HUGHES HUBBARD & REED LLP
Derek J.T. Adler
Erik Bond
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
adler@hugheshubbard.com
bond@hugheshubbard.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONERGY AG,

Plaintiff,

-against-

MEMC ELECTRONIC MATERIALS, INC. and MEMC SINGAPORE PTE. LTD,

Defendants.

Case No.: 09 CIV 4906 (SAS)

AMENDED COMPLAINT

Plaintiff Conergy AG ("Conergy"), by and through its undersigned attorneys, for its Amended Complaint against Defendants MEMC Electronic Materials, Inc. ("MEMC") and MEMC Singapore Pte. Ltd. ("MEMC Singapore") alleges as follows:

BACKGROUND

1. Plaintiff brings this action seeking a declaration that a ten-year Solar Wafer Supply Agreement (the "Wafer Supply Agreement"), pursuant to which it purchases silicon wafers from Defendants for use in manufacturing solar photovoltaic panels, is void and unenforceable.

2. At the time of entering the Wafer Supply Agreement, Plaintiff was building a factory to manufacture solar silicon wafers but did not have a source of supply for the necessary

raw material, polysilicon. Defendants are manufacturers of polysilicon who exercised unique market power because they offered available production capacity during a worldwide shortage of polysilicon. Defendants also sold solar silicon wafers, and were eager to expand their share of this market. Defendants took advantage of their market power by refusing to sell raw materials to Plaintiff unless Plaintiff would agree to effectively mothball its wafer production facilities and not compete with Defendants in the market for solar silicon wafers for ten years. During the same period, Defendants forced at least three other manufacturers of solar panels to enter contracts containing identical restraints on competition.

3. Defendants abused their market power to force Plaintiff into an egregiously illegal and one-sided agreement. The Wafer Supply Agreement includes at least the following unenforceable provisions that are causing irreparable harm to Plaintiff:

(a) The Wafer Supply Agreement contains a purported "take or pay" provision that purportedly requires Plaintiff to pay the full purchase price for a certain minimum quantity of wafers each year, even if Plaintiff does not take delivery of those wafers and Defendants mitigate their damages by selling them to other customers. Defendant's theoretical liability for total breach of the Wafer Supply Agreement could therefore have approached $10 billion, while Defendants would be permitted to more than double their profits by selling the wafers to other customers for perhaps an additional $10 billion. It is well-settled that a provision of this nature is void and unenforceable as a contractual penalty clause.

(b) The Wafer Supply Agreement requires Plaintiff to provide annual deposits and letters of credit, in the tens of millions of dollars, whose sole purpose is to secure the invalid "take or pay" obligation. The Agreement purports to give Defendant the right to unilaterally penalize Plaintiff by withholding the deposits and drawing on the letters of credit.

(c) The Wafer Supply Agreement prohibits Plaintiff from competing with Defendants by selling silicon wafers anywhere in the world. This restraint of trade, which is illegal under New York common law, Section 1 of the Sherman Act and Article 81(1) of the European Community Treaty, prevents Plaintiff from among other things mitigating the effects of the invalid take or pay provision by buying the annual minimum quantity of wafers and selling them to other customers in the market.

(d) The Wafer Supply Agreement even prohibits Plaintiff from selling solar polysilicon wafers manufactured by Plaintiff itself. Plaintiff is not permitted to use its wafer-production capacity to manufacture silicon wafers for sale during the ten year term of the Agreement. This illegal restraint of trade is causing irreparable harm by preventing Plaintiff from adjusting to current difficult economic conditions by putting its wafer production capacity to profitable use.

4. Taken together or individually, these provisions render the entirety of the Wafer Supply Agreement invalid, illegal and unenforceable. Plaintiff negotiated with Defendant for four months prior to commencing this action in an effort to address the invalid and illegal provisions. Plaintiff commenced this action after Defendant broke off those negotiations.

5. This matter is urgent. Defendants may be in a position to cause catastrophic harm to Plaintiff by drawing on an outstanding letter of credit.

THE PARTIES

6. Plaintiff is a corporation organized under the laws of the Federal Republic of Germany with its principal place of business in Hamburg. Plaintiff is one of the leading European manufacturers and installers of solar photovoltaic cells and panels for generating electricity from sunlight.

7. Defendant MEMC is a corporation organized under the laws of the State of Delaware, with its principal place of business in St. Peters, Missouri. It is a manufacturer and supplier of polysilicon in various forms.

8. Defendant MEMC Singapore is a wholly-owned subsidiary of Defendant MEMC. Upon information and belief, Defendant MEMC Singapore is a corporation organized under the laws of Singapore with its principal place of business in Singapore.

JURISDICTION

9. Pursuant to Section 7.12 of the Wafer Supply Agreement, the parties have consented to jurisdiction in the state or federal courts located in New York City for any proceeding in connection with or relating to the Wafer Supply Agreement.

10. Section 7.11 of the Wafer Supply Agreement provides that the Wafer Supply Agreement is governed by New York law.

BACKGROUND OF THE WAFER SUPPLY AGREEMENT

A. Plaintiff's Business

11. Plaintiff was founded in the mid 1990s. Its primary business has been the planning and installation of solar photovoltaic systems to generate electricity from sunlight, including stand-alone facilities for homes and businesses as well as large scale plants that supply power to regional transmission grids. By 2003, Plaintiff had become one of the biggest solar businesses and fastest-growing technology companies in Germany.

12. As part of its expansion plans, Plaintiff decided to enter the business of manufacturing solar panels (also called modules), which are the basic building blocks used in solar arrays and power generation systems.

13. The process of manufacturing solar panels has several distinct phases. The primary raw material is polysilicon, which comes in granular or powder form. In the first phase

of the production chain, raw polysilicon is melted, purified and cast into solid ingots, which are then cut into bricks. In the second phase, the bricks are sawed to produce ultra-thin silicon wafers. In the third phase, chemical finishes and conductive elements are added to the surface of each wafer to transform it into a photovoltaic cell capable of gathering and transmitting electrical energy. Finally, multiple cells are joined together to form solar panels or modules – the flat rectangular units that are linked together in solar power generation arrays.

14. In 2006, Plaintiff began building a technologically-advanced solar panel manufacturing plant in Frankfurt (Oder). In addition to technology for manufacturing solar photovoltaic cells, the plant included high-technology precision saws and related specialized equipment for use in slicing silicon bricks to produce super-thin silicon wafers. The Frankfurt (Oder) plant was intended to be the first of a series of similar factories that would have positioned Plaintiff to become a major force in the market for solar wafers, cells and panels.

B. The Polysilicon Market and the Negotiations with Defendant MEMC

15. Defendant MEMC is one of a limited number of polysilicon manufacturers in the global market. The barriers to entry into the polysilicon production market are massive. Each new plant takes several years to build, at great expense, and involving considerable technological expertise and intellectual property.

16. In 2007 Plaintiff negotiated with various manufacturers seeking a supply of polysilicon for its planned manufacturing facilities. At the time, there was a worldwide shortage of polysilicon and Defendant MEMC was essentially the only manufacturer that offered sufficient uncommitted production capacity to supply Plaintiff's needs. This gave Defendant MEMC unique market power.

17. Defendant MEMC was only willing to negotiate with Plaintiff on the basis of entering a long term (ten year) agreement pursuant to which Plaintiff would agree to buy radically escalating annual quantities of Defendant's products.

18. In addition Defendant MEMC took advantage of its market power to coerce Plaintiff into accepting conditions designed to disable Plaintiff from using its own manufacturing capability to compete with Defendants in the market for silicon wafers. Defendant MEMC refused to sell Plaintiff raw polysilicon and would only sell Plaintiff silicon wafers. Buying wafers was contrary to Plaintiff's business plan, which had been to buy raw polysilicon and do its own casting and wafering. Defendant MEMC also insisted that Plaintiff agree not to compete with Defendants in any of their business segments, including the market for solar silicon wafers.

19. Defendant MEMC also imposed restrictive contractual terms that would make it difficult or impossible for Plaintiff ever to go into the wafering segment of the business, such as insisting on a right of first refusal to buy the wafer cutting saws in the Frankfurt (Oder) factory. This provision is particularly onerous because Defendant MEMC has no obligation to purchase the very substantial additional facilities used with the saws, such as large slurry tanks and other related plant and equipment. By acquiescing in Defendant MEMC's demand for this a right of first refusal, Plaintiff was coerced into disabling itself from selling, leasing or otherwise deploying its wafering equipment as an integrated unit in the future.

20. Defendant MEMC's actions were taken in bad faith with the intention of imposing a naked restraint on trade. The restrictions Defendant MEMC imposed on Plaintiff were intended to limit the output of silicon wafers and reduce competition in the markets for such wafers. The restrictions were not ancillary to the legitimate commercial terms of a supply agreement between a vendor and a vendee.

21. The terms of the Wafer Supply Agreement were dictated by Defendant's then-CEO Nabeel Gareeb. Gareeb abruptly left Defendant MEMC less than one year later, in October 2008. Upon information and belief, the reasons for Gareeb's departure include concerns about his conduct towards Defendants' customers, including the imposition of illegal, onerous and unenforceable contract provisions such as those contained in the Wafer Supply Agreement.

22. The Frankfurt (Oder) plant produced its first solar panel in the summer of 2007, and became fully operational in the summer of 2008.

23. Plaintiff and Defendant MEMC entered into the Wafer Supply Agreement on or about October 25, 2007.

24. During this same time period, when Defendants exercised unique power in the polysilicon market, Defendants entered into a series of "cookie cutter" agreements with other solar panel manufacturers, imposing the same onerous conditions and disabling them as potential competitors of Defendants. Specifically, Defendant entered into such contracts, upon information and belief, with: Gintech Energy Corp., a Taiwan corporation; Suntech Power Holdings Co. Ltd, a Chinese corporation; and Tainergy Tech Co., Ltd, a Taiwan corporation.

C. Overview of the Wafer Supply Agreement

25. Pursuant to the terms of the Wafer Supply Agreement, Plaintiff has agreed to purchase, and Defendant MEMC has agreed to deliver, stated minimum quantities of silicon wafers, at stated prices, during each contract year during the term of the Wafer Supply Agreement (the "Yearly Minimum Quantity"). The first contract year under the Wafer Supply Agreement commenced on July 1, 2008 and will end on June 30, 2009.

D. The Void "Take or Pay" Provision

26. The Wafer Supply Agreement includes a purported "take or pay" provision, which requires Plaintiff to pay the full contract price for a minimum quantity of wafers each

year, even if Plaintiff fails to order such quantity, and regardless of whether Defendants suffer any actual loss as a result of Plaintiff's failure to order the prescribed quantity of wafers.

27. Section 2.2(d) of the Wafer Supply Agreement is the "take or pay" clause. It provides in pertinent part:

> Purchase Shortfalls. If Conergy purchases fewer Watts than the lesser of (i) the Yearly Minimum Quantity, as calculated in accordance with Section 2.2(a) or (ii) the amount of Watts tendered for delivery by MEMC during any Contract Year, Conergy shall pay to MEMC via wire transfer of immediately available funds, within ten (10) days after being invoiced therefor, the difference between (A) the amount that would have been payable by Conergy during such Contract Year if Conergy had purchased the lesser of (i) the Yearly Minimum Quantity as calculated in accordance with Section 2.2(a) or (ii) the amount of Watts tendered for delivery by MEMC during the entire Contract Year, and (B) the amount payable by Conergy during such Contract Year for the actual volume of Watts purchased by Conergy from MEMC based on the applicable price listed on Attachment B hereto (such calculated amount, the "Purchase Shortfall").

(Wafer Supply Agreement § 2.2(d).)

28. The effect of Section 2.2(d) is to require Plaintiff to pay the full contract price for an increasing annual minimum quantity of wafers every year for ten years regardless of the actual volume of wafers Plaintiff actually orders, and indeed even if Plaintiff orders no wafers at all. The Wafer Supply Agreement does not provide for any reduction in the sums owed by Plaintiff based on the price Defendants can obtain by re-selling to other customers the wafers Plaintiff has failed to order (i.e. mitigation of damages). Nor does the Wafer Supply Agreement give Plaintiff the right to demand delivery in later periods of the wafers it has paid for but not received.

E. The Void Letter of Credit and RCRD Provisions

29. At the beginning of each contract year during the term of the Wafer Supply Agreement, Plaintiff is required to provide MEMC Singapore with (i) a letter of credit, and (ii) a

sum referred to as a "Refundable Capacity Reservation Deposit" ("RCRD"), that together cover the total price payable for the minimum quantity of polysilicon wafers Plaintiff is required to purchase that year.

30. Section 3.1 of the Wafer Supply Agreement provides that the RCRD is intended to be "a means of securing Plaintiff's obligations to MEMC."

31. A further purpose of the RCRD payments is stated to be "to induce MEMC to invest in additional polysilicon production and wafer manufacturing capacity." Upon information and belief, since the signing of the Wafer Supply Agreement Defendant MEMC has not made any such investment. Upon information and belief, Defendant MEMC has excess capacity and has in fact been reducing its production capacity by laying off workers and reducing usage of existing facilities.

32. The only contractual obligation secured by the RCRD payment is the void "take or pay" obligation. The only circumstance under which Defendants are entitled to withhold sums from the required annual reimbursements of the RCRD is if there is a "Purchase Shortfall" in any contract year, i.e. if Plaintiff fails to comply with its purported "take or pay" obligation under Section 2.2(d). (Wafer Supply Agreement § 3.1(b).) If the take or pay obligation is void, the RCRD obligation must also be void.

33. In addition to the RCRD payments, Plaintiff is required under the Wafer Supply Agreement to deliver an irrevocable letter of credit to Defendants at the start of each contract year, in an amount based on the difference between the amount of RCRD held by Defendants and the total purchase price Plaintiff will be required to pay for the minimum quantity of polysilicon it must buy during the contract year. According to the express terms of the Wafer

Supply Agreement, the sole purpose of the letter of credit is to secure Plaintiff's purported obligations under the "take or pay" clause of the Agreement:

> The Parties have also agreed that the amount of the Refundable Capacity Reservation Deposit outstanding in any Contract Year is less than the appropriate amount of security to be held by MEMC in order to ensure payment for Conergy's "take or pay" obligations under Section 2.2(a) hereof. Accordingly, the Parties have agreed that Conergy will be required to deliver to MEMC, no later than the seventh Business Day of each Contract Year, an irrevocable Letter of Credit drawn on a bank that is requested by Conergy and approved by MEMC (the "LC Bank"), in an amount equal to the Required Letter of Credit Amount for such Contract Year as is set forth on Attachment C (the "Letter of Credit Amount"), and that expires on the eighth Business Day of the subsequent Contract Year. Conergy may, in its discretion, use quarterly or half-year revolving Letters of Credit to cover the full Letter of Credit Amount during any respective Contract Year; provided, however, that in no event shall there ever be a gap in coverage (i.e., a Letter of Credit will not be permitted to expire before a replacement Letter of Credit is put in place).

(Wafer Supply Agreement § 3.1 (c).)

34. Pursuant to the Section 3.1(c), the circumstances under which Plaintiff is entitled to draw on the annual letter of credit are limited to recovering any unpaid Purchase Shortfall, and only to the extent that such shortfall is not covered by the RCRD it holds.

F. The Void Non-Compete Provisions

35. The Wafer Supply Agreement includes non-compete provisions that purport to preclude Plaintiff from competing with Defendants in the merchant market for solar silicon wafers and even prevent Plaintiff from using its existing wafering capacity to compete in the market for wafers. Section 2.12(a) provides:

> during the Initial Term (and any extensions of the Initial Term pursuant to Section 4.1 hereof), except as may be agreed to in writing by MEMC in advance of engaging in any activities, Conergy shall not, and shall cause each of its affiliates and Subsidiaries to not, directly or indirectly, engage in any Restricted Conergy Business anywhere in the world including (A) owning any interest in, managing, operating, controlling or participating in any Person which owns or operates a Restricted Conergy Business, (B) soliciting any customer or prospective customer of MEMC anywhere in

> the world to purchase any products or services which compete with those provided by MEMC and (C) assisting any Person in any way to do, or attempt to do, anything prohibited above; *provided, however*, that the ownership by Conergy as of the date of this Agreement of the existing installed and ordered . . . wire saws and related downstream wafering equipment . . . shall be permitted.

(Wafer Supply Agreement § 2.12(a).)

36. The term "Restricted Conergy Business" is defined in Section 1.1(z):

> "Restricted Conergy Business" shall mean (i) the design, development, manufacture, marketing or sale of Multi Wafers or Mono Wafers for use in solar cells or (ii) the production of solar grade polysilicon or solar ingots.

(Wafer Supply Agreement § 1.1(z).)

37. Section 2.12(a) confirms that, from MEMC's perspective, the noncompete provisions are essential terms of the Wafer Supply Agreement, stating that "MEMC would not have entered into this Agreement absent the provisions of this Section 2.12." (Wafer Supply Agreement § 2.12(a).)

38. The Wafer Supply Agreement also contains reciprocal noncompete provisions that purport to restrict Defendants' right to compete with Conergy. (Wafer Supply Agreement § 2.13.) These provisions were not requested by Conergy and are a sham. Upon information and belief, Defendants have never had the capacity to manufacture solar cells or panels and have never intended to enter the markets for these products. The purpose of the reciprocal non-compete clauses (which are contained in the standard wafer supply agreements Defendants forced all of their customers to enter) is to disguise and conceal Defendants' true purpose of imposing anticompetitive restrictions on their customers.

39. The Wafer Supply Agreement commits Plaintiff to purchase at least half of its needs from Defendants and makes Defendants a "preferred vendor" with a right of first refusal to supply the rest of Plaintiff's requirement. (Wafer Supply Agreement § 2.14.) The effect of this

obligation, coupled with Plaintiff's duty to buy an escalating minimum volume of wafers from Defendants each year, is to impose a de facto obligation on Plaintiff to purchase 100% or more of its requirements from Defendants.

G. Events After the Signing of the Wafer Supply Agreement

40. On or about October 26, 2007, Defendant MEMC assigned the Wafer Supply Agreement to its wholly-owned subsidiary Defendant MEMC Singapore.

41. Plaintiff approached Defendants seeking to amend the restrictive and onerous provisions of the Wafer Supply Agreement even before the beginning of the first contract year. Defendants were willing to reduce the minimum annual quantity obligations due to a change in Plaintiff's business plans, but were not willing to modify any of the other terms of the Wafer Supply Agreement. On or about July 1, 2008 Plaintiff and Defendant MEMC Singapore entered Amendment No. 1 to the Wafer Supply Agreement ("Amendment No. 1"). Pursuant to Amendment No. 1, Plaintiff and Defendant MEMC Singapore agreed, inter alia, to modify the quantities of silicon wafers to be delivered in each contract year, with related changes to prices, RCRD amounts and letter of credit amounts. Amendment No. 1 did not modify any of the restrictive terms of the Wafer Supply Agreement.

42. As specified in Attachment C-1 to Amendment No. 1, Plaintiff has duly provided Defendant MEMC Singapore with the required RCRD payment and letter of credit for the first contract year under the Wafer Supply Agreement (July 1, 2008 to June 30, 2009).

43. In particular, on July 31, 2008, Commerzbank, AG, New York, issued a standby letter of credit (the "Letter of Credit") in the tens of millions of dollars to secure Plaintiff's purported take or pay obligation during the first year under the Wafer Supply Agreement. The beneficiary of the Letter of Credit is Defendant MEMC Singapore.

44. By the terms of the Letter of Credit, Defendant MEMC Singapore may draw on the Letter of Credit if either (i) there is a Purchase Shortfall, or (ii) Plaintiff does not replace or extend the letter of credit by July 1, 2009.

45. Pursuant to Attachment C-1 to Amendment No. 1, Plaintiff was required to deliver to Defendant MEMC Singapore a new letter of credit for over $100 million within seven (7) business days after July 1, 2009.

46. As of the date of commencement of this action, there had been no purported "Purchase Shortfall" as defined in Section 2.2(d) of the Wafer Supply Agreement.

47. Plaintiff will suffer severe hardship and irreparable harm if (i) it is required to deliver to Defendant MEMC Singapore a new letter of credit in the much higher amount than the current one, or (ii) Defendant MEMC Singapore draws on the Letter of Credit due to Plaintiff's failure to provide such a substitute letter of credit. Defendants should not be permitted to draw on a letter of credit whose sole purpose is to secure compliance with the void take or pay provision.

48. Plaintiff has informed Defendants, orally and in writing, of the reasons why the Wafer Supply Agreement is void, illegal and unenforceable. Starting in January 2009, Plaintiff has been negotiating with Defendants in an attempt to resolve the disputes that form the basis for this lawsuit, without success. On or about April 22, 2009, Defendants notified Plaintiff that they refused to terminate or modify the Wafer Supply Agreement to correct the illegal and unenforceable terms. Defendants have publicly touted the billions of dollars in revenue they expect to receive under the unenforceable take or pay provisions of their contracts with Plaintiffs and others.

FIRST CAUSE OF ACTION
(For a Declaration that the "Take or Pay" Clause and Related Provisions in the Wafer Supply Agreement are Void and Unenforceable, and Injunction Preventing Defendants from Drawing on Related Letter of Credit)

49. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

50. Under New York law, the parties to a contract are not permitted to provide for a monetary penalty that will be payable in the event a party breaches the contract. Any contract provision that purports to impose such a sanction is void and unenforceable as a contractual penalty clause.

51. Under New York law, the parties to a contract are only permitted to agree in advance on the amount of damages payable in the event of a breach if the specified amount is reasonable in relation to the actual damages that are likely to be suffered as a result of the breach. A provision that does not comply with this test is void and unenforceable as a contractual penalty clause.

52. Under New York law, a contract provision that requires a breaching party to pay the full contract price in the event of breach, regardless of the amount of actual damages and without any set-off for sums the non-breaching party may obtain in mitigation, is void and unenforceable as a contractual penalty clause.

53. Section 2.2(d) of the Wafer Supply Agreement is void and unenforceable as a contractual penalty clause.

54. Section 3.1 of the Wafer Supply Agreement, requiring Conergy to make advance payments to secure its purported take or pay obligations under Section 2.2(d), is void because its purpose is to effectuate the void take or pay provision.

55. Section 3.1(c) of the Wafer Supply Agreement, requiring Conergy to provide and maintain letters of credit to secure its purported take or pay obligations under Section 2.2(d), is void because its sole purpose is to effectuate the void take or pay provision.

56. There is an actual controversy between Plaintiff and Defendants over the enforceability of Section 2.2(d) and related provisions of the Wafer Supply Agreement. Plaintiff is entitled to a judicial declaration clarifying and declaring the respective rights of the parties and establishing that Section 2.2(d) and related provisions of the Wafer Supply Agreement are void and should have no further force and effect.

57. Plaintiff will suffer severe hardship and immediate irreparable harm if Defendants are permitted to continue to enforce and demand compliance with the terms of Section 2.2(d) and the provisions of the Wafer Supply Agreement that are designed to secure and effectuate it.

58. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION
(For a Declaration that the Wafer Supply Agreement is Void and Unenforceable for Illegality Under Section 1 of the Sherman Act)

59. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

60. By coercing Plaintiff and other market participants to agree to the restrictions on competition contained in the Wafer Supply Agreement and Defendants' agreements with other customers, Defendants have formed contracts, combinations and conspiracies in an unlawful restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, without any justification, and with substantial anticompetitive effects.

61. There is a relevant economic market for the manufacture and sale of silicon wafers for use in manufacturing solar cells and panels, which are made by cutting bricks of

silicon into super-thin wafers through the use of specialized saws (the "Wafer Market"). There are high barriers to entry into the Wafer Market, including the need for considerable technical expertise as well as the high cost of building the necessary specialized facilities and acquiring the necessary high technology equipment.

62. The relevant geographic scope of the Wafer Market is worldwide. Purchasers of solar silicon wafers located in various parts of the world monitor prices, and order wafers, from manufacturers around the world.

63. Regional variations in incentives for solar development and demand for solar photovoltaic panels can sometimes create localized markets with pricing and supply variations. Thus, in the alternative, the relevant geographic scope for the Wafer Market is Germany, or in the alternative the European Union and/or the United States.

64. There is also a relevant economic market for solar photovoltaic panels to generate electricity from sunlight, which are made from solar silicon wafers (the "Solar Panel Market"). Given the complicated technical capabilities need to transform silicon wafers into solar photovoltaic panels, there are high barriers to entry to the Solar Panel Market. The solar panels made by Plaintiff and other solar panel manufacturers are interchangeable.

65. The relevant geographic scope of the Solar Panel Market is worldwide. Purchasers of solar panels located in various parts of the world monitor prices, and order panels, from manufacturers around the world.

66. Regional variations in incentives for solar development and demand for solar photovoltaic panels can sometimes create localized markets with pricing and supply variations. Thus, in the alternative, the relevant geographic scope for the Solar Panel Market is Germany, or in the alternative the European Union and/or the United States.

67. Defendants compete in the Wafer Market.

68. Section 2.12(a) of the Wafer Supply Agreement, which purports to prohibit Plaintiff from competing with Defendants in the Wafer Market by selling solar polysilicon wafers, is a per se illegal output restraint. But for Section 2.12(a) of the Wafer Supply Agreement, Plaintiff would compete in the Wafer Market. The restrictions contained in Section 2.12 serve no legitimate function in the context of a vendor/vendee relationship and are not ancillary to any of the legitimate commercial terms of the Wafer Supply Agreement. Defendant MEMC's sole purpose in demanding these restrictions was to eliminate a competitor in the Wafer Market.

69. In the alternative, Section 2.12(a) amounts to an unreasonable and unjustifiable restraint on competition, with anticompetitive effects and no legitimate purpose.

70. Plaintiff competes in the Solar Panel Market. Section 2.13 of the Wafer Supply Agreement prohibits Defendants from competing in such market. Section 2.13 therefore amounts to a per se illegal market division.

71. Defendants have entered into long term contracts with other participants in the Solar Panel Market that contain similar restraints on trade and that, among other things, prevent the entry of those participants into the Wafer Market.

72. The cumulative effects of such restrictions have a market-wide effect that reduces competition. They prevent actual or potential competitors from entering or competing in the Wafer Market. They have caused, are causing and/or are likely to cause higher prices, lower quality of product, reduced consumer choice and other antitrust injuries to purchasers in the Wafer Market, including Plaintiff. These unlawful restraints substantially and adversely affect interstate and international commerce.

73. There are no pro-competitive justifications for the restraints imposed by Defendants. In the alternative, there are less restrictive means of achieving any such purported justifications.

74. Defendants acted with malice and with the intent to control the market.

75. The purpose and effect of Defendants' contracts in restraint of trade is to, among other things:

A. Eliminate competition between Plaintiff and Defendants in the Wafer Market and the Solar Panel Market;

B. Raise the price and lower the output of wafers in the relevant markets;

C. Eliminate new entrants to the Wafer Market;

D. Diminish the quality of polysilicon wafers to the detriment of participants in the Solar Panel Market and consumers as a whole;

76. Defendants' contracts in restraint of trade are per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and are malum in se.

77. In the alternative, Defendants' contracts and conspiracy in restraint of trade are unreasonable, unjustifiable, and malum in se, and therefore violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

78. The parties would not have entered into the Wafer Supply Agreement but for the presence of Section 2.12.

79. There is an actual controversy between Plaintiff and Defendants over the legality and enforceability of Section 2.12 of the Wafer Supply Agreement.

80. The illegality of the Wafer Supply Agreement under Section 1 of the Sherman Act, by itself or (in the alternative) in combination of with the other void and illegal contract

provisions alleged herein, renders the Wafer Supply Agreement as a whole unenforceable, null, void and of no further force and effect.

81. Plaintiff has no adequate remedy at law. Plaintiff has been prompt and diligent in pursuing its rights.

THIRD CAUSE OF ACTION
(For a Declaration that the Wafer Supply Agreement is Void and Unenforceable for Illegality Under Article 81 of the European Community Treaty)

82. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

83. Plaintiff is a German corporation subject to the cartel prohibition in Article 81 of the European Community ("EC") Treaty. Defendants serve the European market and are also subject to the same prohibitions. Plaintiff and Defendants are competitors in the Wafer Market.

84. Article 81(1) of the EC Treaty prohibits agreements and concerted practices that may affect trade between EC member states and that "have as their object or effect the prevention, restriction or distortion of competition."

85. Sections 2.12 and 2.13 of the Wafer Supply Agreement, under which Plaintiff agrees not to compete, directly or indirectly, in the Wafer Market and Defendant MEMC agrees not to enter the Solar Panel Market, restrict competition and violate Article 81(1) of the EC Treaty. These restrictions on competition are furthered by other provisions of the Wafer Supply Agreement, including the RCRD and letter of credit requirements contained in Section 3.1 of the Wafer Supply Agreement. They are further enhanced by the aspects of the Wafer Supply Agreement that create a strong financial disincentive for Plaintiff to expand its wafer production capacity.

86. The provisions of the Wafer Supply Agreement that effectively require Plaintiff to purchase 100% of its wafer requirements from Defendants are also anti-competitive, and violate Article 81 of the EC Treaty, because they prevent Defendants' competitors from gaining access to an important potential customer.

87. The Wafer Supply Agreement further violates European Community competition law due to the take or pay provision of Section 2.2. In particular, the onerous penalties for noncompliance with the Wafer Supply Agreement constitute an instance of prohibited "customer exploitation."

88. There is no legally-cognizable justification for the restrictions on competition contained in the Wafer Supply Agreement, which are not intended to create, and do not create, any efficiencies to offset the negative effects on competition. These restrictions do not contribute to improving the production or distribution of goods, nor do they allow customers to share in any such resulting benefits.

89. There is no applicable exemption from liability under Article 81 of the EC Treaty.

90. Under Article 81(2) of the EC Treaty, the presence of the unlawful provisions intended to restrict competition renders the entire Wafer Supply Agreement null and void. These violations are subject to potential criminal penalties.

91. The fact that Defendants have entered a number of agreements that impose identical restrictions on Defendants' other customers in the Wafer Market creates network effects and amplifies the negative effect on competition, in violation of Article 81(1) of the EC Treaty.

92. The Wafer Supply Agreement was made and performed by Defendant MEMC supplying solar wafers to Plaintiff in Germany. The unlawful provisions in the Wafer Supply

Agreement affect trade between EC Member States and have anti-competitive effects in the EC markets.

93. The parties would not have entered into the Wafer Supply Agreement but for the presence of Sections 2.12 and 2.13.

94. The illegality of the Wafer Supply Agreement under Article 81 of the European Community Treaty, by itself or (in the alternative) in combination of with the other void and illegal contract provisions alleged herein, renders the Wafer Supply Agreement as a whole unenforceable, null, void and of no further force and effect.

95. There is an actual controversy between Plaintiff and Defendants over the legality and enforceability of provisions of the Wafer Supply Agreement under EC law.

96. Plaintiff has no adequate remedy at law. Plaintiff has been prompt and diligent in pursuing its rights.

FOURTH CAUSE OF ACTION
(For a Declaration that the Wafer Supply Agreement is Void and Unenforceable due to Void Penalty Provisions)

97. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

98. The purported take or pay obligation contained in Section 2.2(d) is void as a contractual penalty clause. The related letter of credit and RCRD provisions serving as security for that void obligation are likewise unenforceable.

99. The parties would not have entered into the Wafer Supply Agreement but for the existence of the take or pay and related provisions.

100. There is an actual controversy between Plaintiff and Defendants over the legality and enforceability of Section 2.2(d) and related provisions of the Wafer Supply Agreement.

101. The fact that Section 2.2(d) is void and unenforceable, by itself or (in the alternative) in combination of with the other void and illegal contract provisions alleged herein, renders the Wafer Supply Agreement as a whole unenforceable, null, void and of no further force and effect.

102. Plaintiff has no adequate remedy at law. Plaintiff has been prompt and diligent in pursuing its rights.

FIFTH CAUSE OF ACTION
(For a Declaration that the Wafer Supply Agreement is Void and Unenforceable due to Illegality Under New York Common Law)

103. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

104. New York law prohibits non-competition clauses that are unreasonable in duration and breadth.

105. Section 2.12 and 2.13 of the Wafer Supply Agreement contain ten-year restrictions on competition, worldwide in scope, without any justification. Sections 2.12 and 2.13 of the Wafer Supply Agreement therefore are unreasonable restraints on trade, and therefore are void and unenforceable under New York common law.

106. The parties would not have entered into the Wafer Supply Agreement but for the presence of Section 2.12 and 2.13.

107. There is an actual controversy between Plaintiff and Defendants over the legality and enforceability of Sections 2.12 and 2.13 of the Wafer Supply Agreement.

108. The illegality of the Wafer Supply Agreement under New York common law, by itself or (in the alternative) in combination of with the other void and illegal contract provisions

alleged herein, renders the Wafer Supply Agreement as a whole unenforceable, null, void and of no further force and effect.

109. Plaintiff has no adequate remedy at law. Plaintiff has been prompt and diligent in pursuing its rights.

SIXTH CAUSE OF ACTION
(For A Declaration that the Wafer Supply Agreement is Void and Unenforceable due to Multiple Instances of Illegality and Unenforceability)

110. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

111. Numerous integral provisions of the Wafer Supply Agreement are illegal and unenforceable under the public policy of this State and the antitrust laws in the jurisdictions in which the Wafer Supply Agreement is performed. Taken individually or together these provisions infect and invalidate the Agreement, and leave no possibility for reformation.

112. In summary, at least five essential provisions of the Wafer Supply Agreement are illegal and void:

A. The take or pay provision in Section 2.2(d) is void as an penalty liquidated damages provision;

B. The Refundable Capacity Reservation Deposit provision in Section 3.1 is void as security for the unenforceable take or pay obligation;

C. The Letter of Credit requirement is void as security for the unenforceable take or pay obligation;

D. The output restraint on wafer production contained in Section 2.12 is void under the Sherman Act, EC Competition law, and New York common law; and,

E. The market division provision contained in Section 2.13 is void under the Sherman Act, EC Competition law, and New York common law.

113. These provisions are void and unenforceable under the public policy of the State of New York and the United States of America.

114. Each of these provisions is an integral term of the Wafer Supply Agreement, absent which the parties would not have entered into the Wafer Supply Agreement. These provisions therefore are not severable from the Wafer Supply Agreement.

115. There is an actual controversy between Plaintiff and Defendants over the legality and enforceability of these terms of the Wafer Supply Agreement.

116. Because they cannot be severed from the Agreement, and because to enforce these sections would be to enforce a direct illegality, and because Plaintiff lacks an adequate remedy at law, the Wafer Supply Agreement as a whole should be declared unenforceable, null, void and of no further force and effect.

SEVENTH CAUSE OF ACTION
(Breach of the Wafer Supply Agreement)

117. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

118. Pursuant to Section 2.1 of the Wafer Supply Agreement, Defendants agreed to provide silicon wafers that complied with specifications set forth in Attachment A to the Wafer Supply Agreement. Defendants have breached the Wafer Supply Agreement by delivering a substantial quantify of wafers that do not conform to these specification.

119. Pursuant to Section 2.8(a) of the Wafer Supply Agreement, Defendants promised to make continuous improvements to the quality of the silicon wafers delivered to Plaintiff. Plaintiff has breached this promise.

120. Under the Wafer Supply Agreement, the prices to be paid by Plaintiff for wafers delivered by Defendants are based in part on the efficiency of the wafers in converting sunlight

into electricity. Pursuant to 2.2(c) of the Wafer Supply Agreement, prices are to be based on the actual average efficiency experienced by Plaintiff. Defendants have breached the Wafer Supply Agreement and have overcharged Plaintiff by refusing to base the prices for wafers on the actual average efficiency experienced by Plaintiff and by invoicing Plaintiff for higher prices.

121. Defendants have further breached the Wafer Supply Agreement by stopping shipments of wafer in transit to Plaintiff that had been duly ordered and acknowledged in accordance with the terms of the Wafer Supply Agreement.

EIGHTH CAUSE OF ACTION
(Breach of the Wafer Supply Agreement)

122. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

123. Section 2.13(a) of the Wafer Supply Agreement prohibits Defendants from engaging, directly or indirectly, in any "Restricted MEMC Business," which is defined to include the marketing or sale of photovoltaic modules. Further, under this section, Defendants are expressly prohibited from "(A) owning any interest in . . . or participating in any Person which owns or operates a Restricted MEMC Business, (B) soliciting any customer or prospective customer of Conergy anywhere in the world to purchase any products or services which compete with those provided by Conergy, and (C) assisting any Person in any way to do, or attempt to do, anything prohibited above" (collectively, the "Restrictive MEMC Covenants").

124. On or about July 23, 2009, MEMC announced that one of its new "key objectives" is to compete with Conergy and MEMC's other Wafer customers in the downstream solar markets, i.e. the Wafer Market, the Solar Panel Market, and the market for developing large scale solar projects. Pursuant to this new strategy, MEMC also announced that on June 26, 2009 it had signed a binding letter of intent with a German participant in the Solar Panel Market

named Q-Cells SE ("Q-Cells") to form a joint venture that will develop, construct and sell large scale solar photovaltaic projects. Upon information and belief, MEMC and Q-Cells will each own 50% of the joint venture entity. The first development, in Strasskirchen, Bavaria, will include approximately 225,000 solar photovaltaic modules and is expected to be completed by the end of 2009. Upon completion, the joint venture will seek to sell this development to an external investor. The joint venture contemplates developing and selling additional projects thereafter.

125. As set forth above, Plaintiff seeks a declaration that Wafer Supply Agreement is void in its entirety. In the alternative, should the Wafer Supply Agreement be held enforceable, Plaintiff alleges that Defendants have breached and are breaching Section 2.13 of the Wafer Supply Agreement by competing in the downstream solar markets, in particular though the joint venture with Q-Cells. Such breaches include but are not limited to, in connection with the Q-Cells transaction, sales of solar modules and solicitation of actual and potential customers of Plaintiff's own solar development projects.

126. As of the date of the filing of the Complaint, Plaintiff has duly performed its obligations under the Wafer Supply Agreement.

127. Plaintiff has no adequate remedy at law.

128. Section 2.13(c) of the Wafer Supply Agreement states the remedies available for breach of Section 2.13(a):

> "If MEMC or any of its affiliates or Subsidiaries breaches, or threatens to commit a breach of, any of the Restrictive MEMC Covenants, Conergy shall have the following rights and remedies, each of which rights and remedies shall be independent of the others and severally enforceable, and each of which is in addition to, and not in lieu of, any other rights and remedies available to Conergy at law or in equity:
>
> (i) the right and remedy to have the Restrictive MEMC Covenants specifically enforced by any court of competent jurisdiction, it being agreed that

any breach or threatened breach of the Restrictive MEMC Covenants would cause irreparable injury to Conergy and that money damages would not provide an adequate remedy to Conergy and

(ii) the right and remedy to require such Person to account for and pay over to Conergy any profits, monies, accruals, increments or other benefits derived or received by any such Person as the result of any transactions constituting a breach of the Restrictive MEMC Covenants.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

(a) On the First Cause of Action, declaring that Section 2.2(d) of the Wafer Supply Agreement is null, void and of no further force and effect, along with Section 3.1(c) and all other provisions of the Wafer Supply Agreement whose purpose is to effectuate, secure or enforce the rights purportedly granted to Defendants under Section 2.2(d); and

(b) On the First Cause of Action, declaring that Plaintiff is no longer required to provide or maintain any letter of credit under Section 3.1(c) of the Wafer Supply Agreement; and

(c) On the First Cause of Action, declaring that Defendants are not entitled to offset or withhold any portion of the RCRD reimbursements due to Plaintiff based on any purported "Purchase Shortfall" under Section 2.2(d) of the Wafer Supply Agreement; and

(d) On the First and Second Causes of Action, preliminarily and permanently enjoining Defendants and their officers, directors, agents, employees, servants, attorneys, successors, and all those in privity or active concert or participation with any of the foregoing, from drawing on the Letter of Credit; and

(e) On the First Cause of Action, declaring that Plaintiff may revoke the Letter of Credit and directing Defendant MEMC Singapore to return the Letter of Credit to Commerzbank AG by way of terminating any rights it may have thereunder; and

(f) On the Second through Sixth Causes of Action, declaring that the entire Wafer Supply Agreement is unenforceable, null, void and of no further force or effect; or in the alternative

(g) On the Second through Sixth Causes of Action, declaring that Section 2.12 and 2.13.of the Wafer Supply Agreement are unenforceable, null, void and of no further force or effect; or in the alternative

(h) On the Second through Sixth Causes of Action, rescinding the Wafer Supply Agreement; and

(i) On the Seventh Cause of Action, awarding Plaintiff damages in an amount to be determined at trial;

(j) On the Eighth Cause of Action, granting Plaintiff injunctive relief and all other appropriate remedies including recovery of the profits of MEMC's joint venture with Q-Cells; and

(k) Awarding Plaintiff the return of the full RCRD amount held by Defendants, minus only the amount Defendants are entitled to retain under Attachment C-1 of the Wafer Supply Agreement; and

(l) Awarding Plaintiff the costs incurred in prosecuting this action, including reasonable attorneys' fees; and

(m) Granting Plaintiff such other and further relief as the Court deems just, proper and equitable under the circumstances.

Dated: New York, New York
August 17, 2009

HUGHES HUBBARD & REED LLP

By: Derek J.T. Adler

Derek J.T. Adler
Erik Bond
One Battery Park Plaza
New York, N.Y. 10004
(212) 837-6000
adler@hugheshubbard.com
bond@hugheshubbard.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

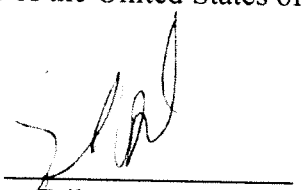
I hereby certify that on this 17th day of August, 2009, I caused copies of the foregoing AMENDED COMPLAINT to be served by e-mail and by first-class mail, postage prepaid on the following:

William J. Hibsher, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, New York 10104

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that under the laws of the United States of America the foregoing is true and correct.

Executed on August 17, 2009



Erik Bond