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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 In re First Solar Derivative Litigation.

No. CV-12-00769-PHX-DGC

10 **ORDER**

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13 On June 30, 2016, the Court dismissed Plaintiffs' second amended complaint for  
14 failure to make a pre-suit litigation demand. Doc. 82. This dismissal was without  
15 prejudice, but the Court indicated that any additional amendment would be contingent on  
16 Plaintiffs' payment of the attorneys' fees incurred by Defendants in litigating the motion  
17 to dismiss the second amended complaint. *Id.* at 25. In dismissing the complaint, the  
18 Court declined Plaintiffs' request to unseal evidence from the related securities fraud  
19 action, *Smilovits v. First Solar Inc.*, No. 12-CV-00555-PHX-DGC.

20 Plaintiffs have filed a motion for reconsideration. Doc. 83. The Court ordered  
21 Defendants to respond, Doc. 86, which they did, Doc. 88. Plaintiffs raise three issues.

22 First, Plaintiffs ask the Court to withdraw its ruling that Plaintiffs may not obtain  
23 certain sealed records in *Smilovits*. Plaintiffs note that they have filed a motion to  
24 intervene in *Smilovits* and a motion to unseal the records in that case, and ask the Court to  
25 withdraw any current ruling on that issue. The Court will address Plaintiffs' motion in  
26 *Smilovits* separately and after full briefing, but will not reconsider the request made in  
27 this litigation. The Court has twice concluded that Plaintiffs are not permitted to conduct  
28 discovery in support of their Rule 23.1 showing. Docs. 62 at 5, 82 at 24. Plaintiffs make

1 arguments in their motion for reconsideration that could have been made earlier and,  
2 therefore, do not provide a basis for reconsideration. To the extent Plaintiffs argue in  
3 their *Smilovits* motion that they have a separate and sufficient basis to obtain the records,  
4 the Court will address that argument after full briefing in *Smilovits*.

5 Second, Plaintiffs ask the Court to extend the September 16, 2016 deadline for  
6 filing a new complaint in this action until 30 days after the Court resolves the motions in  
7 *Smilovits*. This is not a request for reconsideration. Because the Court must rule on the  
8 *Smilovits* motion after full briefing, however, the Court will grant this request.

9 Finally, Plaintiffs ask the Court to reconsider its ruling that any additional  
10 amendment be made contingent on Plaintiffs' payment of attorneys' fees. The relevant  
11 portion of the Court's order stated:

12 If leave to amend is granted, Defendants argue that it should be  
13 "conditioned on the plaintiff paying the defendants' attorneys' fees incurred  
14 on the initial motion to dismiss." Plaintiffs do not argue to the contrary.  
15 Given that Plaintiffs are seeking leave to file their *fourth* complaint, the  
16 Court agrees that such leave should be contingent on Plaintiffs' payment of  
17 the attorneys' fees Defendants incurred in litigating this motion. If  
18 Plaintiffs elect to file an amendment, Defendants may move for attorneys'  
19 fees pursuant to Rule 54(d)(2).

20 Doc. 82 at 25 (citations and quotation marks omitted; emphasis in original). Citing  
21 *International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761  
22 F.2d 1386, 1391 (9th Cir. 1985), Plaintiffs argue that "a condition of the payment of  
23 attorneys' fees is generally unreasonable absent a finding of bad faith, prejudice, or rule  
24 violations." Doc. 83 at 13. Plaintiffs note that the Court did not make such findings in  
25 imposing the condition. *Id.*

26 Defendants argued that any amendment should be conditioned on payment of  
27 attorneys' fees in their motion, in their reply, and at oral argument. *See* Docs. 70 at 22;  
28 77 at 17 n.15; 87 at 43. At no point did Plaintiffs suggest that such a condition would be  
improper. Motions for reconsideration are not the place to make arguments that could  
have been made in the original briefing. *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*,  
841 F.2d 918, 925-26 (9th Cir. 1988).

1 Plaintiffs argue that the Court's prior ruling contravenes the Supreme Court's  
2 guidance that "attorney's fees certainly should not be assessed lightly or without fair  
3 notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*,  
4 447 U.S. 752, 766 (1980). Although the Court concludes that Plaintiffs had an ample  
5 opportunity to address Defendants' suggestion that attorneys' fees should be assessed,  
6 Plaintiffs will have an opportunity to be heard if and when Defendants file a Rule  
7 54(d)(2) motion. *See* Fed. R. Civ. P. 54(d)(2)(C). At that point, Plaintiffs can raise any  
8 arguments they may have as to why an assessment of attorneys' fees would be improper.

9 **IT IS ORDERED:**

- 10 1. Plaintiffs' motion for reconsideration (Doc. 83) is **denied**.
- 11 2. Plaintiffs may file an amended complaint within 30 days of the Court's  
12 decision on Plaintiffs' motion to unseal in *Smilovits*.

13 Dated this 4th day of August, 2016.

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David G. Campbell  
United States District Judge