SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Hudson Solar Cayman, LP, Plaintiff, - against - Sky Solar Holdings, LTD., Sky Solar Power LTD., and Sky International Enterprise Group Limited, Defendants.	Index No. 650847/2019 I.A.S. Part 3 Justice Joel M. Cohen

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Dated: March 11, 2019

Josh Greenblatt
Alexia Renee Brancato
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

Attorneys for Sky Solar Holdings, LTD.,
Sky Solar Power LTD., and
Sky International Enterprise Group Limited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Defendants Sky Solar Holdings, Ltd., Sky Solar Power Ltd., and Sky International Enterprise Group Limited (collectively, "Sky"), by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to Plaintiff Hudson Solar Cayman, LP's ("Hudson") motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 ("Motion"). Submitted herewith is the affidavit of Wu Hao, sworn to on March 11, 2019 ("Wu Aff."), which sets forth the underlying facts relevant to this motion.

PRELIMINARY STATEMENT

Hudson's Motion—which seeks summary judgment under a guaranty based on as-yet unproven and contested events of default allegedly arising under a separate loan agreement—should be denied for at least three reasons.

First, the guaranty at issue is not an instrument for the payment of money only, as required under CPLR § 3213. To the contrary, the Court must resort to multiple external documents and facts to be developed through discovery to evaluate Hudson's claim and purported basis for relief. Second, even before any discovery in this matter, multiple issues of fact exist concerning the alleged defaults and the parties' course of dealing that preclude summary judgment under CPLR § 3213. Finally, Hudson's actions in this matter, including its allegations of default, purported acceleration of Sky's debt obligations, and attempt to enforce the guaranty through its Motion, are in bad faith and designed primarily to force Sky to agree to an unfavorable acquisition by Hudson rather than to protect Hudson's rights.

For these reasons, the Motion should be denied in its entirety.

STATEMENT OF FACTS

I. THE RELEVANT COURSE OF DEALING BETWEEN HUDSON & SKY

Sky and Hudson partnered in 2015 for purposes of investing in and developing renewable power and clean energy projects. Eager to do business with Sky, Hudson agreed to provide an

initial financial commitment of up to approximately $100 million. Wu Aff. ¶ 2. Prior to finalizing its commitment, Hudson conducted diligence into Sky's structure and business. *Id*. Following diligence, Sky and Hudson then entered into several contracts:

- On September 18, 2015, Energy Capital Investment S.À R.L. ("ECI," or the "Borrower"), Lumens Holdings 1, LLC ("Lumens"), Renewable Capital Investment 2, Sociedad Limitada ("RCI-2") and Hudson (collectively, "NPA parties") entered into a Note Purchase Agreement ("NPA"). *Id*. ¶ 3; *id*. Ex. 1.

- On the same date, certain Sky entities[1] executed a Guaranty ("Guaranty") in favor of Hudson for the obligations of the Borrower under the NPA. *Id*. ¶ 3; *id*. Ex. 2. Notably, the Guaranty does not, on its own, require any payment by Sky to Hudson. Rather, as described *infra*, the Guaranty is only triggered once Hudson establishes a breach of obligations under the NPA.

- On July 15, 2016, the NPA parties entered into the Amended and Restated NPA ("ARNPA"). *Id*. ¶ 4; *id*. Ex. 3.

- On July 16, 2016, Sky entered into a Confirmation of Guaranty ("Confirmation of Guaranty") in favor of Hudson for the obligations of ECI under the Amended and Restated NPA. *Id*. ¶ 4; *id*. Ex. 4. As with the Guaranty, the Confirmation of Guaranty does not, on its own, require any payment by Sky to Hudson.

Despite the recent and improper strategic steps taken by Hudson—described herein and culminating in its Motion—the parties' relationship has been successful and profitable for Hudson. Indeed, the parties have worked together on over twenty-five solar energy projects in the United States and Uruguay, totaling over 100 megawatts. *Id*. ¶ 5. To be clear, Sky has met ***all*** payment obligations to Hudson under the ARNPA throughout the parties' relationship. *Id*. ¶¶ 13, 27, 35. Indeed, Hudson does not (and cannot) dispute the absence of ***any*** payment default by Sky under the parties' agreements.

Instead, Hudson seeks to exploit purported technical defaults to manufacture grounds for an acceleration of the entire principal under the ARNPA and obtain a judgment on the Guaranty.

[1] Specifically, Sky Solar Power Ltd. (a British Virgin Islands subsidiary of the Company) and Sky International Enterprise Group Limited (a Hong Kong subsidiary of the Company) entered into the Guaranty. *Id*. Ex. 2.

But the grounds relied on by Hudson for its Motion do not establish a default by Sky. Moreover, Hudson has repeatedly waived and otherwise ignored the purported technical defaults at issue here when it suited Hudson to do so. Accordingly, as addressed herein and in the Wu Affidavit, Hudson's Motion—which will devastate Sky's business and 151 employees worldwide—should be rejected. *Id*. ¶ 35.

II. PURPORTED EVENTS OF DEFAULT

A. The Clear Skies Pledge And Hudson's Waivers

Hudson's primary claim of default relates to Sky's alleged failure to provide a pledge of shares in certain subsidiaries at the time of the ARNPA in 2016. *See* NYSCEF Doc. No. 30 at 9-11. These unproven allegations justify neither Hudson's purported acceleration under the ARNPA nor its effort to recover on the Guaranty through its Motion. While the factual history regarding this issue is complex (and remains to be fully developed through discovery in this matter), the basic facts preclude any grant of summary judgment here.

Under the ARNPA, Hudson received a substantial security package, including: (i) a first lien security interest over all of ECI's present and future assets; (ii) a first ranking share pledge over all of the shares of ECI; (iii) a first lien pledge over all of RCI-2's equity; (iv) a pledge over all of the shares of Lumens—a company 100% owned by Sky (the "Lumens Pledge"); and (v) a second lien interest over all of the assets of certain Uruguayan companies. Wu Aff. ¶ 6; *id*. Ex. 3. Additionally, under Section 3.5(j) of the ARNPA, ECI and Sky were required to pledge all shares, assets and property of Clear Skies I, LLC, Clear Skies II, LLC and Clear Skies IV, LLC (collectively, "Clear Skies" and the "Clear Skies Pledge"). *Id*. ¶ 7.

At the time the parties entered into the ARNPA, however, Sky did not own 100% of Clear Skies. *Id*. ¶¶ 8-9. Lumens was to acquire Clear Skies and then pledge it in its entirety to Hudson. *Id*. Although Lumens was able to acquire Clear Skies, Sky was unable to complete the Clear Skies

Pledge due to, among other things, consent issues with two minority investors in two operating companies owned by Clear Skies I and Clear Skies IV. *Id*. ¶ 9. Sky tried to obtain the consent of the minority investors, but the investors were unresponsive to efforts to fulfill the Clear Skies Pledge. *Id*. Hudson was well aware of this issue in July 2016, at the time of the execution of the ARNPA. *Id*. ¶ 10. Hudson showed no concern with the issue, however, because it still had a security interest in Clear Skies through the Lumens Pledge—*i.e.*, in the event of a default, Hudson would be able to control ***all*** of the shares of Lumens and, as a result, would also control Clear Skies. *Id*. ¶¶ 8-10. In fact, on July 6, 2016, ***prior*** to the execution of the ARNPA, Armin Seifart, corporate counsel to Sky at the time, informed Mark Manisty of Allen & Overy, counsel to Hudson, that Sky would not have full ownership of Clear Skies I and IV at the time of the ARNPA closing. *Id*. ¶ 10; *id*. Ex. 7. Hudson, undeterred, executed the ARNPA on July 15, 2016. *Id*. Ex. 3.

Hudson then explicitly waived the Clear Skies Pledge on ***four*** separate occasions. The first waiver occurred on September 16, 2016, just two months after executing the ARNPA ("September 2016 Waiver Letter"). *Id*. ¶ 11; *id*. Ex. 8. In the September 2016 Waiver Letter, ECI and Hudson agreed that the Clear Skies Pledge "cannot be satisfied prior to the date of the Alternative Note Purchase." *Id*. Ex. 8 § 3.4. ECI and Hudson further agreed that "the Conditions Subsequent [in Section 3.5 of the ARNPA] will be waived." *Id*. Ex. 8 § 2.3. On October 3, 2016, December 7, 2016, and May 15, 2017, ECI and Hudson signed additional letters waiving the Clear Skies Pledge and extending the time to satisfy the pledge. *Id*. ¶ 11; *id*. Exs. 9-11. In the May 15, 2017 waiver letter, Hudson extended the time to complete the Clear Skies Pledge until July 31, 2017. *Id*. ¶ 12; *id*. Ex. 11.

This July 2017 deadline passed, and still Sky was unable to complete the Clear Skies Pledge for the reasons described above. *Id*. ¶¶ 12-14. But Hudson did not react to the passing of that deadline at all, let alone call a default or purport to seek acceleration under the ARNPA at that time. *Id*. To the contrary, aside from a passing reference to the Clear Skies Pledge in a July 2018 letter, Sky did not mention the Clear Skies Pledge until December 26, 2018—***a year and a half*** after the July 2017 waiver deadline. *Id*.; *id*. Ex. 13. Instead, Hudson remained silent regarding this issue but continued to receive and accept interest payments from Sky on the Notes under the ARNPA, and continued to finance and underwrite Sky's business activities. *Id*. ¶ 13-14.

Sky relied on Hudson's repeated waivers and manifest lack of concern regarding the Clear Skies Pledge from the beginning of the parties' relationship until late 2018, when Hudson embarked on its abrupt and strategic effort to exploit the issue. *Id*. ¶¶ 12-15, 18-19. Indeed, if Sky believed that Hudson intended to ultimately call a defect with respect to an issue it had waived and otherwise ignored for years, Sky would have taken any number of steps, including conducting a review of its portfolio of projects to determine if Sky could pledge other projects as security or provide other projects in the form of a rollover transaction. *Id*. ¶ 18.

When Hudson finally raised the Clear Skies Pledge again in December 2018, Sky proposed several alternatives that, coupled with the Lumens Pledge, would provide Hudson with a security comparable or exceeding the Clear Skies Pledge. *Id*. ¶¶ 16-17. For example, Sky proposed putting $20 million into escrow for Hudson, a sum at least equivalent to, if not significantly more than, the value of the Clear Skies Pledge. *Id*. ¶ 16; *id*. Ex. 14. Hudson rejected this proposal. *Id*. ¶ 16. Sky also made other good-faith proposals for replacing the Clear Skies Pledge, including offering to provide Hudson with security over assets in Europe and Japan. *Id*. ¶ 17; *id*. Ex. 14. Hudson rejected these proposals as well and flatly refused to engage with Sky regarding any alternatives

to the Clear Skies Pledge. *Id*. ¶ 17. Instead, despite its multi-year course of waivers and disregard of the Clear Skies Pledge, Hudson abruptly began to claim a default with respect to the Clear Skies Pledge and purported to seek acceleration culminating in the Motion.

B. Sky's Financial Reporting To Hudson

Contrary to Hudson's Motion, *see* NYSCEF Doc. No. 30 at 11, Sky has consistently provided Hudson with required financial reports and additional materials upon request. Wu Aff. ¶¶ 20-21. In fact, the first time Sky ever heard a complaint from Hudson regarding Sky's reporting was on January 17, 2019, when Hudson sent Sky a letter alleging that Sky had defaulted under the ARNPA by failing to provide certain financial documents. *Id*. ¶ 21; *id*. Ex. 16. Any claim of default on these grounds, therefore, is not only unfounded but indicative of the gamesmanship Hudson is engaged in here.

C. The Intercompany Loan

Hudson also seeks to gin up grounds for a destructive acceleration based on a technical and long-ignored claim of default (like the Clear Skies Pledge) regarding an intercompany loan at Sky. *See* NYSCEF Doc. No. 30 at 12. This loan dates from before the signing of the ARNPA in July 2016, when ECI borrowed approximately $36 million from Sky International Enterprise Group Limited via a number of loan assignments. Wu Aff. ¶¶ 22-26. Hudson plainly knew or should have known of the loan based on its due diligence before closing the ARNPA. *Id*. Yet Hudson did not raise the intercompany loan issue with Sky until a January 29, 2019 telephone call and a subsequent February 1, 2019 letter. *Id*. ¶ 24; *id*. Ex. 18.

As discussed in detail below, contrary to Hudson's claim, there has been no default under Sections 5.2(a)(i), 5.2(d)(vii), 5.2(e)(iii), 5.2(g), or 5.2(i) of the ARNPA stemming from the intercompany loan. Wu Aff. ¶ 26. Moreover, there have been no cash payments made in connection with the intercompany loan. *Id*. In short, the loan has had no impact on ECI or Sky's

liquidity and cash flows. *Id.* ¶ 25. Nor has the loan had any impact on Hudson's security interests under the ARNPA. *Id.* Any purported concern by Hudson with the intercompany loan, therefore, is contrived and plainly insufficient to seek acceleration under the ARNPA or summary judgment on the Guaranty through its Motion.

III. HUDSON'S BAD FAITH TACTICS SINCE DECEMBER 2018

After years of overt unconcern with the purported technical defaults alleged in its Motion, Hudson is now engaged in a multi-jurisdictional win-at-all-costs effort to accelerate Sky's obligations under the ARNPA and Guaranty. This abrupt shift is not the result of any legitimate good-faith exercise of Hudson's rights, but rather a strategic effort to pressure Sky and obtain an unfair advantage in the parties' ongoing business negotiations. During most of 2018, Hudson and Sky were discussing a potential partial rollover plan where Hudson would convert part of its Notes into equity in Sky. *Id.* ¶ 31. In connection with those discussions, Sky allowed Hudson to conduct acquisition due diligence, and on December 24, 2018, Hudson proposed to acquire Sky via a statutory merger under Cayman law. *Id.*; *id.* Ex. 22. Before Sky had sufficient time to consider the proposal, Hudson began sending letters to Sky regarding fabricated events of default under the ARNPA, as described below. *Id.* ¶¶ 31-35. Regardless, Sky continued to engage in good-faith negotiations and due diligence with Hudson regarding its proposed acquisition. *Id.* ¶ 32, Ex. 25.

Around the same time in December 2018, Hudson "learned that a subsidiary of [Sky] had entered into a litigation settlement requiring a payment of more than $120 million to be made by April 1, 2019." NYSCEF Doc. No. 30 at 10. Hudson has no interest in this settlement and no right to either consent to or object to the transaction, as it relates to a Japanese subsidiary of Sky—not any United States or Uruguayan business governed by the ARNPA. Wu Aff. ¶ 28. Nonetheless, as made plain in its Motion, Hudson objects to the settlement and seeks to prevent Sky from consummating its obligations. *See* NYSCEF Doc. No. 30 at 10. Accordingly, Hudson

has sought to exploit purported technical defaults under the ARNPA that it previously waived or abandoned or that are baseless on their face.

To that end, on December 26, 2018, after learning about the settlement payment and just two days after making its acquisition offer for Sky, Hudson sent the first notice of an alleged event of default under Section 3.5(j) of the ARNPA. *Id*. ¶ 31; *id*. Ex. 13. Throughout January and February 2019, Hudson then continued to pressure Sky with manufactured events of default, threats of improper acceleration, and a variety of self-help measures, including wrongful takeovers of Sky's subsidiaries. *Id*. ¶¶ 31-34; *id*. Exs. 13, 16, 18, 23-33. Hudson sent Sky no fewer than eight threatening letters during this time. Then, after over a month of intense pressure, including the purported acceleration of amounts due under the ARNPA, Hudson made another potential acquisition offer to Sky. *Id*. ¶ 33; *id*. Ex. 34. Before Sky could even respond, however, Hudson sent yet another manufactured event of default notice on February 1, 2019. *Id*. ¶ 33; *id*. Ex. 18.

Even after filing the Motion on February 8, 2019, Hudson has continued to press its attack on Sky. Indeed, after filing the Motion, Hudson initiated ***three*** additional "statutory demand" actions against Sky in the Cayman Islands, the British Virgin Islands, and Hong Kong—each seeking to force various Sky entities into involuntary insolvency. *Id*. ¶ 30; *id*. Exs. 19-21. Hudson has now withdrawn each of these demands, but not before causing Sky to expend significant resources and time responding to each. *Id*. ¶ 30 n.3; *id*. Exs. 35-37. In a clear indication of its scorched-earth tactics, Hudson then refused to agree to even a limited adjournment of Sky's time to respond to the Motion, which Sky requested based on the time wasted in responding to Hudson's improper statutory demands.

ARGUMENT

Pursuant to CPLR § 3213, "[w]hen 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." On a motion to enforce a guaranty under CPLR § 3213, Hudson must prove "the existence of the guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *Davimos v. Halle*, 35 A.D.3d 270, 272 (1st Dep't 2006). Moreover, if there is any issue of fact, summary judgment must be denied. *Bonds Fin., Inc. v. Kestrel Techs., LLC*, 48 A.D.3d 230, 231 (1st Dep't 2008). When evaluating a motion for summary judgment, the court must "draw[] all reasonable inferences in favor of [Sky]." *Id*.

As set forth herein, Hudson's Motion must be denied because (1) the Guaranty is not "an instrument for the payment of money only;" (2) there are multiple issues of fact that preclude summary judgment; and (3) Hudson's acceleration is in bad faith and is unconscionable.

I. THE GUARANTY IS NOT AN INSTRUMENT FOR THE PAYMENT OF MONEY ONLY AND CPLR § 3213 IS THUS INAPPLICABLE

Hudson cannot meet the threshold requirement that an action pursuant to CPLR § 3213 be based on "an instrument for the payment of money only." New York courts routinely hold that "[a] document does not qualify for CPLR 3213 treatment ***if the court must consult other materials*** besides the bare document and proof of nonpayment, ***or if it must make a more than de minimis deviation from the face of the document***." *PDL Biopharma, Inc. v. Wohlstadter*, 147 A.D.3d 494, 495 (1st Dep't 2017) (emphasis added); *see also Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 245 (Ct. App. June 11, 1996) (evaluating whether the instrument requires "something in addition to defendant's explicit promise to pay a sum of money" and holding that "the instrument does not qualify [for treatment under CPLR § 3213] if outside proof is needed").

Here, the Court "must consult other materials" besides the Guaranty to rule on the Motion and, accordingly, Hudson plainly cannot meet its *prima facie* burden under CPLR § 3213. *See PDL Biopharma, Inc.*, 147 A.D.3d at 495. As set forth above, to determine whether there has in fact been any default that would warrant acceleration and immediate payment by Sky, the Court

cannot look at the Guaranty alone. Instead, at minimum, the Court must look at ***three*** documents—the Notes themselves, the ARNPA, and the Guaranty. Hudson's ***own*** Motion makes this clear, spending over three pages describing relevant sections of each document for the Court to consider in evaluating Hudson's claim. *See* NYSCEF Doc. No. 30 at 5-8. As Hudson explains, the Court must look at (1) the Notes to determine when they allow an acceleration, (2) the ARNPA to determine whether there has been an event of default, what remedies are available, whether acceleration is warranted, the specific amounts allegedly owed to Hudson by ECI, and the calculation of the alleged obligation by Sky taking into account the Yield Maintenance Amount, and (3) the Guaranty, including whether the Guaranty has been triggered, the specific amount allegedly owed by Sky, taking into account the Yield Maintenance Amount set forth in the ARNPA, and whether Sky must reimburse Hudson for fees and costs. *See id*. "Given the foregoing necessity of considering the parties' complex arrangements, agreements and circumstances, and the inability to determine by simple reference to the [Guaranty] . . . [Hudson's] motion must be denied." *PDL Biopharma, Inc.*, 147 A.D.3d at 496 (1st Dep't 2017).

Where, as here, the Court must "resort to [] external document[s]," the Motion must be denied. *See Bonds*, 48 A.D.3d at 231 (CPLR § 3213 unavailable where plaintiffs could not establish a *prima facie* case with promissory note or guaranty alone since claim was based on an acceleration clause in a revolving credit agreement and thus required resort to an external document to define an event of default under the note); *Ian Woodner Family Collection, Inc. v. Abaris Books, Ltd.*, 284 A.D.2d 163, 163-64 (1st Dep't 2001) (denying CPLR § 3213 relief where extrinsic evidence was needed to determine quarterly amounts due under a promissory note and

whether the defendants had actually defaulted according to the note's terms); *Manufacturers Hanover Trust Co. v. Hixon*, 124 A.D.2d 488, 488–89 (1st Dep't 1986) (similar).[2]

II. MULTIPLE ISSUES OF FACT PRECLUDE A GRANT OF SUMMARY JUDGMENT IN THIS MATTER

A. The Alleged Defaults Under The ARNPA Do Not Warrant Acceleration

As described above and in the Wu Affidavit, the purported events of default alleged by Hudson are without legitimate basis and do not warrant acceleration under the ARNPA.

As an initial matter, there has been no default under Section 5.2 of the ARNPA stemming from the intercompany loan between ECI and Sky International Enterprise Group Limited. Wu Aff. ¶¶ 22-27. Specifically, the intercompany loan is not a default because: (i) it was not incurred as a "restricted debt"; (ii) there were no cash payments made on the loan; (iii) the loan did not constitute a change in any accounting practices of Sky; and (iv) it was otherwise known by Hudson. *Id*. ¶ 26.

Additionally, the alleged defaults under Section 3.5(j) and Sections 5.1(c), 5.1(d)(ii)(B), (C), (D), and 5.1(v) are not "material" and certainly do not warrant acceleration under Section 6.1(b). *See id*. Ex. 3. ***First***, Hudson's own actions belie any claim that a default under Section 3.5(j) is "material" enough to be an "event of default" under the ARNPA. Hudson has been aware that Section 3.5(j) could not be fulfilled at all relevant times. Wu Aff. ¶¶ 10-15. With this knowledge, Hudson waived the requirement that Sky comply with Section 3.5(j) for years and then did not raise the issue with Sky for a year and a half after the waivers expired. *Id*. These are not

[2] The cases cited by Hudson in arguing that "the Guaranty is an instrument for the payment of money only," NYSCEF Doc. No. 30 at 15-16, are inapposite. For example, in both *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 495 (Ct. App. June 9, 2015), and *Manufaturers Hanover Trust Co. v. Green*, 95 A.D.2d 737, 737 (1st Dep't 1983), defendants did not dispute defaults under the loans or that the loans were then due and payable. In contrast, as explained herein, Sky contests any live event of default under the ARNPA.

the actions a party takes when the issue is "material."[3] ***Second***, the alleged violations under Sections 5.1(c), 5.1(d)(ii)(B), (C), (D), and 5.1(v) stem from Sky's alleged failure to provide Hudson with documents that are not material in any way to the parties' agreements. Indeed, Hudson itself has never alleged that the documents were material in any way. *See* Wu Aff. ¶¶ 20-21. Thus, there is a question of material fact as to whether there has actually been an event of default or that these alleged violations are actually "material" events of default, and thus Hudson's Motion must be denied. *See, e.g.*, *Smolev v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 541 (1st Dep't 2010) (denying summary judgment where "[t]he record presents questions of fact whether . . . the breaches were material . . . i.e., were so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract") (quotations and citations omitted); *RR Chester, LLC v. Arlington Bldg. Corp.*, 22 A.D.3d 652, 654 (2d Dep't 2005) (similar).

B. Hudson Waived Any Alleged Event Of Default And Should Be Estopped From Accelerating The ARNPA

Assuming, *arguendo*, that there was a default under Section 3.5(j) and Sections 5.2(a)(i), 5.2(d)(vii), 5.2(e)(iii), 5.2(g), and 5.2(i) of the ARNPA, Hudson plainly waived those defaults—both explicitly and through its course of conduct following execution of the ARNPA. Accordingly, Hudson should be estopped from now arguing that those alleged defaults warrant acceleration and demand on the Guaranty.

First, Hudson has known since two months after entering into the ARNPA (at the latest) that the Clear Skies Pledge in Section 3.5(j) could not be fulfilled. For this reason, between

[3] Sky has not, as Hudson suggests, "admitted" that there has been a default based on the Clear Skies Pledge. NYSCEF Doc. No. 30 at 18. On the contrary, Sky has consistently contested that there has been any default given Hudson's knowledge that the Clear Skies Pledge could not be fulfilled and Hudson's perpetual waivers. *See supra* at 3-6; *infra* at 12-13. Moreover, while Sky "acknowledge[d]" Hudson's claims of default in the waiver letters described and cited in Hudson's Motion, Hudson then took absolutely no action with respect to these purported defaults, even after the July 2017 deadline passed without completion of the Clear Skies Pledge. Wu Aff. ¶ 12.

September 2016 and May 2017, Hudson waived the Clear Skies Pledge four times. Moreover, the last waiver expired on July 31, 2017, yet Hudson waited a year and a half, until December 24, 2018, to allege that Sky was in default under Section 3.5(j). Hudson thus cannot now claim that there has been an event of default regarding the Clear Skies Pledge that warrants acceleration and demand on the Guaranty.

This is particularly so because, as described above and in the Wu Affidavit, Sky relied on Hudson's conduct in waiving and otherwise ignoring the purported events of default now relied on by Hudson in the Motion. Wu Aff. ¶¶ 14-15, 18. Had Hudson not consistently waived the Clear Skies Pledge, Sky would have conducted its business in an entirely different manner. For example, Sky would have reviewed its portfolio of projects to determine if Sky could pledge other projects as security or provide other projects in the form of a rollover transaction. *Id*. ¶ 18. In these circumstances, New York courts estop parties like Hudson from relying on a purported default to seek summary judgment. *See Massachusetts Mut. Life Ins. Co. v. Transgrow Realty Corp.*, 101 A.D.2d 770, 771 (1st Dep't 1984) (denying summary judgment where "plaintiff allowed the lapse of a substantial period of time without attempting to enforce" the default and "may have encouraged" the defendant to rely on this lapse, which would "create a situation of waiver and estoppel"); *Scelza v. Ryba*, 169 N.Y.S.2d 462, 463-64 (Sup. Ct. Nassau County 1957) (denying summary judgment where plaintiff established a course of conduct by accepting late payments four months in a row which "equitably estops him from declaring defendants in default").

Second, Hudson has known or should have known about the intercompany loan since before the parties executed the ARNPA. The intercompany loan took place before the parties executed the ARNPA, and Sky provided Hudson with all relevant financial information, including

information about the intercompany loan, in connection with Hudson's diligence before closing the ARNPA. Thus, Hudson knew or should have known about the intercompany loan by July 2016. Wu Aff. ¶¶ 23-25. Yet at no point during the past three years did Hudson ever raise any concern with the loan. *Id*. This years-long silence plainly forecloses a grant of summary judgment based on Hudson's default claim related to the intercompany loan. *See Cadlerock, L.L.C. v. Renner*, 72 A.D.3d 454, 454 (1st Dep't 2010) (dismissing summary judgment due to issue of fact as to whether defendant justifiably relied on years of inaction by plaintiff as to alleged default); *Massachusetts Mut.*, 101 A.D.2d at 770-71 (denying summary judgment where there was an issue of fact as to waiver and estoppel).

C. Hudson's Acceleration Is In Bad Faith

As set forth above and evidenced by the clear timeline in this matter, Hudson's actions since December 2018, including its purported acceleration of the loan, are an improper effort to exploit its contractual rights to obtain an unfair advantage in negotiations with Sky. "Even as a matter of subjective belief, there are ample circumstances in the behavior of [Hudson] both before and immediately after the loan was called to raise an issue as to [Hudson's] good faith." *Canterbury Realty & Equip. Corp. v. Poughkeepsie Sav. Bank*, 524 N.Y.S.2d 531, 534 (3d Dep't 1988) (denying summary judgment where lender's conduct raised genuine issue of material fact as to whether acceleration clause was invoked in good faith). Here, as described *supra*, Hudson's harassment and other improper actions against Sky did not begin until December 26, 2018—after Hudson made its acquisition offer to Sky and after Hudson learned that a subsidiary of Sky would be making an unrelated litigation settlement payment to a third party. Wu Aff. ¶¶ 12, 28, 31. Hudson then ginned up stale events of default based on conduct known to it for years and threatened Sky with acceleration—all while Sky was evaluating Hudson's acquisition offer. Wu Aff. ¶¶ 30-34. When Sky did not immediately accept Hudson's offer, Hudson then improperly

purported to accelerate the ARNPA, served a demand on the Guaranty, took control of ECI and RCI-2, gave notice of its intent to sell Lumens, and filed this lawsuit and the statutory demands aimed at forcing Sky into insolvency. *Id*.

Hudson's actions evince a clear intent to leverage the threat of acceleration in order to force Sky to accept an unfair acquisition offer. At the very least, therefore, there is a question of fact as to whether the acceleration of the ARNPA was in good faith, and Hudson's Motion should be denied. *See Canterbury*, 524 N.Y.S.2d at 534; *North Fork Bank v. Computerized Quality Separation Corp*, No. 148552004, 2005 WL 7871193, at *5 (Sup. Ct. Suffolk County Mar. 31, 2005) (motion for summary judgment denied where "there is no dispute that payment of the note [] was not in default," and genuine issue of material fact existed as to whether acceleration of debt was motivated by good faith); *see also Cty. of Greene v. Chalifoux*, 127 A.D.3d 1316, 1317-18 (3d Dep't 2015) (summary judgment denied because question of fact existed as to whether a default event occurred and loan was properly accelerated).

D. Hudson's Acceleration Is Unconscionable

Finally, Hudson's Motion should be denied because Hudson's purported acceleration of the ARNPA seeks an unconscionable penalty for a "trivial or inconsequential" alleged default. *See Tunnell Publ. Co. v. Straus Communications*, 169 A.D.2d 1031, 1032 (3d Dep't 1991) (denying summary judgment where issue of fact existed relating to whether acceleration would be unconscionable penalty for "trivial or inconsequential" breach). Hudson ***cannot*** claim any payment default, and its only bases for acceleration are three alleged events of default that have not actually damaged Hudson or the security it bargained for under the parties' agreements. Because Hudson has "sustained no damages [and] the security bargained for . . . has not been impaired," "equitable principles may preclude enforcement of an unconscionable penalty," such as acceleration. *Id.* at 1032; *see also Karabu v. Pension Benefit Guar. Corp.*, Civ. No. 96-4960

(BSJ), 1997 WL 759462, at *14 (S.D.N.Y. Dec. 10, 2997) (finding that "trivial or inconsequential" default "cannot—equitably—form the basis for acceleration of [the] debt"); 4C N.Y.Prac., Com. Litig. in New York State Courts § 83:48 (4th ed.) ("The right to accelerate, however, may be denied under equitable principles where the basis of the acceleration is trivial or inconsequential.").[4]

CONCLUSION

For the foregoing reasons, Sky respectfully requests that the Court deny Hudson's Motion in its entirety.

Dated: March 11, 2019

/s/ Josh Greenblatt

Josh Greenblatt
Alexia R. Brancato
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
josh.greenblatt@kirkland.com
alexia.brancato@kirkland.com

Attorneys for Defendants Sky Solar Holdings, Ltd., Sky Solar Power Ltd., and Sky International Enterprise Group Limited

[4] Hudson is not entitled to fees and costs. The cases Hudson relies upon to support its argument that it is entitled to fees and costs, *see* NYSCEF Doc. No. 30 at 18-19, are inapposite because in each of those cases the motion for summary judgment was granted. Here, for the reasons described above, Hudson is not entitled to summary judgment and therefore is not entitled to fees and costs. Even assuming, *arguendo*, that Hudson was otherwise entitled to fees and costs, Hudson's request for costs and fees should be denied given Hudson's bad faith actions, including the fact that Hudson has exponentially increased its own fees and costs (and Sky's) through its unnecessary multi-jurisdictional enforcement actions.

COMMERCIAL 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 5,407 words and complies with the applicable word count limit.

Dated: March 11, 2019

/s/ Josh Greenblatt

Josh Greenblatt
Alexia R. Brancato
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
josh.greenblatt@kirkland.com
alexia.brancato@kirkland.com

Attorneys for Defendants Sky Solar Holdings, Ltd., Sky Solar Power Ltd., and Sky International Enterprise Group Limited