UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALEXANDER Y. USENKO, individually and on behalf of the SunEdison Retirement Savings Plan, and all other similarly situated Plan participants and beneficiaries, Plaintiff, v. SUNEDISON, INC., BOARD OF DIRECTORS OF SUNEDISON, INC., SUNEDISON, INC. INVESTMENT COMMITTEE, STATE STREET BANK & TRUST CO., AHMAD R. CHATILA, EMMANUEL T. HERNANDEZ, ANTONIO R. ALVAREZ, PETER BLACKMORE, CLAYTON C. DALEY, JR., GEORGANNE C. PROCTOR, STEVEN V. TESORIERE, JAMES B. WILLIAMS, RANDY H. ZWIRN, MATTHEW HERZBERG, and JOHN DOE DEFENDANTS 1-10, Defendants.	Case No. **JURY TRIAL DEMANDED**

NATURE OF THE ACTION

1. Plaintiff Alexander Y. Usenko ("Plaintiff"), individually, and on behalf of the SunEdison, Inc., Retirement Savings Plan (the "Plan"), and all other similarly situated Plan participants and beneficiaries (the "Participants"), brings this action against the below-named

defendants (collectively "Defendants") pursuant to §§ 404, 405, 409 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1104, 1105, 1109 and 1132.[1]

2. This case is about the abject failure of the Defendants, fiduciaries of the Plan, to protect the interests of Plan Participants in violation of the Defendants' legal obligations under ERISA. Defendants breached the duties they owed to the Plan, to Plaintiff, and to the proposed class members who are also Participants by, *inter alia*, retaining SunEdison common stock (hereafter, "SunEdison Stock" or "Company Stock") as an investment option under the Plan, when a reasonable fiduciary using the "care, skill, prudence, and diligence… that a prudent man acting in a like capacity and familiar with such matters would use" would have done otherwise. *See* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

3. Specifically, and as shown in greater detail below, Defendants permitted the Plan to continue to offer SunEdison Stock as an investment option to Plan Participants even after Defendants knew or should have known that during the Class Period (August 6, 2015 to the Present): (1) SunEdison Stock was artificially inflated; (2) SunEdison was in extremely poor financial condition; and (3) the Company faced equally poor long term prospects, making it an imprudent retirement investment for the Plan. Defendants were empowered, as fiduciaries, to remove SunEdison Stock from the Plan's investment options, yet they failed to do that, or to act in any way to protect the interests of the Plan or its Participants, in violation of their legal obligations under ERISA.

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[1] All allegations contained herein are based upon personal information as to Plaintiff and the investigation of Plaintiff's counsel. It is likely that, once discovery begins in earnest, the roles of additional persons or entities in the wrongdoing alleged below will be revealed and the wrongdoing itself will be further illuminated. In that event, Plaintiff will seek to amend this Complaint to add new parties and/or new claims in accordance with the Federal Rules of Civil Procedure and this Court's rules.

4. In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court confirmed that plan fiduciaries violate ERISA when they continue to offer an imprudent plan investment option. In *Fifth Third,* the Court considered a class action case similar to this one in which plan participants challenged the plan fiduciaries' failure to remove company stock as a plan investment option. The Supreme Court held that retirement plan fiduciaries are required by ERISA to independently determine whether company stock remains a prudent investment option. In that case, the defendant-fiduciaries argued that their decision to buy or hold company stock was entitled to a fiduciary-friendly "presumption of prudence" standard. *Fifth Third*, 134 S. Ct. at 2463. The Supreme Court rejected that argument, holding that "no such presumption applies," *id.* and further held "that the duty of prudence **trumps** the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary." *Id.* at 2468 (citation omitted) (emphasis added). Accordingly, the Plan's "fiduciaries are subject to the **same duty of prudence** that applies to ERISA fiduciaries in general." *Id*. at 2463 (emphasis added). Thus, even if the Plan required that SunEdison Stock be offered, the Plan's fiduciaries were obligated by law to disregard that directive once Company Stock was no longer a prudent investment for the Plan.

5. The thrust of Plaintiffs' allegations under Counts I (breach of the duty of prudence) and II (breach of the duty of loyalty) is that Defendants allowed the investment of the Plan's assets in SunEdison Stock throughout the Class Period despite the fact that Defendants knew or should have known at least by the beginning of the Class Period that that investment was imprudent as a retirement vehicle for the Plan for at least two separate reasons.

6. First, SunEdison Stock was artificially inflated during the Class Period, while the Plan was purchasing SunEdison Stock. During the Class Period, the Company materially

misrepresented the strength of its financial condition and prospects thereby inflating the value of its stock. As a result, SunEdison Stock, and correspondingly the Plan's assets invested in SunEdison Stock, lost substantial value once the truth emerged.

7. This claim – that a company's stock is imprudent based on the stock price being artificially inflated, and that the fiduciaries should have understood the overvaluation because of nonpublic information of which they were aware – is squarely endorsed by *Fifth Third.*

8. Second, SunEdison Stock was also imprudent during the Class Period in light of circumstances demonstrating SunEdison's perilous financial condition which, included among other things, as explained in detail below, a sea-change in the basic risk profile and business prospects of SunEdison.

9. *Fifth Third* did not make any new law with respect to the second traditional type of imprudence—that the employer's stock has become an imprudent investment not because it is overpriced, but because of the adverse circumstances prevailing during the Class Period rendering the investment imprudent—and this type of claim remains firmly entrenched in the basic trust law principles from which ERISA is derived. Here Plaintiff asserts such claim based upon the ***totality of the circumstances*** which rendered SunEdison Stock an imprudent Plan investment, given the particular character and aims of the Plan discussed below as a vehicle for retirement savings.

10. Indeed, the Supreme Court reaffirmed the ongoing fiduciary duty to monitor a plan's investment options in *Tibble v. Edison, Int'l*, 135 S. Ct. 1823 (2015). *Tibble* held that "an ERISA fiduciary's duty is derived from the common law of trusts," and that "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Id.* at

1828. In so holding, the Supreme Court referenced with approval the Uniform Prudent Investor Act (the "UPIA"), treatises, and seminal decisions confirming the duty.[2]

11. When enforcing the duties of prudence and loyalty, courts focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction. A pure heart and an empty head are not defenses to breaches of ERISA's fiduciary duties. With respect to SunEdison Stock, as alleged below, Defendants failed to engage in a reasoned decision-making process, consistent with that of a prudent fiduciary acting in a like capacity, to review and properly evaluate Company Stock. During the Class Period, Defendants failed to take any action with respect to the Plan's investment in SunEdison Stock, although that stock was clearly performing poorly and unduly risky throughout the Class Period.

12. Plaintiff further states in the alternative, pursuant to FED. R. CIV. P. 8(d)(2), that (a) allegations of SunEdison's deteriorating condition, evidenced by negative publicly available information, which was ignored by the Plan's fiduciaries in continuing to offer Company Stock, (b) SunEdison's overwhelming and unserviceable debt and high debt management risk, and (c) Defendants' failure to properly investigate the continued prudence of SunEdison Stock and/or employ a reasoned decision-making process in evaluating Company Stock, each, individually, represents the kind of "special circumstances" that the Supreme Court recognized in *Fifth Third*

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[2] *Tibble* cites with approval to the UPIA which enshrines trust law and recognizes that "the duty of prudent investing applies both to investing and managing trust assets. . . ." 135 S. Ct. at 1828 (quoting Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 2(c) (1994)). The official comment explains that "'[m]anaging' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments." *Id.* § 2 comment.

renders reliance on a company's stock price imprudent and supports a finding of breach of fiduciary duties as alleged herein in Counts I and II.[3]

13. Given the totality of circumstances prevailing during the Class Period, no prudent fiduciary could have made the same decision as Defendants here to retain and/or continue purchasing the clearly imprudent SunEdison Stock as a Plan investment. To remedy the breaches of fiduciary duties as described herein, Plaintiff seeks to recover the financial losses suffered by the Plan as a result of the diminution in value of Company Stock invested in the Plan during the Class Period.

14. In an ERISA case such as this, the proper measure of damages is the difference between what the Plan Participants received and what the Plan Participants would have received if the Plan's assets had been invested prudently. In other words, with respect to the calculation of the losses to a plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the participants in the plan would not have made or maintained investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available. In this way, the remedy restores the value of the plan's assets to what they would have been if the plan had been properly administered.

15. The market price of SunEdison Stock has fallen from approximately $17.08 on August 6, 2015 (the beginning of the Class Period) to $2.47 on January 19, 2016, the most recent trading day preceding the date of this filing (both adjusted closes) – a decline of over 85.5%

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[3] This type of special circumstance was specifically recognized by the author of *Fifth Third*, Justice Breyer during oral argument of *Fifth Third*. *See Fifth Third* Oral Argument Transcript at 31:10-18 (describing hypothetical situation where in a fiduciary's "inbox is ten feet of papers telling him about… the corporation's condition. It's apparent he's never read them. If he had read them, he would have taken action. Of course you would have a case, I would think."). *Available at www.supremecourt.gov/oral_arguments/argument_transcript/2013*.

(SunEdison Stock has declined by over 92.2% since its high close of $31.84 on July 14, 2015, prior to the start of the Class Period).

JURISDICTION AND VENUE

16. ***Subject Matter Jurisdiction.*** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

17. ***Personal Jurisdiction.*** This Court has personal jurisdiction over all Defendants because they are all residents of the United States and ERISA provides for nation-wide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

18. ***Venue.*** Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) because the Plan is administered in this District, some or all of the fiduciary breaches for which relief is sought occurred in this District, and one or more Defendants reside or may be found in this District.

PARTIES

Plaintiff

19. Plaintiff Alexander Y. Usenko is a former SunEdison employee and "participant" in the Plan, within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7). During the Class Period, Plaintiff Usenko held shares of SunEdison Stock through his individual Plan account, and suffered losses as a result of investing his retirement Plan assets in SunEdison Stock. Specifically, during the Class Period, the value of SunEdison shares in Plaintiff Usenko's account diminished as a result of Defendants' breaches of fiduciary duty described herein. Plaintiff Usenko is no different, in all material respects, than the thousands of other SunEdison employees who entrusted the Defendant-fiduciaries with their retirement savings.

<u>Defendants</u>

(a) <u>Company Defendant</u>

20. Defendant SunEdison is a Delaware corporation headquartered at 13736 Riverport Dr., Maryland Heights, Missouri.

21. According to the Plan's annual report on the Form 11-K for the fiscal year ended December 31, 2014, filed with the Securities and Exchange Commission ("SEC") on June 29, 2015, ("2014 Form 11-K"), SunEdison is the sponsor of the Plan. *Id.* at 4.

22. At all relevant times, SunEdison acted with respect to the Plan's assets through its officers and employees, and its Board of Directors ("Board"), who performed Plan-related fiduciary functions in the course and scope of their employment and/or affiliation with SunEdison. Upon information and belief, SunEdison has the authority to appoint and/or remove, through its Board and/or the Investment Committee (defined below), whose members are employed by SunEdison, the administrators, managers, and/or investment advisors, with respect to the Plan's assets. Upon information and belief, SunEdison is also responsible, through its Board and/or the Investment Committee, for reviewing the performance of any Plan fiduciary or other person(s) or entity(ies) to whom fiduciary duties have been delegated or allocated with respect to the Plan's assets. Accordingly, the actions of the individual Defendants named herein and other employee-fiduciaries are imputed to SunEdison under the doctrine of *respondeat superior*, and SunEdison is liable for these actions.

23. During the Class Period, in addition to being a named fiduciary of the Plan, and in light of the foregoing duties, responsibilities, and actions, SunEdison possessed ultimate decision-making authority concerning whether to retain SunEdison Stock as an investment option. Accordingly, SunEdison was a fiduciary of the Plan within the meaning of ERISA

§ 3(21), 29 U.S.C. § 1002(21) because it exercised discretionary authority and control over Plan management and control over disposition of Plan assets and/or authority to appoint and monitor Plan fiduciaries who had control over Plan management or control over management or disposition of the Plan's assets.

(b) <u>The Director Defendants</u>

24. Upon information and belief, the Director Defendants were responsible for appointing members of the SunEdison, Inc. Investment Committee (the "Investment Committee"). *See* 2014 Form 11-K at 4. As explained below, the Investment Committee was responsible for selecting the Plan's investment options. Because the Director Defendants had the authority to appoint the members of the Investment Committee, and the Investment Committee was responsible for managing the Plan's assets, the Director Defendants had the duty to monitor the activities of the Investment Committee. As a result, the Director Defendants had the ultimate responsibility for removing the Investment Committee members if necessary.

25. The Board is a juridical entity under ERISA and is named as a Defendant.

26. During the Class Period, each Director Defendant identified below was a fiduciary of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because each exercised discretionary authority to appoint and monitor Plan fiduciaries who had discretionary authority or control over Plan management and/or authority or control over management or disposition of the Plan's assets.

27. Defendant Ahmad R. Chatila ("Chatila") has served as President, Chief Executive Officer, and a director of SunEdison since March 2009.

28. Defendant Emmanuel T. Hernandez ("Hernandez") has served as Chairman of the Board since January 2013, and as a director of SunEdison since 2009.

29. Defendant Antonio R. Alvarez ("Alvarez") has served as a director of SunEdison since 2012.

30. Defendant Peter Blackmore ("Blackmore") has served as a director of SunEdison since 2006.

31. Defendant Clayton C. Daley, Jr. ("Daley") has served as a director of SunEdison since August 1, 2014.

32. Defendant Georganne C. Proctor ("Proctor") has served as a director of SunEdison since October 30, 2013.

33. Defendant Steven V. Tesoriere ("Tesoriere") has served as a director of SunEdison since 2012.

34. Defendant James B. Williams ("Williams") has served as a director of SunEdison since 2003.

35. Defendant Randy H. Zwirn ("Zwirn") has served as a director of SunEdison since 2013.

36. Defendants Chatila, Hernandez, Alvarez, Blackmore, Daley, Proctor, Tesoriere, Williams, and Zwirn, are collectively referred to herein as the "Director Defendants."

(c) Investment Committee Defendants

37. According to SunEdison's filings, the SunEdison, Inc. Investment Committee (defined above as the "Investment Committee") is the designated administrator of the Plan (the "Plan Administrator"). *See* 2014 Form 11-K at 4. The Investment Committee signed the 2014 Form 11-K as the Plan Administrator. *Id*. at 13.

38. Furthermore, as explained in the 2014 Form 11-K, the Investment Committee is charged with "the responsibility for reviewing the performance of the Plan's investment

alternatives," including the SunEdison Stock Fund. *Id.* at 4. The Investment Committee members are further identified as the employees of SunEdison. *Id.*

39. The Investment Committee is a juridical entity under ERISA and is named as a Defendant.

40. Defendant Matthew Herzberg ("Herzberg") served as a member of the Investment Committee during the Class Period. Defendant Herzberg signed the 2014 Form 11-K as a member of the Investment Committee. *Id.* at 13.

41. During the Class Period, each Investment Committee member, including, but not limited to Defendant Herzberg, was a fiduciary of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because each exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of the Plan's assets.

42. Defendant Herzberg and other members of the Investment Committee, whose identities are presently unknown to Plaintiff, are collectively referred to herein as the "Investment Committee Defendants." Once the identities of the remainder of the Investment Committee members who served on the Investment Committee during the Class Period are ascertained through discovery proceedings, Plaintiff will include them in any amended pleading(s) under their proper names.

(d) <u>The Trustee Defendant</u>

43. According to SunEdison's filings, Defendant State Street Bank & Trust Co. ("State Street") has served as the trustee of the Plan, effective January 2014. *See* 2014 Form 11-K at 5; *see also id.* at 11. During the Class Period, State Street has held the Plan's assets in a

trust established for the benefit of Plan Participants. *See id.* at 8 ("[t]he Plan assets are maintained in a trust fund").

44. Defendant State Street maintains an office at 780 Third Avenue, New York, New York 10017.

45. Given the overwhelming publicly available information during the Class Period signaling the deteriorating financial condition of SunEdison, State Street had a duty to disregard any instructions from the Investment Committee to invest the Plan's assets in SunEdison Stock. During the Class Period, State Street was a fiduciary of the Plan, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because State Street exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of the Plan's assets.

(e) <u>Additional "John Doe Defendants"</u>

46. To the extent that there are additional officers and employees of SunEdison who were fiduciaries of the Plan during the Class Period, including members of the Investment Committee, the identities of whom are currently unknown to Plaintiff, Plaintiff reserves the right, once their identities are ascertained, to seek leave to join them to the instant action. Thus, without limitation, unknown "John Doe" Defendants 1-10 include other individuals, including, but not limited to, SunEdison officers and employees, who were fiduciaries of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) during the Class Period.

THE PLAN

<u>Purpose</u>

47. The Plan is "a defined contribution retirement savings plan," covering all eligible employees of SunEdison and its subsidiaries. *See* 2014 Form 11-K at 4.

48. Upon information and belief, the purpose of the Plan is to provide Plan Participants with the opportunity to save for retirement.

Administration of the Plan

49. As noted above, the Investment Committee has served as the Plan Administrator during the Class Period. *See* 2014 Form 11-K at 4.

50. Upon information and belief, the Investment Committee, as Plan Administrator, is responsible for the day-to-day administration and operation of the Plan.

Contributions

51. As explained by the 2014 Form 11-K, during the Class Period, the Plan has provided for the following types of contributions:

- Employee salary deferrals
- Employee matching contributions
- Employer non-matching contributions
- Employer "rollover" contributions

See 2014 Form 11-K at 4.

52. In particular, Plan participants may elect to contribute to the Plan from 1% to 50% of their salary on a pre-tax basis.[4] *See* 2014 Form 11-K at 4. With respect to the Company's matching contributions, a Plan Participant "is eligible to receive employer-matching contributions of 100% of the first 3% of the employee's contribution, 50% of the next 2% contributed, and 20% of the next 1% contributed, up to 4.2% of the participant's covered compensation for the Plan year." *Id.* The Company "additionally contributes 2% of compensation as a non-matching contribution on behalf of all participants." *Id.* Finally, Plan

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[4] The pre-tax contribution is limited to the amount specified by Section 402(g) of the Internal Revenue Code ($17,500 in 2014 and 2013). *See* 2014 Form 11-K at 4. Plan participants who attained the age of 50 before the end of the Plan year are eligible to make catch-up contributions. *Id.*

Participants can contribute amounts representing distributions from other qualified defined benefit or contribution plans (rollover). *Id.*

Vesting

53. According to the 2014 Form 11-K, all Plan Participant accounts are immediately and fully vested. *Id.* at 4.

SunEdison Stock Fund

54. During the Class Period, the Plan offered a number of investment options, including the SunEdison Stock Fund. *See* 2014 Form 11-K at 4, 8. The SunEdison Stock Fund is "typically comprised of approximately 97% SunEdison common stock and 3% cash." *Id.* at 5. "Unitized accounting allows for same-day processing of transactions within the SunEdison Stock Fund." *Id.* Interfund transfers in and out of the SunEdison Stock Fund are limited to one per week. *Id.* at 4. Plan Participants can adjust all other investment options daily. *Id.* In May 2010, SunEdison limited the amount of future contributions to the SunEdison Stock Fund to 15% of a Plan Participant's total contributions. *Id.* at 5. Further, Plan Participants are not permitted to transfer existing balances into the SunEdison Stock Fund to the extent the amount invested would exceed 15% of the Participant's account balance. *Id.*

55. At December 31, 2014 and 2013, the Plan held 1,203,446 and 1,395,713 shares, respectively of SunEdison Stock, with a fair market value of $16,822,243 and $18,214,054, respectively.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this action derivatively on the Plan's behalf pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, and as a class action pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Plan, Plaintiff, and the following class of similarly situated persons (the "Class"):

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the SunEdison Retirement Savings Plan at any time between August 6, 2015,[5] and the present (the "Class Period") and whose Plan accounts included investments in SunEdison Stock.

57. Given ERISA's distinctive representative capacity and remedial provisions, courts have observed that ERISA litigation of this nature present a paradigmatic example of a FED. R. CIV. P. 23(b)(1) class action.

58. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are thousands of employees of SunEdison who participated in, or were beneficiaries of, the Plan during the Class Period whose Plan accounts included SunEdison Stock. For example, at the end of Plan year 2014, there were 2,153 participants in the Plan. *See* 2014 Plan Form 5500 filed with the Department of Treasury Internal Revenue Service and the Department of Labor.

59. At least one common question of law or fact exists as to Plaintiff and all members of the Class. Indeed, multiple questions of law and fact common to the Class exist, including, but not limited to:

(a) whether Defendants each owed a fiduciary duty to the Plan, Plaintiff, and members of the Class;

(b) whether Defendants breached their fiduciary duties to the Plan, Plaintiff, and members of the Class by failing to act prudently and solely in the interests of the Plan and the Plan's participants and beneficiaries;

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[5] Plaintiff reserves his right to modify the Class Period definition in the event that further investigation/discovery reveals a more appropriate and/or broader time period during which SunEdison Stock constituted an imprudent investment option for the Plan.

(c) whether Defendants violated ERISA; and

(d) whether the Plan, Plaintiff, and members of the Class have sustained damages and, if so, what is the proper measure of damages.

60. Plaintiff's claims are typical of the claims of the members of the Class because the Plan, Plaintiff, and the other members of the Class each sustained damages arising out of Defendants' wrongful conduct in violation of ERISA as complained of herein.

61. Plaintiff will fairly and adequately protect the interests of the Plan and members of the Class because he has no interests antagonistic to or in conflict with those of the Plan or the Class. In addition, Plaintiff has retained counsel competent and experienced in class action litigation, complex litigation, and ERISA litigation.

62. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the action, or substantially impair or impede their ability to protect their interests.

63. Class action status is also warranted under the other subsections of Rule 23(b)(1)(A) and (b)(2) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

FACTS BEARING UPON DEFENDANTS' FIDUCIARY BREACHES

64. During the Class Period Defendants knew or should have known that Company Stock had become an imprudent Plan investment option for two independent reasons: (1)

SunEdison Stock was artificially inflated; and (2) the Company's basic risk profile had been so dramatically altered due to changed circumstances detailed below that it was no longer a prudent retirement investment for the Plan. As explained herein, under either basis, the Class Period begins no later than August 6, 2015. From the start of the Class Period until the present, the Plan's fiduciaries have failed to cure their fiduciary breaches because, upon information and belief, SunEdison Stock Fund remains an investment option under the Plan and the fiduciaries have not frozen the SunEdison Stock Fund, or taken any other action, consistent with ERISA and the federal securities laws, to prevent the Plan and its Participants from investing any more money in imprudent SunEdison Stock.

A. <u>SunEdison Stock Was Artificially Inflated During the Class Period</u>

65. SunEdison finances, builds, owns, and operates various solar and wind power plants, having developed over 1,300 solar and wind projects in 20 countries. A key part of SunEdison's business is use of the so-called yield companies ("YieldCos."), which have become common in the energy industry, particularly in the renewable energy sector, as a way to finance various types of clean energy production. A YieldCo. is a dividend growth-oriented public company created by a parent company, such as SunEdison, that bundles long-term contracted operating assets to produce predictable cash flows. The YieldCo. is taken public, and the proceeds are upstreamed to the parent to allow for further project development. The parent company, such as SunEdison, acquires assets such as power-generating plants, and then sells those assets and their customer contracts for power purchasing to the YieldCo. The contracts then generate ongoing cash flows, meant to be distributed to the YieldCo.'s shareholders as dividends.

66. Prior to the start of the Class Period, SunEdison spun off two separate corporate entities set up as YieldCos, to raise capital to fund the massive solar and wind power projects that are at the heart of the Company's business.

67. On May 29, 2014, SunEdison announced that TerraForm Power, Inc. ("TerraForm Power"), a YieldCo. subsidiary of SunEdison, had filed a registration statement with the SEC for a proposed initial public offering ("IPO"). SunEdison retained over 90% of the voting power in the company. According to SunEdison's filings, "our business model is to contribute or sell solar energy systems to our TerraForm Power segment, and to realize cash upon the completion and sale of a solar energy system." SunEdison's annual report on Form 10-K for the 2014 fiscal year.

68. Throughout the next year, SunEdison issued quarterly financial statements touting the prospects of its growth in the alternative energy market. At the same time, the Company also continued its acquisition strategy, announcing its acquisition of First Wind Holdings, LLC ("First Wind") for $2.4 billion in a transaction that was completed on January 29, 2015.

69. To fund its acquisitions, SunEdison raised $190 million through a secondary offering of shares in Singapore-based SunEdison Semiconductor Ltd., secured a $400 million credit commitment from several financial institutions, offered $350 million of convertible senior notes due 2022, and offered $375 million aggregate principal amount of convertible senior notes due 2023 and $375 million aggregate principal amount of convertible senior notes due 2025.

70. On May 7, 2015, SunEdison announced that a second of its YieldCos., TerraForm Global, Inc. ("TerraForm Global"), had filed a registration statement in preparation for its IPO.

71. The Company continued to take on new debt to fund growth. On June 16, 2015, SunEdison announced in a press release that it signed a definitive agreement to acquire 100

percent of Globeteq Mesoamerica Energy ("GME"), a renewable energy company based in Central America. In the press release, Defendant Chatila touted the expansion of SunEdison, thereby encouraging investors, including the Plan Participants, to retain and buy SunEdison Stock on the perception that the Company was building a plan of sustainable growth:

> The acquisition of GME strengthens SunEdison's leadership position in the global wind energy market and significantly expands our presence in Central America, a region that offers growth opportunities for our emerging markets development platform. With this acquisition we not only gain an experienced and talented management team with a proven track record in the region, but also position ourselves to accelerate our performance and deliver attractive returns to our shareholders.

June 16, 2015 Press Release.

72. However, unbeknownst to the investing public, including the Plan Participants, SunEdison's acquisition surge was built on nothing but a "house of cards," being propped up by misrepresentations and omissions.

73. Rather than address known needs to increase revenues and lower debt, the Company again jumped into another acquisition. On July 20, 2015, SunEdison announced in a press release that it had entered into a merger agreement with Vivint Solar, a provider of residential solar systems in the United States, for $2.2 billion in cash, stock and convertible notes (the "Vivint Solar Acquisition"). Defendant Chatila stated in pertinent part as follows with regard to the Vivint Solar Acquisition:

> SunEdison's acquisition of Vivint Solar is a logical next step in the transformation of our platform after the successful execution of our First Wind acquisition in January 2015. We expect the Vivint Solar transaction to create significant value for our stockholders through the accretion in our TerraForm Power ownership, the acceleration of our Incentive Distribution Rights and an immediate expansion of our capacity and bandwidth to grow our residential business in the U.S. and globally. As of the fourth quarter of 2015,

> our organic growth and recent acquisitions will put SunEdison on track to deploy more than 1 gigawatt per quarter.
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> * * *
>
> With Vivint Solar, we're tripling our value.

July 20, 2015 Press Release.

74. However, unbeknownst to investors, including the Plan Participants, and despite Defendant Chatila's assurances, SunEdison's acquisition plan was not sustainable. By the time of the Vivint Solar Acquisition, the Company was already highly leveraged and in financial distress as evidenced by its quarterly reports discussed below. As such, SunEdison needed TerraPower's liquidity and credit resources to help finance the Vivint Solar Acquisition. Consequently, SunEdison used its control over TerraForm Power (as alleged above, SunEdison retained over 90% of the voting power in TerraForm Power after its IPO) to compel TerraForm Power to purchase the assets that SunEdison was acquiring as part of its acquisition of Vivint Solar. As alleged in a derivative action against SunEdison filed on behalf of TerraForm Power, *Appaloosa Investment Limited Partnership I, v. SunEdison, Inc., et al.*, Case No. 11898 (Del. Ch. Jan. 12, 2016), unlike the traditional utility-scale projects that TerraForm Power acquired from SunEdison in the past, which involved credit-worthy counterparties and generated reliable cash flows, the residential rooftop solar assets that SunEdison was selling to TerraForm Power as part its Vivint Solar acquisition, had individual homeowners as counterparties, reflecting significantly higher credit risk and lower reliability of cash generation.

75. The Vivint Solar deal was criticized in the financial community as overpriced and too divergent from SunEdison's traditional utility-scale projects. Mackquarie Group stated in a July 21, 2015 analyst report that "There is no denying that a ~60% premium paid for VSLR's [Vivint Solar] vs. its Friday close is gob smacking."

76. The falling price of SunEdison Stock in the wake of the announcement of the Vivint Solar Acquisition, as well as the media reports criticizing this deal, were red flags that should have prompted the Defendants to investigate the continued prudence of retaining and purchasing further SunEdison Stock for the Plan. Yet, Defendants continued to maintain the SunEdison Stock Fund as a Plan investment to the detriment of Plan Participants. Following the announcement of the Vivint Solar Acquisition, SunEdison Stock remained on a downward trajectory, thereby eroding the value of the Plan Participants' retirement savings (while the stock was still inflated at the time by the undisclosed material information regarding the true condition of the Company).

77. Rather than pulling back after the Vivint Solar Acquisition, the Company again charged ahead. On July 31, 2015, TerraForm Global launched its IPO. Originally, TerraForm Global intended to raise a total of $1 billion. However, SunEdison was ultimately only able to raise $675 million through this IPO.

78. Following the disappointing IPO of TerraForm Global, SunEdison Stock's price continued to tank. However, Defendants persisted in misleading investors, including the Plan Participants, into believing that the Company was on the right path.

79. By August 6, 2015, the beginning of the Class Period, SunEdison Stock's price had dropped to $17.08 (the stock was trading over $31 prior to the announcement of the Vivint Solar Acquisition). That same day, SunEdison issued a press release announcing its financial results for the 2015 second quarter, reporting a loss of $263 million. The Company sustained a net loss of $.93 per share. SunEdison also reported that gross margins on the projects that the Company had sold to TerraForm Power were only 12.5%, a drastic cut from SunEdison's prior guidance of 18%. Furthermore, according to its financials, SunEdison's debt now stood at a

whopping $11 billion, which included debt from a number of multi-billion dollar deals to acquire new wind and solar assets. Once again in the face of increasing debt and other serious issues plaguing the Company, Defendant Chantila assured investors, including the Plan Participants that:

> During the second quarter, we continued to balance operational execution while meeting our strategic objectives. On the operations front, our leading organic development engine continues to execute as we exceeded our megawatt (MW) and Retained Cash Available for Distribution (CAFD) guidance, delivering 404 MW and $63 million, respectively. In addition, TerraForm Power delivered $65 million of CAFD and continues to create value for shareholders with its leading DPS growth. Finally, we have largely completed our platform transformation with the agreement to acquire Vivint Solar, a leader in residential solar, as well as the IPO of our Emerging Markets-focused asset ownership platform, TerraForm Global.

August 6, 2015 Press Release.

80. Despite the falling price of SunEdison Stock and adverse Company-specific news available in the public domain, such as the announcement of multi-million losses, the heavy debt incurred by SunEdison, and criticism of the Company's prospects in light of the Vivint Solar Acquisition, the Defenant-fiduciaries continued to take no action to protect the Plan Participants' interests, and continued to offer the imprudent SunEdison Stock Fund as a Plan option.

81. On October 1, 2015, analysts at CriditSights disclosed that a margin call on a $410 million SunEdison "non-recourse" margin loan that SunEdison carried may have been triggered, which would wipe out a large portion of SunEdison's available cash. That day SunEdison Stock's price closed at $7.20. Still, the Plan fiduciaries continued to do nothing to protect the Plan's assets invested in SunEdison Stock.

82. Furthermore, the Company continued to make misrepresentations concerning the strength of its financial condition, even as it filed its Form 8-K with the SEC on October 5, 2015,

announcing layoffs of 15% of its workforce and restricting charges of $30 to $40 million for Q3 2015 through Q1 2016. The October 5, 2015 Form 8-K reported that on September 29, 2015, the Board approved the management's plan to reorganize. However, the October 5, 2015 Form 8-K misrepresented the purpose of these layoffs as a vehicle to "optimize business operations in alignment with current and future market opportunities, and accelerate cash flow positive operations." In reality, the Company did not have the cash flow to sustain its operations.

83. The next day, on October 6, 2015, the *Wall Street Journal* reported in an article entitled "SunEdison Won't Complete $700 Million Buyout of Latin America Power" that as its "woes mount[ed]," SunEdison failed to make a required $400 million upfront payment for a roughly $700 million planned acquisition of Latin American Power ("LAP"). The article noted that attorneys for LAP stated that SunEdison was in breach of its obligations under the deal. That day, SunEdison Stock closed at $8.69.

84. The October 1, 2015 disclosure of the margin call on SunEdison's loan and the October 5, 2015 announcement of the Company layoffs, as well as the continually falling Company Stock price, were additional red flags that should have prompted the Defendants to investigate the continued prudence of retaining SunEdison Stock as a Plan investment. Yet, Defendants continued to maintain the SunEdison Stock Fund in the Plan.

85. Following the Company's October 5, 2015 announcement of massive lay-offs, SunEdison Stock price continued its downward spiral, thereby decimating the value of the Plan Participants' retirement savings.

86. On October 7, 2015, SunEdison disclosed that it was lowering its guidance for 2016, and announced in a press release that it would not sell any projects to TerraForm Power or TerraForm Global that year. In a Business Update presentation released to investors that same

day, SunEdison described a "market dislocation" that had become apparent in the YieldCo. space, noting the recent extremely poor performance of both SunEdison's and Terra Form Power's respective stock prices. Defendant Chatila announced on a call with analysts that SunEdison would "pivot to third-party sales" because there was "a disconnect between the value of these underlying assets and what people are willing to pay for them in a yieldco." Even worse, Defendant Chatila announced that SunEdison planned to reduce expansion plans in Latin America and other emerging markets, which were the YieldCo.'s geographic focus. Defendant Chatila explained that SunEdison "de-emphasized countries, consolidated divisions and walked away from things that didn't make sense in the current dislocation in the market." In other words, the project acquisition strategy upon which the YieldCos. depended to effectuate SunEdison's business plan would not be carried out.

87. On October 8, 2015, *SeekingAlpha* issued another article entitled "SunEdison: Is Bankruptcy Possible," noting that SunEdison's cash expenditures are "clearly unsustainable" with the Company burning "around $3.5 billion in the last four quarters." The article also noted that "SunEdison is over-leveraged" with "shareholders equity of only $632 million and total liabilities of $16,925 million, it is possible to calculate a debt to equity ratio of 26:78." The results "severely call into question the health of the Vivint Solar organization (especially in the context of strong results from Sunrun and SolarCity)" wrote Credit Suisse's Patrick Jobin. Jobin wrote that SunEdison investors should be concerned about what the Company is likely to be acquiring at this point:

> The decline in volumes and likely guidance miss, in addition to the weakening financial position (debt raises challenged recently), indicates troubles either organizationally or as a consequence of the pending acquisition by SunEdison which is supposed to close Q4-Q-1. While no shareholder vote has been scheduled to approve the merger, it appears financial underperformance is not a MAC to

> get out of the deal. While TerraForm is actively trying to sell the operating assets upon acquisition, one must as further questions about the strength of the development engine SunEdison is acquiring.

88. Deutsche Bank's Visual Shah likewise cut his price target on SunEdison, noting that the Company's 10-Q included "language around SUNE debt financing" that "could concern some investors who are focused on the balance sheet, while opex needs could complicate SUNE's ~$150M/Q Guidance."

89. On October 22, 2015, Defendant Chatila informed Vivint Solar that SunEdison's Audit Committee of the Board had serious misgivings about the economics of the merger in light of the prevailing market conditions for both SunEdison and Vivint Solar. SunEdison was in a severe liquidity crunch and was in danger of not being able to carry out the merger on the agreed upon terms.

90. As it turned out, during the Class Period, SunEdison's financial condition had become dire. In November 2015, SunEdison disclosed among other things: (1) drastically lower margins on retained projects than had been forecast; (ii) significant funding issues with two separate transactions; (iii) the re-categorization of over $700 million in "non-recourse" debt (including the $410 million margin loan) to "recourse," meaning the lenders could recover the amounts due directly from SunEdison; and (iv) that it had taken out an emergency $170 million loan from Goldman Sachs on August 11, 2015, at a staggering effective interest rate of 15%.

91. On these troubling news, investors quickly abandoned the marketplace with several prominent hedge funds, such as Daniel Loeb's Third Point, selling their positions. Yet, Defendants continued to maintain the SunEdison Stock Fund in the Plan to the detriment of the Plan Participants. During the Class Period, Defendants took no action to protect the Plan and its

Participants from, *inter alia*, not purchasing additional shares of artificially inflated Company Stock.

B. SunEdison Stock Has Been an Imprudent Investment During the Class Period Due to the Company's Changed Circumstances

92. In addition to SunEdison Stock being imprudent due to its artificial inflation, it has also been imprudent due to the Company's changed circumstances leading up to and during the Class Period.

93. As discussed above, prior to and during the Class Period, SunEdison incurred a gargantuan amount of debt to fund its operations. In particular, SunEdison's debt load reached $11.7 billion by the end of the third quarter of 2015. This debt has threatened the Company's liquidity and its ability to stay solvent.

94. The liquidity risks facing SunEdison were widely reported during the Class Period and should have been well known to the Defendants, who nonetheless failed to act to protect the Plan Participants' interests invested in SunEdison Stock.

95. As alleged above, on August 6, 2015, at the start of the Class Period, SunEdison issued a press release, filed with the SEC as an exhibit to the Form 8-K, reporting results of its operations for the 2015 second quarter. The results were dismal and should have alerted Defendants (among other warning signs alleged herein that were already out in the public domain) of the need to investigate the prudence of maintaining the SunEdison Stock Fund as a Plan Investment. In particular, SunEdison reported a loss of $263 million in its second quarter. Additionally, SunEdison stated it had a loss of 93 cents per share. SunEdison also reported that gross margins on the projects that the Company had sold to TerraForm Power were only 12.5% (down from SunEdison's prior guidance of 18%).

96. The market reacted poorly to SunEdison's announcement of its 2015 second quarter earnings:

> NEW YORK (TheStreet) -- SunEdison (SUNE - Get Report) shares are down by 12.90% to $19.92 in early market trading on Thursday, following the release of the solar energy company's 2015 second quarter earnings results.
>
> The company reported a net loss of $263 million, or a loss of 93 cents per share on an adjusted basis on revenue that rose 5.6% to $455 million for the quarter.
>
> * * *
>
> Separately, TheStreet Ratings team rates SUNEDISON INC as a Sell with a ratings score of D+. TheStreet Ratings Team has this to say about their recommendation:
>
> "***We rate SUNEDISON INC (SUNE) a SELL. This is driven by a number of negative factors, which we believe should have a greater impact than any strengths, and could make it more difficult for investors to achieve positive results compared to most of the stocks we cover. The company's weaknesses can be seen in multiple areas, such as its generally high debt management risk and weak operating cash flow***."

"SunEdison (SUNE) Stock Falling Following Earnings Results," *The Street*, Aug. 6, 2015 (emphasis added). SunEdison Stock closed at $17.08 on August 6, 2015.

97. On the same day that SunEdison released its 2015 second quarter earnings, alarms rang in the financial press that instead of building a successful renewable energy conglomerate (as SunEdison had been misrepresenting to investors, including the Plan Participants), the Company was actually building nothing more than a "house of cards":

> Debt could be too much for this renewable energy giant to overcome.
>
> In a quarter when its competitors wowed investors with better than expected profits, SunEdison (NYSE:SUNE) is plunging after another massive quarterly loss.

The loss itself shouldn't surprise anyone who follows SunEdison*, *but it highlights how tough it's going to be to build a renewable energy powerhouse with nearly $11 billion in debt and negative cash flow from operations. The market is finally starting to realize that this high-profile renewable energy powerhouse may actually be building a house of cards.

Constructing a renewable energy giant

What SunEdison has sold to investors over the past few years is that it can build a massive renewable energy company that can play in nearly every end market in every geography around the world. The company has built an 8.1 GW pipeline of projects with 1.9 GW under construction on top of 404 MW finished in the second quarter. Those are impressive numbers no matter who is building them.

But building that scale has been costly for SunEdison*. *The company has a $10.7 billion debt load and continual losses quarter after quarter. Case in point was a loss of $263 million in the second quarter of 2015 on $455 million of revenue.

There are a few alarming numbers in last quarter's report besides the loss. First is that marketing and administration costs were $259 million, more than two and a half times the $103 million gross margin the company generated. On top of that, interest expense was $146 million, again more than gross margin.

With losses mounting and debt piling up, the only way for SunEdison to get out from under the pressure is to build more projects even faster with even more debt. It's the only path to potential profitability, but it's fraught with risk if interest rates rise or competitors with better technology begin winning projects. Given First Solar and SunPower's profitable results over the last two weeks, I think that second concern is bigger than SunEdison wants to admit.

TerraForm Power paying money it doesn't have

You could say that SunEdison is just pushing projects down to its yeildco, TerraForm Power (NASDAQ:TERP), which will monetize projects long term. ***That's true, and it has grown cash available for distribution (CAFD), but again, it's starting to look like a house of cards.***

> TerraForm Power's CAFD for Q2 was reported to be $65 million, and it paid a dividend of $0.335 per share. But cash provided by operations was just $45.9 million, and net income was just $29.1 million. On top of that, the company has $2.3 billion of debt to pay for with the cash flow.
>
> At the very least, TerraForm Power is being aggressive about what it pays to shareholders and SunEdison, who owns all of its incentive distribution rights, and it is willing to leverage the balance sheet to do that.
>
> **Beware buying the biggest in renewable energy**
>
> ***SunEdison likes to tout itself as the biggest company in renewable energy, but it's far from the most profitable, despite having one of the biggest debt loads in the industry.*** That concerns me as an investor, and I don't see any sort of sustainable advantage for the company in renewable energy right now. SunEdison uses commodity solar panels, wind turbines manufactured by large conglomerates, and even battery storage that's a commodity.
>
> ***I'm not sure that's a path to success in renewable energy, and nearly $11 billion in debt is enough to scare me far away from this stock.***

"SunEdison's Losses Become a Red Flag for Investors," *The Motley Fool*, Aug. 6, 2015 (emphasis added).

98. The massive losses reported by SunEdison for its second 2015 quarter, the significant Company stock decline, as well as media reports that the Company was based on nothing but a "house of cards" because of among other things, SunEdison's massive debt load and weak operating cash flow, should have prompted Defendants to investigate and take protective action with respect to the Plan's investment in SunEdison Stock. Had a proper investigation been conducted, a prudent fiduciary would have determined that SunEdison Stock was no longer a prudent retirement investment for the Plan's Participants. However, Defendants

continued to offer the SunEdison Stock Fund as a Plan investment option, in derogation of their ERISA duties.

99. On November 10, 2015, SunEdison issued a press release, filed with the SEC as an exhibit to the Form 8-K, reporting results of its operations for the third quarter ended September 30, 2015. As the second quarter results, these results were also nothing but dismal. SunEdison incurred a loss of 92 cents per share from continuing operations for the third-quarter 2015, much wider than the year-ago quarter loss of 77 cents. The Company's general and administration expenses increased about 135% to $296 million. Moreover, interest expenses doubled to $214 million because of higher debt. Therefore, SunEdison posted a loss from continuing operations of $287 million or 92 cents per share compared with a loss of $204 million or 77 cents posted in the third quarter of 2014.

100. On the same day SunEdison released its third quarter 2015 results, *Reuters* reported that:

> Nov 10 (Reuters) - Shares of SunEdison Inc slid 24 percent to a nearly two-and-a-half-year low on Tuesday after the U.S. solar company posted a wider-than-expected loss, ***raising fresh concerns about its ability to fund its operations, projects and acquisitions***.
>
> The stock was down $1.49, or 20.1 percent, at $5.91 in midday trade on the New York Stock Exchange. The stock has lost 82 percent of its value since hitting a year high of $33.44 on July 20.
>
> The company also said it would stop selling projects to its two "yieldcos" - bundles of solar, wind or other power assets it spun off into dividend-paying public entities.
>
> The yieldcos had become an important source of funding for SunEdison. The solar industry bellwether said in its quarterly report on Monday that there were no assurances it would be able to raise the $6.5 billion to $8.8 billion needed to fund the construction of renewable energy assets through 2016. …

"SunEdison shares slide 24 percent on liquidity fears," *Reuters*, Nov. 10, 2015 (emphasis added).

101. The following day, on November 11, 2015, *Business Insider* reported that:

> Renewable-energy firm SunEdison is down 14% after the company disclosed a number of cash commitments in its quarterly earnings report.
>
> Here are the details:
>
> - According to an agreement SunEdison made in September, it has bought $100 million worth of TerraForm Global stock from one of its partners, Renova, in March 2016. TerraForm Global is down 4.2%.
> - It also may have to buy $4 billion worth of wind-farm projects from Renova.
> - Meanwhile, another SunEdison affiliate, TerraForm Power, could be required to buy 450 megawatts of completed Vivint projects in 2016, and up to 500 megawatts per year from 2017 to 2020 from SunEdison.
> - TerraForm Power is also obligated to pay $580.3 million of assets for some residential projects. TerraForm Power is down 4.3%.
>
> That's a lot of cash.
>
> SunEdison has been hurting some of Wall Street's biggest names since the stock price started falling this summer. The stock is down 75% year-to-date.
>
> David Einhorn of Greenlight Capital, and Leon Cooperman of Omega Advisors, have taken a hit. In August, Cooperman asked SunEdison executives if they would buy back some stock to stop the bleeding.
>
> He said: "Is there a massive change in the absolute relative prices of a number of your entities you're involved with? Does this create an opportunity for you creating additional value for shareholders by capitalizing on the short-term pessimism in midterm market or is that financial resource pretty much earmarked for reinvestment in the business?"

> In plain English, Cooperman was hoping that the company might embark on stock buybacks. The answer was "no" then, and given these disclosures regarding the company's hefty cash commitments, it's probably "no" now, too.

"SunEdison is getting obliterated," *Business Insider*, Nov. 11, 2015.

102. In the meantime, despite the additional red flags raised by the third quarter 2015 results regarding the Company's business and prospects and the negative commentaries in the financial press, the Defendant-fiduciaries continued to offer the SunEdison Stock Fund as a Plan investment option and took no protective action with regard to the Plan's assets invested in SunEdison Stock.

103. On November 19, 2015, following the release of SunEdison's financial results for the third quarter of 2015, *Real Money* reported that:

> How did the former darling of the S&P 500 sink so low? It seems the company cannot catch a break, as ***liquidity concerns have caught the attention [of] Wall Street analysts as well as hedge funds, who pared down their position in the company***. The Missouri-based renewable energy company develops, builds and operates solar and wind power plants. As part of its business, the company spun off two companies – TerraForm Global (GLBL) and TerraForm Power (TERP), both YieldCos – to operate its projects. As of Wednesday's market close, its stock price has fallen 83% this year to $3.25 from $19.74.
>
> ***"The company overextended itself, continuing to make big acquisitions even when it became clear that the market had turned against them," Jim Cramer said of the company in August as the stock was already in freefall.***
>
> Recent news hasn't been much better for SunEdison. ***The company's disappointing third-quarter earnings, released on November 10, raised questions about its ability to meet current obligations.***
>
> The reality is this: SunEdison's debt went from $2.6 billion to $11.7 billion currently," Gordon Johnson of Axiom Capital Management told *Real Money*. "A lot of that debt was due to the purchase of companies and projects they intended to drop down to

the YieldCo. They can no longer do that so the question is can they sell that stuff into the open market at accretive margins?"

The company's current ratio, which measures current assets vs. current liabilities, stands at 1.3, below the 1.5 to 2.0 range considered prudent by stock analysts.

Axiom also takes issue with the company meeting its targets and how it measures – and discloses – its margins. In October, SunEdison said it planned to sell projects at 18% to 19% gross margin, but it reported that the projects were actually sold at 15%. Making matters worse, SunEdison said that the project excluded equipment, according to James Bardowski of Axiom.

"When you include the full solar system, they actually sold it at 9.6% gross margin – far below what they told everyone a month prior," Bardowski told *Real Money*.

Also concerning analysts is a $160 million loan SunEdison received from Goldman Sachs. Axiom as well as other analysts believe the loan was used to pay off another loan from Deutsche Bank. The company stated an interest rate on the loan of 9.25%, but paid a hefty origination fee, which made the effective rate closer to 15% -- a high rate for short-term financing.

"There's an absence of transparency in their financials," said Doug Kass, of Seabreeze Partners Management and columnist for Real Money Pro. In reference to the company's sales figures as well as the Goldman Sacks loan.

While fundamental issues about the company's sustainability persist, SunEdison has also taken several other hits this week. On Monday, as hedge funds submitted their 13Fs, it was revealed that several, including David Einhorn's Greenlight Capital and dan Loeb's Third Point, significantly pared down or completely exited their positions in SunEdison during the third quarter. Share of stock plummeted 33% on Tuesday, in response to the news.

Adding to the pile, on Wednesday its shares were halted as the price shot up as high as 19% on a rumor that Blackstone was going to invest in SunEdison's debt. When those rumors proved to be untrue, the stock fell in after-hours trading.

"Will Troubled SunEdison Need to Raise More Equity?," *Real Money*, Nov. 19, 2015 (emphasis added).

104. *Barron's* also echoed the analysts' concerns regarding SunEdison's liquidity, as well as analyst downgrades of SunEdison Stock:

> UBS dropped its price target to $3 a share from $6 on Wednesday. Analyst Julien Dumoulin-Smith explained:
>
> We value SUNE on a SOTP [sum of the parts] basis using a combination of EV/EBITDA and DCF [distributable cash flow' approaches plus the market value of LP ownership stakes in TERP and GLBL. We no longer assign any credit for GP incentive distribution rights (~$2/sh previously) and we now subtract the value of -$169M of expensive (9.25%) term loans taken out in August as disclosed in the most recent 10Q (another $0.50). We've decreased Vivint Solar (VSLR)'s cash balance from ~$150 mn to $82 mn per the earnings update. It remains unclear the new sale price for the VSLR assets to TERP via SUNE (who is responsible for pricing this sale, presumably driving further downgrade if unable to receive relief on VSLR terms).
>
> ***SUNE shares have been sliding this month following third quarter results that raised questions about its liquidity and ability to afford all its recent acquisitions. Reports that hedge funds were unloading their holdings in the third quarter and that management was not providing answers to analysts' questions have made matters worse.***

"SunEdison Closes Below $3 A Share," *Barron's*, Nov. 19, 2015 (emphasis added).

105. All in all, SunEdison's shares plunged by 83% during the second half of 2015, as investors became increasingly concerned about the Company's ability to finance its plans, according to *Bloomberg*. In addition to the enormous decline of its stock price, the Company continued to experience other serious financial difficulties during the fall of 2015, including a dearth of liquidity, falling margins, and a reclassification of $739 million of its debt from "non-recourse" to "recourse." However, throughout this time, despite the red flags concerning, *inter alia*, the Company's extraordinary debt and its ability to survive, raised by both the Company's

own quarterly reports, as well as the financial press covering the Company, the Plan's fiduciaries did nothing to protect the Plan Participants' interests invested in SunEdison Stock.

106. The Company's struggles have continued in 2016. On January 7, 2016, SunEdison filed Form 8-K with the SEC, announcing pricing of $725 million of second lien secured term loans and entry into a series of exchange agreements, through which SunEdison swapped its debt for a mix of equity and new debt with a higher interest payment than the old debt did, resulting in $738 million debt restructuring. However, SunEdison's desperate move to restructure its debt in an effort to stay afloat did not succeed in propping up the Company Stock price, which has already been declining for months during the preceding year (which went ignored by the Plan's fiduciaries). The same date of the debt restructuring announcement, it was reported that:

> ***Shares of the solar power semiconductor manufacturer are down over 40% following a series of complex moves that the company made to reduce debt***.
>
> First of all, SunEdison is offering a new $725 million second lien loan that will be used to pay about $170 million on a second lien credit. Included in this loan are 28.7 million shares worth of warrants.
>
> Also, $580 million worth of notes will be traded for a $225 million note due in 2018, plus 28 million common shares. Finally, 11.8 million common shares are being traded for $158.3 million in preferred stock.
>
> ***This has triggered today's massive sell-off because how dilutive it is for investors***. Unfortunately, diluting the stock seems like a neccesary evil for SunEdison, which desperately needs to reduce its debt. However, no one was expecting the costs to be this high.

"Why Is SunEdison Stock Crashing?," *Zacks Equity Research*, Jan. 7, 2016.

107. Neither did SunEdison's January 7, 2016 announcement that it was restructuring its debt, stave off the analysts' concerns about the Company's ability to survive. On the

contrary, more alarms concerning, *inter alia*, SunEdison's massive debt, liquidity risks, and ability to raise more funds for project financing continued to sound in the financial press:

> **Highlights of Debt Restructuring**
>
> SunEdison revealed that it is offering a $725 million second lien loan comprising of $500 million of A1 loans and $225 million of A2 loans. Both the loans, to mature on Jul 2, 2018, carry an interest rate of LIBOR+10%. The loan also includes 28.7 million shares worth of warrants.
>
> This loan is part of its series of exchange agreements with certain holders of its Convertible Senior Notes due 2018, 2020, 2022 and 2025 and Perpetual Convertible Preferred Stock (the "2018 Notes," "2020 Notes," "2022 Notes," "2025 Notes," and "Preferred Stock," respectively).
>
> The company intends to use part of the net proceeds to repay the existing $170 million second lien credit. The remaining will be utilized for the payment of interests, transaction costs and general corporate purposes.
>
> Also, $580 million worth of notes will be traded for a $225 million note due in 2018, plus 28 million common shares. Finally, 11.8 million common shares will be traded for $158.3 million in preferred stock.
>
> **What Triggered the Sell-off?**
>
> According to *Bloomberg*, though the aforementioned deals will increase SunEdison's net debt position by $42 million, it will add $555 million to liquidity — a very positive strategy for a cash-strapped company.
>
> Then what made investors sell the stock? The high cost SunEdison is incurring to enhance liquidity.
>
> Citing Sven Eenmaa, an analyst at Stifel Financial Corp., *Bloomberg* revealed that the new transaction will increase SunEdison's annual interest expenses by about $40 million. The financial data provider also stated that this will dilute existing shareholders by approximately 18%.

> **Conclusion**
>
> ***It is to be noted that SunEdison has been struggling to finance its projects due to the tremendous debt burden it incurred because of the string of buyouts, including First Wind and Solar Grid Storage, made over the past one year.***
>
> The situation worsened in July last year when SunEdison entered into a definitive agreement to acquire Vivint Solar Inc. VSLR in a cash-stock deal worth $2.2 billion. The deal made investors increasingly cautious about its rising debt pressure.
>
> These acquisitions, once believed to be strategic, are now burning a hole in SunEdison's pocket. The acquisitions have taken a toll on its balance sheet with total outstanding debt (including current portion) nearly doubling to $11.7 billion at the end of third-quarter 2015 from $6.3 billion a year ago.
>
> ***Although SunEdison has taken a series of initiatives***, such as lowering its offer price for the Vivint Solar buyout and quitting the development projects in Brazil, to improve the liquidity position, ***we don't see any material impact on its balance sheet***.
>
> ***Further, we believe that with the recent sell-off, it will become difficult for SunEdison to raise more funds for project financing. Therefore, as the going gets tough for the company, we would advise investors to stay away from this Zacks Rank #3 (Hold) stock for now***.

"SunEdison Dives 39% on Complex Debt Restructuring Moves," *Zacks Equity Research*, Jan. 8, 2016 (emphasis added).

108. Following SunEdison's January 7, 2016 debt restructuring announcement, it has been widely reported in the financial press, that the Company's financial prospects (and therefore the value of SunEdison Stock, and the corresponding value of the Plan's assets invested in this stock) continue to look grim:

> ***A move to reduce debt may tell us more about how much trouble SunEdison Inc is in than anything else***.
>
> On the surface, you wouldn't think a financial swap that reduces both long- and short-term debt would be a bad thing for a highly

indebted company. But ***for SunEdison Inc (NYSE:SUNE), the announcement that it was swapping debt for equity and a reduced amount of debt was met with scorn on Wall Stree***t. …

The problem for SunEdison is that it got so indebted that creditors started demanding higher and higher interest rates. At the same time, the company was forced to pivot strategies to selling projects to third parties, which is lower margin than holding them on the balance sheet. ***The combination of higher borrowing costs and lower margins may be too much for SunEdison to overcome***.

The thing with debt...

* * *

The problems with debt start to show if returns don't exceed the cost of debt. And ***with $11.7 billion in debt, $7.9 billion of which is at the parent company, the cost of debt is high for SunEdison***.

* * *.

According to analyst Sven Eenmaa at Stifel Financial Corp., the exchange offer made on Thursday will actually increase interest expense annually by about $40 million because it exchanged low interest rate convertible debt for higher interest rate term debt. With this included, SunEdison's interest costs are about $276 million per year.

* * *

Just breaking even will be a challenge based on the numbers above, but it's possible with an expected 3.5 GW installed in 2016. The real problems start to emerge when you start looking at its future cost of debt.

…the $725 million term loans announced yesterday came with interest rates of LIBOR + 10%, or about 10.85% as of today at 6-month LIBOR rates.

That's an insanely high interest rate compared to competitors like First Solar and SunPower, who are paying LIBOR plus 3.5% or less on short-term debt. ***Not only does that mean interest costs may be increasing further in the future, it make it harder for SunEdison to build projects with competitive financing structures versus competitors.***

* * *

> The general theme here is that ***SunEdison's business is moving toward the lower-margin business of selling projects to third parties at the same time its borrowing costs are trending higher. That's a slippery slope for any business, and it doesn't bode well for SunEdison, especially when it's competing against companies with much lower cost structures.***
>
> As an investor, I'm staying far away from a high-risk company like SunEdison. It's possible the company survives all of these challenges, but ***the path it's currently on is unsustainable***, and I think there's a lot more dilution and/or restructuring to be done before it gets out from under its messy financial situation.
>
> ***The history of highly indebted companies in renewable energy isn't good, and the path forward for SunEdison doesn't look like a profitable one for investors.***

"SunEdison Inc's Digging a Hole It May Never Get Out Of", *The Motley Fool*, Jan. 9, 2016

109. Indeed, as the market did not react positively to SunEdison's debt restructuring maneuver announced on January 7, 2016, the value of the Plan's assets invested in SunEdison Stock has continued to erode, reflecting the severe deterioration of SunEdison Stock's price:

> …*24/7 Wall St.* has tracked five companies in which shareholders were destroyed last week.
>
> * * *
>
> ***Investors pummeled SunEdison Inc. (NYSE: SUNE) after it restructured more of its debt this week, sending the share price down 46% at one point***. The restructuring deal extinguishes about \$580 million in convertible debt and \$158.3 million in preferred stock. The so-called Second Lien Secured Term Loans are expected to close on January 11, and SunEdison expects to receive \$725 million in cash. After paying off approximately \$170 million on its existing second lien credit facility, SunEdison will retain \$555 million for, among other things, general corporate purposes.
>
> The transactions will dress up the company's balance sheet, but the price is very high, according to one analyst cited by *Bloomberg*. SunEdison's interest expense is likely to grow by \$40 million a year and existing shareholders are being slapped with about 18%

> dilution to the value of their shares. Over the past week, the stock dropped roughly 30%. Shares of SunEdison closed at $3.41 late on Friday, with a consensus price target of $14.93 and a 52-week range of $2.55 to $33.45.

"5 Stocks That Destroyed Shareholders This Past Week," *24/7 Wall St.com*, Jan. 9, 2016 (emphasis added).

110. On January 12, 2016, as SunEdison Stock continued on its downward slide, it was reported that:

> ***Gordon Johnson has doubts about Sunedison Inc (NYSE: SUNE)'s chances of making through the year*.**
>
> Speaking Tuesday on PreMarket Prep, Johnson said he's concerned by the company's debt.
>
> "Sunedison amassed a massive amount of debt... The majority of that debt was used to buy projects they intended to drop down into their yieldco," Johnson said, noting that Sunedison took on $10 billion in new debt from 2011-2015. "Essentially what happened is the yieldco story ended, and this was a company left with a lot of debt and a lot of projects which are extremely capital intensive. When the yieldco story fell apart, you didn't have that buyer of first resort."
>
> The stock, which traded as high as $33.45 in July, was trading around $3 on Tuesday morning. The stock was briefly halted on a circuit breaker.
>
> The question now, according to Johnson, is whether Sunedison can sell these projects in the third-party merchant market. It's been trying since the second quarter of 2015, yet so far haven't been able to sell outside its own warehouses and yieldcos.
>
> This is the core of Johnson's worry: "Given the number of deals and the type of deals that they've done...if they're unable to sell those projects, ***I don't know how much longer the equity can last***."
>
> ***When asked if Sunedison's new financing deal was a good move, Johnson responded, "Absolutely not. I think this deal makes me more cautious on the company's ability to make it through 2016."*** …

"Axiom's Gordon Johnson 'More Cautious' On Sunedison's Ability To Make It Through 2016," *Benzinga.com*, Jan. 12, 2016 (emphasis added).

111. On January 12, 2016 alone, SunEdison Stock plummeted by 29% in mid-day trading, further undermining the Company's ability to survive:

> ***More concerns about high debt costs are hitting SunEdison and calling its future into question***.
>
> **What**: Shares of SunEdison Inc (NYSE:SUNE) fell as much as 29% mid-day on Wall Street Tuesday after another analyst questioned the company's long-term survival.
>
> **So what**: Analyst Gordon Johnson at Axiom Capital Management raised more concerns about the company's recent debt restructuring. Details of that restructuring can be seen here, but the short story is that SunEdison traded debt for a combination of equity and new debt that actually holds a higher interest payment than the old debt.
>
> What's concerning is that the restructuring came with debt that holds an interest rate in excess of 10%, incredibly high considering the fact that SunEdison bid aggressively to win projects on the idea that it had a low cost of capital. Johnson said on a podcast this morning, "***I don't know how much longer the equity can last***."
>
> **Now what**: ***SunEdison has been in a downward spiral and it's a situation that will be almost impossible to get out of at this point.*** The company needs low cost funding to build projects and needs new projects to pay for debt already on the balance sheet. With both working against the company there's not a likely scenario where it can get enough funding to dig out of its current hole. ***For investors, the risk of bankruptcy sometime in the next year is too big to ignore and I see no reason to buy the stock now***.

"Why SunEdison Inc's Shares Dropped Another 29% Today," *The Motley Fool*, Jan. 12, 2016 (emphasis added).

112. SunEdison Stock hit a new 52-week trading low of $2.36 on January 12, 2016, closing at $3.02. Summing up the serious issues plaguing the Company, one financial publication reported as follows:

> …Separately, recently, *TheStreet Ratings* objectively rated this stock according to its "risk-adjusted" total return prospect over a 12-month investment horizon. . . . *TheStreet Ratings* has this to say about the recommendation:
>
> ***We rate SUNEDISON INC as a Sell with a ratings score of D***. This is driven by a few notable weaknesses, which we believe should have a greater impact than any strengths, and could make it more difficult for investors to achieve positive results compared to most of the stocks we cover. ***The company's weaknesses can be seen in multiple areas, such as its generally high debt management risk, generally disappointing historical performance in the stock itself and feeble growth in its earnings per share***.
>
> Highlights from the analysis by *TheStreet Ratings Team* goes as follows:
>
> - ***The debt-to-equity ratio is very high at 8.33 and currently higher than the industry average***, implying increased risk associated with the management of debt levels within the company. ***Along with the unfavorable debt-to-equity ratio, SUNE maintains a poor quick ratio of 0.76***, which illustrates the inability to avoid short-term cash problems.
>
> - ***Looking at the price performance of SUNE's shares over the past 12 months, there is not much good news to report: the stock is down 82.14%, and it has underformed the S&P 500 Index***. ***In addition, the company's earnings per share are lower today than the year-earlier quarter.*** Naturally, the overall market trend is bound to be a significant factor. However, in one sense, the stock's sharp decline last year is a positive for future investors, making it cheaper (in proportion to its earnings over the past year) than most other stocks in its industry. But due to other concerns, we feel the stock is still not a good buy right now.
>
> - ***SUNEDISON INC's earnings per share declined by 19.5% in the most recent quarter compared to the same quarter a year ago***. ***The company has reported a trend of declining earnings per share over the past two years.*** . . .

"Here's Why SunEdison (SUNE) Stock Is Plummeting Today," *The Street*, Jan. 12, 2016 (emphasis added).

113. Accordingly, during the Class Period, SunEdison Stock was not a prudent investment option for the Plan Participants, in light of, *inter alia*, (1) undisclosed material information regarding the Company's business and prospects that was inflating the value of SunEdison Stock; (2) poor historical performance of SunEdison Stock; (3) massive amounts of debt threatening the Company's ability to finance its projects and thereby the Company's survival; (4) the Company's rising debt-to-equity ratio; (5) the Company's likelihood of bankruptcy; (6) the Company's high debt management risk; and (7) the Company's losses as noted in SunEdison's quarterly reports.

PROTECTIVE ACTIONS DEFENDANTS COULD HAVE TAKEN REGARDING THE PLAN'S ASSETS INVESTED IN SUNEDISON STOCK DURING THE CLASS PERIOD

114. The Class Period begins on August 6, 2015 because at least by then, Defendants should have been aware that investment in SunEdison Stock was no longer prudent for the Plan.

115. Rather than do nothing (as they did), Defendants could have taken numerous steps with regard to the Plan's assets invested in SunEdison Stock to fulfill their fiduciary duties to the Plan under ERISA. As set forth more fully below, none of these steps (a) would have violated securities laws or any other laws, or (b) would not have been more likely to harm the SunEdison Stock Fund than to help it.

116. Defendants could have timely and fully disclosed the adverse inside information concerning the strength of the Company's business and prospects, subsequent to which, they could have disposed of the Plan's investments held in the SunEdison Stock Fund. Disclosure would have prevented the Plan from acquiring additional shares of artificially inflated SunEdison Stock: the longer the concealment continued, the more of the Plan's good money went into a bad investment; and full and timely disclosure would have cut short the period in which the Plan bought SunEdison Stock at inflated prices.

117. Defendants could have also directed that all Company and Plan Participant contributions to the SunEdison Stock Fund be held by the Fund in cash rather than be used to purchase further SunEdison Stock. Ceasing company stock purchases does not implicate insider trading prohibitions and would not have required any independent disclosures.

118. Defendants also should have closed the SunEdison Stock Fund itself to further contributions, and directed that contributions be diverted from SunEdison Stock Fund into other investment options available under the Plan during the Class Period.

119. Neither of these actions would have implicated, let alone been in violation of, federal securities laws or any other laws.

120. Further, Defendants also could have:

- sought guidance from the DOL or SEC as to what they should have done;
- resigned as Plan fiduciaries to the extent they could not act loyally and prudently; and/or
- retained outside experts to serve either as advisors or as independent fiduciaries specifically for the SunEdison Stock Fund.

THE RELEVANT LAW: CLAIMS FOR RELIEF UNDER ERISA

121. ERISA requires that every plan name one or more fiduciaries who have "authority to control and manage the operation and administration of the plan." ERISA § 1102(a)(1). Additionally, under ERISA, any person or entity, other than the named fiduciary that in fact performs fiduciary functions for the Plan is also considered a fiduciary of the Plan. A person or entity is considered a Plan fiduciary to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct

> or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

122. At all relevant times, Defendants are/were and acted as fiduciaries within the meaning of ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

123. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

124. ERISA § 409(a), 29 U.S.C. § 1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that:

> any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

125. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), provide, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

126. These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the highest known to the law and entail, among other things:

(a) the duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan;

(b) the duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor;

(c) the duty to disclose and inform, which encompasses: (1) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

127. Accordingly, if the fiduciaries of a plan know, or if an adequate investigation would reveal, that an investment option is no longer a prudent investment for that plan, then the fiduciaries must disregard any plan direction to maintain investments in such stock and protect the plan by investing the plan assets in other, suitable, prudent investments.

128. ERISA § 405(a), 29 U.S.C. § 1105 (a), "Liability for breach by co-fiduciary," provides, in pertinent part, that:

> [I]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

129. Plaintiff therefore brings this action under the authority of ERISA § 502(a) for Plan-wide relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

COUNT I

FAILURE TO PRUDENTLY MANAGE THE PLAN'S ASSETS (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA §§ 404(a)(1)(B) AND 405 BY THE COMPANY DEFENDANT AND INVESTMENT COMMITTEE DEFENDANTS)

130. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

131. This Count alleges fiduciary breaches against the Company Defendant and Investment Committee Defendants (the "Prudence Defendants") for continuing to allow the investment of the Plan's assets in SunEdison Stock throughout the Class Period despite the fact that they knew or should have known that such investment was imprudent as a retirement vehicle because: (a) SunEdison Stock was artificially inflated during the Class Period; and (b) the Company's basic risk profile had been so dramatically altered due to changed circumstances that it was no longer a prudent retirement investment.

132. At all relevant times, as alleged above, the Prudence Defendants were fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) in that they exercised discretionary authority or control over the administration and/or management of the Plan and/or disposition of the Plan's assets.

133. Under ERISA, fiduciaries who exercise discretionary authority or control over management of a plan or disposition of a plan's assets are responsible for ensuring that all investment options made available to participants under a plan are prudent. Furthermore, such

fiduciaries are responsible for ensuring that assets within the plan are prudently invested. The Prudence Defendants were responsible for ensuring that all investments in Company Stock in the Plan were prudent. The Prudence Defendants are liable for losses incurred as a result of such investments being imprudent.

134. Upon information and belief, Defendants failed to engage in a reasoned decision-making process regarding the prudence of SunEdison Stock. An adequate investigation by Defendants would have revealed to a reasonable fiduciary that investment by the Plan in SunEdison Stock was clearly imprudent during the Class Period. A prudent fiduciary acting under similar circumstances would have acted to protect Plan Participants against unnecessary losses, and would have made different investment decisions.

135. The Prudence Defendants breached their duties to prudently manage the Plan's assets invested in SunEdison Stock. During the Class Period, the Prudence Defendants knew or should have known that, as described herein, SunEdison Stock was not a suitable and appropriate investment for the Plan. Yet, during the Class Period, despite their knowledge of the imprudence of the investment, the Prudence Defendants failed to take any meaningful steps to protect Plan Participants from losses stemming from the Plan's investment in SunEdison Stock.

136. The Prudence Defendants further breached their duty of prudence by failing to divest the Plan of Company Stock during the Class Period, and/or by ceasing additional purchases of Company Stock, when they knew or should have known that it was not a suitable and appropriate investment for the Plan.

137. The Prudence Defendants also breached their duty of prudence by failing to provide complete and accurate information regarding SunEdison's true financial condition and, generally, by conveying inaccurate information regarding the Company's future outlook. During

the Class Period, upon information and belief, Defendants fostered a positive attitude toward Company Stock, and/or allowed Plan Participants to follow their natural bias towards investment in the equities of their employer, by not disclosing negative material information concerning the imprudence of investment in Company Stock. As such, Plan Participants could not appreciate the true risks presented by investments in Company Stock, and therefore could not make informed decisions regarding their investments in the Plan.

138. As a result of Defendants' knowledge of and, at times, implication in, creating and maintaining public misconceptions concerning the true financial health of SunEdison, any generalized warnings of market and diversification risks that Defendants made to the Plan Participants regarding the Plan's investment in SunEdison Stock did not effectively inform the Plan Participants of the past, immediate, and future dangers of investing in Company Stock.

139. The Prudence Defendants also breached their co-fiduciary obligations by, among their other failures, knowingly participating in each other's failure to protect the Plan from inevitable losses. The Prudence Defendants had or should have had knowledge of such breaches by other fiduciaries of the Plan, yet made no effort to remedy them.

140. As a direct and proximate result of the breaches of fiduciary duties during the Class Period alleged herein, the Plan and, indirectly, the Plan Participants lost a significant portion of their retirement investments. Had the Prudence Defendants taken appropriate steps to comply with their fiduciary obligations during the Class Period, the Plan could have liquidated some or all of its holdings in Company Stock, and/or not have purchased additional imprudent SunEdison Stock, and thereby eliminated, or at least reduced, the losses to Plan Participants.

141. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT II

BREACH OF DUTY OF LOYALTY
(BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA §§ 404(a)(1)(A) AND 405 BY THE COMPANY, DIRECTOR DEFENDANTS, AND INVESTMENT COMMITTEE DEFENDANTS)

142. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

143. This Count alleges fiduciary breaches against the Company Defendant, Director Defendants and Investment Committee Defendants (the "Loyalty Defendants") for continuing to allow the investment of the Plan's assets in SunEdison Stock throughout the Class Period despite the fact that they knew or should have known that such investment was imprudent as a retirement vehicle because: (a) SunEdison Stock was artificially inflated during the Class Period; and (b) the Company's basic risk profile had been so dramatically altered due to changed circumstances that it was no longer a prudent retirement investment.

144. At all relevant times, as alleged above, the Loyalty Defendants were fiduciaries of the Plan within meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Consequently, they were bound by the duties of loyalty, exclusive purpose and prudence.

145. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on plan fiduciaries a duty of loyalty; that is, a duty to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.

146. The duty of loyalty includes the duty to speak truthfully to the plan and its participants when communicating with them. A fiduciary's duty of loyalty to plan participants under ERISA includes an obligation not to materially mislead, or knowingly allow others to materially mislead, plan participants and beneficiaries. As the Supreme Court "succinctly explained" in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries." *Maez v. Mountain States Tel. and Tel. Inc.*, 54 F.3d 1488, 1499 (10^{th} Cir. 1995) (citing *Varity Corp.,* 516 U.S. at 506).

147. During the Class Period, the Loyalty Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia*: failing to timely engage independent fiduciaries who could make independent judgments concerning the Plan's investments in Company Stock; and by otherwise placing their own and/or the Company's interests above the interests of the Plan Participants with respect to the Plan's investment in the Company's securities.

148. During the Class Period, upon information and belief, certain Defendants, including the Director Defendants, made direct and indirect communications with the Plan Participants in which they omitted or misrepresented information regarding or materially related to investments in Company Stock. These communications included, but were not limited to, SEC filings, townhall meetings with Company employees, including the Plan Participants, press releases, and Plan documents (including Summary Plan Descriptions). Defendants, including the Director Defendants, also acted as fiduciaries to the extent of this communication activity.

149. Further, Defendants, as the Plan's fiduciaries, knew or should have known certain basic facts about the characteristics and behavior of the Plan Participants, well-recognized in the

401(k) literature and the trade press[6] concerning employees' natural bias toward investing in company stock, including that:

(a) Out of loyalty, employees tend to invest in company stock;

(b) Employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;

(c) Employees tend not to change their investment option allocations in the plan once made; and

(d) Lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk;

150. Knowing of these natural biases toward investment of Company Stock, Defendants should have been on high alert to protect the interests of the Plan Participants. Defendants, however, disregarded their duties of loyalty to the benefit of the Company as demonstrated by the Plan's substantial investment of its assets in Company Stock, which goes against the grain of best investment practices.

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[6] *See, e.g.*, David Blanchett, CFA, CFP, Morningstar Investment Management, "Employer Stock Ownership in 401(k) Plans and Subsequent Company Stock Performance," July 1, 2013 at 7; David K. Randall, *Danger in Your 401(k)*, Forbes.com (August 30, 2010), *available at*: www.forbes.com/forbes/2010/0830/health-retirement-savings-erisa-danger-in-401k_print.html); Liz Pulliam Weston, *7 Ways to Mess Up Your 401(k)*, MSN.com (December 31, 2007), *available at*: articles.moneycentral.msn.com/RetirementandWills/InvestForRetirement/7MostCommon401kBlunders.aspx); Joanne Sammer, *Managed Accounts: A new direction for 401(k) plans*, Journal of Accountancy, Vol. 204, No. 2 (August 2007), *available at*: www.aicpa.org/pubs/jofa/aug2007/sammer.htm); Roland Jones, *How Americans Mess Up Their 401(k)*s, MSNBC.com (June 20, 2006), available at: www.msnbc.msn.com/id/12976549/); Bridgitte C. Mandrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001), *available at*: mitpress.mit.edu/journals/pdf/qjec_116_04_1149_0.pdf); Nellie Liang & Scott Weisbenner, 2002, *Investor behavior and the purchase of company stock in 401(k) plan - the importance of plan design*, Finance and Economics Discussion Series 2002-36, Board of Governors of the Federal Reserve System (U.S.), *available at*: www.federalreserve.gov/pubs/feds/2002/200236/200236pap.pdf).

151. Because at least some of the Defendants were compensated in SunEdison Stock and owned SunEdison Stock, these Defendants had a conflict of interest which put them in the position of having to choose between their own interests as executives and stockholders, and the interests of the Plan Participants, whose interests Defendants were obligated to loyally serve with an "eye single" to the Plan. *See generally Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251-52 (1993); 29 U.S.C. § 1104(a)(1)(B). These Defendants, while attempting to shore up SunEdison during the Class Period, as its stock price plummeted, abandoned their duties to the Plan and its Participants, and failed to consider at any time during the Class Period what was in the best interest of the Plan and its Participants as they should have done as Plan fiduciaries.

152. The Loyalty Defendants also breached their co-fiduciary obligations by, among their other failures, knowingly participating in each other's failure to protect the Plan from inevitable losses. The Loyalty Defendants had or should have had knowledge of such breaches by other fiduciaries of the Plan, yet made no effort to remedy them.

153. As a consequence of the Loyalty Defendants' breaches of fiduciary duty during the Class Period by putting the interests of themselves and the Company ahead of the Plan and its participants, the Plan suffered substantial losses, as its holdings of Company Stock were devastated. If the Loyalty Defendants had discharged their fiduciary duties to loyally manage and invest the Plan's assets, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan and, indirectly, Plaintiff and the Plan's other participants, lost a significant portion of their retirement investments.

154. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a), and ERISA § 409, 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT III

FAILURE TO ADEQUATELY MONITOR OTHER FIDUCIARIES AND PROVIDE THEM WITH ACCURATE INFORMATION (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA § 404 BY THE COMPANY, THE DIRECTOR DEFENDANTS AND THE INVESTMENT COMMITTEE DEFENDANTS)

155. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

156. This Count alleges fiduciary breaches against the Company, the Director Defendants, and the Investment Committee Defendants (the "Monitoring Defendants").

157. At all relevant times, as alleged above, the Monitoring Defendants were fiduciaries of the Plan, within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

158. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, remove, and, thus, monitor the performance of other Plan fiduciaries.

159. Under ERISA, a monitoring fiduciary must ensure that monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of a plan's assets, and must take prompt and effective action to protect the plan and participants when they are not.

160. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work

and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to the plan's participants or for deciding whether to retain or remove them.

161. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan's assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

162. During the Class Period, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things:

(a) failing, at least with respect to the Plan's investment in Company Stock, to properly monitor their appointee(s), to properly evaluate their performance, or to have any proper system in place for doing so, and standing idly by as the Plan suffered significant losses as a result of the appointees' imprudent actions and inaction with respect to Company Stock;

(b) failing to ensure that the monitored fiduciaries appreciated the true extent of the Company's precarious financial situation and the likely impact that financial failure would have on the value of the Plan's investment in Company Stock;

(c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets and, in particular, the Plan's investment in Company Stock; and

(d) failing to remove appointees whose performance was inadequate in that they continued to permit the Plan to make and maintain investments in the Company Stock despite the practices that rendered it an imprudent investment during the Class Period.

163. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided.

164. The Monitoring Defendants are liable as co-fiduciaries because they knowingly participated in each other's fiduciary breaches as well as those by the monitored fiduciaries, they enabled the breaches by those Defendants, and they failed to make any effort to remedy these breaches despite having knowledge of them.

165. Therefore, as a direct and proximate result of the breaches of fiduciary duty by the Monitoring Defendants during the Class Period alleged herein, the Plan and, indirectly, the Plan Participants, lost substantial retirement savings.

166. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT IV:

FAILURE TO PRUDENTLY AND LOYALLY MANAGE THE PLAN'S ASSETS (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA §§ 404 AND 405 BY STATE STREET)

167. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

168. At all relevant times, as alleged above, Defendant State Street was a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) in that it exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

169. Under ERISA, fiduciaries who exercise discretionary authority or control over management of a plan or disposition of a plan's assets are responsible for ensuring that all investment options made available to participants under a plan are prudent. Furthermore, such fiduciaries are responsible for ensuring that assets within the plan are prudently invested. State Street could not blindly follow directions of the Prudence Defendants and the Monitoring Defendants if it knew or should have known such directions were improper under ERISA.

170. A directed trustee's duty of prudence requires it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants, nor may it allow others, including those whom they direct, or who are directed by the plan, including plan trustees, to do so.

171. State Street breached its duties to prudently and loyally manage the Plan's assets. During the Class Period, based on the red flags raised in the public domain through Company reports and the negative commentaries concerning the Company in the financial press, State Street knew or should have known that, as described herein, Company Stock was not a suitable and appropriate investment for the Plan. Yet, during the Class Period, despite its knowledge of the imprudence of the investment, State Street failed to take any meaningful steps to protect Plan Participants from the losses stemming from the Plan's investment in SunEdison

Stock that it knew would ensue, as the already-weakened and overleveraged SunEdison reported quarter after quarter of losses as its business model became increasingly difficult and its ultimate demise became significantly more likely.

172. State Street further breached its duties of loyalty and prudence by failing to divest the Plan of Company Stock or prevent the Plan from purchasing additional Company Stock, when it knew or should have known that this stock was not a suitable and appropriate investment for the Plan.

173. State Street also breached its co-fiduciary obligations by, among their other failures, knowingly participating in the other fiduciaries' failures to protect the Plan from inevitable losses. State Street had or should have had knowledge of such breaches by other fiduciaries of the Plan, yet made no effort to remedy them.

174. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly the Plan Participants, lost a significant portion of their retirement investment. Had State Street taken appropriate steps to comply with its fiduciary obligations, the Plan could have liquidated some or all of its holdings in Company Stock, and/or avoided additional purchases of Company Stock, and thereby eliminated, or at least reduced, its losses .

175. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), Defendant in this Count is liable to restore the losses to the Plan caused by its breaches of fiduciary duties alleged in this Count.

CAUSATION

176. The devastation of the Plan's assets invested in SunEdison Stock during the Class Period, could have and would have been avoided in whole or in part by Defendants complying with their ERISA-mandated fiduciary duties.

177. Defendants – who knew or should have known that SunEdison Stock was an imprudent retirement investment – chose to, as fiduciaries, continue allowing the Plan to maintain and acquire further SunEdison Stock, while taking no action to protect their wards as SunEdison's condition worsened and the Plan Participants' retirement savings were decimated. Prudent fiduciaries would have acted otherwise and taken appropriate actions to protect the Plan and its participants.

178. To the extent Defendants were required to take action based on non-publicly disclosed information that they were privy to, the following alternative options – which are pled as alternative statements under FED. R. CIV. P. 8(d)(2) to the extent they are inconsistent – were available to Defendants and (a) could have been done without violating securities laws or any other laws, (b) should have been done to fulfill Defendants' fiduciary obligations under ERISA, and (c) would not have been more likely to harm the Plan than to help it.

179. As discussed above, Defendants had numerous options to protect the Plan and its Participants but failed to do so.

180. As a result of Defendants' breaches, the Plan suffered heavy losses during the Class Period because substantial assets of the Plan were imprudently invested, or allowed to be invested, by Defendants in Company Stock during the Class Period, in breach of Defendants' fiduciary duties, as reflected in the diminished account balances of the Plan Participants.

REMEDIES FOR BREACHES OF FIDUCIARY DUTY

181. As noted above, as a consequence of Defendants' breaches, the Plan suffered significant losses.

182. ERISA § 502(a), 29 U.S.C. § 1132(a) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to

make good to such plan any losses to the plan…." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate…."

183. Plaintiff, the Plan, and the Class are therefore entitled to relief from Defendants in the form of: (1) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a), 29 U.S.C. §§ 1109(a) and 1132(a); (3) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (4) taxable costs; (5) interests on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper.

184. Each Defendant is jointly and severally liable for the acts of the other Defendants as a co-fiduciary.

JURY DEMAND

Plaintiff demands a jury.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. A Judgment that the Defendants, and each of them, breached their ERISA fiduciary duties to the Plan Participants during the Class Period;

B. A Judgment compelling the Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the Participants would have made if the Defendants had fulfilled their fiduciary obligations;

C. A Judgment imposing a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

D. A Judgment awarding actual damages in the amount of any losses the Plan suffered, to be allocated among the Plan Participants' individual accounts in proportion to the accounts' losses;

E. A Judgment requiring that Defendants allocate the Plan's recoveries to the accounts of all Plan Participants who had any portion of their account balances invested in SunEdison Stock maintained by the Plan in proportion to the accounts' losses attributable to the decline in the price of SunEdison Stock;

F. A Judgment awarding costs pursuant to 29 U.S.C. § 1132(g);

G. A Judgment awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

H. A Judgment awarding equitable restitution and other appropriate equitable monetary relief against the Defendants.

Dated: January 20, 2016

/s Mark Potashnick

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Counsel for Plaintiff Usenko

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to registered CM/ECF participants.

/s Mark Potashnick