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**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

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| SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>vs.<br><br>JOHNNY R. THOMAS,<br>ROBERT C. POTTS,<br>JONATHAN BRETT WOODARD, and<br>JOHN C. FRANCIS,<br><br>Defendants. | Case No. 19-cv-1132<br><br>**COMPLAINT** |

Plaintiff Securities and Exchange Commission (the "SEC") alleges:

## I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d) and 77v(a), and Exchange Act Sections 21(d), 21(e) and 27(a), 15 U.S.C. §§ 78u(d), 78u(e), and 78aa(a).

2. In connection with the conduct alleged in this Complaint, each Defendant has, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, or of the facilities of a national securities exchange.

3. Venue is proper in this District pursuant to Securities Act Section 22, 15 U.S.C. § 77v, and Exchange Act Section 27, 15 U.S.C. §78aa, and 28 U.S.C. § 1391, because, among other things, Defendants Johnny R. Thomas and John C. Francis reside within this District and, at all relevant times, Blue Earth was headquartered and had its principal place of business in this

District. Additionally, many of the acts, practices, and transactions constituting the violations alleged in this Complaint occurred in this District.

## II. SUMMARY OF ALLEGATIONS

4. From at least March 2014 through at least March 2015, the executives of Blue Earth, Inc. ("Blue Earth" or the "Company"), a provider of alternative and renewable energy services, defrauded investors by making or substantially assisting the making of materially false statements, or omitting material information, about the status and certainty of a potentially lucrative business opportunity involving the construction, ownership, and operation of combined heat and power ("CHP") plants for a large North American processor of beef, pork, poultry, and lamb (the "meat processing company").

5. Blue Earth claimed that this business opportunity, if it succeeded, would transform Blue Earth into an independent power producer, and make it profitable for the long-term. Blue Earth's executives publicly projected that, on an initial seven CHP projects alone, Blue Earth would generate recurring power production revenues of more than $75 million per year and earnings of more than $20 million per year, over ten years following completion of construction. By contrast, in its best year, which was 2012, Blue Earth reported revenues of less than $10 million, and at no point in time had it reported a profit.

6. This opportunity could not materialize on the scale envisioned, however, unless Blue Earth and the meat processing company executed contracts (including long-term lease agreements and energy purchase agreements) for each of the sites, and, unless Blue Earth raised the funds needed to construct and operate the CHP plants, which it estimated to be at least $120 million for construction alone.

7. Without executed contracts in place, raising capital for the proposed CHP projects would be difficult. To attract the necessary capital, Blue Earth's executive team, led by Chief Executive Officer Johnny R. Thomas ("Thomas"), President Robert C. Potts ("Potts"), Chief Financial Officer Jonathan Brett Woodard ("Woodard"), with substantial assistance from Vice President of Corporate Development and Investor Relations John C. Francis ("Francis"), provided

false information to investors in press releases, SEC filings, a prominent presentation to investors in September 2014, and responses to regulatory inquiries that suggested Blue Earth was successfully executing on its executives' plan. Through its executives, Blue Earth falsely claimed that it acquired CHP projects from another company and had contracts with the meat processing company to construct and operate CHP plants; it reported an inflated $44,035,500 ("$44 million") asset on its balance sheet that supposedly reflected those CHP projects; it announced equipment orders for plants not yet approved by the meat processing company and claimed to be making progress payments from cash on hand; and it announced unrealistic timelines for the supposed completion of certain CHP plants. Blue Earth and its executives thereby created the illusion that this business would imminently transform Blue Earth from unprofitable to profitable.

8. The reality was that Blue Earth did not have contracts and was not close to entering into contracts with the meat processing company or generating the significant revenues that its executives publicly projected. All Blue Earth had in hand prior to August 2014, were non-binding term sheets for seven sites. Even if those term sheets could be converted into projects, Blue Earth lacked the financing to fund the projects.

9. Ultimately, Blue Earth and the meat processing company executed contracts for the development, construction and operation of CHP plants at just two sites. Contracts were executed for a site in Brooks, Alberta, Canada (the "Alberta Facility") in August 2014; however, by September 2014, Blue Earth was experiencing liquidity issues and unable to pay for all of the equipment ordered for that site. Contracts were also executed for a smaller and less capital-intensive site in Sumter, South Carolina (the "Sumter Facility") in December 2014. Blue Earth completed construction of the Sumter Facility in 2015 but was unable to raise the capital needed to fund construction at the significantly larger Alberta Facility or enter into contracts for the other CHP projects. Its relationship with the meat processing company soured in October 2014, and Blue Earth ultimately ran out of cash, filed for Chapter 11 bankruptcy, and ownership was transferred to its debtor-in-possession, a senior secured lender and major investor.

10. Defendants' activity directly and/or indirectly violated the antifraud, books and records, and reporting provisions of the federal securities laws. In addition to his material misstatements, and omissions, Thomas failed to file mandatory reports disclosing almost 200 transactions in Blue Earth securities which he beneficially owned.

11. The SEC requests, among other things that the Court enjoin each Defendant from further violating the federal securities laws as alleged in this Complaint, bar each from serving as an officer and director of a publicly traded company and from participating in any future offering of a penny stock, and order each to pay monetary penalties based upon his violations.

## III. DEFENDANTS AND RELATED ENTITIES

### A. Defendants

12. **Johnny R. Thomas**, age 77, resides in Henderson, Nevada. Thomas was the CEO and a director of Blue Earth from September 1, 2010 until August 31, 2015. He also served as Blue Earth's President from September 2010 through May 2013 and as Interim CFO from March 2012 to May 2013. Prior to joining Blue Earth, Thomas was an officer and/or director of SEC-registered publicly-traded companies, including, among others, Consolidation Services, Inc. and AgriBioTech, Inc., which filed for bankruptcy.

13. **Robert C. Potts**, age 57, resides in Orem, Utah. Potts became the President and Chief Operating Officer of Blue Earth effective May 16, 2013, and became a director in January 2014; he held these positions until March 2016. Prior to joining Blue Earth, Potts founded IPS Power Engineering, Inc. ("IPS"), a company that he sold to Blue Earth in July 2013, and which ultimately became Blue Earth CHP. He currently is the COO of a private start-up plastics waste recycling company.

14. **Jonathan Brett Woodard** (a/k/a **Brett Woodard**), age 68, resides in Heber City, Utah. Woodard was CFO of Blue Earth from May 16, 2013 through August 2015. His duties and responsibilities as Blue Earth's principal financial officer included overseeing Blue Earth's financial functions, corporate accounting policies and practices, reporting to the Board on Blue Earth's SEC compliance reporting, and signing Blue Earth's quarterly and annual SEC filings. In

2017, Woodard retired from the successor entity to Blue Earth, Brightmark Energy, LLC, after serving as Managing Director of Finance. Immediately prior to joining Blue Earth, Woodard was a financial consultant to and shareholder of IPS. From 1977 until approximately January 2013, Woodard held a succession of finance-related jobs at private and publicly-traded companies.

15. **John C. Francis**, age 70, resides in Henderson, Nevada. Francis was Blue Earth's Vice President of Corporate Development and Investor Relations and its Corporate Secretary from September 2010 to September 2015. He is Thomas's long-time business partner. Prior to joining Blue Earth, Francis served with Thomas as an officer and/or director of SEC registered publicly-traded companies, including, among others, Consolidation Services, Inc. and AgriBioTech, Inc.

**B. Related Entities**

16. **Blue Earth, Inc.** is incorporated in Nevada and, at all relevant times, was headquartered in Henderson, Nevada. Blue Earth purported to be a comprehensive provider of efficient energy and alternative/renewable energy solutions for small and medium-sized commercial and industrial facilities. It sought to become an independent power producer through its subsidiary, Blue Earth CHP, located in Provo, Utah.

17. Blue Earth's common stock was registered with the SEC pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), until August 28, 2014, when its common stock became registered with the SEC pursuant to Exchange Act Section 12(b), and was up-listed from the OTC Bulletin Board to the NASDAQ Capital Market. Blue Earth's stock traded under the ticker "BBLU" at all relevant times.

18. Blue Earth filed for Chapter 11 bankruptcy on March 21, 2016, and, in the bankruptcy proceeding, ownership was transferred to its debtor-in-possession, which was a major investor during the relevant period and the Company's senior secured lender. NASDAQ suspended trading in Blue Earth's common stock on March 28, 2016, and delisted the stock effective April 18, 2016. On August 1, 2016, Blue Earth voluntarily terminated the registration of its common stock under Exchange Act Section 12(g); and, on January 4, 2017, its periodic reporting obligations were suspended under Exchange Act Section 15(d). Today Blue Earth has

no assets or regular business operations other than collecting lease income on some secured assets for the benefit of the senior secured lender and another secured creditor.

19. **IPS Power Engineering, Inc. ("IPS")**, originally named RR Engineering, Inc., was incorporated in Utah on February 9, 2012. Defendant Potts founded and owned IPS and, as of February 2013, co-owned it with Woodard and a third individual. Blue Earth acquired IPS in July 2013, which, together with Global Renewable Energy Group, Inc., became the Blue Earth CHP subsidiary. IPS purported to specialize in the engineering, procurement, construction, and management of CHP plants. At the time of the acquisition, IPS had minimal assets and liabilities, and total revenues of only $2,500 as of June 30, 2013.

20. **Global Renewable Energy Group, Inc. ("GREG")** was incorporated in Nevada on February 21, 2013. Its primary business was to assist IPS in raising capital for possible CHP projects; by March 2013, Potts was GREG's CEO, and Woodard its CFO, and GREG had a right to participate in IPS's CHP projects, if they occurred. In July 2013, Blue Earth acquired GREG along with IPS. From its inception through June 30, 2013, GREG had no revenues; as of June 30, 2013, its sole asset consisted of $221 in cash.

## IV. TOLLING AGREEMENTS

21. Pursuant to tolling agreements entered into by Woodard and Potts on December 19, 2018, and by Thomas and Francis on December 20, 2018, activity from at least February 27, 2014 and later falls within the statute of limitations set forth in 28 U.S.C. § 2462.

## V. FACTS

### A. Blue Earth Acquired IPS and GREG Without CHP Contracts

22. In 2013, Blue Earth, acting through Thomas and Francis, was looking for acquisition opportunities to grow from a company that provides services to small- and medium-scale alternative energy power plants, to an independent power producer.

23. At the same time, IPS, acting through Potts and Woodard, was seeking to develop a business relationship with the meat processing company that it hoped would result in contracts to develop, construct, own, and operate CHP plants at the meat processing company's facilities.

24. As of early 2013, IPS had performed preliminary studies on facilities owned by the meat processing company but did not have the meat processing company's agreement on specific sites for CHP projects or, more importantly, signed contracts. Also, at the time, IPS did not have the capital necessary to develop any CHP projects for the meat processing company.

25. IPS met Blue Earth in early 2013, through GREG, as IPS and GREG were attempting to secure funding for a hypothetical portfolio of seven CHP projects for the meat processing company.

26. By mid-March 2013, Blue Earth began to pursue an acquisition of IPS and GREG. Thomas and Francis were informed during negotiations that IPS did not have contracts that would allow IPS to proceed with any CHP plants at any of the meat processing company's facilities.

27. Nonetheless, on April 11, 2013, Blue Earth entered into a "Binding Letter of Agreement" to acquire IPS and GREG in exchange for "15,550,000 restricted shares [of Blue Earth common stock], valued at approximately $18,349,000 ($1.18 per share)." The agreement contemplated that IPS would develop "seven initial [CHP] opportunities" for the meat processing company.

28. On May 10, 2013, Thomas and others met with representatives of the meat processing company for the first time and assessed its interest in proceeding with CHP plants. The meat processing company made no commitment with respect to any site at that meeting. It made clear that there were a number of steps that needed to occur before it could decide CHP projects made economic sense at particular sites and then sign contracts.

29. On July 15, 2013, Blue Earth formally acquired all of the outstanding shares of common stock of IPS and GREG in exchange for "a total of 15,550,000 restricted shares of [Blue Earth] common stock." Blue Earth later calculated the purchase price to be $44,035,500 based on a per share price of $2.84 and based its accounting and financial statement reporting on that price.

30. Blue Earth publicly announced that its acquisition of IPS and GREG would transform Blue Earth into an independent power producer and substantially increase Blue Earth's long-term revenue and profit potential.

31. On April 15, 2013, Blue Earth issued a press release announcing that its purpose in acquiring IPS and GREG is "to build 7 projects for a substantial New York Stock Exchange customer" and that the seven projects are expected to generate recurring revenues of more than $800 million and earnings before interest, tax, depreciation, and amortization, or EBITDA, of more than $200 million over a 10 year period following completion of construction.

32. On July 17, 2013, Blue Earth issued a second press release announcing that it "Will Build Seven Power Plants and Sell the Thermal and Electric Power to a Large Customer and the Local Utilities Through Long-Term Power Purchase Agreements." It further stated that it expects to generate power sales of $75 million per year and achieve positive earnings of over $20 million per year for the next 10 years. These projections would only materialize if the meat processing company approved and signed contracts with Blue Earth for each of the seven sites, and if Blue Earth raised the funds needed to construct and operate the plants.

### B. Blue Earth Entered Into Non-Binding Term Sheets With The Meat Processing Company

33. On or about August 2, 2013, after the merger closed, Blue Earth and the meat processing company executed seven **non-binding term sheets** relating to what Blue Earth, IPS, and GREG referred to as the "initial seven projects," located in Live Oak, Florida; Marshalltown, Iowa; Mt. Pleasant, Texas; Souderton, Pennsylvania; Tolleson, Arizona; Worthington, Minnesota; and Brooks, Alberta, Canada.

34. The term sheets did not give Blue Earth the right to develop, construct, own, or operate CHP plants at any of the meat processing company's facilities. At the meat processing company's insistence, each term sheet explicitly states in the first paragraph:

> This Term Sheet is **not binding** on any of the parties herein. This Term Sheet is **intended to serve only as a framework** to identify certain issues and matters that will have to be addressed in further discussions and definitive written agreements between the parties identified herein. **None of the parties herein intend this Term Sheet to create any legal obligations, and no such obligations shall arise unless and until the parties have negotiated and executed definitive written agreements setting forth all of the specific terms and conditions of any relationship that the parties desire to establish in the future ("Definitive Agreements" as further defined below)**.

Each term sheet also states that consummation of each proposed CHP project is "subject to the satisfactory mutual due diligence" of Blue Earth and the meat processing company. At the time the term sheets were signed, neither party had progressed far enough in the due diligence process to conclude for each proposed site that (i) the state and local regulations would allow the projects to proceed as planned, including allow the sale of electricity by third parties or (ii) Blue Earth could generate and sell electricity to the meat processing facility at prices lower than what the local utilities were charging at each site.

35. Each term sheet also expressly states that "[u]ntil Definitive Agreements" – defined as contracts in the form of lease agreements and energy purchase agreements – have been "negotiated, executed, and delivered," "neither party is under any legal obligation with respect to the Proposed Transaction, the CHP Project, or any of the terms herein."

36. Potts negotiated and executed the term sheets on behalf of Blue Earth. Woodard received and reviewed the drafts. Thomas, Woodard, and Francis received copies of the executed term sheets no later than August 2, 2013. Each knew the term sheets were non-binding.

37. At all relevant times, through the combined efforts of Thomas, Francis, Woodard, and Potts, Blue Earth was focused on completing due diligence at the proposed sites, attempting to convince the meat processing company that the economics made sense at particular sites and to sign contracts for those sites, and on raising funds to construct CHP plants. Woodard, as CFO of Blue Earth, also oversaw Blue Earth's accounting.

38. Contracts were not executed for CHP projects at any of the meat processing facilities until on or about August 24, 2014, when Blue Earth and the meat processing company executed a "Ground Lease Agreement" and a "CHP Project Development and Energy Purchase Agreement" for the Alberta Facility. On or about December 2, 2014, Blue Earth and the meat processing company executed a "Ground Lease Agreement" and a "CHP Project Development and Energy Purchase Agreement" for the Sumter Facility, a smaller and less capital-intensive site that replaced one of the initial seven proposed sites (Worthington) which Blue Earth determined to be

not feasible after conducting further due diligence. Thomas and Francis had only limited success in raising capital and were unable to raise an amount sufficient to complete the Alberta project.

39. The relationship between Blue Earth and the meat processing company soured in or about October 2014, and the meat processing company did not enter into contracts with Blue Earth for any CHP projects beyond Alberta and Sumter.

### C. Defendants Created A False Perception That Blue Earth Had Contracts With The Meat Processing Company

40. Despite the clear language of the term sheets, beginning no later than March 2014, Thomas, Woodard, and Potts, with the substantial assistance of Francis, proceeded to make materially misleading representations in SEC filings and elsewhere suggesting that Blue Earth had contracts with the meat processing company for seven or more CHP projects. These representations were material to investors because, among other reasons, (i) contracts decrease the risk of the investment, (ii) contracts are an important step in raising the capital needed to construct and operate co-generation power plants, and (iii) they bolstered the false impression that Blue Earth was executing on a viable business plan that would yield substantial revenue over the long-term.

#### 1. The 2013 Form 10-K

41. On March 3, 2014, Blue Earth filed with the SEC its 2013 Form 10-K for the year ending December 31, 2013, in which it falsely asserted in its financial statements and in Management's Discussion and Analysis ("MD&A"), that it has CHP projects under contract. In fact not a single contract (lease agreement and/or energy purchase agreement) had been signed for any site as of this date. These statements were material to investors as they projected a sense that Blue Earth's projected revenue stream was more certain than was the case.

42. Blue Earth reported a $44 million Construction in Progress asset on its balance sheet, representing 51% of Blue Earth's total assets at year-end, and its supposed best prospects for becoming profitable in the future. It stated in Note 12 to the balance sheet that the Construction in Progress asset represents "**the costs accumulated on 7 co-generation projects in the United**

**States and Canada**" which were "**purchased in the acquisition of IPS and GREG.**" Blue Earth, in fact, had acquired no CHP projects or rights to develop CHP projects from IPS or GREG. The preliminary feasibility studies conducted by IPS prior to the merger, and by Blue Earth CHP after the merger, cost a fraction of the $44 million.

43. Blue Earth also stated in Note 12, that, once construction is completed and the seven CHP plants are in service and generating revenues, it will "depreciate the construction costs for the projects **over the 20 year term of the energy purchase contract**." Blue Earth thereby suggested that energy purchase agreements (a condition the term sheets stated must be met for the relationship to become binding) had been signed for the seven supposed CHP projects, when, in fact, no energy purchase agreements had been signed, and only preliminary drafts for one plant were under discussion with the meat processing company as of March 3, 2014.

44. Further, Blue Earth explicitly stated in the MD&A section of the 2013 Form 10-K that the CHP projects are under contract, and financing is lined up:

> Now that management has secured project financing, the Company's revenues in 2014 should exceed 2013 revenues. These expected revenues will be realized upon the completion of **the cogeneration projects under contract with Blue Earth CHP**.

45. Thomas, Woodard, and Potts each reviewed and signed the 2013 Form 10-K. Woodard and Thomas, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002 ("SOX"), 15 U.S.C. § 7241, each certified that, based upon his knowledge, the 2013 Form 10-K did not contain any material misstatements or omissions, and fairly presented in all material respects Blue Earth's financial condition and results of operations. Francis reviewed and edited drafts, compiled and incorporated others' edits, and directed its filing with the SEC.

46. Additionally, on March 3, 2014, Francis uploaded to the investor relations section of Blue Earth's website a presentation he and Thomas drafted and edited, which represented, among other things, that Blue Earth has a "backlog" of seven CHP projects, and "**20[-year] power purchase agreements**," bolstering the 2013 Form 10-K's false disclosure that all seven projects

were then under contract. On March 4, 2014, Francis and Thomas emailed the presentation to potential investors. The presentation remained on the website until on or about April 18, 2014.

47. Thomas, Woodard, Potts, and Francis each knew, or was reckless in not knowing, that the statements in Blue Earth's 2013 Form 10-K, and Thomas and Francis each knew, or was reckless in not knowing, that the statements in the March 3 website presentation, were false. Each knew that Blue Earth had not acquired CHP projects in the merger with IPS and GREG. When Blue Earth acquired IPS and GREG in July 2013, their combined balance sheets reflected less than $10,000 in tangible assets and less than $25,000 in liabilities. IPS and GREG did not have contracts to develop, construct, own, or operate CHP plants, nor were contracts on the horizon, because due diligence was not completed and IPS and GREG had not demonstrated the economic viability to the meat processing company of CHP plants at any site. IPS and GREG did not even have signed term sheets at the time of the acquisition, except for one site, for which a term sheet was signed in 2012, and no subsequent work was performed.

48. Thomas, Woodard, Potts, and Francis also each knew, or was reckless in not knowing, that, since the merger, Blue Earth and the meat processing company still had not concluded that the seven initial sites reflected in the term sheets were feasible. To the contrary, by January 13, 2014, the meat processing company informed Woodard and Potts, who informed Thomas and Francis, that it was rejecting one of the proposed sites (Live Oak, FL), because state regulations made the project not feasible. This was the first site Blue Earth hoped to have under contract. By late January 2014, Thomas, Woodard, Potts, and Francis determined that another proposed site (Worthington, MN) was not feasible because the local utility was refusing to purchase the excess electricity from Blue Earth.

49. Additionally, Thomas, Woodard, Potts, and Francis were aware that, as of March 3, 2014, preliminary drafts of a lease agreement and a CHP project development and energy purchase agreement were in circulation for one site only, not seven, and not a single contract had been signed for any site. In connection with the year-end 2013 audit, Blue Earth's auditor asked to see executed contracts. Defendants communicated about how to respond, and Woodard copied

Thomas, Francis, and Potts on his email providing the auditor with the only drafts then in existence, which were for the Alberta Facility.

50. Thomas, Woodard, Potts, and Francis also knew that, by March 2014, Thomas and Francis had not yet succeeded in securing the financing that would be needed to construct the seven proposed CHP projects if contracts could be signed. In November 2013, Blue Earth raised approximately $12 million from a Class A warrant redemption call, only a portion of which could be used for CHP projects, which was not enough to construct even the Sumter Facility, the smallest and least capital-intensive of the proposed CHP plants.

51. On April 11, 2014, Blue Earth filed a first amended 2013 Form 10-K that repeated the misleading disclosures in the initially-filed Form 10-K about Blue Earth's relationship with the meat processing company and the nature of the $44 million Construction in Progress asset. Thomas, Woodard, and Potts signed the amended Form 10-K despite each knowing, or recklessly not knowing, that Blue Earth still had no contracts with the meat processing company for CHP plants at any site.

### 2. <u>The Press Release About Equipment Orders</u>

52. Blue Earth and its executives continued to bolster the Company's false narrative about having contracts to develop, construct, and operate CHP plants by announcing, in March 2014, equipment orders for CHP projects even though there were no signed contracts and the meat processing company still had not agreed to projects at any site. These statements were material to investors as they suggested progress toward completion of CHP plants supposedly under contract, and that Blue Earth was steps closer to generating the revenue stream it had publicly projected.

53. On March 11, 2014, Blue Earth issued a press release, drafted by Thomas, and edited and reviewed by Potts, announcing that Blue Earth has ordered generators "costing approximately $17.6 million for three CHP systems" and expects all three to be operational in the fourth quarter of 2014.

54. Blue Earth, in fact, had not ordered generators in March 2014. Rather, on March 7, 2014, Potts signed letters of agreement for three generators slotted for three sites not yet under contract (Alberta, Tolleson, and Marshalltown), and paid a 5% fee, the purpose of which was to lock in prices and future shipment dates. Blue Earth still needed to submit purchase orders for manufacturing of the generators to actually begin.

55. Potts and Woodard had disagreed with Thomas about placing orders because, as made clear in the term sheets, if contracts were never executed, Blue Earth would bear the full cost of the orders. Despite this risk, Thomas insisted on placing orders so that he could announce Blue Earth's supposed progress, but he instructed Potts to keep payments low while Thomas and Francis continued to try to wrap up financing. Potts complied.

56. Thomas and Potts knew that the shipment dates locked in by these letters of agreement – October 31, 2014 (for Alberta) and December 31, 2014 (for Marshalltown and Tolleson) – made it impossible for Blue Earth to complete construction and start to generate revenues at the sites by the fourth quarter of 2014 even if contracts could be signed by then. Accordingly, Thomas and Potts did not expect that all three plants would be operational in the fourth quarter of 2014, and the timeline was factually untrue as it could not be achieved without this equipment. Further, although Potts did place formal purchase orders for these generators months later, Blue Earth did not make installment payments and was eventually declared to be in default on all three orders.

### D. Prompted By SEC Comment, Blue Earth Amended Its 2013 Form 10-K Disclosures, But Continued To State That It Had Contracts To Develop, Construct, and Operate CHP Plants

57. In April 2014, the SEC's Division of Corporation Finance ("Corp. Fin.") issued a comment letter on Blue Earth's 2013 Form 10-K, concerning, among other things, the $44 million Construction in Progress asset that Blue Earth had reported on its year-end 2013 balance sheet and discussed in Note 12 of its 2013 Form 10-K. A comment process followed.

58. As part of that process, on May 1, 2014, Blue Earth filed a second amended 2013 Form 10-K, which updated how Blue Earth described its agreements with the meat processing

company, but continued to highlight to investors the $44 million Construction in Progress asset and to mislead investors about the nature and certainty of the supposed CHP projects that the asset represented.

59. In Note 13 of the second amended Form 10-K, as in Note 12 of the original filing, Blue Earth again falsely asserted that the $44 million Construction in Progress asset represents "**the costs accumulated on 7 co-generation projects in the United States and Canada**," and that such projects were "**purchased in the acquisition of IPS and GREG**." At the end of Note 13, adjacent to its discussion of the seven supposed CHP projects, Blue Earth added the following sentence: "**The terms of the co-generation contracts provide that the Company will sell electricity and steam to the meat processing plants connected to the co-generation plants and will sell the excess electricity to the electrical utility adjacent to the property.**" This addition to the 2013 Form 10-K was an affirmative representation that contracts were in place between Blue Earth and the meat processing company and the local utilities.

60. These representations were materially false. As of May 1, 2014, there were no contracts of any kind for any site. These representations were material to investors as they conveyed the impression that all necessary parties, including the local utilities which Blue Earth's business plan counted on to purchase any excess electricity, were committed and locked in for the long-term, making an investment in Blue Earth securities less risky.

61. In reality, as of May 1, 2014, the only contracts in negotiation were a draft "Lease Agreement" and a draft "CHP Project Development and Energy Purchase Agreement" for the Alberta Facility. Those drafts were not close to being finalized and, in fact, were not finalized until August 2014.

62. Not only were drafts not in circulation for other sites, but also, by May 1, 2014, Blue Earth had yet to complete its due diligence at all seven proposed sites or demonstrate to the meat processing company the economic benefits of having CHP plants at those sites, other than Live Oak and Worthington, which were determined not to be feasible sites.

63. Thomas, Woodard, and Potts each reviewed and signed the second amended Form 10-K and Woodard and Thomas each certified, based upon his knowledge, it did not contain any material misstatements or omissions, and fairly presented in all material respects Blue Earth's financial condition and results of operations.

64. Thomas, Woodard, and Potts each knew, or was reckless in not knowing, that the Note 13 disclosure concerning the current existence of signed contracts was false, as was the assertion elsewhere in the amended Form 10-K that Blue Earth was negotiating and finalizing "the various operating contracts" for the seven CHP projects. Woodard and Potts were directly involved in the negotiations to convert term sheets to definitive agreements. Thomas demanded and received regular updates about the status of the negotiations as the existence of contracts was critical to his efforts to raise capital.

65. Although Blue Earth stated in a separate section of the second amended 2013 Form 10-K that it has "signed a letter of intent with a large U.S. and international protein provider to design, build, and operate seven (7) CHP plants," this statement was false because Blue Earth did not have a letter of intent covering seven CHP projects. It had seven non-binding term sheets, for seven unique sites, each with separate challenges that Blue Earth needed to overcome before the meat processing company would consent to a CHP project at that site, negotiate terms, and sign contracts.

66. Prior to signing the second amended Form 10-K, Thomas, Woodard, and Potts had considered whether to publicly disclose that its purported "letter of intent" was "non-binding." They decided against it. On March 4, 2014, the day after Blue Earth filed its initial 2013 Form 10-K, Potts contacted executives of the meat processing company and asked for its permission to identify the meat processing company by name in Blue Earth's SEC filings. The meat processing company did not consent to Blue Earth identifying it in connection with any CHP projects because "definitive agreements have not been executed." It told Potts, however, that it supported Blue Earth disclosing that the term sheets are non-binding. Thomas, Woodard, and Potts, each of whom signed the second amended Form 10-K, chose not to reveal the terms of the relationship, including

that it was expressly "non-binding," or to provide any additional details that would reveal how distant the parties were from signing contracts for any of the sites.

67. On June 13, 2014, Corp. Fin.'s comment letters and Thomas's responses to those letters became public on EDGAR. Thomas had falsely represented in his April 11, 2014 response to Corp. Fin., that, when Blue Earth acquired IPS and GREG, it acquired a **contractual right to build** co-generation power plants for which IPS and GREG had created "designs and plans" and that the $44 million asset consisted of those "designs and plans."

68. Soon thereafter, in June 2014, Blue Earth raised more than $5 million from investors who exercised warrants and received shares registered pursuant to the Blue Earth's Form S-1 registration statement, which became effective on May 14, 2014.

### E. Thomas Lied To NASDAQ About The Status And Prospects Of Blue Earth's Business Venture In An Effort To Be Uplisted

69. In the midst of attempting to formalize its desired business venture with the meat processing company, Blue Earth applied to have its common stock listed on the NASDAQ Capital Market. Thomas believed that having Blue Earth's stock listed on NASDAQ would greatly increase Blue Earth's ability to attract potential investors and raise capital for future CHP projects.

70. During the application process, NASDAQ asked Blue Earth to provide details concerning the $44 million Construction in Progress asset that Blue Earth reported in its 2013 Form 10-K, and in amendments thereto, and asked it to explain how the asset was valued. Thomas responded to NASDAQ's inquiry by repeatedly and falsely asserting that Blue Earth had contracts with the meat processing company and that the asset was valued based on the expected cash flows from those contracts. Thomas's assertions were material to NASDAQ because, as a gate keeper entrusted to preserve and strengthen the quality of and public confidence in its market, NASDAQ was required to screen applicants and their management on a variety of qualitative factors and to provide listed status only to bona fide issuers. Thomas's misstatements about the existence and value of contracts – which if they existed would have been Blue Earth's best prospects for becoming profitable – went to the heart of Blue Earth's legitimacy and its management's integrity.

71. For example, on May 16 and 18, 2014, days after Blue Earth filed its second amended 2013 Form 10-K, Thomas falsely assured NASDAQ that Blue Earth's CHP projects are "**substantial, real projects that are under construction, and have been for some time**."

72. In a May 18, 2014 letter to NASDAQ, which Francis helped draft, Thomas falsely stated that Blue Earth currently has signed lease agreements and energy purchase agreements with the meat processing company:

a. "Our relationship [with the meat processing company] is such that **they have agreed to purchase power from seven initial CHP power plants** that **we are constructing on leased land at their facilities**, with the expectation that we will build CHP power plants on thirty-five locations over a three-year period."

b. "More importantly, **they have agreed to purchase thermal and electric power from our CHP plants** for a twenty-year period with a fixed price for an initial ten-year period and a price reset at the end of the first ten-year period."

c. "These projects are characterized by a number of tangible items, including but not limited to **site leases**, **power purchase agreements**, and **significant equipment orders with initial down payments**."

The letter also provides NASDAQ with projected power revenues of up to $305 million annually, if Blue Earth built 35 plants, and claims that "[a]ll of these projections are based on **rates already negotiated with our customer,**" suggesting that Blue Earth and the meat processing company were currently negotiating a material expansion to their supposed relationship of seven CHP projects.

73. Thomas and Francis each knew, or was reckless in not knowing, that, as of the date of these representations, no lease agreements had been signed; the meat processing company had not agreed to buy any thermal or electric power from Blue Earth or even approved of CHP projects at the seven sites that were the subject of the term sheets; construction was not occurring at any site; and Blue Earth and the meat processing company were not in discussions to expand the relationship by a single project, much less to projects at 35 sites.

74. On July 25, 2014, Thomas certified to NASDAQ that the information he provided to it was true and correct as of that date, and that he would promptly notify NASDAQ of any material changes.

75. Following Thomas's false statements, made with Francis's substantial assistance, NASDAQ approved Blue Earth's listing application on August 25, 2014. Blue Earth's common stock began to trade on the NASDAQ Capital Market on August 28, 2014.

### F. Blue Earth Continued To Make False Statements To Investors About The Status And Prospects Of Its Business Venture In Order To Raise Much Needed Capital

76. By September 2014, weeks after announcing that Blue Earth and the meat processing company had executed contracts for the Alberta Facility, Blue Earth was experiencing cash flow problems and was unable to make progress payments on the equipment it had ordered earlier in the year. Thomas and Francis attempted to raise much-needed capital, which was largely dependent upon Thomas's and Francis's ability to convince investors that the initial seven CHP projects were real projects, on schedule, and that Blue Earth's business opportunities were about to expand.

77. To advance Blue Earth's goals, on September 11, 2014, Thomas spoke at an investor conference in New York, where he identified the meat processing company by name and announced that 35 of 51 of its facilities in the United States and Canada had been "qualified" for CHP projects. He set forth a construction schedule for up to 14 supposed CHP projects, stating that "**[Blue Earth] expects to turn on the first 3-4 power plants for [the meat processing company] in 2014 and an additional 4-10 power plants in 2015**." Thomas also stated in the live presentation that Blue Earth expects to "turn on" the first CHP plant by the end of September 2014, which at the time was less than three weeks away. This information was material to investors because it gave the false impression that the initial plants were closer to completion than they actually were, that actual revenue generation was soon to be realized on the business venture, and that the meat processing company was prepared to sign additional supposed contracts with Blue Earth for CHP projects.

78. In advance of the investor conference, Thomas and Francis drafted and edited the presentation slides. Thomas then signed, and Francis submitted for filing with the SEC, a Form 8-K that appended the slides. A day later, Thomas spoke at the investor conference where he presented the slides to investors, and his speech was streamed live over the internet.

79. Thomas and Francis each knew at the time of the filing and investor presentation that the meat process company had not agreed to proceed with CHP plants at 35 sites and Blue Earth was not in discussions with the meat processing company to construct, own, and operate CHP plants at 35 potential sites. Thomas's statement at the investor conference with regard to the 35 plants was false.

80. Thomas and Francis each knew at the time of these disclosures that Blue Earth had ordered a total of only four generators, not 14. Therefore, there was no factual basis for the stated expectation as to the timing for "turning on" up-to-14 plants, the stated schedule for the up-to-14 plants was false, and Thomas's and Francis's expectations were not honestly held.

81. Thomas also knew, or was reckless in not knowing, at the time of these disclosures that the contractual ship-by dates for two of the four ordered generators were December 31, 2014, making it impossible under the best of circumstances for those plants to be turned on by year-end 2014. Further, by mid-August 2014, Thomas knew Blue Earth had failed to make installment payments of approximately \$8.5 million on three generators, including the one slated for the Alberta Facility. Thomas controlled Blue Earth's funds and paid no portion of the amounts due because Blue Earth had insufficient funds at the time. This led to discussions between and among Thomas, Woodard, Potts, and Francis by no later than mid-September 2014 concerning how to allocate Blue Earth's insufficient resources among projects. Thomas and Francis each knew, or was reckless in not knowing, that Blue Earth's failure to make installment payments on three of four generators would extend the ship-by dates for those generators past December 31, 2014; indeed, Thomas authorized Potts and Woodard to get extensions. Accordingly, Blue Earth's statements of expectation made about Blue Earth's ability to "turn on" three to four plants by year-end 2014 were false, and did not align with the information that formed Thomas's or Francis's

state of knowledge at the time. Thomas and Francis did not honestly hold this expectation when they prepared and Thomas presented the slides, or when Francis directed they be filed them with the SEC.

82. Thomas and Francis also each knew, or was reckless in not knowing, that Sumter – the location Thomas was referring to when he stated that one plant would be "turned on" by September 30, 2014 – could not be "turned on" within three weeks of the investor conference. As of the date of these disclosures, the contracts for Sumter (a lease agreement and a CHP project development and energy purchase agreement) were still under negotiation and were not finalized until December 2014. Blue Earth did not yet have an executed contract with the firm that would perform the engineering, procurement and construction services for Sumter. Further, on September 6, 2014, before Thomas made the investor presentation, Potts informed Thomas, Francis, and Woodard that a critical component for Sumter had not been ordered on time and would further push out any expected dates for turning on Sumter past the end of the third quarter.

83. Nonetheless, after the investor conference, Thomas and Francis continued to disseminate to investors the materially misleading presentation and audio recording of Thomas's speech. On September 12 and 19, 2014, Francis directed that the presentation and audio recording, respectively, be uploaded to Blue Earth's corporate website. Between September 12 and 29, 2014, Francis and Thomas emailed the misleading presentation slides to ten potential investors.

### G. Despite The Possibility Of Only Two CHP Projects, Blue Earth Continued To Disclose An Aggressive Schedule For The Completion Of Supposedly Multiple CHP Plants

84. By late October 2014, Blue Earth's relationship with the meat processing company soured and its prospects for becoming profitable diminished substantially after the meat processing company learned of (i) information that raised concerns about Blue Earth's ability to fund the only contracted CHP project (Alberta) and (ii) Blue Earth's false assertions about CHP plants not yet under contract and to which the meat processing company had not yet committed.

85. To address these issues, the meat processing company requested a meeting at its offices. It informed Potts, who informed Thomas, Woodard, and Francis, that, "until Blue Earth provides adequate assurances of its financial and corporate capacity to perform," the meat processing company "will not be entertaining any further business relationships with Blue Earth, nor will it continue to negotiate any terms or projects with Blue Earth."

86. Thomas and Potts met with the meat processing company's executives on October 24, 2014. The group discussed Thomas's September 2014 investor presentation and, in particular, the meat processing company's disapproval of Blue Earth's inaccurate statements suggesting that the meat processing company had committed to use Blue Earth to build CHP projects at up to 35 facilities and that three to four plants would be completed by year-end 2014.

87. After the meeting, Thomas admitted in a letter to the meat processing company that he "did not have enough current information to provide guidance" on Blue Earth's construction schedule.

88. Days later, Blue Earth's board of directors met with executives of the meat processing company, without Thomas. Following the meeting, on October 29, 2014, the meat processing company sent Blue Earth's chairman and Potts a letter setting forth the meat processing company's "expectations with regards to its business relationship with Blue Earth."

89. The October 29, 2014 letter states that the meat processing company will move forward with the CHP project at the Alberta Facility provided that Blue Earth works diligently to obtain, among other things, "all financing needed" for the project and "begin[s] construction" prior to December 31, 2014. The letter also states that the meat processing company will continue to negotiate with Blue Earth on definitive agreements for the second, smaller facility (Sumter).

90. The chairman of Blue Earth's board of directors forwarded the October 29 letter to Thomas, Woodard, Potts, and Francis. A few days later, Potts sent an email to Thomas and Woodard noting that the meat processing company is "solely focused on just two sites: Alberta and Sumter." He also suggested that Blue Earth contact equipment manufacturers and ask for a

release of Blue Earth's obligations on equipment orders for sites other than Alberta and Sumter, and that it pay half of the balance due for Alberta by December 5.

### 1. The Third Quarter 2014 Form 10-Q

91. Despite these material developments and without any mention of them, on November 14, 2014, Blue Earth falsely represented in its Third Quarter 2014 Form 10-Q for the period ending September 30, 2014, that multiple of the seven previously-announced CHP projects were nearing completion. This information was material to investors because it gave the false impression that Blue Earth's previously-disclosed relationship with the meat processing company was intact and Blue Earth was on the verge of completing construction and generating revenues from the projects.

92. For example, in Note 7 to the financial statements, Blue Earth identified a $51 million "Cogeneration plants (under construction)" asset, representing the supposed costs incurred on the initial seven CHP plants. The Note states that **"Depreciation of the co-generation plants will commence when the plants are placed in service during the latter part of 2014 or early 2015**." This was essentially the same misleading timeline for completion that Thomas had presented to investors in September 2014, and that resulted in the meat processing company cutting Blue Earth back to two CHP projects; except, this time, Blue Earth's timeline was presented as a certainty not an expectation.

93. Thomas, Woodard, and Francis reviewed and edited multiple redlined drafts of the Form 10-Q before it was filed. Thomas and Woodard then signed the Form 10-Q, and Francis directed it to be filed with the SEC.

94. At the time they made and filed these statements, Thomas, Woodard, and Francis each knew, or was reckless in not knowing, that not a single CHP plant could be placed into service in late 2014, and, at most, one (not seven) could be placed into service in early 2015. As of November 14, 2014, Alberta was still the only CHP project under contract, and Blue Earth still had made none of the progress payments due on the Alberta generator or the generators ordered for two plants with not under contract (Marshalltown and Tolleson). Although Potts and Woodard

had negotiated an extension of the progress payment deadlines, the ship-by dates for two of the generators were moved to March and April 2015, and the manufacturer was refusing to deliver the Alberta generator until it was paid in full, making it impossible to put the Alberta CHP plant (or multiple plants) in service in late 2014 or early 2015. Further, Thomas, Woodard, and Francis each knew, or was reckless in not knowing, that Blue Earth would not be able to pay the accrued amounts by the extended payment date –November 14, the same date on which the Form 10-Q was signed and filed.

95. Six days later, on November 20, 2014, Blue Earth received default notices on all three generator orders. Potts forwarded the default notices to Thomas and Woodard, who learned that the manufacturer had discontinued production of the equipment underlying the Marshalltown and Tolleson orders. Specifically, with respect to the Alberta generator, the generator was complete, but the manufacturer would not ship the generator or transfer title unless and until Blue Earth paid the manufacturer in full, including all accrued late fees.

96. On or about November 25, 2014, Blue Earth raised $10 million from a private investor pursuant to a common stock purchase agreement, which incorporated by reference Blue Earth's misleading 2013 Form 10-K and third quarter 2014 Form 10-Q. To induce the investment, Thomas and Francis falsely assured the private investor that, once his investment was made, a large equipment financing company stood ready to finance the remaining funds needed to complete the Alberta CHP plant. The reality was, as Thomas acknowledged in an email to Woodard, Potts, Francis, and others, the financing company (which was the financing arm of the manufacturer for the three generators then in default) had expressed concerns about "Blue Earth's longevity" and had not committed to providing the remaining financing needed for the Alberta Facility. After receiving the $10 million investment, Thomas told Woodard, Potts, Francis, and others that the $10 million would only provide Blue Earth with capital to operate the business for another two to three months.

### 2. <u>The 2014 Form 10-K</u>

97. On March 16, 2015, Blue Earth filed with the SEC its Form 10-K for the year ending December 31, 2014 ("2014 Form 10-K"), in which it continued to make materially false statements concerning, among other things, its prospects for additional CHP projects with the meat processing company and its ability to fund those projects, including its ability to fund construction of the only two CHP plants then under contract – Alberta and Sumter. It was material to investors to know the number of CHP projects in the pipeline, as such information significantly impacted Blue Earth's revenue prospects. In addition, Blue Earth's ability to fund projects was critical to completing the projects and generating revenues.

98. The 2014 Form 10-K represented not only that Blue Earth has CHP plants under construction for the Alberta and Sumter Facilities, but also that: (i) it is "**developing several additional energy plants** to sell the thermal and electric power to large customers and the local utilities through long-term power purchase agreements"; (ii) it still has "**plans to build seven power plants**"; and (iii) it will release from escrow, on a pro rata basis, the remaining shares that were used to acquire IPS and GREG "**upon the commercial operation date of each Initial Project**," a reference to the seven previously-announced CHP projects.

99. The 2014 Form 10-K also assured investors that Blue Earth's "**short term liquidity needs have been satisfied and we have sufficient capital to fund our operations for the next 12 months.**" With respect to equipment orders, the Form 10-K falsely represented that:

> **In December 2013, and the first quarter of 2014, the Company ordered generators**, costing approximately $7.8 million for several power plants for which the total cost is expected to be approximately $32 million. **The Company is making the equipment installment payments and construction costs from cash on hand**.

According to the 2014 Form 10-K, "**[p]rior to 2015, the Company ha[d] used cash on hand and equity financing to order equipment and advance the projects on schedule.**"

100. These representations were materially false. Blue Earth was not in the process of "developing" or negotiating other CHP projects with the meat processing company or any other company. Negotiations with the meat processing company on CHP projects other than Alberta

and Sumter had ground to a halt and, though Blue Earth had attempted to develop business with other food processing companies, it did not succeed in developing any business.

101. Thomas, Woodard, Potts, and Francis each knew, or was reckless in not knowing, that Blue Earth's disclosures about the supposed development of CHP business beyond the two plants, Alberta and Sumter, were false. For example, on March 11, 2015, just days before the 2014 Form 10-K was filed, Thomas wrote a memo to Woodard, Potts, and Francis, acknowledging that Alberta and Sumter are "hurdles" that Blue Earth will need to pass before approaching the meat processing company about other projects; those hurdles had not yet been passed. In the same memo, Thomas referred to Blue Earth's customer development and closing process as "ineffective," noting that Blue Earth's attempts to develop business with two other food processing companies over the course of a year had not resulted in any signed contracts. Under these circumstances, Thomas, Woodard, Potts, and Francis also did not honestly expect, and were not planning, to build seven CHP plants for the meat processing company.

102. Statements in the 2014 Form 10-K about Blue Earth's past payments for generators and the sufficiency of its cash position to continue making such payments in the future were materially false. Blue Earth still had not paid in full the accrued balances on the order for the Alberta generator, which remained undelivered, and it became delinquent on orders for other critical pieces of equipment slated for the Alberta Facility.

103. For example, on December 1, 2014, after Blue Earth raised $10 million from a private investor, Thomas authorized only a partial payment of $1.7 million to the manufacturer of the Alberta generator, which continued to leave Blue Earth in default.

104. In February 2015, Potts and Woodard asked Thomas to make another partial payment to the manufacturer of the Alberta generator as a show of "good faith" and to avoid the manufacturer seeking legal recourse from Blue Earth. Thomas paid the manufacturer by diverting $500,000 from a credit facility that was supposed to be used exclusively for the Sumter Facility and projects unrelated to CHP. Blue Earth remained in default on the Alberta generator after this payment and the manufacturer continued to refuse to deliver the generator.

105. Further, on or about February 10, 2015, Thomas and Woodard learned from Potts that the manufacturer of a heat processing unit for the Alberta Facility had halted work due to Blue Earth's failure to make timely progress payments, and, as result, there would be further delays.

106. Thomas, Woodard, Potts, and Francis each knew, or was reckless in not knowing, that, by the time the 2014 Form 10-K was filed, Blue Earth was in financial distress and not able to meet its short-term liquidity needs, and it could not fund construction of the larger of the two CHP plants then under contract.

107. Thomas, Woodard, and Potts each reviewed and signed the 2014 Form 10-K. Woodard and Thomas each certified, pursuant to SOX Section 302, 15 U.S.C. § 7241, that, based upon his knowledge, the 2014 Form 10-K did not contain any material misstatements or omissions, and fairly presented in all material respects Blue Earth's financial condition and results of operations. Francis reviewed and edited drafts, compiled and incorporated others' edits, and authorized its filing with the SEC.

### H. Consistent with Blue Earth's False Narratives, Woodard Made And Substantially Assisted <u>Blue Earth's Materially False Asset Valuations</u>

108. Blue Earth bolstered its material misrepresentations concerning the certainty of its prospects for constructing and operating at least seven CHP plants – its primary source of future revenue and profits – by reporting false asset valuations relating to the supposed CHP projects of $44 million in its 2013 Form 10-K filed on March 3, 2014 and $56 million in its 2014 Form 10-K filed on March 16, 2015.

109. Woodard prepared the calculations that Blue Earth used to support these false valuations and certified that the Company's financial statements containing the false valuations were accurate. First, Woodard knew the valuations and the accompanying footnotes were not supported by true facts, were based upon inputs that he manipulated and, therefore, he did not honestly believe that they conveyed an accurate value of the CHP plants or the reported assets. His valuations and the accompanying footnotes were also objectively false because they were

based upon facts that did not exist. Second, Woodard made knowingly false statements in the footnotes that describe and are embedded in the Construction in Progress asset valuation. Third, Woodard knowingly failed to disclose material facts that went to the basis of his valuation and made it materially misleading to a reasonable investor.

### 1. The 2013 Form 10-K's Materially Inflated CIP Asset

110. In its 2013 Form 10-K, filed with the SEC on March 4, 2014, Blue Earth materially misstated the largest asset on its balance sheet, a $44 million Construction in Progress asset, representing 51% of Blue Earth's total assets. According to Note 12 to the balance sheet, this $44 million asset represented the value of "7 co-generation projects" that Blue Earth supposedly had "purchased in the acquisition of IPS and GREG." Blue Earth, in fact, had not purchased any projects. Blue Earth inflated the value of this single asset by more than 400%. This information was material to investors and suggested that Blue Earth's assets and its stockholders' equity had grown substantially through its acquisition of IPS and GREG.

111. Pursuant to GAAP, Accounting Standards Codification 805—*Business Combinations* ("ASC 805"), after it acquired IPS and GREG, Blue Earth was required to: (i) determine the purchase price, (ii) determine and record at fair value all tangible and intangible assets acquired and liabilities assumed, and (iii) allocate to goodwill the residual of the purchase price over net assets (*i.e.*, identifiable assets less identifiable liabilities).

112. At the request of Blue Earth's contract accountant and in anticipation of the year-end 2013 audit, Woodard prepared a discounted cash flow analysis ("October 2013 DCF"), a book and/or record of Blue Earth, which he forwarded to the contract accountant as purported support for the fair value of the $44 million Construction in Progress asset. On or about December 9, 2013, Woodard also provided the October 2013 DCF to the Company's auditor in connection with the year-end 2013 audit.

113. Woodard insisted that his October 2013 DCF be accepted as the support for the $44 million valuation of Blue Earth's Construction in Progress asset. He did so even after Blue Earth's auditor recommended to Woodard that Blue Earth obtain an independent valuation of the asset for

the 2013 audit. Woodard claimed that an independent valuation was unnecessary because he and Potts knew the potential value of the CHP projects better than anyone.

114. Woodard's October 2013 DCF purported to reflect the anticipated cash flows on the seven initial CHP projects, including costs of construction (financed 30% equity, and 70% debt), as well as the anticipated revenues and expenses of operations after completion of construction through the year 2025. The October 2013 DCF then derived a net present value of $42,312,201 for the seven supposed CHP projects, using a 10% discount rate, and looking only at the equity cash flows. Blue Earth accepted the October 2013 DCF as support for the reported $44 million fair value of Blue Earth's Construction in Progress asset.

115. The starting point for Woodard's October 2013 DCF analysis was a discounted cash flow analysis that he had prepared in April 2013, during the merger negotiations. That analysis purportedly reflected cash flows agreed to by Blue Earth and IPS; however, it also reflected a value materially lower than the $44 million.

116. Like the analysis he performed in April 2013, Woodard's October 2013 DCF assumed a number of facts that Woodard knew were untrue at the time of the acquisition, at the time he prepared the analysis, and at the time he signed and certified the 2013 Form 10-K, including, among other falsities, that (i) Blue Earth and the meat processing company had entered into contracts giving Blue Earth the right to develop and construct CHP plants at seven sites and obligating the meat processing company to purchase steam and electric power from Blue Earth for the next 10 or more years; (ii) the local utilities serving those seven facilities were obligated to purchase from Blue Earth any excess electricity generated by the CHP plants for the next 10 or more years; and (iii) Blue Earth had raised sufficient capital to construct and operate each CHP project. The October 2013 DCF also excluded from the valuation calculation the 70% of construction expenses expected to be borne by debtholders.

117. These assumptions alone did not support a valuation of $44 million for Blue Earth's Construction in Progress asset. Woodard then manipulated certain inputs in order to arrive at a number closer to $44 million. Specifically, he reduced the discount rate from 12% to 10% and

removed overhead expenses. Woodard knew these changes did not reflect the true risk that the seven CHP projects supporting the valuation would never go under contract or be completed and, therefore, did not reflect the true risk that the cash flows that were the basis of his October 2013 DCF would never be realized.

118. By the time that Woodard signed and certified Blue Earth's 2013 Form 10-K on March 3, 2014, additional events had transpired that made other assumptions underlying his October 2013 DCF inaccurate.

119. For example, the October 2013 DCF included Live Oak and Worthington as two of the proposed seven sites for CHP projects. By no later than January 2014, however, Blue Earth determined neither site was feasible for a CHP project. Woodward was aware of this and by January 20, 2014, he removed Worthington from his internal analyses. Further, by the time the 2013 Form 10-K was filed, Woodard's internal analyses treated Sumter as a replacement for the proposed Worthington CHP project, though Sumter was a materially smaller and less valuable project. The October 2013 DCF did not reflect the expected cash flows on the proposed Sumter CHP project. Despite knowing these additional flaws, Woodard made no adjustments to capture these developments in his valuation analysis, which he knew Blue Earth used to support its year-end 2013 financial statements.

120. Given that Woodard knew his October 2013 DCF was based upon facts that did not exist, an intentionally manipulated discount rate, missing expenses, and assumptions about a future business that were aspirational, he did not honestly believe the $44 million figure reflected an accurate valuation of the seven initial CHP projects or Blue Earth's reported Construction in Progress asset. For the same reasons, the $44 million asset valuation was objectively false.

121. Further, the falsely valued $44 million asset was accompanied, in Note 12 to Blue Earth's financial statements in the 2013 Form 10-K and its amendments, by false factual assertions that the asset represented the value of "7 co-generation projects" that Blue Earth "purchased in the acquisition of IPS and GREG." It was accompanied in Note 13 to the second amended Form 10-K, filed with the SEC on May 1, 2014, by additional false assertions that the asset represented the

value of "co-generation contracts [that] provide that the Company will sell electricity and steam to the meat processing plants connected to the co-generation plants and will sell the excess electricity to the electrical utility adjacent to the property." Woodard knew when he signed and certified the 2013 Form 10-K and its amendments that Blue Earth did not acquire seven CHP projects at the time of acquisition and that it did not have contracts to develop, build, or operate even one project at the time he made this representation to investors.

122. Alternatively, the $44 million valuation was materially misleading to investors as it omitted to inform investors that: (i) Blue Earth did not acquire CHP projects when it purchased IPS and GREG, (ii) Blue Earth did not have contracts of any type that allowed it to proceed with the development, construction, or operation of CHP plants for the meat processing company, (iii) Woodard's October 2013 DCF did not consider the risk that the proposed projects would never go under contract, (iv) two of the seven supposed CHP projects (Live Oak and Worthington) had already been deemed not feasible, and (v) a supposed substitute CHP project (Sumter), which was much smaller, was not included in Woodard's analysis. Woodard knew these facts, which formed the basis of his calculations, were inconsistent with the $44 million value that he derived, and their omission from the 2013 Form 10-K and its amendments misled investors as to the true value of Blue Earth's assets.

**2. <u>The 2014 Form 10-K's Materially Inflated CIP Asset</u>**

123. In its 2014 Form 10-K, filed with the SEC on March 16, 2015, Blue Earth again materially misstated the largest asset on its balance sheet, a $56,022,580 ("$56 million") asset labelled "Construction in Progress–Internal," which Blue Earth reported as part of "Property and Equipment." This asset represented more than 50% of Blue Earth's total assets at year-end 2014. It was comprised, in part, of the previously-reported $44 million Construction in Progress asset, which Blue Earth maintained as a separate entry in its books and records and, in part, of expenses purportedly incurred in connection with the initial seven supposed CHP projects.

124. Blue Earth inflated the value of its Construction in Progress–Internal asset by at least 125%. It concluded that none of the components of that asset needed to be impaired, despite

negative developments in its relationship with the meat processing company and in Blue Earth's ability to finance projects. Information concerning this asset was material to investors in deciding whether to invest in Blue Earth stock because it suggested that the business venture was intact and Blue Earth had moved closer to generating the revenues it previously had projected for seven initial CHP projects.

125. Pursuant to GAAP, Accounting Standards Codification 350—*Intangibles—Goodwill and Others* ("ASC 350"), given that the $44 million component of the Construction in Progress–Internal asset was an intangible of an indefinite life, Blue Earth was required to evaluate the $44 million component for possible impairment (i) annually or (ii) upon the occurrence of an event or circumstance suggesting the asset's carrying value exceeds its fair value. A company must impair the asset, by reducing the asset's carrying value to its fair value and charging the difference as an expense to the income statement, if the carrying value exceeds its fair value, which may be determined using a discounted cash flow analysis.

126. Blue Earth's obligation to conduct an impairment analysis on the $44 million component of the Construction in Progress–Internal asset was triggered, at the latest, by October 29, 2014. By then, the meat processing company had notified Blue Earth's board of directors of material changes to and new conditions of the companies' relationship, which materially increased the risk that contracts would not be signed for more than one or two CHP plants. Also, by then, Blue Earth was in arrears on the progress payments relating to the generator and other equipment for Alberta, which was still the only site under contract, and therefore Blue Earth's prospects for generating the revenues previously estimated for the Alberta Facility were diminished.

127. Despite these material developments, when Blue Earth conducted an impairment evaluation on the $44 million component of the Construction in Progress–Internal asset for year-end 2014, Woodard insisted that Blue Earth continue to rely on his materially flawed October 2013 DCF – without any updates – as support for the conclusion that such component continued to have a fair value of $44 million. Woodard further insisted that Blue Earth need not impair the Construction in Progress–Internal asset as of year-end 2014.

128. Woodard knew that, for all of the same reasons the October 2013 DCF did not provide an accurate assessment of the value of Blue Earth's $44 million Construction in Progress asset at year-end 2013, it did not provide an accurate assessment of the value of the $44 million component of Blue Earth's $56 million Construction in Progress–Internal asset at year-end 2014.

129. By March 16, 2015, the date on which Woodard signed and certified the 2014 Form 10-K, Woodard knew that the October 2013 DCF did not support the value assigned to the $44 million component of Blue Earth's Construction in Progress–Internal asset because he had made no adjustments to account for, among other things, the facts that: (i) only two projects (Alberta and Sumter) were then under contract; (ii) the expected cash flows for the Sumter project were still not reflected in any way in the October 2013 DCF; (iii) the risk that the Alberta project would not be completed and the expected cash flows would not be realized had increased materially since 2013 because Blue Earth had not made the required payments on the generator and other equipment ordered for Alberta, and the manufacturers were refusing to ship the equipment or had stopped the manufacturing process entirely; and (iv) the meat processing company made clear that there would be no negotiations in the foreseeable future for six of the projects reflected in the October 2013 DCF, which materially increased the risk that contracts would never be signed for and revenue would never be generated from six of the projects in the October 2013 DCF.

130. Woodard also knew that his October 2013 DCF assumed that construction on all seven proposed CHP projects would proceed concurrently and that all projects would be commenced and completed within a 20-month period. But, by no later than October 2014, Woodard knew that Blue Earth could not realistically construct seven CHP plants, much less simultaneously, or within such a compressed period of time due to its then-current liquidity problems and the difficulty of raising capital without signed contracts. Woodard made no adjustments to his October 2013 DCF to account for this change and the increased risk that Blue Earth could not survive financially long enough to complete construction on more than one of the two CHP plants then under contract.

131. Given that Woodard knew his October 2013 DCF did not take into account the then-current risks that the projects would not go under contract and the expected cash flows would not be realized, and it continued to assume facts that still did not exist, Woodard did not honestly believe that $56 million was an accurate value for Blue Earth's Construction in Progress–Internal asset when he signed and certified the 2014 Form 10-K. Further, based upon his knowledge, Woodard did not honestly believe that the Construction in Progress–Internal asset did not need to be impaired as of year-end 2014. For the same reasons, the $56 million value attributed to the Construction in Progress–Internal asset was materially overstated and objectively false.

132. Further, Woodard knew that, when Blue Earth reported an unimpaired $56 million Construction in Progress asset in the 2014 Form 10-K, based on his October 2013 DCF, the disclosure was accompanied by false facts that misled investors about the nature and valuation of the asset. In Note 12 to its financial statements, Blue Earth falsely asserted that the $44 million portion of this asset related to "7 co-generation projects in the United States and Canada" that were "purchased in the acquisition of [IPS and GREG]." In Note 16, Blue Earth falsely suggested that all seven previously-disclosed projects existed, and that the acquisition shares used to acquire the projects would start to be released, pro rata, "upon the commercial operation date of each Initial Project." Woodard signed and certified this disclosure even though he knew that Blue Earth had not acquired seven CHP projects at the time of the acquisition and that, by March 2015, it had two and only two projects under contract, with low prospects for more.

133. Alternatively, the $56 million unimpaired Construction in Progress asset reported in Blue Earth's 2014 Form 10-K, based on Woodard's flawed October 2013 DCF, was materially overstated and misleading because Blue Earth not only continue to omit to disclose the material facts that were known to Woodard as of March 3, 2014, but it also omitted to inform investors that: (i) on October 29, 2014, the meat processing company effectively limited for the foreseeable future the number of CHP projects to one or two (Alberta and Sumter) and (ii) Blue Earth had not succeeded in raising financing needed to complete more than one of those two projects, and was having liquidity issues and in default on the Alberta generator. Woodard knew these facts, that

formed the basis of his calculation, were inconsistent with the $56 million value that he disclosed, and their omission from the 2014 Form 10-K misled investors as to the true value of Blue Earth's assets.

### I. Thomas Failed To Comply With The Reporting Requirements For Blue Earth Securities Transactions In His Personal Accounts And Accounts For Which He Was A Beneficial Owner

134. Blue Earth had a class of securities registered with the SEC from at least February 27, 2014 through September 1, 2015 (the "Section 16 Period").

135. During the Section 16 Period, Thomas was subject to the reporting requirements of Section 16(a). Thomas was the CEO of Blue Earth and a member of its Board of Directors.

136. During the Section 16 Period, Thomas was a beneficial owner of Blue Earth securities held by his wife, an immediate family member who shared the same household. Thomas was required to report his wife's transactions in Blue Earth securities on SEC Form 4 (Statement of Changes of Beneficial Ownership of Securities) ("Form 4"). Thomas's wife had 97 transactions on 70 different trading days during the Section 16 Period.

137. During the Section 16 Period, Thomas was also a beneficial owner of Blue Earth securities held by Manzano Limited Partnership ("Manzano"). Thomas owned and controlled Estancia, LLC, the general partner of Manzano. Thomas was required to report his proportional beneficial interest in Manzano's transactions in Blue Earth securities on Form 4. Manzano had 92 transactions on 75 different trading days during the Section 16 Period. Thomas did not report any of Manzano's transactions on Form 4.

138. During the Section 16 Period, Thomas was also required to report on Form 4 transactions in Blue Earth securities made in his personal trading accounts, and the trading accounts of JRT Trust, over which he had investment control and of which he was a beneficiary. Thomas and JRT Trust, collectively, had 18 transactions in Blue Earth securities on seven trading days during the Section 16 Period. He filed Forms 4 covering transactions occurring only on four of those seven days:

| Form 4 Filed | Transaction Date and Description | Account Holder |
|---|---|---|
| January 3, 2014 | 1/1/2014 acquisition of 250,000 warrants pursuant to an award by the Blue Earth board of directors in connection with various services and performance thresholds | Thomas |
| June 11, 2014 | 6/11/2014 acquisition of 10,000 warrants, exercise of 10,000 warrants and purchase of 10,000 shares of common stock for $2.50 per share | Thomas |
| August 21, 2014 | 8/19/2014 exercise of 1,045,000 warrants and receipt of 1,045,000 shares of Blue Earth common stock for $0.01 per share. | JRT Trust |
| January 2, 2015 | 12/30/2014 exercise of 87,000 warrants and receipt of 87,000 shares of Blue Earth common stock upon conversion | JRT Trust |

139. Thomas did not file any Forms 5 (Annual Statement of Changes in Beneficial Ownership of Securities) ("Form 5") for 2013, 2014 or 2015.

140. Transactions during the Section 16 Period that Thomas was required to report on Forms 4 or 5, but did not, included sales of Blue Earth common stock, which generated gross proceeds of at least $1,334,176.

## COUNT I

### Fraud in Violation of Exchange Act Section 10(b) and Rule 10b-5(b)
### (Against Thomas, Woodard, and Potts)

141. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

142. Thomas, Woodard, and Potts directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, intentionally, knowingly or recklessly made untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of any security.

143. By reason of the foregoing, Thomas, Woodard, and Potts violated, and, unless restrained and enjoined, will continue to violate Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5(b) [17 C.F.R. § 240.10b-5(b)].

## COUNT II

**Aiding and Abetting Blue Earth's Violation of Exchange Act Section 10(b) and Rule 10b-5(b) (Against Thomas, Woodard, Potts, and Francis)**

144. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

145. Blue Earth directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, intentionally, knowingly or recklessly made untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of securities. Thomas, Woodard, Potts, and Francis each knew, or was reckless in not knowing, that Blue Earth committed this violation.

146. By reason of the foregoing, Thomas, Woodard, Potts, and Francis each knew, or was reckless in not knowing, that he provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)], and Rule 10b-5(b) [17 C.F.R. § 240.10b-5(b)], and, unless restrained and enjoined, will continue to aid and abet violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5(b) [17 C.F.R. § 240.10b-5(b)]. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Thomas, Francis, Woodard, and Potts are liable for those violations.

## COUNT III

**Aiding and Abetting Thomas's Violation of Exchange Act Section 10(b) and Rule 10b-5(b) (Against Francis)**

147. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

148. Thomas directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, intentionally, knowingly or recklessly made untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of securities. Francis knew, or was reckless in not knowing, that Thomas committed this violation.

149. By reason of the foregoing, Francis knowingly or recklessly provided substantial assistance to and thereby aided and abetted Thomas's violation of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)], and Rule 10b-5(b) [17 C.F.R. § 240.10b-5(b)], and, unless restrained and enjoined, will continue to aid and abet violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)], and Rule 10b-5(b) [17 C.F.R. § 240.10b-5(b)]. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Francis is liable for those violations.

## COUNT IV

### Aiding and Abetting Blue Earth's Violation of Securities Act Section 17(a)(2)
### (Against Thomas, Francis, Woodard, and Potts)

150. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

151. Blue Earth, in the offer or sale of securities, by use of any means or instruments of transportation or communication in interstate commerce or of the mails, directly or indirectly, intentionally, knowingly, or recklessly, obtained money or property by means of untrue statements of material fact or omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Thomas, Francis, Woodard, and Potts each knew, or was reckless in not knowing, that Blue Earth committed this violation.

152. By reason of the foregoing, Thomas, Francis, Woodard, and Potts each knowingly or recklessly provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Securities Act Section 17(a)(2) [15 U.S.C. § 77q(a)(2)] and, unless restrained and enjoined, will continue to aid and abet violations of Securities Act Section 17(a)(2) [15 U.S.C. § 77q(a)(2)]. Accordingly, pursuant to Securities Act Section 15(b) [15 U.S.C. § 77o(b)], Thomas, Francis, Woodard, and Potts are liable for those violations.

## COUNT V

### Violation of Exchange Act Section 13(b)(5) and Rule 13b2-1
### (Against Woodard)

153. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

154. Woodard knowingly falsified or caused to be falsified books, records, or accounts required to be maintained by Blue Earth pursuant to Exchange Act Section 13(b)(2)(A) [15 U.S.C. § 78m(b)(2)(A)].

155. By reason of the foregoing, Woodard violated and, unless restrained and enjoined, will continue to violate Exchange Act Section 13(b)(5) [15 U.S.C. § 78m(b)(5)] and Rule 13b2-1 [17 C.F.R. § 240.13b2-1].

## COUNT VI

### Aiding and Abetting Blue Earth's Violation of Exchange Act Section 13(b)(2)(A) (Against Woodard)

156. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

157. Blue Earth, whose securities were registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected the transactions and dispositions of its assets.

158. By reason of the foregoing, Woodard knowingly or recklessly provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Exchange Act Sections 13(b)(2)(A) [15 U.S.C. §§ 78m(b)(2)(A)], and unless restrained and enjoined, will continue to aid and abet violations of Exchange Act Section 13(b)(2)(A) [15 U.S.C. §§ 78m(b)(2)(A)]. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Woodard is liable for those violations.

## COUNT VII

### Violation of Exchange Act Rule 13a-14 (Against Thomas and Woodard)

159. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

160. Thomas and Woodard each certified, pursuant to SOX Section 302 [15 U.S.C. § 7241] that, based upon his knowledge, Blue Earth's quarterly and annual reports did not contain any material misstatements or omissions, disclosed all significant deficiencies in internal controls, and fairly presented in all material respects the issuer's financial condition and results of operations. Thomas and Woodard each knew, or should have known, his certifications were false.

161. By reason of the foregoing, Thomas and Woodard violated, and, unless restrained and enjoined, will continue to violate Exchange Act Rule 13a-14 [17 C.F.R. § 240.13a-14].

## COUNT VIII

**Aiding and Abetting Blue Earth's Violation of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder**
**(Thomas and Francis–All; Woodard—Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 only; Potts–Section 13(a) and Rules 12b-20 and 13a-1 only)**

162. The SEC repeats and realleges Paragraphs 1 through 133 of its Complaint.

163. Blue Earth failed to file current, annual, and quarterly reports with the SEC that were true and correct, and failed to include material information in its statements and reports as was necessary to make the required statements made, in light of the circumstances under which they were made, not misleading.

164. By reason of the foregoing, Thomas and Francis each knowingly or recklessly provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Exchange Act Section 13(a) [15 U.S.C. §§ 78m(a)] and Rules 12b-20 and 13a-1, 13a-11, and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13], and, unless restrained and enjoined, will continue to aid and abet violations of these provisions. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Thomas and Francis are liable for those violations.

165. By reason of the foregoing, Woodard knowingly or recklessly provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Exchange Act Section 13(a) [15 U.S.C. §§ 78m(a)] and Rules 12b-20, 13a-1, and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13], and, unless restrained and enjoined, will continue to aid and abet violations of these provisions. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Woodard is liable for those violations.

166. By reason of the foregoing, Potts knowingly or recklessly provided substantial assistance to and thereby aided and abetted Blue Earth's violations of Exchange Act Section 13(a) [15 U.S.C. §§ 78m(a)] and Rules 12b-20 and 13a-1 [17 C.F.R. §§ 240.12b-20, 240.13a-1], and,

unless restrained and enjoined, will continue to aid and abet violations of such provisions. Accordingly, pursuant to Exchange Act Section 20(e) [15 U.S.C. § 78t(e)], Potts is liable for those violations.

## COUNT IX

### Violation of Exchange Act Section 16(a) and Rule 16a-3 thereunder (Against Thomas)

167. The SEC repeats and realleges Paragraphs 1 through 3, 10, and 134 through 140 of its Complaint.

168. Thomas failed to file required reports with the SEC, as an officer or director of Blue Earth, disclosing transactions resulting in a change in his beneficial ownership of Blue Earth common stock within two business days of each transaction being executed on Form 4 and to file annual statements reporting transactions that were not previously reported on Form 5.

169. By reason of the foregoing, Thomas violated, and, unless restrained and enjoined, will continue to violate Exchange Act Section 16(a) [15 U.S.C. § 78p(a)] and Rule 16a-3 [17 C.F.R. § 240.16a-3].

## PRAYER FOR RELIEF

**WHEREFORE**, the SEC respectfully requests this Court enter an Order:

**I.**

Permanently restraining and enjoining each defendant, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, and each of them, from directly or indirectly violating each provision of the federal securities laws with which each is charged as having violated, or aided and abetted the violation of, in this Complaint.

**II.**

Directing each defendant to pay appropriate civil money penalties pursuant to Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d) [15 U.S.C. § 78u(d)], based on the acts or courses of conduct alleged in this Complaint occurring on or after February 27, 2014.

**III.**

Permanently barring each defendant from participating in any future offering of a penny stock, pursuant to Securities Act Section 20(g) [15 U.S.C. § 77t(g)] and Exchange Act Section 21(d)(6) [15 U.S.C. § 78u(d)(6)].

**IV.**

Permanently barring each defendant from acting as an officer or director of any issuer that has a class of securities registered pursuant to Exchange Act Section 12 or that is required to file reports pursuant to Exchange Act Section 15(d), pursuant to Exchange Act Section 21(d)(2) [15 U.S.C. § 78u(d)(2)].

**V.**

Granting such other and further relief as may be necessary and appropriate.

**JURY DEMAND**

The SEC hereby demands a trial by jury, pursuant to Rule 38 of the Federal Rules of Civil Procedure, on all issues and claims so triable.

Respectfully submitted,

Dated: June 28, 2019
Washington, DC

SECURITIES AND EXCHANGE COMMISSION

By: */s/ Suzanne J. Romajas*

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