



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MELVIN J. BRENNER,

Plaintiff,

v.

W. STEVE ALBRECHT, BETSY S. ATKINS, PAT  
WOOD III, THOMAS R. MCDANIEL, THOMAS H.  
WERNER, T.J. RODGERS, UWE ERNST BUFE,  
DENNIS ARRIOLA, and EMMANUEL HERNANDEZ,

Defendants,

-and-

SUNPOWER CORPORATION, a Delaware Corporation,

Nominal Defendant.

C.A. No.

PUBLIC VERSION

**VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT**

Plaintiff, by his undersigned attorneys, for his verified shareholder derivative complaint, alleges upon information and belief, and based in part on a review of documents obtained from the Company by a request pursuant to 8 *Del. C.* § 220, and except as to allegations about himself, which are based upon personal knowledge, as follows:

**SUMMARY OF CLAIMS**

1. This is a shareholder derivative action under Court of Chancery Rule 23.1 on behalf of nominal defendant SunPower Corporation ("SunPower" or the "Company"). The defendants are several of the Company's current and former officers and/or directors, including each member of the Company's board of directors at the time this complaint was filed.

2. SunPower designs and manufactures solar energy cells and panels and provides related products and services for residential and commercial application in the solar energy

market. SunPower's headquarters are located in San Jose, California. At relevant times, SunPower's business was divided between its Components segment, which manufactures and sells solar cells and solar panels, and its Systems segment, which sells solar power systems and related services to system operators and developers.

3. SunPower has experienced dramatic growth in recent years, spurred by worldwide interest in and demand for renewable energy sources such as solar power. For example, between 2005 and 2008, the Company's revenues increased almost 20-fold, from just over \$75 million to over \$1.4 billion. The number of employees at SunPower dramatically increased as well, rising from about 750 in 2005 to approximately 5,400 by the end of 2008.

4. Since its debut as a public company in 2005, SunPower has relied heavily upon its facility located in the Philippines for the manufacture of its solar technology. Historically, approximately 90% of the Company's employees have been located in the Company's Philippines operation, along with most of its physical assets. The Company also maintains related administrative, financial and operations systems in the Philippines facility, including accounting functions related to expenses, manufacturing costs and inventory.

5. On November 16, 2009, Sunpower revealed that, based upon a review conducted at the Philippines operation, "unsubstantiated accounting entries" had been discovered relating to the Company's 2008 and 2009 fiscal years. On March 19, 2010, SunPower filed a Form 10-K with the U.S. Securities & Exchange Commission ("SEC") containing a restatement of the Company's financial results for the fiscal year ended December 28, 2008, each of the quarters of fiscal year 2008, and for the first three quarters of fiscal year 2009.

6. The restatement resulted in a reduction of reported operating income of \$13 million for fiscal year 2008, and \$23 million for fiscal year 2009, for a total of about

\$36 million, and substantial reductions in earnings per share for affected quarters. According to SunPower, the restatement was necessary because “Philippines-based finance personnel” had, among other things, accessed the accounting ledgers to intentionally reverse previously recorded expenses through “manual journal entries.” Improper journal entries were also made to increase inventory and to decrease cost of goods sold (“COGS”). SunPower reported that the false journal entries were deliberately made to achieve expenses figures “that would be consistent with internal expenses projections.” [REDACTED]

[REDACTED]

7. The officers and directors of SunPower named herein owed fiduciary duties of care and loyalty to the Company, including a duty to ensure that the Company maintained sufficient and effective internal controls over the Company’s financial reporting processes. As revealed by internal board documents obtained by plaintiff pursuant to 8 *Del. C.* § 220,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. [REDACTED]

[REDACTED]

10. Defendants' breaches are underscored by their repeated acknowledgement in SEC filings since as early as fiscal year 2005 that the Company's rapid growth was placing "significant strain" on the Philippines facility, and that the Company needed to (a) "effectively implement and improve additional and existing administrative, financial and operations systems, procedures and controls" there and (b) "integrate our financial internal control systems in our Philippines facility" with those of its California headquarters. A majority of the defendants signed SEC filings containing these statements, and were aware for years that the internal controls were failing to hold up under the pressure of the Company's rapid growth.

11. Yet defendants acted in a manner that only made the problems worse. Defendants' breaches have severely damaged the Company. According to its SEC filings, the

[REDACTED]

Company incurred approximately \$8 million in accounting, tax, legal and consulting costs due to the restatement and related investigation. The Company has admitted in SEC filings that “these costs, as well as the substantial management time devoted to address these issues, have adversely affected and may continue to adversely affect our financial condition, results of operations and cash flows.” The Company has also been exposed to reputational harm, as well as to substantial expense and potentially massive uninsured liability arising out of securities fraud class action litigation filed in federal district court in California by purchasers of the Company’s securities during the financial reporting periods for which the Company’s results were restated.

12. All of the defendants had the responsibility to ensure that there existed at SunPower sufficient internal controls to maintain the accuracy of its reported financial results, to ensure that truthful statements were made to shareholders, and to act in the face of clear warning signs. As alleged herein, in utterly failing to do so, each member of the board of directors acted in bad faith, faces a substantial likelihood of liability for breach of fiduciary duty, and is therefore interested in the subject matter of this case. Under these circumstances, any demand on the SunPower board of directors to bring the asserted claims would be futile, and is therefore excused. The directors further lack independence and would never act in a way that might threaten their substantial compensation, as alleged herein.

## **PARTIES**

### **Plaintiff**

13. Plaintiff Melvin J. Brenner purchased SunPower Class A shares on November 8, 2007 and has at all times since been a continuous holder of SunPower shares.

**Nominal Defendant**

14. Nominal defendant SunPower is a Delaware corporation headquartered in San Jose, California. SunPower manufactures solar energy panels and sells related products and services throughout the world. The Company conducted its initial public offering in 2005, and its stock trades on the NASDAQ system under the symbol SWPR, with approximately 55 million Class A shares outstanding.

15. At the time this complaint was filed, the Company's board of directors had six members, all of whom are named as defendants herein.

**Audit Committee Director Defendants**

16. Defendant W. Steve Albrecht ("Albrecht") has served as a member of the board of directors since 2005. Albrecht currently serves on the board of directors of Cypress Semiconductor Corporation ("Cypress"). In fiscal years 2008 and 2009, Albrecht served as Chairman of the Audit Committee. In 2008, Albrecht served as a member of the Compensation Committee and the Nominating and Corporate Governance Committee. For fiscal year 2008, Albrecht received cash fees, stock awards and option awards totaling \$439,846. For fiscal year 2009, Albrecht received cash fees and stock awards totaling \$231,714. For fiscal year 2010, Albrecht received cash fees and stock awards totaling \$324,490.

17. Defendant Betsy S. Atkins ("Atkins") has served as a member of the board of directors since 2005. In fiscal year 2008, Atkins served as a member of the Audit Committee. In fiscal years 2008 and 2009, Atkins served as the Chair of the Compensation Committee and as a member of the Nominating and Corporate Governance Committee. For fiscal year 2008, Atkins received cash fees, stock awards and option awards totaling \$500,307. For fiscal year 2009,

Albrecht received cash fees and stock awards totaling \$231,714. For fiscal year 2010, Atkins received cash fees and stock awards totaling \$275,740.

18. Defendant Pat Wood III (“Wood”) has served as a member of the board of directors since 2005. In fiscal years 2008 and 2009, Wood served as a member of the Audit Committee. In fiscal years 2008 and 2009, Wood served as the Chair of the Nominating and Corporate Governance Committee and as a member of the Compensation Committee. For fiscal year 2008, Wood received cash fees, stock awards and option awards totaling \$484,660. For fiscal year 2009, Wood received cash fees and stock awards totaling \$231,714. For fiscal year 2010, Wood received cash fees and stock awards totaling \$294,490.

19. Defendant Thomas McDaniel (“McDaniel”) has served as a member of the board of directors since February of 2009. In fiscal year 2009, McDaniel served as a member of the Audit Committee. For fiscal year 2009, McDaniel received cash fees and stock awards totaling \$482,279. For fiscal year 2010, McDaniel received cash fees and stock awards totaling \$305,000.

20. As members of the Audit Committee, pursuant to its charter, these defendants were responsible for reviewing the integrity of SunPower’s auditing, accounting, and reporting processes and consideration and approval of appropriate changes; reviewing SunPower’s financial reports and other financial information provided to shareholders and filed with the SEC; and reviewing SunPower’s internal controls. By virtue of their assigned duties and responsibilities, the Audit Committee defendants had a special relationship with the Company. Among the specific duties of the Audit Committee director defendants were the following:

Review the independent financial statement and internal control audit by: (i) reviewing the independent auditor’s proposed audit scope and approach; (ii) discussing with the Company’s independent auditor the financial statements, the Company’s internal control over financial reporting, and the audit findings,

including any significant adjustments, management judgments and accounting estimates, significant new accounting policies and disagreements with management, any deficiencies, significant deficiencies, or material weaknesses, and any other matters described in SAS No. 61 and 90; and (iii) reviewing reports submitted to the Committee by the independent auditor in accordance with applicable SEC Rules . . . .

Review and discuss with management and the independent auditor (a) the adequacy and effectiveness of the Company's internal controls over financial reporting (including any significant deficiencies, material weaknesses and significant changes in internal controls reported to the Committee by management and any fraud involving management or other employees who have a significant role in the Company's internal controls), (b) the results of the internal control audit by the independent auditor, and (c) the effectiveness of the Company's disclosure controls and procedures . . . .

#### **Additional Director Defendants**

21. Defendant Thomas H. Werner ("Werner") has served as a member of the board of directors since 2003. Werner also serves as Chief Executive Officer of the Company. Prior to joining SunPower, from 2001 to 2003, he was Chief Executive Officer of Silicon Light Machines, Inc., an optical solutions subsidiary of Cypress. For fiscal year 2008, Werner received cash and stock compensation totaling over \$5.6 million. For fiscal year 2009, Werner received cash and stock compensation totaling over \$4.2 million. For fiscal year 2010, Werner received cash and stock compensation totaling over \$4.6 million. Werner is identified on the Company's SEC filings as not independent under securities exchange listing standards.

22. Defendant Uwe-Ernst Bufe ("Bufe") has served as a member of the board of directors since 2008. In fiscal years 2008 and 2009, Bufe served as a member of the Compensation Committee and the Nominating and Corporate Governance Committee. For fiscal year 2008, Bufe received cash fees, stock awards and option awards totaling \$57,170. For fiscal



year 2009, Bufe received cash fees and stock awards totaling \$242,239. For fiscal year 2010, Bufe received cash fees and stock awards totaling \$239,490.

23. Defendant T.J. Rodgers (“Rodgers”) served as Chairman of the board of directors from 2002 until May 2011. Rodgers is the co-founder and a director of Cypress, SunPower’s former parent corporation, which owned a majority of the Company’s stock until a spin-off in 2008. For fiscal year 2008, Rodgers received cash fees and stock awards totaling \$735,520. For fiscal year 2009, Rodgers received cash fees and stock awards totaling \$285,086. For fiscal year 2010 received cash fees and stock awards totaling \$278,980.

#### **Officer Defendants**

24. Defendant Dennis Arriola (“Arriola”) has served as the Company’s Chief Financial Officer (“CFO”), Principal Accounting Officer and Senior Vice President since November 2008. For fiscal year 2008, Arriola received cash and stock compensation of over \$2.3 million. For fiscal year 2009, Arriola received cash and stock compensation of over \$2.1 million. For fiscal year 2010, Arriola received cash and stock compensation of over \$2.8 million.

25. Defendant Emmanuel Hernandez (“Hernandez”) served as the Company’s CFO and Principal Accounting Officer from 2005 until the end of October 2008. For fiscal year 2008, Hernandez received cash and stock compensation of over \$1.6 million.

### **SUBSTANTIVE ALLEGATIONS**

#### **Company Background**

26. SunPower is a vertically integrated solar products and services company that designs, manufactures and markets solar electric power technologies. SunPower’s solar cells and solar panels are made using certain proprietary processes developed under the leadership of Stanford University engineering professor Richard Swanson.

27. SunPower products and services are sold through its Components and Systems business segments. The Components segment sells solar power products, including solar panels and inverters, which convert sunlight to electricity compatible with utility networks. The Systems segment sells solar power systems directly to system owners and developers, and provides related services such as development, engineering, procurement, permitting, construction, financing options, monitoring and maintenance.

28. Since becoming a public company in November of 2005, the Company's main manufacturing base has been in the Philippines. A majority of SunPower's employees have worked at the Company's manufacturing facilities in the Philippines as well.

29. As of the end of fiscal year 2005, 703 of the Company's 788 employees worked in the Philippines operation. As of the end of fiscal year 2006, 1,473 of the Company's 1,572 employees worked in the Philippines operation. As of the end of fiscal year 2007, 3,110 of the Company's 3,530 employees worked in the Philippines operation. As of the end of fiscal year 2008, 4,710 of the Company's 5,400 employees worked in the Philippines operation.

30. SunPower's rapid employee growth is matched by its growth in revenues since going public in November 2005. In fiscal 2006, SunPower generated \$78.7 million in revenues. In fiscal year 2007, SunPower generated \$236.5 million in revenues. In fiscal year 2008, SunPower generated \$774.7 million in revenues. In fiscal year 2008, revenues climbed to over \$1.4 billion. Thus, in a span of just 4 years, revenues skyrocketed almost 20 times over.

**SunPower Has Long Acknowledged "Strain" On Its Internal Controls**

31. In the years preceding the restated periods, the Company acknowledged in SEC filings that its rapid growth had placed "significant strain" on its internal control systems.

32. For example, in its Form 10-K for fiscal year 2005, filed with the SEC on March 22, 2006, SunPower stated that “our recent expansion has placed, and our planned expansion and any other future expansion will continue to place, a significant strain on our management, personnel, systems and resources.” According to SunPower, “to successfully manage our growth and handle the responsibilities of being a public company, we believe we must effectively implement and improve additional and existing administrative, financial and operations systems, procedures and controls, including the need to integrate our financial internal control systems in our Philippines facility with those of our Sunnyvale, California headquarters.”

33. The fiscal year 2005 Form 10-K disclosing these risks in the Philippines operation was signed by defendants Werner, Hernandez, Rodgers, Albrecht, Atkins and Wood.

34. Likewise, in its Form 10-K for fiscal year 2006, filed with the SEC on March 1, 2007, SunPower repeated that “our recent expansion has placed, and our planned expansion and any other future expansion will continue to place, a significant strain on our management, personnel, systems and resources.” According to SunPower, “to successfully manage our growth and handle the responsibilities of being a public company, we believe we must effectively implement and improve additional and existing administrative, financial and operations systems, procedures and controls, including the need to integrate our financial internal control systems in our Philippines facility with those of our Sunnyvale, California headquarters.”

35. The fiscal year 2006 Form 10-K disclosing these risks in the Philippines operation was signed by defendants Werner, Hernandez, Rodgers, Albrecht, Atkins and Wood.

36. Again, in its Form 10-K for fiscal year 2007, filed with the SEC on March 3, 2008, SunPower repeated that “our recent expansion has placed, and our planned expansion and any other future expansion will continue to place, a significant strain on our management,

personnel, systems and resources.” According to SunPower, “to successfully manage our growth and handle the responsibilities of being a public company, we believe we must effectively implement and improve additional and existing administrative, financial and operations systems, procedures and controls, including the need to integrate our financial internal control systems in SP Systems [another SunPower subsidiary] and our Philippines facility with those of our Sunnyvale, California headquarters.”

37. The fiscal year 2007 Form 10-K disclosing these risks in the Philippines operation was signed by defendants Werner, Hernandez, Rodgers, Albrecht, Atkins and Wood.

38. In its Form 10-K for fiscal year 2008, filed with the SEC on February 26, 2009, SunPower again repeated that “our recent expansion has placed, and our planned expansion and any other future expansion will continue to place, a significant strain on our management, personnel, systems and resources.” According to SunPower, its plans to further increase production capacity would require the “successful execution” of “implementing and improving additional and existing administrative, financial and operations systems, procedures and controls, including the need to update and integrate our financial internal control systems in SP Systems and in our Philippines facility with those of our San Jose, California headquarters.

39. The fiscal year 2008 Form 10-K disclosing these risks in the Philippines operation was signed by defendants Werner, Arriola, Rodgers, Albrecht, McDaniel, Bufe, Atkins and Wood.

#### **The Restatement**

40. On November 16, 2009, the Company issued a press release disclosing the discovery of “unsubstantiated accounting entries” in its previous financial reports:

[B]ased upon an internal review of its Philippine manufacturing operations, the company believes there may have been unsubstantiated accounting entries made in the first three quarters of 2009, some of which relate to the company's fiscal year ended December 28, 2008. Management informed the Audit Committee of the Board of Directors of these entries and the Audit Committee immediately commenced an investigation of the matter, which is ongoing. The company's Audit Committee and management have discussed these issues with the company's independent auditors.

Based upon the preliminary findings of the ongoing investigation, the Audit Committee to date has identified accounting entries in the Philippines that may have overstated expenses in its cost of goods sold of approximately \$1 million in the first quarter ending March 29, 2009, and understated expenses in its cost of goods sold of approximately \$14 million in the second quarter ending June 28, 2009 and approximately \$2 million in the third quarter ending September 27, 2009. The company previously reported 2009 quarterly revenues and operating income under Generally Accepted Accounting Principles (GAAP) of \$213.8 million and a loss of \$2.5 million, respectively, in the first quarter, \$297.6 million and \$9.9 million, respectively, in the second quarter and \$466.3 million and \$34.6 million, respectively, in the third quarter. Full-year 2008 revenues were reported of \$1,434.9 million and GAAP operating income of \$167.5 million.

If the preliminary investigation findings prove to be final, they could impact the company's previously reported interim 2009 financial results. The company is also in the process of evaluating the financial impact of these adjustments on its previously reported results for the fiscal year and interim periods ended December 28, 2008. The company currently estimates that approximately \$9 million of the identified accounting entries should have been recorded in 2008.

41. On December 15, 2009, the Company issued a press release announcing "significant progress in its internal investigation" related to the Philippines accounting errors. According to the Company, "[t]he investigation is being conducted under the direction of the SunPower board of director's audit committee, with the assistance of outside legal and accounting experts. The investigation to date is consistent with the preliminary findings

announced on November 16, 2009. The audit committee is working with its experts and appropriate SunPower personnel to promptly complete a thorough investigation.”

42. On March 18, 2010, the Company filed a Form 8-K with the SEC, attaching a press release issued on the same date, which stated as follows:

On November 16, 2009, SunPower announced that its Audit Committee commenced an independent investigation into certain accounting and financial reporting matters at the company’s Philippines operations. The Audit Committee retained independent counsel, forensic accountants and other experts to assist it in conducting the investigation.

As a result of the investigation, the Audit Committee concluded that certain unsubstantiated accounting entries were made at the direction of Philippines-based finance personnel in order to report results for manufacturing operations that would be consistent with internal expense projections. The entries generally resulted in an understatement of the company’s cost of goods sold. The Audit Committee concluded that the efforts were not directed at achieving the company’s overall financial results or financial analysts’ projections of the company’s financial results. The Audit Committee also determined that these accounting issues were confined to the accounting function in the Philippines. Finally, the Audit Committee concluded that executive management neither directed nor encouraged, nor was aware of, these activities and was not provided with accurate information concerning the unsubstantiated entries. In addition to the unsubstantiated entries, during the Audit Committee investigation various accounting errors were discovered by the investigation and by management. In connection with its investigation findings, the Audit Committee recommended various remedial measures to address certain personnel, organizational and internal control matters. The Board of Directors approved these recommendations, and the company has begun implementing those recommendations along with other measures identified by management.

43. The March 18, 2010 press release issued by the Company described the restatement as follows:

***Restatement***

The adjustments to restate SunPower's historical consolidated financial data as of and for the year ended December 28, 2008 and for the nine months ended September 27, 2009 are provided in a table format attached to this release. Concurrently with this announcement, the company is separately announcing its fourth-quarter and year-end 2009 earnings. The adjustments to restate the company's historical consolidated financial data for the fourth quarter of fiscal 2008, the full fiscal year 2008, and each of the first three fiscal quarters of 2009 are provided in the earnings press release. The cumulative impact to the restatement period and for the fourth-quarter 2009 totals approximately \$33.2 million of additional pre-tax expense, or a reduction to net income of \$16.9 million on a GAAP basis, over the entire period. The restatement has no material impact on net assets for any period affected, excluding the Audit Committee's investigation expenses of \$3.6 million incurred during the fourth quarter 2009. The restatement has no impact on the company's net cash position or total cash flows for any period affected. Nor will the restatement have a material impact on net assets for any period affected.

44. The March 18, 2010 press release issued by SunPower stated the following regarding internal control deficiencies identified at the Company:

***Identification of Control Deficiencies***

As a result of issues identified during the investigation, as well as other issues separately identified by management, management has concluded that there was not an effective control environment in the Philippines operations. Further, management has concluded that the company did not maintain in the Philippines operations effective controls over inventory variance capitalization.

Management has concluded that these control deficiencies constituted material weaknesses in the company's internal control over financial reporting. *Because of these material weaknesses in our Philippines operations, management has concluded that the company did not maintain an effective internal control over financial reporting or effective disclosure controls and procedures as of January 3, 2010.* Management's report on internal control over financial reporting will be included in the company's Annual Report on Form 10-K for the fiscal year ended January 3, 2010. [emphasis supplied].

45. On March 19, 2010, SunPower filed its Form 10-K for fiscal year 2009 with the SEC and issued the restatement. SunPower restated its financial results for its fiscal year ended December 28, 2008 and for each of the quarters in 2008, as well as for the first three quarters of 2009. The extent of the accounting problems was more serious than the Company had predicted in prior disclosures, as it reduced previously reported operating income by \$36 million (\$13 million in 2008 and \$23 million during the first three quarters of 2009), versus the Company's November 16, 2009 estimate of the error of approximately \$15 million.

46. Under GAAP, financial statements are restated to correct material errors. SFAS No. 154, *Accounting Changes and Error Corrections* ("SFAS 154"), defines "restatement" as "the process of revising previously issued financial statements to reflect the correction of an error in those financial statements." SFAS 154, ¶2. SFAS 154 provides that "[a]ny error in the financial statements of a prior period discovered subsequent to their issuance shall be reported as a prior-period adjustment by restating the prior period financial statements. SFAS 154, ¶25. By restating financial statements for fiscal years 2008 and 2009, SunPower admitted that its prior financial statements contained material misstatements and omissions when issued.

47. The fiscal year 2009 Form 10-K reported the full extent of the required adjustments, as follows:

***Investigation Related Adjustments:***

As noted above, the Audit Committee's investigation found that unsubstantiated entries (a) were made at the direction of the Philippines-based finance personnel in order to report results for manufacturing operations that would be consistent with internal expense projections, (b) generally resulted in an understatement of the Company's cost of goods sold, and (c) were not directed or encouraged by, or done with the knowledge of, executive management. During the course of the investigation, various accounting errors which required adjustments were also identified.



Adjustments for these unsubstantiated entries and errors affected cost of goods sold and the following balance sheet accounts:

- **Accounts payable and accrued liabilities:** The investigation found that certain expenses were understated by (a) not sufficiently accruing expenses or (b) reversing previously recorded expenses through manual journal entries that were not based on actual transactions or reasonable estimates of expenses. The accounts primarily affected were accruals for manufacturing expenses such as subcontracted wafering costs, electricity, and freight and other accrued expenses. Unsubstantiated entries were also recorded to reduce uninvoiced receipts liability accounts, with an offsetting reduction to cost of goods sold.
- **Inventories:** The investigation found that unsubstantiated entries were made to increase inventory and decrease cost of goods sold by adjusting variance capitalization amounts. In addition, inventory obsolescence was understated for materials used in-house by wafering services of silicon ingots.

***Errors Identified during Course of Investigation:***

Through the investigation, errors were also found in the Philippines relating to inventories, prepaid expenses and other current assets, property, plant and equipment, and accounts payable and accrued liabilities. The primary categories of these adjustments are discussed below:

- **Inventories:** The Company recorded corrections related to accounting for inventories in-transit and scrap, as well as the methodology used to calculate the capitalization of inventory variances.

- Prepaid expenses and other current assets: Certain foreign individual income tax filings prepared for employees on foreign assignments contained omissions of taxable income. The amount of the estimated tax understatement plus interest and penalties less any employee receivables generated by the filing of amended returns has been included in the restated financials.
- Property plant and equipment: In some instances, depreciation expense was not recorded in the proper period.
- Accounts payable and accrued liabilities: Vendor credits were not properly applied and certain employee bonuses were not correctly accrued.

48. The fiscal year 2009 Form 10-K further admitted the woeful state of the Company's internal control environment in the Philippines:

*There was not an effective control environment in our Philippines operations. Specifically, certain of the Company's employees in the Philippines violated the Company's code of business conduct and ethics. Individuals in the Company's Philippines finance organization intentionally proposed and/or approved journal entries that were not substantiated by actual transactions or costs. Further, we did not maintain in the Philippines operations, a sufficient complement of personnel with an appropriate level of accounting knowledge, experience and training to ensure that our controls, and specifically our controls over inventory variance capitalization, were effective. [emphasis supplied].*

The material weaknesses in our Philippines operations led to misstatements which ultimately resulted in the Company restating its financial statements as of and for the year ended December 28, 2008 and financial data for each of the quarterly periods for the year then ended and for the first three quarterly periods in the year ended January 3, 2010.

49. The fiscal year 2009 Form 10-K further described the Company's "remediation" efforts as follows:

***Remediation of Material Weakness in 2009***

Prior to the end of our 2009 fiscal year, management of our Company implemented new processes and controls to remediate the material weaknesses in our internal control over financial reporting in our Philippines operations related to the completeness, accuracy, and review of manual journal entries and account reconciliations including:

***Revision of the review and approval process for manual journal entries:***

- Access to our systems to record journal entries for certain employees was eliminated.
- Journal entry approval limits were reduced for certain employees.
- Certain reviewers were replaced by more experienced and knowledgeable personnel, including individuals from corporate headquarters.
- Additional levels of review and approval were added.

***Revision of the process for account reconciliations:***

- Additional levels of review for account reconciliations were added.
- Certain reviewers were replaced by more experienced and knowledgeable personnel, including individuals from corporate headquarters.

***Strengthening of monitoring controls:***

- More detailed reviews for the income statement, balance sheet, and spending were conducted at the subsidiary level.
- Additional levels of review were added.

- Certain reviewers were replaced by more experienced and knowledgeable personnel, including individuals from corporate headquarters.

We implemented, operated and tested these new controls during the fourth quarter of fiscal 2009 and found them to be designed and operating effectively. We also provided mandatory training to all employees regarding our code of business conduct and ethics, our whistleblower policy, and other compliance policies. Although these new processes were effective, we anticipate continuing further refinements around these controls and processes in the longer term.

50. Underscoring the dearth of internal controls that had existed in the Philippines, the fiscal year 2009 Form 10-K described an extensive series of “ongoing” remediation plans to be implemented for the Philippines operation, including addition of a new “vice president controller” for the Asia region, “reinforcement of the Company’s Code of Business Conduct and Ethics,” hiring of “additional qualified employees in the Philippines finance organization,” “segregation of duties between financial planning and accounting functions,” a plan to “increase corporate management presence in the Philippines,” and improvement of quarterly and monthly closing processes to reduce “unnecessary journal entries.”

51. Although defendants had been on notice of “significant strain” in the Philippines for years, additional improvements to the Philippines operation reported in the fiscal year 2009 Form 10-K were such fundamental measures as “train responsible employees on proper method to capitalize manufacturing variances,” “establish formal process for certifications and sub-certifications of financial reports,” “add specific reviews for required manual journal entries,” and “standardize and document all key accounting policies.”

52. The fiscal year 2009 Form 10-K contained a representation by SunPower’s auditor PricewaterhouseCoopers (“PwC”) that SunPower failed to maintain “*in all material*

*respects*” effective internal control over financial reporting “because material weaknesses in internal control over financial reporting related to the Company’s control environment in the Philippines and over accounting for inventory variance capitalization in the Philippines” existed as of January 2010. [emphasis supplied].

53. [REDACTED]

Along with the magnitude and duration of the falsification of accounting records, which involved tens of millions of dollars over two years, [REDACTED]

[REDACTED] In a May 3, 2010 Form 10-Q, SunPower revealed additional corrections to its financial statements for the restated periods, including financial adjustments for having understated work-in-process inventory during the first three quarters of fiscal year 2009.

#### **False Financial Statements**

54. The March 19, 2010 restatement confirms that during fiscal years 2008 and 2009, SunPower’s financial statements filed with the SEC contained material misstatements and omissions. These SEC filings were, at least, the following:

- Q1 2008 Form 10-Q, filed May 9, 2008. This Form 10-Q, signed by defendant Hernandez, reported gross margin of \$53.2 million, pre-tax income of \$13.3 million, and earnings per share of \$.14. These results were false, and were later restated to \$51.5 million, \$11.8 million, and \$.13, respectively. The Form 10-Q stated that the Company’s CEO (Werner) and CFO (Hernandez) “have concluded that our disclosure controls and procedures were effective.” It also attached certifications signed by defendants Werner and Hernandez pursuant to the Sarbanes Oxley Act of 2002 (“SOX

Certifications”) attesting to the purported accuracy and completeness of the Company’s reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company’s financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company’s disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company’s internal controls were false.

- Q2 2008 Form 10-Q, filed August 8, 2008. This Form 10-Q, signed by defendant Hernandez, reported gross margin of \$92.8 million, pre-tax income of \$37.4 million, and earnings per share of \$.37. These results were false, and were later restated to \$82.4 million, \$29.1 million, and \$.32, respectively. The Form 10-Q stated that the Company’s CEO (Werner) and CFO (Hernandez) “have concluded that our disclosure controls and procedures were effective.” It also attached SOX Certifications signed by defendants Werner and Hernandez attesting to the purported accuracy and completeness of the Company’s reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company’s financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company’s disclosure controls, and that the financial statements otherwise fairly presented in all material

respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.

- Q3 2008 Form 10-Q, filed November 7, 2008. This Form 10-Q, signed by defendant Hernandez, reported gross margin of \$105.3 million, pre-tax income of \$44.4 million, and earnings per share of \$.29. These results were false, and were later restated to \$102.2 million, \$41.7 million, and \$.27, respectively. The Form 10-Q stated that the Company's CEO (Werner) and CFO (Hernandez) "have concluded that our disclosure controls and procedures were effective." It also attached SOX Certifications signed by defendants Werner and Hernandez attesting to the purported accuracy and completeness of the Company's reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company's disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.
- Fiscal Year 2008 Form 10-K, filed February 26, 2009. This Form 10-K, signed by defendants Arriola, Werner, Albrecht, Atkins, Rodgers, Bufe, McDaniel, and Wood, reported (a) fourth quarter 2008 gross margin of \$111.3 million, pre-tax income of \$34 million, and earnings per share of \$.37; and (b) fiscal year 2008 gross margin of

\$362.7 million, pre-tax income of \$129.1 million, and earnings per share of \$1.16. For the fourth quarter 2008, these results were false, and were later restated to \$111.7 million, \$33.4 million, and \$.33, respectively. For fiscal year 2008, these results were false, and were later restated to \$349.6 million, \$116.1 million, and \$1.05, respectively. The Form 10-K stated that the Company's CEO (Werner) and CFO (Arriola) "have concluded that our disclosure controls and procedures were effective." It also attached SOX Certifications signed by defendants Werner and Arriola attesting to the purported accuracy and completeness of the Company's reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company's disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.

- Q1 2009 Form 10-Q, filed May 8, 2009. This Form 10-Q, signed by defendant Arriola, reported gross margin of \$47.7 million, loss of \$14.6 million, and loss per share of \$.06. These results were false, and were later restated to \$32.2 million, a loss of \$30.1 million, and loss per share of \$.12, respectively. The Form 10-Q stated that the Company's CEO (Werner) and CFO (Arriola) "have concluded that our disclosure controls and procedures were effective." It also attached SOX Certifications signed by defendants Werner and



Arriola attesting to the purported accuracy and completeness of the Company's reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company's disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.

- Q2 2009 Form 10-Q, filed August 3, 2009. This Form 10-Q, signed by defendant Arriola, reported gross margin of \$58.5 million, pre-tax income of \$25.1 million, and earnings per share of \$.25. These results were false, and later restated to \$40.7 million, \$6.2 million, and \$.16, respectively. The Form 10-Q stated that the Company's CEO (Werner) and CFO (Arriola) "have concluded that our disclosure controls and procedures were effective." It also attached SOX Certifications signed by defendants Werner and Arriola attesting to the purported accuracy and completeness of the Company's reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company's disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial

condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.

- Q3 2009 Form 10-Q, filed November 2, 2009. This Form 10-Q, signed by defendant Arriola, reported gross margin of \$195.5 million, pre-tax income of \$35.8 million, and earnings per share of \$.35. These results were false, and were later restated to \$172.7 million, \$13 million, and \$.27, respectively. The Form 10-Q stated that the Company's CEO (Werner) and CFO (Arriola) "have concluded that our disclosure controls and procedures were effective." It also attached SOX Certifications signed by defendants Werner and Arriola attesting to the purported accuracy and completeness of the Company's reporting, and certifying that defendants had designed controls and procedures to (a) ensure that information was properly disclosed within the Company, and (b) provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of financial statements. The SOX Certifications further stated that defendants had evaluated the effectiveness of the Company's disclosure controls, and that the financial statements otherwise fairly presented in all material respects, the financial condition and result of operations of the Company. As revealed by the restatement, these reported financial results and the statements regarding the adequacy of the Company's internal controls were false.

55. The restatement resulted in a reduction of reported operating income of approximately \$13 million for fiscal year 2008, and \$23 million for fiscal year 2009, for a total of approximately \$36 million over seven quarters. For each of the seven quarters affected by the restatement, and for fiscal year 2008, the Company overstated its earnings per share. The most

significant impact of the restatement was to the first and second quarters on fiscal year 2009, in which earnings per share were revealed to have been overstated by at least 50%.

**Defendants Failed To Address Known Internal Control Breakdowns**

**A. 2008.**

56. [REDACTED]

However, defendants affirmatively represented throughout 2008 and 2009 that the Company's internal controls were fine, even while they failed to take the necessary steps to prevent circumstances leading directly to the restatement of the Company's financial results.

57. [REDACTED]

58. [REDACTED]

59. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 62.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 61.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 60.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 66.

[REDACTED]

[REDACTED] 65.

[REDACTED]

[REDACTED] 64.

[REDACTED]

[REDACTED] 63.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 69.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 68.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 67.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

31

[REDACTED]

72.

[REDACTED]

[REDACTED]

[REDACTED]

71.

[REDACTED]

[REDACTED]

[REDACTED]

70.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 75.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 74.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 73.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 77.

B. 2009.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 76.

[REDACTED]

[REDACTED]

[REDACTED]

34

[REDACTED]

[REDACTED] 80.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 79.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 78.

[REDACTED]

35

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 84.

[REDACTED]

[REDACTED]

[REDACTED] 83.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 82.

[REDACTED]

[REDACTED]

[REDACTED] 81.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36

[REDACTED]

[REDACTED] 87.

[REDACTED]

[REDACTED] 86.

[REDACTED]

[REDACTED] 85.

[REDACTED]

[REDACTED]

37

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 91.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 90.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 89.

[REDACTED]

[REDACTED]

[REDACTED] 88.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 93.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 92.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 95.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 94.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 97.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 96.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

98. Just over two weeks later, on November 19, 2009, the discovery of “unsubstantiated accounting entries” was announced, leading to the restatement of 2008 and 2009 financial results.

**The Company Has Been Damaged**

99. The accounting scandal at SunPower has damaged the Company. According to the Company’s SEC filings, the Company has incurred significant accounting, tax, legal and consulting costs because of the restatement and the related investigation. These costs were approximately \$3.6 million in the fourth quarter of fiscal year 2008, and \$4.4 million in the first quarter of fiscal year 2009, for a total of approximately \$8 million. The Company has admitted in SEC filings that “these costs, as well as the substantial management time devoted to address these issues, have adversely affected and may continue to adversely affect our financial condition, results of operations and cash flows.”

100. The Company has also been exposed to substantial defense costs and expense (and potential liability) arising out of securities fraud class action litigation filed in federal court in California by purchasers of the Company’s securities during the financial reporting periods for which the Company’s results were restated, in an action captioned In re SunPower Securities Litigation, No. 09-5473-RS. The complaint in that action alleges that SunPower, and defendants Werner, Arriola and Hernandez acted with scienter, or intent to defraud investors, by issuing inflated financial results in quarters that were critical to the Company’s success, and avoiding earnings misses for those quarters. According to the Company, an unfavorable outcome in the securities class action “could exceed coverage provided under potentially applicable insurance

[REDACTED]

policies, which is limited. Any such unfavorable outcome could have a material adverse effect on our business, financial condition, results of operations and cash flows.”

101. Furthermore, according to the Company, “we could be required to pay damages or additional penalties or have other remedies imposed against us, or our current or former directors or officers, which could harm our reputation, business, financial condition, results of operations or cash flows. In addition, our Company is largely self insured so that expenses, settlements or damages in excess of \$5 million in these actions will not be recoverable under the primary coverage insurance policies.” Thus, the Company faces potentially large uninsured losses.

102. In addition, the restatement has caused substantial damage to the Company’s reputation in the financial markets. This is evidenced in part by the decline in the Company’s share price following revelations that the Company’s financial statements contained material errors, and that the Company’s internal controls were deficient.

**Demand is Excused**

103. Plaintiff brings this action derivatively for the benefit of SunPower to redress the breaches of fiduciary duty and other violations of law by defendants. Plaintiff has no interest adverse to SunPower, and has hired counsel experienced in this type of litigation.

104. At the time the action was initiated, the board was comprised of the following six directors, all of whom are named as defendants herein: Albrecht, Atkins, Bufe, McDaniel, Werner and Wood.

105. Plaintiff has not made any demand on the board to institute this action because such a demand would be a futile, wasteful and useless act:

a. Demand is excused because defendants, comprising the entirety of the current board, failed to detect, prevent and halt the pervasive accounting problems that were occurring at

SunPower, including the pervasive issuance of false statements to the shareholders, in the face of catastrophic problems that existed at the Company with respect to its internal control environment. As alleged herein, during 2008 and/or 2009, each current director defendant - Atkins, Albrecht, Wood, McDaniel, Bufe and Werner - attended Audit Committee or full board meetings [REDACTED] For years, defendants expressly acknowledged in SEC filings the internal control risks presented by the Philippines operation, including a need to implement and improve internal controls in light of the Company's dramatic growth. Yet even with this stated awareness, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] In 2010, PwC opined that the Company had failed to maintain effective internal controls "in all material respects." This failure to act in the face of multiple "red flags" represented defendants' sustained and systematic failure to exercise their oversight responsibilities, such that, from a practical standpoint, no control environment existed at all. In the face of these mounting breakdowns, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] This further evidences defendants' willful conduct.

b. Demand is further excused because the conduct alleged herein, including permitting the Company to operate with woefully inadequate internal controls and the issuance of false statements to shareholders extending over seven fiscal quarters, was not the product of a valid exercise of business judgment. The SEC filings identified herein, including a Form 10-K signed by each of the current directors, falsely represented that the Company maintained an

[REDACTED]  
[REDACTED]

effective internal control environment, and that the Company's financial statements were complete, accurate and free of misstatement. The conduct alleged herein, including but not limited to the issuance of such false statements to shareholders, was so egregious on its face that board approval cannot possibly meet the test of business judgment, and a substantial likelihood of director liability for breach of fiduciary duty therefore exists.

c. The board defendants participated in approving, reviewing and disseminating SunPower's false financial statements and false SEC filings. For example, defendants Werner, Albrecht, Atkins, Bufe, McDaniel, and Wood all signed the fiscal year 2008 Form 10-K that SunPower filed with the SEC, which contained false statements regarding the Company's financial results, and false statements concerning the supposed adequacy of the Company's internal control environment - which was in truth materially degraded at the time of said Form 10-K. As such, they are interested in the outcome of any inquiry or litigation concerning SunPower's false financial statements and face a substantial likelihood of liability based on their participation in the approval, review and dissemination of SunPower's false financial results and statements concerning the Company's internal controls to the shareholders.

d. Directors Werner, Atkins, Albrecht, Bufe, Wood and McDaniel receive material payments, benefits, stock options and other emoluments by virtue of their board membership, including hundreds of thousands of dollars a year in cash and stock awards. The current directors received these large payments during fiscal years (2008 and 2009) in which they breached their fiduciary duties, as alleged herein, and they continue to receive them. Defendant Werner, in particular, owes his livelihood to the Company since it provides him with his principal occupation. He was paid \$15 million in cash and stock by the Company over the last 3 years alone, and is therefore incapable of impartially considering a shareholder demand. Defendant

Werner is also identified in the Company's SEC filings as not independent under securities exchange listing standards. The amounts paid to each defendant are material, and they are material to each defendant. Defendants will act to preserve, and not threaten, their positions of control and the perquisites thereof, and are therefore incapable of exercising independent objective judgment in deciding whether to bring this action.

e. Defendants Albrecht, Bufe, McDaniel, Atkins and Wood, themselves a majority of the current board (5 of 6) were members of the Audit Committee during some or all of the periods that the Company's internal controls were failing, and false financial statements were disseminated to SunPower's shareholders. The Audit Committee is responsible for reviewing the integrity of SunPower's auditing, accounting, and reporting processes; reviewing SunPower's financial reports and other financial information provided to the public and filed with the SEC; and reviewing SunPower's internal controls regarding finance and accounting. The Audit Committee directors breached their fiduciary duties by causing or allowing the improper financial information and statements regarding SunPower's internal controls to be included in the Company's Form 10-K and 10-Q reports, and by failing to act when put on notice that the Company's internal controls were failing. These directors had special duties to ensure that appropriate measures were taken to fix the Company's internal control environment in the Philippines, which they utterly failed to do. As a result of these defendants' breach of their duties, any demand upon them would be futile.

f. As alleged herein, the current Audit Committee directors were responsible for overseeing the internal control environment at the Company, and had specific duties relating to the Company's financial disclosure controls and audit function. However, in their report on the restatement contained in the March 19, 2010 Form 10-K, the Audit Committee directors then

serving failed to hold themselves or any other serving directors accountable for SunPower's damaging restatement, and instead sought to blame "Philippines finance personnel" for the manual journal entries and accounting improprieties, while purporting to clear "executive management" (including defendant Werner) of any wrongdoing. Furthermore, the investigation absolving the Audit Committee directors was performed by members of the Audit Committee themselves (defendants Albrecht, Wood and McDaniel), even where the Company's internal control breakdowns called their own actions (and inactions) into serious question. Having already blamed others, any demand on these same directors now to investigate and sue themselves, or other directors or management of SunPower, for breach of fiduciary duty would be a futile act under the circumstances, and demand is therefore excused.

## COUNT I

### Breach of Fiduciary Duty

106. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs.

107. Defendants had a fiduciary duty to, among other things, exercise good faith to ensure that the Company's financial statements were prepared in accordance with applicable rules and laws, [REDACTED]

[REDACTED] to exercise good faith and take appropriate action promptly to correct the misconduct and prevent its recurrence.

108. Defendants willfully ignored obvious and pervasive problems with SunPower's internal controls alleged herein, and by deliberate and knowing indifference failed to make a good faith effort to correct the problems until it was far too late.

109. Defendants violated their fiduciary duties of care, loyalty, and good faith by causing or allowing the Company to disseminate to SunPower shareholders materially inaccurate information through, *inter alia*, SEC filings and other public statements and disclosures. These actions could not have been a good faith exercise of prudent business judgment.

110. Defendants violated and breached their fiduciary duties of care, loyalty, reasonable inquiry, oversight, good faith and supervision.

111. As a direct and proximate result of defendants' failure to perform their fiduciary obligations, SunPower has sustained significant damages, not only monetarily as alleged herein, but also to its corporate reputation and goodwill.

112. As a result of the misconduct alleged herein, defendants are liable to SunPower.

## **COUNT II**

### **Contribution and Indemnification**

113. Plaintiff incorporates by reference the allegations set forth above.

114. SunPower is alleged to be liable to private persons, entities and/or classes by virtue of the same facts or circumstances as are alleged herein to give rise to defendants' liability to SunPower.

115. SunPower's alleged liability on account of the wrongful acts and practices and related misconduct described above arises, in whole or in part, from the knowing, reckless, disloyal and/or or bad faith acts or omissions of defendants.

116. SunPower is entitled to contribution and indemnification from each of the defendants in connection with all such claims that have been, are or may in the future be asserted against SunPower by virtue of defendants' wrongdoing.

**PRAYER FOR RELIEF**

**WHEREFORE**, plaintiff, on behalf of SunPower, demands judgment against defendants and each of them jointly and severally as follows:

A. determining that this suit is a proper derivative action and certifying plaintiff as an appropriate representative of SunPower for said action.

B. declaring that each of the defendants breached his or her fiduciary duty to SunPower;

C. determining and awarding SunPower the damages sustained by it as a result of the violations set forth above from each of the defendants, jointly and severally, together with interest thereon;

D. awarding plaintiff the costs and disbursements of this action, including reasonable fees and costs to plaintiff's attorneys, accountants and experts; and

E. granting such other and further relief as the Court may deem just and proper.

**ROSENTHAL, MONHART & GODDESS, P.A.**

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(415) 788-4220

**CERTIFICATE OF SERVICE**

I, Kathaleen St. J. McCormick, Esquire, hereby certify that on June 3, 2011, a copy of the foregoing document was served on the following counsel in the manner indicated below:

**BY LEXISNEXIS FILE & SERVE**

Peter Bradford deLeeuw, Esquire  
Rosenthal, Monhait & Goddess, P.A.  
919 Market Street, Suite 1401  
P.O. Box 1070  
Wilmington, DE 19899-1070

/s/ Kathaleen St. J. McCormick  
Kathaleen St. J. McCormick (# 4579)