



SunEdison, Inc., a large renewable-energy development company that owns and operates renewable energy power plants, filed for bankruptcy on April 21, 2016, and has faced an uphill battle with its creditors ever since. *In re SunEdison, Inc., et al.*, Case No. 16-10992 (S.D.N.Y. 2016). SunEdison is just one of the many businesses in the energy sector that have sought chapter 11 protection in 2016, but SunEdison faces an unusual battle: at the beginning of this month, the Official Committee of Unsecured Creditors (the "Committee") filed a motion to seek standing to pursue the company's directors and officers for claims on the company's behalf while the bankruptcy case is ongoing. While creditors suing officers and directors in bankruptcy is commonplace, doing so during operations and while those officers and directors are still in charge of the business is rare.

On November 4, the Committee filed a request to seek derivative standing, or to step into SunEdison's shoes, to pursue claims against the current and former officers and directors of SunEdison, and to settle any lawsuits on behalf of SunEdison. The company filed for bankruptcy in April after it could not service its debt load resulting from major company growth in the past two years, and the creditors allege that the company's officers and directors breached their fiduciary duties, ignored their responsibilities to SunEdison's business, and violated security laws during SunEdison's recent business explosion. The Committee must satisfy a two-part test to seek derivative standing: a) present colorable claims for relief that would support recovery; and b) demonstrate that the debtor unjustifiably failed to bring suit. The court can also consider whether the action asserting the claims is likely to benefit the reorganization of the estate. The Committee alleges that the claims they seek to bring are "colorable" – that they are not "facially defective" – and that the potential recovery from the pursuit of these claims is highly valuable to the estates' creditors. Because the bankruptcy case is only about six months old, however, the Debtors claim that the Committee's pursuit of these claims is premature, will delay global settlement discussions, and is inappropriate at this time. Because many of the officers and directors the Committee seeks to pursue are still current officers and directors of the Debtors, however, the Committee alleges that the Debtors' failure to bring suit against the officers and directors is only out of self-interest and is a "red herring."

As described in the Committee's motion to seek derivative standing, the creditors' committee hopes to bring claims for breach of fiduciary duties for making false and misleading statements relating to the company's business health, filing false statements on the company's SEC filings, and obtaining excessive and unnecessary debt without the intent or ability to service the debt. The Committee also seeks to bring claims related to insider stock deals and the unjust enrichment of insiders, corporate waste, and aiding and abetting breaches of fiduciary duty. The company faced numerous lawsuits related to these claims and violation of federal securities laws in the past year; while these lawsuits are stayed because of the bankruptcy and upon the request of the Committee, the Committee seeks to step into the company's shoes to pursue these claims against the officers and directors. If any of the lawsuits move forward, the potential liability associated with these lawsuits could be crippling to any plan for SunEdison's successful reorganization. A hearing on the motion to obtain derivative standing is scheduled for December 6. While the claims against SunEdison's directors and officers are numerous, time will tell whether there is light at the end of the tunnel for SunEdison.



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