

NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY

JEAN BARMASH, an individual, for himself and  
derivatively on behalf of nominal defendant  
ENERGYSCORECARDS, INC.,

Plaintiff,

- against -

JEFFREY PERLMAN and BRIGHT POWER, INC.

Defendants,

-and-

ENERGYSCORECARDS, INC.,

Nominal Defendant.

Index No. \_\_\_\_\_

**VERIFIED COMPLAINT**

Plaintiff, JEAN BARMASH (“Barmash”) by and for his Verified Complaint against Defendants Jeffrey Perlman (“Perlman”), Bright Power, Inc. (“Bright Power”), and nominal Defendant EnergyScoreCards, Inc. (“ESC”) (collectively “Defendants”) avers as follows:

NATURE OF THE ACTION

1. This is a classic case of corporate theft and diversion of corporate opportunity. Perlman and Bright Power are the President and controlling shareholder of ESC. As shown below, they have looted ESC consistently in favor of Bright Power and used ESC as if it were a mere division of Bright Power. This has harmed both ESC and ESC’s minority shareholders. Barmash is ESC’s largest minority shareholder and comes to this Court to seek redress.

2. Plaintiff Barmash is a talented software developer. Defendant Perlman enlisted Barmash to develop a software product that would allow Perlman to monitor the energy usage and water consumption of large buildings.

3. There is a burgeoning need for such software given the growing passage of laws (in New York City and elsewhere) requiring large buildings to conduct “energy audits” on a periodic basis to report on their energy usage and water consumption.

4. Barmash developed such a product in 2009. Perlman used Barmash’s software to convince formidable entities<sup>1</sup> (such as Entity A) to sign multi-year license agreements for that software.

5. In February 2010, Barmash and Perlman incorporated ESC.

6. Perlman served as ESC’s President, Treasurer and Secretary. Barmash served as ESC’s Chief Technology Officer.

7. Perlman was also a director of ESC along with Barmash.

8. As an officer and director of ESC, Perlman had every responsibility to develop and maximize ESC’s business. So did Bright Power, ESC’s controlling shareholder. Perlman, upon knowledge and belief, is the controlling shareholder of Bright Power.

9. Instead, Perlman has continually usurped business opportunities belonging to ESC and diverted them to his other company, Bright Power.

10. Bright Power, also, has used and continues using ESC repeatedly as if it were merely a resource of Bright Power’s and not an independent entity. Bright Power has also used ESC’s software for its own clients without providing compensation to ESC.

---

<sup>1</sup> Out of an abundance of caution, to respect any contractual confidentiality obligations that ESC may have to keep client names confidential, Plaintiff has refrained from identifying such entities by name. Plaintiff will provide the names of these clients and/or potential clients after the entry of a suitable confidentiality order or after confirmation from ESC that no confidentiality obligations exist.

11. Perlman and Bright Power have taken contracts that should belong to ESC (for use of ESC's software) and assigned them to Bright Power. Bright Power markets itself as having and owning all of ESC's software, which is not the case.

12. Perlman and Bright Power have also used ESC to raise money for *Bright Power*, not for ESC.

13. Perlman, despite his position as President of ESC, has not worked to develop ESC into a separate company, and in fact the result of his actions is that Bright Power controls every aspect of ESC, including branding and marketing. The software is being marketed as owned by Bright Power, which causes ESC irreparable harm.

14. Perlman and Bright Power have benefited from these acts considerably. Only ESC has suffered – with Barmash, its main minority shareholder, bereft of the fruits of ESC's labors.

15. Barmash brings this case to remedy these rampant breaches of fiduciary duty by ESC's controlling shareholder and president.

#### THE PARTIES

16. On information and belief, Defendant Jeffrey Perlman is a resident of the State of New York.

17. On information and belief, Defendant Bright Power, Inc., is a New York corporation with its principal offices located at 11 Hanover Square, 21st Floor, New York, New York 10005, with an address registered for the service of process with the New York Department of State at 11 Hanover Square, 15th Floor, New York, New York, 10005.

18. Defendant ESC is a Delaware corporation.

19. On information and belief, ESC's principal offices are located at 11 Hanover Square, 21st Floor, New York, New York, 10005.

20. Plaintiff Jean Barmash is a resident of the State of New Jersey.

#### JURISDICTION AND VENUE

21. Each of the Defendants does substantial business in New York on a regular and continuing basis such that general jurisdiction exists over each of them.

22. In addition, Bright Power's principal place of business is in New York, the relevant acts and occurrences detailed herein occurred in New York, and defendant Perlman, on information and belief, resides in New York. Accordingly, the Court has jurisdiction over this matter under CPLR § 301.

23. Venue is proper under CPLR § 503(a) because Perlman resides in New York county and under CPLR § 503(c) because both ESC's and Bright Power's principal places of business are in this County.

#### FACTS COMMON TO ALL CLAIMS

24. Barmash has a Bachelor of Science degree in Engineering, with coursework in Computer Science and Electrical Engineering. He earned that degree in 1999 from the Cooper Union for the Advancement of Science and Art.

25. Barmash has over a decade's worth of experience in the software field and with regard to computer programming. He has held several positions in these fields.

##### **A. Barmash Develops An Energy Benchmarking Program To Monitor Building Energy Usage**

26. In or about December 2008, Barmash met with Defendant Perlman.

27. At that time, Perlman headed Bright Power, among other things. He is also its founder.

28. Perlman, on information and belief, is still the President of Bright Power.

29. Perlman and Barmash discussed a potential new business. Perlman represented himself to have significant expertise in the energy efficiency and related energy fields. Perlman believed that a new and growing market demand existed for building owners to monitor and control their buildings' energy usage.

30. Perlman told Barmash that he attempted to develop such software previously, and had tried to hire other programmers to accomplish this task on two separate earlier occasions. However, Perlman indicated that these earlier efforts were unsuccessful.

31. Perlman said he was looking for a business partner with significant experience in software development to help him build a product that could be sold commercially.

32. Perlman told Barmash that he believed that the market for software that could measure energy usage and water consumption by buildings would be growing and vibrant.

33. On information and belief, a series of rules and regulations (in this city and elsewhere) have been promulgated that have fed the demand for this type of product.

34. On information and belief, these rules and regulations included, among others, New York City's Law No. 84 of 2009, which discusses, among other things, benchmarking the energy efficiency of buildings. Local Law 84 was enacted in or about December 2009 by the City of New York, as part of its "Greener Greater Buildings Plan."

35. On information and belief, this law requires buildings with more than 50,000 gross square feet to provide detailed energy usage information to the City of New York on a specified periodic basis. This represents about 15,000 buildings, and thus presents a tremendous commercial opportunity.

36. On information and belief, these developments are not limited to New York. Various jurisdictions have enacted such laws, including Washington, D.C., Seattle and San Francisco.

37. Perlman and Barmash discussed the concept of developing a software product that would permit owners to monitor their buildings' power consumption continually.

38. Perlman told Barmash that he believed that there would be high demand for such a product from large building owners in New York and beyond.

39. Perlman asked Barmash to begin to create a software tool that would permit such benchmarking and monitoring of the energy usage of large numbers of residential and/or office buildings.

40. The need for such a tool will only increase, as in 2009 New York also passed a new regulation, to be effective in 2013, that will require buildings in New York City to undergo an energy audit once every ten years.

41. In 2008, Bright Power offered no such software tool.

42. Barmash began to develop such a software product in or about April 2009.

43. He worked on such a software program from January 2009 through and including January 2010.

**B. Barmash Develops Software For Energy Benchmarking  
And Defendants Perlman and Bright Power Use The  
Software To Obtain Licensing, Consulting, Advisory And  
Other Revenues Which Are Not Shared With Barmash**

44. As Barmash worked on the software, Perlman engaged in marketing efforts to license the software to various customers so that they could use the software to monitor building energy usage.

45. On information and belief, in or about January 2010, using Barmash's developed software, Perlman made a presentation of Barmash's software's capabilities to Entity A.

46. On information and belief, as a result of that presentation, Entity A agreed to pay to license that software. On information and belief, Entity A agreed to pay approximately \$25,000.00 per year over three years in licensing fees to use the software Barmash created.

47. On information and belief, Perlman presented Barmash's software tool to others, including but not limited to Entity B, an organization that works to develop affordable housing throughout the United States.

**C. Perlman Seeks To Have Barmash Continue To Work For Him On The Software And Therefore Creates Defendant ESC So That He Can Offer Barmash Shares in ESC in Exchange For Barmash's Further Work**

48. Aware of the significant financial benefit available as a result of this software tool, Perlman wished to have Barmash continue to develop the software and work for him.

49. However, Perlman did not wish to pay Barmash any amount that would be reasonable for that work.

50. To induce Barmash to continue to work for him, Perlman suggested the idea of creating a new company, ESC.

51. Perlman promised Barmash roughly twenty-five percent (25%) of that company's shares. In exchange, Barmash agreed to serve as ESC's Chief Technology Officer and as a director of ESC.

52. Perlman and Barmash discussed how ESC could benefit and thrive by licensing the software and by using Perlman's significant contacts in the housing and environmental industries.

53. Perlman arranged to incorporate and create ESC. On information and belief, ESC was incorporated on or about February 10, 2010.

54. Perlman acted as the sole incorporator of ESC.

55. At its inception, ESC had two directors: Barmash and Perlman.

56. Perlman acted as ESC's President, Treasurer and Secretary.

57. ESC had one, controlling shareholder, Bright Power.

58. On information and belief, Bright Power held seventy thousand (70,000) shares.

59. On information and belief, other than Bright Power, two other individuals held six thousand (6,000) shares.

60. Barmash received twenty-five thousand (25,000) shares pursuant to a Restricted Stock Agreement between himself and ESC. He received those shares on or about December 31, 2010. *See* Ex. A.

61. Barmash worked for ESC through 2010 without receiving any further compensation beyond the shares he received in ESC.

62. Other than one payment to him of \$40,000 in 2011 and another \$40,000 in 2012 made by ESC, Barmash never received any compensation from ESC.

63. Nonetheless, Barmash continued to work diligently on the energy benchmarking software for ESC.

64. He improved it in 2010 and 2011, adding new features and developments. He also hired and directed other programmers in this work during his tenure as ESC's Chief Technology Officer.



65. ESC now markets itself as having an online energy management and benchmarking tool that organizes energy and water usage data, supports financial planning for energy improvements, and tracks the progress and success of energy and water saving efforts.

**D. ESC Takes Measures To Protect Its Software, Which Is A Valuable Trade Secret of ESC**

66. ESC's software is a trade secret.<sup>2</sup>

67. Aside from Bright Power's misappropriation of ESC's intellectual property, outside of ESC's business, no one has knowledge of ESC's software.

68. ESC has used a source control system to protect ESC's code and ensure that it remains secure and uniform.

69. Access to ESC's source control system requires passwords and user login information, as do ESC's servers that run the code.

70. Only Barmash and his developers had access to ESC's source control system.

71. In addition, ESC upgraded the security of its servers at the request of its client, Entity C. This upgraded security ensured that unauthorized access would be minimized, if not completely prohibited.

72. ESC's code is critically valuable to ESC and along with customer data, which is also secure, comprises the main value of ESC.

73. Barmash worked on ESC's software from February 2010 to at least June 2012, for more than 3000 hours.

74. Six other developers also worked on ESC's software at various points during this time period.

---

<sup>2</sup> Barmash holds the rights to code he created before ESC was incorporated.

75. At Barmash's hourly rate of \$160 per hour, which was agreed to by ESC later, the value of ESC's software derived from Barmash's work alone equals at least \$480,000 in value.

76. ESC's software is the leading software in New York for the measurement of energy and water usage for large apartment buildings.

77. ESC has used its software to obtain the largest clients of the first order, including Entity D, Entity E, and Entity F.

78. Aside from Bright Power misappropriating ESC's software, no other Company has obtained the same level of market penetration or success in measuring energy and water usage for large apartment buildings.

79. Thus, absent misconduct, no other Company has been able to or will be able to duplicate ESC's software.

**E. Perlman And Bright Power Treat ESC As If It Were Wholly Owned By Bright Power To Damage Barmash, ESC's Main Minority Shareholder**

80. Barmash holds no shares in Bright Power.

81. Perlman, on knowledge and belief, is Bright Power's controlling shareholder.

82. From the inception of ESC, Perlman never acted to work to maximize ESC's revenues or profits.

83. On the contrary, Perlman acted to divert opportunities and business away from ESC to his other company, Bright Power. This would of course benefit Perlman, as a shareholder of Bright Power, and effectively damage Barmash, ESC's main minority shareholder, substantially.

84. That is precisely what Perlman has done.

85. Even though Perlman was ESC's President, Treasurer and Secretary, he worked actively to assign licenses and contracts to Bright Power that should have been given to ESC.

86. Perlman has, from the very inception of ESC, treated it as an appendage of Bright Power, for Bright Power's benefit.

87. Perlman has admitted as much: he has confessed to Barmash that, in truth, he "embraced" the notion of ESC as being effectively nothing more than a division of Bright Power.

88. As Perlman has admitted, the licensing revenue ESC can generate "is more easily saleable to other parts of the country than consulting and the other services" that Bright Power otherwise provided.

89. Accordingly, Perlman has used ESC's software and other assets to further Bright Power's interests at ESC's expense.

90. On ESC's website, Perlman has ESC state that it works with Bright Power in a "simple, centralized platform." On information and belief, Bright Power controls every act that ESC makes.

91. Virtually from its inception, Perlman has treated ESC as the property of Bright Power. Thus, for example, on Bright Power's website, Bright Power refers to ESC's "online energy management and benchmarking tool" as "our analysis" that works for the benefit of Bright Power and as Bright Power property. *See* Ex. B, attached hereto.

92. Bright Power further represents itself as having all of ESC's intellectual property and value. It states on its website that ESC's portfolio analysis is owned by Bright Power, and that it is Bright Power, not ESC, who can assist clients to "[t]ake control of energy use in your property portfolio." *See* Ex. B.

93. Bright Power uses ESC freely as if it were wholly owned by Bright Power, which it is not.

94. Bright Power employees run ESC's Twitter account, monitor ESC's email and answer ESC's phones.

95. Perlman even values ESC only as part of Bright Power, telling Barmash that ESC's valuation derives from being part of that entity.

96. Bright Power's website actively markets ESC, including frequent updates about energy benchmarking and other events, with three events listed for December 2012 alone. *See* Ex. C, attached hereto.

97. On the other hand, ESC's website hasn't had a news item since May 2012, markets Bright Power's services and accomplishments, and directs people to contact Bright Power personnel. *See* Ex. D, attached hereto.

**F. Perlman Systematically Usurps Contracts and Business Belonging To ESC And Assigns Such Work To Bright Power In Contravention Of His Duties To ESC As ESC's Director, President, Treasurer And Secretary**

98. Everyone who operates ESC now is a Bright Power employee. This was also true when Barmash was ESC's CTO (other than for Barmash, who was never employed by Bright Power).

99. Bright Power's domination of ESC is so complete and thorough that, to contact ESC, one has to contact a Bright Power employee, Phil Vos at a Bright Power email address. *See* Ex. D.

100. Thus, Bright Power steals away potential work from ESC.

101. The City of New York reported that Bright Power – not ESC – benchmarked more building for energy and water usage compliance in 2011 than any other benchmarking provider.

102. This is very important because the first “early mover” in this space is likely to be well-primed to gain market share in the growing energy and water usage industry. As a result of Perlman’s actions, the market perceives Bright Power to have provided the services that were in fact enabled by ESC.

103. ESC’s software product has been unquestionably successful. Perlman has ensured Bright Power has been the beneficiary of that success, rather than ESC itself.

104. ESC is nothing other than a shadow of what it should be as a result of Perlman’s predatory acts.

105. Using ESC’s software, Bright Power has, on information and belief, obtained contracts from, among others:

- a. Entity G (to monitor about 81 properties);
- b. Entity H (to monitor about 59 properties);
- c. Entity I (to monitor about 60 buildings);
- d. Entity J (to monitor about 117 properties);
- e. Entity K (to monitor about 43 properties);
- f. Entity L (to monitor about 25 properties);
- g. Entity M (to monitor about 25 properties); and
- h. Entity N (to monitor about 20 properties).

106. Not a single one of these licenses rightfully belong to Bright Power. On information and belief, Bright Power has not turned over these licensing fees to their rightful owner, ESC.

107. Furthermore, relationships with large real estate organizations have considerable value beyond the immediate contracts, because valuable follow-on work is likely to be available thereafter.

**G. Perlman Further Usurps Business Opportunities From ESC In Favor Of Bright Power When Perlman Starts Bright Power's "Portfolio Analysis" Program and Energy Procurement Program**

108. As ESC's President, Treasurer, Secretary and Director, Perlman had every obligation to ensure ESC's growth and financial success.

109. Perlman ignored his obligations, however, yet again, when he worked to create Bright Power's Portfolio Analysis program.

110. Perlman established this program in or about the summer of 2011.

111. This program – in a manner very similar to ESC's program – seeks to aggregate data into a central online platform to aid in the benchmarking of measuring energy and water consumption.

112. The Portfolio Analysis program (i) identifies applicable utility/ government incentives; (ii) quantifies actual after energy retrofits; and (iii) identifies savings through changing utility metering and billing or third-party energy procurement. *See* Ex. B. These functions, to the extent they do not compete directly against ESC itself, attempt to create new business opportunities that should belong to ESC.

113. There can be little doubt that this was a business opportunity within ESC's line of work, because Bright Power itself says that it has to implement ESC's "online benchmarking and

energy tracking system” to utilize the Portfolio Analysis. Bright Power not only stole ESC’s corporate opportunities, it also used ESC’s own software to do so without compensating ESC.

114. Further, this put ESC directly at odds with Bright Power, because Bright Power was brazenly creating a position (and organization) that is directly competitive with ESC.

115. On information and belief, Jon Braman, a Vice President of Bright Power, directs the Portfolio Analysis program.

116. Braman worked heavily on ESC’s functionality and was a key employee instrumental to ESC’s sales and delivery.

117. Braman worked heavily to obtain grants. These grants involved study of hundreds of buildings. The results of those studies were central to ESC’s development of its software, because those studies provided key information necessary to refine and advance ESC’s programs.

118. Bright Power did not compensate ESC for the use of this information.

119. Beyond this, ESC’s revenues have derived substantially from providing such services. On information and belief, at least half of ESC’s revenues in the first half of 2012 derived from service revenue rather than software revenue.

120. Bright Power also started a new line of business to further capitalize on the relationships it stole from ESC, such as Energy Procurement. Energy Procurement requires access to large number of buildings that can be aggregated together to have access to bulk purchasing.

#### **H. Perlman Further Usurps Business Opportunities From ESC In Favor Of Bright Power When Perlman Raises Money Solely For Bright Power Instead Of ESC**

121. Perlman has sought to use ESC's corporate assets and value to assist him to raise money for *Bright Power*, not ESC.

122. Thus, in May 2012, Perlman wrote to Barmash requesting that Barmash sell Barmash's shares in ESC "in preparation for raising investor money" for Bright Power, not for ESC.

123. Perlman has never treated ESC as an independent entity and he has never put ESC's interests first, as he was required to do from ESC's inception as its chief officer and director.

124. Indeed, in considering how to value ESC, Perlman has relied on the partial and prejudiced view of *Bright Power* investors, not ESC investors. He has done so to further his attempt to diminish ESC's valuation, in favor of unjustly increasing the value of Bright Power off of the back of ESC's work and assets.

125. Perlman has *never* used independent business advisors – as he was required – to value ESC with ESC's interests first and foremost. Rather, he has continually relied on Bright Power investors and advisers whose aim is to devalue ESC in favor of placing ESC's assets with Bright Power for an unfairly low value.

#### **I. Barmash Decides To Cease Working For ESC And Perlman Attempts To Force Barmash To Sell His ESC Shares For A Pittance By Threatening Him With Preventing Any Sale Of ESC**

126. In or about November 2011, Barmash notified Perlman that he had decided to resign from his position at ESC.



127. In or about January 2012, Barmash told Perlman he was willing to work on a part-time basis.

128. Barmash and Perlman began to create a transition plan. Barmash agreed to help find, recruit and train his successor, a process that took several months. Barmash's successor started in early April 2012, and Barmash participated in multiple sessions to train his successor.

129. From January until June of 2012, Barmash has worked as a consultant to ESC.

130. Perlman subsequently began to attempt to convince Barmash to sell his shares in ESC to Bright Power for an unfairly low amount of money.

131. In so attempting, Perlman has, in fact, had Bright Power investors threaten Barmash with refusing to have any liquidity event for ESC "for a long time," in favor of putting money into Bright Power, if Barmash did not sell his interest in ESC to Perlman for an unfairly low amount.

132. Previously, Perlman had told Barmash that he had valued ESC at a much higher level.

133. In or about September 2012 Perlman removed Barmash from the board of directors of ESC without warning or advance notice to Barmash.

#### **J. Derivative Allegations**

134. Plaintiff brings these causes of actions derivatively to redress injuries suffered by ESC as a direct result of the breaches of fiduciary duties by Perlman and ESC.

135. Plaintiff has owned ESC stock during the wrongful course of conduct by Perlman, ESC and Bright Power alleged herein, and continues to hold ESC stock.

136. Plaintiff will adequately and fairly represent the interests of ESC and its shareholders in enforcing and prosecuting his rights.

### **K. Demand On The ESC Board Is Excused As Futile**

137. Barmash has not made a demand on the ESC Board to bring suit asserting the claims set forth herein because pre-suit demand would be futile and is excused as a matter of law.

138. That is so because, at present, on information and belief, ESC has only one director: Perlman.

139. Perlman is an interested director because he is also Bright Power's founder and president.

140. Perlman is not an independent director, because he is a shareholder and key officer of Bright Power.

141. Perlman suffers from conflicts of interest and divided loyalties which preclude him from exercising independent business judgment. Perlman has acted, from ESC's inception, in the best interest of Bright Power, not of ESC, and owes Bright Power fiduciary duties as well. His conduct over the last several years has demonstrated that he placed – and places – Bright Power's interests first, improperly, over those of ESC.

142. Bright Power, through a written consent it executed, purported to elect a new director, Conor Laver, on September 19, 2012. *See* Ex. E (the "First Consent").

143. The First Consent is illegal, improper and of no effect with regard to Laver's purported election to the board.

144. The First Consent is ineffective because it violates ESC's Bylaws.

145. Section 2.2 of the Bylaws provides that directors are elected at ESC's annual meeting of stockholders. The Bylaws are attached hereto as Exhibit F.

146. Section 1.1(a) of the Bylaws provides, in pertinent part, that stockholders can elect directors in lieu of the annual meeting by written consent if the consent is *unanimous*. See Ex. F.

147. Here, consent was not unanimous. Only Bright Power voted for it. No other shareholder – including Barmash – voted for this First Consent.

148. The First Consent is thus invalid with regard to Laver’s election. When consent is *not* unanimous, the Bylaws require that “such action by written consent may be in lieu of holding an annual meeting *only if all of the directorships* to which directors could be elected at an annual meeting held at the effective time of such action *are vacant and are filled by such action*.” See *id.* (emphasis added).

149. Therefore, if *any* of the directors to which directors could be elected at an annual meeting held at the effective time such were *not* vacant and/or *were not filled* by that action, then the First Consent would be improper.

150. Here, at least one directorship position was *not vacant* and/or *was not filled* by the First Consent.

151. First, all directorship posts that could be elected at the next annual meeting were *not vacant*.

152. At the time of the First Consent, Defendant Perlman was a director. As a director, he holds his directorship “until the next annual meeting of stockholders and until a successor is elected and qualified, or until such director’s earlier death, resignation or removal.” Ex. F, § 2.4. As Perlman did not die, did not resign and was not removed as a director, his position was not vacant and *could not be vacant* “until the next annual meeting of stockholders *and until* a successor is elected and qualified.” See *id.* (emphasis added).

153. The next annual meeting of stockholders had not yet occurred. Accordingly, Perlman's directorship position was filled and not vacant.

154. Therefore, Laver was not properly elected to ESC's board.

155. This First Consent further did not attempt to fill all the directorships that were to be elected at the next stockholders' meeting.

156. Accordingly, the First Consent is ineffective.

157. Even if Laver were on the board – which he is not – Laver would not be an independent or disinterested director, because he too is a key officer of Bright Power.

158. As Laver himself states, he works for Bright Power, Inc. *See* Exhibit G hereto (LinkedIn page for Laver, listing him as Bright Power, Inc. employee).

159. Laver works for, and is supervised by, Perlman, with regard to all work he performs for both ESC and Bright Power.

160. Laver has worked for Bright Power continuously since June 2009. *See id.*

161. Demand is also excused because Perlman would be required to sue himself for his own breaches of fiduciary duty to ESC, and Laver would be required to sue his boss and the company for which he works, Bright Power. Here, where Perlman and Bright Power have so consistently and continually deprived ESC of revenue, funding, licenses and business opportunities in ESC's line of business, a substantial likelihood of director liability exists. This high likelihood alone establishes demand futility.

162. The ESC board is thus incapable and unwilling to take the actions required to seek the relief requested in this Complaint.

**L. Upon Learning Of This Action, Defendants Illegally And Improperly Attempted To Add Two Bogus New “Directors” To The Board, Further Evidencing Their Bad Faith**

163. In an attempt to settle this case, Plaintiff Barmash sent a copy of this Complaint to counsel for nominal defendant ESC and Bright Power on Monday, January 21, 2013.

164. Two days later, on information and belief, Defendants caused ESC to create a second illegal “Written Consent of Majority Stockholders In Lieu of Meeting” (the “Second Consent”). *See* Ex. H, attached hereto.

165. The Second Consent purported to add two new directors to ESC’s board: Charles Komanoff and Mitchell Hauser.

166. On information and belief, Defendants rushed to add these two new purported “directors” two days after receiving a draft of this pleading so that they could claim -- falsely -- that the board had independent directors and thus could consider demand properly.

167. However, Defendants’ act is illegal, improper and of no effect.

168. The Second Consent is ineffective because it violates ESC’s Bylaws.

169. Section 2.2 of the Bylaws provides that directors are to elected at ESC’s annual meeting of stockholders. *See* Ex. F.

170. Section 1.1(a) of the Bylaws provides, in pertinent part, that stockholders can elect directors by written consent in lieu of the annual meeting if the consent is *unanimous*. *See* Ex. F.

171. Here, once again, consent was not unanimous. Only Defendant Bright Power voted for it. No other shareholder – including Barmash – voted for this Written Consent.

172. When consent is *not* unanimous, the Bylaws require that “such action by written consent may be in lieu of holding an annual meeting *only if all of the directorships* to which

directors could be elected at an annual meeting held at the effective time of such action *are vacant and are filled by such action.*” *See id.* (emphasis added).

173. Therefore, if *any* of the directors to which directors could be elected at an annual meeting held at the effective time such were *not* vacant and/or *were not filled* by that action, then the Second Consent would be improper.

174. Here, at least one directorship position was *not vacant* and/or *was not filled* by the Second Consent.

175. First, all directorship posts that could be elected at the next annual meeting were *not* vacant.

176. At the time of the Second Consent, Defendant Perlman was a director. As a director, he holds his directorship “until the next annual meeting of stockholders and until a successor is elected and qualified, or until such director’s earlier death, resignation or removal.” *See Ex. F, § 2.4.* As Perlman did not die, did not resign and was not removed as a director, his position was not vacant and *could not be vacant* “until the next annual meeting of stockholders and until a successor is elected and qualified.” *See id.* (emphasis added).

177. The next annual meeting of stockholders has not yet occurred. Accordingly, Perlman’s directorship position was filled and not vacant.

178. If Laver were on the board properly, for the same reasons, director Laver’s directorship position was also filled and not vacant. Of course, as shown above, he was *not* on the board.

179. Bright Power itself admits these facts. Its own Second Consent concedes that at least one directorship position was filled and was not vacant. The bogus Second Consent states

that Bright Power increased the number of directors from two (2) to four (4) – thus admitting, at the least, that the directorship of Perlman was filled and remain filled.¶

180. This Second Consent further did not attempt to fill all the directorships that were to be elected at the next stockholders' meeting.

181. Accordingly, the Second Consent is ineffective.

182. Defendants passed this improper Second Consent secretly, with no advance notice. They attempted to engage in this underhanded behavior to damage Plaintiff's case improperly. They only informed Plaintiff of their illegitimate act *after* they had supposedly committed it.

183. This secretive behavior reinforces the need for emergency injunctive relief in this proceeding. The Court should order Defendants to refrain from any further unilateral efforts to appoint any directors or to create any new board committees (of any kind) pending the resolution of this action.

**M. In Any Event, These Two Bogus "Directors" Could Not Have Considered Demand Properly Because They Would Have Been Both Interested And Not Independent**

184. Even were these "directors" members of ESC's board – which they are not – they are each interested and not independent and could not consider a demand.

185. Hauser, upon information and belief, is an interested director because he is an investor to Bright Power and also serves as an advisor to Bright Power.

186. He is also interested in this very action. He knows that Perlman offered to pay Barmash a sum of money with regard to issues arising between Barmash and Bright Power.

187. Hauser declared that Barmash's proposed terms were ridiculous.

188. He also negotiated expressly on behalf of Bright Power with Barmash.

189. For these same reasons, Hauser is not independent. He advises Bright Power, invests with Bright Power and purports to act as a Bright Power representative with regard to the matters related to this very Complaint.

190. Hauser suffers from conflicts of interest and divided loyalties which preclude him from exercising independent business judgment. Hauser acts in the best interest of Bright Power, not of ESC.

191. Komanoff is also interested and not independent.

192. He serves as a consultant to Bright Power, as Bright Power itself admits on its website (where Bright Power lists him as such a consultant). Ex. I, attached hereto.

193. He has worked with Defendant Perlman for years.

194. On information and belief, in 2002 he worked with Perlman on a significant Feasibility Study to transform a city block near the Con Ed 14<sup>th</sup> Street East River Generating Station into a model of community-scale sustainability, energy efficiency, and renewable energy.

195. Komanoff himself referred to Perlman as his “partner” in this venture.

196. The two of them list themselves as co-venturers on a website related to this matter at [greeningablock.org](http://greeningablock.org). Ex. J, attached hereto.

197. On information and belief, Komanoff published a report based in part on this study with Perlman in 2006.

198. Further, on information and belief, Komanoff has subleased an office from Bright Power for a long time.

199. Komanoff suffers from conflicts of interest and divided loyalties which preclude him from exercising independent business judgment. Komanoff acts in the best interest of Bright Power and Defendant Perlman, not of ESC.



**CLAIMS FOR RELIEF**  
**FIRST CAUSE OF ACTION**  
**(Breach of Fiduciary Duty)**  
**(Derivatively Against Defendant Perlman)**

200. Plaintiff repeats and realleges paragraphs 1 through 199 of this Complaint as if fully set forth herein.

201. Perlman is and has been President, Secretary, Treasurer and Director of ESC.

202. As such, Perlman owes ESC the highest duties of good faith, fair dealing, due care, and loyalty.

203. To fulfill these duties, Perlman was not permitted to use his position of trust and confidence to further his private interests.

204. He was required to provide this duty in an undivided and unselfish manner, for ESC's best interests only.

205. That duty required Perlman to put the best interest of ESC and its shareholders first, over any interest he otherwise possessed, and above the interests possessed by Perlman otherwise, and he had to observe this rule using the most scrupulous observance of his duty.

206. Perlman has breached these duties continually.

207. He has done so by, among other things, (a) assigning software licensing contracts and other contracts that properly belonged to ESC to Bright Power; (b) diverting corporate opportunities for investment for funds to Bright Power instead of to ESC; (c) usurping ESC's corporate opportunity to develop a Portfolio Analysis program by assigning that matter to Bright Power instead of to ESC; (d) valuing ESC in an unfairly low manner in an attempt to augment Bright Power's interests over those of ESC; (e) using partial, biased personnel to value ESC in an unfairly low manner, because those personnel were Bright Power investors and advisors.

208. Perlman also had a fiduciary duty to keep ESC's confidential business information and intellectual property secret and confidential.

209. To the extent he has improperly divulged that information to Bright Power, he has breached his duty of loyalty to ESC as well.

210. Perlman stood on both sides of these transactions because at the same time as he was purportedly acting as ESC's President, Treasurer and Secretary, he was also acting as Bright Power's president and controlling shareholder.

211. This created a conflict of interest that Perlman resolved by always and continually favoring Bright Power over ESC.

212. He also committed those acts to squeeze Barmash out and force him to sell his shares in ESC for an unfairly low amount.

213. No majority of disinterested directors ever approved of Perlman's acts, because ESC lacked sufficient disinterested directors to do so.

214. During Barmash's tenure as an officer at ESC, ESC had only two directors: Barmash and Perlman. There was accordingly no majority of directors who were disinterested who could have approved of Perlman's acts or omissions.

215. Perlman dominated and controlled ESC because he (i) constituted half of ESC's board; (ii) held virtually all of ESC's officer posts simultaneously; (iii) controlled and dominated Bright Power, ESC's controlling shareholder (and largest shareholder, by far); and (iv) controlled virtually all employees involved in ESC.

**SECOND CAUSE OF ACTION**  
**(Breach of Fiduciary Duty)**  
**(Directly Against Defendant Bright Power)**

216. Plaintiff repeats and realleges paragraphs 1 through 215 of this Complaint as if fully set forth herein.

217. Defendant Bright Power, as ESC's controlling shareholder, owes fiduciary duties to ESC and to its shareholders.

218. As such, Bright Power owes ESC the highest duties of good faith, fair dealing, due care and loyalty.

219. Bright Power breached its fiduciary duties by, among other things, (a) taking software licensing contracts that properly belonged to ESC for Bright Power's own benefit; (b) diverting corporate opportunities for investment for funds to Bright Power instead of to ESC; (c) usurping ESC's corporate opportunity to develop a Portfolio Analysis program by assigning that matter to itself; (d) by valuing ESC in an unfairly low manner in an attempt to augment Bright Power's interests over those of ESC; (e) by using partial, biased personnel to value ESC in an unfairly low manner, because those personnel were Bright Power investors and advisors.

220. As a result of Bright Power's actions, ESC has been and will continue to be damaged.

221. Plaintiff has no adequate remedy at law.

### **THIRD CAUSE OF ACTION**

#### **(Waste of Corporate Assets)**

#### **(Directly Against Bright Power and Derivatively Against Perlman)**

222. Plaintiff repeats and realleges paragraphs 1 through 221 of this Complaint as if fully set forth herein.

223. Perlman and Bright Power have used ESC's software for their own benefit without paying just compensation for such assets.

224. Perlman and Bright Power took ESC's software and used it to obtain contracts for Bright Power, rather than for ESC.

225. All revenues received from such contracts went to Bright Power, and nothing went to ESC.

226. As a result, Perlman and Bright Power wasted ESC's valuable intellectual property, software and other assets and obtained virtually nothing of value for ESC.

227. As a result of these actions, the Company has been and will be damaged.

228. Plaintiff has no adequate remedy at law.

#### **FOURTH CAUSE OF ACTION**

##### **(Unjust Enrichment)**

##### **(Directly Against Bright Power and Derivatively Against Perlman)**

229. Plaintiff repeats and realleges paragraphs 1 through 228 of this Complaint as if fully set forth herein.

230. Defendants were enriched by having taken over the licensing contracts specified herein (as well as any others taken), as well as by using ESC's corporate assets (including but not limited to its software) for Defendant's own benefit.

231. Defendants took those items, though they belonged and should have belonged to ESC, at ESC's expense.

232. It is against equity and good conscience for Defendants to retain what is sought to be recovered, because the compensation Bright Power provided to ESC in exchange for use of ESC's software and appropriation of the software license agreements involving ESC's software in no way equal the value of these assets taken from ESC.

233. By virtue of the foregoing, Defendants are liable to ESC for the reasonable value of the assets taken from ESC and damages ESC has suffered in its valuation as an enterprise, in an amount to be determined at trial.

#### **FIFTH CAUSE OF ACTION**

##### **(Aiding and Abetting Breach of Fiduciary Duty)**

##### **(Directly Against Bright Power)**

234. Plaintiff repeats and realleges paragraphs 1 through 233 of this Complaint as if fully set forth herein.

235. Bright Power knowingly participated in Perlman's myriad breaches of fiduciary duty, because it knowingly (1) took licensing contracts that belonged to ESC; (2) engaged in activities to ensure that such contracts came to Bright Power rather than to ESC; and (3) established competing units (including but not limited to the Portfolio Analysis Program).

236. Bright Power provided substantial assistance to Perlman in his completion of these acts by accepting the licensing contracts; by aiding Perlman in ensuring that such contracts were diverted to Bright Power away from ESC as a matter of first instance; and by establishing competing units such as the Portfolio Analysis Program.

237. By virtue of the foregoing, Defendants are liable to ESC for the reasonable value of the assets taken from ESC, in an amount to be determined at trial.

#### **SIXTH CAUSE OF ACTION**

##### **(Constructive Trust)**

##### **(Derivatively Against Perlman and Directly Against Bright Power)**

238. Plaintiff repeats and realleges paragraphs 1 through 237 of this Complaint as if fully set forth herein.

239. Defendants were in a relationship of trust and confidence with ESC because Perlman was ESC's President and director, among other things. Bright Power was ESC's majority and controlling shareholder.

240. Defendants were required to act in ESC's best interests when they collected monies from business dealings that should have been provided to, and handled through, ESC. This requirement was an implicit promise inherent in their relationship with ESC.

241. Defendants have been unjustly enriched by their retention of monies from the contracts and business opportunities that were diverted to Bright Power away from ESC.

242. By virtue of the foregoing, the court should impose a constructive trust upon Defendants for all monies diverted away from ESC owing from such diverted and

misappropriated business opportunities, in an amount to be determined at trial, plus interest and attorney's fees.

**SEVENTH CAUSE OF ACTION**

**(Accounting)**

**(Derivatively Against Perlman and Directly Against Bright Power)**

243. Plaintiff repeats and realleges paragraphs 1 through 242 of this Complaint as if fully set forth herein.

244. Defendants were in a relationship of trust and confidence with ESC because Bright Power was ESC's majority and controlling shareholder and because Perlman was ESC's president and director, among other things.

245. Defendants, accordingly, owed duties to ESC to provide all monies they collected from the business diverted away from ESC to Bright Power.

246. Defendants breached that duty by withholding those monies from ESC.

247. By virtue of the foregoing, the court should require Defendants to provide an accounting to Plaintiff for (1) all monies received by Defendants due to their diversion of business rightfully belonging to ESC.

**EIGHTH CAUSE OF ACTION**

**(Misappropriation of Confidential Business Information)**

**(Derivatively Against Perlman and Directly Against Bright Power)**

248. Plaintiff repeats and realleges paragraphs 1 through 247 of this Complaint as if fully set forth herein.

249. ESC's software programs permitting the measurement of energy and water usage are valuable trade secrets critical to ESC's success and continued viability.

250. ESC owns all of the code created after ESC was incorporated.

251. ESC has kept that information confidential and has not shared this information with the public.

252. ESC ensures that this information is secure through a source control system requiring user login information and passwords. Only Barmash and his developers had access to the source control system.

253. ESC further ensured its code was kept confidential by upgrading the security of its servers in order to prohibit unauthorized access.

254. The code, along with customer data, which was also secure, comprises the main value of ESC and has been used to obtain large clients such as Entity D, Entity E, and Entity F.

255. The work put into ESC's software by Barmash alone is equal to at least \$640,000 in value.

256. The software is almost virtually impossible to duplicate, as demonstrated by the fact that no other company has been able to penetrate the market of measuring energy and water usage for large apartment buildings at the same level.

257. ESC's research into building's energy usage and into methods of improving and monitoring such energy usage are trade secrets of ESC.

258. Defendants Perlman and Bright Power are using those trade secrets in breach of their duties to ESC because they are taking that confidential information for virtually nothing given to ESC in exchange for this information.

259. As ESC's President, Treasurer, Secretary and Director, Perlman has many duties to ESC to protect ESC's confidential information.

260. As ESC's controlling shareholder, Bright Power also has a duty to ESC to protect ESC's confidential information.

261. Defendants are using ESC's confidential information in breach of their duties to ESC for Defendants' benefit improperly.

262. By virtue of the foregoing, Defendants are liable to ESC for the reasonable value of the assets taken from ESC and damages ESC has suffered in its valuation as an enterprise, in an amount to be determined at trial.

**WHEREFORE**, Plaintiff respectfully requests that the Court grant the following relief:

A. Declaring that making a demand upon the ESC board to investigate and prosecute the derivative claims alleged herein would be futile for the reasons alleged herein;

B. Declaring that Perlman breached his fiduciary duties to ESC;

C. Enjoining Bright Power and Perlman from using ESC's assets further (whether by merger, corporate dissolution, or otherwise);

D. Enjoining Defendants from altering, modifying or otherwise changing the composition of ESC's bylaws, certificate of incorporation or board of directors (whether through the creation of committees or otherwise) during the pendency of this action;

E. Awarding the Plaintiff compensatory and punitive damages in an amount to be proved at trial on the merits as a result of the wrongs alleged in Counts I-IV of this Complaint;

F. Awarding the Plaintiff pre- and post-judgment interest;

G. Awarding the Plaintiff the costs and disbursements of this action, including a reasonable allowance for Plaintiff's attorneys' fees; and,

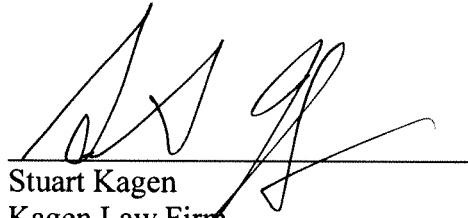
H. Awarding the Plaintiff such other relief as the Court may deem just and proper.

Plaintiff demands a trial by jury on all issues so triable.



Dated: New York, New York  
February 5, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stuart Kagen', is written over a horizontal line. The signature is stylized and cursive.

Stuart Kagen  
Kagen Law Firm  
570 Lexington Ave., Ste. 1600  
New York, NY 10022  
Telephone: (212) 880-2045

*Attorneys for Plaintiff*

VERIFICATION

STATE OF NEW YORK                 )  
   ) ss:  
COUNTY OF NEW YORK             )

Jean Barmash, being duly sworn, deposes and says:

- 1. I am the Plaintiff in the action herein.
- 2. I have read the annexed Complaint and know of the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

Jean Barmash  
Jean Barmash

Sworn to before me this  
5 day of February, 2013

Gretchen Ber...  
Notary Public

EVA H. POSMAN  
NOTARY PUBLIC, STATE OF NEW YORK  
4743761  
QUALIFIED IN NEW YORK COUNTY  
MY COMMISSION EXPIRES MAY 18, 2015