UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

ALLCO RENEWABLE ENERGY LIMITED, OTTER CREEK SOLAR LLC, THOMAS MELONE and PLH VINEYARD SKY LLC Plaintiffs, v. JOSEPH KULKIN, JANE DOES 1-3 and JOHN DOES 1-3. Defendants.	Case No. 2:20-cv-44 **COMPLAINT FOR DEFAMATION, INJURIOUS FALSEHOOD AND TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS**

NATURE OF THE ACTION

1. This diversity action arises out of a defamatory e-mail communication made by Defendants Joseph Kulkin and his co-conspirators Jane Does 1-3 and John Does 1-3 (the "Defendants") to Isovolta, Inc., a Vermont corporation, and its affiliates (collectively, "Isovolta") on November 22, 2018 (attached hereto as **Exhibit A**, the "November 22nd Email"). That EMail was false and was sent with the malicious intention of defaming the Plaintiffs and preventing the Plaintiffs from closing on a prospective land access deal with Isovolta whereby the Plaintiffs would gain access to their proposed solar facility site (the "Solar Site") by crossing Isovolta's land by easement or otherwise (the "Land Deal"). The Plaintiffs had been working on the Land Deal with Isovolta since December of 2015.

2. Plaintiffs bring this action to obtain damages to remedy, among other things, the Defendants' defamatory statements about Plaintiffs and Defendants' intentional interference with the Land Deal.

3. As a direct result of Defendants' wrongful act, Defendants are liable to Plaintiffs for all resulting costs and losses, including the economic losses related to (i) delay in constructing the solar projects, (ii) the delay in the closing of the Land Deal, (iii) the delays caused by having to use an alternative access point to access Plaintiffs' Solar Site until the Land Deal was closed, and (iv) the costs and losses resulting from the loss of contracts or permits from the inability to use the access that would have been provided by the Land Deal in a timely manner.

PARTIES

4. Allco Renewable Energy Limited ("Allco") and the other Plaintiffs are developers, owners and operators of solar electric facilities. Allco's corporate mission is to combat climate change, enforce laws that benefit developers of solar energy QFs on a broad scale, and open up markets broadly to solar QFs by overcoming the traditional reluctance of utilities to purchase from QFs. Allco's mission includes fighting the devastating environmental impacts from burning fossil fuels, including without limitation, the adverse effects that continued use of fossil-fuel generation will have on humans and endangered species. *See, e.g., Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. 2019) (declaring California's implementation of PURPA under its Re-MAT program invalid); *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. 2016) *aff'd* 875 F.3d 64 (1st Cir. 2017) (declaring Massachusetts' implementation of PURPA invalid); *Windham Solar LLC*, 156 FERC ¶ 61,042 (2016), *Windham Solar LLC,* 157 FERC ¶61,134 (2016) (declaring Connecticut's implementation of PURPA invalid); *Windham Solar LLC v. Pub. Utils. Regulatory Authority*, Docket HHD-CV-HHD-CV19-6119928-S (Conn. Sup. Ct. filed November 13, 2019) (challenging the approval of incentives for fossil fuel generation under Connecticut's public trust doctrine). Allco Renewable Energy Limited is a Delaware corporation with its principal place of business in Florida.

5. Plaintiff Otter Creek Solar LLC ("OCS") is the owner and developer of the Otter Creek 1 (the "OC1 Project"), the Otter Creek 2 (the "OC2 Project") and the Otter Creek 3 (the "OC3 Project") solar projects in Rutland, Vermont and other solar projects in Vermont. Plaintiff OCS is party to a contract with VEPP Inc. ("VEPP") dated August 27, 2018, for the sale of wholesale sale of energy from OCS' OC1 project. Plaintiff OCS is party to a contract with VEPP dated February 3, 2018, for the sale of wholesale sale of energy from OCS' OC2 project. Plaintiff OCS is party to a contract with VEPP dated January 30, 2019, for the sale of wholesale sale of energy from OCS' OC3 project. Otter Creek Solar LLC is wholly owned by Allco Finance Limited, which is a Delaware corporation with its principal place of business in Florida.

6. Plaintiff PLH Vineyard Sky LLC ("PLH") is a Florida limited liability company (f/k/a PLH LLC) with an office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, Vermont 05482, and is the owner of the site of the OC1, OC2 and OC3 solar projects.

7. Plaintiff Thomas Melone is a resident of Florida and the sole owner of Allco Renewable Energy Limited and PLH.

8. Defendant Joseph Kulkin is a resident of Bennington, Vermont and the creator and administrator of a Facebook Group entitled, "The Politics of Bennington."

9. Defendants Jane Does 1-3 are unknown co-conspirators of Joseph Kulkin that, upon information and belief, have aided and abetted Kulkin's defamatory and tortious conduct.

10. Defendants John Does 1-3 are unknown co-conspirators of Joseph Kulkin that, upon information and belief, have aided and abetted Kulkin's defamatory and tortious conduct.

FACTS

11. The Plaintiffs have spent significant time, effort and resources on developing the Otter Creek solar facilities in Rutland since they purchased the Solar Site, a 54.61-acre parcel of land off of Cold River Road in Rutland, on September 26, 2014. The Solar Site can be accessed

from Cold River Road to the east of the Site. Notwithstanding the ability to access the Solar Site from Cold River Road, the Plaintiffs planned to clear the Solar Site and construct the facilities from an access point off of Windcrest Road in the southwest corner of the Solar Site. In order to obtain access to the Solar Site from Windcrest Road, the Plaintiffs needed to obtain either an easement or a lot line adjustment from its neighbor, Isovolta for a small section of land—0.03 acres.

12. The Plaintiffs' business relationship with Isovolta started in December of 2015 when Ecos Energy LLC ("Ecos"), on behalf of OCS, began negotiations for the Land Deal. On January 16, 2016, Seth Howard, the facilities manager of Isovolta, made the following statement to Ecos: "I still do not see any reason why we would not be interested in finding an agreement, it's simply a matter of formalities." Dozens of calls and emails between Plaintiffs' agents and Seth Howard solidified the business relationship and kept the process moving promptly through 2016 continuing into 2017. Ecos met in-person with Seth Howard in Rutland in March of 2017 and both parties agreed there was a path forward for finalizing the Land Deal.

13. On August 23, 2016, Plaintiffs filed petitions for certificates of public good ("CPGs") for the OC1 and OC2 Projects with the Vermont Public Utility Commission (the "PUC"). A CPG is required under 30 V.S.A. §248 for an electric generation facility to be constructed in Vermont. The petitions filed by the Plaintiffs described that site clearing and construction would occur through an access road off of Windcrest Road and that permanent access driveways for operation, maintenance and decommissioning of the solar facilities would be installed off of Cold River Road for OC2 and Windcrest Road for OC1. On February 27, 2018, the Plaintiffs were granted CPGs for the OC1 and OC2 Projects by the PUC.

14. At the time the CPGs were issued, the Plaintiffs' business relationship with Isovolta still had not resulted in the closing of the Land Deal. The process with Isovolta was slow going

because this was a very small transaction for Isovolta that could be approved only by their corporate offices in Austria, which had to approve all real estate transactions, no matter the size. As such, it was not until early July 2018 that Seth Howard informed Plaintiffs that the Land Deal was still supported by the Isovolta Rutland office but he needed to get final approval from 'corporate,' which he stated meant the Isovolta board of directors in Austria.

15. Thereafter the parties proceeded to finalize the form of access (i.e. easement or lot line adjustment) and resolve land issues that popped up such as whether Windcrest Road east of the railroad tracks was a town or a private road. Those issues were resolved by late Fall and the Land Deal was ready to close. It was during this time that the Defendant Kulkin contacted Isovolta by sending the November 22 Email. Isovolta became non-responsive in the wake of the November 22 Email. Without receiving any response from Seth Howard in late fall of 2018 or early winter of 2019 after multiple attempts, the Plaintiffs proceeded with clearing the Solar Sites with access off of Cold River Road.

16. On February 1, 2019, Ecos decided to contact the Isovolta Austrian headquarters directly but was still unable to get any response. As a result, the Melones contacted a former colleague who worked with them on railcar financings for OBB, the Austrian National Railway. He was able to make contact with the Austrian headquarters and a meeting was scheduled in person in Rutland for March 2019 with Seth Howard and an Austrian executive. That meeting occurred on March 27, 2019, and even though Isovolta appeared willing to re-engage with the Land Deal, it was clear that Isovolta had taken on a different negotiating position with the Plaintiffs in the wake of the November 22nd Email, requiring the Plaintiffs to agree to pay an increased price in order to finalize the Land Deal.

17. Once an agreement was made, Isovolta's supervisory board approval was given on April 24, 2019, after which an error was discovered in the deed description which required a re-

approval from the supervisory board, which occurred on July 17, 2019, after which the agreement was promptly executed on July 18, 2019. Despite the Defendants' tortious interference in the process which caused an eight-month delay, Plaintiffs were ultimately able to close the lot line adjustment at a higher price, but at this point the damage from the November 22 Email had already been done. But for the November 22 Email, the Land Deal would have closed in late 2018, would have been less expensive for the Plaintiffs, and the Plaintiffs would not have had to access the Solar Site from Cold River Road in the interim.

18. The November 22 Email proximately caused further damage to Plaintiffs. One of Kulkin's allies in his efforts to stop Plaintiffs' solar energy projects is Annette Smith of an organization that calls itself "Vermonters for a Clean Environment."

19. On January 30, 2019, Annette Smith filed a complaint with the PUC alleging that the Plaintiffs were violating the CPGs by accessing the Solar Site from Cold River Road for site clearing. The PUC opened case 19-1596 in response to the complaint.

20. On June 13, 2019, the PUC issued an order in case no. 19-1596 opening an investigation into whether OCS violated Commission Rule 5.408 or any conditions in its CPGs for OC1 or OC2 by using Cold River Road to access the solar site instead of Windcrest Road. The PUC's June 13, 2019, order caused an immediate cessation of the about to begin construction of the OC1 and OC2 projects, causing substantial damage to Plaintiffs. Ultimately the PUC determined that the use of Cold River Road for clearing purposes was not a violation of the CPGs.

21. Although the PUC ultimately determined that the use of Cold River Road did not violate the CPGs, the commencement of the Investigation precluded OCS from proceeding with the construction of the projects. The PUC threatened to revoke the CPGs and/or the power purchase agreements ("PPAs") for the projects and OCS could not proceed with construction with those threats looming over the projects. Solar projects require both a permit and a PPA (or some

other long-term purchase of energy or environmental attributes at adequate rates) in order to obtain financing to build the project. Because the PUC was threatening to remove one or both, the projects could not obtain financing and could not be constructed.

22. Making matters worse, the cascading damage from the Kulkin email has reached the point where the PUC directed VEPP to terminate the PPAs for the OC1 project. Further damage may also result from PUC's actions related to the PPA for the OC2 project.

23. But for the Defendants' defamatory statements and tortious interference with the Land Deal, (i) the Land Deal would have closed at the end of 2018 at a lower cost to the Plaintiffs, (ii) the clearing of the Solar Site that occurred in early 2019 would have occurred from off of Windcrest Road rather than off of Cold River Road, (iii) the PUC's investigations into the alternative use of Cold River Road, which precluded construction of the OC1 and OC2 Projects, would never have occurred, and (iv) the OC2 Project would have been constructed in calendar year 2019 in advance of the commissioning milestone of February 2, 2020.

24. Kulkin has also established a pattern of making and publishing to his Facebook group called the "politics of Bennington," false, malicious, outrageous and reprehensible defamatory statements against Plaintiffs, such as, on January 4, 2016—"Solar Arrays: Melone… the Town stepped up to the plate, albeit 13 months late, and took a few whacks at scumbag Tom Melone of Allco;" on May 25, 2016—"Tom and Mike Melone … threatened [Libby Harris] with unspeakable violence;" and September 14, 2018—"the Melones [are], pigs of the highest order."

JURISDICTION AND VENUE

25. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because of diversity of citizenship under 28 U.S.C. § 1331 and the amount in controversy exceeds $75,000.

26. This Court has personal jurisdiction over Defendants because upon information and belief all Defendants reside in Vermont.

27. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2) because a substantial part of the events giving rise to this action occurred in the District of Vermont.

CLAIMS FOR RELIEF

COUNT I

TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

28. Plaintiffs restate and incorporate by reference each and every allegation in preceding paragraphs as if fully set forth herein.

29. Under Vermont law, the elements of tortious interference with a prospective contractual relationship are (1) the existence of a valid business relationship or expectancy; (2) knowledge by the defendant of the relationship or expectancy; (3) an intentional act of interference on the part of the defendant; (4) that the defendant interfered either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair, or improper; (5) damage to the party whose relationship or expectancy was disrupted; and (6) proof that the interference caused the harm sustained. *See Gifford v. Sun Data, Inc.,* 165 Vt. 611, 613 n.2, 686 A.2d 472 (1996). The facts of this case plainly demonstrate the existence of each of these elements.

30. The Plaintiffs had a valid business relationship with Isovolta which began in December of 2015 when the parties entered into discussions regarding the Land Deal. Defendants were aware of this relationship between Plaintiffs and Isovolta and intentionally interfered with it, as demonstrated in the November 22 Email. The November 22 Email was a false and defamatory statement. The November 22nd Email ends with the statement: "I can put you in touch with someone who understands every aspect of this and will gladly explain the finer details." Defendant Kulkin makes it clear that these statements are not his opinion but are based on factual content that

can be verified by a third party and that he is actively working with others, who upon information and belief, are Jane Does 1-3 and John Does 1-3. The Defendants sent the November 22 Email with the malicious intent of harming the Plaintiffs and did so in a manner which was dishonest, unfair and improper. The November 22 Email caused Isovolta to cease negotiations with Plaintiffs for a period of approximately 4 months, resulting in the Plaintiffs having to pay an increased purchase price for the Land Deal, a delay in the construction of the OC1 and OC2 projects, and the loss or potential loss of PPAs for the projects.

31. But for the Defendants' defamatory statements and tortious interference with the Plaintiffs' prospective contractual relationship with Isovolta and the Land Deal, (i) the Land Deal would have closed at the end of 2018 at a lower cost to the Plaintiffs, (ii) the clearing of the Solar Site that occurred in early 2019 would have occurred from off of Windcrest Road rather than off of Cold River Road, (iii) the PUC's investigations into the alternative use of Cold River Road, which precluded construction of the OC1 and OC2 Projects, would never have occurred, (iv) the OC2 Project would have been constructed in calendar year 2019 in advance of the commissioning milestone of February 2, 2020, and (v) the Plaintiffs would not have lost or potentially lost the power purchase agreements for its solar projects in Rutland.

32. As a result, Plaintiffs are entitled to compensatory, consequential, speculative and punitive damages proximately caused by, and that may in the future be proximately caused by, the Defendants' conduct.

COUNT II

DEFAMATION

33. Plaintiffs restate and incorporate by reference each and every allegation in preceding paragraphs as if fully set forth herein.

34. Under Vermont law, the elements of a defamation claim are: (1) "a false and defamatory statement concerning another"; (2) "some negligence, or greater fault, in publishing the statement"; (3) "publication to at least one third person"; (4) "lack of privilege in the publication"; (5) "special damages, unless actionable per se"; and (6) "some actual harm so as to warrant compensatory damages." *Russin v. Wesson*, 2008 VT 22, ¶ 5, 183 Vt. 301, 303, 949 A.2d 1019, 1020 (quoting *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1168 (Vt. 1983)). The facts of this case demonstrate the existence of each of these elements.

35. Defendants' November 22nd Email contains two false and defamatory statements: (1) "The Melones are cancerous Wall Street snakes who have infected Vermont and if you get involved with them you will find yourself on the bad end of several lawsuits," and (2) "This has everything to do with how the Melones treat people –like garbage – in order to get what they want." A communication is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community *or to deter third persons from associating or dealing with him*." *Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766, 778 (D. Vt. 1993) (quoting *Weisburgh v. Mahady*, 147 Vt. 70, 511 A.2d 304, 306 (Vt. 1986)) (emphasis added). Clearly, the intent of the November 22nd Email was to do both.

36. These published statements made by Defendants further suggest that they are based upon undisclosed facts. In fact, the November 22nd Email ends with the statement: "I can put you in touch with someone who understands every aspect of this and will gladly explain the finer details." Defendant Kulkin makes it clear that these statements are not his opinion but are based on factual content that can be verified by a third party and that he is actively working with others, who upon information and belief are Jane Does 1-3 and John Does 1-3. In addition, these statements were made with negligence and/or greater fault as they were clearly made maliciously by the Defendants with the specific intent of both harming each of the Plaintiffs' respective

reputations and deterring Isovolta from engaging in any business dealings with the Plaintiffs and with zero regard for the truth. *See Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1169 (Vt. 1983) (requirement of negligence or greater fault element is satisfied upon a finding that the statement was made with malice).

37. There is also no privilege in the communication. There is no special relationship between Defendants and Isovolta and the communication was made solely with malicious intent to injure the Plaintiffs. *Id.* at 1169. In addition, the November 22nd Email constitutes libel as a matter of law because (i) it was intended to be and was injurious to the Plaintiffs' business and (ii) it imputes the crime of filing frivolous lawsuits onto the Plaintiffs. Lastly, there is actual harm to the Plaintiffs because the November 22nd Email caused Isovolta to cease negotiations with Plaintiffs for a period of approximately 4 months, resulting in the Plaintiffs having to pay an increased purchase price for the Land Deal, a delay in the construction of the OC1 and OC2 projects, and the loss or potential loss of PPAs for the projects.

38. But for the Defendants' defamatory statements, (i) the Land Deal would have closed at the end of 2018 at a lower cost to the Plaintiffs, (ii) the clearing of the Solar Site that occurred in early 2019 would have occurred from off of Windcrest Road rather than off of Cold River Road, (iii) the PUC's investigations into the alternative use of Cold River Road, which precluded construction of the OC1 and OC2 Projects, would never have occurred, (iv) the OC2 Project would have been constructed in calendar year 2019 in advance of the commissioning milestone of February 2, 2020 and (v) the Plaintiffs would not have lost or potentially lost the power purchase agreements for its solar projects in Rutland.

39. As a result, Plaintiffs are entitled to compensatory, consequential, speculative and punitive damages proximately caused by, and that may in the future be proximately caused by, the Defendants' conduct.

COUNT III

INJURIOUS FALSEHOOD

40. Plaintiffs restate and incorporate by reference each and every allegation in preceding paragraphs as if fully set forth herein.

41. The elements of a claim of injurious falsehood are (i) the publication of a false statement harmful to the interests of another, (ii) the actor intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (iii) the actor knows that the statement is false or acts in reckless disregard of its truth or falsity. *Restatement (Second) of Torts*, § 623A. The facts of this case demonstrate the existence of each of these elements.

42. But for the Defendants' false and malicious statements, (i) the Land Deal would have closed at the end of 2018 at a lower cost to the Plaintiffs, (ii) the clearing of the Solar Site that occurred in early 2019 would have occurred from off of Windcrest Road rather than off of Cold River Road, (iii) the PUC's investigations into the alternative use of Cold River Road, which precluded construction of the OC1 and OC2 Projects, would never have occurred, (iv) the OC2 Project would have been constructed in calendar year 2019 in advance of the commissioning milestone of February 2, 2020, and (v) the Plaintiffs would not have lost or potentially lost the power purchase agreements for its solar projects in Rutland.

43. As a result, Plaintiffs are entitled to compensatory, consequential, speculative and punitive damages proximately caused by, and that may in the future be proximately caused by, the Defendants' conduct.

PRAYER FOR RELIEF

For the reasons stated, Plaintiff respectfully requests the following relief:

a. Grant judgment in favor of Plaintiffs and against Defendants;

b. Award Plaintiffs general and punitive damages as requested herein;

c. Award Plaintiffs their reasonable attorney fees; and

d. Grant Plaintiffs such other relief as is just and appropriate.

Dated: March 18, 2020

Respectfully submitted,

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