IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
iSun, Inc., *et al*.,[1]	Case No. 24-11144 (TMH)
Debtors.	(Jointly Administered)
	RE: D.I. 14, 65, 97, 108 and 114

DEBTORS' OMNIBUS REPLY IN RESPONSE TO THE OBJECTIONS TO THE DIP MOTION AND THE BID PROCEDURES MOTION

The above-captioned debtors and debtors in possession (the "Debtors"), hereby file this omnibus reply (the "Reply") in support of the DIP Motion and the Bid Procedures Motion; and in response to the following objections made by: (a) Cedar Advance, LLC ("Cedar") [D.I. 97] (the "Cedar Objection"); (b) the Official Committee of Unsecured Creditors (the "Committee") [D.I. 108] (the "Committee Objection"); and (c) the Office of the United States Trustee (the "UST") [D.I. 114] (the "UST Objection"), and collectively with the Cedar Objection and the Committee Objection, the "Objections"). In response to the Objections and in further support of the DIP Motion and the Bid Procedures Motion, the Debtors state as follows:

PRELIMINARY STATEMENT

1. The Debtors commenced these chapter 11 cases with the sole objective of maximizing value for the benefit of the Debtors' creditors. Under the circumstances—including

[1] The Debtors in these Chapter 11 cases, along with the last four (4) digits of their federal tax identification numbers, are: (i) iSun, Inc. ("iSun") (0172) (ii) Hudson Solar Service, LLC ("Hudson") (1635); (iii) Hudson Valley Clean Energy, Inc. ("Hudson Valley") (8214); (iv) iSun Corporate, LLC ("iSun Corporate") (4391); (v) iSun Energy, LLC ("iSun Energy") (1676); (vi) iSun Industrial, LLC ("iSun Industrial") (4333); (vii) iSun Residential, Inc. ("iSun Residential") (3525); (viii) iSun Utility, LLC ("iSun Utility") (4411) ; (ix) Liberty Electric, Inc. ("Liberty") (8485); (x) Peck Electric Co. ("Peck") (5229); (xi) SolarCommunities , Inc. ("SolarCommunities") (7316); and (xii) Sun CSA 36, LLC ("Sun CSA") (7316); (collectively referred to as the "Debtors"). The Debtors' mailing address is: 400 Avenue D, Suite 10 Williston, Vermont 05495, with copies to Gellert Seitz Busenkell & Brown LLC, Attn: Michael Busenkell, 1201 N. Orange Street, Suite 300**,** Wilmington, DE 19801.

the indisputable fact that no alternative financing is available to the Debtors—the DIP Facility furthers the Debtors' objectives to consummate going concern sales, which Debtors believe will maximize proceeds for the Debtors' estates. If the DIP Motion is not approved, Debtors will be forced to immediately liquidate at fire sale prices and terminate the employment of hundreds of employees.

2. The DIP Facility is the only financing available to the Debtors at this time as is supported by the fact that no alternative DIP Lender offered financing to the Debtors, let alone on better terms than the DIP Facility. As discussed below, the DIP Facility is the result of arm's-length negotiations and a marketing process undertaken by the Debtors and their financial advisors. It cannot be disputed that entry into the DIP Facility constitutes a sound exercise of the Debtors' business judgment, and is fair and reasonable under the circumstances.

3. Similarly, the Bid Procedures Motion sets forth Bid Procedures that reflect the reality of the Debtors' circumstances and are designed to encourage parties to submit value maximizing bids in the most cost-effective way possible. Debtors' believe that in order to maximize value to the Debtors' estates, the business must be sold as a going concern, and will provide more value than a liquidation. Further, it cannot be disputed that time is of the essence here. There is no reason to second-guess the Debtors' business judgment in this regard.

4. The Cedar Objection should be overruled because: (1) if the Receivables are not property of the estate then Cedar's consent to the use of cash collateral is unnecessary; (2) Debtors' secured lender, Decathlon Growth Credi, LLC ("Decathlon"), did not consent to the sale and thus, has a continuing security interest in the Receivable and any cash proceeds therefrom; and (3) Decathlon has priority over any purported security interest of Cedar.

5. The Committee Objection should also be overruled. The Committee's Objection

is based primarily on the proposition that this Court should second-guess the Debtors' business judgment despite the Committee's failure to rebut the business judgment rule. As to the DIP Motion, the Committee contends that because the terms of the DIP Facility favor the DIP Lender, they are *per se* unfair but this is not the law. Moreover, the Committee's disagreement with the allocation of the DIP Budget does not render the DIP Budget inadequate. The Committee's Objection should be overruled.

6. As to the Bid Procedures Motion, the Committee ignores that the Debtors have been seeking strategic alternatives since August 2023. Additionally, since the commencement of these cases, over 423 potential interested parties have been contacted. Over 25 of those parties have entered into non-disclosure agreements and are currently engaged in due diligence. Clearly, the Debtors' proposed timeline is based on an exercise of its business judgment, and the Committee has failed to provide any reason why this should be second-guessed.

7. Similarly, the Debtors' choice to agree to the Bid Protections was an exercise of sound business judgment. The Committee ignores the fact that the Bid Protections were the result of arm's-length negotiations with the Stalking Horse Bidder in exchange for allowing the Debtors to conduct a sale process. Moreover, the Stalking Horse Bidder is setting a floor, which furthers the goal in these cases, which is to maximize value to the estates. The Committee's disagreement with the Bid Protections is not enough to rebut the business judgment rule.

8. Finally, the Committee's issues with the Asset Purchase Agreement are premature. The Debtors are only requesting approval of the Bid Procedures at this time, and the Committee fails to provide a reason why these issues need to be addressed at this time. At the Sale Hearing, Debtors will be prepared to present

9. Because the Committee has failed to rebut the business judgment rule, the

Committee Objection should be overruled.

10. The UST Objection should be overruled for the same reasons as the Committee Objection. Similar to the Committee, the UST asks this Court to second-guess the business judgment of the Debtor based on the speculative belief that the current Bid Procedures "may actually chill bidding". As mentioned above, the current parties in interest evaluating the business are well aware of the proposed Bid Procedures and Bid Protections. Nevertheless, they continue to conduct due diligence. Based on the current circumstances, the Bid Procedures are doing exactly what the Debtors intended, encouraging a cost-effective and competitive bidding process.

11. For the reasons set forth below, this Court should overrule the Objections, approve the DIP Motion on a final basis, and approve the Bid Procedures in order to allow the sale process to proceed in order to maximize the value to the Debtors' estates.

BACKGROUND

12. On June 3, 2024 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their affairs as debtors in possession pursuant to §§ 1107(a) and 1009 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these cases.

13. On June 14, 2024, the United States Trustee appointed the Committee of Unsecured Creditors (the "Committee").

14. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases and regarding Debtors' business and capital structure is set forth in the *Declaration of Jeffrey Peck in Support of Debtors' Petition and First Day Motions* [D.I. 4] (the "First Day Declaration") which is incorporated by reference herein.

15. On January 3, 2024, the Debtors filed the Debtors' Motion For Entry Of Interim and Final Orders (I) Authorizing The Debtors To Obtain Postpetition Financing, (II) Granting Security Interests and Superpriority Administrative Expense Status, (III) Granting Adequate Protection To Certain Prepetition Secured Credit Parties, (IV) Modifying The Automatic Stay, (V) Authorizing The Debtors To Enter Into Agreements With Clean Royalties, LLC, (VI) Authorizing Non- Consensual Use Of Cash Collateral, (VII) Scheduling A Final Hearing, and (VIII) Granting Related Relief [D.I. 14] seeking approval of, among other things, debtor-in-possession financing (the "DIP Motion").

16. On June 6, 2024, this Court entered the Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 (I) Authorizing the Debtors to Obtain Postpetition Financing; (II) Granting Liens and Superpriority Administrative Expense Claims; (III) Authorizing the Use of Cash Collateral; (Iv) Granting Adequate Protection to Prepetition Secured Parties; (V) Modifying the Automatic Stay; (VI) Scheduling Final Hearing; and (VII) Granting Related Relief [D.I. No. 49] approving the DIP Motion on an interim basis and scheduling a final hearing on the DIP Motion for June 28, 2024 at 1:00 p.m.

17. On June 7, 2024, the Debtors filed Debtors' Motion for Entry of Orders (A) (I) Approving Bid Procedures in Connection with the Sale of Substantially all of the Debtors' Assets, (II) Scheduling an Auction and a Sale Hearing, (III) Approving the Form and Manner of Notice Thereof, (IV) Authorizing the Debtors to Enter Into the Stalking Horse Agreement, (V) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (VI) Granting Related Relief; and (B) (I) Approving the Purchase Agreement; (II) Approving the Sale of Substantially All of the Debtors' Assets Free and Clear; (III) Approving the Assumption And

Assignment of Contracts and Leases; and (IV) Granting Related Relief [D.I 65] (the "Sale Procedures Motion").

18. On June 21, 2024, Cedar filed the Objection of Cedar Advance, LLC to Debtors' Use of Cash Collateral. [D.I. 97].

19. On June 25, 2024, the Committee filed the Objection of the Official Committee of Unsecured Creditors to the Debtors' (i) DIP Motion and (ii) Sale Procedures Motion. [D.I. 108].

20. On June 26, 2024, the Office of the United States Trustee filed the Limited Objection and Reservation of Rights to Debtors' Motion for entry of Orders (A) (I) Approving Bid Procedures In Connection With The Sale Of Substantially All Of The Debtors' Assets, (II) Scheduling An Auction And A Sale Hearing, (III) Approving The Form And Manner Of Notice Thereof, (IV) Authorizing The Debtors To Enter Into The Stalking Horse Agreement, (V) Approving Procedures For The Assumption And Assignment Of Contracts And Leases, And (VI) Granting Related Relief; And (B) (I) Approving The Purchase Agreement; (II) Approving The Sale Of Substantially All Of The Debtors' Assets Free And Clear; (III) Approving The Assumption And Assignment Of Contracts And Leases; And (Iv) Granting Related Relief. [D.I. 114]

DEBTORS' REPLY

The Cedar Objection

21. The Cedar Objection should be overruled. First, to the extent that the Cedar Agreement constituted a sale of the Receivables (as such term is defined in the Objection), Cedar's consent to the use of cash collateral is unnecessary as the Receivables would not be property of the Debtors' estates, and Cedar would have whatever rights they have to those Receivables. Second, the Debtors' secured lender, Decathlon Growth Credit, LLC ("Decathlon") did not consent to the sale and Decathlon's security interest continues in the Receivables and in any cash

proceeds resulting from the settlement of those Receivables. Third, to the extent that the Cedar Agreement is determined to be a financing transaction, Decathlon has priority over any purported security interest of Cedar. As such, this Court should overrule the Cedar Objection.

22. As discussed in the First Day Declaration, Debtors entered into a loan agreement with Decathlon on or around December 12, 2023 (the "Decathlon Loan"). The Decathlon Loan is secured by substantially all of the Debtors' assets, including the Receivables that Cedar purportedly purchased, which Decathlon perfected by the filing of UCC-1 financing statements on or around October 26, 2023.

23. As noted in the Cedar Objection, Debtors and Cedar entered into an agreement on or around January 4, 2024 (the "Cedar Agreement"). Cedar filed a UCC-1 financing statement in the state of Vermont on or around February 15, 2024 in connection with the Cedar Agreement.

24. Under Section 9-315 of the Uniform Commercial Code, and as adopted in Florida, "(1) a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and (2) a security interest attaches to any identifiable proceeds of collateral." Fla. Stat. Ann. § 679.3151; see also Brooks v. Strategic Funding Source, Inc. (In re Brooks), 619 B.R. 669, 675 (Bankr. C.D. Ill. 2020) ("Thus, under section 9-315, a secured party only forfeits its security interest in collateral pursuant to this provision when collateral is authorized by the secured creditor to be transferred free and clear of that party's security interest.").

25. Decathlon has a security interest in the Receivables, and the cash proceeds therefrom, that is superior to any purported interest that Cedar received under the Cedar Agreement. As such, if the Cedar Agreement is considered a "true sale" of the Receivables,

Decathlon's security interest remains in the proceeds of the sale, and Decathlon has consented to the use of cash collateral, which includes the Receivables and any proceeds therefrom.

26. Moreover, In re R&J Pizza Corp. did not involve a secured lender with a prior security interest in the "accounts" that were purchased. No. 14-43066-CEC, 2014 Bankr. LEXIS 5461, at *3 (Bankr. E.D.N.Y. Oct. 14, 2014). The other cases cited by Cedar similarly do not involve a secured lender with a prior and superior security interest. As such, the cases relied upon by Cedar are factually inapposite and do not support the Objection.

27. Further, Decathlon's loan was effective December 12, 2023 and Decathlon filed a UCC-1 financing statement on November 26, 2023. Cedar did not file an UCC-1 financing statement until February 15, 2024. If the Cedar Agreement is considered a financing agreement, Decathlon has priority over Cedar. Moreover, Cedar only filed its UCC-1 financing statement in Vermont and is therefore only effective against the Debtors organized under the laws of Vermont.

28. For all these reasons, the Cedar Objection should be overruled.

The Committee Objection

A. The DIP Motion

29. For the reasons set forth in the DIP Motion, the supporting Declarations, and this Reply, the Final DIP Order should be approved and the Committee's objection to the DIP Motion should be overruled. As mentioned above, the Debtors' entry into the DIP Facility is a sound exercise of the Debtors' business judgment. The Committee has failed to articulate a reason as to why this Court should second-guess the Debtors' decision to enter into the DIP Facility.

i. *The DIP Facility is Based Upon the Debtors' Business Judgment*

30. First, the Final DIP Order should be approved because the Debtors' entry into the

DIP Facility constitutes a reasonable exercise of the Debtors' business judgment and provides significant benefits to the Debtors' estates as a whole. *See, e.g., In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender."). In determining whether the Debtors have exercised sound business judgment in selecting the DIP Facility, a court need only "examine whether a reasonable business person would make a similar decision under similar circumstances." *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009).

31. The business judgment standard is satisfied here. As described in the DIP Motion and the NeJame Declaration, the Debtors, through their investment banker, England, ran a marketing process for their debtor-in- possession financing. *See* NeJame Decl. ¶¶ 10. The Debtors negotiated the DIP Facility in good faith and at arm's length, and believe that the terms of the DIP Facility are competitive and the best that could be obtained under the circumstances. *See* NeJame Decl. ¶ 9.

32. This is further supported by England's attempts to find alternative financing. More specifically, England contacted 23 potential DIP lenders for an alternative to the DIP Facility. NeJame Decl. ¶10. Of the 23, only 3 ultimately entered into non-disclosure agreements, and were granted access to Debtors' virtual data room. To date, the Debtors have not received a proposal from an alternative DIP Lender. As such, the Debtors have tested the market for DIP financing on better terms, and have come up empty.

33. The DIP Facility is Debtors' only option under the circumstances. The terms and conditions of the DIP Facility were negotiated in good faith. Further, Debtors believe that any material changes to the DIP Facility will result in the withdrawal of the necessary funding to these cases to the detriment of all stakeholders.

ii. *The Committee has Failed to Rebut the Business Judgment Rule*

34. In order to rebut the business judgment rule, an opposing party must show that the debtor: (1) failed to make a decision; (2) made an uninformed decision; (3) was not disinterested or independent; or (4) was grossly negligent. In re L.A. Dodgers LLC, 457 B.R. 308, 313 (Bankr. D. Del. 2011). Here, the Committee does not even attempt to rebut the business judgment rule

35. As previously mentioned, the DIP Facility is based upon the best terms available to the Debtors after a market survey and arm's length negotiations with the DIP Lender. Here, the Committee does not even attempt to satisfy the elements required to rebut the business judgment rule. The fact that these terms may favor the Lender are of no moment when taken in context; that is, there is no other option to the Debtors. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003) (although many of the terms favored the lenders, "taken in context, and considering the relative circumstances of the parties," the court found them to be reasonable).

36. The Committee has failed to provide a reason why the Debtors are not entitled to review under the business judgment standard. Rather the Committee asks this Court to replace the Debtors' business judgment with that of its own. To be sure, the Committee's disagreement with certain terms and allocations of the DIP Budget is not sufficient to rebut the business judgment rule.

37. For these reasons, the Committee's objection to the DIP Motion should be overruled.

B. The Bid Procedures Motion

38. For the reasons set forth in the Bid Procedures Motion and this Reply, the Committee's Objection to the Bid Procedures Motion should be overruled.

i. The Bid Procedures are Fair and Reasonable

39. Similar to its objection to the DIP Motion, the Committee asks this Court to ignore the Debtors' business judgment, attempts to impute its own standard of review (that is, the Committee knows best), and entirely ignores the circumstances of these Cases. The Bid Procedures were developed by the Debtors, along with their professionals, in order to maximize the value of the estates under the circumstances. As such, the Committee's objections to the Bid Procedures should be overruled.

40. First the Committee's objection to the sale timeline ignores the fact that the Debtors have been evaluating their strategic alternatives since August 2023. First Day Decl., ¶ 31. It also ignores the fact that as a result of an ongoing covenant breach with a previous lender and market pressure, Debtors have had limited access to capital.

41. It further ignores the fact that the Debtors, through their investment banker, have already begun the marketing process. Since the Petition Date, over 400 potential interested parties have been contacted. Over 20 of those parties are currently conducting due diligence. As previously stated, the Bid Procedures are working as designed to maximize the value of the Debtors' assets.

42. Further, the Committee ignores the fact that the Bid Protections provided to the Stalking Horse were the result of arm's-length negotiations and were provided in order to allow the Debtors to conduct the proposed sale process. Had the Debtors not agreed to the Bid Protections, the Debtors would have entered into these cases without an established floor for the value of the Debtors' assets. It cannot be disputed that Debtors were exercising their sound business judgment in agreeing to the Bid Protections.

43. Similarly, the Debtors' decision to require bids to be for all of the Debtors' assets

is based upon the Debtors' business judgment. The Committee's contention that this requirement favors one purchaser is based upon the false premise that no other interested party would want to purchase the entire business. This is nothing more than speculation. The Debtors' decision is based upon the circumstances and their judgment that a sale of all the assets is the most efficient cost-effective way to maximize the value of the business.

44. Finally, the Initial Overbid Amount is not unreasonable. The Initial Overbid Amount takes into consideration that the initial overbid should provide more value to the estates after accounting for the Bid Protections. If the Bid Procedures allowed for an initial overbid of just $250,000, as the Committee proposes, the Debtors would potentially be in a situation where the highest bid would result in less money going to the estates. Simply put, the Initial Overbid Amount was based upon maximizing the value of the assets in a cost-effective and efficient manner. As such, the Initial Overbid Amount is the product of the Debtors' business judgment and should not be second-guessed.

ii. The Committee's Objection to Certain Provisions of the Asset Purchase Agreement is Premature

45. The Committee's objection to certain provisions of the Asset Purchase Agreement with the Stalking Horse Bidder is premature as the Debtors will be required to, and will be prepared to, justify any sale at the Sale Hearing. *Prime Lending II, LLC v. Buerge (In re Buerge)*, 2014 Bankr. LEXIS 1264, at *36 (B.A.P. 10th Cir. Apr. 2, 2014) ("Generally, in the context of a sale of assets by auction with or without the use of a stalking horse bidder, two hearings are required: one to approve the auction and bidding procedures, and another hearing, after the auction, to approve the sale to the winning bidder.").

46. As is required, the Debtors will be prepared to justify any proposed sale to this Court when the appropriate time arrives. *In re Saratoga & N. Creek Ry., LLC*, 635 B.R. 581, 606

n.63 (Bankr. D. Colo. 2022) ("And, perhaps any such objection would be premature since the Debtor has not requested that the Court formally approve a specific sales transaction under Section 363(b)."). The Committee fails to provide any reason why their purported issues with terms in the asset purchase agreement should be determined now when it is unknown whether those terms will be relevant at a currently unscheduled sale hearing.

47. Simply put, these issues are more properly addressed at the sale hearing and this Court should overrule the Committee's objection as premature.

48. For all these reasons, the Committee Objection should be overruled.

The UST Objection

49. For the same reasons this Court should overrule the Committee's Objection, this Court should overrule the UST's Objection, which asks this Court to second-guess the business judgment of the Debtors and replace it with his own.

WHEREFORE, the Debtors respectfully request that the Court overrule the Objections; and grant the relief requested in the DIP Motion and the Bid Procedures Motion.

Dated: June 27, 2024

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