

Deutsche Solar Owes \$770M In Contract Suit, Judge Rules

By **Stan Parker**

Law360, New York (July 13, 2016, 9:27 PM ET) -- A Michigan federal judge on Wednesday ruled that Deutsche Solar GmbH owes Hemlock Semiconductor Corp. \$770 million after backing out of a long-term silicon supply agreement, refusing to find the contract's damages provision unconscionable.

U.S. District Judge Thomas L. Ludington granted Hemlock's motion for summary judgment in its suit seeking to force Deutsche Solar, a subsidiary of SolarWorld AG, to make good on its promise to buy polycrystalline silicon until 2019, finding Deutsche Solar didn't meet the burden of proof to show why it shouldn't have to follow the terms of the contract it agreed to.

Judge Ludington rejected Deutsche Solar's arguments that the \$770 million request for damages was unconscionable, finding that it wasn't a penalty to be imposed, but a term of the agreement itself.

"The very nature of take-or-pay contracts is that the party furnishing the goods is entitled to payment even if it does not need to produce goods for the delivery period," Judge Ludington wrote.

He also wrote that Deutsche Solar failed to help the court arrive at any other conclusion by providing other figures to go by.

"Deutsche Solar's lack of evidence about its own calculation of damages strips the court of a starting point for assessing its claim of unreasonableness," Judge Ludington wrote.

Deutsche Solar had also argued that it should be excused from the agreement because China's participation in the solar industry created market conditions that made the contracts impracticable, but Judge Ludington wrote that the court had already rejected that argument in January in a similar dispute between Hemlock and Kyocera Corp.

Kyocera had also tried to participate in the suit against Deutsche Solar suit as an amicus curiae, but Judge Ludington rejected that bid as well in the Wednesday order. He said Kyocera's interest in the outcome of the current dispute was tied to its position in the previous case, which would prevent it from participating as an amicus curiae.

Kyocera wanted participate not as a friend of the court, but as a friend of Deutsche Solar — "as amicus germaniae solaris rather than amicus curiae" — Judge Ludington wrote.

A spokesman for Hemlock declined to comment Wednesday. Counsel for Deutsche Solar did not

immediately respond late Wednesday to a request for comment.

Hemlock Semiconductor Corp. is represented by J. Peter Coll Jr., John Ansbro, Daniel W. Robertson and Alvin Lee of Orrick Herrington & Sutcliffe LLP and Craig W. Horn of Braun Kendrick Finkbeiner PLC.

Deutsche Solar is represented by Larry K. Elliott and David F. Russey of Cohen & Grigsby PC, and Daniel P. Malone and Joseph E. Richotte of Butzel Long PC.

The case is Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, case number 1:13-cv-11037, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Mark Lebetkin.

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