manipulated the schedule for completing the Cassadaga Project so that it could capture the full value of the tax credits and give Trireme nothing. As alleged in the implied covenant and reformation claims described above, Innogy is liable for its misconduct based on its breach of contract. If, however, the parties' contract does not provide Trireme a remedy for Innogy's misconduct, then equity demands an alternate remedy—*i.e.*, unjust enrichment. *See, e.g.*, *E*Trade Fin. Corp. v. Deutsche Bank AG*, 420 F. Supp. 2d 273, 291 (S.D.N.Y. 2006) (denying motion for judgment on the pleadings on unjust enrichment claim where plaintiff pleaded events that were not governed by the contract between the parties); *see also Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 316 (N.D.N.Y. 2019) (denying motion to dismiss unjust enrichment claim where defendant executed limited warranty to plaintiff as part of the purchase of a vehicle, plaintiff alleged a design defect, and the limited warranty did not cover design defects); *Bice v. Robb*, No. 07 Civ. 2214 (PAC), 2010 WL 11586924, at *5 (S.D.N.Y.

Jan. 15, 2010) (denying motion to dismiss unjust enrichment claim); *Strauss Paper Co. v. RSA Exec. Search, Inc.*, 260 A.D.2d 570, 571 (2d Dep't 1999) (upholding summary judgment for plaintiff on unjust enrichment claim where the contract between the parties did not specify a definition for a key term).

Innogy's "heads I win, tails you lose" argument is fundamentally unjust, inequitable, and economically irrational. Innogy should pay for the benefit it received from Trireme. Unjust enrichment is designed to provide a remedy in precisely such a case.

IV. TRIREME ADEQUATELY ALLEGES TORTIOUS INTERFERENCE

The SAC plainly sets out adequate allegations of tortious interference with contract against Defendant Cassadaga Wind. It describes Cassadaga Wind's actions and alleges that Cassadaga Wind "procured Innogy's breaches of the Merger Agreement." SAC ¶ 186.

A. Trireme Adequately Alleges Causation.

Defendants state that a claim for tortious interference with contract requires an allegation that the interfering defendant was a "but for" cause of the breach. *See* Defs.' Br., at 14. This is incorrect. The elements of tortious interference with contract under New York law are: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401-02 (2d Cir. 2006) (citation omitted). That is all.

Defendants further contend that a claim for tortious interference must also allege "but for" causation—*i.e.*, that the breaching party would not have committed the breach were it not for defendant's interference. *See* Defs.' Br., at 14. But this is not a requirement under New York law. *See, e.g.*, *Nat'l Fin. Partners Corp. v. USA Tax & Ins. Servs., Inc.*, 145 A.D.3d 440, 441 (1st Dep't

2016) (defendant "need not be the sole proximate cause to sustain a claim for tortious interference with contract"); *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 35 A.D.3d 317, 318 (1st Dep't 2006) ("A cognizable claim for tortious interference does not require an allegation that the defendant's conduct was the sole proximate cause of the alleged harm.").

The decision in *Union Carbide Corp. v. Montell N.V.*, 944 F. Supp. 1119 (S.D.N.Y. 1996), is an excellent illustration of the correct analysis. In that case, Judge Scheindlin denied a motion to dismiss where defendants argued that plaintiff's tortious interference claim was "deficient because it [did] not allege that there would not have been a breach but for the activities of defendants." 944 F. Supp. at 1138 (internal citation omitted). The court noted that the "but for" language could be traced to a single case—*Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820 (2d Cir. 1990)—and listed several decisions from the New York courts addressing claims for tortious interference that "make no mention of any requirement that explicit 'but for' language is necessary to withstand a motion to dismiss." *Id.* (quoting cases); *see also, e.g.*, *Lane's Floor Coverings, Inc. v. Ardex, Inc.*, No. CV-95-4078, 1996 WL 19182, at *3 (E.D.N.Y. Jan. 4, 1996) (denying motion to dismiss).

Here, Trireme has adequately alleged causation against Cassadaga Wind—alleging that, as the designated "Project LLC" for the Cassadaga Project, Cassadaga Wind intentionally and improperly prevented achievement of the conditions under which Innogy would owe the Milestone Payment by October 1, 2019 to deny Trireme the Milestone Payment, and it did so ***through its own intentional delay*** in submitting the necessary permit filings. SAC ¶¶ 100, 161. Cassadaga Wind is therefore wrong to assert that it "is not alleged to have taken any action independent of" Innogy.

Next, Defendants cite *Masefield AG v. Colonial Oil Indus.* for the proposition that plaintiff

must allege a specific action by defendant. *See* Defs.' Br., at 14-15. However, the facts of that case support the sufficiency of Trireme's allegations. In *Masefield*, Judge Leisure denied a motion to dismiss a tortious interference counterclaim in light of the complaint's allegation that plaintiff pressured the contracting party to cancel the contract. No. 05 Civ. 2231(PKL), 2006 WL 346178, at *4-5 (S.D.N.Y. Feb. 15, 2006) (finding this alleged "specific action" sufficient to survive a motion to dismiss). Similarly, the SAC alleges that Cassadaga Wind was responsible for making filings and obtaining engineering reports in connection with the Cassadaga Project, and that Cassadaga Wind delayed making required filings in derogation of Innogy's obligation to exercise commercially reasonable efforts, causing Innogy to breach the Merger Agreement. *See* SAC ¶¶ 71-100. Such allegations are more than sufficient to withstand a motion to dismiss. *See Masefield*, 2006 WL 346178, at *5.

B. Cassadaga Wind's Purported "Economic Interest" Does Not Give Rise to a Heightened Pleading Requirement.

Defendants argue that Cassadaga Wind has an economic interest in the Merger Agreement sufficient to invoke the "economic interest" defense to tortious interference with contract, and that this purported economic interest requires Trireme to have pleaded "malice, fraud, or criminality" in the SAC. *See* Defs.' Br., at 16-19. This too is incorrect.

First: The economic interest defense does not apply. It is not enough to assert, as Defendants do, that Innogy may shield itself from liability with the economic interest defense simply because of Cassadaga Wind's "affiliate relationship" with Innogy. *See* Defs.' Br., at 17. When courts have dismissed claims for tortious interference involving "affiliated" defendants on grounds of economic interest, the party invoking the economic interest defense is typically a corporate parent interfering in the contract of its wholly-owned subsidiary—indeed, this is the case with nearly all of Defendants' cited authorities. *See Am. Protein Corp. v. AB Volvo*, 844 F.2d 56,

63 (2d Cir. 1988); *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996); *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687 (1969); *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1st Dep't 1990).[8] By contrast, Cassadaga Wind is not alleged to be the corporate parent of Innogy; instead, until recently it was owned by a chain of LLCs whose sole member was Innogy's German parent company Innogy SE, and it is currently owned by a chain of LLCs whose owner is the Dutch company RWE Renewables International Participations BV. *See* SAC ¶¶ 24-26. Those alleged facts prevent a finding of economic interest.

Second: Defendants argue that the economic interest defense applies because Cassadaga Wind acted to protect its economic interest in Innogy's business. *See* Defs.' Br., at 17. Yet the SAC does not allege that Cassadaga Wind has an economic interest in Innogy's business. *See Horowitz v. Nat'l Gas & Elec., LLC*, No. 17-CV-7742 (JPO), 2018 WL 4572244, at *6 (S.D.N.Y. Sept. 24, 2018) (finding that the economic interest defense was "not yet available" to defendant at the motion to dismiss stage, where plaintiffs had not alleged that the interference with contract "was for anyone's benefit" other than defendant's). At best, the details of the relationship between Innogy and Cassadaga Wind, and any putative "economic interest" Cassadaga Wind may have in Innogy's business, are an issue for discovery, as several cases in this Court have refused to apply this defense at the pleading stage to dismiss causes of action for tortious interference with contract, since "the facts of the pleadings [are] not sufficiently developed to show entitlement for the defense." *See, e.g.*, *Hildene Cap. Mgmt., LLC v. Friedman, Billings, Ramsey Grp., Inc.*, No. 11 Civ. 5832(AJN), 2012 WL 3542196, at *9 (S.D.N.Y. Aug. 15, 2012). Accordingly, Defendants'

[8] Defendants' additional cited authorities for the claim that "an affiliate relationship like this alone has been enough to preclude a tortious interference claim" are not to the contrary. *See* Defs.' Br., at 18-19. As with *Am. Protein*, *Foster*, *Felsen*, and *Koret*, Defendants' cases involve a tortious interference claim brought against a parent company for interference in its subsidiary's contract. *See Multi-Juice, S.A. v. Snapple Beverage Corp.*, No. 02 CIV. 4635(RPP), 2003 WL 1961636, at *5 (S.D.N.Y. Apr. 25, 2003); *Primetime 24 Joint Venture v. Echostar Commc'ns Corp.*, No. 98 CIV 6738 RMB MHD, 2002 WL 44133, at *8 (S.D.N.Y. Jan. 11, 2002).

heavy reliance on *MTI/The Image Grp. v. Fox Studios E., Inc.* is misplaced, since the case was in summary judgment, rather than at the motion to dismiss stage. *See* 262 A.D.2d 20, 21 (1st Dep't 1999).

C. The Agency Defense Does Not Apply to Cassadaga Wind.

Last, Defendants contend that the Court should dismiss Trireme's claim for tortious interference because Cassadaga Wind was acting as Innogy's agent, which ostensibly requires Trireme to show that Cassadaga Wind "acted outside the scope of its authority" or "committed an independent tortious act against the plaintiff." *See* Defs.' Br., at 19 (quoting *Albert v. Loksen*, 239 F.3d 256, 274-75 (2d Cir. 2001)). Unfortunately for Defendants, *Albert* is inapplicable.

In *Albert*, the court addressed the specific circumstance of an at-will employee and a terminated employee relationship that ***did not*** involve an enforceable contract. *See Albert*, 239 F.3d at 274. In this context, employees may not "evade the employment at-will rule" by recasting causes of action as tortious interference with employment. *Id.* (quoting *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 189 (1989)). At no point did the court in *Albert* expand this limited holding beyond the context of an at-will employee relationship. *Id.* at 274-75.

Moreover, to the extent that an agent must act outside the scope of its authority to be liable for tortious interference in a principal's contract, both the existence of an agency relationship and the scope of authority thereunder are questions of fact not properly addressed on a motion to dismiss. *See, e.g.*, *Purgess v. Sharrock*, 806 F. Supp. 1102, 1109 (S.D.N.Y. 1992) (whether defendant agents were acting within the scope of their authority must be resolved at trial); *Bernhard v. Dutchess Cmty. Coll.*, No. 80 CIV. 4871, 1982 WL 193, at *11 (S.D.N.Y. Feb. 19, 1982) (scope of authority "must be resolved by the trier of fact").

CONCLUSION

For these reasons, the Court should deny Defendants' motion to dismiss in its entirety.

Dated: March 4, 2021

LAW OFFICES OF JOHN F. BAUGHMAN, PLLC

By /s/ John F. Baughman

John F. Baughman
Nathaniel E. Marmon
John C. Treat
299 Broadway – Suite 1816
New York, NY 10007
(212) 548-3212

Attorneys for Plaintiffs Trireme Energy Holdings, Inc. and Trireme Energy Development, LLC