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

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10 In re First Solar Derivative Litigation

No. CV12-00769-PHX-DGC

11 **ORDER**

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13 Plaintiffs have filed a motion to continue the deadline for filing a fourth amended  
14 complaint. Doc. 92. Plaintiffs ask the Court to extend the deadline until 30 days after the  
15 Ninth Circuit rules on their appeal of this Court's order denying their request to intervene  
16 and obtain information filed under seal in the securities fraud action.

17 The Court has noted, several times, that Plaintiffs cannot conduct discovery to  
18 establish demand futility under Federal Rule of Civil Procedure 23.1. Docs. 65 at 5; 82 at  
19 24; 91 at 1. The Court viewed Plaintiffs' motion to intervene in the securities fraud  
20 action as an effort to avoid this rule. Doc. 413 at 7-8 (in CV12-555).

21 The Court has also noted, repeatedly, that Plaintiffs should pursue a books and  
22 records review under Delaware law. Plaintiffs apparently made such a request in  
23 February, but then failed to respond for more than four months after First Solar asked that  
24 the request be more narrowly tailored. Doc. 94 at 8. First Solar later offered to permit  
25 Plaintiffs to inspect board minutes on relevant topics – minutes that may contain the very  
26 information Plaintiffs have lacked, namely, information showing board knowledge of  
27 various alleged facts – but Plaintiffs declined. *Id.* Plaintiffs have said in their most  
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1 recent briefing, and previously, that they were preparing to file an action for a books and  
2 records under Del. Code Ann., Title 8, § 220, but they have yet to commence such an  
3 action.

4 The Court concludes that Plaintiffs have had ample opportunity to collect the  
5 information needed to plead demand futility, if such information exists. Plaintiffs should  
6 have collected that information before filing this case some four years ago. Rule 23.1  
7 required Plaintiffs to explain their “reasons for . . . not making the effort” to obtain board  
8 action. Fed. R. Civ. P. 23.1(b)(3)(B). Instead of alleging facts sufficient to justify their  
9 decision not to seek board action, or securing the information through the procedures of  
10 Delaware law, Plaintiffs essentially have sought discovery through the securities fraud  
11 action, something the law does not permit as a means to satisfy their Rule 23.1 burden.  
12 *See In re Merck & Co. Securities Litigation*, 493 F.3d 393, 400 (3d Cir. 2007) (“As we  
13 have stated, derivative plaintiffs are required to establish that demand would have been  
14 futile at the time they commenced litigation. A corollary of this rule is that discovery  
15 generally may not be used to supplement allegations of demand futility.”) (citations  
16 omitted); *Beam v. Stewart*, 845 A.2d 1040, 1056 (Del. 2004) (“In general, derivative  
17 plaintiffs are not entitled to discovery in order to demonstrate demand futility.”); *Rales v.*  
18 *Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993) (“derivative plaintiffs . . . are not entitled  
19 to discovery to assist their compliance with Rule 23.1”). Because Plaintiffs have had  
20 sufficient opportunity to obtain needed information, the Court cannot justify delaying this  
21 case further while Plaintiffs pursue an appeal of their effort to obtain improper discovery.

22 **IT IS ORDERED** that Plaintiffs’ motion for an extension (Doc. 92) is **denied**.  
23 The clerk is directed to terminate this action.

24 Dated this 29th day of November, 2016.

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28 David G. Campbell  
United States District Judge