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Nixon Peabody Gets OK For Deal With DC Solar Investors

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Law360 (January 26, 2023, 9:56 PM EST) — A California state court judge has approved a settlement between Nixon Peabody LLP and DC Solar investors who claimed the firm saw warning signs that the now-defunct solar power supplier was running a billion-dollar Ponzi scheme that promised payments based on sublease revenue from mobile solar generators.

Last week, Los Angeles County Superior Court Judge Elihu M. Berle signed off on the motion for good faith settlement filed by Nixon Peabody and partner Forrest David Milder, who represented DC Solar as its tax counsel. The investors have accused both Milder and the firm of being aware of the fraud perpetuated by DC Solar's principals and several others, and not taking action to stop it.

The settlement's sum has been redacted from court papers.

"The settlement is less than the $692 million in alleged out-of-pocket losses for which plaintiffs seek to hold defendants liable," Nixon Peabody's Dec. 16 motion for good faith settlement determination stated. "Despite that variance, public policy strongly supports this settlement. Nixon has litigated this case aggressively and established strong factual defenses to its own liability. Settling with Nixon removes substantial uncertainty for plaintiffs, cuts down on their costs, and — candidly — removes the most aggressive litigant from plaintiffs' path to trial."

The lawsuit at issue was launched in December 2019 by plaintiff Solar Eclipse Investment Fund III LLC, which is made up of investors who said they poured hundreds of millions of dollars into DC Solar via 29 separate "tax equity" transactions between 2011 and 2019. They further invested in DC Solar-sponsored limited liability partnerships, the majority of which investors owned.

DC Solar's business focused on making and leasing mobile solar generators, which are solar panels on wheeled trailers. DC Solar sold generators to the Solar Eclipse Investment Funds, whose investors bought membership interests by paying 30% of the generators' purchase price at close, with DC Solar seller-financing the remaining 70%.

After close, investors received nearly dollar-for-dollar tax credits. To pay down the seller-financing and make money, DC Solar was supposed to lease the generators back from the investments and sublease them to third parties, which would make payments to the company.

But DC Solar made only a small fraction of the sublease revenue from generators to fund the investors and later began selling generators that didn't exist and "roundtripping" new investor money to disguise the lease payments, the Dec. 16 motion states.

Five years ago, DC Solar found itself at the center of a criminal investigation and a host of civil lawsuits arising from a scheme orchestrated by Jeff and Paulette Carpoff, who privately owned DC Solar Solutions Inc. and DC Solar Distribution Inc. from 2009 through 2019.

Although it started out as a legitimate business, by at least 2011, the Benicia, California-based company operated a Ponzi-like scheme that defrauded investors of approximately $1 billion through misrepresentations related to the offer and sale of investments designed to make money and trigger significant tax benefits for investors.

Federal prosecutors in the Eastern District of California said that the Carpoffs and others raised $910 million from investors in their MSG business through fake lease contracts and false financial statements, and as the lies deepened, the company eventually stopped making its generators altogether but continued to accept new investments, selling thousands of units that didn't exist.

The Carpoffs executed dozens of interstate wire transfers of payments from victims to accounts they controlled. The couple was accused of using the money to fund their lavish lifestyle, including buying more than 100 luxury cars; properties in Lake Tahoe, Las Vegas, the Caribbean and Cabo San Lucas; a suite at a pro football stadium; a minor league pro baseball team; a NASCAR racecar sponsorship;

subscription jet services; and jewelry.

Jeff Carpoff was sentenced in 2021 to 30 years in prison after copping to a conspiracy to commit wire fraud and money laundering while Paulette Carpoff admitted to conspiracy to commit an offense against the United States and money laundering. The couple entered their pleas in 2020 while simultaneously settling parallel civil claims with the U.S. Securities and Exchange Commission.

Several others, including general contractor and electrician Joseph W. Bayliss and outside accountant Ronald J. Roach, were also charged and admitted to their roles in the scheme. DC Solar in 2019 filed for Chapter 11 in the Nevada bankruptcy court following an IRS and FBI raid that, it said, forced it to lay off nearly all its employees.

When the DC Solar investors filed their suit against Nixon Peabody and Milder in 2019, they argued that the firm had received information from the IRS and DC Solar itself showing a lack of third-party leasing, a circular flow of money to conceal that lack and a "re-rent" agreement between related DC Solar entities. The investors also accuse Nixon Peabody of knowing the transactions didn't perform as they were sold to the investors.

In October 2021, DC Solar bankruptcy trustee Christina Lovato, represented by Meland Budwick PA, sued Nixon Peabody, accusing it and Milder of playing a "vital role" in the scam by creating and implementing the complex, tax-advantaged renewable energy investments at its center despite having reason to suspect DC Solar's founder was lying to investors.

Last month, the firm urged Judge Berle to find that the settlement with investors was reached in good faith, noting that it had substantive defenses that could ruin the investors' chances at trial, including the fact its role was restricted to providing tax advice to DC Solar.

"Nixon would also argue at trial that plaintiffs received more information than Nixon did regarding DC Solar's subleasing activities and revenues, and that plaintiffs were not relying on Nixon to investigate or provide such information," the motion stated.

Further, Nixon Peabody claimed it has substantive defenses to any transactions before 2016, which would significantly limit the investors' damages. The firm said the investors sank $345 million into the 22 transactions that occurred prior to the date

on which Nixon Peabody said it became aware of the fraud.

Representatives for the investor plaintiffs and Nixon Peabody did not immediately return inquiries for comment Thursday.

“Ms. Lovato, the Trustee for DC Solar, is pleased Nixon Peabody did the right thing and paid a substantial and significant amount to the investors to address their damages,” a spokesperson for the trustee said in a Friday statement. “Regardless, the Trustee intends to hold Nixon Peabody fully accountable for the hundreds of millions of damages it inflicted upon its former client DC Solar by knowingly joining in Mr. Carpoff’s Ponzi Scheme. The Trustee looks forward to proving Nixon Peabody’s complicity and central role in the fraud and proceeding to trial for compensatory and punitive damages.”

Nixon Peabody’s media team issued the following statement Friday: “The Trustee’s claims against Nixon Peabody have absolutely no merit. The Court has invited an early summary judgment motion which we will file this spring.”

Nixon Peabody and Milder are represented by Elliot R. Peters, Eric H. MacMichael, Benjamin D. Rothstein, Julia L. Allen, Bailey W. Heaps, Deeva Shah and Christine M. Zaleski of Keker Van Nest & Peters LLP.

Solar Eclipse Investment Fund III is represented by Steven W. Thomas, Emily Alexander and Mark Forrester of Thomas Alexander & Forrester LLP.

The case is Solar Eclipse Investment Fund III LLC et al. v. Cohnreznick LLP et al., case number 19STCV45775, in the Superior Court of the State of California, County of Los Angeles.

Read more at:
https://www.law360.com/articles/1569844/nixon-peabody-gets-ok-for-deal-with-dc-solar-investors?copied=1