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10 *and Martifer Solar USA, Inc.*

Electronically Filed June 30, 2014

7 **UNITED STATES BANKRUPTCY COURT**
8 **DISTRICT OF NEVADA**

9 In re
10 MARTIFER AURORA SOLAR, LLC, a
11 Nevada limited liability company,
12 Affects Martifer Aurora Solar, LLC
13 Affects Martifer Solar USA, Inc.
14 Affects all Debtors

Case Nos. BK-S-14-10355-abl and
BK-S-14-10357-abl
Jointly Administered under
Case No. BK-S-14-10355-abl
Chapter 11

**DEBTORS' MOTION FOR APPROVAL,
PURSUANT TO FED. R. BANKR.
P. 9019, OF SETTLEMENT
AGREEMENT WITH CATHAY BANK**

Hearing Date: OST PENDING
Hearing Time: OST PENDING

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20 Martifer Aurora Solar, LLC, and Martifer Solar USA, Inc. (the "Debtors"), debtors and
21 debtors in possession in the above-captioned jointly administered chapter 11 cases (collectively,
22 the "Bankruptcy Case"), respectfully submit this motion (the "Motion") for entry of an order,
23 pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"),
24 approving the settlement agreement (the "Settlement Agreement") attached as Exhibit "1" to the
25 Tucker Declaration (defined below) between the Debtors and Cathay Bank ("Cathay"). In
26 addition, approval of the Settlement Agreement is a condition by both Cathay and BayWa in
27 connection with the Asset Sale. The Asset Sale is crucial to the Debtors as they have little in the
28 way of cash reserves left and if the Asset Sale does not close the Debtors will no longer continue

MEMORANDUM OF LAW

POINTS AND AUTHORITIES

I

PRELIMINARY STATEMENT

The Debtors and Cathay (the “Settling Parties”) have reached an arms-length and negotiated settlement of certain disputes between them in connection on terms and conditions that are reasonable, fair and equitable. Tucker Declaration, ¶ 4. This settlement is a condition to the closing of the Debtor’s sale of assets to BayWa r.e. USA LLC (“BayWa”), which this Court approved on June 27, 2014. Tucker Declaration, ¶¶ 37 and 54. Such settlement is memorialized in the Settlement Agreement attached as Exhibit “1” to the Tucker Declaration and incorporated for all purposes herein by this reference. Capitalized terms used herein without definition have the meanings as set forth in the Settlement Agreement.

II

JURISDICTION

1. This Court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are section 105 of title 11 of the United States Code (the “Bankruptcy Code”) and Bankruptcy Rule 9019(a).

III

FACTUAL BACKGROUND

4. The factual background with respect to the Loan, the Loan Documents, the CBS Project, the AEF/CBS Contract, the AEF/Martifer Contract, and the AEF/Martifer Settlement Agreement is set forth in the Tucker Declaration. See Tucker Declaration ¶¶ 5-17.

5. Under the AEF/Martifer Settlement Agreement, (i) the Frye Parties assigned their rights under the AEF/CBS contracts to Martifer USA, including rights to Rebates, Grants, and

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1 Supplier Fees, and (ii) Martifer USA undertook the Frye Parties' obligations thereunder.
2 Martifer USA also: (i) promised to pay AEF certain fees; (ii) granted AEF a security interest in
3 the Grants to secure such payment; and (iii) released its rights to payment from, and security
4 interests in, certain property of, the Frye Parties. See Tucker Declaration ¶ 18.

5 6. In addition, under the APA, AEF transferred all of its rights in connection with
6 the CBS Project to Studios Solar, LLC, a Delaware limited liability company ("Studios
7 Holding"); Studios Solar 2, LLC, a Delaware limited liability company ("Studios 2"); Studios
8 Solar 3, LLC, a Delaware limited liability company ("Studios 3"); Studios Solar 4, LLC, a
9 Delaware limited liability company ("Studios 4"); and Studios Solar 5, LLC, a Delaware limited
10 liability company ("Studios 5," and with Studios Holding, Studios 2, Studios 3, and Studios 4,
11 individually and collectively referred to as the "Studios Entities"). See Tucker Declaration ¶ 19.

12 7. Debtors and Guarantor defaulted in their obligations to Cathay under the Loan
13 Documents by, among other things, failing to pay to Cathay all amounts outstanding under the
14 Loan on the maturity date of November 30, 2013 (collectively, the "Existing Defaults"). See
15 Tucker Declaration ¶ 20.

16 8. In connection with, among other things, the Existing Defaults, on December 31,
17 2013, Cathay filed a complaint against Debtors and Guarantor, initiating the action styled as
18 *Cathay Bank v. Martifer Solar USA, Inc., et al.* in the Superior Court of California, County of
19 Los Angeles, West District (the "State Court"), Case No. SC121853 (the "State Court Action").
20 See Tucker Declaration ¶ 21.

21 9. On March 7, 2014, Cathay filed a Complaint for Declaratory Relief (the "Cathay
22 Adversary Complaint") in the Bankruptcy Case, with respect to the AEF/Martifer Settlement
23 Agreement and the effect on the collateral of the Cathay thereby, commencing Adversary
24 Proceeding No. 14-01036 (the "Cathay Adversary Proceeding"). The Cathay Adversary
25 Complaint names as defendants the Debtors, the Committee, the Studios Entities, and the Frye
26 Parties (individually and collectively referred to as the "Cathay Adversary Proceeding
27 Defendants"). See Tucker Declaration ¶ 22.

1 10. The Cathay Adversary Complaint seeks, among other things, a declaratory
2 judgment regarding the construction and interpretation of the AEF/Martifer Settlement
3 Agreement, including but not limited to a determination of what assets and rights were
4 transferred to Martifer USA and/or the Studios Entities pursuant to the AEF/Martifer Settlement
5 Agreement. The Cathay Adversary Complaint also seeks a declaratory judgment regarding the
6 validity, priority, and/or extent of the Liens with respect to, among other things assets and rights
7 transferred to Martifer USA and/or the Studios Entities pursuant to the AEF/Martifer Settlement
8 Agreement and all funds deposited into the Debtors' account at California Bank & Trust (the
9 "CB&T Account"), including but not limited to all funds on deposit in the CB&T Account on the
10 Petition Date. See Tucker Declaration ¶ 23.

11 11. In connection with the Cathay Adversary Proceeding, Cathay also filed UCC
12 Financing Statements against the assets of each of the Solar Studio entities in Delaware to which
13 a copy of the Cathay Adversary Complaint is attached. The Debtors allege that such filing was
14 improper as Cathay was never granted a security interest in such assets. Cathay disputes the
15 Debtors' assertions and alleges, among other things, that all of the assets transferred to the
16 Studios Entities were already subject to Cathay's valid and perfected liens at the time the
17 transfers occurred, and have remained subject to Cathay's valid and perfected liens at all times
18 thereafter and that the UCC Financing Statements properly give notice of that claim and the
19 Cathay Adversary Proceeding. See Tucker Declaration ¶ 24.

20 12. Debtors allege that Cathay does not have a security interest in and/or perfected
21 liens on, among other things: (i) any and all assets and rights transferred to the Studios Entities
22 pursuant to the AEF/Martifer Settlement Agreement, including but not limited to the Ground
23 Leases, Rebates, Grants, and Supplier Fees; or (ii) any funds deposited into the CB&T Account,
24 including but not limited to all funds on deposit in the CB&T Account on the Petition Date. See
25 Tucker Declaration ¶ 25.

26 13. On March 11, 2014, Martifer USA filed its Motion to Assume Settlement
27 Agreement with Alternative Energy Financing, LLC (the "Assumption Motion") [ECF No. 370],
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1 whereby Martifer USA moved the Bankruptcy Court for approval of Martifer USA's assumption
2 of the AEF/Martifer Settlement Agreement pursuant to Bankruptcy Code section 365. On March
3 27, 2014, the Bankruptcy Court entered its Order granting the Assumption Motion. [ECF
4 No. 529]. See Tucker Declaration ¶ 26.

5 14. On April 8, 2014, following an all hands meeting among the Debtors, the Parent,
6 the Committee and Cathay, the Debtors filed the Declaration of Michael Tucker in Support of the
7 Debtor's continued Cash Collateral Motion [ECF No. 586] (the "Cash Collateral Tucker Decl.").
8 The Cash Collateral Tucker Decl. attached a budget showing the estimated liquidity needs of the
9 Debtor through May 31, 2014, as calculated by Mr. Tucker (the "Tucker Decl. Budget"). See
10 Tucker Declaration ¶ 27.

11 15. On April 10, 2014, the Debtors, the Parent, Cathay and the Committee
12 memorialized their discussions into an executed global stipulation (the "Global Stipulation")
13 with respect to, among other things, payments by the Guarantor to support the liquidity needs of
14 the Debtors, payments by Guarantor to Cathay, and the application of such payments by Cathay.
15 [ECF No. 606]. See Tucker Declaration ¶ 28.

16 16. On April 11, 2014 and April 17, 2014, the Court entered its Order and Amended
17 Order, respectively, approving the Global Stipulation [ECF No. 611, as amended ECF No. 643].
18 See Tucker Declaration ¶ 29.

19 17. On May 21, 2014, the Debtors, Cathay and the Committee entered into a
20 *Stipulation and Final Order . . . Authorizing Debtors To Use Cash Collateral and Provide*
21 *Adequate Protection, etc.* [ECF No. 813]. On May 23, 2014, following a hearing, the Court
22 issued its *Order Approving Stipulation and Final Order . . . Authorizing Debtors To Use Cash*
23 *Collateral And Provide Adequate Protection, etc.* [ECF No. 822], approving said Stipulation.
24 See Tucker Declaration ¶ 30.

25 18. On May 21, 2014, the Debtors, Parent, the Committee and Cathay also entered
26 into a *Stipulation . . . (I) Authorizing Debtors to Obtain Postpetition Financing; and (II)*
27 *Granting Related Relief with respect to, among other things, payments by Parent to Cathay and*
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1 *additional DIP financing by Parent to the Debtors* [ECF No. 810]. On May 23, 2014, the Court
2 issued its *Amended Order Approving Stipulation Between the Debtors, Martifer Solar Inc.,*
3 *Cathay Bank and the Official Committee of Unsecured Creditors Authorizing Debtors to Obtain*
4 *Postpetition Financing on a Final Basis and Granting Related Relief* [ECF No. 829], approving
5 said Stipulation. See Tucker Declaration ¶ 31.

6 19. On May 20, 2014, Cathay filed (a) Proof of Claim No. 40 in the Martifer USA
7 Bankruptcy Case, and (b) Proof of Claim No. 17 in the Martifer Aurora Bankruptcy Case
8 (collectively, the "Proof of Claim"). The Proof of Claim asserts that Cathay held a secured claim
9 against Debtors, on the Petition Date, in the amount of at least \$6,337,886.39. See Tucker
10 Declaration ¶ 32.

11 20. On June 2, 2014, Debtors filed their *Motion for Entry of an Order Pursuant to*
12 *Sections 105(a), 363, 365, 503 and 507 of the Bankruptcy Code and Rules 2002, 6004, 6006,*
13 *9007, 9008 and 9014 of the Federal Rules of Bankruptcy Procedure Approving and Authorizing:*
14 *(A) Bidding Procedures in Connection with the Sale of Substantially all of the Debtors' Assets;*
15 *(B) Stalking Horse Bid Protections; (C) Form and Manner of Notice of the Sale Hearing;*
16 *(D) Sale of Substantially all of the Debtors' Assets Free and Clear of Liens, Claims,*
17 *Encumbrances, and Other Interests, Except as Provided in the Successful Bidder's Asset*
18 *Purchase Agreement; (E) Purchase Agreement Thereto; (F) Assumption and Assignment of*
19 *Certain of the Debtors' Executory Contracts and Unexpired Leases Related Thereto; and*
20 *(G) Related Relief (the "Sale Motion")* [ECF No. 853]. See Tucker Declaration ¶ 33.

21 21. On June 13, 2014, the Bankruptcy Court entered its Order approving those aspects
22 of the Sale Motion set for hearing on that date, including the selection of BayWa r.e. USA LLC
23 ("BayWa") as the Stalking Horse Bidder (as defined therein), and authorizing certain bidding
24 procedures. [ECF No. 915]. See Tucker Declaration ¶ 34.

25 22. In the Sale Motion, Debtors also moved the Bankruptcy Court for the entry of the
26 Sale Order (as defined therein) at the conclusion of the Sale Hearing (as defined therein),
27 authorizing the Debtors to, among other things: (a) sell certain of the Assets (as defined therein)

1 free and clear of all liens, claims, encumbrances and other interests to BayWa or, following the
2 Auction (as defined therein), to any other Successful Bidder (as defined therein), on terms
3 substantially similar to those set forth in the Stalking Horse Agreement (as defined therein); and
4 (b) enter into and perform the obligations under the Stalking Horse Agreement or a substantially
5 similar agreement with any other Successful Bidder, as the case may be. See Tucker Declaration
6 ¶ 35.

7 23. As explained in the Sale Motion, the Stalking Horse Agreement provides for
8 BayWa's purchase of substantially all of the Debtors' assets other than the Excluded Assets (as
9 defined therein) (the "Assets"). In exchange for the Assets, the Stalking Horse Agreement
10 provides for BayWa, among other things, to make a cash payment to Debtors of \$5,785,000 at
11 the closing of the Stalking Horse Agreement (the "Cash Purchase Price"). See Tucker
12 Declaration ¶ 36.

13 24. Among other things, the Stalking Horse Agreement and related documents
14 require, as conditions precedent to closing, that Cathay (a) execute UCC-3 lien releases
15 regarding Cathay's liens on and claims against the assets of the Debtors and of the Studios
16 Entities being purchased by Bay Wa in the Sale, and (b) dismiss the Cathay Adversary
17 Proceeding in its entirety, "with prejudice." No order of the Court can or will be effective to
18 transfer the Assets to Bay Wa "free and clear" of Cathay's claims to such Assets; nor can the
19 Court order that the Cathay Adversary Proceeding be dismissed "with prejudice" without
20 Cathay's consent or a fully noticed hearing. See Tucker Declaration ¶ 37.

21 25. The Settling Parties have reached a resolution of their disputes and differences
22 arising out of, inter alia, the Loan Agreement, AEF/Martifer Settlement Agreement, the Cathay
23 Adversary Proceeding, the Proof of Claim, and regarding the extent, validity, and priority of the
24 Cathay's security interests in and liens upon the Assets to be sold pursuant to the Sale Motion in
25 accordance with and subject to the terms and conditions set forth in the Settlement Agreement.
26 See Tucker Declaration ¶ 38.

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IV

THE SETTLEMENT AGREEMENT

A. Conditions Precedent.

26. The effectiveness of the Settlement Agreement is conditioned on:

- a. This Court’s entry of an Order approving the Settlement Agreement, in form and substance reasonably satisfactory to the Settling Parties, that by the time of the Sale Closing (as defined below) is not stayed pending appeal (the “9019 Order”);
- b. This Court’s entry of an order approving the sale of the Debtors’ Assets to BayWa for the Cash Purchase Price, in form and substance reasonably satisfactory to the Settling Parties, that by the time of the Sale Closing is not stayed pending appeal (the “Sale Order”);
- c. The closing of the sale of Debtors’ Assets to BayWa for the Cash Purchase Price (the “Sale Closing”);
- d. Payment of the Cathay Secured Claim (as defined below) directly to Cathay by wire transfer of immediately available funds from the Sale Escrow (as defined below) upon the Closing thereof; and
- e. Receipt by Cathay of the Studios Entities Releases (as defined below) and the Committee Release (as defined below).

Provided, however, that if this Court does not enter either the 9019 Order or the Sale Order, and/or the Sale Closing does not occur, the Settlement Agreement shall be void, and have no evidentiary or other legal effect on the Debtors or Cathay; *and provided further* that if the Effective Date (as defined below) does not occur, then Cathay agrees to provide the Cathay Adversary Defendants with an additional 14 days to respond to the Cathay Adversary Complaint following the termination or expiration of the Settlement Agreement. See Tucker Declaration,

¶ 39.

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1 **B. Effective Date.**

2 27. The Settlement Agreement shall become effective (the “Effective Date”) upon the
3 later of the entry of the 9019 Order or one business day before the Sale Closing. See Tucker
4 Declaration, ¶ 40.

5 28. If, within sixty (60) days of the date of the Settlement Agreement, either the 9019
6 Order or the Sale Order is not entered, or either is stayed pending appeal, or the Sale Closing
7 does not occur, the Settlement Agreement shall expire and be of no further force or effect on
8 Debtors or Cathay, unless all parties thereto shall have executed a written extension of the
9 Settlement Agreement acceptable to each other. See Tucker Declaration, ¶ 41.

10 **C. Cathay’s Claims.**

11 29. The Settlement Agreement provides that, on the date of the Sale Closing (the
12 “Sale Closing Date”), Cathay shall have an allowed and approved secured claim against the
13 Debtors' estates in the amount of \$4,700,000.00 which is not subject to defense or offset (the
14 “Cathay Secured Claim”), and the Proof of Claim will be deemed amended and fully allowed as
15 a secured claim against the Debtors' Bankruptcy Estates in the amount of the Cathay Secured
16 Claim. Cathay shall have an allowed general unsecured claim for any amounts that are due or
17 ever become due under, among other things, the Loan Documents or the Settlement Agreement,
18 in excess of the Cathay Secured Claim (such difference, the “Cathay Unsecured Claim”). See
19 Tucker Declaration, ¶ 42.

20 30. The Cathay Secured Claim shall be satisfied through the direct payment in cash
21 to Cathay from the proceeds of the Sale Closing as described in paragraph 33 below. Cash equal
22 to the amount of the Cathay Secured Claim shall be wire transferred directly to Cathay, in
23 immediately available funds, to pay all amounts then due and owing to Cathay by the Debtors on
24 the Sale Closing Date with regard to or in connection with, in any respects, the Loan, the Loan
25 Documents, the Guaranty, the Subordination Agreement, the Bankruptcy Case, the State Action,
26 the Guarantor Adversary (as defined below), the Guarantor, the Settlement Agreement, or
27 otherwise, including but not limited to all principal, interest, default interest, liabilities, claims,
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1 fees, charges, legal fees and expenses. All excess funds (if any) above amounts then due by
 2 Debtors to Cathay from such payment shall be deposited into an internal, Cathay controlled
 3 account at Cathay (the "Reserve Account") as a reserve and security for any costs, fees or
 4 expenses, including attorneys' fees, thereafter incurred by Cathay with regard to or in connection
 5 with the Loan, the Loan Documents, the Guaranty, the Subordination Agreement, the
 6 Bankruptcy Case, the State Action, the Guarantor Adversary (as defined below), the Guarantor,
 7 the Settlement Agreement, or otherwise (the "Cathay Post-Sale Expenses"), which expenses
 8 expressly include, but are not limited to, expenses, fees or costs, including attorneys' fees,
 9 incurred by Cathay related to the disputes, claims and counter-claims asserted by, against or
 10 among, the Debtor, Guarantor, and/or the Committee in Adversary Case 14-01100-abl (the
 11 "Guarantor Adversary"), this Agreement, or otherwise. All funds in the Reserve Account shall at
 12 all times belong to Cathay subject to the provisions of the Settlement Agreement. Cathay may,
 13 in addition to the foregoing and in its sole discretion, also use any funds on deposit in the
 14 Reserve Account to resolve or settle any claims that may be asserted against Cathay arising
 15 under, with regard to, or in connection with, the Loan, the Loan Documents, the Guaranty, the
 16 Subordination Agreement, the Bankruptcy Case, the State Action, the Guarantor Adversary, the
 17 Guarantor, the Settlement Agreement, or otherwise. See Tucker Declaration, ¶ 43.

18 31. The Settlement Agreement further provides that (i) Cathay's prepetition and
 19 replacement liens shall and do transfer to and attach to any proceeds in the Reserve Account;
 20 (ii) such liens are valid, perfected and are of first priority as to the funds maintained in the
 21 Reserve Account and (iii) neither the Debtors nor any third party shall have no rights to any
 22 proceeds in the Reserve Account, except as expressly set forth in the Settlement Agreement.
 23 From and after the Sale Closing Date until Cathay and the Debtors otherwise agree in writing,
 24 Cathay may, no more frequently than once a month and without further Court Order, unilaterally
 25 reimburse itself from the Reserve Account for the amount of any Cathay Post-Sale Expenses
 26 then incurred or outstanding. Cathay shall, within 5 business days of each such reimbursement
 27 and deduction, provide written notice to the Debtors of the amount and nature of each such
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1 reimbursement and deduction. If the Debtors assert an objection to the amount or nature of any
2 particular reimbursement and deduction, the Debtors may, within 15 business days of Cathay's
3 notice, and after making a reasonable effort to resolve the objection with Cathay informally, seek
4 to have the objection resolved by application to this Court. Once the amounts deposited into the
5 Reserve Account have been exhausted, any further Cathay Post-Sale Expenses shall be deemed
6 allowed as part of the Cathay Unsecured Claim. Notwithstanding the Release provisions
7 described in paragraphs 39 and 40 below, nothing contained in the Settlement Agreement or in
8 any Order approving the Settlement Agreement operates to release any claims of Cathay to any
9 Cathay Post-Sale Expenses incurred under the Loan Documents, the Settlement Agreement, the
10 Reserve Account or otherwise. See Tucker Declaration, ¶ 44.

11 32. Cathay requires the Debtors' to obtain the consent and approval of Committee to
12 the terms and conditions of the Settlement Agreement, and to the form and substance of the 9019
13 Order. See Tucker Declaration, ¶ 45.

14 **D. Settlement Upon Sale Closing.**

15 33. On the Effective Date, the escrow agent for the Sale Closing (the "Escrow
16 Agent") shall pay Cathay by wire transfer, in immediately available funds, directly from the
17 Cash Purchase Price, an amount equal to the Cathay Secured Claim. See Tucker Declaration,
18 ¶ 46.

19 34. On or before the Effective Date, upon Cathay's confirmation of its receipt of a
20 wire transfer in immediately available funds in the full amount of the Cathay Claim, it will
21 simultaneously deliver to the Debtor each of the following, duly executed by an authorized
22 representative of Cathay (collectively, the "Cathay Terminations"):

- 23 a. UCC-3 termination statements with respect to all of the Liens, except as to
24 the Reserve Account, in a form acceptable to the parties;
- 25 b. A request for the dismissal, with prejudice, of the Cathay Adversary
26 Proceeding in its entirety, in a form acceptable to the parties;

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- 1 c. A request for the dismissal of the State Court Action with prejudice, but as
- 2 to the Debtors only, in a form acceptable to the parties;
- 3 d. The Committee Release, duly executed by an authorized representative of
- 4 Cathay, to be delivered to the Committee by the Escrow Agent,
- 5 concurrently with the delivery of the Cathay Terminations to the Debtors.

6 See Tucker Declaration, ¶ 47.

7 35. On or before the Effective Date, the Debtors shall (i) cause each of the Studios

8 Entities to provide the Escrow Agent with separate and duly executed Releases of Claims, in the

9 form annexed as Exhibit "A" to the Settlement Agreement (the "Studios Releases"), (ii) provide

10 the Escrow Agent with the duly executed Committee Release to be delivered to Cathay upon the

11 Sale Closing, and (iii) a request for the dismissal, "with prejudice" of Adversary Proceeding No.

12 14-ap-1014 abl in a form acceptable to the parties. See Tucker Declaration, ¶ 48.

13 36. After wire transferring the amount of the Cathay Secured Claim to Cathay, the

14 Escrow Agent deliver (i) the Cathay Terminations to Debtors, and (ii) the Committee Release

15 executed by Cathay to the Committee. See Tucker Declaration, ¶ 49.

16 37. On the Effective date, concurrently with delivery of the Cathay Terminations to

17 the Debtors, the Escrow Agent shall deliver the Studios Releases, the Committee Release and

18 dismissal to Cathay. See Tucker Declaration, ¶ 50.

19 **E. Guaranty and Subordination.**

20 38. Cathay's rights under the Guaranty and the Subordination remain unaffected by

21 the Settlement Agreement and shall not be terminated until all possible amounts due or to

22 become due, including but not limited to the Cathay Secured Claim and the Cathay Unsecured

23 Claim, shall have been paid to Cathay in full. If at such time there remain funds in the Reserve

24 Account, those funds shall be returned to the Debtors; provided, however, that if at such time if

25 there is a final order of the Bankruptcy Court as to the disposition of the remaining funds on

26 deposit in the Reserve Account (if any), including but not limited to with regard to any

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1 subrogation rights in favor of a subrogee, Cathay shall remit such funds as Ordered by the Court.

2 See Tucker Declaration, ¶ 51.

3 **F. Mutual Releases.**

4 39. The Settlement Agreement provides that, except for the obligations of Cathay to
5 the Debtors under the Settlement Agreement, the Debtors release and discharge Cathay
6 (including its affiliates, advisors, successors and assigns (other than MSI or S.A.)) from any and
7 all claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs and expenses
8 (including, but not limited to, attorneys' fees), damages, injuries, actions and causes of actions,
9 of whatever kind or nature, whether legal or equitable, known or unknown, suspected or
10 unsuspected, contingent or fixed, including, without limitation, those based upon, arising out of,
11 appertaining to, or in connection with any of the matters or facts alleged or set forth in
12 paragraphs 4-25 above, the Loan, the Loan Documents, the State Court Action, the Bankruptcy
13 Case, the Cathay Adversary Proceeding, the Guarantor Adversary, the Proof of Claim, the
14 lending relationship between Cathay on the one hand, and Debtors, on the other hand, any and all
15 tangible and intangible collateral, and all avoidance actions under Chapter 5 of the Bankruptcy
16 Code or any similar preference or fraudulent conveyance law. Notwithstanding the general
17 description of the parties being released by Debtors under the Settlement Agreement, nothing in
18 the Settlement Agreement is intended to release, or does release, any claims asserted or retained
19 by Debtors against MSI or S.A., or either of them. See Tucker Declaration, ¶ 52.

20 40. Except for the obligations of Debtors retained or created under the Settlement
21 Agreement, expressly including but not limited to the Debtors' obligations under the Loan
22 Documents, the Settlement Agreement, or otherwise, with respect to their obligations to Cathay
23 on account of the Cathay Post-Closing Expenses and the Reserve Account detailed above,
24 Cathay releases and discharges the Debtors (including their successors and advisors) from any
25 and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs and
26 expenses (including, but not limited to, attorneys' fees), damages, injuries, actions and causes of
27 actions, of whatever kind or nature, whether legal or equitable, known or unknown, suspected or

1 unsuspected, contingent or fixed, based upon, arising out of, appertaining to, or in connection
2 with any of the matters or facts alleged or set forth in paragraphs 4-25 above, the Loan, the Loan
3 Documents, the State Court Action, the Bankruptcy Case, the Cathay Adversary Proceeding, the
4 lending relationship between Cathay on the one hand, and Debtors, on the other hand, and any
5 and all real and personal property collateral heretofore granted to Cathay as security for the
6 obligations of Debtors under the Loan Documents, jointly and severally. See Tucker
7 Declaration, ¶ 53.

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V

ARGUMENT

A. Legal Standard.

“Compromises are a normal part of the process of reorganization.” Protective Comm. for
Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (citations
and internal quotation marks omitted). Accordingly, Bankruptcy Rule 9019 provides: “On
motion by the trustee and after notice and a hearing, the court may approve a compromise or
settlement.” Fed. R. Bankr. P. 9019(a).

The Court is afforded “great latitude in approving compromise agreements.” Woodson v.
Fireman’s Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). “The purpose of a
compromise agreement is to allow the trustee and the creditors to avoid the expenses and
burdens associated with litigating sharply contested and dubious claims.” Martin v. Kane (In re
A&C Props.), 784 F.2d 1377, 1380-81 (9th Cir. 1986). Moreover, “[t]he law favors compromise
and not litigation for its own sake” Id., at 1381. Accordingly, to approve a settlement
agreement, a bankruptcy court need not conduct a mini-trial on the merits of the claims or an
exhaustive investigation into the underlying dispute between the parties. United States v. Alaska
Nat’l Bank (In re Walsh Constr., Inc.), 669 F.2d 1325, 1328 (9th Cir. 1982). It is sufficient that
the court find that the settlement was negotiated in good faith and that it is fair and equitable.
A&C Props., 784 F.2d at 1381. In order to be approved, a settlement must be a reasoned
evaluation of the litigation risks, balanced against the potential upside from pursuing the

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1 litigation. *See, e.g., Key3Media Group Inc. v. Pulver.com (In re KeyMedia Group Inc.)*, 336
2 B.R. 87, 92 (Bankr. D. Del. 2005).

3 The Ninth Circuit has identified four factors that a bankruptcy court must consider in
4 determining whether a proposed settlement agreement is reasonable, fair and equitable:

- 5 (a) the probability of success in the litigation;
- 6 (b) the difficulties, if any, to be encountered in the matter of collection;
- 7 (c) the complexity of the litigation involved, and the expense, inconvenience
8 and delay necessarily attending it; and
- 9 (d) the paramount interest of the creditors and a proper deference to their
10 reasonable views in the premises.

11 A & C Props., 784 F.2d at 1381 (citations omitted).

12 In considering these factors, bankruptcy courts need only canvass the issues, not decide
13 disputed facts and questions of law. *See Burton v. Ulrich (In re Schmitt)*, 215 B.R. 417, 423
14 (B.A.P. 9th Cir. 1997). “If the court were required to do more than canvass the issue[s], ‘there
15 would be no point in compromising; the parties might as well go ahead and try the case.’” *Suter*
16 *v. Goedert (In re Suter)*, 396 B.R. 535, 548 (D. Nev. 2008) (quoting 10 *Collier on Bankruptcy*, ¶
17 9019.02). Additionally, “while creditors’ objections to a compromise must be afforded due
18 deference, such objections are not controlling.” A & C Props., 784 F.2d at 1382. Indeed, the
19 settlement need not be the best that could have been achieved, but only must not fall “below the
20 lowest point in the range of reasonableness.” *In re Pac. Gas & Elec. Co.*, 304 B.R. 395, 417
21 (Bankr. N.D. Cal. 2004) (quoting *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496
22 (Bankr. S.D.N.Y. 1991) (citations and internal quotation marks omitted)); accord *Redwood*
23 *Trust v. Am. Bldg. Storage, LLC (In re Am. Bldg. Storage, LLC)*, No. CC-06-1259-MOPAD,
24 2007 WL 7532281, at *5 (B.A.P. 9th Cir. Apr. 2, 2007) (not for publication).

25 **B. The A&C Properties Factors Weigh Heavily in Favor of Approving the Settlement.**

26 The Settlement Agreement should be approved because it is a fair and reasonable
27 settlement of multiple claims that maximizes the value of the estate and thus complies with all of
28

1 the A&C Properties factors. In addition, approval of the Settlement Agreement is a condition by
2 both Cathay and BayWa in connection with the Asset Sale. The Asset Sale is crucial to the
3 Debtors as they have little in the way of cash reserves left and if the Asset Sale does not close the
4 Debtors will no longer continue to operate as going concerns, which will greatly reduce the value
5 of the Estates' assets for all creditors. See Tucker Declaration ¶.54.

6 **1. Probability of Success in Litigation.**

7 There is a plethora of litigation between the Debtors and Cathay which this Settlement
8 Agreement settles. That litigation has been extensively pursued by Cathay, including the State
9 Court Action, the use of cash collateral and adequate protection issues in the Bankruptcy Case,
10 the Cathay Adversary Proceeding and the Trustee Motion. If these matters are not settled the
11 Debtors expect that Cathay will continue to aggressively pursue such litigation, and the Debtors
12 have limited resources with respect thereto. Although the Debtors dispute the extent, validity and
13 priority of Cathay's interest in certain of the assets to be sold pursuant to the Sale Motion,
14 Cathay has aggressively asserted/defended its interests throughout the Bankruptcy Cases,
15 including contesting the Debtors' use of cash collateral, and filing the Cathay Adversary
16 Proceeding, the filing of the Trustee Motion, and the Proof of Claim. For example, in the Cathay
17 Adversary Complaint, Cathay asserts a security interest in the CBS Project assets, including
18 those held by the Studios Entities [ECF No. 332]. The Debtors dispute Cathay's security interest
19 in the Studios Entities' assets, and if required to file an answer to the Complaint, would so state.
20 See Tucker Declaration ¶ 54.

21 In addition to disagreeing on the validity of Cathay's interest in the CBS Project assets,
22 the parties have also differed greatly on the value of such assets. Compare *Declaration of James*
23 *Crossland in Support of Cathay Bank's Omnibus Opposition to Entry of Final Orders*
24 *Authorizing the Debtors to Use the Bank's Cash Collateral and Obtain Post-Petition Financing*
25 *on the Terms the Debtors Propose* [ECF No. 514] with *Declaration of James Wong in Support of*
26 *Debtors' Reply to Cathay Bank's Omnibus Opposition to Entry of Final Orders Authorizing the*
27 *Debtors to Use the Bank's Cash Collateral and Obtain Post-Petition Financing on the Terms the*

1 *Debtors Propose* [ECF No. 520]. The bids the Debtors have received for those assets also appear
2 to have valued such assets in a widely different manner based on valuation of various future
3 components of those assets. See Tucker Declaration ¶ 56.

4 The parties have also disagreed greatly on the value of the remaining assets in the estate,
5 which the Debtors do not believe is easily currently quantifiable. Cathay has consistently
6 asserted its doubts as to the ultimately collectability, and thus the value, of the Debtors' accounts
7 receivable. See *Declaration of Eileen Lewis In Support of Secured Creditor Cathay's Demand*
8 *for Adequate Protection* [ECF. No. 61 at ¶ 3]. See Tucker Declaration ¶ 57.

9 Cathay has filed its Proof of Claim in the amount of at least \$6.3 million. Although
10 currently incapable of quantifying because many or most of the assets are subject to litigation,
11 the Debtors believe that the assets that are subject Cathay's Liens may have an aggregate value
12 of less than \$4.7 million. They may have an aggregate value of more than \$4.7 million, once
13 actually litigated and quantified. As noted above, however, the Debtors contend that the CBS
14 Project assets, including those held by the Studios Entities, are not subject to Cathay's Liens.
15 The CBS Project assets comprise the central assets subject to the Sale to BayWa or any other
16 Successful Bidder and represent a significant portion of the Cash Purchase Price or Alternative
17 Cash Purchase Price. Under the Settlement Agreement, Cathay has agreed to limit its secured
18 Claim to \$4.7 million and release all Liens (except on the Reserve Account), in exchange for
19 receipt of cash in the amount of the Cathay Secured Claim from the Cash Purchase Price which
20 includes the sale of the CBS Project Collateral. The Settlement Agreement thus eliminates the
21 risk of the Debtors not prevailing in the Adversary or the other litigation in their efforts to reduce
22 the Claim or dispute the extent of the Liens, and obviates the delay and expense involved in
23 litigation. See Tucker Declaration, ¶ 58.

24 As such, in the exercise of their reasonable business judgment, the Debtors believe that
25 the Cathay Secured Claim is a reasonable estimate of the value of Cathay's secured claims.
26 Debtors also believe that the payment of that amount from an Asset Sale which includes the CBS
27 Projects, as to which the Debtors assert Cathay does not have a lien, is a reasonable settlement of

1 the extensive and complex disputes between the Debtors and Cathay. This is especially so in
2 light of Cathay's aggressive litigation stance thus far, and because a settlement is required in
3 order for the Debtors to sell the assets free and clear to BayWa, given that Cathay has filed UCC-
4 1s as to such CBS Project collateral. See Tucker Declaration, ¶ 59.

5 Accordingly, the first A & C Properties factor – probability of success in litigation –
6 weighs in favor of this Court approving the Settlement Agreement.

7 **2. Difficulties in Collection.**

8 The Debtors will not be collecting anything from Cathay under the Settlement
9 Agreement. See Tucker Declaration ¶ 60. As such, the second A & C Properties factor is
10 neutral under the circumstances.

11 **3. Complexity, Expense, and Delay Resulting from Litigation.**

12 But for approval of the Settlement Agreement, the significant disputes between the
13 Debtors and Cathay will undoubtedly linger and prove costly. Litigation concerning the AEF
14 Settlement Agreement, and the actions taken by the parties pursuant thereto, will be complex and
15 lengthy. The arguments involved require the tracing of proceeds, which is likewise time
16 consuming. Many of the fact witnesses are no longer employed by the Debtors and no longer
17 reasonably available. Moreover, many expert witnesses will be required to opine on the value of
18 Cathay's secured claims, Cathay's rights in the assets of the Studios Entities, the valuation of the
19 assets of Studios Entities, which is in and of itself complex, and the damages due to the Debtors
20 if they prevail on their slander of title or interference with economic advantage claims against
21 Cathay. See Tucker Declaration ¶ 61.

22 In addition to the litigation regarding the CBS Project Assets, the litigation regarding the
23 value of all other assets that may or may not be subject to Cathay's secured claims would also be
24 extensive and costly and would also require many expert witnesses as to valuation and outcome
25 of potential litigation which will be extremely costly to the Estates. It is likely that both parties
26 will appeal an adverse ruling, adding further expense and delay. And as mentioned above, delay
27

1 will eliminate the BayWa Asset Purchase and the Estates would likely revert to liquidation,
2 severely de-valuing the value of the Estates. See Tucker Declaration ¶ 61.

3 Accordingly, the third A & C Properties factor – the complexity of litigation involved
4 and the expense, inconvenience, and delay necessarily attending it – weighs heavily in favor of
5 approving the Settlement Agreement.

6 **4. Benefit to Creditors.**

7 The Settlement Agreement benefits creditors by resolving the pending disputes between
8 the parties without requiring the Debtors to incur additional expense and by allowing the value of
9 the estate to be preserved through the sale of the assets to Cathay. All creditors have admitted
10 that the Sale to BayWa, which the Court approved on June 27, 2014, is very beneficial to the
11 Estates and should not be stopped. The Sale Order approved by the Court (and which was a
12 completely consensual Sale Order by all parties after the addition of protective language by all
13 objectors) provides that all creditors' liens are preserved in the proceeds of the Sale and that,
14 other than payment to Cathay as contemplated by the Settlement Agreement, no additional
15 proceeds will be distributed without prior Court order. Without the Settlement Agreement, there
16 will be no Sale to BayWa. Deference should be given to the Debtors' and Cathay's judgment over
17 the use of the Sale proceeds because the Asset Sale preserves the value of the Estates as a going
18 concern; if the Asset Sale does not close as planned in the middle of July, the Debtors' cash flow
19 issues will force a liquidation, and eliminate the possibility of the Debtors being sold as a going
20 concern. See Tucker Declaration ¶ 62.

21 Based on the foregoing, the Debtors submit that it is the best interests of their Estates and
22 creditors to resolve the Debtors' disputes with Cathay under the terms of the Settlement
23 Agreement. See Tucker Declaration ¶ 63.

24 **VI**

25 **CONCLUSION**

26 The Debtors believe the Settlement Agreement should be approved. Upon consideration
27 of the A&C Properties factors, the Settlement Agreement is fair and equitable and was by all

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EXHIBIT A

PROPOSED ORDER

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and Martifer Solar USA, Inc.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

MARTIFER AURORA SOLAR, LLC, a
Nevada limited liability company,

- Affects Martifer Aurora Solar, LLC
- Affects Martifer Solar USA, Inc.
- Affects all Debtors

Case Nos. BK-S-14-10355-abl and
BK-S-14-10357-abl

Jointly Administered under
Case No. BK-S-14-10355-abl

Chapter 11

**ORDER GRANTING DEBTORS’
MOTION FOR APPROVAL, PURSUANT
TO FED. R. BANKR. P. 9019, OF
SETTLEMENT AGREEMENT WITH
CATHAY BANK**

Hearing Date: OST PENDING
Hearing Time: OST PENDING

The Court, having reviewed and considered Debtors’¹ Motion for an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, for approval of the compromise embodied in the Settlement Agreement, as more fully set forth in the Motion; and upon consideration of the Declaration of Michael Tucker in support thereof; and the Debtor having appeared by and through its counsel, Fox Rothschild LLP, and all other appearances having been

¹All capitalized, undefined terms shall have the meaning ascribed to them in the Motion.

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1 noted on the record; the Court having stated its findings of fact and conclusions of law on the
2 record at the hearing on the Motion, which findings of fact and conclusions of law are
3 incorporated herein by this reference in accordance with Federal Rule of Civil Procedure 52, as
4 made applicable by Bankruptcy Rule 9014; and it appearing that the relief requested is warranted
5 on the grounds, among others, that the Settlement Agreement: (a) was negotiated in good faith
6 and is fair and equitable, (b) contemplates an immediate resolution of all disputes between the
7 Settling Parties on terms favorable to the Debtors; (c) avoids litigation that could prove to be
8 protracted and expensive; and (d) is in the best interests of the Debtors, the Estates and the
9 creditors because it resolves issues between the Settling Parties without the incurrence of
10 additional expense, and creates the potential for recovery by unsecured creditors; after due
11 deliberation and sufficient cause appearing therefor, it is hereby

12 **ORDERED** that the Motion is GRANTED; and

13 **IT IS FURTHER ORDERED** that

- 14 1. The Settlement Agreement is approved;
- 15 2. The Debtors are authorized to take all actions contemplated by the Settlement
16 Agreement according to the terms and provisions thereof; and
- 17 3. This Court shall, and hereby does, retain jurisdiction with respect to all matters
18 arising from or related to the implementation and interpretation of this Order.

19 Prepared and Respectfully Submitted by:

- 20 4. Except as otherwise noted, all provisions of this Agreement, including the
21 releases, are binding upon Cathay and any assignee or successor entity thereto; the Debtors; the
22 Debtors' bankruptcy estates, the Committee and any successor entity to any of the foregoing,
23 subject to entry of the 9019 Order; and any trustee appointed in the Bankruptcy Case, whether
24 prior to or after conversion of the Bankruptcy Case to a case under Chapter 7 of the Bankruptcy
25 Code.

26 ///

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