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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Mark Smilovits, et al.,

10 Plaintiffs,

11 v.

12 First Solar Incorporated, et al.,

13 Defendants.

No. CV-12-00555-PHX-DGC

ORDER

14 Pursuant to the Court's directions during the discovery conference call held on
15 October 22, 2014 (Doc. 236), the parties have provided the Court with a matrix setting
16 forth their positions with respect to requests for production and subpoenas served by
17 Plaintiffs. This order will set forth the Court's rulings.

18 The Court must say that when it directed the parties to confer and narrow issues,
19 and then present their positions in a matrix, it did not anticipate 72 single-spaced pages.
20 There is much duplication in the matrix. In the future, the parties should make their
21 arguments more succinctly.

22 RFP 52: The Court ruled at the October 22, 2014 conference that Plaintiffs'
23 requests were not untimely.

24 The Court is not persuaded by Defendants' predictive coding argument. The
25 requested documents relate to a discrete time period and a specific subject – the departure
26 of Robert Gillette. Defendants have not explained why a search for such documents
27 requires the use of predictive coding to search 22 million pages of documents. Nor have
28 Defendants provided any concrete information concerning the cost or effort to “retrain”

1 the predictive coding tool even if it was to be used. The Court cannot accept the
2 proposition that Defendants' use of predictive coding effectively confines Plaintiffs'
3 document discovery to initial requests for production.

4 Nor can the Court conclude that the requested documents are irrelevant. Plaintiffs
5 make a loss causation argument that appears to be something like this: "the fraud caused
6 Gillette's ouster and the ouster caused a 25% market drop, therefore the fraud caused the
7 market drop." Whether or not this is a viable loss causation theory is not sufficiently
8 briefed for the Court to decide, but the Court does find that documents related to
9 Gillette's ouster may be probative of his mental state (an issue because he is a Defendant
10 in this case) and alleged false statements concerning what was happening within the
11 company during the critical period when he departed.

12 Defendants shall produce the documents called for by this request.

13 RFPs 53, 54, 55, 56(c)-(f), 57, 58, 59, 60, 62: Defendants demonstrate that these
14 requests are duplicative of previous requests served by Plaintiffs and responded to by
15 Defendants. *See* Doc. 244-1 at 66-71 nn. 1-8. These requests seek documents related to
16 particular quarterly financial disclosures or other earnings guidance provided by First
17 Solar, as well as press releases and earnings conference calls associated with specific
18 quarterly reports. And yet Plaintiffs previously requested "[a]ll documents concerning
19 First Solar that were publicly disseminated, including drafts, *and all communications*
20 *related thereto*, including: (a) all *press releases*, annual reports, *quarterly reports*, proxy
21 materials and *other materials* sent to First Solar security holders or to any financial
22 institutions, analysts, broker-dealers or investment banks; (b) all recordings, transcripts or
23 summaries of electronic media broadcasts, including *conference calls* and interviews
24 with, or statements by, First Solar officers, directors or employees, concerning First
25 Solar; and (c) *all print media clippings and reproductions concerning First Solar.*"
26 Doc. 244-1 at 68-69 n. 2 (RFP No. 34; emphasis added). The new requests also seek all
27 documents related to the market's reaction to the quarterly reports. The quarters at issue
28 are 2Q-10, 3Q-10, 4Q-10, 1Q-11, 3Q-11, and 4Q-11, with the first quarterly disclosure

1 (2Q-10) having been made on July 29, 2010, and the last (4Q-11) on February 28, 2012.
2 The guidance was provided on December 14, 2011. And yet Plaintiffs previously sought
3 “[a]ll documents regarding First Solar’s share price, market capitalization and the value
4 of options or any other First Solar securities, *including documents concerning price*
5 *movements in First Solar common stock* from July 29, 2010 to July 30, 2010, October 28,
6 2010 to October 29, 2010, February 24, 2011 to February 28, 2011, May 3, 2011 to May
7 4, 2011, October 25, 2011 to October 26, 2011, November 4, 2011 to November 5, 2011,
8 December 14, 2011 to December 15, 2011, February 28, 2012 to February 29, 2012, and
9 all investor relations documents and communications that concern the allegations in the
10 Complaint.” Doc. 244-1 at 68 n. 4 (RFP No. 37; emphasis added).

11 Plaintiffs assert that Defendants’ responses to their previous requests were subject
12 to objections, but do not dispute Defendants’ assertion that those objections were made in
13 December of 2013 and have not been challenged by Plaintiffs in the intervening 11
14 months. Nor do Plaintiffs dispute Defendants’ assertion that the parties met and
15 conferred about the objections in 2013, or that Defendants’ shared with Plaintiffs the sets
16 of documents Defendants were using to train their predictive coding tool to locate
17 documents responsive to Plaintiffs’ previous requests and accepted input from Plaintiffs
18 on how to code documents used to train the predictive coding software. These efforts
19 were designed to ensure that the software would identify documents responsive to
20 Plaintiffs’ previous requests. *See* Doc. 196-1.

21 The Court concludes that Defendants took significant steps to produce all
22 documents called for by Plaintiffs’ previous requests, including the technology assisted
23 review of 22 million pages of documents and the eventual production of 2.5 million
24 pages. These efforts were made with input from Plaintiffs on how best to train the
25 predictive coding software to locate relevant and responsive documents. *Id.* Although
26 Defendants objected to some portions of the previous requests, more than 11 months have
27 passed without a challenge to those objections. The Court will not require Defendants to
28 produce additional documents in response to these requests.

1 RFP 60 seeks “[a]ll documents concerning any actual, potential or possible impact
2 from any Defect on First Solar’s revenues, sales, or other financial results or operations,”
3 a very broad request covered by Plaintiffs’ previous requests.

4 RFP 62 seeks “[a]ll communications between Defendants and First Solar’s
5 customers or vendors regarding First Solar modules or any Defect, including documents
6 concerning such communications,” another very broad request covered by Plaintiffs’
7 previous requests.

8 RFP 56(a)-(b): The Court concludes that documents reflecting a connection
9 between relevant defects and selling price or ASP in 1Q-11 are relevant. The Court does
10 not agree, however, that “all documents” related to the selling price or ASP, or to the
11 disclosures identified in subpart (b), are relevant.

12 The complaint identifies specific categories of defects and manufacturing
13 problems related to the alleged fraud. The Court is not persuaded that discovery into
14 every possible defect can be said to be relevant to Plaintiffs’ claims as required by
15 Rule 26(b)(1).

16 Defendants assert that “any document that discusses a linkage between the
17 relevant defects and selling price has already been produced.” Doc. 244-1 at 30. If
18 Defendants have made this statement in a formal Rule 34 response, no further action is
19 needed. If they have not made this affirmative statement, they should by the date
20 provided below. If Defendants are unable to make the statement, they must conduct a
21 search for documents that will enable them to make the statement in a Rule 34 response.

22 RFP 61: This request broadly seeks “[a]ll documents and communications
23 regarding” Adler Solar Services GmbH, which First Solar hired to remediate the LPM
24 issue. Defendants respond that they have searched for documents related to LPM, which
25 include 5,000 documents that refer or relate to Adler, but they do not assert that they have
26 searched for documents related to Adler. The Court will not require Defendants to
27 produce all documents and communications related to Adler, or all documents and
28 communications related to LPM, but will require Defendants to produce documents and

1 communications related to both Adler and remediation of the LPM issue, a somewhat
2 narrower request than Plaintiffs’.

3 RFP 63: This request seeks “[a]ll documents concerning any Company-specific
4 information released to the market that First Solar contends impacted the price of First
5 Solar common stock on [various specific dates].” Defendants respond that they have
6 produced all documents responsive to this request. Plaintiffs ask the Court to preclude
7 Defendants from using any documents not included in Defendants’ disclosures to date.
8 The Court cannot rule on the preclusion of evidence without addressing factors specific
9 to that evidence, and therefore will deny Plaintiffs’ request. *See, e.g.*, Fed. R. Civ. P.
10 37(c),(d), (e).

11 Subpoena Request 1: The Court does not agree with Defendants’ assertion that
12 Plaintiffs are precluded from obtaining document discovery from directors because
13 Plaintiffs failed to identify them as additional custodians of documents sought from First
14 Solar. Plaintiffs seek documents in the directors’ personal possession. The Court
15 instructed the parties to treat the subpoenas served on the directors as Rule 34 requests to
16 streamline the process of dispute resolution and the production of documents, not to
17 suggest that Plaintiffs should have conducted all subpoena discovery through Rule 34
18 requests made early in the case.¹

19 The Court will require Defendants to respond to Request 1 for the same reasons
20 described above with respect to RFP 52.

21 The Court will require Defendants to respond to Requests 2, 5, and 6 because they
22 seek relevant information.

23 Request 3 is plainly overbroad and seeks much that would not be relevant to this
24 case. Defendants shall produce documents and communications in the Directors’

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26 ¹ If the parties had proceeded by subpoenas, the possibility exists that disputes
27 would be brought before judges in locations were the directors reside. Fed. R. Civ. P.
28 45(d)(1). Those disputes could have been (and, in the Court’s view, would have been)
transferred to this Court under Rule 45(f). The Court’s directive to treat the subpoenas as
Rule 34 requests and raise issues directly with the Court was intended to save the time
and effort of such round-about procedures.

1 personal possession regarding CPW, First Solar's stock declines on the dates enumerated
2 in the Third RFP, Request No. 63, stock sales by the responding director, compensation
3 paid by First Solar to the responding director, First Solar's warranty accounting and
4 reserving, and First Solar's compliance with GAAP.

5 Request 4 is plainly overbroad and seeks much that is not relevant to this case.
6 Plaintiffs propose no narrowing of that request. Defendants need not respond to
7 Request 4.

8 Defendants shall comply with this order on or before **December 19, 2014**.

9 Dated this 20th day of November, 2014.

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David G. Campbell
United States District Judge