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**Alterra, LLC, a Utah Limited Liability Company, Plaintiff/ Appellee,
vs. Jeffrey Larson, an Rndividual, Defendant/ Appellant.**

Utah Court of Appeals

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UTAH COURT OF APPEALS
STATE OF UTAH

ALTERRA, LLC, a Utah limited liability
company,

Plaintiff/Appellee,

vs.

JEFFREY LARSON, an individual,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20150223-CA

Civil No. 150400116 CN

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
Honorable Judge Samuel McVey

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Pursuant to Utah Rule of Appellate Procedure 24, Appellant Jeffrey Larson respectfully submits this Reply Brief in support of his appeal from the May 19, 2015, Order of the trial court granting Alterra a preliminary injunction, R. 580-573.

ARGUMENT

Mr. Larson showed in his opening brief that the trial court erred in granting a preliminary injunction, an “extraordinary,” “equitable” remedy, not “lightly granted.” *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). Alterra provides nothing to genuinely refute that the trial court erred.

I. Mr. Larson Is Appealing the Trial Court’s Legal Conclusions.

In his opening brief, Mr. Larson demonstrated that he is appealing the trial court’s numerous legal errors, culminating in its erroneous conclusion that Alterra was entitled to the “extraordinary remedy” of a preliminary injunction. Alterra cannot really dispute that the trial court made repeated legal errors. So it argues that Mr. Larson is actually appealing the trial court’s finding of facts. (Appellee Br. at 1, 23.) Relatedly, Alterra repeatedly asserts that Mr. Larson failed to marshal the evidence supporting the trial court’s findings of facts, and his appeal should therefore be dismissed.¹ Alterra is wrong. Mr. Larson is challenging the trial court’s legal conclusion that Alterra was entitled to the “extraordinary remedy” of a preliminary injunction, which itself was the culmination of the numerous other legal errors.

¹ Appellee’s Br. at 18, 19, 20, 22-23, 29, 42, 44, 48, 49. Alterra’s Statement of Facts is paragraph after paragraph of testimony from Alterra’s witnesses that it contends supports the Order. (*Id.* at 5-10, ¶¶ 1-23; at 12-16, ¶¶ 27-52, 54.)

To briefly recap, In August 2014, Mr. Larson signed an integrated Regional Sales Manager/ Direct Seller Agreement (the “2015 Agreement,”) (R.1), drafted by Alterra, a pest-control company. The 2015 Agreement constituted the terms of service Mr. Larson was to provide for Alterra’s 2015 summer sales program, which ran from April to August 2015. Although Mr. Larson was responsible for recruiting for Alterra’s 2015 summer sales program beginning in the fall of 2014, he was only to be compensated based on the sales by him and those in his “downline” during the summer of 2015. The parties modified the 2015 Agreement’s definition of “Confidential Information” in a “December 2014 Addendum,” also drafted by Alterra. (R.652.) In January 2015, after Mr. Larson recruited for Alterra for months for the summer of 2015 without compensation, he left to accept employment with a company that sells security services. Alterra immediately sued for *inter alia* breach of the 2015 Agreement of misappropriation of trade secrets under the Uniform Trade Secrets Act (the “UTSA”), Utah Code sections 13-24-1 to -9. The trial issued the preliminary injunction in February, ruling that Alterra was entitled to the injunction under both theories.

In particular, Mr. Larson is appealing (i) the trial court’s interpretation of the 2015 Agreement, as modified by the December 2014 Addendum; and (ii) the trial court’s interpretation of the UTSA. Both are *legal* questions.² As Alterra acknowledges, marshalling the evidence is only required when a party is challenging *factual* findings.

²*Desert Power, LP v. Public Service Comm’n*, 2007 UT App 374, ¶ 12, 173 P.3d 218 (“An ‘interpretation of a contract presents a question of law[.]’” (*Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134); *LPI Serv. v. Labor Comm’n*, 2007 UT App 375, ¶ 7, 173 P.3d 858 (“Question of statutory construction are matters of law . . .”).

(Appellee's Br. at 22.) Appellate courts defer to trial courts on findings of fact *if* the trial court uses the appropriate legal standard, because the finder of fact can evaluate the credibility of witnesses, which a written transcript alone cannot reveal.³ But if a trial court misapplies the law to the facts, there is no such deference, and the trial court's legal conclusions are reviewed de novo.⁴

Even if Alterra were correct that Mr. Larson is appealing the trial court's factual findings, the standard of review would not be, as Alterra suggests, the same abuse of discretion standard applied after a full trial on the merits. Preliminary injunctions are court orders barring defendants from doing something they would otherwise be legally entitled to do, which is why a preliminary injunction is an extraordinary, equitable remedy. Consequently, a trial court's "*discretion must be exercised consistently with sound equitable principles, 'taking into account all the facts and circumstances of the case'.*"⁵ Alterra's preliminary injunction interferes with Mr. Larson's fundamental right

³ E.g., *Brown v. Babbitt*, 2015 UT App 161, ¶¶ 6-7, 353 P.3d 1262 (fact finder's role is to assess credibility and weigh evidence).

⁴ E.g., *State v. Barela*, 2015 UT 22, ¶ 17, 349 P.3d 676, 680, *reh'g denied* (May 21, 2015) ("We . . . yield[] deference to the jury's determination of the sufficiency of the evidence but address[] the legal questions . . . de novo.") (footnotes omitted); *Desert Power, LP*, 2007 UT App 374, ¶ 12 ("[W]hen reviewing an application or interpretation of law[,] we use a correction of error standard, giving no deference to [the trial court's] interpretation[.]" (quoting *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 824 (Utah 1992))).

⁵ *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 90 (Utah 1992) (citations omitted; emphasis added).

to earn a living,⁶ by barring him from recruiting people he knows, by all accounts the most effective method for recruiting door-to-door salespeople. (R.813, Feb 11, 2015, Hr'g, 42:18-43:3.) Mr. Larson's appeal is on legal grounds, but the trial court's interpretation of the 2015 Agreement and UTSA suggests that it failed to properly consider the equitable considerations arising from interfering with Mr. Larson's livelihood.

II. The Trial Court Erred in Granting the Injunction.

A. Likelihood of Success.

Under Utah Rule of Civil Procedure 65A(e)(4), a plaintiff seeking a preliminary injunction must show “a substantial likelihood that [it] will prevail on the merits . . . , or the case presents serious issues on the merits.” To make the “likelihood” showing requires “a prima facie showing that the elements of its underlying claim can be proved.”⁷ However, the trial court was unaware of the “prima facie” test (Appellant's Br. at 19 (citing R.814, Feb 12, 2015, Hr'g, 160:16-19), and thus did not apply it. That was error.

⁶ Utah Code § 34-34-2 (Utah public policy is that “the right to live includes the right to work”).

⁷ *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶¶ 8-15, 974 P.2d 821 (Utah 1999) (reversing grant of preliminary injunction on trade secrets claim where plaintiff did not make prima facie case)); *see also, e.g.*, 43A C.J.S. Injunctions § 55 (updated 2015) (petitioner for preliminary injunction must make a prima facie case). Tellingly, Alterra utterly ignores the “prima facie” test.

i. **Alterra Cannot Meet the “Prima Facie” Test on Its Breach of Contract Claim.**

Alterra cannot meet the “prima facie” on its breach of contract claim for the following reasons:

1. *Alterra only barred Mr. Larson from recruiting Alterra’s independent contractors for a company that “provide[s] services of the type offered by Alterra,” i.e., pest-control services, in subparagraph 13(ii) of the 2015 Agreement.* The trial court recognized it had the responsibility to interpret the 2015 Agreement, including subparagraph 13(ii).⁸ A court enforces an unambiguous contract “according to its terms.” *Brodkin v. Tuhaye Golf, LLC*, 2015 UT App 165, ¶ 18, 355 P.3d 224. The trial court did not find the term “services of the type offered by Alterra” ambiguous; it simply ignored it. The trial court thus failed to follow the fundamental precept that in interpreting contracts, *all* provisions must be considered, with none ignored.⁹ Mr. Larson’s employer sells security services, not pest-control services like Alterra. (Appellee’s Br. at 5, ¶ 1.) Therefore, the trial court erred in concluding Mr. Larson is barred from recruiting Alterra’s contractor salespeople to work for his new company.

Alterra acknowledges that courts must give effect to all terms. (*Id.* at 24-25.) Yet, tellingly, other than quoting the “services of the type” language, Alterra (similar to the trial court) otherwise ignores it. (Appellee’s Br. at 11, 26.) The trial court did not find

⁸ R.813, Tr. Day 1 156:22-25.); *Desert Power, LP*, 2007 UT App 374, at ¶ 12 (contract interpretation is a question of law).

⁹ *E & H Land, Ltd. v. Farmington City*, 2014 UT App 237, ¶ 13, 336 P.3d 1077 (citation omitted), *quoted in* Appellee’s Br. at 24-25.

Alterra’s “services of the type” language ambiguous, but Alterra hints several times that it may be.¹⁰ But Alterra’s suggestions that subparagraph 13(ii) *may* be ambiguous are insufficient. Alterra would have to offer a reasonable interpretation—but cannot—that the language barring Mr. Larson from recruiting Alterra independent contractors to sell for a company that “provide[s] services of the type offered by Alterra” bars him from recruiting for a company that sells security systems.

Additionally, Alterra argues that the trial court did not improperly rely on Alterra’s parol evidence in interpreting the 2015 Agreement, including the “services of the type offered by Alterra” provision. (Appellee’s Br. at 28.) But the trial court did rely on such testimony. For example, the trial court “found” in paragraph 23 of the Order that *“Plaintiff has goodwill between it and its clients[,] which clients include not only [its] customers . . . , but [its] independent contractors.”* (R.577-76 ¶ 23 (emphasis added).¹¹) Even if Alterra’s “goodwill” with its salespeople were protectable (*see* § II.A.i.3.b), *nothing* in the 2015 Agreement supports the trial court’s *legal* conclusion that Alterra’s

¹⁰ Appellee’s Br. at 25 (“Provisions which may seem ambiguous can become clear when ‘considered in the context of the entire document.’”); at 27 (“Even if there is some ambiguity, Alterra has [met the likelihood prong]”); at 28 (“Thus, if there is ambiguity, the evidence supports the district court’s conclusion. . . .”).

¹¹ Similarly, paragraph 5 of the Order states: “The parties . . . subsequently exchanged services for money [under the 2015 Agreement].” Mr. Larson disputes that he received anything for the recruiting he did for Alterra in the fall of 2014, so the trial court must have relied on Alterra’s witnesses. (R.579.)

contractor-salespeople are its “clients.” Instead, the trial court improperly relied on testimony from Alterra’s witnesses, which was plain error.¹²

2. *Alterra Modified the 2015 Agreement’s Definition of Confidential Information in the December 2014 Addendum.* Alterra modified the definition of “confidential information” in the 2015 Agreement, signed by the parties in August 2014, when the parties signed the December 2014 Addendum. (Appellant’s Br. at 22-24.) In particular, Alterra narrowed the definition of “confidential information” by changing the terms to omit the identity and contact information of Alterra’s independent contractor salespeople. (Cf. R.652 ¶ 1 with R.2 ¶ 14.) Alterra also narrowed the 2015 Agreement by providing that information Mr. Larson already knew in December 2014, that is in the public domain, or he received from a third party who was free to disclose it is *not* confidential. (R.652 ¶ 2.) It is black-letter law that language in a new agreement between parties, including a modification, supersedes contrary language in an earlier agreement.¹³

Alterra argues Mr. Larson inadequately briefed modification. (Appellee’s Br. at 29-30.) But while Alterra asserts in one breath that Mr. Larson provided no legal authority regarding modification, it acknowledges in the next that he did. (*Id.*) Alterra also baldly asserts that Mr. Larson “provides no contractual provision that was

¹² *E & H Land, Ltd.*, 2014 UT App 237, at ¶¶ 12-13, *cert. denied sub nom. E & H v. Farmington* (Utah Feb. 11, 2015) (parol evidence of a party’s intent is only admissible if the contract is facially ambiguous or has a latent ambiguity.) Alterra does not argue facial or latent ambiguity.

¹³ Appellant’s Br. at 22-24 & n.8 (citing *Harris v. IES Assocs., Inc.*, 2003 UT App 112, ¶ 46, 69 P.3d 297; *Rapp v. Mountain States Tel. & Tel. Co.*, 606 P.2d 1189, 1191 (Utah 1980); *Ward v. IHC Health Servs., Inc.*, 2007 UT App 362, ¶ 8, 173 P.3d 186).

supposedly modified or superseded.” (*Id.*) Yet Mr. Larson has provided the provision: In the December 2014 Addendum, Alterra modified the definition of “confidential information” in paragraph 14 of the 2015 Agreement, both as to what is *and* what is *not* confidential information. (Appellant’s Br. at 22-24.)

In sum, Alterra cannot dispute its definition of “Confidential Information” in the December 2014 Addendum is substantively different in certain key ways from its definition in the 2015 Agreement. It also cannot dispute the parties signed the December 2014 Addendum months after they signed the 2015 Agreement. Consequently, Alterra wants this Court, like the trial court, to disregard that Alterra modified the definition of “confidential information” in the 2015 Agreement in December 2014.¹⁴ This Court, however, should not ignore the trial court’s error.

3. *The Trial Court Erred in Analyzing the Unenforceable Restrictive Covenants in the 2015 Agreement.* Alterra’s restrictive covenants are unenforceable restrictions on competition and the right to earn a living. Utah public policy “favors free competition,” and therefore *all* “covenants restricting competition are disfavored.” *Cordell v. Berger*, No. 2:01-CV-71 OC, 2001 WL 1516742,*5 (D. Utah Nov. 27, 2001). Accordingly, “*restrictive covenants are not favored in the law and are strictly construed*

¹⁴ Alterra contends that the 2015 Agreement and December 2014 Addendum are not referring to the same type of information. (Appellee’s Br. at 33-34.) But both documents reference such things as training materials and products. Furthermore, Alterra provided in paragraph 2 of the December 2014 Addendum that certain information it defined in the 2014 Agreement as confidential was *not* confidential under the December 2014 Addendum, signed months later. There is no reasonable interpretation of the two agreements whereby information Alterra agreed in December 2014 is *not* confidential is nevertheless now confidential, because the parties had earlier agreed it was.

in favor of the free and unrestricted use of property.” St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194, 198 (Utah 1991) (emphasis added). In particular, *restrictive covenants “primarily designed to limit competition or restrain the right to engage in a common calling,” such as a sales person, “are not enforceable.” Robbins v. Findlay*, 645 P.2d 623, 627 (Utah 1982) (emphasis added).¹⁵ Applying that rule here, the restrictive covenants in the 2015 Agreement are unenforceable:

a. The trial court erred when it rewrote the 2015 Agreement to include the term “clients.” The trial court erred when it concluded that Alterra has “goodwill” with its independent contractor salespeople. (R.577-76 ¶ 23.) The trial court rewrote the unambiguous language of subparagraphs 13(i), regarding soliciting Alterra customers, and 13(ii), regarding soliciting its contractor salespeople, of the 2015 Agreement to include “clients,” a term not in the 2015 Agreement. If Alterra wanted subparagraphs 13(i) and 13(ii) to mirror each other regarding what Mr. Larson is barred from doing in his common calling, it should have drafted them to reflect that. It was not the trial court’s place to do so: [A] court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself. *Ted R. Brown and Assocs. v. Carnes Corp.*, 753 P.2d 964, 970

¹⁵ See also *Lazer Inc. v. Kesselring*, 823 N.Y.S.2d 834, 839 (N.Y. Sup. Ct. 2005) (holding restrictive covenant barring former employee from soliciting former co-employees unenforceable, because the purpose was not to protect employer from unfair competition); *Nat’l Employment Serv. Corp. v. Olsten Staffing Serv., Inc.*, 761 A.2d 401, 405 (N.H. 2000) (“the mere cost associated with recruiting and hiring employees is not a legitimate interest protectable by a restrictive covenant in an employment contract”).

(Utah Ct. App.1988). That is especially true here, where the disfavored restrictive covenants are construed against Alterra.

Alterra puzzlingly argues that Mr. Larson “accuse[s]” the trial court of rewriting the 2015 Agreement to include “clients” “without identifying where in the 2015 Agreement the district court supposedly made this change.” (Appellee’s Br. at 39.) To repeat: The trial court rewrote paragraph 13 to add “clients.” The trial court seemingly wanted to enjoin Mr. Larson from recruiting Alterra contractors for any company that sells its services using door-to-door sales people, despite subparagraph 13(ii). But, again, a court may not rewrite an agreement because one party does not like the terms it agreed to.

b. The trial court also erred in concluding that Alterra has legally protectable goodwill with its independent contractors. Utah law is clear: The only interest that a business may protect in disfavored restrictive covenants is its goodwill with its *customers*:

Goodwill is the advantage . . . acquired by an establishment, *beyond the mere value of the capital, stocks, funds or property employed therein*, in consequence of the general patronage . . . it receives from . . . habitual *customers* on account of its location, or local position or reputation for quality, skill, integrity or punctuality. . . It is the probability that old *customers* will resort to the old place or seek old friends, and the likelihood of new *customers* being attracted to well advertised and favorably known services or goods.¹⁶

¹⁶ *Peterson v. Jackson*, 2011 UT App 113, ¶ 35, 253 P.3d 1096 (quoting *Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966)); see also *TruGreen Companies, LLC v. Mower Bros., Inc.*, 2008 UT 81, ¶ 11, 199 P.3d 929 (restrictive covenants interfering with a person’s right to make a living are enforceable only if “necessary to protect . . . good will”); *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 827-28 (Utah 1951) (holding a

Alterra's independent contractor *salespeople* are just that, people who sell *for* it, not customers it sells *to*. Alterra argues that the cases Mr. Larson cited do not state that the legal definition of "goodwill" does not exclude a company's relationship with its salespeople. (Appellee's Br. at 39 n.10.) But when something is defined by what it *is*—here, "goodwill" is defined as an asset related to *customers*—there is no need to also say what it is *not*.¹⁷

Alterra also argues that courts have found that a party's relationships with its independent contractors are a protectable interest, even if it is not called "goodwill." (*Id.* at 36-37.) However, Alterra cites no Utah cases in support, because there are none. The only federal case Alterra cites in which it appears that the court *might* have applied Utah law is *Neways Inc. v. Mower*, 543 F. Supp. 2d 1277 (D. Utah 2008). But the court there did not state it was applying Utah law and cited no law from *any* state. Furthermore, whether the restrictive covenant there improperly interfered with the right to earn a living by recruiting salespeople was not the issue.

According to Alterra, the *Neways* court "enforc[ed] a non-solicitation provision that prohibited soliciting current independent contractors." (Appellee's Br. at 36 (citing *Neways*, 543 F. Supp. 2d at 1287-88).) Alterra also asserts that the "non-solicitation provision in *Neways* . . . did not prohibit the defendants from soliciting distributors in

covenant not to compete is necessary for the protection of the goodwill of the business if the signer is likely to take customers from the employer if the signer leaves).

¹⁷ Alterra cites evidence it argues supports the trial court's finding that Alterra has a protectable interest. (Appellee's Br. at 37.) But Alterra misses the point: Mr. Larson is appealing the trial court's legal conclusion that Alterra *could have* a protectable interest.

their frontlines [i.e., from among those the defendants personally recruited and the defendants' immediate families], but the Court did not hold that this fact was determinative.” (*Id.* at 36 n.7.)

Alterra does not quite accurately describe *Neways*, where two separate agreements were at issue. One provided the signer was “not prohibited from recruiting his or her ‘personally enrolled downline Distributors [of the plaintiff] and immediate family members.’” 543 F. Supp. 2d at 1286. The other provided the signer would not recruit “*any* distributor” of the plaintiff’s, with no exception for the signer’s own recruits and family members *Id.* at 1288 (emphasis added). But the issue before the court on *both* agreements was whether to issue an injunction against the defendants—*regardless* of which agreement they signed—barring them from soliciting plaintiff’s contractors they either did not recruit personally or who were not family members. *Id.* at 1282, 1284 (the plaintiff “recognize[d] that the [defendants] were entitled to recruit their immediate family members, as well as those distributors whom they had personally sponsored into plaintiff”).

In other words, in *Neways*, the issue was whether a multi-level marketing company that essentially provided a downline to certain contractors could protect itself contractually from those contractors later recruiting that downline for another company. But those contractors were not barred from soliciting their own recruits and family members for another company. Here, Mr. Larson is enjoined from recruiting individuals he was personally responsible for recruiting, the very types of people excluded from the *Neways* injunction. Even if *Neways* controlled, nothing in it suggests that in Utah

anything other than goodwill with customers may be protected by a disfavored restrictive covenant.¹⁸

c. *A covenant not to solicit is analyzed the same as a covenant not to compete, and, furthermore, paragraph 13 of the 2015 Agreement is a covenant not to compete.* The trial court erred in concluding, with no explanation, that this case is a non-solicitation case and therefore is somehow inherently “different” from a non-compete case. (R.578 ¶ 16.) The trial court cited *TruGreen Cos. v. Mower Bros.*, but the court made no such distinction there. 2008 UT 81, ¶ 11, 199 P.3d 929 (“covenants not to compete . . . , disclose private information, *or* solicit the employer’s customers . . . are enforceable [if] . . . necessary to protect a company’s good will” (emphasis added)).

Alterra argues, based on *Neways* and cases from other states, that the trial court was correct that covenants not to compete and covenants not to solicit are fundamentally different. (Appellee’s Br. at 38-39.) But *Neways* (even if the court applied Utah law) is not controlling and readily distinguishable in any event. Moreover, states vary greatly in how they treat restrictive covenants that restrict competition. (See n.19.) Utah public policy is clear, however: *All* such restrictive covenants are disfavored and construed against the drafter, including covenants not to solicit.

Furthermore, even if the distinction between a covenant not to compete and a covenant not to solicit *might* have merit—and it does not under *TruGreen*—it would be

¹⁸ Alterra cites cases from other jurisdictions, but rules regarding restrictive covenants that interfere with the right to make a living vary greatly by state. See, e.g., Brian Malsberger, *Covenants Not to Compete: A State-by-State Survey* (9th ed. 2013). In Utah, the only legally protectable interest when restrictive covenants that interfere with the right to make a living are at stake is goodwill with customers.

irrelevant. Alterra argues that it is only attempting to enforce a non-solicit provision, not a non-compete. (Appellee's Br. at 38-39.) But Alterra made clear at the hearing that although it referred only subparagraph 13(ii) in its Complaint, its breach of contract claim is actually based on *all* of paragraph 13. (Appellant's Br. at 21-22.) But *Alterra plainly stated in paragraph 13 that it is a covenant not to compete*:

It is the intent of the parties that this Non-Solicitation & *Covenant not to Compete* Agreement precludes Representatives from interfering in Alterra's business in any way.¹⁹

Based on Alterra's argument that paragraph 13 must be read in its entirety, the trial court relied on subparagraph 13(i) and paragraph 13 generally no less than five times in the Order.²⁰ That includes in paragraph 14 of the Order (R.578), where the trial court concluded that the "express intent between the parties in paragraph 13 of the Agreement [is] that Defendant may not interfere with Alterra's business in any way."

In other words, *the trial court read around Alterra's plain statement in paragraph 13 of the 2015 Agreement that paragraph 13 is a covenant not to compete, even while it relied on the rest of the same sentence in granting Alterra its injunction.* That was plain error.²¹

¹⁹ Alterra argues that paragraph 13 is not a covenant not to compete, because that term is in the heading of paragraph 13, and is only for convenience. (Appellee's Br. at 38.) But Alterra stated in the *body* of paragraph 13 that it *is* a covenant not to compete.

²⁰ Paragraphs 2, 9, 10, 14, and 29 of the Order all reference either subparagraph 13(i) or paragraph 13 generally, or both. (R.579-577, 575 (quoted in Appellant's Br. at 4-6).)

²¹ Appellee's Br. at 28 n.5. Alterra also argues that subparagraph 13(i) is not a non-compete provision, because it does not include the term "non-compete." That is

d. *The Court should hold that the trial court erred in “blue-penciling” the overbroad term “future contractors” from paragraph 13 of the 2015 Agreement.* The trial court improperly “blue-penciled” the disfavored restrictive covenants—i.e., rewrote them—by deleting the facially overbroad provision in paragraph 13 that Mr. Larson may not recruit Alterra’s “future contractors.” (Appellant’s Br. at 29-32.) The trial court recognized that “future contractors” is facially overbroad, both because logically *anyone* is a potential Alterra contractor, and because Mr. Larson would essentially be barred from “recruiting returned missionaries, for example, and the Court believes that that would be too broad of a restriction on Defendant.” (R.574 ¶ 33.) But the trial court did not simply void the facially overbroad restrictive covenants, it wrote “future contractors” out of subparagraph 13(ii) when it granted Alterra’s injunction.

No Utah case has explicitly held that a court may not blue-pencil a facially-overbroad restrictive covenant that interferes with a person’s right to make a living. But if the Court were to allow such blue-penciling, it would severely undermine the policy disfavoring such covenants.²² The trial court rewrote what it recognized was facially overbroad Alterra’s restrictive covenant by deleting “future contractors” because it

irrelevant, because it is part of paragraph 13, which *is* a covenant not to compete. Furthermore, paragraph 13(i) is in part a covenant not to compete: “Representative will not . . . [i]nduce or attempt to induce, solicit or attempt to solicit . . . any then current customer of Alterra to . . . contract with another summer sales company.” (R.2.) A covenant not to solicit customers is a covenant not to compete for customers.

²² While Mr. Larson’s discussion in the text is in the context of disfavored restrictive covenants, blue-penciling would also be contrary to the general rule that courts may not rewrite contracts. *Ted R. Brown*, 753 P.2d at 970.

concluded that was not “what the parties would have intended.” (*Id.*) But the reason restrictive covenants that interfere with the right to make a living are disfavored is that there is no intent of the “parties.” Companies like Alterra draft such covenants solely for their own benefit. They then hold such covenants like a club over the head of the signers. Just a threat to sue by the company will scare most signers into complying with an overbroad restrictive covenant. Furthermore, signers who might not be cowed still run head-long into the reality that being sued is expensive, even if a defendant ultimately “wins.”

Consequently, the Alters of the world know there is very little risk from drafting overbroad disfavored restrictive covenants, because they will seldom be scrutinized by a court. As a practical matter, they thus have very little incentive to draft such covenants carefully. And that creates a vicious circle—the Alters of the world can make the risk to signers seem so great that they dare not fight, even if the restrictive covenants are clearly overbroad, like the trial court concluded Alterra’s are. As a result, cases like the present one are rare, so rare that it has been decades since *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983), on which both parties rely. In the meantime, a company like Alterra’s only concern when drafting an overbroad disfavored restrictive covenant is that—in the unlikely event such a covenant should receive judicial scrutiny—a court would rule the entire covenant unenforceable.

If the Alters of the world knew that a court would “fix” their overreaching by blue-penciling, they would have virtually no incentive not to draft even more overbroad restrictive covenants. Such companies would be even less likely to see their disfavored

restrictive covenants reviewed by a court: More facially overbroad restrictive covenants would scare the relatively unsophisticated signers even more. In addition, the few signers who might be willing to test such covenants would have to assess the risk from a partial “victory” if a court rewrites an overbroad restrictive covenant, rather than voiding it.

In other words, if courts could blue-pencil restrictive covenants like Alterra’s, the rule that such covenants are disfavored because they interfere with the fundamental right to make a living, and are therefore construed against the drafter, would essentially be eviscerated and rendered illusory. Not allowing blue-penciling puts the risk from overreaching where it should be: If a company chooses not to draft a covenant restricting someone’s right to earn a living carefully, and a court concludes it is overbroad, the entire covenant should be void. The Court should therefore hold that the trial court erred in blue-penciling paragraph 13 of the 2015 Agreement, instead of concluding that all of paragraph 13 is void.²³

²³ Courts in other states recognize that allowing courts to blue-pencil disfavored restrictive covenants would be contrary to the policy reasons for subjecting such covenants to heightened judicial scrutiny in the first place. *See Lapolla Indust. v. Hess*, 750 S.E.2d 467, 473 (Ga. 2013) (restrictive covenants in employment agreements are strictly scrutinized and courts will not blue-pencil them if unenforceable); *Gen. Med. Corp. v. Kobs*, 507 N.W.2d 381, 385 (Wis. 1993) (“restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable *even as to so much of the covenant ... as would be a reasonable restraint*” (quoting W.S.A. 103.465) (emphasis by court)); *Unlimited Opportunity, Inc. v. Waadah*, 861 N.W.2d 437 (Neb. 2015) (reaffirming that blue-penciling of unenforceable restrictive covenants was not permitted, even if the agreement had a savings clause); *Lab. Corp. of Am. Holdings v. Kearns*, 2015 WL 413788 (M.D. N. Car. Jan 30, 2015) (“courts are ‘severely’ limited in their ability to blue-pencil offensive provisions [, and] at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable.” (citations omitted)); *Loewen Group Acquisition Corp. v. Matthews*, 12 P.3d 977, 982 (Okla. Ct. App. 2000) (judicial modification of unenforceable restrictive covenant not allowed if

Alterra contends that Utah law allows blue-penciling (Appellee’s Br. at 40), but that is based on its misreading of *System Concepts*. According to Alterra, the Utah Supreme Court there revised a restrictive employment covenant “to avoid the ‘harsh penalty’ of rendering the entire covenant void.” (*Id.* (citation omitted).) But the court did not revise anything in *System Concepts*. At issue was whether the plaintiff’s failure to include an explicit, specific territorial restriction in a covenant not to compete rendered it void. *Id.* at 426-27. The entire market for the plaintiff’s products was about 2,500 potential customers, all in the United States. Instead of imposing the “harsh remedy” of voiding the provision “under the particular circumstances” of the small, identifiable market, the court found that there was already an implied geographical restriction that did not need to be made explicit. *Id.* at 427.

The trial court here did not find an implied, *additional* term in the 2015 Agreement. Instead, it *struck as overbroad Alterra’s explicit term “future contractors,”* based solely on its speculation about what the parties *really* intended. It is inappropriate for a court to speculate when interpreting a contract, and particularly when interpreting a disfavored restrictive covenant. Alterra drafted clearly overbroad language, and must live with the consequences.

e. The trial court also erroneously relied on Alterra’s facially overbroad provision in paragraph 13 of the 2015 Agreement that bars Mr. Larson from interfering in Alterra’s business in “any way.” (See Appellant’s Br. at 31-32.) The

doing so “would require ‘material judicial alteration and the provision of essential terms in order to come within the rule of reason’” (citation omitted)).

trial court relied heavily on Alterra's "intent" statement in paragraph 13 of the 2015 Agreement.²⁴ But taken to its logical conclusion, the "intent" language would entitle Alterra to an injunction barring Mr. Larson from leaving Alterra, which might interfere with Alterra's business, despite the 13th Amendment. (Appellant's Br. at 31-32.) Even if paragraph 13 were not a restrictive covenant that interferes with Mr. Larson's right to earn a living, the "intent" language would be overbroad. But since paragraph 13 *is* such a restrictive covenant, the trial court erred in granting the preliminary injunction, and instead should have voided paragraph 13.

Because Alterra cannot dispute that the term "interfering in any way" is facially overbroad, it baldly asserts:

The 2015 Agreement's statement that the parties desire that Larson refrain from interfering in Alterra's business is a statement of intent, intended to assist in interpreting the Agreement, and is not a covenant. Parties may include a broad statement of intent to assist in interpretation without making the contract void for overbreadth.

(Appellee's Br. at 41.) "The parties," however, did not draft paragraph 13, Alterra did. And because paragraph 13 is composed of disfavored restrictive covenants, it is construed against Alterra. The purpose of contract interpretation is to determine intent and, when a term is unambiguous, "'the parties' intentions are determined from the plain meaning' of the words the parties used to describe their agreement." *E & H Land*, 2014 UT App 237, at ¶ 13 (citation omitted). Alterra's unambiguous, stated intent is that it may bar Mr. Larson from interfering in its "business in any way." But that makes

²⁴ More accurately, the trial court relied heavily on the language in that sentence except for "this Non-Solicitation & Covenant not to Compete Agreement." (See § II.A.i.3.c.)

paragraph 13 facially overbroad on its face, and it is therefore unenforceable. Furthermore, because the purpose of contract interpretation is to determine intent, an unambiguous “broad statement of intent” by definition *states* the interpretation.

Finally, even if Alterra included its “broad statement of intent” to aid in interpreting the 2015 Agreement, Alterra does not and cannot explain how its statement could be of any aid in interpreting the 2015 Agreement. Alterra does not—and cannot—explain, for example, why its “broad statement of intent” could change the plain meaning of the language in subparagraph 13(ii) that provides that Mr. Larson is only barred from recruiting for a company that “provide[s] services of the type offered by Alterra,” i.e., pest control services. Alterra’s “broad statement of intent” cannot be interpreted such that the trial court could ignore “services of the type” and otherwise rewrite paragraph 13 *carte blanche*.

In sum, Alterra did not meet the “likelihood” prong on its breach of contract claim.

ii. Alterra Did Not Show “Likelihood” on Its UTSA Claim.

The trial court also erroneously concluded that Alterra showed “likelihood” on its UTSA claim. That conclusion was based on its conclusion that “parties can define trade secrets, pursuant to legislature’s statement in the Trade Secrets Act that the parties may agree to define trade secrets in any manner they choose.” (R.576 ¶ 24.) The trial court was simply wrong: The UTSA *does* define “trade secret,” Utah Code section 13-24-2, and *nothing* in the UTSA provides that parties may choose another definition.

Alterra argues that whether something is a trade secret is generally a factual issue, and that Mr. Larson is appealing the trial court’s finding that Alterra’s alleged trade

secrets are such under the UTSA. (Appellee's Br. at 42-44.) It is true that whether an alleged trade secret meets the statutory definition is a factual question. *But the trial court could not have determined that Alterra's alleged trade secrets meet the statutory definition it did not know exists.* Thus, the trial court also erred in concluding that Alterra showed "likelihood" on its UTSA claim.

B. Irreparable Harm.

The trial court erred in its perfunctory rulings that Alterra met the "irreparable harm" prong, Rule 65A(e)(1). (Appellant's Br. at 35-37.) Alterra needed to show a *real* threat of harm.²⁵ But instead the trial court's conclusion was based on its improper speculation about possible harm to Alterra.²⁶

Alterra cannot dispute that the trial court's musings about what could have happened if it did not grant Alterra's preliminary injunction were speculation. Instead it argues that it showed the misappropriation of trade secrets under the UTSA, so irreparable harm is presumed. (Appellee's Br. at 47.) But the trial court only concluded that Alterra had shown misappropriation based on its erroneous conclusion that Alterra could have defined *anything* as a trade secret under the UTSA. Alterra also argues that there was evidence that might support the trial court's speculation. (*Id.* at 47-49.) But the trial court's speculation in the Order is just that. Moreover, the trial court's

²⁵ *E.g.*, *Syst. Concepts*, 669 P.2d at 428 (injunction only appropriate where plaintiff shows "likely or threatened" harm); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir.2005) (irreparable injury must be "certain, great, actual; not theoretical").

²⁶ *E.g.*, R.574 ¶ 35 (speculating Alterra "could lose significant summer sales if Defendant did something he agreed not to do").

conclusions regarding irreparable harm was based on its erroneous conclusion that Alterra's provision in subparagraph 13(ii) of the 2015 Agreement that bars Mr. Larson only from soliciting its salespeople for a company that "provide[s] services of the type offered by Alterra"—pest-control services—also bars him from recruiting for a company that sells security systems. The trial court's ruling was also based on its erroneous conclusion that Alterra's disfavored restrictive covenants are enforceable, which they are not, as discussed in detail above.

C. Balance of Harms.

The trial court also erroneously concluded that the balance of equities favored Alterra under Rule 65A(e)(2), again based on its improper speculation. (Appellant's Br. at 37-39.) Alterra argues that "[r]ather than marshal the evidence . . ., [Mr. Larson] incorporates the legal arguments presented earlier in his brief." (Appellee's Br. at 49.) But Alterra recognizes in that statement that, its repeated contention to the contrary notwithstanding, Mr. Larson is appealing the trial court's legal conclusions.

Alterra also argues that balancing the equities "is a fact intensive inquiry," and lists what it asserts is "substantial evidence of the harm it would [have] suffer[ed]." (*Id.* at 50.) But Alterra does not connect this "substantial evidence" to the trial court's conclusions regarding harm in the Order. Alterra is thus asking the Court to rule that the trial court could have found that the balance of harms favored Alterra, if it had properly applied the law. But the trial court's errors are why Mr. Larson is appealing.

D. Public Interest.

The trial court erred in concluding that Alterra showed it met the public interest prong, Rule 65A(e)(3). The trial court cited Utah's "clear preference for enforcing contractual covenants." (R.577 ¶ 19.) It is a truism that enforcing contracts is important generally. But the trial court ignored the competing policy: Restrictive covenants that interfere with the right to earn a living are disfavored. The trial court also concluded that public policy would not rule out a preliminary injunction "because there is no non-compete clause at issue." (*Id.* ¶ 20.) But there *is* a non-compete clause at issue, and even if there were not, covenants not to solicit that interfere with the right to make a living are equally disfavored with covenants not to compete. (§ II.A.i.3.c.)

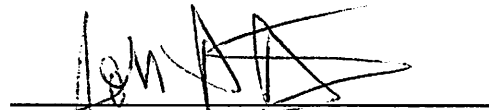
Alterra baldly asserts that "Larson waived his public interest argument by not presenting reasoned argument supported by facts and case law." (Appellee's Br. at 51.) But that is again based on Alterra's mischaracterization of Mr. Larson's appeal. The trial court could not have balanced the competing policies when it ignored one of them.

CONCLUSION

For the reasons cited herein and in Mr. Larson's opening brief, the trial court erred in granting Alterra its preliminary injunction. Accordingly, the Court should reverse the trial court's grant of the preliminary injunction.

DATED this 19th day of October, 2015.

ANDERSON & KARRENBERG

A handwritten signature in black ink, appearing to read 'Thomas R. Karrenberg', is written over a horizontal line.

Thomas R. Karrenberg

John A. Bluth

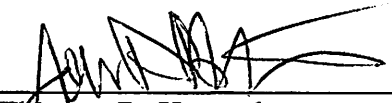
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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of this brief of Defendant and Appellant Jeffrey Larson, as determined using Microsoft Word, is 6,681 words in length, starting at the opening paragraph through the Conclusion and, therefore, in compliance with Utah Rule of Appellate Procedure 24(g)(5)(A).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, October 14, 2015, I served two (2) true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** via First Class Mail, postage prepaid to the following:

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