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*Attorneys for Steven R. Bailey, Chapter 7 Trustee*

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH**

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In re:

EMPIRE SOLAR GROUP, LLC,  
  
Debtor.

Bankruptcy No.21-23636

Chapter 7

Honorable Joel T. Marker

[Filed via ECF]

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**MOTION PURSUANT TO 11 U.S.C. §§ 105(a) AND FEDERAL RULES OF  
BANKRUPTCY PROCEDURE 9014 AND 9019, FOR ENTRY OF AN ORDER  
APPROVING A SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS  
BETWEEN THE TRUSTEE, ON THE ONE HAND AND SUNTUIY SOLAR LIMITED  
LIABILITY COMPANY ON THE OTHER HAND**

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**MOTION**

Pursuant to 11 U.S.C. §§ 105(a) and Federal Rules of Bankruptcy Procedure 9014 and 9019, Steven R. Bailey (the “**Trustee**”), in his capacity as Chapter 7 trustee of the estate of Empire Solar Group, LLC (the “**Debtor**”), through counsel, hereby moves (the “**Motion**”) the

Court for the entry of an order approving the form and substance of a Settlement Term Sheet (the “**Term Sheet**”), which Term Sheet is between the Trustee, on the one hand, and Suntuity Solar Limited Liability Company (“**Suntuity**”), on the other hand, to settle and resolve various claims and causes of action that the Parties have or may have against one another. A true and correct copy of the signed Term Sheet is attached hereto as Exhibit “A.”

The Term Sheet was executed by the Trustee and Suntuity on May 30, 2023, but it is only effective if its terms are approved by the Court pursuant to this Motion. In summary, the Term Sheet provides for a Settlement Payment from Suntuity in the total amount of \$200,000.00 (paid in two installments) in settlement of any claims that that estate has or may have against Suntuity arising out of Suntuity’s pre-petition business and financial dealings with the Debtor, including but not limited to certain payments that Suntuity received related to those business and financial dealings.

The Term Sheet further provides that the Trustee will transfer and assign to Suntuity any claims held by the Debtor, the Trustee and the Debtor’s Chapter 7 estate, including state law claims and claims under Chapter 5 of the Bankruptcy Code, against Abby Buchmiller, Amanda Roseburg, Uinta Bank, GoodLeap LLC, fka Loan Pal and Rock Creek Financial Advisors and, in return for the transfer of those claims, Suntuity will pay to the Trustee, for the benefit of the estate, twenty five percent (25%) of any recoveries received on such transferred claims.

The Term Sheet further provides for broad form customary releases, except that Suntuity will not release and will expressly retain (a) its right to receive distributions under Claim 143-1

that Suntuity filed against the Debtor's estate, and (b) any claims that Suntuity has or may have against the current or former owners of the Debtor, i.e. Abby Buchmiller or Amanda Roseburg.

The Term Sheet further provides that the Trustee and Suntuity shall enter into a more formal settlement agreement to document the terms set forth in the Term Sheet. It is contemplated that the settlement agreement will be executed prior to the Court's approval of this motion and, if that happens, the Trustee will supplement this motion with the executed settlement agreement. In any event, the settlement agreement will be consistent with the provisions of the Term Sheet, which Term Sheet documents the material terms of the parties' agreement.

### **MEMORANDUM OF LAW**

#### **I. JURISDICTION AND VENUE.**

1. The Court has jurisdiction respecting the Motion and the relief requested herein pursuant to 28 U.S.C. §§ 1334 and 157.

2. The Motion presents a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (I), (N) and (O).

3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The legal predicates for the relief sought in the Motion are 11 U.S.C. § 105(a), and Rules 9014 and 9019 of the Federal Rules of Bankruptcy Procedure.

#### **II. FACTUAL BACKGROUND.**

5. The Debtor commenced the above-captioned chapter 7 bankruptcy proceeding (the "**Bankruptcy Case**") on August 22, 2021 (the "**Petition Date**") by filing a voluntary

petition for relief under chapter 7 of title 11 of the United States Code (the “**Bankruptcy Code**”).

6. The Trustee is the duly qualified and acting Chapter 7 trustee in the Bankruptcy Case.

7. Prior to the Petition Date, in July 2021, the Debtor and Suntuity entered into a series of agreements (the “**July Agreements**”) wherein Suntuity agreed to purchase and acquire a controlling ownership interest in the Debtor.

8. As part of the July Agreements, took operating control of the Debtor with the apparent intent of partnering with or otherwise taking ownership and control of the Debtor.

9. The Trustee alleges that almost immediately after entering into the July Agreements, Suntuity began engaging in actions to divert money, property and assets away from the Debtor and its creditors and into its own pockets. The Trustee further alleges that Suntuity breached its fiduciary duties to the Debtor.

10. Suntuity denies all allegations.

11. On May 30, 2023, the Trustee and Suntuity engaged in mediation regarding the Trustee’s claims against Suntuity, and also possible Suntuity claims against the estate.

12. The mediation was presided over by Judge William T. Thurman.

13. The mediation was successful and, at the conclusion of the mediation, the parties executed the Term Sheet.

14. The material provisions of the Term Sheet are as follows:

- Suntuity shall pay the Trustee, for the benefit of the estate, \$200,000.00, with \$100,000.00 being due by August 1, 2023 and the remaining \$100,000 being due by December 31, 2023;
- The Trustee will sell and assign to Suntuity all claims of the Debtor, the Trustee and the Debtor's Chapter 7 estate, including state law claims and claims under Chapter 5 of the Bankruptcy Code, against Abby Buchmiller, Amanda Roseburg, Uinta Bank, GoodLeap LLC, fka Loan Pal and Rock Creek Financial Advisors (the "**Assigned Claims**");
- Suntuity shall not be required to pursue any claims any of the Assigned Claims, and it shall be in Suntuity's sole discretion to do so. If Suntuity does pursue any of the Assigned Claims, however, it shall pay to the Trustee, for the benefit of the estate, 25% of any recoveries on such Assigned Claims. If Suntuity elects to pursue Assigned Claims, it shall promptly inform the Trustee and his counsel of that fact, including providing the Trustee and his counsel with a copy of any complaint or other legal process that it files to initiate the action, and it shall further keep the Trustee and his counsel reasonably informed of the status of such actions;
- With respect to any Chapter 5 claims constituting the Assigned Claims (i.e., Chapter 5 claims against Abby Buchmiller, Amanda Roseburg, Uinta Bank, GoodLeap and Rock Creek Financial Advisors), the Trustee agrees that he can be named as either plaintiff or co-plaintiff with Suntuity on such claims, and that such claims shall be asserted in the US Bankruptcy Court for the District of Utah, unless otherwise agreed or if the US Bankruptcy Court for the District of Utah would be an inappropriate venue for such claims. Notwithstanding the foregoing, Suntuity shall be solely responsible for all costs and expenses of pursuing such Assigned Claims, including all legal fees and costs to pursue such claims. The Trustee will reasonably cooperate with Suntuity, including in decisions regarding settlement, subject to the exercise of his business judgment and any statutory or judicial requirements;
- The Trustee shall provide a full release of all claims against Suntuity and its owners, officers, employees, agents, servants, affiliates, etc.;
- Suntuity shall provide a full release of all claims against the Debtor, the Estate and the Trustee, and the Trustee's professionals, except for the claim asserted against the Estate in Suntuity's filed proof of claim.

Suntuity will not be required to release the current or former owners of the Debtor, i.e., Abby Buchmiller or Amanda Roseburg, and those claims will be carved out expressly from Suntuity's release; and

- If the Parties do not agree on the form and substance of the Further Agreement, this Settlement Term Sheet shall nonetheless be binding, provided it is approved by the United States Bankruptcy Court for the District of Utah.

### **III. RELIEF REQUESTED.**

15. By this Motion, the Trustee respectfully asks the Court to enter an order approving the Term Sheet and ratifying the Trustee's execution of the Term Sheet on behalf of the estate, pursuant to 11 U.S.C. § 105(a) and Federal Rules of Bankruptcy Procedure 9014 and 9019.

16. Typically, in considering whether to approve a settlement of claims brought by the bankruptcy estate, courts consider the four factors outlined in *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10<sup>th</sup> Cir. BAP 1997). Those factors are (a) the probability of success in the litigation, (b) the difficulties to be encountered in collection, (c) the complexities and expense of the litigation involved, and (d) the interests of creditors in proper deference to their reasonable views.

17. Further, settlements are favored in bankruptcy. *See In re Southern Medical Arts Co. Inc.*, 343 B.R. 250 (10<sup>th</sup> Cir. BAP 2006); *In re Kaiser Steel Corp.*, 105 B.R. 971, 978 (D. Colo. 1989). Appellate courts have held that a bankruptcy court's approval of a compromise must be affirmed unless the court's determination is either (1) completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the

supportive evidentiary data. *Id.* The underlying test for the bankruptcy court's approval of a settlement is whether the trustee's actions are "within the universe of reasonable actions," not whether pressing onward might produce more funds. *See In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632, 636 (1st Cir. 2000), *cert denied*, 531 U.S. 960, 121 S.Ct. 385, 148 L.Ed.2d 297 (2000); *see also In re CS Mining, LLC*, 574 B.R. 259, 273 (Bankr. D. Utah 2017).

18. Considering the four *Kopexa Realty* factors, the Trustee believes the Agreement is fair, equitable, and in the best interests of the estate and creditors, and that the Agreement should be approved.

19. First, as to the probability of success in litigation with Suntuity, while the Trustee believes the claims the estate holds against Suntuity are valid, Suntuity believes it has valid defenses to those claims and Suntuity also may hold claims against the estate related to the asset sale which occurred in the early stages of this case (at least Suntuity has suggested as much although the Trustee disputes the validity of any such claims). If the Trustee were to sue Suntuity and Suntuity were to assert those claims as counterclaims and succeed on them, that could offset or totally eliminate any recovery on the Trustee's claims. Further, the Trustee's claims would be fact-intensive and expensive to prosecute, as they would be dependent upon development of a factual record that is hotly disputed by Suntuity. Thus, the Trustee believes the first *Kopexa* factor weighs in favor of approval of the settlement reflected in the Term Sheet.

20. Second, while Suntuity appears to be a solvent and ongoing business enterprise, the Trustee has no independent knowledge as to the financial viability of Suntuity and cannot calculate the difficulty in collecting a judgment against Suntuity if one were obtained. The

Trustee assumes he could collect a judgment against Suntuity if one were entered. But even if the Trustee would not have difficulty collecting a judgment, payment of that judgment would only occur in the future after litigation has concluded. Further, depending upon the amount of the judgment and the basis for it, Suntuity could seek to appeal the judgment, further delaying the Trustee's recovery on these claims. And the Trustee also notes that Suntuity is located in New Jersey so the Trustee would likely need to domesticate the judgment there in order to collect it. In short, the Trustee views the second *Kopexa* factor as neutral.

21. Third, the estate has limited funds, and the Trustee strongly believes that litigation against Suntuity would be expensive, difficult and time consuming for all the reasons set forth above. This is not a simple preference case which is typically based on limited and undisputed facts. Rather, the Trustee's claims and Suntuity's potential defenses and counterclaims would be based on numerous facts that would have to be developed in litigation. Thus, the Trustee views the third *Kopexa* factor as strongly weighing in favor of approval of the Term Sheet.

22. Fourth, the economic terms of the settlement are favorable to the estate. The estate receives \$200,000.00 plus potential additional funds depending upon Suntuity's success in prosecuting the Assigned Claims. Further, the Trustee avoids further costs and expenses including the substantial costs and expenses that would be generated in litigation. The Trustee also is unaware of any basis he would have to recover his attorneys' fees and costs incurred from having to litigate against Suntuity, in the event litigation were commenced. Thus, the fourth *Kopexa* factor also weighs heavily in favor of approval of the Term Sheet because the



settlement reflected therein is favorable to creditors of the estate.

23. Simply put, the interest of creditors in this case is to recover assets at a reasonable cost, in light of the circumstances. Under the Agreement, the estate will receive at least \$200,000.00 in unencumbered funds in short-order, and will avoid a costly and time-consuming legal fight with Suntuity which also could include defending against counterclaims. Given the facts underlying the transactions between the Debtor and Suntuity, and Suntuity's likely defenses, the settlement is a fair result, particularly given that no funds will need to be expended in formal litigation to obtain these funds. This is a meaningful recovery for the estate, and it has been obtained without having to needlessly incur substantial administrative expenses.

24. Based upon the foregoing, the Trustee believes in his business judgment that the settlement he has negotiated with Suntuity should be approved. In the Trustee's view, this is a fair and reasonable settlement. *See, e.g., Shaw v. Anderson (In re Anderson)*, 2006 Bankr. LEXIS 4420, at \*23 (Bankr. D. Utah August 14, 2006) (noting that the Court's obligation under Rule 9019 is to "'canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness' in order to determine whether the settlement is 'fair and equitable' and in the best interests of the estate") (citations omitted).

WHEREFORE, based upon the foregoing, the Trustee respectfully asks the Court to (a) approve the Term Sheet attached hereto as Exhibit "A," and (b) and grant the Trustee such other and further relief as the Court deems just and proper.

DATED this 29<sup>th</sup> day of June, 2023.

RAY QUINNEY & NEBEKER P.C.

*/s/ Michael R. Johnson*

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Michael R. Johnson

*Counsel for the Trustee*

**CERTIFICATE OF SERVICE**

I certify that on June 29, 2023, the foregoing document was electronically filed with the Court and therefore served via ECF upon the following:

- **B. Scott Allen** coley@mvmlegal.com
- **Rod N. Andreason** randreason@kmclaw.com, mkowalczyk@kmclaw.com
- **Steven R. Bailey tr** karen@baileylaw.org, UT06@ecfcbis.com
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- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov
- **Aaron M. Waite** aaronmwaite@agutah.gov

/s/ Carrie Hurst

# **EXHIBIT A**

**Settlement Term Sheet for Settlement of Claims by the Estate of Empire Solar  
Against Suntuity Solar**

In settlement of all claims at issue in mediation, Steve Bailey, as Chapter 7 Trustee (“Trustee”) for the estate of Empire Solar Group LLC (“Debtor”) and Suntuity Solar Limited Liability Company (“Suntuity”) shall enter into a Settlement Agreement and Mutual Release of Claims (“Further Agreement”) that is in form and substance acceptable to the Trustee and Suntuity (collectively, the “Parties”). The basic terms of the Agreement shall provide that the Parties agree to settle and resolve their disputes as follows:

- Suntuity shall pay the Trustee, for the benefit of the estate, \$200,000.00, with \$100,000.00 being due by August 1, 2023 and the remaining \$100,000 being due by December 31, 2023.
- The Trustee will sell and assign to Suntuity all claims of the Debtor, the Trustee and the Debtor’s Chapter 7 estate, including state law claims and claims under Chapter 5 of the Bankruptcy Code, against Abby Buchmiller, Amanda Roseburg, Uinta Bank, GoodLeap LLC, fka Loan Pal and Rock Creek Financial Advisors (the “Assigned Claims”).
- Suntuity shall not be required to pursue any claims any of the Assigned Claims, and it shall be in Suntuity’s sole discretion to do so.

If Suntuity does pursue any of the Assigned Claims, however, it shall pay to the Trustee, for the benefit of the estate, 25% of any recoveries on such Assigned Claims. If Suntuity elects to pursue Assigned Claims, it shall promptly inform the Trustee and his counsel of that fact, including providing the Trustee and his counsel with a copy of any complaint or other legal process that it files to initiate the action, and it shall further keep the Trustee and his counsel reasonably informed of the status of such actions.

- With respect to any Chapter 5 claims constituting the Assigned Claims (i.e., Chapter 5 claims against Abby Buchmiller, Amanda Roseburg, Uinta Bank, GoodLeap and Rock Creek Financial Advisors), the Trustee agrees that he can be named as either plaintiff or co-plaintiff with Suntuity on such claims, and that such claims shall be asserted in the US Bankruptcy Court for the District of Utah, unless otherwise agreed or if the US Bankruptcy Court for the District of Utah would be an inappropriate venue for such claims.

Notwithstanding the foregoing, Suntuity shall be solely responsible for all costs and expenses of pursuing such Assigned Claims, including all legal fees and costs to pursue such claims. The Trustee will reasonably cooperate with Suntuity, including in decisions

regarding settlement, subject to the exercise of his business judgment and any statutory or judicial requirements.

- The Trustee shall provide a full release of all claims against Suntuity and its owners, officers, employees, agents, servants, affiliates, etc.
- Suntuity shall provide a full release of all claims against the Debtor, the Estate and the Trustee, and the Trustee's professionals, except for the claim asserted against the Estate in Suntuity's filed proof of claim. Suntuity will not be required to release the current or former owners of the Debtor, i.e., Abby Buchmiller or Amanda Roseburg, and those claims will be carved out expressly from Suntuity's release.
- The Agreement shall contain standard terms regarding recovery of attorneys' fees and costs in the event of default and collection, jury trial waivers, consent to jurisdiction in the state or federal courts sitting in Salt Lake County, etc.
- The Trustee shall promptly (by no later than June 10, 2023) file a motion with the United States Bankruptcy Court for the District of Utah seeking approval of this Settlement Term Sheet.
- If the Parties do not agree on the form and substance of the Further Agreement, this Settlement Term Sheet shall nonetheless be binding,



provided it is approved by the United States Bankruptcy Court for the District of Utah.

DATED THIS 30<sup>th</sup> day of May, 2023.

By: Steven R. Bailey

Title: Trustee

By: St. R. Bailey  
Steven R. Bailey, Trustee

By: [Signature]  
Attorneys for Suntuity  
David Weinstein

Matthew M. Boley

By: [Signature]  
Attorneys for the Trustee

Suntuity Limited Liability Company

By: [Signature]  
David Weinstein  
Authorized Signatory