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## Solyndra

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# SOLYNDRA’S CHAPTER 11 BANKRUPTCY

*Brandon Brewer*

*Matthew Kinsey*

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## Cast of Characters

<b>Department of Energy</b>	Authorized Solyndra loan guarantee under Section 1705 of the American Recovery and Reinvestment Act of 2009. Responsible for the analyzing of the solar panel market in addition to the general overseeing of the loan.
<b>Steven Chu</b>	Secretary of the Department of Energy and a driving force behind the acceleration and approval of Solyndra’s loan guarantee. Chu accepted full responsibility for the Solyndra guarantee and pledged there were no political motivations behind his decisions.
<b>Solyndra</b>	Manufacturer of solar panels based in Fremont, California. Was the first recipient of a section 1705 loan guarantee under the American Recovery and Reinvestment Act. After plummeting market prices, filed for Chapter 11 bankruptcy protection.
<b>Office of Management and Budget</b>	Responsible for assisting the President in overseeing the preparation of the federal budget. Reviewed Solyndra’s loan package and outlined numerous concerns while noting time constraints before ultimately giving final approval to the loan.
<b>PricewaterhouseCoopers</b>	One of the world’s largest accounting firms and Solyndra’s auditor. Audit report included concerns over cash flow and doubts about continued production.
<b>Peter Orszag</b>	Director of the Office of Management and Budget
<b>Wilbur “Bill” Stover</b>	Chief Financial Officer and Member of Solyndra’s Board of Directors. One of two Solyndra representatives who refused to

testify at House hearings with the Subcommittee of Oversight and Investigations.

**Brian Harrison**

Chief Executive Officer and Member of Solyndra's Board of Directors. One of two Solyndra representatives who refused to testify at House hearings with the Subcommittee of Oversight and Investigations.

**Argonaut Private Equity**

Private equity firm founded by George Kaiser. Solyndra's largest private investor.

**George Kaiser**

Founder of Argonaut Private Equity and the George Kaiser Family Foundation, both heavy investors in Solyndra. Major Obama fundraiser.

**Judge Mary F. Walrath**

Judge for the United States Bankruptcy Court for the District of Delaware

**Peter Kohlstadt**

Claimant in a class action lawsuit against Solyndra under the U.S. Worker Adjustment and Retaining Notification Act and California Labor Code

**Roberta A. DeAngelis**

Appointed U.S. trustee. Filed motion to be appointed trustee of Solyndra's Ch. 11 filing. Also filed motion to have bankruptcy changed from a Chapter 11 to a Chapter 7 liquidation

## I. INTRODUCTION

Solyndra designed and manufactured solar photovoltaic systems designed for large, commercial building owners, government agencies, utilities, developers, roofing contractors, integrators, and energy service companies.<sup>1</sup> Solyndra was originally founded by Dr. Christian Gronet<sup>2</sup> in 2005 as Gronet Technologies, Inc.<sup>3</sup> Gronet Technologies, Inc. changed its name several months later to Solyndra, a play on the words “solar” and “cylinder.”<sup>4</sup> Solyndra started out as green tech’s poster child, showing how government and green entrepreneurs could team up to create clean energy, blue collared jobs, and a healthy new industry.<sup>5</sup> Instead, Solyndra will likely be remembered as a cautionary tale of how taxpayer dollars were wasted when the government made financial investments based on political considerations.<sup>6</sup>

### A. *Solyndra’s New Technology*

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<sup>1</sup> *Company Overview of Solyndra LLC*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2012 1:04 PM ET), <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=33681528>.

<sup>2</sup> Dr. Christian Gronet is an alumnus of Stanford University, where he earned a Ph.D. in semiconductor processing and a bachelor of science degree in Materials Science. *Christian Gronet: Executive Profile & Biography - Businessweek*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2012 1:06 PM ET). <http://investing.businessweek.com/research/stocks/private/person.asp?personId=54334387&privcapId=33681528&previousCapId=282225&previousTitle=KLA-TENCOR%20CORPORATION>. Prior to Solyndra, Dr. Gronet had founded G-Squared Semiconductor Corp., which invented and developed technology for rapid thermal processing of silicon wafers for manufacturing integrated circuits. *Id.* G-Squared Semiconductors was later acquired by Applied Materials where he would serve 11 years as a Vice President and General Manager of the Transistor, Capacitor and Gate product group at Applied Materials. *Id.* Gronet left Applied Materials in 2002 and become a private investor prior to founding Solyndra in 2005. Chang Liu, *The Solyndra Saga*, MEMSCENTRAL.COM (2011), [http://memscentral.com/Secondlayer/The\\_Solyndra\\_Saga.htm](http://memscentral.com/Secondlayer/The_Solyndra_Saga.htm).

<sup>3</sup> *Company Overview of Solyndra LLC*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2012 1:04 PM ET), <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=33681528>.

<sup>4</sup> *Id.*

<sup>5</sup> Kent Bernhard, Jr., *Solyndra Goes From Solar Poster Child to Cautionary Tale*, PORTFOLIO.COM (Sept. 02, 2011 3:48pm EDT), <http://www.portfolio.com/views/blogs/daily-brief/2011/09/02/solyndra-failure-causes-obama-venture-capitalists-and-solar-industry-headaches/>.

<sup>6</sup> *Id.*

To understand Solyndra's business and its products, an understanding of (1) the basic principles behind solar behind energy and (2) the different materials used in solar panel technology is needed.

## 1. Basic Energy Principles

The sun gives off enough energy in one minute to supply the world's energy needs for an entire year.<sup>7</sup> Energy from the sun reaches the Earth in the form of electromagnetic radiation. Scientists use terms like electromagnetic radiation, infrared light, visible light, and ultraviolet light to describe energy from the sun. Ordinary people simply use the term "sunlight."

Like all forms of energy, sunlight can be changed from one form of energy into another. To illustrate this, one can picture a sunbather lying out on a beach in Rio de Janeiro. As sunlight hits the sunbather's body, the sunlight (electromagnetic energy) is absorbed by the sunbather's skin and converted into heat (thermal energy). Heat reacts with the different chemicals in the skin and, depending on the amount of certain chemicals in a person's skin, either gives the sunbather a nice tan or a nasty sunburn.

## 2. Photovoltaic Materials

Most materials, like the sunbather's skin or the glass in a window, convert electromagnetic energy (sunlight) into thermal energy (heat). Some materials, however, convert electromagnetic energy into electrical energy. Materials that convert light into electricity are described as being "photovoltaic." Scientists have discovered several different types of photovoltaic materials. These include crystalline silicon, cadmium telluride, copper indium gallium selenide, and gallium arsenide.<sup>8</sup>

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<sup>7</sup> *Solar Energy*, ALTERNATIVE ENERGY, <http://www.altenergy.org/renewables/solar.html> (last visited Apr. 14, 2012).

<sup>8</sup> *Fundamentals of Photovoltaic Materials*, National Solar Power Research Institute, Inc. (Dec. 21, 1998), *available at* <http://userwww.sfsu.edu/~ciotola/solar/pv.pdf>.

While all of these materials can convert sunlight into electricity, each material has different physical properties. For example, crystalline silicon can be mined from sand, one of the most abundant materials on earth. This makes crystalline silicon a relatively cheap material to manufacture.<sup>9</sup> Crystalline silicon is also heavy and brittle compared to other photovoltaic materials such as copper indium gallium selenide.<sup>10</sup> Copper indium gallium selenide strongly absorbs sunlight and thus can be used to make flexible films.<sup>11</sup>

### *B. Solyndra's Solar Cylinders*

Traditional solar panel technology suffers from a variety of problems that Solyndra hoped to capitalize on. First, solar panels, while producing “free” electricity, require significant upfront costs.<sup>12</sup> Second, solar panels are expensive and must be installed properly in order to operate safely and efficiently.<sup>13</sup> Third, traditional crystalline silicon panels—the kind one normally thinks of when picturing solar panels—require special structural support.<sup>14</sup> To keep high speed winds from ripping the angled panels off their structural mounts, additional structural support to the building that houses the panels may also be required. Also, traditional crystalline silicon

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<sup>9</sup> Galen Barbose, Naïm Darghouth, Ryan Wiser & Joachim Seel, *Tracking the Sun IV: An Historical Summary of the Installed Cost of Photovoltaics in the United States from 1998 to 2010*, LAWRENCE BERKELEY NATIONAL LABORATORY (Sept. 2011), <http://eetd.lbl.gov/EA/EMP/reports/lbnl-5047e-ppt.pdf>.

<sup>10</sup> H.S. Ullal, *Polycrystalline Thin-Film Solar Cell Technologies*, NATIONAL RENEWABLE ENERGY LABORATORY (Dec. 2008), <http://www.nrel.gov/docs/fy09osti/44622.pdf>.

<sup>11</sup> *Fundamentals of Photovoltaic Materials*, National Solar Power Research Institute, Inc. (Dec. 21, 1998), <http://userwww.sfsu.edu/~ciotola/solar/pv.pdf>.

<sup>12</sup> *Calculate the cost of Photovoltaic Systems (Home Solar Electricity)*, NEW MEXICO SOLAR ENERGY ASSOCIATION, [http://www.nmsea.org/Curriculum/7\\_12/Cost/calculate\\_solar\\_cost.htm#Calculation%20of%20upfront%20cost](http://www.nmsea.org/Curriculum/7_12/Cost/calculate_solar_cost.htm#Calculation%20of%20upfront%20cost) (last visited Apr. 14, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> *Solar PV: Safety and The Building Regulations*, IN BALANCE ENERGY, [http://www.inbalanceenergy.co.uk/articles/solar\\_pv\\_safety\\_and\\_the\\_building\\_regulations.html](http://www.inbalanceenergy.co.uk/articles/solar_pv_safety_and_the_building_regulations.html) (last visited Apr. 14, 2012).



panels need to be angled in order to face the sun. Fourth, solar panels can sometimes be aesthetically unpleasant.<sup>15</sup>

Instead of a flat, crystalline silicon panel, Solyndra's products used rows of tubes. Each tube was, in reality, two tubes. The outer tube acted much like a lens, bending the sunlight towards an inner tube. The outside of the inner tubes were lined with the photovoltaic material copper indium gallium selenide (CIGS). Solyndra's designs were protected by several patents,<sup>16</sup> giving them a virtual monopoly on all cylindrical solar panel designs.

Solyndra's patented cylindrical design mitigated several problems associated with traditional crystalline silicon designs.<sup>17</sup> First, Solyndra's cylindrical design allowed panels to be placed in almost any orientation with minimal impact on energy generation because the outer tubes are able to capture a wide array of sunlight angles.<sup>18</sup> This allowed Solyndra panels to follow building contours instead of having to align in a true south or true north direction.<sup>19</sup>

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<sup>15</sup> See, e.g., John Sullivan, *Some say Warwick solar panels are too ugly*, TIMES HERALD-RECORD (Oct. 1, 2012) <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20120110/NEWS/201100329/-1/SITEMAP>.

<sup>16</sup> Real time process monitoring and control for semiconductor junctions, U.S. Patent No. 8,110,828 (filed June 9, 2011); Constant force mechanical scribes and methods for using same in semiconductor processing applications, U.S. Patent No. 8,109,004 (filed Jan. 26, 2011); Volume compensation within a photovoltaic device, U.S. Patent No. 8,106,292 (filed Nov. 30, 2007); Volume compensation within a photovoltaic device, U.S. Patent No. 8,093,493 (filed Nov. 30, 2007); Interconnects for solar cell devices, U.S. Patent No. 8,067,688 (filed Jan. 3, 2007), Real time process monitoring and control for semiconductor junction, U.S. Patent No. 7,964,418 (filed Aug. 16, 2007); Apparatus and methods for connecting multiple photovoltaic modules, U.S. Patent No. 7,963,813 (filed Nov. 2, 2007); System and method for creating electric isolation between layers comprising solar cells, U.S. Patent No. 7,879,685 (filed July 25, 2007); Constant force mechanical scribes and methods for using same in semiconductor processing applications, U.S. Patent No. 7,877,881 (filed Mar. 18, 2010); Method of and apparatus for inline deposition of materials on a non-planar surface, U.S. Patent No. 7,855,156 (filed May 9, 2007); Constant force mechanical scribes and methods for using same in semiconductor processing applications, U.S. Patent No. 7,707,732 (filed Oct. 15, 2008); Method of depositing materials on a non-planar surface, U.S. Patent No. 7,563,725 (filed May 9, 2007); Bifacial elongated solar cell devices with internal reflectors, U.S. Patent No. 7,394,016 (filed Oct. 11, 2005); Interconnects for solar cell devices, U.S. Patent No. 7,259,322 (filed Jan. 9, 2006); Monolithic integration of cylindrical solar cells, U.S. Patent No. 7,235,736 (filed Mar. 18, 2006); Bifacial elongated solar cell devices, U.S. Patent No. 7,196,262 (filed June 20, 2005).

<sup>17</sup> *Technology / Products*, SOLYNDRA, <http://www.solyndra.com/technology-products> (last visited Apr. 14, 2012).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Second, Solyndra's cylindrical system was extremely lightweight compared to traditional crystalline silicon panels.<sup>20</sup> Solyndra's system did not require the oftentimes expensive mounting hardware and ballast and allowed for installation on older buildings not designed to carry heavy rooftop loads.<sup>21</sup> Third, because wind could blow between the series of tubes and because the system was relatively lightweight, high-speed wind concerns were minimized, and installation cost savings were realized.<sup>22</sup> Because Solyndra's panels were not mounted to the roof, Solyndra's panels would never transfer wind load to the roof or be blown off the roof.<sup>23</sup> Simple, non-penetrating mounting hardware was used in the Solyndra systems because no roof penetrations, attachments, or ballast were needed.<sup>24</sup> Fourth, because Solyndra panels did not need to be titled and spaced apart like traditional crystalline silicon panels,<sup>25</sup> Solyndra's panels could be placed closer together. This enabled greater rooftop coverage and easier access to irregular spaces or gaps caused by roof obstacles, while also providing easy visibility and access for rooftop maintenance.<sup>26</sup>

### *C. Growing Pains*

Solyndra started shipping its first product line in July 2008.<sup>27</sup> Sales continued to grow from year to year; however, despite the growth in sales, Solyndra never had a profitable year.<sup>28</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Form S-1 Registration Statement of Solyndra, Inc., U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 18, 2009), [http://www.sec.gov/Archives/edgar/data/1443115/000119312509255919/ds1.htm#toc15203\\_1](http://www.sec.gov/Archives/edgar/data/1443115/000119312509255919/ds1.htm#toc15203_1).

<sup>28</sup> *Id.*

This situation of continued losses despite growing sales is common for most starting businesses and is not necessarily the sign of a failing business. Selected analysts saw clean energy companies, including Solyndra, as sound businesses with great opportunity.<sup>29</sup> Solyndra describes itself as such in a December 2009 prospectus filing with the SEC:

We commenced commercial shipments of our photovoltaic systems in July 2008 and have increased our sales volume and revenue every quarter since that date. We sold 17.2 megawatts, or MW, of panels . . . compared to 1.6 MW for the fiscal year ended January 3, 2009. For the nine months ended October 3, 2009, our revenue was \$58.8 million, compared to \$6.0 million for the fiscal year ended January 3, 2009. Our panels have been deployed in over 100 commercial installations internationally and across the United States. . . . As of the date of this prospectus, we have framework agreements with system integrators and roofing materials manufacturers outlining general terms for the delivery of up to 865 MW of our photovoltaic systems by the end 2013.<sup>30</sup>

With only one production plant in operation, Solyndra would need to expand its manufacturing capabilities in order to increase revenues.<sup>31</sup> Solyndra

## II. THE DEPARTMENT OF ENERGY LOAN

On January 9, 2009, the Department of Energy Credit Committee convened to consider the loan guarantee of \$535,000,000 for Solyndra Fab 2 LLC and a solar photovoltaic power

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<sup>29</sup> See Claire Cain Miller, *Thin Film Solar Companies Raise Hundreds of Millions in Financing*, NEW YORK TIMES (Sept. 11, 2008, 2:28 PM), <http://bits.blogs.nytimes.com/2008/09/11/another-thin-film-solar-company-rakes-in-venture-capital/> ("Thin film has the potential to be extremely disruptive. Because of its cost, it will steal market share."); *Powered by China, Clean Energy Investment Holds Steady in Q2*, BUSINESS WIRE (July 13, 2010 09:00 AM EDT), <http://www.businesswire.com/news/home/20100713005435/en/Powered-China-Clean-Energy-Investment-Holds-Steady> ("Venture capital and private equity financings remain a bright spot for clean energy in 2010 compared to last year.").

<sup>30</sup> Form S-1 Registration Statement of Solyndra, Inc., U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 18, 2009), [http://www.sec.gov/Archives/edgar/data/1443115/000119312509255919/ds1.htm#toc15203\\_1](http://www.sec.gov/Archives/edgar/data/1443115/000119312509255919/ds1.htm#toc15203_1).

<sup>31</sup> *Id.*

panel project.<sup>32</sup> One of the driving forces behind the original loan guarantee was the Department of Energy's Secretary Chu. When Chu met with the Department of Energy on January 9, 2009, he specifically asked what actions needed to be taken in order to accelerate the pace of review and issuance of loan guarantees. On January 26, 2009, the American Recovery and Reinvestment Act of 2009 (ARRA) was introduced to the house by Representative Dave Obey.<sup>33</sup> Under the ARRA, a change was made to the current Department of Energy Loan Guarantee Program that allowed for certain projects to qualify as Section 1705 loan guarantees. Under these Section 1705 loan guarantees, the borrower was no longer required to pay the credit subsidy cost, but in order to be eligible for this funding, the stimulus required that the projects begin no later than September 30, 2011.<sup>34</sup>

By not requiring the borrower to pay the credit subsidy, the government was substantially increasing the risks associated with any approved projects. Before, when the borrower was responsible for the credit subsidy, there was great incentive on a corporation's part to thoroughly review projects and reduce any potential risks that could arise. Once the government agreed to pay the subsidy on behalf of the borrowers, these corporations had far less concern for the minimizing of any risks. While many of these companies were unable to afford the credit subsidy on their own and did indeed need the help of the government, it cannot be ignored that projects were implemented with far less concern for risk aversion.

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<sup>32</sup> CJ Ciaramella, *White House political pressure alleged in Solyndra loan deal*, THE DAILY CALLER (Sept. 14, 2011, 2:51 PM) <http://dailycaller.com/2011/09/14/white-house-political-pressure-alleged-in-solyndra-loan-deal/> (last visited April 22, 2012).

<sup>33</sup> Govtrack.us, H.R. I (111th): American Recovery and Reinvestment Act of 2009, <http://www.govtrack.us/congress/bills/111/hr1> (Last visited April 20, 2012).

<sup>34</sup> Wilson Sonsini Goodrich & Rosata Professional Corporation, Status Update – Department of Energy Title XVII Loan Guarantee Program (2011)

In March 2009, Solyndra was reported as the first commitment in the stimulus for credit subsidy costs.<sup>35</sup> The timing was curious and illustrated the Department of Energy's desire to reduce the cycle time for the decision-making process. At the time of the announcement, the Loans Program Office of the Department of Energy had still not received the Independent Market Report outlining the feasibility and soundness of Solyndra's model.<sup>36</sup> Furthermore, Solyndra and the Department of Energy were still negotiating over the debt to equity ratio of the deal. Solyndra was arguing for an 80–20 debt to equity split, with the Department of Energy asking for more equity.<sup>37</sup> In addition, there was still debate as to whether the deal would be structured as a corporate or project finance arrangement.<sup>38</sup>

On March 6, 2009, documents from the Department of Energy's Credit Committee and Credit Review Boards show that dates for the review and approval of the Solyndra application had been scheduled, even with no finalized term sheet having been negotiated.<sup>39</sup> There is also evidence that Solyndra was pushed through the process so as to be in time for a speech President Obama was giving in California on March 18<sup>th</sup>, as mentioned in email exchanges amongst the Loan Programs Office staff.<sup>40</sup> However, eventually negotiations did conclude and the term

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<sup>35</sup> Solyndra, News and Information, *Solyndra Offered \$535 Million Loan Guarantee By The U.S. Department of Energy Solyndra*, <http://www.solyndra.com/2009/03/us-department/> (last visited April 20, 2012).

<sup>36</sup> Background Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 12, 2011)

<sup>37</sup> Background Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 12, 2011)

<sup>38</sup> *Id.*

<sup>39</sup> Lachlan Markay, *Solyndra Update: Friday Document Dump Raises More Questions*, THE FOUNDRY (Jan. 17, 2012, 1:26 PM) <http://blog.heritage.org/2012/01/17/solyndra-update-friday-document-dump-raises-more-questions/> (last visited April 19, 2012).

<sup>40</sup> John of the SolarTribune, *Treasury: review of Solyndra loan was "rushed"*, THE SOLAR TRIBUNE (Apr. 5, 2012) <http://solartribune.com/2012-04-05-treasury-review-of-solyndra-loan-was-rushed/#.T5oHcNWOWE> (last visited Apr. 19, 2012).

sheet was finalized on March 20, 2009.<sup>41</sup> While the Credit Committee did conditionally approve its commitment to Solyndra, it also listed its concerns and questions associated with the start-up. This list of concerns was considered particularly extensive and included everything from a proper analysis of Solyndra's competitors to greater details of the company's financials.

With the March 18<sup>th</sup> date approaching, the Credit Review Board met on March 17, 2009 to discuss the commitment to Solyndra. During this meeting, it is unclear if the Credit Committee's follow-up questions were even discussed. The conditional commitment was approved provided that Solyndra was able to raise its equity contribution. On July 7, 2009, Secretary Chu even went as far to say that the "loan is theirs, as soon as they get the additional capital that's required by statute."<sup>42</sup> Unfortunately, this was very much at odds with the consensus of the Department of Energy's Loan Program Office. In an email from July 7, 2009, one staff member stated that he had no idea where the information on the equity raise had come from and that the claim saying that Solyndra had already secured the loan didn't help them move forward in the negotiation process.<sup>43</sup>

After the conditional commitment was approved, Solyndra's package was then submitted to the Office of Management and Budget for review. In an act of apparent haste again, prior to the package's approval, the White House and Department of Energy scheduled an announcement for the closing of Solyndra's loan guarantee.<sup>44</sup> Not surprisingly, a little over one week after the White House and Department of Energy began scheduling this announcement, a major

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<sup>41</sup> R. Todd Neilson: Solyndra Report of R. Todd Neilson (2012)

<sup>42</sup> Jhoanna Frances S. Valdez, *D.O.E. asked Solyndra to delay announcement of company layoffs*, ECOSEED (Nov. 16, 2011) <http://www.ecoseed.org/politics-article-list/article/3-politics/11850-d-o-e-asked-solyndra-to-delay-announcement-of-company-layoffs> (last visited April 15, 2012)

<sup>43</sup> *Id.*

<sup>44</sup> Sarah Roman, Solyndra Timeline, AMERICAN FREEDOM (Nov. 12, 2011) <http://usamericanfreedom.com/2011/11/12/solyndra-timeline/> (Last visited April 10, 2012)

outstanding issue was identified that concerned the working capital and liquidity of the company. Specifically, a Department of Energy staff member noted the working capital issue had long been a concern and projected the company would run out of cash in September 2011.<sup>45</sup> The Department of Energy tackled the issue for a period of four days before deciding on August 25, 2009 to push through the deal.<sup>46</sup> With still lingering concerns, the Department of Energy agreed to refine the definition of project overrun costs to be paid for by the parent company and to alter Solyndra's financial model.<sup>47</sup>

After briefing the Office of Management and Budget on August 25, 2009, it became fairly evident that the Department of Energy had rushed the production of its documents in order to meet a September 4, 2009 scheduled announcement event at Solyndra's facilities. There were serious concerns over everything from the proposed credit subsidy estimates to the outlined cash flow numbers.<sup>48</sup> The concerns were so grave that one staff member of the Office of Management and Budget even contacted Vice President Joe Biden's office to voice his concerns about the rushed nature associated with the approval.<sup>49</sup> When one staff member noticed that the deal was based on a workout recovery scenario when it should have been developed under a liquidation scenario, the employee was told that due to pressure to quickly approve Solyndra,

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<sup>45</sup> *Solyndra Facts vs Fiction: Cash Flow Modeling*, ENERGY.GOV (Sept. 23, 2011, 5:25 PM) <http://energy.gov/articles/solyndra-facts-vs-fiction-cash-flow-modeling> (last visited March 15, 2012)

<sup>46</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>47</sup> Bill Vlasic and Matthew L. Wald, *Solyndra Is Blamed as Clea-Energy Loan Program Stalls*, THE NEW YORK TIMES (Mar. 12, 2012) <http://www.nytimes.com/2012/03/13/business/energy-environment/stalled-clean-energy-loan-program-feels-solyndras-chill.html?pagewanted=all> (last visited April 2, 2012)

<sup>48</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>49</sup> Doug Mataconis, *Emails Reveal White House Pressure To Approve Solyndra Loan*, OUTSIDE THE BELTWAY (Sep. 14, 2011) <http://www.outsidethebeltway.com/emails-reveal-white-house-pressure-to-approve-solyndra-loan/> (last visited April 4, 2012)

there was no time to make the change.<sup>50</sup> There appear to have been a number of red flags raised regarding not only Solyndra's guarantee, but also its business model as a whole.

On September 1, 2009, the Office of Management and Budget recommended that the Solyndra deal be slowed down in order to address serious concerns about the weakening world market prices for solar panels.<sup>51</sup> In any case, the September 4, 2009 groundbreaking event went ahead as planned with Secretary Chu attending the event and Vice President Joe Biden making a guest appearance via satellite.<sup>52</sup> In his commencement speech, Secretary Chu hailed Solyndra's advanced technology and room for future business growth.<sup>21</sup> He also noted that Solyndra's groundbreaking would be a shared success story with the Department of Energy and that they were being aggressive in ensuring Solyndra received the necessary funding.<sup>53</sup>

Once the Solyndra loan guarantee was closed, the Department of Energy began disbursing the funds in order to allow for the company to construct a brand new facility that was to be called "Fab 2."<sup>54</sup> Within six months of the closing, Solyndra received over half of the loan

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<sup>50</sup> Background Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 12, 2011)

<sup>51</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>52</sup> Press Release, House Energy and Commerce Committee, *Leaders Seek Financial Details for 14 Loan Guarantees DOE is Poised to Award in the Next 10 Days* (Sept. 20, 2011) <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8931> (last visited April 10, 2012)

<sup>53</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>54</sup> Uclia Wang, *Solyndra: Fab 2 Construction Begins*, GREENTECHSOLAR (Sep. 4, 2009) <http://www.greentechmedia.com/articles/read/solyndra-fab-2-construction-begins/> (last visited April 10, 2012)



guarantee amount for a total of \$286 million.<sup>55</sup> Furthermore, immediately after closing the \$535 million loan guarantee, Solyndra filed yet another application for a second loan guarantee.<sup>56</sup>

On March 16, 2010, Solyndra's auditors, PricewaterhouseCoopers, released a report stating that the company had suffered negative cash flows since inception and recurring losses from its operations.<sup>57</sup> PricewaterhouseCoopers also expressed doubt about Solyndra's ability to continue production.<sup>58</sup> As a result, an addendum to Solyndra's S-1 Initial Public Offering registration was added.<sup>59</sup> Upon hearing this, the Office of Management and Budget requested information from the Department of Energy concerning its monitoring of the Solyndra loan guarantee.<sup>60</sup> The summary described the project as a continuing success and as on target with the initial business plan, despite the audit report.<sup>61</sup>

As a result of a Going Concern letter produced by PricewaterhouseCoopers, President Obama's staff began to voice their worry.<sup>62</sup> With an anticipated visit to the plant on May 26, 2010, Obama's staff wanted to ensure the solid status of the company and asked the Department

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<sup>55</sup> Background Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 12, 2011)

<sup>56</sup> Matthew Boyle, *Documents show Solyndra sought second government loan guarantee for \$469 million*, THE DAILY CALLER (Sep. 16, 2011, 3:49 PM) <http://dailycaller.com/2011/09/16/documents-show-solyndra-sought-second-government-loan-guarantee-for-469-million/> (Last visited April 10, 2012)

<sup>57</sup> Jim Snyder and Christopher Martin, *Obama Team Backed \$535 Million Solyndra Aid as Auditor Warned on Finances*, BLOOMBERG (Sep. 12, 2011, 12:59 PM) <http://www.bloomberg.com/news/2011-09-12/obama-team-backed-535-million-solyndra-aid-as-auditor-warned-on-finances.html> (Last visited April 11, 2012)

<sup>58</sup> *Id.*

<sup>59</sup> Lindsay Riddell, *Auditors raise doubt over Solyndra*, THE SAN FRANCISCO BUSINESS TIMES (Apr. 2, 2010, 10:07 AM) [http://www.bizjournals.com/sanfrancisco/stories/2010/03/29/daily85.html?ed=2010-04-02&ana=e\\_du\\_pub](http://www.bizjournals.com/sanfrancisco/stories/2010/03/29/daily85.html?ed=2010-04-02&ana=e_du_pub) (Last visited April 11, 2012)

<sup>60</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>61</sup> *Id.*

<sup>62</sup> Amer Madhani, *E-mails show White House worried about Solyndra deal*, USA TODAY (Oct. 3, 2011, 9:15 PM) <http://content.usatoday.com/communities/theoval/post/2011/10/e-mails-show-white-house-worried-about-solyndra-deal/1> (Last visited April 20, 2012)

of Energy's American Recovery and Reinvestment Act advisor for an update on the situation.<sup>63</sup> The advisor stated that the Going Concern letter was standard for pre-IPO companies and shouldn't be worried about.<sup>64</sup> He also stated that while Solyndra may face issues in the next 18-24 months, the company's long-term outlook was very good.<sup>65</sup> After this update, the staff decided to move forward with President Obama's appearance at the plant as scheduled.

Later, in June 2010, Solyndra stated that it would be cancelling its planned public offering and had decided to raise any needed capital from already existing investors.<sup>66</sup> This announcement raised serious concerns in the Office of Management and Budget with a call for the Department of Energy to increase its monitoring of Solyndra.<sup>67</sup> With the President and Vice-President both having made appearances at Solyndra events, there was potential for huge embarrassment if the project was to fail. In addressing the announcement, the Office of Management and Budget collaborated with the Treasury in producing a list of twelve follow-up items for the Department of Energy in relation to Solyndra's financial status. This list was sent on July 26, 2010, one day before a Loan Guarantee meeting between Secretary Chu, Office of Management and Budget Director Peter Orszag, and Treasury Assistant Secretary Mary Miller.<sup>68</sup>

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<sup>63</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>64</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>65</sup> *Id.*

<sup>66</sup> Danny Bradburt, *Solyndra cancels planned solar IPO*, BUSINESS GREEN (June 21, 2010) <http://www.businessgreen.com/bg/news/1806103/solyndra-cancels-planned-solar-ipo> (Last visit April 10, 2012)

<sup>67</sup> Memorandum from Subcomm. on Oversight and Investigations Democratic Staff to Democratic Members of the Subcommittee on Oversight and Investigations (Oct. 3, 2011)

<sup>68</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

One month later, the Department of Energy had still yet to provide the requested follow-up information.<sup>69</sup>

On July 9, 2010, the Department of Energy then provided the Office of Management and Budget with a project report outlining Solyndra's second loan guarantee for \$468 million.<sup>70</sup> The Office of Management and Budget's staff worried whether the company's financial status could support a second guarantee. The Department of Energy opted to continue its review of the second loan guarantee and on September 14, 2010, alerted the Office of Management and Budget that Solyndra would be visiting them in order to discuss their current status and to discuss the second loan guarantee.<sup>71</sup>

On October 8, 2010, Solyndra executives informed the Department of Energy that they would not be able to raise the necessary capital by the end of the year.<sup>72</sup> Solyndra's original plan was said to no longer be viable due to the company's situation having changed in such a dramatic fashion.<sup>73</sup> Specifically, Solyndra's CFO, Bill Stover, stated that "without access to FFB loan funds in October, November, and December for work that has been completed, Solyndra would run out of cash in November."<sup>74</sup> Throughout October, Solyndra met with its investors and bankers in order to structure a deal for new capital while the Department of Energy

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<sup>69</sup> *Id.*

<sup>70</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>71</sup> *Id.*

<sup>72</sup> Zeke Miller, *Energy Department Pushed Solyndra To Wait To Announce Layoffs Until After Midterm Elections*, THE FREE REPUBLIC (Nov. 15, 2011, 11:34 AM) <http://www.freerepublic.com/focus/f-news/2807776/posts> (Last visited March 20, 2012)

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

analyzed potential financial models for the deal.<sup>75</sup> On October 25, 2010, Solyndra CEO, Brian Harrison, emailed the Department of Energy stating that the company had received press inquiries concerning Solyndra's ongoing problems and expressed worry that the state of Solyndra was starting to leak outside the company.<sup>76</sup> Harrison further stated that he would like to move forward with an internal communication to employees regarding layoffs on Thursday, October 28, 2010.<sup>77</sup>

On October 30, 2010, Argonaut Private Equity—Solyndra's largest investor—met with the Department of Energy concerning the restructuring of the loan guarantee.<sup>78</sup> During the meeting the Department of Energy indicated that they could commit to Solyndra for November but had not made a decision regarding December yet.<sup>79</sup> Furthermore, Argonaut found it curious that the Department of Energy was adamant that the announcement of consolidation not be made until November 3<sup>rd</sup>.<sup>80</sup> No reasoning was given for this date, but Argonaut indicated in numerous emails that the layoff announcement was postponed because of the November 2 elections.<sup>81</sup>

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<sup>75</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>76</sup> Ronnie Greene and Matthew Mosk, *Emails: Energy Dept. Asked Solyndra to Postpone Layoff Notice Until After Election*, ABC NEWS (Nov. 15, 2011) <http://abcnews.go.com/Blotter/email-energy-dept-asked-solyndra-postpone-layoffs-till/story?id=14957973> (Last visited Mar. 15, 2012)

<sup>77</sup> *Id.*

<sup>78</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>79</sup> *Id.*

<sup>80</sup> Carol Leonnig and Joe Stephens, *Solyndra: Energy Dept. pushed firm to keep layoffs quiet until after midterms*, THE WASHINGTON POST (Nov. 15, 2011) [http://www.washingtonpost.com/politics/solyndra-department-of-energy-pushed-hard-for-company-not-to-announce-layoffs-until-after-2010-mid-term-elections/2011/11/15/gIQA2AriON\\_story.html](http://www.washingtonpost.com/politics/solyndra-department-of-energy-pushed-hard-for-company-not-to-announce-layoffs-until-after-2010-mid-term-elections/2011/11/15/gIQA2AriON_story.html) (Last visited April 2, 2012)

<sup>81</sup> *Id.*

The Department of Energy, Solyndra, and its investors all began negotiations in early December on restructuring an agreement that would allow new capital for the company.<sup>82</sup> While the Department of Energy had initially stated that it was not allowed to subordinate its interest, it reversed its position on December 7, 2010.<sup>83</sup> The Department of Energy agreed to allow the investors first recovery on the first \$75 million in the event of Solyndra's liquidation.<sup>84</sup> On December 8, 2010, Chief Counsel of the Department of Energy's Loan Programs Office contacted the Department of Energy's Chief Counsel stating that she had concerns with the new proposal and that the proposal was in violation of the EP Act.<sup>85</sup> Under this statute, she believed there was a provision that prohibited subordination.<sup>86</sup> On December 10, 2010, the Department of Energy circulated a summary of the terms of the restructuring, which still included the subordination of the Department of Energy's interests to Solyndra's investors.<sup>87</sup>

While the terms for the restructuring were agreed to in December, the Department of Energy continued to fund Solyndra with disbursements in December and January.<sup>88</sup> During January and early February, the Office of Management and Budget determined the restructuring was a modification under Circular A-11 and that it would pose a cost to the government.<sup>89</sup>

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<sup>82</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>83</sup> *Id.*

<sup>84</sup> Saqib Rahim, *Republicans Probed Whether DOE's Effort to Save Solyndra Violated 2005 Energy Act*, THE NEW YORK TIMES (Oct. 11, 2011) <http://www.nytimes.com/cwire/2011/10/11/11climatewire-republicans-probe-whether-does-effort-to-sav-11629.html?pagewanted=all> (Last visited April 2, 2012)

<sup>85</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

Meanwhile, the Department of Energy had labeled the restructuring as a working.<sup>90</sup>

Additionally, the Office of Management and Budget questioned the subordination of the Department of Energy's interests, believing that they had stretched the definition and purpose of the Energy Policy Act of 2005 beyond its limits.<sup>91</sup>

After calls between the Office of Management and Budget and the Department of Energy, a legal opinion concerning the permissibility of the subordination was eventually drafted. This was not produced until January, long after the restructuring terms had been set and Solyndra's funding had continued.<sup>92</sup> By early February, the Office of Management and Budget had determined the Solyndra restructuring was indeed a modification and would result in a cost to the government.<sup>93</sup> The Department of Energy then proceeded to submit a new set of cash flows to the Office of Management and Budget.<sup>94</sup> This led to the reversal of the Office of Management and Budget's position and on February 11, 2011, they determined that the restructuring did in fact constitute a workout.<sup>95</sup> On February 22, 2011, Secretary Chu signed a Department of Energy Action memo approving the agreement.<sup>96</sup> The new agreement outlined the terms and structure of the deal and included the subordination of the Department of Energy's

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<sup>90</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>91</sup> The Associated Press, *Treasury Officials' Testimony Fuels GOP Concerns Over Solyndra Loan Restructuring*, FOX NEWS (Oct. 14, 2011) <http://www.foxnews.com/politics/2011/10/14/house-panel-looks-at-solyndra-loan-restructuring/> (Last visited March 20, 2012)

<sup>92</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

interest in the first \$75 million. The deal was completed on February 23, 2011, as Solyndra, its investors, and the Department of Energy all signed the final restructuring contract.<sup>97</sup>

After the closing of the restructuring agreement, the Department of Energy continued to fund the Solyndra loan guarantee with \$468 million of the \$535 million having already been disbursed.<sup>98</sup> From March to August 2011, the Department of Energy authorized an additional \$40 million in disbursements to Solyndra while also increasing its monitoring of the company.<sup>99</sup> As part of the restructuring agreement, Solyndra was to provide weekly cash flow reports and allow the Department of Energy to observe board meetings.<sup>100</sup> While these measures indicated an upgrade in the overseeing and running of Solyndra, documents indicate that by May 2011, the company was again having working capital issues. Solyndra was in need of a second round of financing by early June and, in a May 5, 2011, board meeting, it was stated that unless additional capital was secured, the company would need to commence with bankruptcy proceedings.<sup>101</sup>

In order to address the need for more capital, Solyndra determined that Argonaut, its largest investor, would purchase its Accounts Receivable at a reduced price.<sup>102</sup> The idea behind this agreement was that when any buyer paid off their bill, Argonaut would be paid back with

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<sup>97</sup> Cliff Stearns, *As DOE Doubled Down and Restructured Solyndra's Loan, White House Pulls Plug on Ex-GSA Chief's Planned Visit to Solyndra in February 2011*, CONGRESSMAN CLIFF STEARNS (Apr. 19, 2012) <http://www.stearns.house.gov/index.cfm?sectionid=134&sectiontree=6,134&itemid=2016> (Last visited April 19, 2012)

<sup>98</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>99</sup> *Id.*

<sup>100</sup> Alex Ferreras, *Congressional Hearing to Focus Restructuring of Solyndra's Debt*, LOANSAFE (Oct. 14, 2011) <http://www.loansafe.org/congressional-hearing-to-focus-restructuring-of-solyndras-debt> (Last visited April 10, 2012)

<sup>101</sup> R. Todd Neilson: Solyndra Report of R. Todd Neilson (2012)

<sup>102</sup> Todd Woody, *Solyndra: Pay Some Investors Before Taxpayers In Solar Flame Out*, FORBES (Sept. 6, 2011, 7:15 PM) <http://www.forbes.com/sites/toddwoody/2011/09/06/solyndra-pay-some-investors-before-taxpayers-in-solar-flame-out/> (Last visited April 2, 2012)

Solyndra receiving the difference between Argonaut's purchase price and the customer's purchase price. The purchase agreement was fitted with a \$75 million cap but allowed for an increase up to \$100 million if agreed upon by both Argonaut and Solyndra.<sup>103</sup> Even with this agreement, Solyndra would still need an infusion of \$46 million in additional working capital by August 2011 in order to maintain a workable minimum balance.<sup>104</sup>

On July 28, 2011, Solyndra's board convened and announced that it had revised its annual plan to reflect a 19 percent drop in shipments, a 23 percent drop in revenue, and a 10 percent decline in average sales price.<sup>105</sup> After this board meeting, the Director of the Loan Program Office Portfolio Management group sent an email, which was later forwarded to Secretary Chu, to Executive Director Jonathan on August 4, 2011.<sup>106</sup> He advised that Solyndra's cash position was very low and expressed doubts that investors would be willing to provide the necessary \$20 million required within the next ten days.<sup>107</sup>

With a lack of commitment from investors, the Department of Energy retained investment bank Lazard Ltd., to analyze a potential second Solyndra restructuring.<sup>108</sup> On August 17, 2011, the Department of Energy, the Department of the Treasury, and the Office of Management and Budget convened in order to discuss the prepared analysis.<sup>109</sup> As expected, the

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<sup>103</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)

<sup>107</sup> *Id.*

<sup>108</sup> CJ Ciaramella, *Energy Department hired Wall Street to Salvage Solyndra*, THE DAILY CALLER (Nov. 4, 2011, 5:52 PM) <http://dailycaller.com/2011/11/04/big-money-still-flowed-to-politically-connected-donors-while-solyndra-sunk/> (Last visited April 2, 2012)

<sup>109</sup> Supplemental Memorandum from The Subcomm. on Oversight and Investigations to the Comm. of Energy and Commerce (Sept. 14, 2011)



report noted the unwillingness of investors to put more capital into the company without an additional restructuring agreement and advised that without this funding, the company would need to “begin an orderly wind-down of business.”<sup>110</sup> The report went on to further indicate that Lazard anticipated little, if anything, would be recovered by the Department of Energy.<sup>111</sup>

On August 26, 2011, the Department of Energy, Solyndra, and its investors reached a critical state in discussions as the Department of Energy did not want to advance an additional \$5.4 million to the company.<sup>112</sup> The next day, Lazard gave a second presentation to the Office of Management and Budget, the Treasury, and the Department of Energy.<sup>113</sup> On August 28, 2011, the Department of Energy informed Solyndra that it would not be providing the company with additional funding.<sup>114</sup> The Solyndra board of directors met on August 30, 2011, and voted in favor of moving forward with bankruptcy proceedings.<sup>115</sup> The company announced its decision to the public on August 31, 2011, and was eventually raided on September 8, 2011, by the Federal Bureau of Investigation and by the Department of Energy Office of Inspector General.<sup>116</sup>

### III. THE PERFECT STORM: MARKET FORCES LEADING TO SOLYNDRA’S FAILURE

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Todd Woody, *Solyndra: Pay Some Investors Before Taxpayers In Solar Flame Out*, FORBES (Sept. 6, 2011, 7:15 PM) <http://www.forbes.com/sites/toddwoody/2011/09/06/solyndra-pay-some-investors-before-taxpayers-in-solar-flame-out/> (Last visited April 2, 2012)

<sup>115</sup> *Id.*

<sup>116</sup> Jim Snyder, *FBI Raid on Solyndra May Herald Escalation of Watchdog Probe*, BLOOMBERG (Sep. 9, 2011, 12:00 AM) <http://www.bloomberg.com/news/2011-09-08/solyndra-s-california-headquarters-raided-by-fbi-agency-spokeswoman-says.html> (Last visited April 15, 2012)

From its founding in 2005 through the early parts of 2009, Solyndra looked like a “can’t fail” green energy company.<sup>117</sup> Solyndra’s products were considered innovative, and the company was shielded from the high prices plaguing the polysilicon market. With European countries heavily subsidizing the consumption of solar panels and other forms of green energy, international demand for Solyndra products, and solar products in general, increased.<sup>118</sup> The question then is: what happened in the intervening years of 2009 to 2011 that led a promising startup to file for bankruptcy?

The answer is threefold: (1) the steep decline in the price of silicon, (2) the cessation of several European subsidy programs, and (3) a colossal influx of low-cost Chinese panels.<sup>119</sup> Taken separately, Solyndra may have been able to survive each of these occurrences, but when hit with all three at once, Solyndra’s business model had little hope of succeeding.

#### *A. The Rise and Fall of Polysilicon Prices From 2008 to 2011*

In 2008, as Solyndra was coming of age, a shortage of polysilicon caused prices of the commodity to soar in the spot market.<sup>120</sup> At its highest point, the price of polysilicon reached \$400 per kilogram on the market, allowing manufacturers to realize profit margins as high as 70%.<sup>121</sup> With such fat margins, production of polysilicon quickly increased. Existing players in

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<sup>117</sup> Jesse Parent, *Solyndra’s Lessons: Challenges of the Global Energy Market*, THEENERGYCOLLECTIVE.COM (Feb. 29, 2012), <http://theenergycollective.com/jesse-parent/77851/solyndra-s-lessons-challenges-global-energy-market>.

<sup>118</sup> *Id.*

<sup>119</sup> Declaration of W.G. Stover, Jr., Senior Vice President and Chief Financial Officer, In Support Of First Day Motions, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

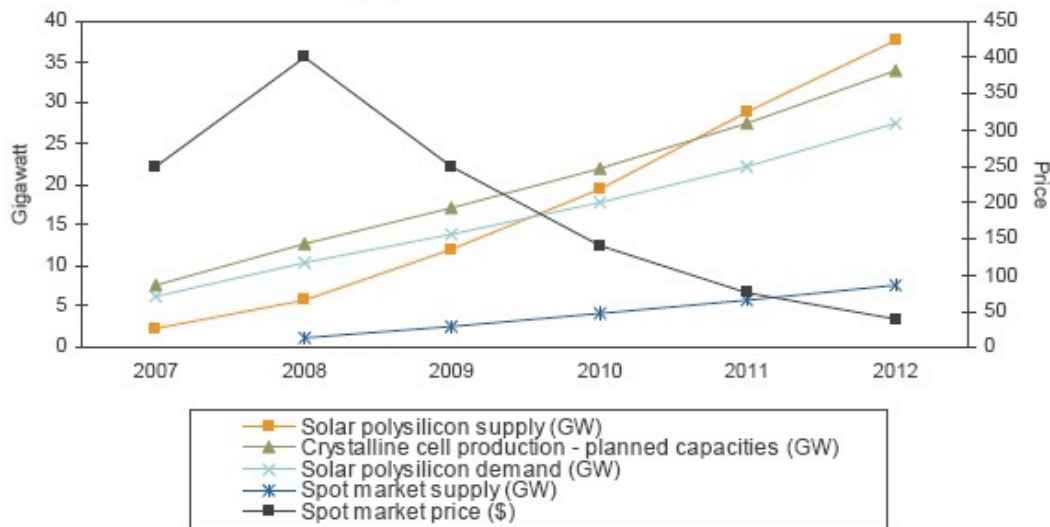
<sup>120</sup> *Polysilicon Prices Hit Record Low in 2011; Will Head Even Lower, Enabling \$0.70/W PV in 2012*, GREENTECHMEDIA.COM (Feb. 10, 2012), <http://www.greentechmedia.com/articles/read/polysilicon-prices-hit-record-lows-in-2011-will-head-even-lower-enabling-0>.

<sup>121</sup> *Id.* At this point, it is important to gain a small understanding as to the production of polysilicon through the early parts of the 2000s. For much of the decade, the market had resembled a strong oligopoly, with a few major players supplying much of the market need. After 2008, this oligopoly would quickly be replaced with a more competitive marketplace. *Id.*

the market began expansion plans and construction of massive, new plants.<sup>122</sup> The large profit margins drew new players into the market, further increasing overall polysilicon supply.<sup>123</sup>

But 2008 also saw another phenomenon that added to the collapse of prices in the market: the worldwide economic recession. When the recession struck, demand for solar energy—the largest consumer of polysilicon—dropped off dramatically. This in turn caused a dramatic drop off in demand for polysilicon products.<sup>124</sup> As evidenced by the figure below, the financial crash of 2008 caused a dramatic decrease in the price of polysilicon. The decrease in demand in conjunction with the oversupply caused by the influx of new manufacturing brought about record low prices in 2011.<sup>125</sup>

**Polysilicon Pricing Peaks and Supply Chain Immaturity and Inflexibility Induce Significant Supply/Demand Imbalances in 2009**



<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Laura Mandaro, *Polysilicon prices fall to earth*, NORTH COAST SOLAR STOCKS (Nov. 22, 2008, 1:21 p.m. EST), <http://northcoastsolarstocks.wordpress.com/2008/11/22/polysilicon-prices-fall-to-earth/>.

<sup>125</sup> *Id.*

For Solyndra, what had once been a competitive advantage was now a major cause for concern. The technology that Solyndra heralded was unresponsive to the polysilicon market, which was good when prices were soaring around \$400 per kilogram, but was bad when prices for polysilicon collapsed. The cost of production for traditional solar panel manufacturers decreased to a point where traditional products became cheaper than Solyndra's products. Considering the new state of the market, Solyndra's production costs were much higher than their competitors in the market. Because Solyndra did not rely on the polysilicon market for their raw materials, they would have to find other ways to decrease costs.

While the collapsing polysilicon prices were the first sign of trouble for Solyndra, it is likely that with time Solyndra could have become profitable had it had enough time to weather the storm. However, other compounding conditions—noteably the decrease of European subsidies and China flooding the market—would necessitate filing for bankruptcy.<sup>126</sup>

### *B. European Solar Subsidy Cuts*

The second factor that signaled the end of Solyndra was the termination of several key subsidies in Europe that promoted the consumption of solar energy. As WG Stover, Solyndra's Chief Financial Officer, said in his declaration to the bankruptcy court, "the reduction or elimination of governmental subsidies and incentives for the purchase of solar energy, particularly in Europe, negatively impacted the availability of capital for PV system owners, further reducing demand for Solyndra's panels."<sup>127</sup>

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<sup>126</sup> There are those who suggest that the collapse of the polysilicon market was perfectly foreseeable and should have been foreseen and considered by the Department of Energy in considering Solyndra for the stimulus loan. In fact, it does seem that insiders of the current administration knew of the concerns before President Obama ever visited the Solyndra in 2010. Various emails from Presidential staff were turned over during the house investigation warning the president that his visit to Solyndra could prove to be an embarrassment in the future.

<sup>127</sup> *Supra* note 119.

Governments across Europe were hit hard by the economic recession of 2008, and many were forced to pursue aggressive spending cuts. Up until 2008, the European Union had become known as a fertile market for solar companies because of the system of feed-in tariffs present in many of the European Union's most prominent countries. These subsidies made the installation of solar power a cost-effective option for European consumers when prices were high.<sup>128</sup> These tariffs allowed manufacturers to provide units at a competitive price to consumers, which drove up demand. In 2008, Germany, Italy, Spain, and the United Kingdom were all among the world's leaders in solar panel installations.<sup>129</sup>

However, as the price of polysilicon dropped, leading to a steep decline in the price of solar cells, the subsidies became overly generous to manufacturers. European governments were feeding in more money per unit than was feasible, sometimes even more than the unit was actually worth.<sup>130</sup>

As a response to this growing problem, as well as to the growing problem of budget deficits in the western world, many of these European countries announced cuts to governmental solar subsidies that had previously fueled demand for solar installations. The United Kingdom, for example, announced that they planned to cut solar subsidies in half by 2012.<sup>131</sup> Likewise, the German government claimed that they were going to slash solar subsidies by up to 30% in the

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<sup>128</sup> Feed-in tariffs (also called minimum price policies, standard offer contracts, feed laws, etc.) are a subsidy system for renewable energy that offers a guarantee of payment to project owners for the total amount of electricity they produce, long-term contracts (typically 10-20 years), and access to the nation's power grid. For a full discussion of these subsidies See, Toby D. Couture, *Renewable Energy Feed-in Tariffs: An Analytical View*, CALIFORNIA ENERGY COMMISSION, May 28, 2009, [http://www.energy.ca.gov/2009\\_energypolicy/documents/2009-05-28\\_workshop/presentations/01\\_Couture\\_Feed-in\\_Tariff\\_Wkshop\\_May\\_28\\_09.pdf](http://www.energy.ca.gov/2009_energypolicy/documents/2009-05-28_workshop/presentations/01_Couture_Feed-in_Tariff_Wkshop_May_28_09.pdf).

<sup>129</sup> Uclia Wang, *The Story Behind Solyndra's Rise and Fall*, GIGAOM, Aug. 31, 2011.

<sup>130</sup> Michael Birnbaum and Anthony Faiola, *Solar Industry Faces Subsidy Cuts in Europe*, WASH. POST, Mar. 18, 2012.

<sup>131</sup> *Id.*

Summer of 2011 and could foresee abolishing them altogether by some time in 2012.<sup>132</sup> Spain and Italy followed suit and announced similar cutbacks to their solar programs.

It is unlikely that governments could have known the far-reaching effects of their actions. As an executive of one German solar company stated, “[Solar Power] is becoming cheap because of mass production. And this has happened only through creating demand. To stop it now makes no sense.”<sup>133</sup> Subsidies dried up, and manufacturers were no longer able to rely on them to fuel demand in the European markets. As the demand in Europe decreased, the price of solar panels depressed even further. This decrease in demand, coupled with an increased supply of solar products, forced the price of solar cells below the cost of producing them.

These decreases in demand alone would not likely have spelled the end for Solyndra. But coupled with the other factors (the drop in the price of polysilicon and the dumping of solar products by China), it was simply not feasible for Solyndra to continue operations. The continued fall of competitor prices forced Solyndra to sell their product at a loss and increased the financial struggles of a now risky start-up that was struggling to stay competitive in a struggling market.

### *C. Oversupply: The China Factor*

In March of 2012, the United States imposed a tariff on all solar panels manufactured in China.<sup>134</sup> American manufacturers of solar panels had been calling for such measures to be taken since the inception of two Chinese programs put in place to incentivize the manufacture of

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Don Lee and Adrian Chang, *U.S. to Impose Tariffs on Solar Panels from China*, L.A. TIMES, Mar. 20, 2012, [http://www.latimes.com/business/la-fi-china-solar-20120320,0,2891514.story?track=rss&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+latimes%2Fbusiness+\(L.A.+Times+-+Business\)](http://www.latimes.com/business/la-fi-china-solar-20120320,0,2891514.story?track=rss&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+latimes%2Fbusiness+(L.A.+Times+-+Business))

solar panels in China. Domestic manufacturers claimed that the Chinese government was enabling illegal dumping of product into solar markets against WTO regulations.<sup>135</sup> This flooding of the market by Chinese manufacturers was the final piece of the perfect storm that prevented Solyndra from offering solar panels at a competitive price.

In 2008, as the world economy floundered in a recession, solar power companies across the globe struggled.<sup>136</sup> Chinese companies, in the period of low demand, opted to build large factories, funded by massive loans from government-funded banks.<sup>137</sup> By building larger factories, Chinese manufacturers were able to create economies of scale that allowed them to drastically decrease production costs and sell their solar products at a price greatly below the world market price. In addition to the government-funded loans, the Chinese government would soon introduce two new programs to further depress the costs of production for Chinese manufactures and drive prices down even further.

In 2009, the Chinese government introduced two new solar subsidy programs: (1) the building-integrated photovoltaic (BIPV) subsidy program and (2) the Golden Sun program.<sup>138</sup> The BIPV program was introduced in March of 2009 as the Chinese government's response to the sharp downturn in demand due to the 2008 increase in the price of polysilicon. The program offered an upfront subsidy of 15–20 Yuan for every watt of solar power produced.<sup>139</sup> The response to the program was overwhelming. Every major player in the Chinese solar power

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<sup>135</sup> *Id.*

<sup>136</sup> *Supra* note 129

<sup>137</sup> *Id.*

<sup>138</sup> *China's National Solar Subsidy Program*, <https://sites.google.com/site/chinapolicyinfocus/china-s-solar-subsidy-programs/china-s-solar-industry/china-s-national-solar-subsidy-programs>

<sup>139</sup> Melody Song, *Government Support Energizes China's PV Market*, PV GROUP, Feb. 2010, [http://www.pvgroup.org/NewsArchive/ctr\\_034481](http://www.pvgroup.org/NewsArchive/ctr_034481)

market participated in the program, including Suntech, which had 20 percent of its applications approved to receive government funds.<sup>140</sup>

With such an overwhelming response to the BIPV subsidy and the Chinese government's belief that solar power was an imperative business sector, both domestically and for export, they quickly rolled out another subsidy to boost production.<sup>141</sup> In July of the same year, China's ministry of finance introduced the Golden Sun program, which was anticipated to subsidize up to 600 mega watts of solar installations with the Chinese government paying for 50–70% of installation costs.<sup>142</sup> With these subsidies in full effect, the Chinese represented 40% of the world's production of solar panels by 2010.<sup>143</sup>

The problem for Solyndra was not the amount of production; the problem was that a vast majority of the Chinese manufacturing output was exported to other markets, including the United States.<sup>144</sup> From the perspective of American manufacturers, the Chinese government was funding the mass production of solar panels and dumping them in the American market, a practice forbidden by the World Trade Organization.<sup>145</sup>

Simply put, the oversupply of solar panels in the market was the final strike against Solyndra. First, the steep decrease in the price of silicon drove the prices down for the vast majority of solar panel manufacturers. Second, prices were further depressed by a sharp decrease in demand due to various European countries, including Italy and Germany, reducing or eliminating various solar subsidies, which had been artificially inflating demand for solar power.

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<sup>140</sup> *Id.*

<sup>141</sup> *Supra* note 138.

<sup>142</sup> *Supra* note 139.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Supra* note 129.



Finally, prices were depressed even further by the ability of Chinese manufacturers, relying heavily on government funding and subsidies, to flood the market with solar cells at prices that American manufacturers could not match. As Solyndra's CFO described it, the company simply could not lower the costs of production fast enough to allow them to be competitively priced in the market, ultimately causing Solyndra's failure.<sup>146</sup>

Soon after Solyndra's chapter 11 filing, American solar manufacturers once again opined for the government to investigate the subsidies provided by the Chinese government. In March of 2012, the United States levied a tariff against Chinese manufacturers as a result of this investigation. The tariff came too late to save Solyndra, but Solyndra's all-too-public failure may have been the push that the United States government needed to step in and protect American manufacturers.

The three previous sections have shed some light on the various market forces that drove what appeared to be a promising solar start-up into Chapter 11. The three previous sections also illustrate the volatility that dominates the solar power market as a whole.

#### IV. THE DECISION TO FILE FOR BANKRUPTCY

The Board of Managers convened a meeting on September 1, 2011, to discuss the inevitability of bankruptcy protection.<sup>147</sup> The Solyndra's operating agreement required the approval of at least two outside managers in order to file for bankruptcy protection.<sup>148</sup> Stephen Johnson and Richard Adkisson, both outside managers as defined by the operating agreement,

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<sup>146</sup> *Supra* note 127.

<sup>147</sup> Voluntary Ch. 11 Petition of 360 Degree Solar Holdings Inc., *In re* Solyndra LLC, Case No. 11-12800 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>148</sup> *Id.*

along with the rest of the board present, voted in favor of seeking bankruptcy.<sup>149</sup> The vote in favor for filing a petition was unanimous.<sup>150</sup> In the same meeting, the board authorized company officers to (1) execute, verify, and file all necessary petitions, schedules, lists, and other documents, (2) retain and employ all assistance attorneys, financial advisors, claims and noticing agents, accountants and other professionals needed for the bankruptcy, (3) obtain post-petition financing according to terms which may be negotiated by the management of the company, and (4) to retain the law firm of Pachulski Stang Ziehl & Jones LLP as general bankruptcy counsel.<sup>151</sup>

#### *A. Filing the Petition*

On September 6, 2011, Solyndra filed for chapter 11 bankruptcy protection.<sup>152</sup> Both 360 Degree Solar Holdings Inc. and Solyndra LLC filed voluntary petitions.<sup>153</sup> Solyndra, as a Delaware limited liability company,<sup>154</sup> filed in the District of Delaware.<sup>155</sup> The case was assigned to Judge Mary F. Walrath.

In an affidavit filed in support of first day motions, Solyndra's CFO, Bill Stover, blamed Solyndra's financial difficulties on a "combination of general business conditions and an

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Voluntary Ch. 11 Petition of 360 Degree Solar Holdings Inc., *In re* Solyndra LLC, Case No. 11-12800 (MFW) (Bankr. D. Del Sept. 6, 2011); Voluntary Ch. 11 Petition of Solyndra LLC, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>154</sup> See File No. 4568683, Registered Entity Search, Delaware Department of State: Division of Corporations (<http://sos.delaware.gov>).

<sup>155</sup> Voluntary Ch. 11 Petition of 360 Degree Solar Holdings Inc., *In re* Solyndra LLC, Case No. 11-12800 (MFW) (Bankr. D. Del Sept. 6, 2011).

oversupply of solar panels dramatically reduced solar panel pricing world-wide.”<sup>156</sup> According to Stover, subsidized foreign manufacturers provided a cheaper supply of solar panels, forcing Solyndra to lower prices in order to stay competitive.<sup>157</sup> At the same time, the reduction or elimination of governmental subsidies to purchasers of solar panels, especially in Europe, reduced demand for Solyndra’s panels.<sup>158</sup> Lastly, Solyndra was unable to collect its accounts receivables in a timely manner. Foreign competitors offered extended payment terms and Solyndra’s customers, now used to the extended terms of foreign competitors, refused to comply with less favorable, previously agreed upon terms.<sup>159</sup>

### *B. The Legal Effects of Solyndra’s Filing*

Solyndra’s filing of a voluntary petition for relief under 11 U.S.C. § 301 automatically triggered several other sections of the Bankruptcy Code. First and foremost, by virtue of the Bankruptcy Code, an estate containing all of Solyndra’s legal and equitable interests was created.<sup>160</sup> Conceptually, all of Solyndra’s assets were plunked out of the Solyndra bucket and dropped into the newly created, heavily fortified bankruptcy estate bucket.

The Bankruptcy Code creates this new “bucket” to keep individuals from reaching in and grabbing the remaining assets of Solyndra. Everyone must wait their turn as the court reaches into the bucket and hands everyone their appointed share of the remaining assets. All the players in a bankruptcy proceeding have some kind of incentive to deplete the bucket of resources. Equity holders have the incentive to run up administrative expenses with the far flung hopes of

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<sup>156</sup> Declaration of W.G. Stover, Jr., Senior Vice President and Chief Financial Officer at ¶ 23, In Support Of First Day Motions, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See* 11 U.S.C. § 541.

somehow realizing a small return on their investment. Unsecured creditors are trying to collect on their debts before administrative expenses eat up the remaining cash. Secured creditors are trying to collect on their collateral before their equity cushion runs out. Lawyers, accountants, and turnaround professionals deplete assets with their services fees. Furthermore, while minimal in amount and fixed by statute, the bankruptcy trustees receive revenues from statutory fees.

The Bankruptcy Code protects the estate through two main statutory vehicles. First is the automatic stay of 11 U.S.C. § 362. The automatic stay is a creature of statute and is effective immediately upon the filing of petition.<sup>161</sup> The automatic stay (with narrow exceptions<sup>162</sup>) prohibits all collection efforts.<sup>163</sup> The second group of statutes protects against the business's management, as debtor in possession, from depleting the assets of the company through continued operations during the bankruptcy. These statutes are loosely sprinkled through the Bankruptcy Code and usually take the form of barring the debtor in possession from using certain assets,<sup>164</sup> taking on additional debt,<sup>165</sup> or protecting the interest of secured parties.<sup>166</sup> For the most part, the Bankruptcy Code allows the debtor in possession to use or sell these protected assets, provided that the debtor in possession can prove that the use or sale of the assets is vital to maintaining the going concern value of the business.<sup>167</sup>

### *C. First Day Motions*

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<sup>161</sup> *Id.* at 362(a).

<sup>162</sup> *Id.* at 362(b).

<sup>163</sup> *Id.* at 362(a)(1-8).

<sup>164</sup> *Id.* at 363.

<sup>165</sup> *Id.* at 364.

<sup>166</sup> *Id.* at 361.

<sup>167</sup> *See, e.g., Id.* at 363(b).

Like most large companies that file for chapter 11, Solyndra had already prepared a number of first day motions in anticipation of filing a bankruptcy petition. While the individual motions vary depending on the debtor's individual circumstances, first day motions used by debtors keep business operations running, to the extent possible, without disruption.<sup>168</sup>

Like all businesses, Solyndra needed cash to run its day to day operations. Just as the automatic stay protects against creditors diminishing the bankruptcy estate,<sup>169</sup> various provisions of the Bankruptcy Code protect against the diminution of the estate by the debtor in possession. These provisions act as safeguards and set up the court as a gatekeeper for certain actions.<sup>170</sup> Solyndra needed the court's immediate authorization on a number of matters.

#### 1. Postpetition Secured Financing

Solyndra's first motion sought authorization from the court for Solyndra to (1) incur postpetition financing in the form of a \$4 million priming senior secured superpriority debtor in possession term loan with \$2.5 million of the \$4 million authorized before the final order; (2) use cash collateral tied up by prepetition lenders' security interests; (3) provide adequate protection to prepetition secured lenders; and (4) grant needed technical procedures to accomplish the items (1)-(3).<sup>171</sup> The proposed loan agreement contained a carve-out provision for the expenses of Pachulski Stang Ziehl & Jones and other bankruptcy professionals.<sup>172</sup>

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<sup>168</sup> JONATHAN P. FRIEDLAND, MICHAEL L. BERNSTEIN, GEORGE W. KUNEY & JOHN D. AYE, CHAPTER 11 - 101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE: A PRIMER 18, (H. Slayton Dabney, Jr. & John W. Kibler eds., 2007). <sup>169</sup> See 11 U.S.C. § 541.

<sup>170</sup> See, e.g., *Id.* at 361, 362(d)(1), 363, 364.

<sup>171</sup> Motion for Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection (IV) Modifying the Automatic Stay, and (v) Scheduling a Final Hearing, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>172</sup> *Id.*

Prior to filing a petition, Solyndra had obtained the cooperation of its two largest secured lenders, Argonaut Ventures and Madrone Partners, for DIP financing.<sup>173</sup> Argonaut and Madrone would create a special purpose entity to loan Solyndra the needed capital to continue remaining business operations.<sup>174</sup> The priming loan would be secured by all present and after-acquired assets and property of Solyndra.<sup>175</sup> Solyndra wished the priming lien to include any property acquired by the estate through avoidance actions and preferential or fraudulent transfers.<sup>176</sup>

Again, Solyndra's inside investors would be getting a sweetheart deal. DIP financing allows the lender to take a security interest in unencumbered assets. A priming lien for new money has priority over administrative expenses and unsecured creditors.<sup>177</sup> Despite the additional collateral and priority protection granted to priming loans, DIP financing is able to command higher than normal interest rates simply due to the fact that the debtor is in bankruptcy.<sup>178</sup>

Judge Waltham signed the interim order the next day on September 7, 2011.<sup>179</sup> The signed interim order read almost word for word from the proposed order attached in the initial

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See 11 U.S.C. §§ 364(d), 507(a)(2).

<sup>178</sup> Marshall S. Huebner, *Debtor-In-Possession Financing*, THE RMA JOURNAL, April 2005 (“[B]ecause of the many lender protections enshrined in the U.S. Bankruptcy Code to induce [debtor in possession] lending, the safest loans in a troubled industry may well be those made to bankruptcy debtors.”); David A. Skeel, Jr., *The Past, Present and Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905 (2004) (“[G]enerous terms offered to [DIP] financiers have encouraged lenders to make loans to cash-starved debtors”).

<sup>179</sup> Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection (IV) Modifying the Automatic Stay, and (V) Scheduling a Final Hearing, *In re Solyndra LLC*, Case No. 11-12779(MFW) (Bankr. D. Del Sept. 6, 2011).

motion with two notable exceptions.<sup>180</sup> First, the interim order provided protection to Solyndra's landlords by prohibiting Solyndra from encumbering, pledging, or collateralizing any leasehold interest of Solyndra to the extent prohibited by the terms of the lease agreement.<sup>181</sup> The order specifically singled out Global Kato and stated that any letters of credit issued in connection with Solyndra's lease were property of Global Kato and not property of Solyndra's bankruptcy estate.<sup>182</sup> Second, the final order gave all parties the right at the Final Hearing to challenge whether the Inventory Accounts Receivable Trust Funds were property of Solyndra.<sup>183</sup> In the event that the Accounts Receivable Trust Funds<sup>184</sup> were to be found property of Solyndra, Judge Walrath specified that the amount of the Accounts Receivable proceeds would be deducted from the \$2.5 million interim financing.<sup>185</sup>

The final order would be comparable in substance with the original proposed order and the interim order.<sup>186</sup> Argonaut Solar, LLC, the special purpose entity lending vehicle comprised

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<sup>180</sup> See Motion for Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection (IV) Modifying the Automatic Stay, and (v) Scheduling a Final Hearing, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011); Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection (IV) Modifying the Automatic Stay, and (V) Scheduling a Final Hearing, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011). <sup>181</sup> Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection (IV) Modifying the Automatic Stay, and (V) Scheduling a Final Hearing, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> In an effort to raise capital and keep Solyndra afloat, Solyndra sold off large portion of its accounts receivables to specially created subsidiaries prior to filing for bankruptcy. *Id.* Solyndra would continue to collect the accounts receivable even though the subsidiaries owned the proceeds of the accounts. *Id.* These proceeds, held in Solyndra's accounts but owned by the subsidiaries, were a matter of dispute as to whether they should be included as property of the estate. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection,

of Argonaut and Madrone, would provide the \$4 million loan. Judge Walrath found the Accounts Receivable Trust Funds proceeds to not be property of the estate,<sup>187</sup> thus barring the use of the Accounts Receivable Trust Funds proceeds from being used toward the priming lien. Judge Walrath also prohibited the use of any property acquired through any present and future avoidance actions from being used toward the priming lien.<sup>188</sup>

## 2. Motion for Joint Administration

Solyndra then filed a motion to join its two cases together.<sup>189</sup> Bankruptcy Rule 1015(b) provides that the court may order the joint administration of the estates of a debtor and its affiliates if two or more petitions are pending in the same court by or against a debtor and an affiliate.<sup>190</sup> Because 360 Degree Solar Holdings, Inc. held a 100% ownership interest in Solyndra LLC,<sup>191</sup> the court quickly approved the attached order the next day and 360 Degree Solar Holdings, Inc. case was folded into Solyndra LLC's.<sup>192</sup>

## 3. Motion to Establish Procedures for Interim Compensation

Next, Solyndra filed a motion to establish procedure for interim compensation of professionals to assist Solyndra during the bankruptcy proceedings, specifically singling out

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and (IV) Modifying the Automatic Stay, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Debtors' Motion for Order Directing Joint Administration of Related Chapter 11 Cases, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>190</sup> FED. R. BANKR. P. 1015(b).

<sup>191</sup> Voluntary Ch. 11 Petition of 360 Degree Solar Holdings Inc., *In re Solyndra LLC*, Case No. 11-12800 (MFW) (Bankr. D. Del Sept. 6, 2011); Voluntary Ch. 11 Petition of *Solyndra LLC*, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>192</sup> Order Authorizing Joint Administration of Related Chapter 11 Cases, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).



Pachulski Stang Ziehl & Jones LLP.<sup>193</sup> Section 331 of the Bankruptcy Code allows professionals such as examiners, trustees, lawyers, and accountants to submit their fees to the court and, after notice and a hearing, the court may allow and disperse payment of the professional's fees from the bankruptcy estate.<sup>194</sup> Solyndra submitted a proposed plan which allowed for shorter payment periods for the first three months of the bankruptcy, followed by longer payment periods as the case progressed. A hearing regarding the proposed order was scheduled for September 27, 2011, with proposed objection due by September 20.<sup>195</sup> With no objections filed, Judge Walrath signed the original proposed order on September 23 2011.<sup>196</sup>

#### 4. Motion to Maintain and Administer Warranty Programs and Honor Related Prepetition Obligations

Solyndra then filed a motion to maintain and administer Solyndra's warranty program and honor prepetition obligations related to the warranty program.<sup>197</sup> By continuing the warranty program, Solyndra hoped to keep customer confidence in the product and keep sales from deteriorating.<sup>198</sup> In their motion,<sup>199</sup> Solyndra made several arguments based on 11 U.S.C.

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<sup>193</sup> Motion of the Debtors for the Entry of an Order Establishing Procedures for Interim Compensation Pursuant to Section 331 of the Bankruptcy Code, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>194</sup> 11 U.S.C § 331.

<sup>195</sup> Notice of Hearing re: Notice of Motion of Debtors for Entry of an Order Establishing Procedures for Interim Compensation Pursuant to Section 331 of the Bankruptcy Code, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>196</sup> Administrative Order Establishing Procedures for Interim Compensation Pursuant to Section 331 of the Bankruptcy Code, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>197</sup> Motion of the Debtors for Entry of an Order Authorizing the Debtors to Maintain and Administer Warranty Program and Honor Prepetition Obligations Related Thereto, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

1107(a) and 11 U.S.C. 1108,<sup>200</sup> 11 U.S.C. 363(c),<sup>201</sup> and 11 U.S.C. 363(b)(1).<sup>202</sup> Solyndra argued that the warranty program fell under the ordinary course of business.<sup>203</sup> Should the court find that the warranty program did not fall under the ordinary course of business, Solyndra argued that under section 363(b)(1), the court, after notice and hearing, should allow Solyndra to use property of the estate. Solyndra further argued that continuing the warranty program was in the best interest of the creditors because failure to do so “would risk encouraging certain customer constituencies to initiate business relationships with the Debtors’ competitors,”<sup>204</sup> thereby depleting the going concern value of the business.<sup>205</sup> Even though some warranty claims arose prepetition, Solyndra stated that the "necessity of payment" doctrine allows for payment of a prepetition claim if the claim is essential to the continued operation of the business during reorganization.<sup>206</sup> Judge Walrath entered an order the next day granting the motion.<sup>207</sup> The order emphasized that “the requirements of Bankruptcy Rule 6003, which provide that a motion to pay all or part of a claim that arose before the filing of the petition shall not be granted by the Court

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<sup>200</sup> 11 U.S.C § 1108 permits debtors in possession to operate their businesses.

<sup>201</sup> 11 U.S.C § 363(c) authorizes the debtor in possession to use certain property of the estate in the ordinary course of business without notice or a hearing.

<sup>202</sup> 11 U.S.C § 363(b)(1) authorizes a debtors in possession to use certain property of the estate outside the course of ordinary business so long as the requirements of notice and a hearing are satisfied.

<sup>203</sup> Motion of the Debtors for Entry of an Order Authorizing the Debtors to Maintain and Administer Warranty Program and Honor Prepetition Obligations Related Thereto, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>204</sup> *Id.* at ¶ 23.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* See also *Ionosphere Clubs, Inc.*, 98 B.R. at 176; *In re Lehigh & New England Rye Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (stating the "necessity of payment" doctrine "teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during reorganization, payment may be authorized even if it is made out of corpus."); *In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987).

<sup>207</sup> Order Authorizing the Debtors to Maintain and Administer Warranty Program and Honor Prepetition Obligations Related Thereto, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

within 21 days after the filing of the Petition, are satisfied by the content of the Motion and the notice requirements of Rule 6004 shall be waived.”<sup>208</sup>

5. Motion to Maintain Existing Bank Accounts and Continue Use of Existing Cash Management System

Next, Solyndra sought an exemption from one of the United States Trustees for the District of Delaware’s established operating guidelines for debtors in possession.<sup>209</sup> The United States Trustee Guidelines in the District of Delaware requires a chapter 11 debtor in possession to open new bank accounts and close all existing accounts.<sup>210</sup> The new bank accounts can only be opened in certain financial institutions designated as authorized depositories by the United States Trustee.<sup>211</sup> The requirement is designed to keep prepetition and postpetition claims and payments separate; thus preventing banks from honoring checks drawn before the Petition Date and helping to protect against the inadvertent payment of prepetition claims.<sup>212</sup> Changing accounts and account numbers would require Solyndra to notify all of its customers and set up entirely new electronic and wire transfer procedures with each customer.<sup>213</sup> Such measures would ultimately cause significant delays in collecting revenues from customers and disrupt Solyndra’s ability to pay post petition obligations.<sup>214</sup> Such inconveniences could only hurt

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<sup>208</sup> *Id.*

<sup>209</sup> Motion of Debtors for Order Under 11 U.S.C. §§ 105, 363, 364, 503(B), 1107 and 1108 Authorizing (I) Maintenance of Existing Bank Accounts, (II) Continued Use of Existing Business Forms, (III) Continued Use of Existing Cash Management System, (IV) Continued Access to Corporate Credit Cards, (V) Limited Funding for Wind-Up of Foreign Subsidiaries, and (VI) Waiver of Section 345(B) Deposit and Investment Requirements, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Solyndra's reputation with its remaining customers.<sup>215</sup> Solyndra also requested authorization to fund the wind-up for its foreign subsidiaries in a combined amount not to exceed \$500,000.<sup>216</sup> Solyndra also requested continued access to corporate credit cards.<sup>217</sup> The next day, Judge Walrath granted the motion with a number of stipulations.<sup>218</sup> Most notable was the maximum amount allowed to wind up Solyndra's foreign subsidiaries.<sup>219</sup> Judge Walrath authorized \$60,000 as opposed the requested \$500,000.<sup>220</sup>

#### 6. Motion to Pay Prepetition Employee Wages and Benefits

Solyndra needed to keep paying the remaining employees in order to keep what was left of the business running. Solyndra filed a typical motion asking the court to authorize the payment of certain prepetition wages and benefits to its employees.<sup>221</sup> Solyndra set several limits to each category of employee related expenses.<sup>222</sup> The combined total Solyndra asked for, and was subsequently given by the court, amounted to \$1,242,103.<sup>223</sup> Judge Walrath's only addition

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Order Authorizing (I) Maintenance of Existing Bank Accounts, (II) Continued Use of Existing Business Forms, (III) Continued Use of Cash Management System, (IV) Continued Access to Corporate Credit Cards, (V) Limited Funding for Wind-Up of Foreign Subsidiaries, and (VI) Waiver Of Section 345(B) Deposit and Investment Requirements, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Debtors' Motion Pursuant to Bankruptcy Code Sections 105(a), 363, and 507(a) for an Order Authorizing the Debtors to (I) Pay Prepetition Wages, Salaries, Employee Benefits, and Other Compensation; (II) Remit Withholding Obligations; (III) Maintain Employee Compensation and Benefits Programs and Pay Related Administrative Obligations; and (IV) Have Applicable Banks and Other Financial Institutions Receive, Process, Honor, and Pay Certain Checks Presented for Payment and Honor Certain Fund Transfer Requests, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>222</sup> *Id.*

<sup>223</sup> Order Granting Debtors' Motion Pursuant to Bankruptcy Code Sections 105(a), 363, and 507(a) for an Order Authorizing the Debtors to (I) Pay Prepetition Wages, Salaries, Employee Benefits, and Other Compensation; (II) Remit Withholding Obligations; (III) Maintain Employee Compensation and Benefits Programs and Pay Related Administrative Obligations; and (IV) Have Applicable Banks and Other Financial Institutions Receive, Process,

to Solyndra's attached sample order was the addition of express conditions of the statutory caps allowed to individual employees by the Bankruptcy Code.<sup>224</sup> (#35).

#### 7. Motion to Pay Prepetition Sales and Use and Similar Taxes

Solyndra sought to pay the government their taxes, and the court kindly obliged. Judge Walrath's order was identical to the sample order included in Solyndra's original motion. Solyndra could now pay its federal, state, and local taxes as they came due.

#### 8. Motion Prohibiting Utilities from Discontinuing Service

Under Section 366 of the Bankruptcy Code, utility companies may not discontinue services to a debtor simply because the debtor has entered bankruptcy.<sup>225</sup> Debtors are protected for the first 30 days; however, if debtors are unable to provide adequate assurance of payments after the 30 day period, utility providers are free to discontinue service.<sup>226</sup> Section 336 explicitly states that administrative expense priority does not constitute adequate assurance of utility payments.<sup>227</sup>

In order to keep the lights and the water running, Solyndra, in its motion, proposed creating a separate account to house 50% of the anticipated aggregated amount of utility claims

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Honor, and Pay Certain Checks Presented for Payment and Honor Certain Fund Transfer Requests, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>224</sup> *Id.*

<sup>225</sup> See 11 U.S.C. § 366(a) (“a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.”).

<sup>226</sup> See 11 U.S.C. § 366(b) (“Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.”).

<sup>227</sup> 11 U.S.C. § 366(c)(1)(B) (“For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.”).

for one month.<sup>228</sup> Additionally, Solyndra proposed a set of procedures for utility companies to request additional adequate assurance. Solyndra's initial two week<sup>229</sup> estimate topped off at \$172,250.<sup>230</sup> Judge Walrath entered a bridge order granting Solyndra's motion until the final hearing which was scheduled for September 27, 2011.<sup>231</sup> The final order was entered October 6, 2011, with no substantial differences between the bridge order and the final order.<sup>232</sup>

## 9. Motion to Reject Unexpired Lease

Because Solyndra was shutting down almost all of its manufacturing operations by the date of the petition, Solyndra no longer required the use of the leased premises located at 400-472 Kato Terrace in Fremont, California.<sup>233</sup> Section 365(a) of the Bankruptcy Code authorizes debtors to reject unexpired leases of non-residential real property. The Third Circuit uses the business judgment rule to determine whether rejection of an unexpired lease of non-residential property is appropriate.<sup>234</sup> The business judgment rule, as its name implies, states an action is

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<sup>228</sup> Motion of The Debtors for an Order Under Section 366 of the Bankruptcy Code (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance and (C) Establishing Procedures for Determining Adequate Assurance of Payment, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>229</sup> Two weeks is approximately 50% of one month's worth of utility payments.

<sup>230</sup> Motion of The Debtors for an Order Under Section 366 of the Bankruptcy Code (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance, and (C) Establishing Procedures for Determining Adequate Assurance of Payment, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>231</sup> Bridge Order Under Section 366 of The Bankruptcy Code (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance, and (C) Establishing Procedures for Determining Adequate Assurance of Payment, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>232</sup> Amended Final Order Under Section 366 of The Bankruptcy Code (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance, and (C) Establishing Procedures For Determining Adequate Assurance Of Payment, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>233</sup> Debtors' Motion for Order Under Section 365(A) of the Bankruptcy Code Authorizing the Debtors (A) to Reject Unexpired Lease and (B) Abandon Any Personal Property Located a Such Premises and Fixing a Bar Date for Claims of Counterparty, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>234</sup> *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 162 (D. Del. 2006) ("[A] debtor may assume an executory contract or unexpired lease if (i) outstanding defaults under the contract or lease have been cured under section

acceptable only if the effects of the action would increase the businesses proverbial “bottom line.”<sup>235</sup>

Solyndra argued in its motion that, with the termination of their manufacturing operations, it had no further use for the leased facilities.<sup>236</sup> Not only did the leased facilities no longer provide any manufacturing benefit to Solyndra, but, Solyndra contended, the rent was above market, and no evidence suggested that the value of the Rejected Lease would increase in the immediate future.<sup>237</sup>

After receiving no objections,<sup>238</sup> the court entered an order granting Solyndra’s motion on September 23, 2011.<sup>239</sup> With the rejection of the lease, Kato would now hold an unsecured claim and share *pro rata* with the rest of the Tranche E Lenders and other trade creditors.

#### V. OUTCOMES FOR THE SECURED AND UNSECURED CREDITORS

Solyndra never gave any indication that it expected to re-emerge from bankruptcy as a viable business. In his affidavit in support of first day motions, Stover stated: “The Debtors are

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365(b)(1) of the Bankruptcy Code, and (ii) the debtor's decision to assume such executory contract or unexpired lease is supported by valid business justifications.”); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 53 (Bankr. D. Del. 2001) (“The Debtor's decision to assume or reject an executory contract is based upon its business judgment.”). *See also* National Labor Relations Board v. Bildisco & Bildisco (In re Bildisco ), 682 F.2d 72, 79 (3d Cir.1982) aff'd at 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, [under] the ‘business judgment’ test.”).

<sup>235</sup> *See* Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1 (1989).

<sup>236</sup> Debtors’ Motion for Order Under Section 365(A) of the Bankruptcy Code Authorizing the Debtors (A) to Reject Unexpired Lease and (B) Abandon Any Personal Property Located at Such Premises and Fixing a Bar Date for Claims of Counterparty, In re Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>237</sup> *Id.*

<sup>238</sup> Certificate of No Objection Regarding Debtors' Motion for Order Under Section 365(A) of the Bankruptcy Code Authorizing the Debtors (A) to Reject Unexpired Lease and (B) Abandon Any Personal Property Located at Such Premises and Fixing a Bar Date for Claims of Counterparty, In re Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>239</sup> Order Granting Debtors' Motion for Order Under Section 365(A) of the Bankruptcy Code Authorizing the Debtors (A) to Reject Unexpired Lease and (B) Abandon Any Personal Property Located at Such Premises and Fixing a Bar Date for Claims Of Counterparty, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

pursuing a two-pronged strategy to effectuate either a sale of their business to a ‘turnkey’ buyer who may acquire substantially all of Solyndra’s assets or, if the Debtors are unable to identify any such potential buyers, an orderly liquidation of the Debtors’ assets for the benefit of their creditors.”<sup>240</sup>

While Solyndra’s equity holders would be left with nothing from the pre-plan sale proceeds, the main investors would not go away empty handed. Argonaut Ventures and Madrone Partners, Solyndra’s two largest private investors, would benefit as DIP financiers through their lending vehicle, AE DIP 2011, LLC,<sup>241</sup> as well as holding the senior liens through the Tranche A Loan Facility Agreement.<sup>242</sup>

Two groups held most of Solyndra’s unsecured debt: trade creditors and Tranche E Loan Facility Agreement Lenders.<sup>243</sup> At the time of filing, trade creditors held over \$35 million in unsecured debt while Tranche E Loan Facility Agreement Lenders held over \$38 million in unsecured debt.<sup>244</sup> The Office of the United States Trustee District of Delaware, pursuant to Section 1102(a)(1) of the Bankruptcy Code, appointed an official committee to represent the unsecured parties in the case.<sup>245</sup> The Trustee’s Office appointed<sup>246</sup> the following six persons<sup>247</sup>:

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<sup>240</sup> Declaration of W.G. Stover, Jr., Senior Vice President and Chief Financial Officer, In Support Of First Day Motions, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>241</sup> Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection, and (IV) Modifying the Automatic Stay, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>242</sup> Declaration of W.G. Stover, Jr., Senior Vice President and Chief Financial Officer, In Support Of First Day Motions, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>243</sup> Consolidated List of Creditors Holding 35 Largest Unsecured Claims, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>244</sup> *Id.*

<sup>245</sup> Notice of Appointment of Committee of Unsecured Creditors, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>246</sup> *Id.*



(1) the two largest trade creditors,<sup>248</sup> each holding over \$7.5 million in unsecured claims, (2) three smaller trade creditors,<sup>249</sup> and (3) Peter M. Kohlstadt, the named plaintiff in the WARN Act class action suit.<sup>250</sup> The committee would soon employ Blank Rome LLP to represent itself and the other unsecured creditors in the case.<sup>251</sup>

#### Chief Restructuring Officer

With the scheduled departure of Solyndra's CEO, Brian Harrison, Solyndra made a motion *nunc pro tunc* to employ Berkeley Research Group, LLC to perform restructuring services and to designate R. Todd Neilson as Chief Restructuring Officer ("CRO").<sup>252</sup> Section 363(c) of the Bankruptcy Code authorizes debtors to enter into certain transactions and use property of the estate in the ordinary course of business.<sup>253</sup> Solyndra maintained retention of interim corporate officers and other temporary employees is proper under section 363 of the Bankruptcy Code and cited a long list<sup>254</sup> of cases to justify its position.<sup>255</sup>

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<sup>247</sup> The Bankruptcy Code gives a specific definition to word "person." *See* 11 U.S.C § 101(41).

<sup>248</sup> The two largest trade creditors at the time of the filing of the petition were Schott North America, Inc. and MGS Manufacturing Group, Inc. Consolidated List of Creditors Holding 35 Largest Unsecured Claims, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>249</sup> The three smaller trade creditors were Certified Thermoplastics Co. Inc., West Valley Staffing Group, Plastikon Industries Inc., and VDL Enabling Technologies Group. *Id.*

<sup>250</sup> *See* Complaint, Kohlstadt v. Solnydra (*In re* Solyndra), Adv. Proc. No. 11-53 155 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>251</sup> Application to Employ/Retain Blank Rome LLP as Counsel for the Official Committee of Unsecured Creditors of Solyndra LLC, et al., *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>252</sup> Motion of the Debtors Pursuant to 11 U.S.C. § 363 for Entry of an Order Authorizing the Employment of Berkeley Research Group, LLC and Designating R. Todd Neilson as Chief Restructuring Officer to the Debtors *Nunc Pro Tunc* to October 6, 2011, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>253</sup> *See* 11 U.S.C. §363(c).

<sup>254</sup> The following cases were cited: *In re* Point Blank, Case No. 10-11255 (PJW) (Bankr. D. Del. May 13, 2010); *In re* Washington Mutual, Inc., Case No. 08-12229 (MFW) (Bankr. D. Del. November 7, 2008); *In re* Accredited Home Lenders Holding Co., Case No. 09-11516 (MFW) (Bankr. D. Del. July 2, 2009); *In re* CB Holdings Corp., Case No. 10-13683 (MFW) (Bankr. D. Del. January 10, 2011); *In re* DHP Holdings II Corp., Case No. 08-13422 (MFW)(Bankr. D. Del. April 28, 2009); *In re* Filene 's Basement, Case No. 09-11525 (MFW) (Bankr. D. Del. May 26, 2009); *In re* Fleming Companies, Inc., Case No. 03-10945 (MFW) (Bankr. D. Del. June 4, 2003); *In re* Flying J,

Because neither Berkeley Research Group, nor Todd Neilson as CRO, would be employed as professionals under section 327 of the Bankruptcy Code, neither would be subject to the compensation requirements of sections 330 and 331 of the Bankruptcy Code.<sup>256</sup> All fees<sup>257</sup> and expenses<sup>258</sup> would be payable monthly to BRG without the need for BRG to file fee applications with the Bankruptcy Court.<sup>259</sup> Berkeley Research Group, out of the kindness of their heart, would, however, file quarterly statements of its fees and expenses allowing parties in interest the information needed to object to fees.<sup>260</sup>

The United States Trustees Office objected to the engaging the services Berkeley Research Group and R. Todd Neilson because the United States Trustees Office, prior to the filing of Solyndra's motion, had filed a motion with the court directing the appointment of a chapter 11 trustee in the case.<sup>261</sup> Over the objections of the United States Trustee's Office, Judge

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Case No. 08-13384 (MFW) (Bankr. D. Del. April 3, 2009); In re Harry & David, Case No. 11-10884 (MFW) (Bankr. D. Del. April 27, 2011); In re Universal Building Products, Inc., Case No. 10-12453 (MFW) (Bankr. D. Del. August 23, 2010); In re Western Nonwovens, Case No. 08-11435 (PJW) (Bankr. D. Del. August 4, 2008); In re Mortgage Lenders Network USA, Inc., Case No. 07-10146 (PJW) (Bankr. D. Del. February 28, 2007); In re Global Home Products, LLC, Case No. 06-10340 (KG) (Bankr. D. Del. May 4, 2006); In re Meridian Automotive Systems-Composite Operations, Inc., et al., Case No. 05-11168 (MFW) (Bankr. D. Del. July 19, 2005); In re Cable & Wireless USA, Inc., Case No. 03-13711 (KJC) (Bankr. D. Del. Jan. 16, 2004).

<sup>255</sup> Motion of the Debtors Pursuant to 11 U.S.C. § 363 for Entry of an Order Authorizing the Employment of Berkeley Research Group, LLC and Designating R. Todd Neilson as Chief Restructuring Officer to the Debtors *Nunc Pro Tunc* to October 6, 2011, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>256</sup> See 11 U.S.C § 330-31.

<sup>257</sup> Berkeley Research Group charged the following hourly rates: Directors \$595-770, Managing Consultant \$345 – 455, Consultant \$280-340, Associate \$235-\$275, and Para-Professionals \$100-170. Motion of the Debtors Pursuant to 11 U.S.C. § 363 for Entry of an Order Authorizing the Employment of Berkeley Research Group, LLC and Designating R. Todd Neilson as Chief Restructuring Officer to the Debtors *Nunc Pro Tunc* to October 6, 2011, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>258</sup> Total compensation through the confirmation date of a chapter 11 plan to Berkeley Research Group and the CRO was estimated to be approximately between \$900,000 and \$1,100,000. The CRO and Berkeley Research Group stated that they would be seeking the approval of the Board to exceed \$1,100,000. *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See Objection of the United States Trustee to the Motion of the Debtors Pursuant to 11 U.S.C. § 363 for Entry of an Order Authorizing the Employment of Berkeley Research Group, LLC and Designating R. Todd Neilson as Chief

Walrath approved the contract with Berkeley Research Group and the appointment of Todd Neilson as CRO.<sup>262</sup>

## VI. FIRST NON-PLAN SALE ATTEMPT

After the dust had settled from all the action created by the first day motions, the focus of the case would now turn toward the non-plan sale of the business. Court dockets and the media would refer to this and another subsequent attempt as a “turnkey sale” of the business.<sup>263</sup>

Solyndra would need help in structuring and marketing the auction of Solyndra’s business.

Following the court’s approval, Solyndra hired the investment banking firm Imperial Capital, LLC as their financial advisors and investment bankers for purposes of the turnkey sale.<sup>264</sup>

On September 16, 2011, Solyndra filed a motion with the court outlining their proposal for a non-plan sale of the business.<sup>265</sup> The proposed sale would be on an “‘as is,’ ‘where is,’ and ‘with all faults’ basis.”<sup>266</sup> Potential bidders’ offers were required to be (1) irrevocable, (2)

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Restructuring Officer to the Debtors *Nunc Pro Tunc* to October 6, 2011, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>262</sup> Order Authorizing The Employment Of Berkeley Research Group, LLC And Designating R. Todd Neilson As Chief Restructuring Officer To The Debtors *Nunc Pro Tunc* To October 6, 2011, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>263</sup> See Motion of Solyndra LLC For an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011); *Solyndra Sale Will Wait Until January*, U.S. NEWS & WORLD REPORT (Nov. 17, 2011), <http://www.usnews.com/news/articles/2011/11/17/solyndra-sale-will-wait-until-january>.

<sup>264</sup> Amended Notice of Hearing re: Notice of Entry of Bridge Order and Final Hearing Regarding Debtors; Motion for Order Under Section 366 of the Bankruptcy Code, (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (B) Deeming Utilities Adequately Assured of Future Performance and (C) Establishing Procedures for Determining Adequate Assurance of Payment, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>265</sup> Motion of Solyndra LLC For an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>266</sup> *Id.*

accompanied with a good faith deposit set at 5% of the bid price, and (3) ready, willing, and able to close by Dec. 1, 2011.<sup>267</sup> Offer letters were not to request a breakup-up fee or overbid fee; however, offers could include a willingness to become a stalking horse bidder.<sup>268</sup> Two groups objected to some of the specific provisions of the proposed sale: (1) landlords, comprised of iStar Ctl I, L.P.,<sup>269</sup> Global Kato HG, LLC,<sup>270</sup> and Calaveras LLC<sup>271</sup> and (2) the official committee of unsecured creditors.<sup>272</sup>

#### A. Landlord Contentions with the Preplan Sale

The landlords' main contentions focused around (1) the lack of notice to object to potential assignees and (2) waiver of pre-closing liabilities.<sup>273</sup> All parties were concerned that the

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> iSTAR CTL I, L.P.'s Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>270</sup> Limited Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>271</sup> Joinder to iSTAR CTL I, L.P.'s Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>272</sup> Objection of the Official Committee of Unsecured Creditors to Motion of Solyndra LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>273</sup> See iSTAR CTL I, L.P.'s Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011); Limited Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011); Joinder to

proposed sale procedure lacked adequate time for the landlords to evaluate potential offers and prepare objections to the proposed assignment if needed.<sup>274</sup> Under Rule 6006 of the Federal Rules of Bankruptcy Procedure, a motion to assume, reject, or assign an unexpired lease is a contested matter under Rule 9014.<sup>275</sup> Under Rule 9014, “relief shall be requested by motion, and a reasonable notice and opportunity for hearing shall be afforded the party against whom the relief is sought.”<sup>276</sup> Without reasonable notice and opportunity to prepare objections to the winning bid, the landlords argued that Solyndra was violating their rights under Rule 9014.

Solyndra’s motion also stated that:

[The] assignee of the Assumed Executory Contracts shall not be subject to any liability to the assigned contract counterparty or lessor that *accrued or arose before the closing date of the sale* of the Assets and [the Debtor] shall be relieved of all liability accruing or arising thereafter pursuant to section 365(k) of the Bankruptcy Code.<sup>277</sup>

Global Kato and Calaveras had concerns about lease agreement provisions that required the lessee to return the premise to original conditions.<sup>278</sup> Concerns also arose around potential pre-

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iSTAR CTL I, L.P.’s Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>274</sup> *Id.*

<sup>275</sup> *See* FED. R. BANKR. P. 9014.

<sup>276</sup> *Id.* at 9014(a).

<sup>277</sup> Motion of Solyndra LLC For an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving forms of Notice; and (D) Granting Related Relief at ¶ 46, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011) (emphasis added).

<sup>278</sup> *See* Limited Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011); Joinder to iSTAR CTL I, L.P.’s Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of

sale liabilities occurring, e.g., pre-closing obligations to “indemnity obligations, maintenance, and the obligation to keep the Premises lien free.”<sup>279</sup>

In an effort to accommodate the three landlords, Solyndra agreed to revise their previous order to provide time for landlords to review the financial wherewithal of the bidder and the backup bidder.<sup>280</sup> Solyndra also agreed to have any issues of adequate assurance of future performance determined by the court.<sup>281</sup>

*B. Committee of Unsecured Creditors Contentions with the Preplan Sale*

The official committee of unsecured creditors filed an objection with the court regarding timing of the non-plan sale. The creditor’s committee felt that Solyndra was rushing the non-plan sale by setting a bid deadline of October 25, 2011.<sup>282</sup> Bonnie Fatell of Blank Rome, an attorney for the creditor’s committee, told Reuters:

We are concerned there is a rushed sale here . . . . This is a new technology and a complex company with complex relations with vendors. To expect anyone to

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Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>279</sup> Limited Objection to Motion of Solyndra, LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief at ¶ 6, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>280</sup> Omnibus Reply and Submission of Redlined Orders in Support of (I) Entry of Final Order Approving Postpetition Secured Financing and Use of Cash Collateral and (II) Approval of Procedures for Sale of Business Assets on Turnkey Basis, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>281</sup> *Id.*

<sup>282</sup> Objection of the Official Committee of Unsecured Creditors to Motion of Solyndra LLC for an Order (A) Approving Procedures for Sale of Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing To Consider Approval Of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

really have an opportunity to complete due diligence on a company that was not marketed previously is stretching the process unduly.<sup>283</sup>

One might speculate that the unsecured creditors, knowing that they would likely receive nothing from the sale, had nothing to lose by extending the deadline. Perhaps the unsecured creditors were hoping for a revival of the restricting talks between the Tranche A Debt holders and the government that had occurred prior to the filing in early August. The unsecured creditors committee provided no evidence as to how delaying the bid and auction dates would benefit either themselves or any other party. Unsurprisingly, Judge Waltham, in her September 28, 2011 order, kept the original deadlines.<sup>284</sup>

### *C. Failure of the Non-Plan Sale*

On October 18, 2011, Solyndra sent notice that the bid and auction deadlines had been pushed back to November 16, 2011, and November 18, 2011.<sup>285</sup> During this time, Judge Waltham entered an order allowing Solyndra to start selling off non-core assets.<sup>286</sup> As the bid deadline approached with no bidders, Solyndra extended the bid deadline with the courts

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<sup>283</sup> *Solyndra cleared for Oct. 27 bankruptcy auction*, REUTERS (Sep 27, 2011 1:16pm EDT), <http://www.reuters.com/article/2011/09/27/solyndra-bankruptcy-hearing-idUSS1E78Q0FB20110927>.

<sup>284</sup> Order (A) Approving Procedures for Sale of Solyndra LLC's Business Assets on Turnkey Basis; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>285</sup> Notice of Continued Bid Deadline, Auction, and Sale Hearing for Sale of Solyndra LLC's Business Assets on Turnkey Basis and Assumption and Assignment of Related Contracts and Leases, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>286</sup> Order Granting Motion of Solyndra LLC Pursuant to Sections 105(A) and 363 of the Bankruptcy Code and Authorizing Them to (A) Conduct Auction for Non-Core Assets, and (B) Sell Such Assets to the Successful Bidders at an Auction Free and Clear of All Encumbrances, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

permission and sought approval for a piecemeal sale of Solyndra's assets in case no viable bidders materialized.<sup>287</sup>

Unfortunately for all involved, even after postponing the auction date twice,<sup>288</sup> only one bid was received.<sup>289</sup> The bid was a lowball offer designed to buy the real estate and equipment at a price significantly below market value.<sup>290</sup>

## VII. THE SUBCOMMITTEE HEARINGS

The rapid decline of Solyndra raised serious questions about the Department of Energy's analysis of the company and the solar energy market. As a result, a hearing with the House Subcommittee on Oversight and Investigations was scheduled in order to examine both Solyndra and the Department of Energy's overall loan guarantee program.<sup>291</sup> Republicans were particularly adamant about the necessity of the hearing, sensing a great opportunity to attack the Obama administration.

As expected, the hearings were very politically charged. Republicans questioned the dealings of George Kaiser and the role he played in securing Solyndra's loan guarantee.<sup>292</sup> As both a major Obama fundraiser and as one of Solyndra's largest investors, significant concerns

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<sup>287</sup> Notice of Continued Bid Deadline, Auction, and Sale Hearing for Sale of Solyndra LLC's Business Assets on Turnkey Basis and Assumption and Assignment of Related Contracts and Leases, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>288</sup> *Id.*

<sup>289</sup> Michael Bathon, *Solyndra Wins Approval of Second Auction If Sale Fails*, BLOOMBERG BUSINESSWEEK (December 23, 2011, 5:09 AM EST), <http://www.businessweek.com/news/2011-12-23/solyndra-wins-approval-of-second-auction-if-sale-fails.html>; Randall Chase, *Only a 'lowball' bid received by bankrupt Solyndra*, THE WASHINGTON TIMES (Nov. 22, 2011), <http://www.washingtontimes.com/news/2011/nov/22/only-a-lowball-bid-received-by-bankrupt-solyndra/>; *UPDATE 1-Solyndra fails to garner bids for sale*, REUTERS (Wed Jan 18, 2012 12:02am EST), <http://www.reuters.com/article/2012/01/18/solyndra-idUSL1E8CI0EF20120118>;

<sup>290</sup> *Id.*

<sup>291</sup> Ronnie Greene, iWatch News, *From state, Energy officials pushed ahead with financial boost to now-failed solar startup*, Sep. 13, 2011 <http://www.iwatchnews.org/node/6401/> (Last visited April 10, 2012)

<sup>292</sup> Jim Puzzanghera, Los Angeles Times, *Solyndra investors are sought for questioning in House inquiry*, Sep. 20, 2011 <http://articles.latimes.com/2011/sep/20/business/la-fi-solyndra-investors-20110920> (Last visited April 10, 2012)



over his financial ties were raised.<sup>293</sup> Furthermore, after initially agreeing to waive the 5<sup>th</sup> Amendment in order to accommodate a rescheduled hearing, Solyndra's representatives of Brian Harrison and Bill Stover later recanted on their pledges.<sup>294</sup> This led to considerable outrage from the Subcommittee as question after question was turned away. The continued questioning and refusal to answer got so heated that it was eventually equated to a witch-hunt and suggested as outright badgering by Representative Henry Waxman, D-Calif.<sup>295</sup>

The refusal of the Solyndra executives to testify led to the involvement of the U.S. Trustee's Office. U.S. Trustee Roberta A. DeAngelis was appointed to handle the Solyndra case and filed a motion to be appointed trustee in Solyndra's Chapter 11 bankruptcy filing.<sup>296</sup> DeAngelis argued that lack of testimony hindered the bankruptcy proceeding.<sup>297</sup> DeAngelis would also file a motion to have the Chapter 11 changed to a Chapter 7 liquidation, again arguing that there was a lack of full disclosure and that the executives' lack of testimony allowed for the avoiding of necessary reporting obligations.<sup>298</sup> Judge Mary F. Walrath, who was overseeing the United States Bankruptcy Court for the District of Delaware dismissed both

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<sup>293</sup> Matea Gold and Stuart Pfeifer, *The Lost Angeles Times*, *Solar Firm's Obama Links Probed*, Sep. 17, 2011 <http://articles.latimes.com/2011/sep/17/nation/la-na-SOLYNDRA-DONOR-20110917> (Last visited April 10, 2011)

<sup>294</sup> Amy Harder, *National Journal*, *Solyndra Executives Refuse to Testify Before House Panel*, Sep. 23, 2011 <http://www.nationaljournal.com/energy/solyndra-executives-refuse-to-testify-before-house-panel-20110923> (Last visited April 10, 2012)

<sup>295</sup> Associated Press, *Fox News*, *Solyndra Execs Plead Fifth at Congressional Hearing More Than a Dozen Times*, Sep. 23, 2011 <http://nation.foxnews.com/solyndra/2011/09/23/solyndra-execs-reduced-embarrassing-spectacle-hearing> (Last visited April 10, 2012)

<sup>296</sup> Business Law Daily, *Justice Department Seeks Trustee In Solyndra Bankruptcy Case*, Sep. 30, 2011 <http://businesslawdaily.net/2011/09/30/justice-department-seeks-trustee-solyndra-bankruptcy-case/> (Last visited April 10, 2012)

<sup>297</sup> Aviva Gat, *The Deal Pipeline*, *UST wants to install trustee to oversee Solyndra*, Oct. 3, 2011 <http://www.thedeal.com/content/restructuring/ust-wants-to-install-trustee-to-oversee-solyndra.php> (Last visited April 15, 2012)

<sup>298</sup> REUTERS, *Update 3-U.S. DOJ seeks trustee in Solyndra bankruptcy*, Sep. 30, 2011 <http://www.reuters.com/article/2011/10/01/solyndra-bankruptcy-idUSS1E78T1TK20111001> (Last visited April 11, 2012)

motions.<sup>299</sup> Judge Walrath indicated that there was no evidence of any fraud or mismanagement within the company.<sup>300</sup> DeAngelis had also noted Solyndra's unwillingness to discuss the status and answer questions concerning certain contracts that Solyndra had agreed to.<sup>301</sup> Judge Walrath also addressed this as she stated that Solyndra's refusal to answer certain questions fell far short of the necessary standards for a trustee appointment.<sup>302</sup>

As the hearings continued, Energy Secretary Steven Chu was brought in to testify.<sup>303</sup> Unlike Solyndra's executives, Energy Secretary Chu answered all questions and was very forthright with the committee.<sup>304</sup> Energy Secretary Chu accepted full responsibility for the loan approval and restructuring of Solyndra while also admitting that he would not have approved the loan today.<sup>305</sup> Furthermore, Energy Secretary Chu reaffirmed that there were no political motivations behind his decision to approve the loan.<sup>306</sup> With the conclusion of the hearings, many in the media felt the Republicans had gone on the attack with the sole intentions of embarrassing President Obama. The failure of Solyndra appears to be somewhat typical of any doomed business failure; the market simply bottomed out. There was a real lack of

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<sup>299</sup> Jim McElhatton, The Washington Times, *Judge denies government bid for Solyndra trustee*, Oct. 17, 2011 <http://www.washingtontimes.com/news/2011/oct/17/judge-denies-bid-by-government-for-solyndra-truste/?page=all> (Last visited April 10, 2012)

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Reuters, CNBC, *Chu Takes Responsibility for Solyndra Loan*, Nov. 17, 2011 [http://www.cnbc.com/id/45335012/Chu\\_Takes\\_Responsibility\\_for\\_Solyndra\\_Loan](http://www.cnbc.com/id/45335012/Chu_Takes_Responsibility_for_Solyndra_Loan) (Last visited, April 22, 2012)

<sup>304</sup> *Id.*

<sup>305</sup> Matthew Daly, The Huffington Post, *Steven Chu, Energy Secretary, Takes Responsibility for Solyndra Loan*, Nov. 17, 2011 [http://www.huffingtonpost.com/2011/11/17/steven-chu-solyndra-responsibility\\_n\\_1099188.html](http://www.huffingtonpost.com/2011/11/17/steven-chu-solyndra-responsibility_n_1099188.html) (Last visited April 22, 2012)

<sup>306</sup> *Id.*

substance as to the necessity for the hearings and many viewed them as a waste of taxpayer money.

#### VIII. THE WARN ACT CLASS ACTION LAWSUIT

In anticipation of their impending Chapter 11 filing, Solyndra management engaged in a mass layoff and plant closing on August 31, 2011. Six days later, Solyndra would file their voluntary petition for relief under Chapter 11 of the bankruptcy. However, on September 2, Peter Kohlstadt filed a class action lawsuit in the U.S. District Court for the Northern District of California under both the United States Worker Adjustment and Retraining Notification (WARN) Act and the California Labor Code.<sup>307</sup>

As a general matter, the WARN Act requires employers to give employees, at minimum, 60 days advance notice of any intended plant closings or mass layoffs so as to provide laid off employees an economic cushion as they seek for new employment.<sup>308</sup> Kohlstadt claimed that Solyndra officials had failed to provide the 60 day notice to the laid off employees affected by the plant closings just prior to the bankruptcy. Kohlstadt claimed Solyndra thus owed the laid off employees 60 days' worth of wages, benefits, commissions, 401(k) contributions, and other benefits of employment.<sup>309</sup> In addition to the federal WARN Act claim, the complaint also claimed relief under the California WARN Act. The language of the California Act is similar to the federal act, and it was logical that the state claim would follow the federal claim.<sup>310</sup>

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<sup>307</sup> Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.* (2000); Cal. Lab. Code § 1400 *et seq.* (West 2000). Also note that while the class action was filed in Northern California it was subsequently transferred to the bankruptcy court when Solyndra filed for bankruptcy protection. Finally, this may be a good place to discuss that there was another WARN Act complaint filed, but it was merged into this lawsuit.

<sup>308</sup> *Id.* at 29 U.S.C. § 2102(a).

<sup>309</sup> Complaint, Kohlstadt v. Solyndra, LLC, et al., *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>310</sup> *See, Supra* note 276.

On top of the WARN act claims, the complaint alleged a claim for compensation for all accrued time off earned by the employees who had been laid off.<sup>311</sup> Sections 201 and 202 of the California Labor Code require employers to pay all wages due to the employee within a time specified by law. Kohlstadt and the other claimants argued that this included all accrued time off (vacation, sick leave, etc.), but Solyndra had only agreed to pay wages associated with time off accrued in the 90 days prior to their termination.

Finally, Kohlstadt and the claimant class were concerned about their placement in the bankruptcy priority pecking order.<sup>312</sup> Due to this fact, they categorized their claim as a first priority administrative expense under 11 U.S.C. 503(b)(1)(A).<sup>313</sup> The importance of this qualification can't be understated, as the priority of the claim would likely mean the difference between recovering the full value of the claims and recovering nothing at all.<sup>314</sup> As an unsecured claim, the WARN Act claimants would almost certainly recover nothing from Solyndra's bankruptcy proceedings.

After the initial filing of the complaint, very little action occurred for several months. An initial pretrial conference was scheduled for November 2, 2011, but the parties agreed to continue the proceeding until February 22, 2012.<sup>315</sup> On January 23, 2012, the court entered an amended stipulation that extended Solyndra's opportunity to respond to the claim.<sup>316</sup> This was

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<sup>311</sup> *Supra* note 278.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> There has been no resolution to this issue documented in this docket, but the fact that both parties agreed to the indefinite extension of the matter until a more full picture of the estate can be known suggests that the plaintiffs expect their claims to be unsecured and have a very low priority in the dissolution of the estate.

<sup>315</sup> See Docket Report, Kohlstadt v. Solyndra, LLC, et al., *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>316</sup> Order Approving Amended Stipulation Extending Time (Indefinitely) for Debtors to Respond to Complaint, *In re* Solyndra LLC, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

an amendment to the initial agreement to extend Solyndra's opportunity to respond and continue the initial preconference hearing.<sup>317</sup> In this amended stipulation, the parties both agreed that it was unclear at the time whether the debtor would have the requisite property to fund a recovery for unsecured creditors. With that in mind, both parties determined that it was not worth the energy, time, or money expended to continue this adversarial proceeding at the time.<sup>318</sup>

On February 22, there was a hearing held in the matter, but little is publically available as of April 23, 2012. The transcript for the hearing will not be available until May 26, 2012, and was not available for access at the time of this writing.<sup>319</sup> Most recently, this matter was scheduled for another hearing on March 22, 2012 along with several other matters concerning the Solyndra bankruptcy.<sup>320</sup> However, these hearings were once again continued and have been rescheduled for April 19, 2012.<sup>321</sup> The future of this action depends totally on whether there are any funds available for unsecured creditors to recover.

#### IX. THE END OF THE ROAD

Solyndra's chapter 11 bankruptcy is not an uncommon end for a promising start-up in an ultra-competitive, emerging marketplace. When a market is emerging, such as the green energy market, there will be winners and losers. Solyndra's bankruptcy received extra scrutiny because of the government-backed loan totaling \$535 million and because of the government's subsequent voluntary subordination of the loan. As far as the bankruptcy goes, there was very

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> The docket report stated that the transcript would be available at the clerk's office, but would not be available until the date listed above.

<sup>320</sup> *Notice of Agenda of Matters Scheduled for Hearing*, Kohlstadt v. Solyndra, LLC et al, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>321</sup> *Notice of Change of Hearing Date & Time for April 19, 2012 Hearing*, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

little value left in Solyndra at the time the petition was filed.<sup>322</sup> As a result, the bankruptcy itself has not been very contentious, and it seems that Solyndra will likely fade gently into the night.

Various matters still remain which need to be resolved. These final matters have been continued several times, the most recent continuance has been rescheduled to an April 24, 2012 hearing. These matters are largely perfunctory in nature and will not likely change the ultimate outcomes in the bankruptcy proceedings.

Aside from the hearing, only two items of note are happening recently in the bankruptcy. First, the committee for unsecured creditors<sup>323</sup> reserved their right to object to the rights of secured creditors in the remainder of the bankruptcy. Second, the court is granting various motions to authorize the sale of *de minimis* and non-core assets. Other than these actions, the bankruptcy seems to be winding down. Action will likely pick up once again when higher priced assets and intellectual property reach the auction block. As throughout Solyndra's bankruptcy, professionals will continue to collect fees as super priority administrative expense. Whether these fees are well earned or worth the money is up to each individual's personal interpretation.<sup>324</sup> With the November elections coming up, it is possible that Solyndra's bankruptcy will further gain attention as the GOP attempts to tie the failure of Solyndra to President Obama's record.

From a small, private start-up to a massive public failure, the rise and fall of Solyndra has been nothing short of a wild ride. As the process draws ever so slowly to a close, several

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<sup>322</sup> See, Schedules, *In re Solyndra LLC*, Case No. 11-12779 (MFW) (Bankr. D. Del Sept. 6, 2011).

<sup>323</sup> With two failed attempts at a sale under §363 of the bankruptcy code, it is unlikely that there will be anything left for the unsecured creditors to get after the debts to the secured creditors are satisfied. With that in mind, it is likely that this is simply a carefully choreographed fight scene where the parties put on the appearance of contention while fully understanding the path of the bankruptcy

<sup>324</sup> See *Supra* note 203. While this is an admittedly cynical view, it seems that there really is nothing left to fight about. Small motions are being made regularly. With little value on the line for unsecured creditors, no one seems to want to fight over assets that creditors will never see.

questions have yet to be answered. First, what does Solyndra's failure say about the United States government as an investor in the private sector—especially in regard to risky startup companies in emerging markets? Second, to what extent will Solyndra's failure affect the 2012 presidential election? Third, what does this bankruptcy signal, if anything, about the American solar market? And finally, how will this and the failures of other green energy companies affect investment in green energy moving forward? These questions can only fully be answered with time. However, one thing is for sure: the Solyndra bankruptcy will affect the answer to each of these questions.