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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Solyndra Residual Trust, by and through its Liquidating Trustee, R. Todd Neilson,

Plaintiff,

v.

Suntech Power Holdings Co., Ltd., Suntech America, Inc., Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc.,

Defendants.

Case No. CV-12-05272 (SBA) (EDL)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

Date: June 4, 2013
Time: 1:00 p.m.
Place: Oakland Courthouse, Courtroom 1 – 4th Floor

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MEMORANDUM OF POINTS AND AUTHORITIES

In this case, The Solyndra Residual Trust ("Solyndra") alleges a conspiracy whereby Defendants, acting in concert, undertook to dominate the solar rooftop market in the U.S. and drive Plaintiff and almost the entire U.S. solar industry out of business. Defendants have now moved to dismiss the Complaint. This Court should deny Defendants' motion given:

First, Defendants' argument that such a conspiracy is "implausible" ignores: a) that all Defendants embarked upon a scheme to export more than 95% of their products and flood the U.S. market, despite the desperate need for solar panels in their home country—with none of them pursuing an alternative China market strategy; b) Defendants' remarkably parallel predatory pricing and identical price movements over time; c) a Trina executive and whistleblower admitting below-cost sales; d) Defendants Trina and Yingli sharing a corporate headquarters in the Cayman Islands; e) Suntech's CEO and Chairman admitting to selling below cost to dominate the U.S. market; f) U.S. governmental determinations—fully litigated by Defendants—that they dumped solar panels in the U.S. at less than fair value; g) Defendants' senior executives' participation in trade association meetings with the stated purpose of "coordination and collaboration," and more.

Second, Defendants' argument that the Complaint lacks requisite details of the "express agreement" to conspire ignores that the law is plainly to the contrary.

Third, Defendants raise a series of straw men—all of which should be flatly rejected. For example, Defendants argue that Solyndra fails to plead "recoupment" of monopoly profits—even though there is no requirement to do so under Section 1 of the Sherman Act or the Cartwright Act. Similarly, Defendants claim that Solyndra's tortious interference claims fail because Solyndra does not allege any "independently wrongful conduct;" yet, Defendants conveniently ignore that they have already been found guilty of dumping below fair market value by both the ITC and DOC, and, separately, that the Complaint charges independent wrongful conduct through violations of the Sherman Act, the Cartwright Act, and the Unfair Practices Act.

Fourth, Defendants argue that Solyndra was a victim of "vigorous competition" and then attempt to argue that there was no antitrust injury as there was allegedly no predation. Such a circular argument necessarily raises factual issues, and further ignores Solyndra's well-pled

allegations that Defendants eliminated virtually all competition in the rooftop solar market—with the contemporaneous bankruptcy of more than 10 solar companies while simultaneously growing their market share from a few percentage points to market domination—all on an inferior product.

Fifth, Solyndra has adequately pled the existence of a relevant geographic and product market recognized by the market participants, industry analysts, the agencies charged with measuring injury to competition, and more.

In the end, Defendants' motion should be denied and the parties should complete discovery and proceed to trial forthwith.

FACTUAL BACKGROUND

I. THE PARTIES.

Prior to being run out of business by Defendants' illegal conspiracy, Solyndra manufactured thin-film photovoltaic solar panels for the commercial and industrial rooftop market. (Am. Compl. ¶ 13.) Solyndra's solar panels provided greater sunlight collection, more competitive energy generation, and lower installation costs than traditional polysilicon-based panels. (*Id.* ¶¶ 13, 58.) Solyndra represented a pinnacle of American innovation, being recognized by the Massachusetts Institute of Technology as one of the "50 Most Innovative Companies in the World" and by THE WALL STREET JOURNAL in its article "The Next Big Thing: Top 50 Venture Backed Companies." (*Id.* ¶ 68.)

Standing in contrast to Solyndra are Defendants, who sold hundreds of millions of dollars of basic polysilicon solar panels in the U.S. each year. Suntech Power Holdings Co., Ltd. is the world's largest producer of solar panels and Suntech America, Inc. is its wholly-owned subsidiary (collectively, "Suntech"). (*Id.* ¶¶ 14-15.) Trina Solar Limited is a leading producer of solar panels and Trina Solar (U.S.), Inc. (collectively, "Trina") is its wholly-owned subsidiary. (*Id.* ¶¶ 16-17.) Yingli Green Energy Holding Co. is one of the largest solar panel manufacturers, and Yingli Green Energy Americas, Inc. (collectively, "Yingli") is its wholly-owned subsidiary. (*Id.* ¶¶ 18-19.) The U.S. government found all Defendants illegally dumped solar panels in the U.S. to the material injury of American manufacturers such as Solyndra. (*Id.* ¶¶ 14, 16, 18.)

The parties, and other U.S. solar manufacturers that Defendants drove out of existence,

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competed in the commercial and industrial rooftop market (the "CIR Market") in the U.S. (*See id.* ¶ 27.) This market is distinguished by the fact that solar panels used here are installed where the power is actually consumed (thus eliminating the need for a centralized generation system and distribution infrastructure) and by unique structural, spatial, and weight restraints of this market. (*Id.* ¶¶ 27, 31.) Further, the U.S. market is treated as a distinct market from others around the world by solar industry analysts, by the U.S. government, and even by Defendants. (*See id.* ¶¶ 33-34.)

II. DEFENDANTS CONSPIRE TO ELIMINATE AMERICAN COMPETITION.

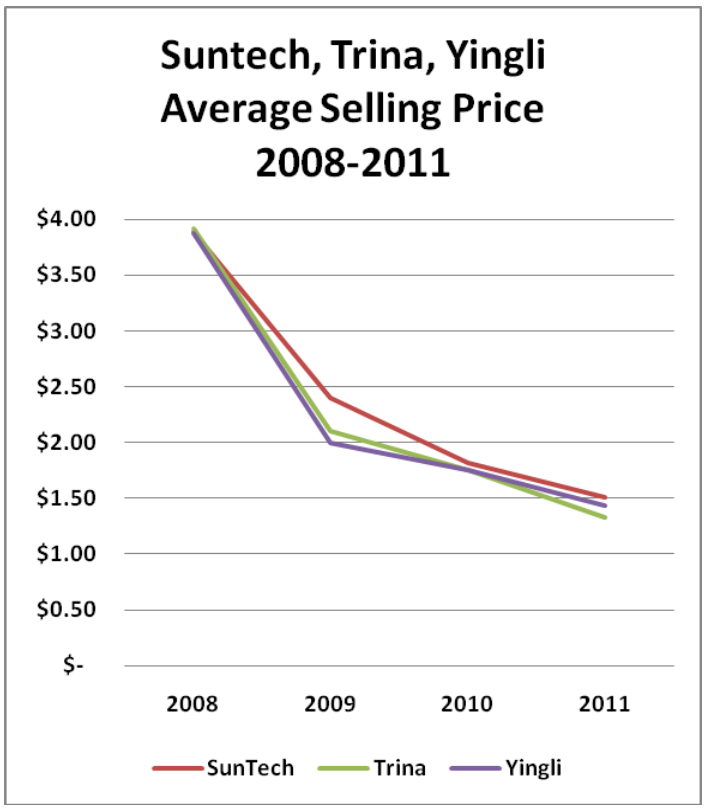
Threatened by the rise of innovative solar panels produced by U.S. manufacturers such as Solyndra, Defendants entered into a conspiracy with each other and with key suppliers and lenders in order to eliminate competition in the CIR Market. (*Id.* ¶¶ 74, 76.) The centerpiece of this unlawful cartel was the Defendants' decision to conspire together to export over 95% of their production ($20 billion of panels in 2010 alone), including to the U.S., rather than using their capacity to satisfy China's unmet energy needs. (*Id.* ¶¶ 22, 100.) Rational economic behavior would have Defendants sell in their home country where they would not encounter substantial international shipping costs. (*See id.* ¶ 135.) Instead, Defendants sent massive exports to the U.S. for a clear purpose—to drive American solar panel manufacturers (and their attendant technological innovation) out of business. (*Id.* ¶ 100.) Defendants' dumping far outstripped U.S. demand and actual market conditions—a fact ignored by Defendants but already determined by the ITC.[1] (*See* Final ITC at 29.)[2] Additionally, Defendants have admitted to selling their solar panels in the U.S. market at prices that are below costs (in order to gain U.S. market share)—action that is again contrary to rational economic behavior. (Am. Compl. ¶¶ 161-62.)

Defendants' conspiracy was furthered by China New Energy, a trade association with the stated goal of "cooperation and collective assistance" among its members, including Defendants.

[1] The Court may take judicial notice of the ITC and DOC determinations. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *Lane v. Wells Fargo Bank N.A.*, No. C 12-04026 WHA, 2013 WL 269133, at *2 (N.D. Cal. Jan. 24, 2013) (taking judicial notice of federal agency documents); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 26 F. Supp. 2d 1022, 1024 (S.D. Ohio 1998) (taking judicial notice of ITC determination).

[2] Final ITC is available at http://www.usitc.gov/publications/701_731/pub4360.pdf. Relevant excerpts are attached as Ex. 1.

(*Id.* ¶ 86.) China New Energy's meetings served to facilitate "collaborative efforts between the members." (*Id.* ¶¶ 87, 89, 95.) For example, at the second forum, Shi Zhengrong, Suntech's CEO and Chairman, specifically discussed how to make ***Chinese solar manufacturers*** into the "world's outstanding *brand*." (*Id.* ¶ 91.) And, at the third meeting, Defendants' top executives discussed further developing "High-end dialogue between top leaders of PV enterprises." (*Id.* ¶ 93.) Following these and other meetings,[3] Defendants agreed to and did export 95% of their production,



and moved their prices in tandem as demonstrated below. (*Id.* ¶¶ 78-79.)

Defendants' conspiracy is further evidenced by their parallel pricing and export conduct that defied rational economic principles and notions of independent conduct. For example, demand for solar panels in the U.S. was expected to double or even triple (*id.* ¶¶ 82-84), which, according to rational economic principles, should have caused an increase in prices. (*Id.* ¶ 81.) Yet, in concerted fashion, Defendants slashed their prices by over 60% as demonstrated above. (*Id.* ¶ 78.) Defendants

[3] Defendants' conspiracy was not only furthered by meetings of China New Energy (*see* Am. Compl. ¶ 97), but the spirit of "cooperation" that flowed between Defendants. For example, sales executives at Trina and Suntech regularly met, traveled, and socialized together. (*Id.* ¶ 98.)

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attempt to explain away these facts, but there is simply no rational explanation for their conduct as they all moved together contrary to actual demand. (*See, e.g.*, Final DOC at 27-28 ("[S]hipments increased at a rate greater than that of U.S. producers indicat[ing] that there were other reasons for [Respondents'] growth. Thus, the record does not support Suntech's and Trina's assertions regarding the role of the incentives in the import surges at the end of 2011.").)[4]

Defendants were aided in their conspiracy by a number of other entities in addition to China New Energy, including polysilicon suppliers and banks, who, like Defendants, participate in a non-market economy motivated by maximizing employment and executive compensation. (Am. Compl. ¶¶ 23-24, 181.) Further, the ITC and DOC have already determined that Defendants received (i) polysilicon from co-conspirator suppliers at unfairly low prices and (ii) loans from co-conspirator banks at below-market rates. (*Id.* ¶ 137.) These co-conspirators thus absorbed Defendants' costs, which are costs borne by the conspiracy itself. (*Id.* ¶ 138.) For example, instead of requiring Defendants to repay loans when they became due, the co-conspirator banks employed an "extend and pretend" scheme which allows Defendants to escape repayment of below-market loans. (*Id.* ¶ 111.)

III. DEFENDANTS' CONSPIRACY DESTROYS AMERICAN COMPETITION.

Despite a growing market for solar panels, at least a dozen major American solar manufacturers are out of business or have closed plants because of Defendants' illegal cartel. (*Id.* ¶¶ 171, 174.) Americans have been harmed by the significant reduction in consumer choice and technological innovation (and the concomitant loss of thousands of U.S. jobs). (*Id.* ¶¶ 151, 176-80.) Prior to Defendants' successful conspiracy, consumers had a broad array of technological choice, including Solyndra's cylindrical solar panels, Energy Conversion Devices' flexible solar laminates, and Defendants' traditional polysilicon solar panels. (*Id.* ¶¶ 176-79.) Now, the American consumer is left largely with the basic and least-innovative technology available—Defendants' polysilicon solar panels. (*Id.* ¶ 179.) This point is highlighted by the fact that of the 270 times that the solar efficiency barrier has been broken by a technological innovation, never once has it been done by a

[4] Final DOC is available at http://ia.ita.doc.gov/frn/summary/prc/2012-25564-1.pdf. The quoted excerpts are attached as Ex. 2.

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Chinese firm. (*Id.* ¶ 180.) In contrast, U.S. firms (many of which are now out of business) are responsible for more than 70% of those innovations. (*Id.*)

Not only has the market itself been harmed by Defendants' conspiracy, but Solyndra suffered a particularly acute injury. Competing fairly, Solyndra simply could not keep pace with the illegal prices charged by Defendants pursuant to their conspiracy, despite long-term agreements for virtually all its production. (*See id.* ¶ 79.) Solyndra lost all of its existing and potential customers because of Defendants' illegal conduct, including millions of dollars lost in agreed-upon sales due to Defendants' tortious interference. (*See id.* ¶¶ 157-59, 184-215.) For example, Solyndra's customers were told by Defendants that if they honored their agreements with Solyndra, they too would be forced out of business by competition from businesses that sourced panels from Defendants at irrationally low prices. (*Id.* ¶ 191.)

IV. THE U.S. GOVERNMENT FINDS DEFENDANTS GUILTY OF DUMPING.

In the fall of 2011, the ITC and DOC opened investigations into allegations that Chinese companies, including Defendants, received illegal subsidies and illegally dumped solar panels on the U.S. market. (*Id.* ¶ 124.) These investigations involved more than a year of discovery covering a wide range of topics, including Defendants' input and production costs, U.S. prices, capacity, and exports, lengthy briefing by the parties, including Defendants, and live testimony by Defendants' top executives. (*Id.* ¶¶ 126-28; *see also* ITC Disc. Mot., DKT No. 45.)

After this extensive investigation, the DOC determined that Defendants dumped solar panels into the U.S. at less than fair value, and imposed massive duties of up to 31% on their imports. (Am. Compl. ¶¶ 130, 134.) Evidence was presented that "the opportunities for our 'Made in the USA' cells and modules have been extremely limited in 2011 due to foreign competitor products being priced below our cost even when using highly automated equipment and low cost materials," and that Defendants priced their "products considerably below the cost of the raw materials needed to assemble them." (Preliminary ITC at VI-8-9.)[5] The DOC also determined that Defendants received substantial illegal subsidies from polysilicon suppliers and preferential loans at below-market rates

[5] Preliminary ITC is available at http://www.usitc.gov/publications/701_731/pub4295.pdf. Quoted excerpts are attached as Exhibit 3.

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from Chinese banks, and that these illegal subsidies accounted for nearly 16% of Defendants' prices.[6] (Am. Compl. ¶¶ 136-37.) The Government further found that there was no rational economic justification for Defendants' conduct as they all dumped together far in excess of any increased demand. (*See, e.g.*, Final ITC at 29.)[7] Ultimately, by a 6-0 decision, the ITC found that "critical circumstances exist" as a result of the "massive imports of subject merchandise over a relatively short period of time by" Defendants. (Am. Compl. ¶ 131.)

LEGAL STANDARD

Solyndra's complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The plaintiff need not set out in detail all the facts upon which it bases its claim, but must just "give the defendant[s] fair notice of what the [plaintiff's] claim is and the grounds on which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "'In general, the inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff.'" *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1141 (N.D. Cal. 2009) (Armstrong, J.) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)). Further, the allegations in a plaintiff's complaint are not to be taken piecemeal, but rather, must be considered as a whole. *See id.* at 1147.

ARGUMENT

I. SOLYNDRA HAS ALLEGED A MORE THAN PLAUSIBLE CONSPIRACY.

Defendants' motion retreads ground well-worn by many unsuccessful post-*Twombly* defendants, making the fatal mistake of blindly ignoring Solyndra's detailed factual allegations. When viewed in its totality and in the light most favorable to Solyndra, the Complaint unquestionably alleges a plausible conspiracy. Defendants' quibbles with Solyndra's allegations are

[6] Defendants attempt to cancel out these illegal subsidies by pointing to the fact that Solyndra itself received a government loan on market terms and at a market interest rate. (Mot. at 15:6-8.) Ironically, Defendants imports "receive[] a disproportionate benefit from the" U.S. governmental programs (Preliminary ITC at 25-26, excerpts attached as Ex. 3), and further, Defendants' misguided *in pari delicto* defense is inapplicable to antitrust actions. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 140 (1968) ("We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."), *overruled on other grounds by Copperweld Corp. v. Ind. Tube Corp.*, 467 U.S. 752 (1984).

[7] Excerpts are attached as Ex. 1.

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factual disputes which are only proper for determination by a jury.

A. Solyndra's Complaint Contains Ample Evidence of Defendants' Conspiracy.

Defendants' overreaching is evident from their first argument, which is completely at odds with controlling precedent from the Supreme Court, the Ninth Circuit, and this Court. Defendants erroneously argue that because Solyndra has not identified an "express agreement among Defendants regarding pricing," the alleged conspiracy is not "plausible" under the standards set forth in *Twombly*. (Mot. at 6:19-20.) But an "express agreement" is not required to sustain a Section 1 claim. *See United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966) (reversing judgment for defendants because "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy"); *Movie 1 & 2 v. United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1251-52 (9th Cir. 1990) (same); *In re Flash Memory*, 643 F. Supp. 2d at 1144 (complaint sufficient even with no allegations of express agreement); *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, No. C-04-02266 JW, 2004 WL 2075445, at *5 (N.D. Cal. Sept. 15, 2004) (denying motion to dismiss because "[u]nder the Sherman Act, concerted action does not require an express agreement"); *see also Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) (reversing grant of motion to dismiss, noting that price-fixing conspiracies often lack direct "smoking gun" evidence of a conspiracy and instead are inferred from parallel conduct coupled with circumstantial evidence and "plus factors"). The antitrust laws merely require the plaintiff to allege "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. This is exactly what Solyndra has done here.

Solyndra's demonstration of strikingly parallel pricing and export conduct, together with trade association meetings (for the express purpose of "collaboration"), are bolstered by a bevy of other "plus factors," which together are more than sufficient to "nudge" the Complaint from "conceivable to plausible" (*see Twombly*, 550 U.S. at 570):

- Each of the Defendants entered into the Export Plan for 95% of their production, in similar fashion and at virtually the same time, shipping a massive amount of their product to the U.S. despite the desperate need for it in their home country and an economic motivation for one or more of the Defendants to pursue an alternative market strategy.

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(Am. Compl. ¶¶ 22, 100.)

- Suntech's founder and then-CEO, Dr. Shi Zhengrong, publicly admitted in THE NEW YORK TIMES that Suntech was selling its solar panels at prices below the "the cost of materials, shipping, and assembly . . . in order to gain market share." (*Id.* ¶ 161.)[8]
- A whistle-blowing Trina executive admitted to regularly selling below cost. (*Id.* ¶ 105.)
- Trina's own Chairman admitted that the company had engaged in "irrational pricing practices" (*id.* ¶ 162)—in striking contrast to Defendants' arguments in their brief.
- Trina and Yingli share a corporate headquarters in the Cayman Islands. (*Id.* ¶ 99.)
- As a result of Defendants' conspiracy to price solar panels at prices below costs, Defendants posted massive net losses in 2011. (*Id.* ¶ 163 (i.e., Suntech suffered a net loss of $1 billion).)
- Each Defendant was selling solar panels at prices below costs as calculated by Solyndra and third-party analysts using Defendants' SEC filings. (*Id.* ¶¶ 164-66.)
- At a time when demand was rising and companies were exiting the market, Defendants all slashed their prices by over 60%. (*Id.* ¶¶ 78, 82-85, 152-55.)
- While industry analysts expected price declines of approximately 5% per year, Defendants instead lowered prices by over 60% between 2008 and 2011. (*Id.* ¶¶ 78, 102.)
- After litigation on the merits, the government found that Defendants schemed to manufacture solar panels and ship them to the U.S. at less than fair value. (*Id.* ¶ 119.) The ITC and DOC further found that Defendants acted contrary to rational economic principles in dumping massive amounts of solar panels at a rate "more than double the very significant . . . growth of apparent U.S. consumption." (Final ITC at 29.)[9]
- Defendants' executives (including specifically Suntech's CEO and Chairman and Trina's CEO and Chairman—together with Yingli) met at China New Energy meetings in

[8] Defendants seek to introduce an alleged retraction of the admission that Suntech was selling below cost. (*See* Mot. at 23 n.17.) As an initial matter, this is a factual issue that cannot be decided on a motion to dismiss. *See Lazy Y Ranch*, 546 F.3d at 588. Further, the reporter rebutted the so-called retraction, noting that Dr. Shi speaks fluent English and was asked the relevant question twice, thus calling into question the sincerity of the supposed retraction.

[9] Quoted excerpts are attached as Ex. 1.

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December 2007, November 2008, and January 2010. (Am. Compl. ¶¶ 89, 91, 93, 95.) And, following each of these meetings, Defendants continued with their massive dumping scheme and dropped prices in tandem by as much as 40%. (*Id.* ¶¶ 92, 94, 96.)

- Defendants' costs were subsidized by their co-conspirators, and they each received substantial below-market loans from the same bank, and other illegal subsidies from other co-conspirators. (*Id.* ¶¶ 23, 109-16.)
- Defendants' salespeople regularly met, traveled, and socialized together. (*Id.* ¶ 98.)

Defendants take particular issue with Solyndra's allegations regarding their membership in China New Energy but improperly ignore all of Solyndra's specific allegations that China New Energy provided more than just an opportunity for Defendants to collaborate. (*See* Mot. at 8:4-7.) For example, Defendants completely disregard Solyndra's allegations that the stated purpose of China New Energy was to facilitate "coordination" and "collaboration." (Am. Compl. ¶ 86.) Thus, not only did Defendants have the opportunity to conspire, ***the meetings were designed to facilitate the conspiracy***. Further, the ***chairmen*** of all three Defendants participated at meetings of China New Energy, including Trina's CEO and Chairman who was also responsible for approving Trina's below-cost sales. (*Id.* ¶¶ 89, 106.) In fact, at one meeting, Shi Zhengrong, Suntech's then-CEO, specifically discussed making Chinese solar producers collectively, ***not his own company***, into a leading worldwide brand. (*Id.* ¶ 91.) In sum, Solyndra's allegations show "how and when" Defendants had the opportunity to conspire, which is all that is required at the motion to dismiss stage. *See In re Flash Memory*, 643 F. Supp. 2d at 1148 (membership in trade associations and attendance at meetings "demonstrates *how and when* Defendants had opportunities to exchange information or make agreements . . . and may be alleged to show that putative conspirators had the opportunity and means to develop and/or further their alleged collusive scheme" (internal quotations omitted)); *see also In re SRAM Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (participation in trade association meetings provides the necessary factual context for a plaintiff's Section 1 claim to survive a motion to dismiss); *Todd*, 275 F.3d at 213 (same).

Despite Defendants' best efforts to analogize this case to *In re Late Fee and Over-Limit Fee Litigation*, 528 F. Supp. 2d 953 (N.D. Cal. 2007) ("*Late Fee*"), Solyndra's allegations are far more

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robust than those dismissed in that case. As an initial matter, the complaint in *Late Fee* failed even to allege parallel conduct—rather the so-called "heart" of the plaintiff's antitrust claims in that case was a chart showing the alleged parallel activity which revealed that only three of the six defendants acted in parallel, and only for part of the alleged time period. *Id.* at 962. In contrast to *Late Fee*, the Defendants' acts here are not only completely parallel but singularly consistent with conspiratorial conduct. Further, as set forth above, the Complaint here includes specific and detailed allegations of the alleged conspiratorial conduct, including the "when, where, [and] by whom this alleged agreement was reached," together with conduct inconsistent with normal competitive behavior. *See id.*; (*see also* Am. Compl. ¶¶ 86-100.)[10]

Defendants' argument that the "large" number of alleged conspirators dooms Solyndra's claim is likewise without merit. (*See* Mot. at 8:12-28.) Solyndra has identified seven co-conspirators in addition to the named Defendants, more than ten-fold fewer than in *In re Insurance Brokerage Antitrust Litigation* where over 100 defendants were named and the only allegations to show that an agreement existed between "so great a number" were that the defendants would not have undertaken the complained of actions "but for" the conspiracy. *See* Nos. 04-5184, 05-1079, 2006 WL 2850607, at *12-13 (D.N.J. Oct. 3, 2006). And, contrary to Defendants' argument, Solyndra does provide an explanation for why these companies participated in the conspiracy: "to provide Defendants with 'billions of dollars in . . . loans [and] discounts on polysilicon'" (Mot. at 8:24-26, quoting Am. Compl. ¶ 182)—in a non-market economy such as exists in China, companies often have little incentive to maximize profit and instead are primarily interested in maximizing employment for the populace and compensation for the companies' executives. (*See* Am. Compl. ¶ 181.) Significantly, Solyndra's allegations are confirmed by the DOC's findings that the co-conspirators all provided Defendants below-cost polysilicon, below-market loans, and other unlawful subsidies. (*See, e.g., id.* ¶¶ 23-24.)

Defendants' next critique of Solyndra's Complaint relies on a complete misreading of the

[10] Similarly, the allegations in Solyndra's Complaint are far more extensive than those that were inadequate in *Twombly* where the Supreme Court found that the plaintiff had only pled "parallel conduct and a bare assertion of conspiracy." 550 U.S. at 556. Here, Solyndra alleges parallel conduct and more than a dozen other "plus factors" confirming the conspiracy. (*See supra* at 9-10.)

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allegations contained therein. Defendants argue that the Complaint contains an alternative and more plausible explanation for the sudden price decreases than the alleged conspiracy—namely that the price drops were a result of the industry "becoming dramatically more competitive." (Mot. at 9:1-28.) Solyndra, however, has alleged the polar opposite of an industry becoming more competitive. The reality as pled is that Defendants' actions have ruined at least twelve American solar manufacturers, while Defendants themselves have gained control of the market. (Am. Compl. ¶¶ 40, 151-55.) Further, Defendants have already lost their argument that there is an "'obvious alternative explanation' for the market conditions underpinning Solyndra's claims" (Mot. at 9:1-28)—as the government determined (i) that Defendants dumped at a multiple of increased U.S. demand (Final ITC at 29);[11] (ii) that "but for" Defendants' unlawful conduct, Defendants' prices would have been 31% higher (DOC Fact Sheet at 3);[12] and (iii) that "the record does not support [Defendants'] assertions regarding the role of the incentives in the[ir] import surges at the end of 2011." (Final ITC at 28).

B. Government Findings Provide Evidence of Defendants' Illegal Conspiracy.

Defendants erroneously argue that the Court should ignore the adverse findings by the ITC and DOC. (Mot. at 13:10-19.) But, these determinations provide further context to, and evidence of, Defendants' conspiracy and are therefore relevant to Solyndra's federal and state law claims. In fact, Defendants' argument regarding the relevance of the ITC and DOC findings have already been rejected by Magistrate Judge LaPorte in a discovery dispute. *See* 1/29/13 Hearing Transcript at 4-5 ("[T]he majority of the [ITC and DOC] documents requested are – do have overlapping relevance to this [case], as well as the government investigation.").[13]

Furthermore, contrary to Defendants' contention, Solyndra is not using the ITC and DOC

[11] Quoted excerpts are attached as Ex. 1.

[12] DOC Fact Sheet available at http://ia.ita.doc.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-finals-20121010.pdf. Quoted excerpts are attached as Ex. 4.

[13] Defendants argue that trade law is entirely at odds with antitrust law (s*ee* Mot at 5:10-21), but a central purpose of both is to ensure no company has an unfair advantage over its competitors. More fundamentally, here the governmental investigations specifically involved analysis of Defendants' cost and price data for U.S. sales, and the determination that Defendants were selling solar panels at less than fair value—prices 31% higher but for Defendants' illegal conduct—without even considering the significant international shipping costs. (*See* Am. Compl. ¶¶ 134-35.)

findings for a preclusive effect. Rather, these findings are admissible and further evidence that, *inter alia*, (i) Defendants sold their products below cost in the U.S. and (ii) Defendants' price changes were ***not*** the result of "rational and common business strategy unilaterally prompted" by the market. While Defendants may disagree with the inferences that can and should be drawn from this evidence, the ITC and DOC findings are unquestionably evidence from which such inferences can be drawn, particularly when examining whether Solyndra has alleged a plausible conspiracy.[14]

C. Solyndra is Not Required to Plead Recoupment.

As one of many straw man arguments, Defendants attempt to inject a new pleading requirement into well-established Section 1 case law—recoupment. (Mot. at 10:22-12:16.) Under Ninth Circuit law, however, the elements of a ***Section 1*** price-fixing claim are merely "(1) collusion to fix predatory prices, and (2) causal antitrust injury." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) (citing *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 335-45 (1990)). A "dangerous probability of recoupment" is not an element of a Section 1 price-fixing claim. *Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1182-83 (N.D. Cal. 2001) ("Importantly, section 1 claims do not require the plaintiff to demonstrate the section 2 elements of 'predatory or anticompetitive conduct' and a 'dangerous probability of achieving monopoly power.' . . . Indeed, so long as [Plaintiff] can establish that injury to competition has occurred[, Plaintiff] need not prove that the underlying objective of the alleged conspiracy between [Defendants] is likely to succeed through ultimate recoupment of . . . defendants' losses.").

The case upon which Defendants rely for their misguided argument that recoupment is required—*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993)—was a price discrimination case under the Robinson-Patman Act that applied ***Section 2*** principles. And, this court has rejected the imposition of Section 2 requirements upon Section 1 claims. *Fricke-Parks Press, Inc. v. Fang*, *supra*.

[14] Defendants purport to express concern that Solyndra might be alleging an action based on the U.S. antidumping laws. (Mot. at 13:20-21.) Solyndra alleges no such thing, but rather violations of, *inter alia*, Section 1 of the Sherman Antitrust Act, California's Cartwright Act, California's Unfair Practices Act, and common law tortious interference, but no stand alone "private 'dumping' action." (*See* Am. Compl. ¶¶ 46-51.) Rather, as explained above, Solyndra points to the DOC and ITC investigations as further evidence of Defendants' predatory pricing and conspiratorial conduct.

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However, even if the Court were to read a new pleading requirement in Section 1 claims, (and it should not), Solyndra has pled a "dangerous probability of recoupment." Specifically, Solyndra has alleged that Defendants have driven at least twelve competitors (including Solyndra) from the market, making the market more concentrated and less competitive. (Am. Compl. ¶¶ 151-55.) Solyndra has further alleged that Defendants now control in excess of 65% of the relevant market (*id.* ¶ 40),[15] which is sufficient market power to control prices. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980) (65% market share sufficient for market power, reversing dismissal). Solyndra has also alleged that operating in a non-market economy, Defendants will have ample time to recoup their losses particularly because the high barriers to entry will prevent any new competitors from entering, leaving Defendants' market power unthreatened. (Am. Compl. ¶¶ 37-38, 181.)[16] In fact, Defendants have proven that they have sufficient capacity to absorb the market shares of their eliminated rivals, such as Solyndra, because they have flooded the market with their panels, increasing output each year. (*Id.* ¶¶ 14, 16, 18, 40.)

D. Solyndra is Not Required to Plead Pricing Below Marginal Costs.

Even though the Complaint employs the phrase "below cost" on more than 45 occasions, Defendants argue that it should be dismissed because it fails to allege pricing "below ***marginal*** cost." (Mot. at 12:18-13:7.) Defendants would have the Court believe that the word "marginal" is magical, without which an antitrust claim could never survive beyond the pleading stage. Defendants are wrong for at least three reasons.

First, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Solyndra is merely required to "give the defendant[s] fair notice of what the [plaintiff's] claim is and the grounds upon which it rests," which it plainly has done. *Twombly*, 550 U.S. at 555.

[15] Contrary to Defendants' assertions (Mot. at 12, n.5), Solyndra alleges that Defendants possess at least a 65% market share—which is now expanding with the annihilation of the U.S. solar manufacturers. (Am. Compl. ¶ 40.) First Solar produces utility-scale solar products, and as explained in the Complaint is not included in this calculation because it does not compete in the CIR Market. (*Id.*)

[16] Furthermore, Defendants are *still* engaged in the continuing conspiracy and thus are positioned to coordinate their efforts to raise prices and thus recoup losses. (Am. Compl. ¶ 40.)

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Second, it is premature at the pleadings stage to determine what cost measure (e.g., average total cost, marginal cost, average variable cost) is appropriate,[17] particularly considering that courts in this Circuit have endorsed a variety of tests and measures to determine whether prices are predatory. *See, e.g.*, *William Inglis*, 668 F.2d at 1035 ("pricing below *average total cost* and above average variable cost" can be predatory); *Transamerica Computer Co. v. Int'l Bus. Machs. Corp.*, 698 F.2d 1377, 1387 (9th Cir. 1983) ("[P]rices exceeding *average total cost* might nevertheless be predatory in some circumstances."); *Arminak & Assocs. Inc. v. Saint-Gobain Calmar, Inc.*, 789 F. Supp. 2d 1201, 1207 (C.D. Cal. 2011) (test is whether the prices are below "*average variable costs*"). In fact, while *Cascade Health Solutions v. PeaceHealth*, cited by Defendants (Mot. 13:4-5), suggested that average variable cost is a proper test, the court was addressing "the appropriate measure of costs" for multi-product bundling discount cases and specifically noted that marginal cost ("the increase to total cost that occurs as a result of producing one additional unit of output") is impossible to ascertain from "conventional business accounts," and thus could not be the required measure. 515 F.3d 883, 909-10 (9th Cir. 2008).

Additionally, to the extent that Defendants seek dismissal of Solyndra's state law claims for failure to plead that the prices were below Defendants' "marginal" costs, this is plainly not the law in California. *See Turnbell & Turnbell v. ARA Transp., Inc.*, 268 Cal. Rptr. 856, 860-61 (Cal. Ct. App. 1990) (California state law "employ[s] a fully allocated cost or fully distributed cost standard to determine whether a sale [is predatory]"); Cal. Bus. & Prof. Code § 17026 ("Cost as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.").

Third, to the extent that Defendants argue that average variable cost is actually the correct measure of costs for predatory pricing (which Solyndra disputes), Solyndra has satisfied even that standard by alleging that Defendants have admitted to selling below average variable cost:

[17] The precise measures of total costs, variable costs, and amount of output are all fact-intensive inquiries that depend on the circumstance of the case, "not rigid adherence to a particular cost-based rule." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981). Such a factual inquiry is appropriately addressed after discovery, not on a motion to dismiss. *See C.B. Trucking, Inc. v. Waste Mgmt., Inc.*, 137 F.3d 41, 43-44 (1st Cir. 1998) (affirming decision declining to address below-cost question on motion to dismiss, ruling instead on summary judgment based on evidence submitted by parties).

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"Suntech, to build market share, is selling solar panels on the American market for less than the cost of materials, assembly, and shipping."[18] (Am. Compl. ¶ 161.) Materials, assembly, and shipping are "variable costs—costs that change with the amount of output." *Cascade Health Solutions*, 515 F.3d at 909. Thus, what Defendants have admitted to doing is selling below their ***average variable cost***.[19]

II. SOLYNDRA HAS PLED AND SUFFERED ANTITRUST INJURY.

Defendants' argument that Solyndra has not adequately alleged antitrust injury under the Sherman Act also fails because, as explained above, Solyndra does allege that Defendants fixed their prices at predatory levels—that is, below costs. (Mot. at 15:17-17:9.)[20] As explained by the Ninth Circuit, "[l]osses . . . suffer[ed] as a result of predatory pricing is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors." *Amarel v. Connell*, 102 F.3d 1494, 1508 (9th Cir. 1996) (quoting *Atl. Richfield*, 495 U.S. at 339). Here, that is exactly what Solyndra has alleged—losses suffered as a result of Defendants' predatory pricing conspiracy. (*See, e.g.*, Am. Compl. ¶¶ 13, 157-58.) The fact that Defendants reported "positive gross margins in their earnings reports" (Mot. at 16:7-8) is irrelevant, because, as Solyndra alleges, those reports were not accurate and because Defendants' prices were well below costs. (*See* Am. Compl. ¶¶ 117, 165-70.)

Further, even if Solyndra was required to show a possibility of recoupment (which it is not), it is irrelevant that Defendants have not yet recouped their losses. (*See* Mot. at 16:2-4.) Solyndra has properly alleged all that would be required—a "dangerous probability" that they will do so in the

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[18] Defendants argue that they were not pricing below costs because they received massive subsidies from their suppliers and lenders. (Mot. at 14:22-15:8.) However, this argument ignores allegations that: a) Defendants were selling below costs *without* respect to subsidies (*see, e.g.*, Am. Compl. ¶¶ 102, 105-06, 119, 161-66), and b) these suppliers and lenders were Defendants' co-conspirators, and thus bore these costs of the conspiracy themselves (*Id.* ¶¶ 23-24, 108-20).

[19] Furthermore, there can be no doubt that Solyndra refers to prices below an appropriate measure of costs because the Complaint repeatedly refers to Defendants' below-cost prices as predatory. (*E.g.*, Am. Compl. ¶¶ 109, 161, 220, 230.)

[20] Defendants also ignore Solyndra's allegations regarding how Defendants' illegal cartel has stifled innovation and decreased consumer choice (*see* Am. Compl. ¶¶ 176-80), both of which have been found sufficient to establish antitrust injury. *See Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012) (decreased innovation is among "the types of injuries that commonly satisfy" the antitrust injury requirement); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1036 (C.D. Cal. 2007) (same); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) ("reduced consumer choice [is] harmful to competition").

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future. Solyndra also pleads antitrust injury as it alleges a conspiracy which not only successfully eliminated Plaintiff, but virtually all competitors in the market. *See, e.g.*, *Les Schockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508-09 (9th Cir. 1989) (elimination of competitors is antitrust injury "when the relevant market is both narrow and discrete and the market participants are few"); *See also Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1443 (9th Cir. 1988) (affirming verdict where defendant eliminated 1 out of 5 competitors). In short, Defendants' challenges to Solyndra's allegations of antitrust injury are meritless.[21]

III. SOLYNDRA PLED THE REQUISITE GEOGRAPHIC AND PRODUCT MARKETS.

Defendants next argue that Solyndra failed to properly plead the geographic and product markets, but the Complaint contains detailed factual allegations describing both. (Am. Compl. ¶¶ 25-40.) This is more than what is required at the motion to dismiss stage, as it is well settled in this Circuit that there "is no requirement that [the market] definition elements of the antitrust claim be pled with specificity." *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d. 1103, 1122 (N.D. Cal. 2012). Furthermore, in light of Solyndra's detailed allegations, these issues are better left for expert testimony and ultimately determination by the jury.

A. Solyndra Adequately Pled a Relevant Geographic Market.

Solyndra has sufficiently pled a relevant geographic market. To survive Defendants' motion to dismiss, Solyndra must only plead a "specific geographic area where competition is alleged to take place." *Jensen Enters. Inc. v. Oldcastle, Inc.*, No. C 06-00247 SI, 2006 WL 2583681, at *7 (N.D. Cal. Sept. 7, 2006); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962) (proposed geographical market must conform to "commercial realities of the industry and be economically significant"). Solyndra explains how the U.S. is the relevant geographic market in numerous allegations, including:

[21] Defendants also suggest that for a plaintiff to suffer antitrust injury, recoupment must have already occurred. (*See* Mot. at 16:2-4.) In support of that argument, Defendants selectively quote a snippet of dicta out of context. In *Western Parcel Express v. United Parcel Service of America, Inc.*, the court made clear that the relevant inquiry was not whether recoupment had already occurred, but whether defendant was "*capable* of recoupment" or was "*likely* to gain . . . pricing power." 65 F. Supp. 2d 1052, 1063 (N.D. Cal. 1998). Regardless, the court was only concerned with recoupment as it related to the Section 2 claims in the case. *Id.* at 1057-64.

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- The U.S. is where the competition at issue took place, as demonstrated by the fact that nearly a dozen U.S. solar manufacturers have gone out of business since the start of Defendants' scheme. (Am. Compl. ¶ 5.)
- Defendants treat the U.S. "as a single and distinct geographic market," as demonstrated by the use of their U.S.-based subsidiaries to market and assemble their products for sale to the U.S. (*Id.* ¶¶ 15, 17, 19, 33.)
- The ITC and DOC confirmed that the U.S. commercial and industrial rooftop solar panel market is a distinct market. (*Id.* ¶ 33.)
- Shi Zhengrong, founder and former CEO of Suntech, admitted that the U.S. is one common market. (*Id.* ¶ 33.)
- The U.S. contains its own regulatory system for the market that subsidizes and incentivizes domestic *purchasers* of solar energy. (*See id.* ¶ 39.)

Defendants' arguments to the contrary simply do not form a sufficient basis upon which the Court could dismiss the Complaint. For example, Defendants suggest that because European companies supply similar products and because Defendants and Solyndra sold panels to international customers that the geographic market should thus be expanded. (Mot. at 19:17-23.) Unsurprisingly, Defendants cite to no authority holding that the existence of a similar producer in another country is grounds for expanding the relevant geographic market, and merely selling panels to a customer in a foreign country does not equate to "economic significance" for purposes of pleading a relevant geographic market. *See TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 816 (C.D. Cal. 2010) (rejecting defendant's argument that relevant geographic market was the "international market" where there was sufficient evidence supporting plaintiff's allegations that the U.S. was a separate geographic market). Thus, Solyndra has more than satisfied its burden at the motion to dismiss stage.

B. Solyndra Adequately Pled A Relevant Product Market.

Defendants' argument that Solyndra improperly narrows the relevant product market and fails to justify its proposed market is premature at the motion to dismiss stage. (*See* Mot. at 17:25-18:15.) In fact, courts in this circuit routinely deny motions to dismiss based on inadequate market

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allegations because the specifics of the relevant market are a factual inquiry appropriately left for the jury. *See Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1051 (9th Cir. 2008) ("[V]alidity of the relevant market is typically a factual element . . . subject to factual testing by summary judgment or trial."); *Smith v. eBay Corp.*, No. C 10-03825 JSW, 2012 WL 27718, at *8 (N.D. Cal. Jan. 5, 2012) (denying motion to dismiss because "the Court cannot say that Plaintiffs' proposed relevant product market is not sustainable on its face"); *In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027, 1032 (N.D. Cal. 2008) (same); *Brownlee v. Applied Biosys. Inc.*, No. 88 20672, 1989 WL 53864, at *3 (N.D. Cal. Jan. 9, 1989) (same).[22]

To properly plead a relevant product market, Solyndra must only describe "a pool of services that are reasonably interchangeable and are therefore economic substitutes for one another. . . [with] reference to the rule of reasonable interchangeability and cross-elasticity of demand." *In re eBay*, 545 F. Supp. at 1031. Solyndra has done just that.[23] With regard to "reasonable interchangeability," Solyndra alleges that commercial and industrial rooftop systems have certain requirements, such as "high efficiency (given space constrained rooftops), low weight, ease of installation, non-invasive mounting, and ease of maintenance," which makes the CIR Market unique and distinct from other solar panel markets, such as utility. (Am. Compl. ¶ 36.) Further, a separate CIR Market is confirmed by leading analysts and many of Solyndra's (and Defendants') customers—such as $309

[22] In many of Defendants' own cases, the court denied a motion to dismiss because the plaintiff was entitled to a factual inquiry into its market allegations. *See Allen v. Dairy Farmers of Am.*, 748 F. Supp. 2d 323, 337 (D. Vt. 2010) (plaintiff entitled to a factual inquiry before alleged product and geographic market could be "dismissed as impermissibly narrow"); *E .I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (reversing dismissal of Sherman Act claim alleging the United States as the relevant market and requiring a factual inquiry into market allegations); *Newcal Indus.*, 513 F.3d at 1051. And, when courts do dismiss a complaint for inadequate market allegations, they do so because the plaintiff has completely failed to allege any facts at all to support the market allegations—far different from the instant Complaint where there are over fifteen paragraphs specifically addressing the relevant market. *See, e.g., Golden Gate Pharm. Servs., Inc. v. Pfizer*, 433 F. App'x 598, 599 (9th Cir. 2011) (affirming dismissal because the complaint "fail[ed] to state ***any*** facts indicating that the all [relevant] products are interchangeable for the same purpose").

[23] Contrary to Defendants' arguments, Solyndra never alleged a product market that consists *only* of its own products. (*See* Mot at 17:25-18:3.) In fact, Solyndra included third parties' products in its proposed relevant market, including Defendants' polysilicon panels, and specifically identified several competing producers (like Energy Conversion Devices) who produced solar panels for the CIR Market that also went out of business as a result of Defendants' conspiracy. (*See, e.g.*, Am. Compl. ¶¶ 27, 40, 176.)

million customer Carlisle Syntec, Inc.—that focused exclusively on rooftops. (*See id.* ¶¶ 36, 192); *TYR*, 709 F. Supp. 2d at 816 ("The boundaries of a market can also be shown by. . .the product's peculiar characteristics and uses, unique production facilities, [and] distinct customers. . .").

Solyndra also sufficiently alleges its relevant product market from the consumer's perspective, or "cross-elasticity of demand"—an analysis that depends on "consumer behavior and perceptions" and therefore is "a deeply fact-intensive inquiry." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 562 F. Supp. 2d 392, 399 (E.D.N.Y. 2008); *see also Fox v. Good Samaritan Hosp.*, No. C-04-00874 RMW, 2007 WL 2938175, at *9 (N.D. Cal. Oct. 9, 2007) ("[T]he relevant market is a question of fact for the jury."). Thus, any factual disputes as to consumer behavior would also be improper to resolve on a motion to dismiss. *In re eBay*, 545 F. Supp. 2d at 1032 (denying motion to dismiss because plaintiff was entitled to the opportunity to prove its market allegations). Solyndra explains how the relevant product reflects commercial and industrial consumer needs and preferences, such as high energy yields and low rooftop impact. (*Am. Compl.* ¶¶ 31, 36.) It follows that commercial and industrial rooftop customers are unlikely to purchase other energy solutions without these attributes. (*See id.* ¶¶ 35, 36.) Solyndra's proposed market is further confirmed by the fact that it is treated as such by leading industry analysts, by other now-bankrupt solar companies, such as Energy Conversion Devices, that similarly sold almost exclusively to the distinct CIR Market, and by the sheer number of shared customers between Solyndra and similar producers, like Defendants. (*See id.* ¶¶ 36, 176, 178-79, 197, 203, 211.) In sum, Solyndra properly alleges the basic elements (reasonable interchangeability and cross-elasticity of demand) to plead a relevant product market, and Defendants' motion to dismiss the Complaint on this basis should be denied.

Defendants wrongfully argue that Solyndra failed to "support excluding any alternative method of generating electricity." (*See* Mot. at 18:11-14.) But, Solyndra alleges why alternative methods of generating electricity were excluded—including the major role played by governmental subsidies, and that the need for alternatives to the "consumption of fossil fuels, such as oil, coal, and gas" was a principal reason for the explosion in popularity of the solar industry. (*Am. Compl.* ¶ 41.) Put simply, commercial and industrial rooftop panels are not "reasonably interchangeable" with

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alternative forms of energy or other solar energy products, nor should the cross-elasticity issues be resolved on a motion to dismiss.

IV. SOLYNDRA STATES A VIABLE CARTWRIGHT ACT CLAIM.

Defendants argue that Solyndra's Cartwright Act claim fails because the Sherman Act claim fails. (Mot. at 20:6-14.) For all the reasons stated above, however, Solyndra has adequately alleged its Sherman Act claim. And, even if the Court were to adopt Defendants' misguided recoupment arguments regarding Solyndra's Section 1 claim, recoupment is not a required element of a Cartwright Act claim. As a result, Solyndra has easily alleged a claim under the Cartwright Act and Defendants' motion to dismiss should be denied.

V. VIOLATIONS OF U.S. AND STATE LAWS SATISFY THE "WRONGFUL CONDUCT" REQUIREMENT FOR TORTIOUS INTERFERENCE.

In the face of detailed allegations of multiple unlawful activities, and the specifics of Solyndra's customers and contracts interfered with by Defendants, Defendants nevertheless attempt to argue that Solyndra has failed to plead the "requisite wrongful act" required to sustain its interference with prospective economic advantage claim. (Mot. at 20:15-21:9.) In doing so, Defendants ignore that Solyndra has alleged that they not only violated the Sherman Act, but also California's Cartwright Act and Unfair Practices Act. Defendants' amnesia is perhaps most pointed, however, with respect to the ITC and DOC's guilty findings. Any one of these alone would satisfy the "requisite wrongful act" prong of the prospective economic advantage claim; taken together, they provide robust support for Solyndra's tortious interference allegations.

An act is independently wrongful if it is "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954 (Cal. 2003). In other words, violations of international, U.S., and state laws satisfy this prong. *See id.* at 953-54 (denying demurrer because allegations which would constitute a violation of 15 U.S.C. § 78, "clearly satisfied the independent wrongfulness requirement"); *see also CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1110 (9th Cir. 2007) (reversing dismissal of tortious interference with prospective economic advantage claim because plaintiff alleged defendant's acts violated Unfair Competition Law). Thus,

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the ITC and DOC findings are alone sufficient to satisfy this element. *See Korea Supply Co.*, 63 P.3d at 954. And, even if they were not, the fact that Solyndra's Sherman Act, Cartwright Act, and Unfair Practices Act claims are validly stated would also satisfy this element. *Id.*

VI. SOLYNDRA ALLEGES UNLAWFUL "DISRUPTION" OF ITS AGREEMENTS.

Defendants attempt to dismiss Solyndra's tortious interference with contractual relations claim based on a misreading of Solyndra's Complaint and on an overly narrow application of the law. Defendants argue—in error—that Solyndra's interference claim fails because Solyndra only pled that it "voluntarily agreed to modify contract terms" instead of pleading facts "showing that there were any actual breaches of contract." (Mot. at 24:11-17.) Nowhere in the Complaint, however, will the Court find any allegation that Solyndra modified these agreements "voluntarily." Rather, the Complaint is replete with allegations of Defendants' disruption of Solyndra's contracts, including forcing Solyndra to renegotiate new agreements at lower prices or risk losing the customer completely.[24] (*See, e.g.*, Am. Compl. ¶¶ 197, 201.) And, as Defendants are forced to admit: "disruption of the contractual relationship" (even absent an actual breach of contract) is all that is necessary to sustain the claim. (Mot. at 23:22-24:2 ("Solyndra is required to plead that Defendants caused an actual breach or *disruption* of the contractual relationship it had with a third party.")); *see also Shamblin v. Berge*, 212 Cal. Rptr. 313, 315-16 (Cal. Ct. App. 1985) ("[Interference with a contractual relationship] protects against intentional acts ***not necessarily resulting in a breach***." (emphasis added)). In fact, it is sufficient that the tortious interference "resulted in greater expense or burden on the performance of its contractual obligations with third parties." *Sebastian Int'l, Inc.*

[24] Defendants' claim that Solyndra failed to plead actual notice of Solyndra's contracts is simply incorrect. (Mot. at 24 n.19.) Solyndra alleges that its agreements were "widely publicized through press releases, newspaper articles, and otherwise in the solar industry trade." (Am. Compl. ¶ 188.) Solyndra further demonstrated Defendants' knowledge by alleging that Defendants approached Solyndra's customers and threatened that if they continued to honor their contracts with Solyndra, they would financially fail. (*Id.* ¶ 191.) These allegations easily satisfy the knowledge element. *See Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, No. C-07-0635 JCS, 2007 WL 1455903, at *4 (N.D. Cal. May 16, 2007) (allegations of knowledge sufficient where defendant was a competitor and likely learned of the agreement through its position in the same industry); *Jensen Enters. Inc. v. Oldcastle, Inc.*, No. C-06-00247 SI, 2006 WL 2583681, at *8 (N.D. Cal. Sept. 7, 2006) ("Although [plaintiff] does not specifically allege that [defendants] knew of these contracts, such knowledge can be inferred from other allegations. [Plaintiff] alleges that [defendants] conspired to exclude competitors from the [market], implying that they knew of contracts between developers and non-[defendant] vault manufacturers.").

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v. Russolillo, 162 F. Supp. 2d 1198, 1205 (C.D. Cal. 2001).

Solyndra also levies several allegations about how Defendants disrupted their customer agreements. For example, Solyndra's customers were told by Defendants that if they honored their agreements with Solyndra, they too would be forced out of business by competition from businesses that sourced panels from Defendants at irrationally low prices. (Am. Compl. ¶ 191.) And, as a result of Defendants' interference, Carlisle pressed Solyndra to sell it fewer panels and at lower prices than those agreed upon, Solyndra sold GeckoLogic fewer panels at lower prices than the parties had agreed upon, and USE purchased only half of the agreed-upon volume. (*Id.* ¶¶ 197-212.) In light of these specific allegations of interference, Solyndra has sufficiently pled its tortious interference with contractual relations claim. *See Luxpro Corp. v. Apple, Inc.*, No. 10-03058 JSW, 2011 WL 3566616, at *3-4 (N.D. Cal. Aug. 12, 2011) (denying motion to dismiss tortious interference with contract claim because plaintiff sufficiently pled disruption of contract); *see also Sebastian*, 162 F. Supp. 2d at 1208 (whether defendant rendered plaintiff's contracts more expensive or burdensome was a "triable issue").

Defendants' next argument—that Solyndra failed to allege sufficient "acts of inducement"—is likewise without merit. (*See* Mot. at 24:20-25:15.) According to Defendants, Solyndra has only alleged that Defendants "offer[ed] to sell goods at low prices to a third party [which] does not constitute inducement." (Mot. at 25:4-11.) As is clear from the record, however, Solyndra alleges that Defendants actually sold goods at ***prices so low that they were below-cost***. (*See* Am. Compl. ¶¶ 190, 197, 204, 211, 214.) In other words, the conduct alleged by Solyndra was more than just a company lowering prices in the ordinary course of business, but illegal and harmful conduct taken with the specific intent of destroying Solyndra and other American competition. As even the case cited by Defendants makes clear, this is exactly the type of conduct that is prohibited by California law: a party may not "under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor." *Imperial Ice Co. v. Rossier*, 112 P.2d 631, 633 (Cal. 1941);[25] *see Ariba, Inc. v. Rearden Comm., Inc.*, No. C-

[25] Defendants' other cited cases are inapposite. In *VasoNova Inc. v. Grunwald*, the court dismissed plaintiff's tortious interference with contract claim where it was clear that the agreements at issue had been abandoned and discontinued two years prior to defendants' alleged tortious interference.

11-01619 EDL, 2011 WL 4031140, at *7 (N.D. Cal. Sept. 8, 2011) (defendant cannot cause breach without incurring liability when the alleged wrongful conduct was aimed at the competitor). As a result, Solyndra has adequately pled all elements to sustain its tortious interference with contract claim and Defendants' motion to dismiss this count should be denied.

VII. SOLYNDRA PLED SPECIFIC INTENT FOR ITS UNFAIR PRACTICES CLAIM.

Defendants next half-heartedly claim that Solyndra failed to allege that they acted with the "specific purpose" of destroying Solyndra. This argument casts doubt as to whether Defendants even read the following paragraphs of the Complaint, which demonstrate that Defendants acted with the "specific purpose" of, and succeeded in, destroying Solyndra in particular and American competition in general:

- Suntech's former CEO and Chairman, Dr. Shi Zhengrong, admitted that "Suntech, to build market share, is selling solar panels on the American market for less than the cost of materials, assembly, and shipping." (Am. Compl. ¶ 161.)
- Contrary to rational economic principles, Defendants shipped 95% of their products outside of their domestic market, actions that simply do not make sense unless Defendants had the specific intent to injure Solyndra and other American solar manufacturers. (*Id.* ¶¶ 22, 100.)
- Defendants conspired with each other and "with key suppliers and lenders to drive American solar manufacturers out of business through the price fixing, dumping, and unlawful activity described herein." (*Id.* ¶ 74.)
- "Suntech, Trina, and Yingli acted together to dominate the U.S. CIR Market and drive Solyndra and other American solar companies out of business." (*Id.* ¶ 80.)
- Defendants "began to slash their prices in an effort to aggressively capture market share and drive competition from the marketplace." (*Id.* ¶ 85.)
- Defendants utilized China New Energy as part of their "overall plan to ensure American

No. C-12-02422 WHA, 2012 WL 4119970, at *4 (N.D. Cal. Sept. 18, 2012). And, in *Augustine v. Trucco*, the court found that plaintiff failed to state a cause of action for tortious interference with contract because of the "fatal fact" that ***there was no contract***. 268 P.2d 780, 791 (Cal. Ct. App. 1954).

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solar manufacturers, particularly Solyndra, are driven out of the market." (*Id.* ¶ 88.)

- Defendants knowingly and intentionally combined "with the specific intent to fix prices of Defendants' solar panels at predatory levels" and for the "purposes of destroying fair competition in the United States market." (*Id.* ¶ 220.)

Through these and other paragraphs, Solyndra has plainly alleged that Defendants acted with the specific intent to destroy competition.

Defendants finally contend that Solyndra's Unfair Practices Act claim is implausible because Defendants started selling panels before Solyndra entered the market, and therefore could not possibly have intended to injure Solyndra. (Mot. at 22:18-23:2.) But Defendants ignore the allegations stated above that Defendants sought to injure not only Solyndra, but also other American solar companies. (*See, e.g.*, Am. Compl. ¶¶ 171, 174.) Not only do Defendants cite no authority for this argument, but under Defendants' hypothesis, an established player in the market could act with impunity to destroy all newcomers merely because it sold its product before the newcomers entered the market. This is obviously not the law, and Defendants' motion to dismiss should be denied on this basis as well.

CONCLUSION

For the foregoing reasons, Solyndra requests that the Court deny Defendants' Joint Motion to Dismiss Plaintiff's First Amended Complaint. Alternatively, should the Court grant Defendants' motion in any respect, Solyndra requests leave to amend.

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