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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA

In re:)	Case No. 14-10355-ABL
)	
Martifer Aurora Solar, LLC, a Nevada limited liability company,)	Chapter 11
)	
)	Jointly Administered with:
Martifer Solar USA, Inc., a California corporation,)	Case No.: 14-10357-ABL
)	
)	Hearing Date: September 22, 2014
Debtors.)	Hearing Time: 9:30 a.m.
)	

OPPOSITION TO MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ISSUANCE OF ORDER REQUIRING MARTIFER SOLAR, INC. TO FUND THE COMMITTEE CARVE OUT PURSUANT TO THE FINAL DIP ORDER

Martifer Solar, Inc. (“**MSI**”), the parent company of the above-captioned debtors and debtors in possession (the “**Debtors**”), hereby submits this opposition (the “**Opposition**”) to the Motion of the Official Committee of Unsecured Creditors (the “**UCC**”) for Issuance of Order Requiring Martifer Solar, Inc. to Fund the Committee Carve Out Pursuant to the Final DIP Order (the “**Motion**”).¹ In support of the Opposition, MSI respectfully states as follows:

¹ Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Motion.

Preliminary Statement

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2 1. MSI injected millions of dollars into these bankruptcy cases which all parties,
3 including the Debtors, Cathay Bank and the UCC, readily accepted. Like the Debtors in their
4 subrogation litigation with MSI, the UCC now seeks the benefit of its deal with MSI without having
5 to comply with any of the corresponding obligations. Specifically, MSI did not unilaterally agree to
6 fund \$325,000 to the UCC for professional fees (the “**UCC Carve Out**”) for no consideration.
7 Rather, MSI bargained for releases of the estates’ Chapter 5 claims under the Bankruptcy Code.
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11 2. The Motion seeks to compel MSI to pay the UCC Carve Out pursuant to the Final
12 DIP Order. Importantly, however, the UCC omits the fact that the Final DIP Order expressly states
13 that any payment of the UCC Carve Out is “pursuant to the Binding Term Sheet. . . .” See Final DIP
14 Order, Docket No. 829, at p. 9.
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17 3. As the UCC is aware, the Term Sheet contains obligations of both parties.
18 Specifically, a key term of the term sheet between MSI and the UCC (the “**Term Sheet**”) is the
19 Parent Settlement, which states, in pertinent part, as follows:
20

21 *Estate Release of Parent.*

22 On the Effective Date, except for Parent’s obligations under the Plan, parent and its
23 subsidiaries and affiliates, and their respective directors, officers, shareholders and
24 employees who are not directors or officers of the Debtors (collectively, the “Parent
25 Releases”) shall receive releases, from, among other things, any and all causes of action
26 and claims of the Debtors and their respective estates against any Parent Releasee,
27 including, without limitation, any causes of action under Chapter 5 of the Bankruptcy
Code (the “Released Debtors Claims”).

28 See Term Sheet, p. 2, a copy of which is attached hereto as **Exhibit A**. Moreover, the Term Sheet
29 states the “Term Sheet shall be implemented through the Plan, sale and/or 9019 order.” Id.
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31 4. Simply put, the Parent bargained for releases, including releases from causes of action
32 under Chapter 5 of the Bankruptcy Code, in return for funding the UCC Carve Out. In its Motion,
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1 however, the UCC seeks to compel payment of the UCC Carve Out without complying with its
2 obligations under the Term Sheet, that is, delivering releases to MSI.

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4 5. Unfortunately, however, the UCC cannot perform with its obligations under the Term
5 Sheet because the Debtors are actively litigating the estates' claims. Moreover, although the Debtors
6 sold most of their assets in the sale to BayWa r.e. renewable energy GmbH ("BayWa"), the Term
7 Sheet was not implemented through the BayWa sale order, and it has not been implemented through
8 a plan and/or a 9019 order. Accordingly, the UCC has not performed its obligations under the Term
9 Sheet. Moreover, the express terms of the Term Sheet required its implementation by Court order,
10 which has not happened. As a result, MSI cannot be compelled to fund the UCC Carve Out.
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14 6. Finally, nothing in the Term Sheet prohibits the UCC from seeking payment of any of
15 its allowed professional fees from the Debtors. In fact, the Debtors are not a signatory to the Term
16 Sheet. As the UCC received approval of its first fee application in the Debtors' bankruptcy cases
17 (see Docket Nos. 1209 and 1210), the UCC now has an allowed administrative claim. Therefore,
18 MSI should not be compelled to fund the UCC Carve Out when: (i) it has not received the benefit of
19 its bargain; and (ii) the UCC may seek payment from the Debtors. Thus, the Motion must be denied.
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22 Argument

23 **The UCC Has Not Performed Under the Binding Term Sheet**

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25 7. The Motion is simply an effort to compel payment of the UCC Carve Out pursuant to
26 the terms of the Term Sheet, or simply, a motion to enforce the contract between the parties. To
27 enforce the Term Sheet between the parties, the UCC is required to prove the following: (i) a valid
28 and existing contract was entered into between the parties; (ii) plaintiff performed or was excused
29 from performance; (iii) defendant breached; and (iv) plaintiff sustained damages as a result of the
30 breach. Reichert v. General Insurance Co. of Amer., 68 Cal.2d 822, 442 P.2d 377 (1968).
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1 8. Moreover, under Nevada law, the plain language of an unambiguous contract
2 controls. Ringle v. Bruton, 86 P.3d 1032, 1039 (Nev. 2004). Furthermore, “[e]very word [of a
3 contract] must be given effect if at all possible.” Royal Indem. Co. v. Special Serv. Supply Co., 413
4 P.2d 500, 502 (Nev. 1966). Finally, a contract should be “interpreted as a whole without giving
5 undue weight to any particular clause beyond that which [is] reasonable.” In re Las Vegas Monorail
6 Co., 429 B.R. 317, 332 (Bankr. D. Nev. 2010).

9 9. Here, the UCC’s argument fails. First, while the Term Sheet was signed by MSI and
10 the UCC, the express terms of the Term Sheet state that it “shall be implemented through the Plan,
11 sale and/or 9019 order.” See Term Sheet, p. 2. In this case, the Term Sheet has not been
12 implemented through a plan, sale and/or 9019 order, and there is no indication that it will be.
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15 10. Second, the UCC has neither performed under the Term Sheet, nor provided any
16 evidence that it is excused from performance (i.e. delivering releases to MSI). Simply put, MSI
17 bargained for releases in exchange for the payment of the UCC Carve Out. The UCC has not
18 delivered the releases, and it does not appear that it will be possible for the UCC to do so.
19 Specifically, the Debtors have not turned over the Chapter 5 causes of action to the UCC, and the
20 Debtors continue to threaten MSI with litigation.
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23 11. The above facts and corresponding failure of the UCC to deliver releases to MSI
24 constitute an anticipatory repudiation of the Term Sheet, thereby excusing MSI’s obligation to fund
25 the UCC Carve Out. See Kahle v. Kostiner, 455 P.2d 42, 44 (Nev. 1969) (affirming doctrine of
26 anticipatory repudiation where party demonstrates unequivocal intent not to perform a substantial
27 portion of the contract).
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1 12. Accordingly, as the UCC has not performed its obligation to deliver releases to MSI
2 pursuant to the terms of the Term Sheet, MSI cannot be compelled to fund the UCC Carve Out.
3 Therefore, the Motion should be denied.
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5 **The UCC Has an Allowed Administrative Claim Against the Debtors**
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7 13. Notwithstanding the above, the UCC also failed to establish the last element of a
8 contract action, that is, evidence that it has sustained damages. Indeed, whether a case is one in
9 contract or tort, an injured party bears the burden of proving that he or she has been damaged.
10 Bergstrom v. Estate of DeVoe, 854 P.2d 860 (Nev. 1993); Chicago Title v. Schwartz, 851 P.2d 419
11 (Nev. 1993).
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14 14. Here, the UCC has not proven that it was damaged. Importantly, nothing in the Term
15 Sheet prevents the UCC from asserting an administrative claim against the Debtors for its allowed
16 professional fees and expenses. Indeed, the UCC already has orders approving its fee applications
17 (see Docket Nos. 1209 and 1210), which are entitled to administrative priority. Therefore, the
18 Motion should be denied.
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21 WHEREFORE, MSI respectfully requests this Court to: (i) deny the Motion; and (ii) grant
22 such other relief as is necessary and proper.
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24 Dated this 17th day of September, 2014.
25

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent electronically via the Court's CM/ECF system to the following on September 17, 2014:

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