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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Mark Smilovits, individually and on behalf
9 of all other persons similarly situated,

10 Plaintiff,

11 v.

12 First Solar, Inc., et al.,

13 Defendants.

No. CV-12-00555-PHX-DGC

ORDER

14 On August 17, 2012, Mark Smilovits filed his First Amended Complaint (“the
15 complaint”) on behalf of himself and all other persons similarly situated against
16 Defendant First Solar, Inc. (“the company” or “First Solar”) and Individual Defendants
17 Michael J. Ahearn, Robert J. Gillette, Mark R. Widmar, Jens Meyerhoff, James Zhu,
18 Bruce Sohn, and David Eaglesham (collectively “Defendants”). Doc. 93. Defendants
19 filed a motion to dismiss. Doc. 102. The motion has been fully briefed. Docs. 109, 113.
20 Also before the court is Plaintiff’s motion to limit confidentiality agreements between
21 First Solar and several of its employees. Doc. 99. That motion has also been fully
22 briefed. Docs. 99-101, 106-07, 112. For the reasons that follow the court will deny
23 Defendants’ motion to dismiss and deny Plaintiff’s motion to limit confidentiality
24 agreements without prejudice to the Court’s resolving the issue at the case management
25 conference.¹

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27 ¹ The request for oral argument is denied because the issues have been fully
28 briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);
Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

1 **I. Background.**

2 Defendant First Solar designs and manufactures solar panel modules. Plaintiff
3 represents a class of persons who purchased or otherwise acquired the publicly traded
4 securities of First Solar between April 30, 2008 and February 28, 2012. Doc. 93 ¶ 1. The
5 Individual Defendants are a select group of officers and directors of First Solar. *Id.*

6 The complaint consists of two counts. In count one, Plaintiff alleges that
7 Defendants violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 by
8 disseminating and approving false or misleading statements during the class period.
9 Doc. 93 ¶ 254. In count two, Plaintiff alleges that Defendants violated Section 20(b) of
10 the same Act because they qualify as control persons and failed to exercise control to stop
11 violations of Section 10(b).

12 Plaintiff claims that Defendants manipulated First Solar's cost-per-watt ("CPW")
13 metric to artificially inflate the company's stock price.² Plaintiff also alleges that
14 Defendants concealed a known defect or "excursion" in Defendants' manufacturing
15 process and, once the excursion became known, hid the extent of the problem. Plaintiff
16 also claims that Defendant concealed a known defect in the design of Defendant's solar
17 modules that led to an increased failure rate of the modules in hot climates ("heat
18 degradation effect").

19 **II. Legal Standards.**

20 **1. Pleading Standard.**

21 When analyzing a complaint for failure to state a claim to relief under Rule
22 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
23 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
24 Cir. 2009). To avoid a Rule 12(b)(6) dismissal, the complaint must plead enough facts to
25 state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S.
26 544, 570 (2007). This plausibility standard "is not akin to a 'probability requirement,'

27
28 ² Cost-per-watt is defined by Plaintiff as: (total manufacturing costs) / (total watts produced) within a given period. Doc. 93 at 8 n.1.

1 but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556).

3 “In alleging fraud or mistake, a party must state with particularity the
4 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). “To allege fraud with
5 particularity, a [claimant] . . . must set forth an explanation as to why the statement or
6 omission complained of was false or misleading.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d
7 1541, 1548 (9th Cir. 1994).

8 Securities claims must also meet the heightened pleading requirements of the
9 Private Securities Litigation Reform Act (“PSLRA”). 15 U.S.C. § 78u-4(b)(1-2);
10 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007). When plaintiffs
11 allege misleading statements or omissions, the PSLRA requires that the complaint
12 “specify each statement alleged to have been misleading” and “the reason or reasons why
13 the statement is misleading.” 15 U.S.C. § 78u-4(b)(1)(B). Plaintiffs must also “state
14 with particularity facts giving rise to a strong inference that the defendant acted with the
15 required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A).

16 **2. Elements of 10b-5 Claim.**

17 To state a claim under Section 10(b) and Rule 10b-5, a plaintiff must plead: “(1) a
18 material misrepresentation or omission by the defendant; (2) scienter; (3) a connection
19 between the misrepresentation or omission and the purchase or sale of a security; (4)
20 reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss
21 causation.” *Janus Capital Group, Inc.*, 131 S. Ct. 2296, 2301, n.3 (2011); *see also Dura*
22 *Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

23 **III. Discussion.**

24 Defendants argue that Plaintiff’s complaint must be dismissed on three grounds.
25 Doc. 102 at 5-6. First, they argue that Plaintiff has failed to plead the falsity of any of
26 First Solar’s statements. Second, they argue that Plaintiff has not pled facts sufficient to
27 establish a cogent theory of scienter. Third, Defendants argue that Plaintiff has not pled
28 sufficient facts to establish loss causation. The Court will address each argument in turn.

1 **1. False Statements.**

2 Plaintiff has alleged that Defendants made false statements with regard to First
3 Solar's CPW, warranty reserves, and revenue. Defendants argue that Plaintiff has not
4 pled facts showing that the statements were false.

5 Plaintiff alleges that the CPW metric was central to First Solar's business plan.
6 Specifically, he cites to statements establishing that in order to survive without
7 government subsidies and compete with other solar panel producers, and eventually with
8 fossil fuels, First Solar had to "lower[] its costs to produce modules faster than it reduced
9 its selling prices." Doc. 93 ¶ 22. If it failed, Plaintiff alleges, First Solar's "margins
10 would erode, [and] profitability would decline." *Id.* Furthermore, without reducing
11 production costs, First Solar would likely default on several large contracts that were vital
12 to the company's overall performance. *Id.* Because of its importance, officers and
13 directors frequently represented CPW to the public as an indicator of First Solar's
14 success. *See e.g.* Doc. 93 ¶¶ 66, 112, 119, 126, 132, 206

15 Plaintiff provides facts from a confidential witness ("CW-6") who is identified as
16 a senior member of the Internal Audit Department. Doc. 93 ¶ 25. CW-6 received a
17 complaint from an anonymous whistleblower who attended a meeting at which First
18 Solar's Vice President of Financial Planning and Analysis instructed attendees to "do
19 whatever is necessary" to achieve the CPW number reported publicly by First Solar's
20 management. *Id.* CW-6 stated that he reported the whistleblower's complaint, including
21 the events of this meeting regarding CPW manipulation, to Defendant Meyerhoff. *Id.*
22 Plaintiff alleges that First Solar took virtually no action in response to this report, but
23 simply told the Vice President to watch what he said in meetings. *Id.*

24 Plaintiff alleges that First Solar manipulated the D-rating of the panels it sold in an
25 attempt to increase the CPW. *Id.* at 18-19. The D-rating is a percentage reduction in watt
26 output assigned to each panel to account for the fact that panels do not produce watts at
27 their theoretical maximum efficiency. *Id.* Initially, First Solar's panels had a D-rating
28 from 12-15%, but according to another confidential witness there was "pressure from

1 defendant Meyerhoff to stop selling panels with such a large D-rating” and it was
2 eventually lowered to 6-8%. *Id.* ¶ 47. This was done despite the fact that Defendants
3 were uncovering “increasingly severe product defects.” *Id.*

4 Plaintiff alleges, based on confidential witnesses and circumstantial evidence, that
5 Defendants became aware of a potential defect or “excursion” in its manufacturing
6 process that caused some panels to prematurely lose power. *Id.* ¶ 28. Plaintiff alleges
7 that Defendants learned of this problem in 2008 when customers began making
8 complaints. *Id.* Because of warranty guarantees, First Solar was obligated to address the
9 issue. *Id.* Plaintiff alleges that Defendants stated in a July 29, 2010 conference call that
10 First Solar had “identified” and “addressed” the problem by 2009 even though the
11 problem was not actually revealed to investors until July 2010. *Id.* When it was
12 revealed, Plaintiff contends that First Solar misrepresented the scope of the problem as
13 affecting only 4% of its modules. In fact, Plaintiff alleges, First Solar had known since
14 2007 that the problem would be greater, with some tests showing it would be as high as a
15 12-14% failure rate. *Id.* at ¶¶ 30-31. According to one confidential informant, First Solar
16 management instructed him or her to ignore these test results. *Id.* at ¶ 31. Plaintiff
17 alleges that the engineering staff laughed when they saw the company’s had publicly
18 stated that there would be only a 4% failure rate. *Id.*

19 Moreover, until December 14, 2011, Defendants represented that the issues were
20 “dealt with” and “reflected in our financials,” but several months after that last statement
21 First Solar announced an additional \$163.6 million charge for product defect costs and an
22 expected \$40-44 million charge for the upcoming quarter. *Id.* ¶¶ 40-41. Plaintiff
23 maintains that the degree to which these liabilities were understated and the proximity of
24 the statement to the alleged corrections provides additional evidence of concealment and
25 manipulation. *Id.*

26 Plaintiff alleges that Defendants withheld information about the excursion because
27 they wanted to delay increasing warranty costs. *Id.* ¶ 27. By delaying public disclosure
28 of additional costs that would eventually be incurred, First Solar could prevent those

1 losses from being reflected in the CPW metric, which takes into account warranty costs
2 only for units currently produced. *Id.* Thus, Defendants could give the allusion of
3 manufacturing quality panels at ever lower prices while knowing that the CPW did not
4 include upcoming warranty expenses for known defects. Because of the non-disclosures
5 and understated extent of the problem, Plaintiff alleges that Defendant’s frequent
6 statements of the CPW were misleading under the circumstances in which they were
7 given. *Id.* ¶¶ 62-138.

8 Defendants contend that Plaintiff’s argument amounts to nothing more than
9 quibbling with First Solar’s statistical methodology – a tactic the Ninth Circuit rejected in
10 *In re Rigel Pharms. Inc. Sec. Litig.*, 697 F.3d 869, 877-78 (9th Cir. 2012). They also
11 contend that instructing the Vice President to “watch what he says at meetings” was
12 corrective action with respect to potential CPW manipulation and that Plaintiff does not
13 claim that the CPW and D-ratings were unreasonable or false. Finally, they argue that
14 Plaintiff misunderstands CPW and that the non-disclosures they allege would not have
15 affected the metric in any event. Doc. 113 at 7-8.

16 The Court concludes that Plaintiff has pled facts which, if proven, would show
17 deliberate attempts to manipulate CPW. Active manipulation of an important and widely
18 reported metric is more than a mere dispute over statistical methods. Plaintiff has
19 identified a witness who received a complaint about a meeting where CPW manipulation
20 was discussed and reported that complaint directly to a Defendant. Defendants do not
21 deny that such a meeting occurred. Plaintiff has also quoted other witnesses who allege
22 personal knowledge of Defendants’ awareness and concealment of the manufacturing
23 excursion. Plaintiff has made specific allegations related to manipulation of the D-rating
24 and explained how and why such manipulation would deceive investors. The Court must
25 assume these facts to be true for purposes of the motion to dismiss, and finds that
26 Plaintiff has pled enough facts to state a claim.

27 Plaintiff alleges that Defendants also made false statements by holding an
28 inadequate warranty reserve and improperly recognizing revenue. For example, Plaintiff

1 alleges that Defendants falsely represented that the claims process related to the
2 excursion was completed and accounted for in their financials when it was not. Doc. 93
3 ¶ 40. Defendants again counter that Plaintiff's allegations lack specificity.

4 Defendants seek dismissal of the entire complaint, not dismissal of specific
5 allegations in the complaint. Because there is only one count in the complaint alleging
6 violations of Section 10(b), the Court need only find that some of the claims within that
7 count are sufficiently pled to deny the motion to dismiss. The Court finds that allegations
8 of CPW manipulation, and the related allegations discussed above, are sufficiently pled
9 false statements.

10 Plaintiff has alleged no statements by Defendant Eaglesham relating to CPW.³
11 The only statement in the complaint attributed to Eaglesham is a presentation given at a
12 meeting of analysts and investors on June 24, 2009. Doc. 93 ¶ 203. The only arguably
13 misleading portion of that statement is Eaglesham's explanation that "our track of field
14 performance and our knowledge of field performance allows us to have fairly high
15 confidence that our product is delivering in the field[.]" *Id.* Other facts pled could
16 demonstrate the falsity of this statement, such as allegations by CW-1 that problematic
17 performance data related to the excursion was presented to Eaglesham no later than the
18 end of 2008. *Id.* ¶ 28. The complaint alleges that First Solar eventually conceded that it
19 had identified the cause of the manufacturing excursion by June 2009. *Id.* Plaintiff has
20 pled that Eaglesham was aware of a defect or excursion in the manufacturing process
21 when he said that he and First Solar had a "fairly high level of confidence that [their]
22 product is delivering in the field." *Id.* ¶ 203. The statement contained no disclosure
23 regarding the excursion. Plaintiff has pled enough facts to survive a motion to dismiss.

24 **2. Scierter.**

25 For Rule 10b-5 claims, the Supreme Court has defined scierter as the "intent to
26 deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12

27
28 ³ Each individual Defendant, with the exception of Eaglesham, referenced CPW in public statements. *See e.g.* Doc. 93 ¶¶ 66, 112, 119, 126, 132, 206.

1 (1976). The Ninth Circuit requires that “intent to deceive” be alleged “in great detail,
2 [by] facts that constitute strong circumstantial evidence of deliberately reckless or
3 conscious misconduct.” *Silicon Graphics Inc. Securities Litig.*, 183 F.3d 970, 974 (9th
4 Cir. 1999). A complaint will survive a motion to dismiss “only if a reasonable person
5 would deem the inference of scienter cogent and at least as compelling as any opposing
6 inference one could draw from the facts alleged.” *Tellabs*, 551 U.S. at 324. A court must
7 first determine whether any single allegation is “sufficient to create a strong inference of
8 scienter; [and] second, if no individual allegation is sufficient,” the court must conduct “a
9 ‘holistic’ review of the same allegations to determine whether the insufficient allegations
10 combine to create a strong inference of intentional conduct or deliberate recklessness.”
11 *N.M State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1095 (9th Cir. 2011).

12 Plaintiff bases his allegations of scienter on the testimony of the confidential
13 witnesses, the “core operations inference,” the proximity of at least one of the false
14 statements to the updated financials reflecting the full scope of the loss, Defendants’
15 insider stock sales during the class period, Defendants’ basis for compensation,
16 accounting irregularities, and Sarbanes-Oxley certifications. Defendants respond that the
17 confidential witnesses do not allege personal knowledge of Defendants’ mental state, that
18 the core operations inference does not apply, that Defendants’ stock sales were not
19 suspicious, and that the overall theory of fraud is not cogent or as compelling as the
20 counter inference.

21 Plaintiff cites testimony of confidential witnesses to establish what they believe
22 Defendants knew and when. Plaintiff also cites Defendants’ statements touting the
23 allegedly manipulated CPW while failing to disclose either the reality of the
24 manufacturing excursion or, at a minimum, its full extent. *See e.g.* Doc. 93 ¶¶ 66, 112,
25 119, 126, 132, 206. Plaintiff similarly alleges that Defendants knew of, concealed, and
26 downplayed the heat degradation effect. *Id.* ¶¶ 36, 50, 58, 77, 80. Where knowledge of
27 the falsity of the statements is not directly tied to the testimony of a confidential witness,
28 Plaintiff attempts to rely on the “core operations inference” that knowledge of matters

1 affecting the core operations of a company can be imputed to that company's high level
2 executives. *See South Ferry LP, No. 2 v. Killinger* 542 F.3d 776, 782 (9th Cir. 2008).
3 Because the allegedly manipulated CPW metric was so central to First Solar's business
4 model, Plaintiff maintains that by virtue of their position in the company (in addition to
5 other evidence) Defendants must have known about the non-disclosures that affected the
6 stock price.

7 All of these things were done, claims Plaintiff, because Defendants intended to
8 and did engage in stock sales at artificially inflated prices. Defendants counter that two
9 defendants, Gillette and Widmar, actually purchased 11,000 shares of stock during the
10 class period. Doc. 102 at 13. Plaintiff argues that the other five individual Defendants'
11 sales are "suspicious because they sold nearly all of their shares and that was twice as
12 high a percentage as their trading history, which was geared toward diversification," and
13 those that bought stock simply "thought they could sustain the scheme longer than did
14 others." Doc. 109 at 20. Furthermore, at least some of the trading seemed suspicious at
15 the time it occurred, as Defendant Ahearn's sales prompted a question on a March 3,
16 2010 conference call about what Ahearn might know that investors did not. Doc. 93 ¶
17 214. To that question, Defendant Meyerhoff responded that the timing was not good, but
18 he "believed[d] [they] had put this behind [them]." *Id.* Plaintiff also notes that at least
19 some of Defendants' compensation was based "directly on the cost-per-watt metric." *Id.*
20 ¶ 24.

21 Defendants argue that the confidential witnesses' statements are insufficient to
22 establish a strong inference of scienter and that the core operations inference should not
23 apply because Plaintiff has not adequately alleged that the CPW metric was actually
24 false. Doc 113 at 12-13. They argue that the stock sales look more drastic because of the
25 length of the class period, that period sales were not disproportionate to pre-period sales,
26 and that most of the stock was sold by Ahearn who served as Chairman but not as an
27 officer for most of the class period. Doc. 102 at 17-18. With respect to compensation,
28 Defendants contend that CPW was only a small part of the formula for determining

1 bonuses and bonuses were a small part of Defendants' compensation. *Id.* at 18-19. In
2 sum, Defendants argue that the counter inference that First Solar innocently
3 underestimated costs associated with its remediation efforts is more compelling than
4 Plaintiff's inference that information was deliberately withheld or distorted to inflate
5 stock prices. *Id.* at 19-20.

6 The Court finds that Plaintiff has pled enough specific facts to create an inference
7 of scienter "at least as compelling as any counter inference." *Tellabs*, 551 U.S. at 324.
8 While Defendants dispute the veracity of many of the allegations, factual disputes about
9 specific, plausible allegations are not sufficient to dismiss a claim. Factual allegations
10 and their reasonable inferences are accepted as true at the motion to dismiss stage.
11 Additionally, the Court need not decide the applicability of the "core operations
12 inference" because the testimony of the confidential witnesses, allegations regarding
13 Defendants' stock sales and compensation plans, and other circumstantial evidence is
14 sufficiently detailed to allege scienter for the single 10(b) count in the complaint.

15 **3. Loss Causation.**

16 Defendants argue that Plaintiff has not alleged loss causation because the stock
17 price went down as a result of the revelation of "bad news" rather than the revelation of
18 fraud. Doc. 102 at 20. Plaintiff argues that the precipitous drop in First Solar's stock
19 price was the direct result of revelations about the extent of the remediation costs
20 Defendants had concealed for years – in other words, that Defendants' fraudulent
21 concealment of true remediation costs ultimately caused the very losses suffered by
22 Plaintiff and the class. Doc. 93 ¶¶ 224, 227, 229, 230, 234. These allegations sufficiently
23 plead that Defendants' fraud caused the loss. *See In re Daou Sys., Inc.*, 411 F.3d 1006,
24 1026 (9th Cir. 2005) (holding that stock prices that dropped because of poor financial
25 statements were causally related to fraudulent accounting practices that allegedly inflated
26 earnings in previous financial statements). Plaintiff has pled loss causation.

27 **4. Section 20(a) Claim.**

28 Section 20(a) allows for liability of control persons when someone within their

1 control violates another section of the Exchange Act. Defendants move to dismiss the
2 Section 20(a) claim because, they allege, Plaintiff has failed to plead a primary violation
3 of Section 10(b). They also claim that Plaintiff has not adequately pled facts showing
4 that Defendants had control over the statements not directly attributed to them.

5 As explained above, Plaintiff has adequately pled a violation of Section 10(b).
6 Plaintiff has also pled that Defendants were high ranking executives at First Solar and
7 that they often spoke on the company's behalf. Plaintiff has provided detailed allegations
8 of Defendants' involvement in the decision making processes that led to the allegedly
9 fraudulent behavior. At this stage in the litigation, these allegations are sufficient. *See*
10 *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000) (quoting *Wool v.*
11 *Tandem Computers, Inc.*, 818 F.2d 1433, 1441 (9th Cir. 1987)) ("day-to-day oversight of
12 company operations and involvement in the financial statements at issue were sufficient
13 to presume control over the transactions giving rise to the alleged securities violation");
14 *In re Adaptive broadband Sec. Litig.*, No. C 01-1092-SC 2002 WL (989478 (N.D. Cal.
15 Apr. 2, 2002) ("The Court finds that the allegations that the Individual Defendants held
16 the highest offices in the corporation, spoke frequently on its behalf, and made key
17 decisions in how to present its financial results are sufficient to survive Defendants'
18 contention that the complaint lacks specificity as to control person liability.").

19 **IV. Motion to Limit Confidentiality Agreements.**

20 After filing the complaint in this case, Plaintiff began attempts to interview former
21 employees of First Solar to gather information related the CPW metric, defects and
22 shortcomings in First Solar modules, and First Solar's accounting practices. Doc 100 at
23 5. Plaintiff learned from several former employees that First Solar had sent a letter to
24 former employees advising that they may be contacted by "lawyers interested in suing
25 First solar" who "may not identify themselves or their clients when they call and . . . may
26 even leave the impression they are acting on behalf of First Solar, its shareholders of the
27 government." Doc. 101-1 at 2. The letter asked the recipient to contact First Solar's in-
28 house counsel if they were contacted and told them to "feel free" to contact in-house

1 counsel if they had any questions. *Id.* The letter also reminded the recipients that they
2 were not obligated to speak to lawyers and that they were bound by the terms of a
3 confidentiality agreement which prevented them from “disclos[ing] any confidential,
4 proprietary, trade secret or privileged information regarding First Solar.” *Id.* Finally, the
5 letter warned that “even innocuous comments or ones you think may help First Solar can
6 be taken out of context and used against First Solar.” *Id.*

7 Plaintiff found that some former employees were reluctant to provide information
8 because they worried about violating the terms of their confidentiality agreements.
9 Because of the employees’ fear, Plaintiff asked First Solar to clarify the extent of the
10 confidentiality agreements and permit former employees to talk about CPW, module
11 defects, and accounting practices. Doc. 100 at 6. Plaintiff offered to stipulate to a
12 protective order to ensure that such information did not become public. *Id.* When
13 Defendants refused, Plaintiff filed this motion for an order limiting the confidentiality
14 agreements. *Id.*

15 Plaintiff contends that the agreements define “Confidential Information” more
16 broadly “than what would be necessary to serve legitimate purposes, such as to protect
17 trade secrets, forecasts, customer lists, technological developments, or any other sensitive
18 aspect of First Solar’s business.” Doc. 100 at 10. Plaintiff argues that the enforcement of
19 First Solar’s confidentiality agreements to prevent former employees from disclosing
20 information relating to violations of securities laws is against public policy. *Id.* at 12-18.

21 In *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002), a
22 district court considering similar confidentiality agreements held that “[t]o the extent that
23 those agreements preclude former employees from assisting in investigations of
24 wrongdoing that have nothing to do with trade secrets or other confidential business
25 information, they conflict with the public policy in favor of allowing even current
26 employees to assist in securities fraud investigations.” *Id.* at 1137. In this case, Plaintiff
27 seeks to ask former employees of First Solar questions about subjects related to alleged
28 violations of securities laws.

1 Defendants make three arguments in response to Plaintiff's motion.

2 First, citing *Kuriakose v. Federal Home Loan Mortgage Co.*, 674 F. Supp. 2d 483,
3 491 (S.D.N.Y. 2009), Defendants argue that Plaintiff lacks standing to challenge the
4 confidentiality agreements between First Solar and its former employees. *Id.* at 492.
5 *Kuriakose* explained that a federal court's jurisdiction is constitutionally limited to "cases
6 and controversies" and that the standing doctrine "serves to identify those disputes which
7 are appropriately resolved through the judicial process." *Id.* (quoting *Whitmore v.*
8 *Arkansas*, 495 U.S. 149 (1990)). Thus, "the party invoking federal jurisdiction bears the
9 burden of satisfying" the three elements of standing set forth in *Lujan v. Defenders of*
10 *Wildlife*, 504 U.S. 555, 560 (1992). *Id.*

11 Although the *Kuriakose* court's statement of standing law is accurate, the Court
12 cannot agree that it applies separately to Plaintiff's challenge to the confidentiality
13 agreements. Plaintiff has satisfied the standing requirement of Article III by alleging that
14 he has been injured by the securities fraud of Defendants. That allegation satisfies the
15 *Lujan* requirements of (1) injury in fact, (2) caused by Defendants, (3) that is likely to be
16 redressed by a favorable decision in this case. *Id.* The Court is aware of no law that
17 requires a plaintiff who has established such standing to show standing a second time
18 when disagreements arise in the litigation. Standing applies to a case or controversy –
19 here, Plaintiff's securities fraud case. Standing is not subdivided into separate hurdles
20 that must be cleared with respect to each succeeding issue that arises in the process of
21 resolving the case or controversy. Thus, standing is no bar to Plaintiff's challenge to the
22 confidentiality agreements. Although it is true that Plaintiff is not a party to the
23 confidentiality agreements, he alleges that those agreements are blocking access to
24 relevant information. The Court views this as no different than any other instance where
25 one party claims that the other party is blocking access to relevant information.

26 Second, Defendants contend that Plaintiff's request violates Arizona Rule of
27 Professional Conduct 4.2, which prohibits a lawyer from communicating about the
28 subject of the representation with a person the lawyer knows to be represented by another

1 lawyer, unless the other lawyer has consented or the communication is authorized by law.
2 But the confidentiality agreements are not based on Rule 4.2. They were not entered to
3 regulate the ethics of lawyer conduct. Plaintiff's counsel will be obligated to abide by
4 Rule 4.2 even if the agreements are modified. The rule therefore does not provide a basis
5 for denying Plaintiff's request for modification.

6 Defendants likewise argue that *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. Ct.
7 App. 1992), prohibits ex parte communications with former employees whose acts or
8 omissions gave rise to the litigation. *Lang* has been the law in Arizona for many years,
9 and Plaintiff's counsel are obligated to abide by it. But the rule in *Lang*, like Rule 4.2,
10 does not provide a basis for declining to modify the confidentiality agreements. The
11 agreements are not based on *Lang*. If the agreements are overbroad and against public
12 policy, they should not stand as a bar to Plaintiff's obtaining relevant information. The
13 fact that other ethical rules might limit the information Plaintiff can obtain through ex
14 parte communications does not mean that overbroad confidentiality agreements should
15 remain in place. The *Lang* argument provides no basis for declining Plaintiff's request.

16 Third, Defendants argue that their confidentiality agreement does not violate
17 public policy. They assert that cases brought under the Reform Act are often dismissed at
18 the pleading stage. Defendants cite several cases in which courts have discounted the
19 testimony of confidential witnesses and dismissed complaints for failure to state a claim.
20 Doc. 106 at 13-14; see e.g. *Higgenbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 756-57 (7th
21 Cir. 2007); *Ind. Elec. Workers' Pension Trust Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d
22 527, 535 (5th Cir. 2008). For reasons stated above, however, the Court has declined
23 Defendants' request to dismiss this action, and these cases do not address whether public
24 policy favors or disfavors broad confidentiality agreements.

25 Defendants argue that the First Solar agreements protect legitimately confidential
26 information and should not be limited. Specifically, they claim that Plaintiff has failed to
27 show how "First Solar's wattage rating and details about First Solar's manufacturing
28 process is not properly protected confidential information." Doc. 106 at 15-16. Plaintiff

1 agrees that confidentiality agreements may be enforceable with respect to confidential
2 information, but argues that the First Solar agreements prevent the disclosure of more
3 than just confidential information. Doc. 112 at 10 (quoting *Static Control Components,*
4 *Inc. v. Darkprint Imaging, Inc.*, 200 F. Supp. 2d 541, 549 (M.D.N.C. 2002)).

5 The Court concludes that it does not presently possess sufficient information to
6 enter an order on this issue. On one hand, cases such as *JDS Uniphase* and *Chambers v.*
7 *Capital Cities/ABC*, 159 F.R.D. 441, 444 (S.D.N.Y. 1995), hold that there is a clear
8 public policy in favor of current and former employees voluntarily participating in
9 investigations of federal law violations. *JDS Uniphase*, 238 F. Supp. 2d at 1137 (“To the
10 extent that those agreements preclude former employees from assisting in investigations
11 of wrongdoing that have nothing to do with trade secrets or other confidential business
12 information, they conflict with the public policy in favor of allowing even current
13 employees to assist in securities fraud investigations.”); *Chambers*, 159 F.R.D. at 444
14 (“in some circumstances, agreements obtained by employers requiring employees to
15 remain silent about underlying events leading up to dispute, or concerning potentially
16 illegal practices when approached by others can be harmful to the public’s ability rein in
17 improper behavior. . . Absent possible extraordinary circumstances not present here, it is
18 against public policy for parties to agree not to reveal, at least in the limited contexts of
19 depositions or pre-depositions interviews concerning litigation arising under federal law,
20 facts relating to alleged or potential violations of such law.”).

21 On the other hand, it is distinctly possible that free and unfettered inquiry into the
22 broad subjects identified by Plaintiff – CPW, module defects, and accounting practices –
23 could result in the disclosure of genuinely confidential and proprietary information. The
24 Court cannot conclude that these subjects are so free of confidential information that the
25 agreements should be modified to simply exclude them.

26 To resolve this issue, the Court will require further briefing and a hearing. With
27 the motion to dismiss denied, the Court will schedule a case management conference for
28 **January 30, 2013 at 4:00 p.m.** At least ten days before that conference, the parties shall

1 provide the Court with memoranda not to exceed ten pages.

2 Plaintiff's memorandum shall describe in more detail the employees he wishes to
3 interview and the subjects he wishes to cover, and shall provide a proposal for how those
4 inquiries can be made without compromising First Solar's legitimate interest in
5 protecting confidential and proprietary information. Plaintiff may provide a proposed
6 protective order that would help accomplish this purpose.

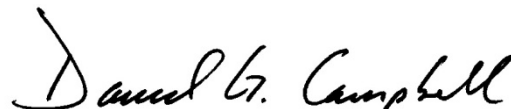
7 First Solar shall provide more information, under seal if necessary, concerning the
8 kinds of proprietary and confidential information that may be revealed if Plaintiff is
9 permitted to inquire into the subjects he has identified. First Solar shall provide a
10 proposal for how that information can be protected while allowing Plaintiff to pursue the
11 public policy of investigating alleged securities fraud. First Solar may also propose a
12 protective order that would help protect its interests.

13 The Court will review these memoranda and discuss them with the parties at the
14 case management conference, after which it will enter an order resolving this issue.
15 Plaintiff's motion for modification of the former employee confidentiality agreements
16 will be denied without prejudice to the Court's resolving this issue at the case
17 management conference.

18 **IT IS ORDERED:**

- 19 1. Defendants' motion to dismiss (Doc. 102) is **denied**.
- 20 2. Plaintiffs' motion to limit confidentiality agreements (Doc. 99) is **denied**
21 without prejudice to the Court's resolving this issue at the case management conference.
- 22 3. The Court will hold a case management conference on **January 30, 2013**
23 **at 4:00 p.m.**, and will issue a separate order regarding the case management issues to be
24 discussed at the conference.

25 Dated this 17th day of December, 2012.

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David G. Campbell
United States District Judge