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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	**Chapter 15**
SUNTECH POWER HOLDINGS CO., LTD. (IN PROVISIONAL LIQUIDATION),	)	**Case No. 14-10383-smb**
Debtor in a Foreign Proceeding.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF SUNTECH POWER HOLDINGS CO., LTD. (IN PROVISIONAL LIQUIDATION) IN OPPOSITION TO SOLYNDRA RESIDUAL TRUST'S MOTION TO TRANSFER VENUE

TABLE OF CONTENTS

Page

Pursuant to the Court's Order, the JPLs[1] hereby submit their proposed findings of fact and conclusions of law ("**Venue FOF**" and "**Venue COL**," respectively) in opposition to Solyndra Residual Trust's ("**Solyndra**") Proposed Findings of Fact and Conclusions of Law on Motion to Transfer Venue ("**Solyndra PFOF**" and "**Solyndra PCOL**," respectively) [Docket No. 63]. In support hereof, the JPLs respectfully state that Solyndra's Motion to Transfer Venue should be denied for the reasons set forth below:

FINDINGS OF FACT

I. BACKGROUND.

1. Suntech Power Holdings' corporate history, business operations, corporate structure, assets, and liabilities are described in greater detail in *Proposed Findings Of Fact And Conclusions Of Law Of Suntech Power Holdings Co., Ltd. (In Provisional Liquidation), In Support Of Verified Petition For Recognition Of Foreign Main Proceeding Pursuant To Section 1517 Of The Bankruptcy Code* ("**Suntech Recognition PFOF**" and "**Suntech Recognition PCOL**," respectively) [Docket No. 64], which is incorporated by reference herein. The Court only reiterates those facts that are necessary to adjudicate Solyndra's motion to transfer venue, which, for the reasons explained below, is denied.

2. As described in greater detail in the Suntech Recognition PFOF, Suntech Power Holdings has been continuously registered in the Cayman Islands since 2005. (PX 2; PX 3; Walker at 45:21–24; *see also* Suntech Recognition PFOF ¶ 1.) Suntech Power Holdings is a holding company with limited contacts with the U.S. (Walker at 46:22–47:13.) As described more fully below, what contacts it does have with the U.S. are predominantly with New York,

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Suntech Recognition PFOF and Suntech Recognition PCOL (as defined below).

the location where it has gone more than twice to raise capital and where substantial litigation against the company remains pending. (PX 22; PX 19; PX 31; *see also* Walker at 52:20–53:6.)

II. SUNTECH POWER HOLDINGS' CONNECTIONS TO NEW YORK.

A. Suntech Power Holdings' Historic Connections to New York.

3. Suntech Power Holdings' American Depositary Shares ("**ADSs**") were registered to be listed on the New York Stock Exchange on November 1, 2005. (PX 19; *see also* Walker at 52:20–53:1.) Bank of New York acted as depositary for the ADSs. (PX 31 at SPH00008832 (§ 1.01) (definition of "ADS DEPOSITARY").)

4. Suntech Power Holdings also issued $575 million of 3.00% convertible senior notes on March 17, 2008 (the "**Notes**") (PX 31.) The Notes were issued pursuant to a New York indenture (the "**Indenture**"). (*Id*.) The Indenture required Suntech Power Holdings to maintain a paying agent and registrar in New York. (*Id*. at SPH00008837–38 (§ 2.03), SPH00008847 (§ 4.01).) The Indenture is governed by New York law. (*Id*. at SPH00008881 (§ 12.09).) It provides for a New York choice-of-forum provision. (*Id*. (§ 12.10).) Suntech Power Holdings designated CT Corporation in New York City to act as agent for service of process. (*Id*.)

B. Suntech Power Holdings Is Sued in New York.

5. The Notes matured on March 15, 2013. (PX 31.) Suntech Power Holdings defaulted on repayment of the Notes. (Walker 44:2–10; 50:14–51:1.) On June 13, 2013, noteholders Trondheim Capital Partners L.P. and Michael Meixler commenced an action against Suntech Power Holdings in the New York State Supreme Court, New York County, and on June 18, 2013, Marcus and Jessica Dugaw commenced an identical action in the same court. *See Trondheim Capital Partners, L.P. and Michael Meixler v. Suntech Power Holdings Co., Ltd.*, No. 652060/2013 (Sup. Ct. N.Y. County); *Marcus and Jessica Dugaw v. Suntech Power Holdings, Co.*, No. 156535/2013 (Sup. Ct. N.Y. County). Suntech Power Holdings removed

both actions to the United States District Court for the Southern District of New York. Notice of Removal, *Trondheim Capital Partners, L.P. and Michael Meixler v. Suntech Power Holdings Co., Ltd.*, Case No. 13–4668, Docket No. 1 (S.D.N.Y. July 8, 2013); Notice of Removal, *Marcus and Jessica Dugaw v. Suntech Power Holdings Co. Ltd.*, Case No. 13–5608, Docket No. 1 (S.D.N.Y. Aug. 12, 2013). On September 19, 2013, the noteholders obtained judgments against Suntech Power Holdings for $578,230.88, plus post-judgment interest. (PX 41, PX 42.)

6. Suntech Power Holdings appealed those judgments to the United States Court of Appeals for the Second Circuit. (PX 15 at SPH00007099.) Those appeals were pending as of the Petition Date, but subsequently dismissed on March 3 and March 4, 2014. (PX 62, PX 63.)

C. The Trondheim Group Commences the Involuntary Bankruptcy.

7. On October 14, 2013, the aforementioned judgment creditors and a fourth creditor, Longball Holdings, LLC (collectively, the "**Trondheim Group**"), commenced an involuntary chapter 7 bankruptcy case (the "**Involuntary Bankruptcy**") against Suntech Power Holdings in the United States Bankruptcy Court for the Southern District of New York. (PX 22.) The Trondheim Group is represented by counsel in New York. (*Id*.)

8. Suntech Power Holdings moved to dismiss the Involuntary Bankruptcy as a bad faith filing and on the grounds that venue was improper under 28 U.S.C. § 1408. (Solyndra Ex. 77.) After the Trondheim Group filed amended bankruptcy petitions, Suntech Power Holdings renewed its motion to dismiss but withdrew its defense that venue in this Court was improper. *See* Suntech Power Holdings Co., Ltd.'s Memorandum of Law in Support of Motion to Dismiss the Amended Involuntary Chapter 7 Petition, *In re Suntech Power Holdings Co., Ltd.*, Case No.13–13350, Docket No. 32 (Bankr. S.D.N.Y. Dec. 9, 2013).

9. On January 27, 2014, Suntech Power Holdings, the Trondheim Group, and certain funds managed by Clearwater Capital Partners, LLC (collectively, "**Clearwater**") and funds

managed by Spinnaker Capital LLC (collectively, "**Spinnaker**") (two of Suntech Power Holdings' noteholders who hold approximately 50% of the Notes (Cairns at 10:25–11:11)) entered into a Restructuring Support Agreement (the "**RSA**") to resolve the Involuntary Bankruptcy. (PX 23.) All parties to the RSA are represented by New York counsel and the RSA is governed by New York law. (*Id*. at §§ 17.9, 17.12).

10. Pursuant to the terms of the RSA and upon the satisfaction of certain conditions, the JPLs agreed to commence a chapter 15 case in this Court on or before February 21, 2014. (PX 23 at § 2(a).) The Trondheim Group insisted that the chapter 15 case be commenced in the same district where its chapter 7 petition was pending. *See* Statement of Petitioning Creditors in Support of Opposition by the Joint Provisional Liquidators of Suntech Power Holdings., Co. Ltd. to Motion by the Solyndra Residual Trust to Transfer Venue, at ¶ 8 [Docket No. 46]. The parties agreed to seek a stay of the Involuntary Bankruptcy until this Court enters an order recognizing the Cayman Proceeding as a foreign main or foreign non-main proceeding. (PX 23 at § 2(f).) The Court stayed the Involuntary Bankruptcy while this case was pending. (PX 65 at 8–13.)

11. Although the parties to the RSA agreed to sign a stipulation of dismissal of the Involuntary Bankruptcy upon execution of the RSA (PX 23 at § 2(c)), the RSA does not authorize the parties to file the stipulation with the Court to seek dismissal of the Involuntary Bankruptcy until a chapter 15 recognition order is entered. (*Id.* at § 4.) The terms of the RSA specifically require that such recognition order be entered by this Court, the bankruptcy court in the jurisdiction in which the Trondheim Group commenced its litigation and the Involuntary Bankruptcy against Suntech Power Holdings. (PX 23 at SPH00001934R (definition of "Bankruptcy Court"), SPH00001936R (definition of "Recognition Order").)

12. To this end, a critical term for the Trondheim Group in negotiating the RSA was the ability to participate in the chapter 15 proceeding once commenced. *See* Statement of Petitioning Creditors in Support of Opposition by the Joint Provisional Liquidators of Suntech Power Holdings., Co. Ltd. to Motion by the Solyndra Residual Trust to Transfer Venue, at ¶ 8 [Docket No. 46]. The Trondheim Group, represented by counsel in New York who has no presence in California, would be substantially prejudiced if this case were transferred to the Northern District of California. (*Id*. at ¶ 9.) The Trondheim Group has expended substantial effort to obtain judgments in New York and to commence the Involuntary Bankruptcy in New York. (*Id*. at ¶ 7.) If this proceeding is transferred, the Trondheim Group would be required to retain new or additional counsel in connection with the chapter 15 and incur the cost of simultaneously participating in the Involuntary Bankruptcy before this Court. (*Id*. at ¶ 9.)

D. The JPLs Commence the Chapter 15 Proceeding.

13. The JPLs commenced the chapter 15 case in this Court on February 21, 2014 (the "**Petition Date**"). In determining where to commence this proceeding (and in connection with negotiating this term with the parties to the RSA), David Walker considered that the Involuntary Bankruptcy was already pending in this Court (and thus the Court is familiar with Suntech Power Holdings and its restructuring efforts), (Walker at 52:15–19), and that New York is significantly more convenient than California for the JPLs and their staff, who are based in the Cayman Islands. (Walker 52:11–14.) There is no evidence that any other jurisdiction would have been a reasonable option for commencing a chapter 15 case.

14. Before the Petition Date, the JPLs sought to open a bank account in New York and contacted Morgan Stanley, among other financial institutions, to assist them in doing so. (Solyndra Ex. 20.) Morgan Stanley was not able to open a bank account for Suntech Power Holdings because of the inability to complete the institution's "Know Your Customer"

regulations prior to the Petition Date. (*Id.*) There is no evidence that Morgan Stanley's inability to accommodate the JPLs' requested timeframe demonstrates bad faith or misconduct on the part of the JPLs. To the contrary, the evidence only shows that the JPLs diligently sought to open a bank account in New York before commencing a bankruptcy case here.

15. The JPLs ultimately entered into an agreement with Computershare subsidiary Kurtzman Carson Consultants LLC ("**KCC**")[2] to open an account for Suntech Power Holdings' benefit at Bank of New York-Mellon ("**BoNY**") at 1 Wall Street in New York City. (PX 8, Solyndra Ex. 33, Walker at 54:9–12, Foster at 52:15–21.) On February 20, 2014, the JPLs transferred $500,000.00 from Suntech Power Holdings' Cayman Islands bank account to the bank account at BoNY. (PX 35 at SPH00008812 (transfer out of Cayman account), PX 45 at SPH00008896 (transfer into BoNY account).)

16. The facts and circumstances surrounding the opening and administration of the BoNY account show that the funds therein are property and an asset of Suntech Power Holdings, as explained in greater detail in the Suntech Recognition PFOF and PCOL, incorporated by reference herein. (Suntech Recognition PFOF ¶ 74–79, PCOL ¶ 2–11.) The unrebutted testimony and documentary evidence shows that the JPLs have complete and unfettered control over the funds and indeed the funds have only been disbursed based on the written authorization of David Walker. (PX 45, PX 8, Walker at 53:25– 55:19.) Drake Foster, KCC's general counsel, testified that KCC opened the account for Suntech Power Holdings as agent for Suntech Power Holdings and claims no interest in the funds. (Foster at 53:19–54:21, 57:4–58:23, 60:22–61:12.) Nor has any other party asserted an interest in the funds in the BoNY account.

[2] KCC and Computershare are used interchangeably herein.

17. The unrebutted evidence shows that the JPLs opened the account at BoNY for two reasons: (i) to facilitate payments to U.S. professionals and creditors, and (ii) to comply with certain provisions of the Bankruptcy Code. (Walker at 53:12–24.) The Court concludes that neither of these purposes is improper, and the mere fact that certain financial institutions were unable to open a bank account for Suntech Power Holdings is not evidence of any bad faith or manipulation. Furthermore, there is no evidence that the JPLs or Suntech Power Holdings intended to or did in fact prejudice or injure any party by opening the bank account at BoNY or commencing the chapter 15 case here.

E. Administration of the Chapter 15 Proceeding.

18. This Court has conducted several hearings in both this proceeding and the Involuntary Bankruptcy, (*see, e.g.*, PX 65, PX 66), in addition to reviewing the numerous pleadings filed in both cases over the last nine months. This Court also conducted an evidentiary hearing on Suntech Power Holdings' motion for recognition of the Cayman Proceeding as a foreign main proceeding and Solyndra's motion to transfer venue. In connection with the evidentiary hearing, the Court heard the live testimony of David Walker, considered the deposition testimony of Drake Foster of KCC and Edward Cairns of Clearwater, and reviewed over 150 exhibits submitted by the parties. The Court is therefore intimately familiar with the facts and circumstances of this case.

19. If the JPLs obtain recognition of the Cayman Proceeding by this Court, the resolution of claims and the approval of a scheme of arrangement will still occur in the Cayman Islands. Moreover, a chapter 15 case, by its terms, has no process for claims allowance or disallowance. Therefore, while the JPLs and Suntech Power Holdings' stakeholders may play an ongoing role in a chapter 15 proceeding, witnesses under the custody or control of Solyndra or ECD will not be compelled to be present in this district with nearly the same frequency or degree

(if ever) that they would in a chapter 11 case addressing such issues as first day motions, DIP financing, or use of cash collateral.

III. SUNTECH POWER HOLDINGS' OTHER CONNECTIONS TO THE U.S.

A. Connections to the Northern District of California.

20. Suntech Power Holdings does not have any assets or a place of business in California. (*See* Walker at 46:22–47:13.) As of the Petition Date, Suntech Power Holdings' only employee or officer in California was Kim Liou, its General Counsel. (Walker at 48:4–6.) Mr. Liou no longer works for Suntech Power Holdings.

21. Suntech Power Holdings' indirect subsidiary, Suntech America, Inc. ("**Suntech America**"), is a Delaware corporation registered to do business in California. (PX 44.) Suntech Power Holdings and Suntech America are five levels removed from each other in the corporate structure, with certain intermediate entities subject to oversight by outside parties in foreign insolvency proceedings: Suntech America is a direct subsidiary of Suntech ES Holdings, Inc. (a U.S. entity), which in turn is wholly owned by SPI (a Swiss entity), which in turn is wholly owned by Suntech Power (Cyprus) Co., Ltd. (a Cypriot entity), which in turn is wholly owned by PSS (a BVI entity). (PX 11.) SPI is in the process of exiting a Swiss administrative proceeding directed by the cantonal court in Schaffhausen, Switzerland. (Walker at 77:12–17, Solyndra Ex. 1 at Ex. D.) PSS is currently in a liquidation proceeding in the British Virgin Islands. (PX 21.) Although Suntech America may conduct distribution activities in California, Suntech Power Holdings has no distribution capacity in California, or the United States for that matter. (Walker at 47:2–13.)

22. On January 24, 2014, Suntech America and Suntech Power Holdings entered into a loan agreement to provide $7 million in post-petition financing to Suntech Power Holdings. Suntech America's external counsel located in Delaware represented Suntech America in

connection with negotiating and entering into the loan. (PX 67.) The loan agreement is governed by the law of the Cayman Islands, and the parties agreed to the exclusive jurisdiction of the Cayman Islands. (PX 18.)

23. On October 11, 2012, Solyndra commenced a lawsuit against Suntech Power Holdings and Suntech America in the United States District Court for the Northern District of California asserting certain state and federal antitrust claims. (PX 12.) Two other shareholder actions against Suntech Power Holdings were also commenced in California in 2012. *Scott Bruce v. Suntech Power Holdings Co., Ltd. et al.*, Case No. 12-4061 (N.D. Cal. 2012); *Kent Ji v. Zhengrong Shi, et al.*, Case No. 12-6409 (N.D. Cal. 2012).

24. No fact witnesses, testifying experts, or other parties to the chapter 15 proceeding are located in the Northern District of California.

B. Connections to Other States in the U.S.

25. In addition to Suntech America, Suntech Power Holdings indirectly owns three other U.S. subsidiaries: Suntech ES Holdings, Inc., Suntech Arizona, Inc., and Suntech Power Development Co., Inc. (PX 11.) All of the U.S. subsidiaries, including Suntech America, are incorporated in Delaware. (*See, e.g.*, PX 44.)

26. Suntech Power Holdings is also subject to several litigations and other proceedings in courts other than the Southern District of New York or the Northern District of California:

- An antitrust action filed by Energy Conversion Devices Liquidation Trust ("**ECD**") against Suntech Power Holdings is also pending in the United States District Court for the Eastern District of Michigan (Southern Division) since October 2013. *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd. et al.*, Eastern District of Michigan (Southern Division), Case No. 13-cv-24341.
- A lawsuit filed in the Central District of California against Suntech Power Holdings. *Banning Unified School District v. Daniel's Electrical Construction et*

al, Superior Court of the State of California, County of Riverside, Case No. RIC1214285.

(PX 59 at 8–9 (Response to Interrogatory 7).)

IV. SOLYNDRA AND ECD.

27. On September 6, 2011, Solyndra filed for bankruptcy in the District of Delaware and now, post-confirmation, operates as a liquidation trust. The liquidation trustee is located is in Los Angeles, in the Central District of California. (PX 69.) The liquidation trustee continues to litigate Solyndra's post-confirmation chapter 11 case in Delaware; as recently as April 2014, Solyndra commenced an adversary proceeding in the Delaware bankruptcy court against a California-based creditor. (PX 61.)

28. Solyndra has appeared in this case through its New-York based bankruptcy counsel and its Chicago-based antitrust counsel, which has a substantial presence in New York. (*See, e.g.*, PX 65, PX 66.)

29. ECD filed for chapter 11 on February 14, 2012, in the Eastern District of Michigan. ECD's liquidation trustee purports to be located in Michigan (although with a New York telephone number). (PX 64.) ECD is represented by the same Chicago-based antitrust counsel as Solyndra.

30. ECD recently sought to transfer venue of its antitrust litigation pending against Suntech Power Holdings and Suntech America from the Eastern District of Michigan Southern Division to the Northern District of California. (PX 68.) The presiding judge in Michigan denied the motion to transfer, holding that ECD's "obviously improper motivations provide an adequate basis for denying the motion" and that ECD failed to provide any evidentiary support for its "vague allegations" that venue would be more convenient in California. (*Id.*)

CONCLUSIONS OF LAW

I. VENUE IS PROPER IN THIS DISTRICT.

1. Venue in chapter 15 cases is governed by 28 U.S.C. § 1410. Under subsection (1), venue is proper in the district in which the debtor has its principal assets or principal place of business in the United States. If subsection (1) is not met, under subsection (2), venue is proper in a district in which there is pending against the debtor an action or proceeding in state or federal court. And if subsections (1) and (2) are not met, venue is proper in any district in which venue would be consistent with the interests of justice and convenience of parties, having regard to the relief sought by the foreign representative.

2. As explained in the Suntech Recognition PFOF and PCOL, incorporated by reference herein, venue is satisfied under both sections 1410(1) and 1410(2). (*See* Suntech Recognition PCOL ¶ 12–25.)

3. Furthermore, as described in the Suntech Recognition PFOC and PCOL, Solyndra's contention that venue of this case would be satisfied in the Northern District of California, (Solyndra PCOL ¶ 40), is incorrect as a matter of fact and law because Suntech America—the only fact Solyndra cites in support of this contention—is not Suntech Power Holdings' principal asset or principal place of business in the U.S. In any event, the Court concludes that even if venue would only be proper in the Northern District of California, there is no legal basis to transfer venue because Solyndra has moved to transfer venue under 28 U.S.C. § 1412 (interest of justice and convenience of parties), not 28 U.S.C. § 1406 (improper venue). Therefore, this Court only has before it a motion to transfer based on the convenience of the parties and interest of justice. *See, e.g., In re Houghton Mifflin Harcourt Publ'g. Co.*, 474 B.R. 122, 137 (Bankr. S.D.N.Y. 2012) (holding that the court did not have authority to transfer a case

based on the convenience of the parties or interest of justice where the motion was brought under section 1406 on the grounds that the case was improperly filed in a district that lacked venue).

II. THE COURT DENIES THE MOTION TO TRANSFER VENUE.

A. Section 1412 Does Not Apply to Chapter 15 Cases.

4. The third and final prong of section 1410 provides that venue is proper in the district that "will be consistent with the interests of justice and convenience of the parties, having regard to the relief sought by the foreign representative." 28 U.S.C. § 1410(3). Section 1412 provides similar relief, permitting a court to "transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412.

5. The Court finds that in crafting a hierarchical venue statute pertaining exclusively to chapter 15 cases, Congress determined that the bankruptcy courts should only consider whether venue is proper in the interests of justice and convenience of parties if the court first determines that the foreign debtor has no principal place of business or assets in the United States or is not subject to an action or proceeding in the district where the proceeding is pending. Allowing a court to consider those very same factors under section 1412 would create a loophole in the chapter 15 venue statute that Congress could not have intended to create. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (holding that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

6. By adopting section 1410, Congress carefully circumscribed the scope of the court's inquiry into the interests of justice and the convenience of parties in chapter 15 cases, conditioning their application to "the relief sought by the foreign representative." *See* 28 U.S.C. § 1410(3). Section 1412 contains no such limitation. Thus, to apply section 1412 to chapter 15

cases would render that condition in section 1410(3) superfluous. *See, e.g., Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 300-01 (2d Cir. 2002) ("[T]he canon of statutory interpretation known as generalia specialibus non derogant—general provisions do not qualify specific ones—is applicable here. It would be odd for Congress to have taken pains to enact subsection (d)(2)(A) with its specific procedure for filing an *in rem* action 'in the judicial district in which the domain registrar is located,' only to qualify, and indeed nullify, that circumscribed requirement by effectively creating nationwide *in rem* jurisdiction in subsection (d)(2)(C).").

7. Based on the foregoing, the Court concludes that the structure and language of sections 1410 and 1412 militate against any argument that venue should be transferred in the interest of justice or convenience of parties under section 1412 in a chapter 15 proceeding. Section 1412 therefore does not apply.

B. Even if Section 1412 Does Apply, the Court Denies the Motion to Transfer Venue.

8. Even if the Court held that section 1412 applied to a chapter 15 proceeding, Solyndra has nevertheless failed to meet its burden under that section. Where a case is properly venued, such as here, the JPLs choice of venue is "'entitled to great weight' in the consideration of change of venue motions." *In re Dunmore Homes, Inc.*, 380 B.R. 663, 670 (Bankr. S.D.N.Y. 2008) (*citing In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002)). The district in which a case is properly pending is presumed to be the appropriate district, and the party seeking to change the venue bears the burden to prove otherwise. *See In re Manville Forest Prods. Corp. (Gulf States Exploration Co. v. Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1390-91 (2d Cir. 1990). "As a result, 'a heavy burden of proof rests on the moving party to demonstrate that the balance of convenience clearly weighs in his favor.'" *Dunmore Homes*, 380 B.R. at 670 (quoting *Lionel Leisure, Inc. v. Trans Cleveland Warehouses, Inc. (In re Lionel Corp.)*, 24 B.R. 141, 142

(Bankr. S.D.N.Y. 1982)); *see Manville Forest*, 896 F.2d at 1391. For the reasons discussed below, Solyndra has failed to meet this heavy burden.

a. Interests of justice are not served by transferring this case to the Northern District of California.

9. In deciding whether interests of justice are served by transferring venue, a court considers the following factors:

> whether (i) transfer would promote the economic and efficient administration of the bankruptcy estate; (ii) the interests of judicial economy would be served by the transfer; (iii) the parties would be able to receive a fair trial in each of the possible venues; (iv) either forum has an interest in having the controversy decided within its borders; (v) the enforceability of any judgment would be affected by the transfer; and (vi) the plaintiffs original choice of forum should be disturbed.

Dunmore Homes, 380 B.R. at 671-72.

10. The most important of these factors is the economic and efficient administration of the estate (factor (i)). *See In re Landmark Capital Co. (Landmark Capital Co. v. N. Cent. Dev. Co.)*, 20 B.R. 220, 224 (S.D.N.Y. 1982). Where the bankruptcy court's existing involvement with a case has given it a familiarity with the matter and transferring venue would entail delay because a new court would have to surmount a learning curve, the Second Circuit has held that a motion to transfer venue should be denied even if all of the convenience-of-the-parties factors weigh in favor of transferring venue. *See Manville Forest*, 896 F.2d at 1391.

11. Here, it would be far more economic and efficient for this case to remain here. This Court is very familiar with this proceeding, and transferring venue would result in significant delay. This Court has conducted multiple hearings in this proceeding, in addition to presiding over the related Involuntary Bankruptcy. (*See supra* Venue FOF ¶ 18.) If this proceeding were transferred, there would necessarily be a delay before the new court could schedule a hearing on the petition and conduct an evidentiary hearing similar to the one that this

Court has already completed. (*Id*.) In other words, if this case were transferred to another court, Suntech Power Holdings would have to expend substantial resources to get to the point where this Court is already. Not only would this outcome be very inefficient, it would be inconsistent with Congress's instruction that recognition be "decided at the earliest possible time," further tilting the scales against venue transfer. 11 U.S.C. § 1517(c).

12. Moreover, judicial economy (factor (ii)) weighs strongly in favor of denying venue transfer. If the case is transferred, Suntech Power Holdings would be required to simultaneously administer two bankruptcy proceedings on opposite sides of the country. Suntech Power Holdings' obligations under the RSA are only satisfied if the JPLs obtain recognition of the Cayman Proceeding by this Court. (*See supra* Venue FOF ¶ 11.) As a result, if this case is transferred, the Trondheim Group would be under no obligation to petition the Court to dismiss the Involuntary Bankruptcy, delaying entry of the recognition order to a date far beyond what the parties agreed. (*Id*.) To have two courts adjudicate the same set of facts would be inefficient and would unnecessarily drain the limited resources of Suntech Power Holdings' estate. Accordingly, factors (i) and (ii)—the most important factors—weigh heavily in favor of denying the transfer venue motion.

13. Factors (iii) and (v)—fairness of trial and enforceability of judgment—are neutral. There is no evidence that the parties will not receive a fair trial or be unable to enforce any judgments either here or in the Northern District of California.

14. Factor (iv)—whether either forum has an interest in having the controversy decided within its borders—favors New York. This case is not a case where employees or retirees of the debtor are located in the alternate jurisdiction. *Cf. In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012). Nor does Suntech Power Holdings have a place of business,

let alone a nerve center or a distribution facility, in another U.S. jurisdiction. (*See supra* Venue FOF ¶¶ 2, 21, 22.) Solyndra itself is a liquidating trust that is not even administered in the Northern District of California, and ECD is a liquidating trust administered from Michigan. (*See supra* Venue FOF ¶¶ 27, 29.) As a result, the Northern District of California has no particular interest in the administration of this case. On the other hand, the Southern District of New York has substantial ties to this matter: Suntech Power Holdings' ADSs were traded here on the NYSE, (*see supra* Venue FOF ¶ 3), certain noteholders commenced litigation here, (*see supra* Venue FOF ¶ 5), New York law governs the Notes and the RSA, (*see supra* Venue FOF ¶¶ 4, 9), and the Involuntary Bankruptcy is pending here. (*See supra* Venue FOF ¶ 7.).

15. Finally, the Court finds the answer to factor (vi)—whether the plaintiffs original choice of forum should be disturbed—is a resounding no. This district was not just a forum of the JPLs' choosing—it was repeatedly selected by Suntech Power Holding's creditors, first when entering into the Indenture, then when commencing the noteholder litigation, then again when filing the Involuntary Bankruptcy, and then finally when negotiating the RSA. (*See supra* Venue FOF ¶¶ 3–9.) The preferences of these creditors—who, unlike Solyndra and ECD, hold non-contingent, undisputed claims—should be given great weight. *See Patriot Coal*, 482 B.R. at 748 ("[i]f the entirety of the Debtors' economic stakeholders had implored the Court to leave venue unchanged because a transfer of venue would have taken dollars from their pockets, it would be difficult to square the interest of justice with the purposeful infliction of economic harm on a debtor's creditors.") (citing *In re Houghton Mifflin Harcourt Publ'g Co.*, 474 B.R. 122, 124 (Bankr. S.D.N.Y. 2012)). The emphasis by courts on the interests of creditors "with money on the line" is important and especially applicable to the competing interests here. *See id.*; *Houghton Mifflin Harcourt Publ'g Co.*, 474 B.R. at 124.

16. In light of the above, Solyndra failed to meet its burden to demonstrate that the interests of justice weigh in favor of transferring venue. To the contrary: the evidence overwhelmingly shows that the interests of justice are far better served by denying the motion to transfer venue.

b. It is more convenient for the chapter 15 case to remain in New York.

17. The convenience-of-parties prong focuses on six factors:

> (i) proximity of creditors of every kind to the court; (ii) proximity of the debtor; (iii) proximity of witnesses necessary to the administration of the estate; (iv) location of the assets; (v) economic administration of the estate; and (vi) necessity for ancillary administration if liquidation should result.

Dunmore Homes, 380 B.R. at 676.

18. Courts should only transfer a proceeding to a more convenient forum—not to an equally convenient forum and certainly not to merely shift the inconvenience from one party to another. *See K-Tel Int'l, Inc. v. Tristar Prods., Inc.*, 169 F. Supp. 2d 1033, 1045 (D. Minn. 2001). There is no evidence that the Northern District of California would be more convenient to anyone.

19. The most important party for whom convenience matters is the JPLs because they are the most frequent participants in this chapter 15 case. The JPLs—the only individuals with the authority to represent Suntech Power Holdings in this matter—are based in the Cayman Islands. (*See supra* Venue FOF ¶ 13.) Mr. Walker testified that for him it is "certainly . . . easier to travel to New York than it is to San Francisco." (*Id*.) The Court concludes that this is the single most significant factor dictating that venue is more convenient here.

20. Traveling to California would also be more inconvenient for the Trondheim Group, which is represented by New York counsel who has been active in these proceedings and who does not have a presence in California. (*See supra* Venue FOF ¶ 7.) If this case were

transferred to San Francisco, the Trondheim Group's ability to participate in the proceeding would be significantly impaired. (*See supra* Venue FOF ¶ 12.) While Solyndra notes that members of the Trondheim Group are located in Arizona and Washington, (Solynda PFOF ¶ 24), their selection of New York counsel—the individuals who actually participate in this case—bolsters the conclusion that New York is the more convenient forum.

21. Solyndra itself does not have a compelling basis for transfer to the Northern District of California. Solyndra, now a liquidating trust administered from Los Angeles, California, filed for chapter 11 in Delaware and continues to carry out litigation in Delaware. (*See supra* Venue FOF ¶ 27.) The fact that Solyndra affirmatively chose to file its own bankruptcy proceeding in Delaware, a mere hour-and-a-half by train from New York City, suggests that it has no difficulty traveling to the East Coast to appear in court. Solyndra's legal professionals are also not located in the Northern District of California: they regularly appear in this case through New York-based bankruptcy counsel, and Solyndra's Chicago-based antitrust counsel has a substantial presence in New York too. (*See supra* Venue FOF ¶ 28.)

22. Nor is there any evidence that the Northern District of California is more convenient for ECD, a liquidating trust based in Michigan and represented by the same Chicago-based antitrust counsel as Solyndra. (*See supra* Venue FOF ¶ 29.) This Court agrees with the recent decision of the Honorable Robert H. Cleland, United States District Court Judge for the Eastern District of Michigan, denying ECD's motion to transfer venue of its antitrust litigation from the Eastern District of Michigan to the Northern District of California.

23. The lack of evidence put forward by Solyndra or ECD—the moving parties with the burden to establish that California is more convenient than New York—is telling. Indeed, neither Solyndra nor ECD presented any evidence that it would be more convenient for the

chapter 15 proceeding to be in the Northern District of California. The Court finds this lack of proof very persuasive, and it further bolsters the conclusion that there is no justification to transfer venue here.

24. The antitrust litigations commenced by Solyndra and ECD were not even commenced in the same district, judicial circuit, or even the same region of the country. (*See supra* Venue FOF ¶¶ 23, 26.) Those litigations will have substantial duplication of fact and expert witnesses as compared to this proceeding, further negating any argument that there is a compelling reason based on the convenience of the parties that the chapter 15 proceeding should be transferred to the same district as Solyndra's antitrust suit.

25. In addition, all parties who have appeared in this proceeding, including the JPLs, the Trondheim Group, Spinnaker, Clearwater, Solyndra, and ECD have counsel located in New York. Solyndra's argument that the location of professionals is "not a proper factor to take into account" in determining venue transfer motions, (Solyndra PFOF ¶ 57), is contrary to case law in this district. For example, in *In re Enron Corp.*, the location of New York professionals was among the key reasons cited by Judge Gonzalez in denying the motion to transfer venue. *In re Enron,* 284 B.R. 376, 391 (Bankr. S.D.N.Y. 2002) (noting that for the "bankruptcy case to succeed it is dependent upon a group of professionals and business people that have determined that this is the proper venue for the case. Were the venue to change, it would not result in a change in the key individuals that are making the decisions in [the] case. Rather, a change in venue to Puerto Rico would simply make it that much less convenient for [the] decision-makers to efficiently and economically administer [the] estate."). In addition, in *Dunmore Homes*, a case repeatedly cited by Solyndra, Judge Glenn recognized that "venue was most appropriate where the people who would handle the bankruptcy were located." *Dunmore Homes*, 380 B.R. at 673.

Thus, the fact that professionals are located here—including one without a presence in California—strongly weighs in favor of keeping the case here.

26. Finally, the fact that Suntech America provided post-petition financing to Suntech Power Holdings in connection with the Cayman Proceeding is of no moment. Suntech America is not directly involved in the chapter 15 proceeding, and no employee, officer or director of Suntech America is expected to be a witness or appear in this case. Moreover, the loan agreement is governed by Cayman Islands law; any litigation arising from the loan is subject to the exclusive jurisdiction of the Cayman Islands court. (*See supra* Venue FOF ¶ 22.) Most importantly, Suntech America has not sought to transfer venue of this case to California. The Court sees no reason to permit Solyndra or ECD to assert a right to transfer venue based on the purported interest of Suntech America when Suntech America has asserted no such interest.

27. The cases Solyndra cites to support venue transfer do not alter this result because they all involve chapter 11 debtors where the court transferred venue because local interests were implicated.[3] For example, in *Dunmore Homes*, the debtor filed for chapter 11 in New York, while its significant assets consisted of real property located in California. 380 B.R. at 673. Judge Glenn transferred venue because "where a debtor's assets consist solely of real property cases have held that transfer of venue is proper because matters concerning real property have always been of local concern and traditionally are decided at the situs of the property." (*Id*.) (citing *Enron*, 284 B.R. at 392). Here, however, Suntech Power Holdings has no real property in California, so the unique local interest at stake in *Dunmore Homes* is entirely absent. Furthermore, the court in *Dunmore Homes* concluded that it had minimal familiarity with the

[3] *See, e.g.*, *In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012); *In re Dunmore Homes, Inc.*, 380 B.R. 663 (Bankr. S.D.N.Y. 2008); *In re Innovative Commun'cn Co., LLC*, 358 B.R. 120 (Bankr. D. Del. 2006) (Solyndra PCOL ¶ 50); *In re Trico Steel Co. LLC*, 261 B.R. 915 (Bankr. N.D. Ohio 2001) (Solyndra PCOL ¶ 57). The only other case Solyndra cites, *In re Hoffman-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009) (Solyndra PCOL ¶ 50 n.3), is not even a bankruptcy case and thus has no applicability here at all.

case, having only considered the first-day motions and motions to approve the sale of certain property, which were "not likely to be the kinds of issues that require the most court time in the future." *Id*. at 674. By contrast, this Court has gained extensive familiarity with the Verified Petition, the assets and liabilities of Suntech Power Holdings, and the conduct of the JPLs. (*See supra* Venue FOF ¶ 18.) To require a new court to start over would be a waste of resources and time. Finally, in *Dunmore Homes,* the ability of several California-based creditors to participate in the proceeding would have been limited if the case remained in New York. *Id*. Here, there is no evidence that venue in New York prejudices any of Suntech Power Holdings' creditors, while there is evidence that transferring this proceeding to California will impair the quality of participation for the Trondheim Group. (*See supra* Venue FOF ¶ 12.)[4]

28. This proceeding is vastly different from, and entails vastly different participation than in, a chapter 11 case. (*See supra* Venue FOF ¶ 19.) Even if recognition is granted by this Court, Solyndra and ECD will not be required to appear in this Court with nearly the same frequency as in a chapter 11 proceeding, if at all. The majority of issues central to Suntech Power Holdings' restructuring, like the formulation of a scheme of arrangement, will occur in the Cayman Islands regardless of whether this Court grants recognition. (*Id.*) The local concerns identified by *Dunmore Homes* and the other cases cited by Solyndra are simply not present here.

29. In light of the foregoing, the Court concludes that all of the convenience factors (proximity of creditors, proximity of the debtor, proximity of witnesses, location of the assets, economic administration of the estate, and the necessity for ancillary administration if liquidation should result) all weigh in favor of denying the motion to transfer venue and settling venue of this case in this district.

[4] As discussed in greater detail below, this case is also vastly different from *Patriot Coal* for a host of other reasons.

c. Solyndra failed to identify any evidence of bad-faith manipulation.

30. Solyndra argues that the Court should consider another factor in determining whether to transfer venue in the interests of justice: the integrity of the bankruptcy court system, a factor it concedes "may rarely be applicable." (*See* Solyndra PFOF ¶ 46.) Even if this were a separate factor the Court could consider in a venue-transfer motion (though it should not be), this case is certainly not one of the rare cases where it should be applied because Solyndra has failed to prove any of its allegations that the JPLs manipulated venue or that any party was prejudiced by their actions.

31. As a factual manner, Solyndra failed to prove its allegations that venue was improperly engineered and that Suntech Power Holdings had no connection to New York prior to opening the account at BoNY. Suntech Power Holdings has had a presence in New York virtually since Suntech Power Holdings' formation, as Suntech Power Holdings' ADSs were offered on the NYSE and its bonds were issued under New York law to creditors, many of whom are based in New York. (*See supra* Venue FOF ¶¶ 3, 4.) These historic connections led Suntech Power Holdings' creditors to commence litigation against Suntech Power Holdings and launch the Involuntary Bankruptcy in the Southern District of New York. (*See supra* Venue FOF ¶¶ 5–7.) There is no evidence that any of these actions were undertaken in bad faith to prejudice other parties, at the behest of Suntech Power Holdings, or for the purposes of creating jurisdiction over this proceeding. As a result, Suntech Power Holdings, and the JPLs on its behalf, have been regularly present in New York, attending hearings in New York, engaging in negotiations with New York-based counsel, and finally establishing a New York-based account, which has been used for paying fees to a New York account for its attorneys and fees required under the New York law-governed RSA. (*See supra* Venue FOF ¶¶ 15–17.) It is perfectly logical and appropriate, then, that the JPLs would commence the chapter 15 case here too.

32. Furthermore, case law in this jurisdiction and elsewhere undermines Solyndra's suggestion that Suntech Power Holdings opening of a bank account in New York shortly before filing was impermissible. *See In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) (holding that a $10,000 retainer deposited with debtor's counsel in a client trust account shortly before filing a chapter 15 proceeding was sufficient to satisfy section 109(a)); *see also In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (finding that Yukos, one the largest petroleum products, oil, and gas providers in Russia, met the requirements of section 109(a) even though it had created a new entity in the United States and transferred funds to that entity only hours prior to filing for bankruptcy protection).

33. In *Octaviar*, Judge Chapman concluded that depositing funds in New York to comply with section 109(a) was not problematic, observing that the statute "says, simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property." *Octaviar*, 511 B.R. at 373. Likewise, section 1410 only requires a debtor to have its principal assets in a district to establish proper venue—the statute says nothing about the circumstances surrounding the creation of those assets. 28 U.S.C. § 1410(1).

34. Finally, Solyndra's reliance on Judge Chapman's decision in *In re Patriot Coal Corp.* is misplaced. In *Patriot Coal*, the debtor organized an affiliate in New York immediately prior to filing its chapter 11 petition in order to create a basis for venue of the debtor and its 98 affiliates. *Patriot Coal*, 482 B.R. at 748. Although the court found that the debtor satisfied the venue requirements, the court transferred this case based on the interest of justice and convenience of the parties. In doing so, the court took into consideration the fact that Patriot Coal and its affiliated debtors were operating companies and that the location of the debtors'

headquarters, officers, employees, unions, retirees, and mining operation were all located in districts in the United States other than New York—and, after evaluating those facts, the court concluded that Patriot Coal's chapter 11 cases belonged where their effects would be felt most meaningfully.

35. Suntech Power Holdings is not Patriot Coal. Suntech Power Holdings does not have headquarters, decision-makers, operations, billions of dollars of assets, coal mines, thousands of employees, labor unions, or communities filled with retirees in the Northern District of California, or anywhere else in the United States. (*See supra Venue* FOF ¶¶ 2, 20–24.) Suntech Power Holdings is a holding company with a trust account in the U.S., financial creditors, and contingent claims brought against it by two liquidating trusts, one created in a Delaware bankruptcy proceeding and the other in a Michigan bankruptcy proceeding, each with their own creditors dispersed throughout the country. Finally, Solyndra and ECD are not similarly situated to the movant in *Patriot Coal*, the U.S. Trustee. Unlike Solyndra and ECD, the U.S. Trustee brought the motion as a disinterested party on behalf of the public's interest and with no ulterior motives. Certainly the same cannot be said for Solyndra and ECD.

36. As a result, unlike *Patriot Coal*, the convenience of the parties and interest of justice do not support a transfer.

37. The Court thus finds that there is no statutory authority to support the argument that venue of the chapter 15 case should be transferred based on the unsubstantiated allegation that Suntech Power Holdings manufactured venue in New York in bad faith.

CONCLUSION

38. For the foregoing reasons, Solyndra's motion to transfer venue is denied.

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