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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**GEC US 1 LLC, et al.,**

Plaintiffs,

v.

**FRONTIER RENEWABLES, LLC, et al.,**

Defendants.

Case No.: 16-cv-1276 YGR

**ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT**

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**FRONTIER RENEWABLES, LLC,**

Counterclaim Plaintiff,

v.

**ACTIV SOLAR GMBH, et al.,**

Counterclaim Defendants.

Re: Dkt. Nos. 154, 176

**TO PARTIES AND COUNSEL OF RECORD:**

In an Order of this date, the Court provides a synopsis of the parties and claims which it adopts here. Presently pending before the Court is defendant Frontier's motion for partial summary judgment (Dkt. No. 154) and plaintiff AS (Wright)'s cross-motion for partial summary judgment (Dkt. No. 176).

Defendant Frontier moves for partial summary judgment as to its fifth cause of action, which seeks a judicial declaration that Frontier is the 100% owner of Wright Solar pursuant to the contractual default and remedy provisions contained in Section 11.3(b) of the Wright Solar Park LLC Amended & Restated Limited Liability Company Agreement (the "LLC Agreement," Dkt. No. 138-2).

1 Plaintiff AS (Wright) cross-moves for partial summary judgment that Section 11.3(b) of  
2 the LLC Agreement does not apply and that, even if it does, AS (Wright) improperly interprets the  
3 provision to provide a forfeiture remedy such that Frontier owns 100% of Wright Solar. Plaintiff  
4 also raises waiver, estoppel, and ratification defenses.

5 Having carefully considered the papers submitted, the pleadings in this action, and oral  
6 argument held January 31, 2017, and for the reasons discussed below, the Court **DENIES** both  
7 motions for partial summary judgment.

8 **I. APPLICABLE LAW ON SUMMARY JUDGMENT**

9 Summary judgment is proper if the pleadings and evidence in the record “show that there  
10 is no genuine issue as to any material fact” and the moving party is entitled to judgment as a  
11 matter of law. Fed. R. Civ. P. 56(c). Any party seeking summary judgment bears the initial burden  
12 of identifying those portions of the pleadings and discovery responses that demonstrate the  
13 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
14 Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*,  
15 477 U.S. 242, 248 (1986). An issue is “genuine” only if there is a sufficient evidentiary basis on  
16 which a reasonable fact finder could find for the nonmoving party, and a dispute is “material” only  
17 if it could affect the outcome of the suit under governing law. *Id.* at 248–49.

18 Once the moving party meets its burden, the non-moving party may defeat summary  
19 judgment by showing, through admissible evidence, that a material factual dispute exists.  
20 *California v. Campbell*. 138 F.3d 772, 780 (9th Cir. 1998). When deciding a summary judgment  
21 motion, courts must view the evidence in the light most favorable to the non-moving party and  
22 draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*,  
23 638 F.3d 703, 709 (9th Cir. 2011).

24 **II. DISCUSSION**

25 **A. Background**

26 On April 4, 2012, AS (Wright) and Frontier entered into a Membership Interest Purchase  
27 and Contribution Agreement (the “MIPCA,” Dkt. No. 138-3), pursuant to which AS (Wright)  
28 obtained a 75% “Membership Interest” in, and became a “Member” of, Wright Solar, with

1 Frontier maintaining a 25% Membership Interest in Wright Solar. (Frontier’s Separate Statement  
2 In Support of Motion for Partial Summary Judgment, Dkt. No. 156, Undisputed Material Fact  
3 (“UMF”) 11-12.)

4 On April 6, 2012, and in conjunction with the MIPCA, AS (Wright) and Frontier entered  
5 into the LLC Agreement. (UMF 13.) The MIPCA incorporates the LLC Agreement by reference,  
6 and attaches a copy of the LLC Agreement as Exhibit B. (UMF 14.)

7 According to Frontier, AS (Wright) became a “Defaulting Member” under the LLC  
8 Agreement as a result of an “Insolvency Event,” pursuant to Section 11.1(b) of the LLC  
9 Agreement. Section 11.1, entitled “Default,” provides:

10 A Member (a “**Defaulting Member**”) shall be in default of its obligations under  
11 this Agreement (a “**Default**”) if:

12 (a) it (or its Affiliate, as applicable) fails to make an Committed Capital  
13 Contribution within the time periods set forth in Section 6.2(b); or

14 (b) an Insolvency Event occurs in respect of such Member or any Affiliate that  
15 Controls the Member or its ultimate parent entity.

16 (Dkt. No. 138-2 at Section 11.1 (emphasis in original)).

17 Frontier argues that AS (Wright) became a Defaulting Member as a result of certain  
18 insolvency events experienced by Activ GmbH. Once AS (Wright) became a Defaulting Member,  
19 Frontier argues it was entitled to all of AS (Wright)’s share of Wright Solar pursuant to Section  
20 11.3(b) such that it now owns 100% of Wright Solar. Section 11.3, entitled “Remedies,” states:

21 (a) The provisions of Article XVII [governing “Deadlock Resolution Procedures”]  
22 shall apply in the event of any Default pursuant to Section 11.1(a) that is not cured  
23 pursuant to the terms of this Agreement and the Parties shall have any remedies  
24 available at law.

25 (b) If an Insolvency Event in respect of a Member in Default under this Agreement  
26 (a “**Defaulting Member**”) has occurred, then the Defaulting Member  
27 unconditionally and irrevocably agrees that the other Member shall immediately be  
28 entitled to relief from any stay (including the so-called “automatic stay” arising  
under 11.U.S.C. §362) to allow the non-Defaulting Member to, among other things,  
take possession of and Dispose of the Membership Interests of the Defaulting  
Member and receive all Distributions in respect of the Membership Interests of the  
Defaulting Member pursuant to this Section 11.3.

(Dkt. No. 138-2 at Section 11.3 (emphasis in original)).

1 Frontier hinges its claim on the notion that Section 11.3 allows it to “take possession of  
2 and Dispose of the Membership Interests of the Defaulting Member and receive all Distributions  
3 in respect of the Membership Interests of the Defaulting Member.” Plaintiff AS (Wright) counters  
4 with two arguments. First, it disputes that it became a Defaulting Member under Section 11.1(b).  
5 Second, even assuming that it became a Defaulting Member under Section 11.1(b), AS (Wright)  
6 argues that Section 11.3(b) does not, as a matter of law, require forfeiture of a Defaulting  
7 Member’s interest such that Frontier now owns 100% of Wright Solar.

8 **B. Analysis**

9 The Court finds that it cannot interpret Section 11.3(b) of the LLC Agreement to require  
10 forfeiture of AS (Wright)’s interest in Wright Solar as a matter of law. Instead, both parties have  
11 proffered evidence that creates disputed issues of material fact relating to the interpretation of  
12 Section 11.3(b)’s remedy. The provision is poorly drafted and consequently ambiguous.<sup>1</sup>

13 Further, the Court notes that Delaware law disfavors forfeiture. *See, e.g., Hillman v.*  
14 *Hillman*, 910 A.2d 262, 270 (Del. Ch. 2006); *see also Garrett v. Brown*, No. CIV.A. 8423, 1986  
15 WL 6708, at \*8 (Del. Ch. June 13, 1986), *aff’d*, 511 A.2d 1044 (Del. 1986) (“Forfeitures are not  
16 favored and contracts will be construed to avoid such a result.” (citations omitted)); *Clements v.*  
17 *Castle Mortg. Serv. Co.*, 382 A.2d 1367, 1370 (Del. Ch. 1977) (observing that forfeiture “is highly  
18 disfavored by the courts, including those of Delaware” (citations omitted)). Thus, the condition  
19 effecting a forfeiture “must be unambiguous.” *Martin v. Hopkins*, No. CIV.A. 05C-04-027, 2006  
20 WL 1915555, at \*6 (Del. Super. Ct. June 27, 2006) (citation omitted).

21 Here, given the language of the LLC Agreement, the Court cannot find that Section  
22 11.3(b)’s remedy is unambiguously forfeiture. For example, plaintiff argues that Section 11.3(b) is  
23 actually a prepetition waiver, which would merely require that a petitioning party be allowed to  
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25 <sup>1</sup> Accordingly, the Court declines to address the parties’ arguments with respect to whether  
26 AS (Wright) became a Defaulting Member pursuant to Section 11.1(b). The Court finds that, even  
27 if AS (Wright) did become a Defaulting Member, Frontier would still not be entitled to summary  
28 judgment because, for the reasons stated above, Section 11.3(b)’s remedy is ambiguous and  
therefore does not, on this record and as a matter of law, entitle Frontier to AS (Wright)’s share of  
Wright Solar.

1 seek relief from the applicable bankruptcy stay with the Defaulting Member having agreed in  
2 advance not to oppose this request. Plaintiff argues that these are not self-executing but, rather,  
3 require the approval of the bankruptcy court.<sup>2</sup> (Dkt. No. 183-2 at 13-14.) As such, the Defaulting  
4 Member is not committing to an immediate relief from the stay—since this is something the  
5 Defaulting Member cannot provide—but rather is agreeing not to oppose the petition for relief  
6 from the stay.<sup>3</sup> (*Id.* at 15.)

7 Similarly, the Court also cannot find that Section 11.3(b)'s remedy is unambiguously *not*  
8 forfeiture. For example, plaintiff's argument that 11.3(b) should be construed as a prepetition  
9 waiver, discussed above, only makes sense if the Court also finds that 11.3(b) is only triggered by  
10 a Member's own Insolvency Event, rather than the Insolvency Event of "any Affiliate that  
11 Controls the Member or its ultimate parent entity." Such an interpretation appears to directly  
12 contradict the plain language of Section 11.1(b) of the LLC Agreement, which clearly defines  
13 Defaulting Member to include a "Default" resulting from an Insolvency Event that "occurs in  
14 respect of such Member or any Affiliate that Controls the Member or its ultimate parent entity."

15 Thus, the Court finds that, on this summary judgment record, Section 11.3(b)'s remedy is  
16 ambiguous. Further factual development is needed to interpret the relevance and application, if  
17 any, of Section 11.3(b). Judgment as a matter of law is therefore inappropriate.

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22 <sup>2</sup> See, e.g., *In re Triple A & R Capital Inv., Inc.*, 519 B.R. 581, 583–84 (Bankr. D.P.R.  
23 2014), *aff'd sub nom. In re Triple A&R Capital Inv. Inc.*, No. BR 14-4744 BKT11, 2015 WL  
24 1133190 (D.P.R. Mar. 12, 2015) (collecting and analyzing cases nationwide that interpret the  
25 enforceability of prepetition waivers, noting that bankruptcy courts have "used different  
26 approaches with conflicting results," but that "the courts are in agreement that a prepetition waiver  
27 of the automatic stay, even if enforceable, does not enable the secured creditor to enforce its lien  
28 without first obtaining stay relief from the bankruptcy court").

<sup>3</sup> The Court has not done, nor has AS (Wright) provided, a thorough review of case law  
demonstrating typical language constituting a prepetition waiver. Moreover, for the reasons stated  
above, interpreting that provision as a prepetition waiver also contributes to the ambiguity in the  
agreement.

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**III. CONCLUSION**

For the foregoing reasons, the Court hereby **ORDERS** as follows:

Defendant Frontier’s motion for partial summary judgment (Dkt. No. 154) and plaintiff AS (Wright)’s cross-motion for partial summary judgment (Dkt. No. 176) are both **DENIED**.

This Order terminates Dkt. Nos. 154 and 176.

**IT IS SO ORDERED.**

Dated: February 15, 2017

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE