

Plaintiff Hudson Solar Cayman, LP (“Hudson Solar”) respectfully submits this Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment in Lieu of Complaint pursuant to Section 3213 of the New York Civil Practice Law and Rules (“CPLR”). The underlying facts relevant to this Motion for Summary Judgment in Lieu of Complaint are set forth in the Affidavit of Neil Z. Auerbach, sworn to on February 8, 2019 (the “Auerbach Aff.”).

PRELIMINARY STATEMENT

On September 18, 2015, Defendants Sky Solar Holdings, Ltd. (“Sky Solar Holdings”), Sky Solar Power Ltd. (“Sky Solar Power”), and Sky International Enterprise Group Limited (“Sky International” and, together with Sky Solar Holdings and Sky Solar Power, the “Guarantors”) executed an irrevocable and unconditional guaranty in favor of Hudson Solar (the “Guaranty”) with respect to certain senior amortizing notes held by Hudson Solar with the current aggregate principal amount of \$53,882,852 (the “Notes”). Auerbach Aff. Ex. 17. The Guarantors consented to the exclusive jurisdiction of New York courts for all matters arising under the Guaranty, the terms of which are to be construed in accordance with New York law. Auerbach Aff., Ex. 14 at § 9.1. The Notes were purchased under the Amended and Restated Note Purchase Agreement dated July 15, 2016, among Energy Capital Investment S.A.R.L. (“ECI”), Lumens Holdings 1, LLC, (“Lumens”), and Renewable Capital Investment 2, Sociedad Limitada (“RCI 2”), as Obligors (collectively, the “Obligors”), and Hudson Solar, as Administrative Agent, Initial Note Purchaser, and Note Holder (the “Note Purchase Agreement”).¹ Auerbach Aff. Ex. 1. The Guarantors reaffirmed the Guaranty pursuant to a Confirmation of Guaranty dated July 15, 2016, made by the Guarantors, as Guarantors, in favor of Hudson Solar, as Administrative Agent (the “Confirmation of Guaranty”). Auerbach Aff. ¶ 2 & Ex.15.

¹ Capitalized terms used but not defined herein have the meanings given in the Note Purchase Agreement.

As of July 31, 2017, and continuing to this day, the Obligors have been in default under the Note Purchase Agreement for failing to satisfy conditions subsequent relating to collateral security for the Notes. Auerbach Aff. ¶¶ 18-20. Indeed, the Obligors have admitted that their failure to satisfy these conditions constitutes an Event of Default under the terms of the Note Purchase Agreement, entitling Hudson Solar to pursue the remedies available under the Agreement, including an acceleration of all amounts due under the Notes such that they become immediately due and payable. Auerbach Aff. Ex. 19 at ¶ 4.1. Having discovered additional breaches of the Note Purchase Agreement that constitute further Events of Default, and having tried unsuccessfully to engage the Obligors and Guarantors in negotiations to remedy these defaults, Hudson Solar delivered a Notice of Acceleration to the Obligors on January 22, 2019, notifying them of Hudson Solar's acceleration of the Notes and all other Obligations under the Note Purchase Documents, which, as of January 22, 2019, was not less than \$114,706,678.² Auerbach Aff. Ex. 23 at 1. On the same day, Hudson Solar delivered the Demand on Guaranty to the Guarantors, notifying them of the Notice of Acceleration and demanding payment within fifteen days of not less than \$96,079,936 due under the Guaranty.³ Auerbach Aff. Ex. 24 at 2. To date, neither the Obligors nor the Guarantors have made payment to Hudson Solar of the amounts demanded under the Notice of Acceleration or the Demand on the Guaranty, respectively. Auerbach Aff. ¶ 16.

² As of January 22, 2019, this amount was the sum of the aggregate principal amount of \$54,620,414 due under the Note Purchase Documents and the Notes, plus an additional \$60,086,263 in Yield Maintenance Amount, as provided for under the terms of the Note Purchase Agreement. The aggregate principal amount has been revised to \$53,882,852 in this document, which excludes accrued and unpaid Coupon Interest of \$746,154 (\$8,591 of which is a payment shortfall that is owed under the Notes). Auerbach Aff. ¶ 17.

³ As of January 22, 2019, this amount was the sum of the aggregate principal amount of \$54,620,414 due under the Note Purchase Documents and the Notes, plus an additional \$41,459,522 in Yield Maintenance Amount (as there is a 69% cap on the Guarantors' liability for the Yield Maintenance Amount under the terms of the Guaranty). The aggregate principal amount has been revised to \$53,882,852 in this document, which excludes accrued and unpaid Coupon Interest of \$746,154 (\$8,591 of which is a payment shortfall that is owed under the Notes). Auerbach Aff. ¶ 17.

As set out below, as of February 8, 2019, the total amount of the Obligations (as defined in Section 1.1 of the Note Purchase Agreement) owing under the Note Purchase Documents and the Notes is not less than \$115,783,850 (the “Obligor Amount Due”) plus all fees and expenses incurred to date or to be incurred by Hudson Solar in connection with the enforcement of its rights under the Notes and the Note Purchase Documents. Auerbach Aff. ¶ 17. As further set out below, as of February 8, 2019, pursuant to the Guaranty, the Guarantors are obligated to pay Hudson Solar not less than \$97,671,954 (the “Guarantor Amount Due”), as well as reimburse Hudson Solar’s fees and expenses incurred in enforcing its rights under the Notes, the Guaranty, and the other Note Purchase Documents. *Id.*

The Guaranty is an “instrument for the payment of money only” within the meaning of CPLR 3213. Because the Guarantors have failed to satisfy their payment obligations under the Guaranty, the case law is clear that Hudson Solar is entitled to summary judgment in lieu of complaint and entry of judgment against the Guarantors in the amount of the Guarantor Amount Due, plus Default Rate Interest in the amount of \$62,858 per day from the date hereof to the date of the entry of judgment. Hudson Solar is entitled to judgment (including attorney’s fees) incurred in connection with the enforcement of its rights under the Notes, the Guaranty, and the other Note Purchase Documents, subject to further proof of quantum of expenses incurred through judgment.

NO PRIOR ACTION

No prior application for the relief requested herein has been made to this Court or any other court.

STATEMENT OF INDISPUTABLE FACTS

A. Hudson Solar's Rights Upon The Occurrence Of An Event Of Default

Under the Note Purchase Documents and the Guaranty, Hudson Solar has a number of rights and remedies available to it upon the occurrence of an Event of Default. For instance, each of the Notes provides that:

Upon the occurrence and during the continuation of any one or more of the Events of Default specified in the Note Purchase Agreement, all amounts then remaining unpaid on this Note or pursuant to the Note Purchase Agreement may be declared to be or may automatically become immediately due and payable as provided in the Note Purchase Agreement.

Auerbach Aff. ¶ 11.

Section 6.1(b) of the Note Purchase Agreement provides, in turn, that the occurrence of an Event of Default entitles Hudson Solar, as Administrative Agent, to accelerate all amounts due and owing under the Note Purchase Documents:

If an Event of Default occurs, the Administrative Agent may (and must if so directed by the Majority Note Holders) by notice to the Company or any other party declare any or all of the Obligations immediately due and payable, and all such Obligations shall thereupon be immediately due and payable.

Auerbach Aff Ex. 1 at § 6.1(b).

Moreover, Section 6.2 of the Note Purchase Agreement provides Hudson Solar, as Administrative Agent, Initial Note Holder, and Note Holder, with additional rights upon the occurrence of an Event of Default, including the right to commence any appropriate proceedings to protect and enforce its rights under the Note Purchase Documents:

(a) If any Event of Default shall occur and be continuing, and in addition to the rights and remedies set forth in Section 6.1 hereof and each Security Document, the Note Holders may protect and enforce their rights under the Note Purchase Documents by any appropriate Proceedings, including Proceedings for specific performance of any covenant or agreement contained in any Note Purchase Document and the appointment

of receivers and administrators where permitted by law. All rights, remedies and waivers conferred upon the Note Holders or the Administrative Agent under the Note Purchase Documents shall be deemed cumulative and not exclusive of any other rights, remedies or powers available under the Note Purchase Documents or at law or in equity.

(b) Subject to Section 6.2(f), if any Event of Default shall occur and be continuing, in addition to any and all other rights and remedies that the Note Holders shall have, the Note Holders shall have the option to:

(i) maintain this Agreement in full force and effect and sue for the Principal Payments, Commitment Fees or Coupon Interest as they become due and payable;

(ii) accelerate all amounts due under the Notes, and to collect in addition to the amount of outstanding principal, accrued Coupon Interest and other amounts owing with respect to the Obligations (including the Yield Maintenance Amount) and all costs and expenses of the Note Holders or Administrative Agent in enforcing these provisions, including legal advisors' fees and costs; or

(iii) in the case that an event of default under any Project Financing Document is continuing, take such steps as the Note Holders consider necessary in order to remedy such event of default.

In the case of paragraph (iii) above, the Company shall procure that the relevant Project Companies cooperate with the Note Holders in order to give effect to the rights and remedies being exercised by the Note Holders thereunder.

Id. at § 6.1(a) & (b).

In the event of acceleration pursuant to Section 6.2(b)(ii), Hudson Solar is also entitled to the payment of an additional Yield Maintenance Amount under the Note Purchase Agreement: “[u]pon any acceleration of the Notes pursuant to Section 6.2(b)(ii) or Section 6.2(f), the Yield Maintenance Amount shall become immediately due and payable, in addition to all principal and accrued but unpaid interest then due on the Notes.” *Id.* at § 6.2(c). The Yield Maintenance Amount is essentially a make-whole for interest payments that would have been

made had the Obligor not defaulted and instead made the scheduled periodic payments on the Notes over time. Auerbach Aff. ¶ 13.

Finally, the Guaranty provides that:

Each Guarantor hereby irrevocably and unconditionally, on a joint and several basis:

(a) guarantees to each Finance Party the prompt and complete payment when due of any and all present and future obligations and liabilities of the Obligor under the Note Purchase Documents (the “Obligations”);

(b) undertakes with each Finance Party that whenever an Obligor does not pay any amount when due under or in connection with any Note Purchase Document, such Guarantor shall forthwith, within 15 days of written demand by any Finance Party, pay that amount as if such Guarantor instead of the relevant Obligor were expressed to be the principal obligor; and

(c) indemnifies each Finance Party (to the fullest extent permitted by applicable law) on demand against any loss or liability suffered by it if any obligation guaranteed by such Guarantor is or becomes unenforceable, invalid or illegal.

Auerbach Aff. Ex. 14 at § 1.1.

For purposes of the Guaranty, “Finance Parties” means the Administrative Agent and the Note Holder under the Note Purchase Agreement. *Id.* at § 1.1, Preamble. Each Guarantor has therefore undertaken to pay Hudson Solar amounts that an Obligor fails to pay when due under or in connection with the Note Purchase Documents. Auerbach Aff. ¶ 14. However, the amount owed under the Guaranty is not equal to the entire amount due from the Obligor under the Note Purchase Documents and the Notes, and is limited as follows:

[L]iabilities and obligations of the Guarantors under this Guaranty with respect to Obligations (x) comprising any Yield Maintenance Amount shall not exceed 69% of the aggregate Yield Maintenance Amount then due and payable under the Note Purchase Agreement . . .

Auerbach Aff. Ex. 14 at § 1.1. Thus, the Guarantors' obligation is capped with respect to the Yield Maintenance Amount. Auerbach Aff. ¶ 14.

Additionally, the Guaranty provides that:

Each Guarantor agrees to jointly and severally pay to the Administrative Agent and the other Finance Parties on demand all costs, expenses (including legal fees and expenses) and taxes incurred or arising in connection with the preparation, documentation, negotiation, execution, delivery, administration or enforcement of this Guaranty or any amendment of or waiver or consent under this Guaranty.

Auerbach Aff. Ex. 14 at § 11.

As described further below, Events of Default under the Note Purchase Agreement have occurred and are continuing, on the basis of which Hudson Solar has accelerated the Notes, together with all other Obligations under the Note Purchase Documents, causing all amounts owing under the Notes and all other Obligations (including but not limited to the Yield Maintenance Amount) to be immediately due and payable. Auerbach Aff. ¶ 16. The Obligors have not made payment of the Obligor Amount Due, nor have the Guarantors made payment of the Guarantor Amount Due. *Id.*

As discussed above, the Obligor Amount Due as of February 8, 2019 is not less than \$115,783,850. *Id.* at ¶ 17. Further, the Guarantor Amount Due as of February 8, 2019 is not less than \$97,671,954, which is the sum of (i) \$53,882,852 (the outstanding principal amount of the Notes, including capitalized PIK interest), (ii) \$41,974,368 (which is 69% of the Yield Maintenance Amount owing pursuant to Section 6.2(c) of the Note Purchase Agreement), (iii) \$746,154 (accrued and unpaid Coupon Interest), and (iv) \$1,068,581 (Default Rate Interest at the rate of 20% per annum from and including January 23, 2019 to February 8, 2019). *Id.* Default Rate Interest is accruing on the Guarantors' obligations under the Guaranty at a rate of \$62,858 per day. *Id.* In addition, the Guarantors are obligated to reimburse the documented fees incurred

by Hudson Solar in connection with its pursuit of remedies under the Notes, the Guaranty and the other Note Purchase Documents, all such fees being Obligations (as defined in Section 1.1(a) of the Guaranty) in respect of which the Guarantors have guaranteed payment. Auerbach Aff. Ex. 14 at § 11.

B. Events Of Default Under The Note Purchase Agreement

Section 3.5(j) of the Note Purchase Agreement requires that ECI procure for the benefit of Hudson Solar, as Administrative Agent, a pledge (the “Pledge”) of all of the share capital in, and assets and property of, Clear Skies I, LLC and Clear Skies IV, LLC and their respective subsidiary projects, by September 16, 2016. Auerbach Aff. Ex. 1 at § 3.5(j).

ECI failed to procure the Pledge for the benefit of Hudson Solar within the time period provided under the Note Purchase Agreement, which failure constitutes an Event of Default under the Note Purchase Agreement. Auerbach Aff. ¶ 19. Following the occurrence of this Event of Default, Hudson Solar and the parties entered into letter agreements on October 3, 2016, December 7, 2016, and May 15, 2017, in each case temporarily extending the time for ECI to fulfill this obligation. *Id.* In the last such letter agreement, dated May 15, 2017 (the “May 15 Letter”), ECI agreed and acknowledged that any failure by ECI to procure the Pledge by July 31, 2017, would be deemed, and constitute, an Event of Default under the Note Purchase Agreement with respect to all Notes, and “in respect of which the Note Holders may elect to take any of the actions or steps specified in Section 6.2 (*Remedies*) of the Note Purchase Agreement.” Auerbach Aff. Ex. 19 at ¶ 4.1. The parties further agreed that the May 15 Letter did “not constitute a waiver or amendment of any right or remedy other than in relation to the specific waivers and/or amendments expressly given under this Letter [and] the Administrative Agent fully reserves all of its respective rights under the Note Purchase Agreement and the other Note Purchase

Documents with respect to all Defaults currently outstanding, or that may exist, including those rights set forth in your previous letters to us.” *Id.* at ¶ 5.2.

ECI failed to procure the Pledge by the extended deadline of July 31, 2017. Auerbach Aff. ¶ 20. No further extensions were granted by Hudson Solar and ECI’s obligation to procure the Pledge remains outstanding as of the date hereof. *Id.* The continuing failure to procure the Pledge is an Event of Default under the Note Purchase Agreement, the Notes, and each of the Note Purchase Documents. *Id.*

In December 2018, Hudson Solar learned that a subsidiary of the Guarantors had entered into a litigation settlement requiring a payment of more than \$120 million to be made by April 1, 2019. *Id.* at ¶ 21. The subsidiary’s payment obligation is guaranteed by one or more of the Guarantors. *Id.* Given the persistent failure of ECI to comply with Section 3.5(j) of the Note Purchase Agreement and the substantial amount due under the Notes, the discovery of material new debt of this magnitude raised the specter that the Guarantors and, indeed, the corporate group as a whole, would be insolvent and lack sufficient liquidity to fully satisfy the Obligations under the Note Purchase Documents, the Notes, and the Guaranty. *Id.*

On December 26, 2018, Hudson Solar delivered to ECI and Lumens a Notice of Persistent Event of Default (the “December 26 Letter”), reiterating the continued existence of the Event of Default under Section 3.5(j) of the Note Purchase Agreement, identifying the concerns raised by the litigation settlement, and reserving all rights in connection therewith, including but not limited to the right to accelerate the amounts due under the Notes. Auerbach Aff. ¶ 22. Prior to the December 26, 2018 Letter, Hudson Solar (and its affiliates) had previously attempted to engage with the Guarantors, as parent holding companies of the Obligors, on numerous occasions by making a series of proposals to address the liquidity issues of the group. However,

these offers were not given serious consideration by the directors and management of the Guarantors and have since been withdrawn. *Id.*

On January 11, 2019, ECI and Lumens responded to the December 26 Letter and acknowledged that “the security pledge discussed in Section 3.5(j) of the Note Purchase Agreement . . . cannot be fulfilled.” Auerbach Aff. Ex. 20 at 1.

C. Additional Events Of Defaults And Breaches Of Affirmative Covenants

On January 17, 2019, Allen & Overy LLP, on behalf of Hudson Solar, notified the Obligors and Sky Clean Energy Ltd. of additional breaches of affirmative covenants in the Note Purchase Agreement that require the provision of information to Hudson Solar (“January 17 Letter”). Auerbach Aff. Ex. 21 at 1.

These breaches, each of which constitutes a Default under the Note Purchase Agreement, include: (i) failure to provide certain financial information as required by Section 5.1(c); (ii) failure to provide additional information in response to the diligence conducted pursuant to Section 5.1(d)(i)(A) and (B); (iii) failure to provide certain operating information as required under Section 5.1(d)(ii)(B); (iv) failure to provide unaudited quarterly financial statements of ECI, Lumens, and each funded holding company, as required under Section 5.1(d)(ii)(C); (v) failure to provide audited financial statements as required under Section 5.1(d)(ii)(D); and (vi) failure to provide the annual corporate budget as required under Section 5.1(v). Auerbach Aff. ¶ 25. The foregoing Defaults are continuing, as Hudson Solar has to date received neither the information required under the Note Purchase Agreement nor any information that ECI has made available to its project finance lenders. *Id.* at ¶ 26.

Further investigation of ECI and its financial affairs led Hudson Solar to uncover additional violations of the covenants of the Note Purchase Agreement constituting Events of

Default thereunder. Auerbach Aff. ¶ 27. Specifically, under Section 4.1(dd) of the Note Purchase Agreement, the Obligors represented that there were no intercompany positions other than those listed on Schedule 7 to the Note Purchase Agreement and that all other intercompany positions had been released or otherwise terminated. Auerbach Aff. Ex. 1 at § 4.1(dd). Further, under Section 5.2(g) of the Note Purchase Agreement, the Obligors covenanted not to incur additional intercompany debt without Hudson Solar's consent. *Id.* at § 5.2(g).

Notwithstanding these representations and covenants, on information and belief, ECI incurred a payable to a shareholder, which Hudson Solar understands to be Sky International, which payable was reported in ECI's 2016 audited financial statements to be \$35,816,797 as of December 31, 2016, and \$23,464,305 as of December 31, 2017, as reported in ECI's 2017 audited financial statement (the "Alleged Payable"); these financial statements were only recently obtained by Hudson Solar. Auerbach Aff. Ex. 22. As ECI never sought Hudson Solar's consent to incur this obligation, nor was it ever disclosed, the Alleged Payable is an unauthorized intercompany loan obligation under the Note Purchase Agreement, constituting (i) a breach of the representations made in Section 4.1(dd) of the Note Purchase Agreement, and (ii) a breach of the negative covenant in Sections 5.2(a)(i), 5.2(d)(vii), 5.2(e)(i) and 5.2(g) of the Note Purchase Agreement. Auerbach Aff. ¶¶ 29-31.

On February 1, 2019, Hudson Solar sent a letter to the Obligors, the Guarantors and Sky Capital America addressing these breaches of the Note Purchase Agreement and demanding a full explanation of the Alleged Payable by February 6, 2019. Auerbach Aff. Ex. 26. Hudson Solar has not received a response to this correspondence. Auerbach Aff. ¶ 32.

D. Acceleration And Enforcement Actions Taken To Date

On January 22, 2019, Hudson Solar delivered the Notice of Acceleration to the Obligors, notifying them of Hudson Solar's acceleration of the Notes and all other Obligations under the Note Purchase Documents, which as of January 22, 2019, was not less than \$114,706,678. Auerbach Aff. Ex. 23 at 1. On the same day, Hudson Solar delivered the Demand on Guaranty to the Guarantors notifying them of the Notice of Acceleration and demanding payment within fifteen days of not less than \$96,079,936, which amount was the sum of the outstanding principal amount of the Notes as of that date and 69% of the Yield Maintenance Amount. Auerbach Aff. Ex. 24 at 2.

Further, on January 24, 2019, due to the continuance of Events of Default under the Note Purchase Documents, Hudson Solar exercised its remedies under Luxembourg law with respect to the shares of ECI pledged to it by Sky International under the ECI Share Pledge by designating Hudson Global Finance DE, LLC to exercise the right of appropriation on all the ECI shares, which right was exercised on that date. Auerbach Aff. ¶ 33. As a consequence, Hudson Global Finance DE, LLC is presently the 100% owner of ECI, indirect 100% owner of RCI 2, and indirect 85% owner of each of the Uruguay Project Companies. *Id.*

Following such acquisition of the ECI shares, Hudson Solar has continued to investigate the financial affairs of the company and its subsidiaries. *Id.* at ¶ 34. Based on the information reviewed to date, these shares have no value as ECI continues to be obligated to Hudson Solar under the Notes for over \$115 million, which appears to be substantially greater than the value of its assets. *Id.*

E. Lack Of Public Disclosures

Sky Solar Holdings is listed on the NASDAQ as a foreign issuer and, as such, is subject to various reporting obligations. *Id.* at ¶ 35. Notwithstanding these obligations, the Sky Solar Holdings board of directors has failed to disclose numerous material events that would be relevant to shareholders, including, but not limited to: (i) Hudson Solar's (and its affiliates') proposals to address the group's serious liquidity issues; (ii) the ongoing Events of Default under the Note Purchase Agreement; (iii) the receipt of numerous notices regarding such Events of Default; (iv) the acceleration of the Notes; (v) the Demand on Guaranty; and (vi) the exercise of appropriation rights against Sky International under Luxembourg law, resulting in the assignment of the shares of ECI to Hudson Global Finance DE, LLC. *Id.*

Combined with the ongoing Events of Default under the Note Purchase Agreement and the company's history of failing to disclose material information to Hudson Solar in breach of the Note Purchase Agreement, this additional failure to properly inform shareholders leads Hudson Solar to believe that it is dealing with a severely mismanaged company that does not operate in a candid manner and that is unable to meet its obligations, both monetary and non-monetary, to its creditors and shareholders. *Id.* at ¶ 35.

ARGUMENT

As an initial matter, New York courts are the appropriate venue to bring this motion for summary judgment in lieu of complaint. The parties have contractually consented to the exclusive jurisdiction of New York courts for all matters arising under the Guaranty, the terms of which are to be construed in accordance with New York law. Auerbach Aff. Ex. 1 at § 9.1.

CPLR 3213 provides: “When an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” “CPLR 3213 was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 491-92 (2015) (internal quotation marks and citation omitted).

New York courts regularly grant relief under CPLR 3213 following nonpayment under an instrument for the payment of money only. Under CPLR 3213, a plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant’s failure to make payment according to its terms. *See Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 137 (1st Dep’t 1968). The burden then shifts to the defendant to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement. *Simoni v. Time-Line, Ltd.*, 272 A.D.2d 537, 537 (2d Dep’t 2000) (citations omitted).

As shown below, Hudson Solar has established a prima facie case for summary judgment in lieu of complaint, and the Guarantors cannot establish the existence of any material issue of fact that would warrant trial of this action before the Court. Summary judgment in favor of Hudson Solar is therefore appropriate here.

A. Summary Judgment In Lieu Of Complaint Is Appropriate Under The Guaranty

i. The Guaranty is an instrument for the payment of money only under CPLR 3213

The Guaranty made in favor of Hudson Solar easily falls within the ambit of CPLR 3213. It is well established in New York that an “unconditional guaranty is an instrument

for the payment of ‘money only’ within the meaning of CPLR 3213.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank*, 25 N.Y.3d at 492 (citation omitted); *see also Jason Trading Corp. v. Lason Trading Corp.*, 303 A.D.2d 180, 180 (1st Dep’t 2003) (finding an unconditional guaranty of a promissory note an instrument for the payment of money only within the meaning of CPLR 3213). As the Court of Appeals has noted, “[g]uaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank*, 25 N.Y.3d at 493 (collecting cases).

In addition, a guaranty “may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain. The need to refer to the underlying promissory notes to establish the amount of liability does not affect the availability of [relief under] CPLR 3213.” *Mfrs. Hanover Tr. Co. v. Green*, 95 A.D.2d 737, 737 (1st Dep’t 1983) (citation omitted).

The Guaranty at issue is an unconditional guaranty. By its terms, the Guaranty: (i) “irrevocably and unconditionally” guarantees to Hudson Solar the “prompt and complete payment due of all and all present and future obligations and liabilities of the Obligors under the Note Purchase Agreements” (Auerbach Aff. Ex. 14 at § 1.1(a)); and (ii) irrevocably waives any defenses, set-offs or counterclaims regarding the Guarantors obligations to Hudson Solar. *Id.* at § 1.4(a)(ix). That the Guaranty does not recite a sum certain is irrelevant—it is a promise to make payment for all amounts owed to Hudson Solar by the Obligors under the Note Purchase Documents and the Notes. As such, it is clear that the Guaranty in this matter is an instrument for the payment of money only within the meaning of CPLR 3213.

ii. Hudson Solar has made a prima facie case for summary judgment in lieu of complaint

To meet its prima facie burden on a motion for summary judgment in lieu of complaint, Hudson Solar must prove “the existence of the guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank*, 25 N.Y.3d at 491. Hudson Solar has clearly done so. Attached to the Auerbach Aff. are executed copies of the Guaranty (Ex. 14), the Note Purchase Documents and the Notes (Exs. 1-13), and Hudson Solar’s Demand on the Guaranty (Ex. 24). The Auerbach Aff. further avers that the Guarantors have not made payment on the Guarantor Amount Due. *See* Auerbach Aff. ¶ 16. Accordingly, Hudson Solar has established a prima facie showing that it is entitled to summary judgment in lieu of complaint. *Poah One Acquisition Holdings V Ltd. v. Armenta*, 96 A.D.3d 560, 560 (1st Dep’t 2012) (“Plaintiff demonstrated its entitlement to summary judgment as against [guarantor] by submitting the guaranty executed by him and an affidavit of nonpayment.”) (citation omitted); *German Am. Capital Corp. v. Oxley Dev. Co. LLC*, 102 A.D.3d 408, 408 (1st Dep’t 2013) (affirming grant of summary judgment in lieu of complaint where, as here, plaintiff submitted note, guaranty, and an affidavit from plaintiff’s principal attesting to defendant’s failure to pay on the maturity date) (citations omitted); *Seaman-Andwall Corp.*, 31 A.D.2d at 137-39 (granting summary judgment in lieu of complaint where, as here, note called for payment and affidavit alleged a default in payment and notification to defendants).

iii. The Guarantors cannot establish that a triable issue of fact exists

Having established a prime facie showing that Hudson Solar is entitled to summary judgment in lieu of complaint, the burden shifts to the Guarantors to establish that a triable issue of fact exists such that summary judgment is not appropriate. *Simoni*, 272 A.D.2d at

537. The Guarantors cannot do so. There can be no dispute that, at a minimum, ECI's failure to procure the Pledge constitutes an Event of Default, entitling Hudson Solar to accelerate all outstanding amounts due under the Note Purchase Documents and the Notes. Indeed, the Obligor has admitted as much. *Auerbach Aff. Ex. 19* at ¶ 4.1. The Guarantors similarly cannot dispute that, due to the Obligor's nonpayment of the Obligor Amount Due, they are liable to Hudson Solar for the Guarantor Amount Due under the terms of the Guaranty. *See Cooperatieve Centrale Raiffeisen-Boerenleenbank*, 25 N.Y.3d at 494 (affirming grant of summary judgment in lieu of complaint where, as here, "broad, sweeping and unequivocal language" of the guaranty established guarantor's liability and foreclosed any challenge to the enforceability or validity of the instruments for payment); *Acute Corp. v. Stewart*, 21 Misc. 3d 1134(A), 875 N.Y.S.2d 818 (Sup. Ct. Kings Cnty 2008) (granting summary judgment in lieu of complaint where, as here, guarantor failed to pay loans that were accelerated by plaintiff as a consequence of the principal's default).

Accordingly, the Court should therefore grant Hudson Solar's motion for summary judgment in lieu of complaint and enter judgment against the Guarantors in the amount of the Guarantor Amount Due, plus Default Rate Interest in the amount of \$62,858 per day from the date hereof to the date of the entry of judgment.

B. Hudson Solar Is Entitled To Attorneys' Fees Under The Guaranty

The Guaranty further provides that the Guarantors are liable for all costs and expenses, including attorneys' fees, incurred by Hudson Solar in connection with this action as well as all other fees incurred by Hudson Solar in connection with enforcing its rights under the Notes and the other Note Purchase Documents. *Auerbach Aff. Ex. 14* at §§ 11, 14. Courts in New York routinely enforce such provisions. *See DDS Partners*, 6 A.D.3d at 349 (affirming

order pursuant to CPLR 3213 awarding plaintiff attorneys' fees under terms of instrument for payment of money, subject to hearing on amount of fees); *Simoni*, 272 A.D.2d at 538 (same); *Community Nat'l Bank & Tr. Co. of N.Y. v. I.M.F. Trading, Inc.*, 167 A.D.2d 193, 194 (1st Dep't 1990) (same). Accordingly, the Court should also award Hudson Solar its legal fees and expenses, subject to a hearing as to the amount.

CONCLUSION

For all of the foregoing reasons, Hudson Solar respectfully requests that this Court enter an order and judgment pursuant to CPLR 3213 in favor of Hudson Solar and against the Guarantors (jointly and severally) in the amount of the Guarantor Amount Due, plus Default Rate Interest in the amount of \$62,858 per day from the date hereof to the date of the entry of judgment and Hudson Solar's fees and expenses (including attorney's fees) incurred in connection with the enforcement of its rights under the Guaranty, the Notes and the other Note Purchase Documents, on the grounds that this action is based upon an instrument for the payment of money only and that the Guarantors cannot raise any triable issue of fact.

Dated: New York, New York
February 8, 2018

Respectfully submitted,

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COMMERICAL DIVISION RULE 17 CERTIFICATION

Pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court, 22 N.Y.C.R.R. § 202.70, I certify that this document contains 5,548 words and complies with the applicable word count limit.

Dated: New York, New York
February 8, 2018

Respectfully submitted,

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