



**IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE**

SOLARRESERVE CSP HOLDINGS,	:	
LLC, a Delaware limited liability	:	
company,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No.
	:	
TONOPAH SOLAR ENERGY, LLC,	:	
a Delaware limited liability company; and	:	
UNITED STATES DEPARTMENT OF	:	
ENERGY,	:	
	:	
Defendants.	:	

**VERIFIED COMPLAINT PURSUANT TO SECTION 18-110 OF THE DELAWARE LLC ACT**

**Nature of the Case**

Plaintiff, SolarReserve CSP Holdings, LLC, a Delaware limited liability company (“SolarReserve”), brings this action based on its membership interest in Tonopah Solar Energy, LLC, a Delaware limited liability company (“Tonopah”), pursuant to Section 18-110(a) of the Delaware LLC Act to determine whether its duly appointed manager for Tonopah, Troy Taylor, who took his place on Tonopah’s Board of Managers, pursuant to Tonopah’s Third Amended and Restated Limited Liability Company Agreement dated October 30, 2018 (the “LLC Agreement”),<sup>1</sup> can

<sup>1</sup> See Exhibit “A” attached.

be validly superseded by a notice of default letter dated September 17, 2019 (“Notice of Default”),<sup>2</sup> from the United States Department of Energy (“DOE”).

The DOE’s actions interfere with SolarReserve’s right to participate in the management of Tonopah; and they result in a forfeiture of SolarReserve’s property rights in a \$1 billion project which SolarReserve started in 2008, without an opportunity to contest that forfeiture.

### **Parties**

1) SolarReserve holds an interest in Tonopah through several intermediary entities. SolarReserve has a 50% interest in Tonopah Solar Investments, LLC, a Delaware limited liability company (“TSI”), which has an interest in Tonopah Solar Energy Holdings I, LLC, which has an interest in Tonopah Solar Energy Holdings II, LLC, a Delaware limited liability company (“TSEH II”). In turn, TSEH II is the sole member of Tonopah.

2) Tonopah is the operating entity for a solar power plant for which DOE guaranteed the funding and acts as loan servicer. There are a multitude of other inter-related entities that are not parties to this suit, but who played some role in the construction or funding of the solar plant.<sup>3</sup>

---

<sup>2</sup> See Exhibit “B” attached.

<sup>3</sup> For example, CMB Infrastructure Investment Group IX, L.P. (“Group IX”) agreed to loan \$90 million for the construction of the solar plant involved in this matter, to SolarReserve CSP Finance LLC, which is the sole member of SolarReserve. In

3) DOE is the guarantor of a loan to Tonopah and now through its directions to the collateral agent on the DOE loan, seeks to exercise certain rights pursuant to the Notice of Default.

4) Pursuant to Section 4.2(b) of the LLC Agreement, SolarReserve has the right to appoint one of the managers of Tonopah. The LLC Agreement provides for two “independent” managers, but DOE also appointed them.

5) The DOE purports to remove the manager of Tonopah previously appointed by SolarReserve (“SolarReserve Manager”), and replace the SolarReserve Manager with a handpicked “independent” manager of its own choosing (“DOE Manager”).

### **Core Purpose of This Summary Proceeding**

6) This summary proceeding under Section 18-110(a) seeks an adjudication of the issue of whether the DOE’s actions in this regard are proper.

7) The DOE purports to remove and replace the SolarReserve Manager with the DOE Manager, and has removed a second manager that the DOE also purports to impose on Tonopah pursuant to its Notice of Default.

8) While the DOE claims that its hand-picked managers are “independent,” in actuality, DOE now has the ability to exert substantial control

---

connection with that loan, Group IX recently entered into a Forbearance Agreement and a Pledge Agreement with SolarReserve which gave an equitable interest to Group IX in SolarReserve, and other rights to act on behalf of SolarReserve.

over Tonopah through such hand-picked “independent” managers, which comprise the entirety of the Tonopah Board of Managers.

9) It now appears that the DOE can determine the fate of Tonopah without any representation of SolarReserve on the Board of Tonopah. *See* Affidavit of Troy Taylor at Exhibit “C”

10) Section 2(a)(v) of the LLC Agreement requires a unanimous vote of the managers of Tonopah before Tonopah can make major decisions for Tonopah, including institute proceedings in bankruptcy. The DOE can now secure unanimous votes of the managers.

### **Key Background Facts**

11) In March 2008, an affiliate of SolarReserve formed Tonopah as a Delaware LLC for the stated purpose of developing, owning and operating a 110 MW Solar Plant with molten salt storage located in Tonopah, Nye County, Nevada (“Crescent Dunes Project”). At the time of Tonopah’s formation, an affiliate of SolarReserve held 100% of the membership interests in Tonopah. In the Fall of 2011, Tonopah entered into various agreements with the DOE under which the DOE guaranteed a Federal Financing Bank loan to Tonopah of \$700 million to fund the Crescent Dunes Project.

12) In September 2011, Tonopah entered into an agreement (“the EPC Contract”) with Cobra Thermosolar Plants, Inc. (“CPI” or “Cobra”) for the

engineering procurement and construction of the 110 MW nominal capacity thermal solar electrical generation facility, in Tonopah, Nevada.

### **Non-Party Entities Involved**

13) SolarReserve CSP Finance, LLC (“SolarReserve CSPF”) is the sole member and owner of 100% of the membership interests in SolarReserve.<sup>4</sup>

14) SolarReserve and an affiliate of CPI, the contractor for the Crescent Dunes Project, each own 50% of the membership interests in Tonopah Solar Investments LLC.

15) Tonopah Solar I, LLC owns 26.8011% and Tonopah Solar Investments LLC owns 73.1989% of the membership interests in Tonopah Solar Energy Holdings I, LLC (“TSEH I”).

16) TSEH I owns 100% of the membership interest in Tonopah Solar Energy Holdings II, LLC, which owns 100% of the membership interests in Tonopah.

### **Start-Up of Solar Plant**

17) After entry into the EPC Contract, it took about four years for the Crescent Dunes Project to generate power.

---

<sup>4</sup> The \$90 million loan from Group IX to SolarReserve CSPF served as part of SolarReserve’s equity funding in Tonopah.

18) The Crescent Dunes Project commenced commercial operations in 2015, and with the DOE's express approval, achieved provisional acceptance on December 22, 2016.

19) As part of its approval, the DOE expressly waived all "events of default" existing up to that date.

### **DOE's Scheme to Take Control**

20) After provisional acceptance in December 2016, DOE improperly sought to amass increased control over the Crescent Dunes Project, as well as over Tonopah, purportedly based on its loan guarantee rights.

21) Prior to<sup>5</sup> a May 22, 2018 amended and restated operating agreement for Tonopah, drafted by the DOE, the DOE required that Tonopah reconstitute its Board of Managers, and orchestrated the resignation of Tonopah officers, who were associated with SolarReserve, and who had intimate knowledge of the Crescent Dunes Project and improper actions taken by the DOE.

22) As of May 22, 2018, the new board of managers of Tonopah consisted of: (1) Lee Bailey (SolarReserve Manager); (2) Cristobal Gonzalez (Cobra Manager); and two "Independent" Managers handpicked by the DOE: (3) Mark Manski; and (4) Joe Bondi.

---

<sup>5</sup> In December 2017, the DOE hired FTI Consulting, Inc., and forced the resignations of key officers of Tonopah.

23) The DOE also installed FTI Consulting, Inc. to serve as the *de facto* officers for the Crescent Dunes Project.

### **Current LLC Agreement of Tonopah**

24) On or about October 30, 2018, the Third Amended and Restated Operating Agreement for Tonopah was executed (previously abbreviated as “LLC Agreement”).

25) The LLC Agreement is Tonopah’s current operating agreement.

26) Upon information and belief, the “DOE Consent” upon which the DOE’s Notice of Default is based, and which is referenced in the LLC Agreement, was never executed along with the LLC Agreement.

### **Tonopah’s LLC Managers Prior to Notice of Default**

27) On August 5, 2019, SolarReserve, pursuant to the LLC Agreement, exercised its right to replace the SolarReserve Manager for Tonopah. In response, Tonopah’s counsel advised SolarReserve that the replacement of the SolarReserve Manager would not become effective unless and until the replacement was approved by Tonopah’s upstream entities, *i.e.*, TSEH II, TSEH I, and TSI. While SolarReserve disagreed with Tonopah’s counsel’s position, SolarReserve, while reserving its rights, requested that TSEH II, TSEH I, and TSI execute written consents authorizing and directing that Troy Taylor replace Lee Bailey as the SolarReserve Manager for Tonopah. A process which should have taken a matter of days and

which SolarReserve deemed unnecessary, took a month and-a-half to complete before Troy Taylor was installed as the new SolarReserve Manager for Tonopah.

28) Tonopah's counsel has not made the same demand on the DOE for the installment of its nominated managers as it did when SolarReserve appointed Troy Taylor as the SolarReserve Manager.

29) Within days of Troy Taylor being installed as the SolarReserve Manager for Tonopah, a process for which SolarReserve provided the DOE with notice throughout, the DOE issued the Notice of Default. By the Notice of Default, the DOE seeks to appoint two new managers to the Board of Managers for Tonopah, which gives the appearance of the DOE in complete control of Tonopah through its handpicked "independent" directors which comprise the entirety of the Tonopah Board of Managers.

30) Upon information and belief, through the Notice of Default, the DOE intends to achieve its goal of controlling Tonopah. *See* Affidavit of Troy Taylor attached as Exhibit "C."

### **Construction Problems**

31) At its inception, in 2009, Tonopah had entered into an agreement with Nevada Power Company d/b/a NV Energy ("NVE") for a Renewable Power Purchase Agreement (the "PPA") which provided for the Crescent Dunes Project to produce electrical power for the Nevada power grid for a 25-year term. On January

1, 2019, NVE sent a Notice of Potential Default to Tonopah. In June 2019, NVE notified Tonopah stating that it was terminating the PPA because Tonopah failed to produce the requisite energy levels required by the PPA, such failure being based in part on various issues with a hot salt tank, and the construction-related problems that caused problems with the operation of the plant. In response to the termination notice, Tonopah advised that the issues with the hot salt tank were the result of a force majeure as defined in the PPA and that DOE had cure rights to cure any purported defaults under the PPA. SolarReserve believes that any issues related to the hot salt tank and construction related problems were caused by CPI and its related entities, and not a force majeure event.

### **The DOE's Takeover Goals**

32) Pursuant to NVE's notice of termination sent to Tonopah, the 90-day cure period related to the termination notice of NVE expires on October 3, 2019. Upon information and belief, SolarReserve believes that in connection with DOE's purported takeover of Tonopah, on or before October 3, 2019, Tonopah now exposes SolarReserve's equity to the uncertainty of a Tonopah bankruptcy filing—with the vote of the purported new “independent” LLC Managers that the DOE recently purported to install, in conjunction with the votes of the “independent” managers previously appointed by the DOE. *See* Affidavit of Troy Taylor, attached as Exhibit “C.”

33) As previously indicated, the DOE has now appointed all four “independent” managers of the Tonopah Board of Managers, and SolarReserve no longer has a representative LLC Manager on Tonopah’s Board of Managers.

34) Thus, SolarReserve, through its SolarReserve Manager, can no longer prevent a unanimous vote for virtually any material corporate decision of Tonopah, including, but not limited to, Tonopah filing for bankruptcy which may not be in Tonopah’s best interest. Upon information and belief, DOE has restricted Tonopah’s use of existing corporate assets, including cash accounts. This has led to the Tonopah Board of Managers making a bad faith request for a capital contribution in the amount of \$75,000,000 from Tonopah’s sole member, TSEH II.

35) The net result of the DOE’s actions will be to: (i) interfere with SolarReserve’s right to a vote on Tonopah’s Board of Managers; (ii) cause the forfeiture of SolarReserve’s property rights in a \$1 billion project that it started; and (iii) wrest control of Tonopah from its equity holders.

#### **FERC Approval Not Obtained by DOE**

36) As a prerequisite to taking control of Tonopah through its Notice of Default, the DOE was required to first obtain the prior approval of the Federal Energy Regulatory Commission (“FERC”) by filing an application pursuant to Section 203 of the Federal Power Act (“FPA”).

37) Prior approval was required because the DOE's purported exercise of its rights pursuant to the Notice of Default constituted a change in control of a public utility or jurisdictional facilities within the meaning of Section 203(a)(1)(A) of the FPA.

38) The DOE did not obtain the required FERC approval prior to exercising control over Tonopah pursuant to its Notice of Default. This is another example of DOE not respecting of rights of existing stakeholders in a rush to exert control over Tonopah.

39) Therefore, because the DOE did not obtain the necessary prior approval from FERC before purporting to oust two managers of the Tonopah Board, the DOE should be prevented from attempting to hijack control over Tonopah in this manner.

## COUNT I

### **DECLARATORY JUDGMENT TO CONFIRM THAT THE RIGHT OF SOLARRESERVE TO APPOINT A MANAGER OF TONOPAH PURSUANT TO THE LLC AGREEMENT IS NOT SUPERSEDED BY THE DOE NOTICE OF DEFAULT**

40) SolarReserve repeats the foregoing paragraphs by reference.

41) Section 4.2(b) of the LLC Agreement preserves the right of SolarReserve to appoint an LLC manager to Tonopah's Board of Managers.

42) The DOE Notice of Default purports to supersede the right of SolarReserve to appoint a manager of Tonopah based on the previously referenced DOE Consent on which the DOE relies for its recent actions.<sup>6</sup>

43) The LLC Agreement includes a signature page that purports to acknowledge the terms of the DOE Consent on which the DOE relies for its recent actions. However, upon information and belief, the DOE Consent referred to in the LLC Agreement, purportedly dated as of October 30, 2018, was never executed, and SolarReserve does not even possess an unsigned copy.

44) Pursuant to Section 18-110(a) of the Delaware LLC Act, this Court has the power and the authority to confirm whether SolarReserve's designee on the Board of Managers of Tonopah, Troy Taylor, remains as an LLC Manager for Tonopah, or whether the Notice of Default recently issued by the DOE is effective for purposes of removing the SolarReserve Manager and appointing the DOE's designee as an LLC Manager for Tonopah.

45) SolarReserve seeks a declaratory judgment from this Court declaring that (1) Troy Taylor, the SolarReserve Manager, remains in place pursuant to Section 4.2(b) of the LLC Agreement, (2) the DOE's Notice of Default purporting to remove the SolarReserve Manager and appoint its own designee, is not effective, and (3) any actions taken subsequent to the Notice of Default with the newly appointed

---

<sup>6</sup> The DOE also relies on an Equity Pledge Agreement.

“independent” managers, including but not limited to the request for capital contributions, are not effective.

WHEREFORE, SolarReserve respectfully requests the Court to enter declaratory judgment in its favor as follows:

1) Declaring that the SolarReserve Manager, Troy Taylor, remains as a manager of Tonopah; and

2) Declaring that the DOE’s Notice of Default is not effective for purposes of removing the SolarReserve Manager, and is not effective for purposes of appointing its own LLC managers of Tonopah; and

3) Declaring that any actions taken subsequent to the Notice of Default with the newly appointed “independent” managers, including but not limited to the request for capital contributions, are not effective; and

4) Awarding SolarReserve the costs of this action and such other relief as is permitted under Delaware law and/or deemed equitable or otherwise appropriate

by the Court.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

By: /s/ Francis G.X. Pileggi

Francis G.X. Pileggi (Bar No. 2624)

Gary W. Lipkin (Bar No. 4044)

222 Delaware Avenue, 7th Floor

Wilmington, DE 19801

(302) 655-3667

fpileggi@eckertseamans.com

glipkin@eckertseamans.com

*Counsel for Plaintiffs*

*Of Counsel:*

Michael G. Platner, Esquire

Vincent F. Alexander, Esquire

Lewis Brisbois

110 S.E. 6th Street, Suite 2600

Ft. Lauderdale, FL 33301

Dated: October 2, 2019