

Judge upholds rare defense verdict in \$250M+ solar investment case

A Los Angeles federal judge upheld a jury's defense verdict for CMB Export LLC, saving it \$250M+ in a rare class action by foreign investors over a Mojave Desert solar investment flop.

By Devon Belcher

A federal judge in Los Angeles upheld a rare defense jury verdict that saved an investment company over \$250 million in liability claims by a class of foreign investors who alleged the company did not deliver on promises regarding their investment in a Mojave Desert solar facility.

"It was a challenging three-week jury trial involving a high-profile technological marvel. ... It's heartening that the jury understood the complexity, stayed engaged over the several weeks and rendered a complete defense verdict after considering all of the evidence," Craig E. Holden, a partner at Lewis Brisbois Bisgaard & Smith LLP, said in a phone interview on Thursday.

"It's rare, in general, for class actions once they're certified, to go to trial because the stakes are high. But here, the court certified a fairly rare type of class action under the [Federal Rules of Civil Procedure]. And that is, specifically, Subsection 23(b)(2) and 23(c)(4). ... This is the first of its kind to be tried to a jury. For us, to try a first-of-its-kind case like this, and to have a complete and upheld defense verdict, is humbling."

In a certification ruling last year, the judge explained that "Rule 23(b)(2) allows the Court to certify a class seeking class-wide injunctive relief if 'the party opposing the class acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'"

Rule 23(c)(4), according to the judge, "provides that 'when appropriate, an action may be brought or maintained as a class action with respect to particular issues.'"

The decision was upheld by U.S. District Judge Michael W. Fitzgerald on Wednesday. However, the ruling will be appealed, according to the investors' counsel at Gaw Poe LLP.



CRAIG HOLDEN

"We respectfully disagree with the court's ruling because there was not substantial evidence supporting the verdict. Our clients intend to appeal," Gaw Poe founding partner Randolph Gaw wrote in an email.

Holden, along with several other Lewis Brisbois attorneys, successfully defended CMB Export LLC at trial last November against a 200-member investor class who accused the company of misleading them about the profitability of Ivanpah Solar Power Facility, using innovative solar software, that was built in the early 2010s. *Cai et al v. CMB Export LLC, 2:22-cv-02025* (C.D. Cal., filed March 28, 2022).

The jury found CMB did not breach its fiduciary duty of loyalty and good faith dealings regarding loans and partnership agreements in 2011 to fund the plant, which went online in early 2014.

The investor class, who used the government's EB-5 visa program to enter the deal, alleged the plant did not generate the amount of revenue that was anticipated by BrightSource, an energy company involved in the facility's funding. As a result, they argued they did not receive a return on their collective \$90 million loan investment and were taken advantage of.

CMB argued it acted properly, in accordance with partnership agreements, and made fair and reasonable decisions at the time to protect the plaintiffs' investments. The company further argued that since the investors were able to obtain green cards because of the deal, they received a substantial benefit from the matter.

The EB-5 visa program allows immigrant investors to become permanent residents if they invest in a U.S. business that creates jobs. During the trial, CMB's counsel identified this as the plaintiffs' primary reason for investing into a group the company created, "Group VII," which allows foreign nationals to participate in the program.

Holden said he and his team were able to simplify the case for the jury by contextualizing the ambitiousness of the solar plant's ingenuity, while including the ever-changing landscape of technology and relations between other countries and the U.S.

"I think hindsight is not always 20/20 and it's difficult to second-guess investment decisions years after the fact," Holden said. "That's why I think we were successful in establishing that what the plaintiffs were doing was akin to playing Monday morning quarterback after your chosen play design failed. And I think that resonated with the jury."

However, the investors' counsel argued CMB's actions were in bad faith. In the complaint, they claimed that in 2018, they received an audit report that revealed CMB concealed or obfuscated its activities from "Group VII" and gave

false reassurance to the group's partners that loan modifications and bridge loans were made to ensure the borrowed money would be repaid.

In the investors' motion for a new trial, Gaw Poe partner Mark W. Poe argued their trial evidence demonstrated any reasonable jury should have found that CMB was liable for these alleged breaches because, for example, the company knowingly acted against the class' interests over the handling of a failed transaction between BrightSource and a Chinese investment group, Baoneng Group.

"It was unequivocally established at trial that CMB causing 'Group VII' to enter into the second loan modification was self-dealing by CMB - this new agreement modified the existing payment priorities ... so that [CMB owner Patrick F. Hogan] could make approximately \$9 million in liquidation premiums from the anticipated sale of BrightSource to Baoneng," the motion stated.

"CMB's failure to notify 'Group VII' about the BrightSource lending opportunity - and CMB's subsequent assignment of the 2017

HFT Bridge Loans to 'Group VII' to make it responsible for repayment of those loans - violated the plain language of ... the Limited Partnership Agreement."

However, the motion was denied in a separate ruling by Fitzgerald on Wednesday, who did not order the parties to submit findings of fact and conclusions of law.

"Perhaps if there were any ambiguity in the jury's verdict in this matter, the court may have requested proposed findings to minimize ambiguity. But in the face of a jury verdict in

which all of plaintiffs' theories were rejected, it is difficult to imagine why the court would direct the parties to go to the trouble of submitting the proposed findings of fact and conclusions of law," Fitzgerald wrote.

"The jury's verdict is clear. Even if the court declined to strike the proposed findings of fact and conclusions of law, the great majority of them could not be adopted in a manner consistent with the jury's verdict."

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