2017

VIVINT SOLAR, INC., and ARM SECURITY, INC., Plaintiffs/ Appellants, vs. DOUGLAS ROBINSON, Defendant/Appellee. : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

VIVINT SOLAR, INC., and ARM SECURITY, INC., Plaintiffs/Appellants, vs. DOUGLAS ROBINSON, Defendant/Appellee.	**BRIEF OF APPELLANTS** Appellate Case No. 20170248

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, HONORABLE THOMAS LOW, DISTRICT JUDGE

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JURISDICTION

The Court of Appeals has jurisdiction under Utah Code Section 78A-4-103(2)(j).

STATEMENT OF ISSUES

1. Did the district court commit reversible error by dismissing on summary judgment Appellants' action to enforce post-employment restrictive covenants?

   a. Determinative Law. *Fort Pierce Industrial Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶ 19, 379 P.3d 1218, is determinative that restrictive covenants are not strictly construed and are interpreted using the same rules of construction used to interpret contracts generally. There are no other determinative provisions or cases on this issue.

   b. Standard of Review. The district court's "legal conclusions and ultimate grant or denial of summary judgment" are reviewed for correctness, viewing "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600, 601.

   c. Preservation of Issue. Preserved at R. 1052–1121.

2. An attorney fee award under Utah Code Section 78B-5-825 requires a showing that the action or defense was without merit (no basis in law or fact) and not brought or asserted in good faith. Was it error for the district court to award attorney fees against Appellants particularly where (a) the court found "some basis" for Vivint Solar, Inc.'s claims, and concluded that it was "not convinced" that the claims were "necessarily

made in bad faith"; and (b) the bases for ARM Security Inc.'s and Vivint Solar, Inc.'s claims were similar?

a. Determinative Law. There are no determinative provisions or cases.

b. Standard of Review. A trial court's interpretation of the legal prerequisites for awarding attorney fees under Utah Code Section 78B-5-825(1) is a question of law reviewed for correctness. *Rushton v. Salt Lake Cnty.*, 1999 UT 36, ¶ 17, 977 P.2d 1201 (holding that statutory interpretation presents a legal question). Whether a claim was brought in "bad faith" under section 78B-5-825(1) is a question of fact reviewed under a clearly erroneous standard. *In re Sonnenreich*, 2004 UT 3, ¶ 45, 86 P.3d 712.

c. Preservation of Issue. Preserved at R. 1637–68.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Vivint Solar, Inc. ("Solar") and ARM Security, Inc. ("ARM") (collectively "S&A") sued Douglas Robinson ("Robinson") on August 8, 2014, for violating restrictive covenants by competing with Solar, and for soliciting S&A's employees. R. 1–19. Robinson moved for summary judgment on February 12, 2016. R. 326–85. The motion was granted in the district court's May 5, 2016 Ruling and Order. R. 1419–40.

Robinson requested attorney fees under Utah Code Section 78B-5-825(1) on May 19, 2016, R. 1441–50, which the court granted in its October 24, 2016 Order, R. 1880–92. The district court's March 14, 2017 Order and Final Judgment awarded attorney fees to Robinson. R. 2460–63.

S&A filed a notice of appeal on March 24, 2017, appealing the Ruling and Order granting summary judgment, the Order granting the motion for attorney fees, and Order and Final Judgment awarding attorney fees. R. 2476–2519.

II. STATEMENT OF FACTS

A. Vivint, Solar and ARM

Solar sells, installs, maintains and finances solar systems for residential customers through a door-to-door sales model. R. 907. ARM is a wholly-owned subsidiary of Vivint, Inc. ("Vivint") that employs the sales representatives who sell Vivint's products and services through a door-to-door sales model. R. 1161.

S&A are successful largely because of their effective sales force. R. 907. Solar's sales team is recognized as "the best . . . in the country," and business analysists have acknowledged that Solar's "competitive advantage lies entirely in its sales capabilities." R. 915. Recruiting and maintaining a reliable and stable sales force is critical for S&A. R. 907, 910–12, 914–16.

B. Hiring Robinson

Robinson previously worked with companies using door-to-door sales models, and had successfully recruited salespeople to sell door-to-door. R. 387–88. Vivint hired him as a regional manager under a regional manager employment agreement and accompanying side letter. R. 388–89, 401–11, 413–14, 1123–34, 1136–37. Robinson was hired to recruit and establish a sales team with a focus on individuals who previously worked with him. R. 780–81, 1140. Robinson received a $100,000 signing bonus and a $500,000 discretionary budget to develop his team. R. 1136–37, 1140.

Later, all Vivint's regional managers, including Robinson, became employees and regional managers of ARM. R. 390, 439, 1144, 1162. Robinson signed ARM's Regional Manager Employment Agreement ("ARM Regional Manager Agreement"). R. 390, 1144. The agreement expressly did not replace other agreements between the parties or between Robinson and any parent, subsidiary, or affiliate of ARM, or any restrictive covenants or confidentiality agreements, unless those agreements contradicted the ARM Regional Manager Agreement. R. 390, 1156–57.

While employed with ARM, Robinson helped develop a sizeable and effective sales force. R. 390, 397. Many with whom Robinson had previously worked followed him to ARM. R. 390. Subsequently, many individuals on Robinson's sales team moved to Solar at Robinson's urging. R. 391–92. Robinson received overrides and an opportunity for long-term incentive plan compensation with Solar. *Id.* Robinson also recruited new Solar sales representatives, for which he was compensated. R. 392. He fostered close personal relationships and developed substantial goodwill with his sales team. R. 390, 907.

C. Robinson's Solicitation of Employees and Competition

While Robinson was employed with ARM and affiliated with Solar, he began contacting other residential solar companies to pursue his own business opportunities. R. 887, 890–93, 895–98, 1150. He met with SunRun, one of Solar's main competitors, R. 887, and discussed leaving S&A and taking Solar employees, including Solar's "sales leaders" in the Bay Area, to begin a competing business affiliated with SunRun. R. 895–99. Robinson invited some of Solar's sales leaders to SunRun's headquarters to meet

SunRun executives. *Id*. Robinson believed his recruitment of a number of these people to join him was effectively "done" by July 22, 2014. R. 903. Robinson told SunRun that he had "more sales leadership ready to roll than [he] even initially anticipated." R. 895. At SunRun's request, Robinson provided sales forecasts obtained from Solar sales representatives to show projected sales and revenue that SunRun could expect from these Solar employees. R. 904. Robinson then formed LGCY Power, LLC ("LGCY"), to compete with Solar and to operate as SunRun's "exclusive Utah based model." R. 894, 907, 1150–52. Over time, at least 30 sales representatives left S&A to work for LGCY with SunRun in competition with Solar, impairing Solar's legitimate business interests, including its goodwill in its sales representatives. R. 907.

D. Robinson's Termination

After ARM learned of Robinson's plan to take S&A employees to work with him at SunRun, Vivint and ARM's general counsel notified Robinson that his employment with ARM and Vivint, and his relationship with Solar, were terminated. R. 782–84, 1166, 1211. Robinson received a termination letter reminding him of the restrictive covenants of his agreements with S&A. R. 396, 774–75.

E. Robinson's Agreements and Covenants

1. ARM Sales Rep Agreements

Robinson electronically signed ARM Sales Rep Agreements in 2013 and 2014 (collectively, the "ARM Agreements"). R. 786–823, 825–70, 1163. Even though he was an ARM Regional Sales Manager, he was required to sign the ARM Agreements to access Vivint's sales tools, make direct sales of Vivint products to customers, and be

compensated for those sales. R. 389, 396, 920, 1141–45, 1148–49, 1165.

The ARM Agreements contain the following employee non-solicitation covenant:

> In the event of termination of this Agreement or Representative's employment with ARM, and for a period of five (5) years from the date of such termination, Representative will not directly or indirectly engage in the following conduct, nor will Representative aid, assist, encourage, or influence others to do so: Induce or attempt to induce, solicit or attempt to solicit, or encourage or attempt to encourage, in any capacity, on Representative's behalf or on behalf of any other firm, person, or entity, . . . (b) any current or former representative, employee, or contractor of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities to terminate their relationship with that entity or work for an entity that competes with ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities . . . .

R. 791, 830.

2. Solar LTIP Plan and LTIP Agreement

Solar invited Robinson and other regional managers to participate in a Long-Term Incentive Pool Plan ("LTIP Plan"). R. 391. Participants signed a Notice of Award and Award Agreement ("LTIP Agreement"), agreeing to comply with the attached LTIP Restrictive Covenants and the terms of the LTIP Plan. R. 874, 1179.

3. LTIP Restrictive Covenants

Appendix A to the LTIP Agreement was entitled "Restrictive Covenants" ("LTIP Restrictive Covenants"). Its terms were incorporated into the LTIP Agreement:

> In order to accept your Award, *you must agree to be bound by the restrictive covenants set forth in Appendix A to this Award Agreement* and fully incorporated herein. … By signing this Award Agreement and accepting the Award, you acknowledge and agree that you have reviewed this Award Agreement and the Plan it their entirety, have had an opportunity to obtain the advice of counsel prior to executing this Award Agreement, and fully understand all provisions of this Award Agreement (*including Appendix A*), and the Plan.

R. 1195 (emphasis added). Robinson signed the LTIP Agreement. R. 393, 1148, 1195.

4. LTIP Non-Competition Covenant

The LTIP Restrictive Covenants include a covenant not to compete ("LTIP non-compete covenant") which states in part:

> During the Restricted Period, the Participant will not directly or indirectly: (A) engage in the Business anywhere in the United States, or in any geographical area that is within 100 miles of any geographical area where the Restricted Group engages in the Business, including, for the avoidance of doubt, by entering into the employment of or rendering any services to a Core Competitor, except where such employment or services do not relate in any manner to the Business.

R. 1196.

5. LTIP Non-Solicitation Covenant

The LTIP Restrictive Covenants also include an employee non-solicitation covenant ("LTIP employee non-solicitation covenant") which states in part:

> (iv) During the Employment Term and the Restricted Period, the Participant will not, whether on the Participant's own behalf or on behalf of or in conjunction with any Person, directly or indirectly:
>
> (A) Solicit or encourage any employee of the Restricted Group to leave the employment of the Restricted Group;
>
> (B) hire any executive-level employee, key personnel, or manager-level employee (i.e., any operations manager or district sales manager) who was employed by the Restricted Group as of the date of the Participant's termination of employment with the Company or who left the employment of the Restricted Group coincident with, or within one year prior to or after, the termination of the Participant's employment with the Company . . . .

R. 1196–97.

6. LTIP Plan and Delaware Law

The LTIP Plan is "governed by and construed in accordance with the internal laws of the State of Delaware applicable to contracts made and performed wholly within the State of Delaware . . . ." R. 1187.

F. S&A's Lawsuit

S&A brought this action to enjoin Robinson from uniting with SunRun to compete against S&A, and from soliciting S&A's sales employees and using S&A's goodwill with their employees. R. 17–18, 1098.

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT

The district court was incorrect to dismiss S&A's restrictive covenant claims on summary judgment. The court applied an erroneous "strict construction" standard to construe Robinson's covenants, ruling that the covenants are disfavored in the law. R. 1425. The Utah Supreme Court subsequently disavowed this standard in *Fort Pierce Industrial Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶ 19, 379 P.3d 1218. But this erroneous standard underlies the district court's rulings, including its *sua sponte* legal conclusion that the covenants (and the parties' agreements *in toto*) were procedurally and substantively unconscionable. R. 1427–34, 1438. S&A were not allowed to address "unconscionability" before the district court ruled, as the law requires.

Under its "strict construction" standard, the district court also misapplied the summary judgment standards by failing to draw factual inferences in favor of the non-moving parties, and incorrectly concluded—on summary judgment—that (1) the

restrictive covenants were unnecessary to protect S&A's goodwill in their employees, R. 1426, (2) Delaware law and its blue-pencil doctrine would not apply to the LTIP Agreement, R. 1437, (3) S&A were barred from invoking the blue-pencil doctrine under Delaware and Utah law without asserting a claim for "reformation," R. 1427, 1438, and (4) the agreements' severability clauses would not apply to narrow any portion of the restrictive covenants the district court found overbroad, R. 1429–33, 1438.

II. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES

The district court erred in awarding Robinson attorney fees under Utah Code Section 78B-5-825(1) because S&A's claims had a firm basis in law and fact, and were not asserted in bad faith. Moreover, the district court contradicted its own ruling by finding that Solar "provided some basis" for its restrictive covenant claims and that "[t]he Court is not convinced that Solar's argument on this issue was necessarily made in bad faith." R. 1888–89. These conclusions should also preclude the fee award against ARM because the bases for ARM's claims were substantially the same as Solar's.

This Court should reverse the district court's (1) Ruling and Order granting summary judgment, (2) Order granting the motion for attorney fees, and (3) Order and Final Judgment awarding attorney fees.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING S&A'S CLAIMS ON SUMMARY JUDGMENT.

A. The District Court Applied an Erroneous "Strict Construction" Standard.

Citing dicta in *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d

194 (Utah 1991), the district court ruled that restrictive covenants are "not favored in the law" and are to be "strictly construed." R. 1425. This incorrect standard underlies the district court's summary judgment rulings.

The Utah Supreme Court in *Fort Pierce* rejected this standard after summary judgment was entered in this case. The Court disavowed the dicta in *St. Benedict's* and clarified that the "'interpretation of restrictive covenants is governed by the same rules of construction as those used to interpret contracts' and that, 'generally, unambiguous restrictive covenants should be enforced as written.'" 2016 UT 28, ¶ 19 (quoting *Swenson v. Erickson*, 2000 UT 16, ¶ 21, 998 P.2d 807). The Court also ruled that the district court in *Fort Pierce* "erred in applying strict construction" to the restrictive covenants because it "incorrectly believed" itself bound by "dicta" in *St. Benedict's* that "'restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property.'" *Id.* (quoting *St. Benedict's*, 811 P.2d at 194).

Accordingly, it was reversible error for the district court to construe the restrictive covenants and S&A's contentions based thereon as matters disfavored in the law under a strict construction standard. Even though S&A alerted the district court to *Fort Pierce*, R. 1731–34, the court left its summary judgment ruling in place, saying only that it "regret[ted] citing to *St. Benedict's*" and "shouldn't have done so," R. 1821.

B. Restrictive Covenants are Necessary to Protect S&A.

1. Elements of enforceable restrictive covenants.

Utah and Delaware courts recognize that "[r]estrictive covenants are generally upheld . . . where they are necessary for the protection of the business." *Allen v. Rose*

Park Pharmacy, 237 P.2d 823, 826 (Utah 1951); *Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171, 174–75 (Del. Ch. Ct. 1969). Legitimate business interests include business "trade secrets, the goodwill of [the] business, or an extraordinary investment in the training or education of the employee." *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982); *see also Research & Trading Corp. v. Pfuhl*, 1992 WL 345465, at *12 (Del. Ch. Ct. Nov. 18, 1992). The appropriateness of a restrictive covenant is based on factual determinations which require courts to evaluate covenants "on a case-by-case basis." *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 427 (Utah 1983).

A restrictive employment covenant "must comply with the requirements set forth in *Allen v. Rose Park Pharmacy*." *Sys. Concepts*, 669 P.2d at 425. These include: (1) the covenant was supported by consideration; (2) no bad faith was shown in contract negotiations; (3) the covenant is necessary to protect business goodwill; and (4) the covenant is reasonably restricted in time and area. *Id.* at 425–26. On summary judgment, Robinson did not contend that the restrictive covenants lacked consideration or were forced upon him in bad faith. Instead, he argued that the covenants did not protect any goodwill and were too broad. R. 359–68, 377–82.

Applying a "strict construction" standard, the district court went further. It incorrectly found it "undisputed" that the ARM restrictive covenants "were not negotiated" and that "the restrictions are overboard and unnecessary to protect ARM's goodwill." R. 1426. The first "finding" misconstrues Utah law. The law does not require that a restrictive covenant be negotiated to be valid. Rather, *Allen* states that a restrictive covenant cannot be "negotiated in bad faith." *See Allen*, 237 P.2d at 826.

There is no evidence that ARM acted in bad faith by including restrictive covenants in the ARM Agreements. And even if such evidence existed, the court could not make that finding without violating summary judgment standards that preclude drawing inferences against ARM, the non-moving party. *See Pugh v. Dozzo-Hughes*, 2005 UT App 203, ¶ 23, 112 P.3d 1247 (reversing the trial court where it interpreted facts and made inferences in favor of the moving party).

2. Robinson's employee goodwill is protectable.

Business goodwill resides in relationships that give the business value or a competitive edge. *See PC Crane Serv., LLC v. McQueen Masonry, Inc.*, 2012 UT App 61, ¶ 2, 273 P.3d 396 (defining goodwill). Through well-compensated managers like Robinson, S&A develop strong relationships of trust and confidence (goodwill) with their sales force. *See* R. 390, 907. This relationship with S&A's employees is a legitimate business interest that may be protected by a restrictive covenant. *See PartyLite Gifts, Inc. v. MacMillan*, 895 F. Supp. 2d 1213, 1225 (M.D. Fla. 2012) (holding that a restrictive covenant is an acceptable method for an employer to protect its relationship with its employees); *Adv. Marine Enters., Inc. v. PRC Inc.*, 501 S.E.2d 148, 153 (Va. 1998).

S&A's business success is largely due to their extremely effective sales force which includes many people Robinson recruited. R. 907, 910–912, 914–916. Industry observers have noted that much of Solar's business value is derived from its unique sales force. Fortune.com observed:

> The competition [in the solar industry] is so stiff, in fact, that solar companies pushing commoditized panels find themselves battling it out in a surprising place in the organization: sales. The sale of solar panels to

> homeowners can be tricky and calls for a substantial educational process, leaving solar companies to slug it out over who can best identify and acquire new customers.

R. 911–12. Solar's door-to-door sales force has been cast as the best in the country and one of the largest residential pipelines for selling solar panels, giving Solar a competitive advantage and, thus, value. R. 915. The same is true with the sales force employed by ARM for Vivint. R. 390, 919–20.

S&A's goodwill with their sales force is critical. Robinson was effective in developing the relationships necessary to amass an important segment of Solar's sales force. Through Robinson's efforts, between 100 and 300 were successfully recruited. R. 390. Many had long-standing relationships with Robinson as long-time "friends" and colleagues at prior companies. *Id.*

Robinson's strong relationships with these sales representatives became S&A's valuable asset. The *Allen* court addressed the analogous context of "customer" goodwill and ruled that the employer is "entitled to the goodwill created by his employee." 237 P.2d at 827. By hiring the employee, the employer "was purchasing the goodwill which might accrue to the business by reason of [the employee's] personal attributes." *Id.* The court stated that this interest was "subject to ownership" and a "covenant was necessary which would prohibit [the employee] from drawing away all his close friends, but the defendant's customers, to another nearby drug store." *Id.*

Robinson fostered similar personal relationships (indeed, long-term friendships) with many of S&A's valuable sales team. R. 390, 907. Thus, Robinson's services were truly "special, unique, or extraordinary." *Robbins*, 645 P.2d at 628. Robinson was paid to

create these relationships. He received a $100,000 signing bonus and then $500,000 of discretionary funds (that he largely kept for himself) to recruit his teams. R. 1136–37, 1140–41. He was also allowed to participate in Solar's LTIP Plan with an opportunity to receive LTIP incentive stock options as a reward for recruiting for Solar. R. 391.

Robinson has also acknowledged the value of employee goodwill. LGCY Power, Robinson's company, recently sued former sales employees to enforce non-competition and non-solicitation covenants, alleging that "[t]he lifeblood of LGCY's success is its sales force, which consists of sales managers and sales representatives. LGCY invests substantial time, money, and resources into developing and maintaining its relationship s with its sales representatives and managers."[1] Robinson's company also alleges that "LGCY relies heavily on its sales managers to develop and maintain strong professional bonds and goodwill between LGCY and the members of its sales force."[2] These allegations are nearly identical to S&A's articulation of the goodwill they seek to protect here. Robinson now cannot dispute that S&A's employee goodwill is a legitimate interest that S&A is entitled to protect.

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[1] *See LGCY Power, Inc. v. Newby et al.*, Third Judicial Dist. Ct., Case No. 170903582, Complaint ("LGCY Complaint") ¶ 31, attached hereto as Addendum A. This Court has discretion to take judicial notice of this publicly available document (court filings) pursuant to Utah R. Evid. 201(b), because there is a "'compelling countervailing principle to be served.'" *Finlayson v. Finlayson,* 874 P.2d 843, 847 (Utah Ct. App. 1994). This Court has an interest in taking notice of this complaint which replicates S&A's goodwill position here and contradicts Robinson's position taken below. S&A were unable to present this evidence to the trial court because LGCY's case was filed in June 2017. It is therefore proper for the Court to take judicial notice of this court filing now.

[2] *LGCY* Complaint ¶ 35.

3. The non-compete covenants properly protect employee goodwill.

S&A sought to protect their employee goodwill by ensuring that Robinson would not compete with Solar for a one-year period after leaving ARM in order to prevent Robinson from misappropriating S&A's employee goodwill and drawing S&A employees away to work with him at LGCY in competition with Solar. The restrictive covenants provide this protection.

It is irrelevant that Robinson did not typically deal directly with or sell products to S&A's customers. His creation of LGCY to be SunRun's "exclusive Utah based model," R. 894, immediately threatened S&A's goodwill with members of their sales teams and many joined him. R. 907. The need for non-compete and non-solicitation covenants to protect the goodwill in S&A's sales force was real and confirmed by the number of employees who left to join Robinson's competing company. *See id.*

4. The non-solicitation covenants also protect employee goodwill.

The non-solicitation covenants also protect S&A's investment in the sales employees Robinson recruited. Like the employee in *Allen*, Robinson was "responsible for creating the goodwill" associated with S&A sales representatives. 237 P.2d at 827. Sales representatives must be skilled to sell solar products effectively. R. 911–12 (recognizing the sale of solar panels "calls for a substantial educational process"). Solar is correct to protect its goodwill and investment in its sales force by prohibiting Robinson under the LTIP employee non-solicitation covenant from encouraging Solar's employees to join him in a competing business. *See PartyLite Gifts, Inc.*, 895 F. Supp. 2d at 1225 (recognizing legitimate business purpose "in restricting former employees from soliciting

and hiring the employer's employees, premised on the employer's concern about 'future success' and protecting itself against 'loss or misuse of its employees'") (citation omitted). It was error for the district court to ignore the harm to S&A's goodwill caused by Robinson's direct competition and employee solicitation.

C. The District Court Erred in Rejecting Blue-Pencil Principles of Partial Enforcement.

S&A need protections supplied by Robinson's covenants, including the LTIP Restrictive Covenants which are governed by Delaware law. Robinson agreed to them and received compensation for them. R. 391, 1195. The scope of the covenants are sufficient to provide the narrow injunctive relief S&A requested. *See* R. 18. But to the extent it found the covenants overbroad, the district court should have applied Delaware's blue-pencil doctrine, and similar principles under Utah law to provide the scope of protection reasonably needed to give effect to the parties' agreements.[3]

1. Delaware law governs the LTIP Restrictive Covenants.

Delaware law governs the LTIP Plan and the LTIP Agreement's Restrictive Covenants for two reasons: First, terms in both the LTIP Plan and LTIP Agreement that define Robinson's covenant breaches are governed by Delaware law. The LTIP Plan is

[3] Most jurisdictions apply the blue-pencil doctrine to enforce a restrictive covenant rather than declare the covenant void and unenforceable. *See, e.g.*, *Turnell v. CentiMark Corp.*, 796 F.3d 656, 663–64 (7th Cir. 2015) (applying Pennsylvania law); *Mountain Comprehensive Health Corp. v. Gibson*, 2015 WL 1194508, at *4–*5 (Ky. Ct. App. Mar. 13, 2015); *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 915 (Ind. Ct. App. 2011); *First Empire Sec., Inc. v. Miele*, 17 Misc.3d 1108(A) (N.Y. Sup. Ct. 2007); *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 980–81 (D. Ariz. 2006) (applying Arizona law); *Sharvelle v. Magnante*, 836 N.E.2d 432, 439 (Ind. Ct. App. 2005); *Freiburger v. J-U-B Eng'rs, Inc.*, 111 P.3d 100, 107–08 (Idaho 2005).

expressly governed by the "law of the state of Delaware." R. 1187. The LTIP Plan defines "Restrictive Covenant Violation" as:

> [T]he Participant's [Robinson's] *breach* of any provision of any agreement (including any [LTIP] Award Agreement) with the Company or any Affiliate or Subsidiary (whether currently in existence or arising in the future from time to time, and whether entered into pursuant to the Plan or otherwise) containing covenants regarding non-competition, non-solicitation, non-disparagement and/or non-disclosure obligations.

R. 1191 (emphasis added). Thus, Delaware law applies to construe a "Restrictive Covenant Violation" and a "breach" under the LTIP Plan. The LTIP Agreement, in turn, borrows the "Restrictive Covenant Violation" term from the LTIP Plan. *See* R. 1195 ("Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the [LTIP] Plan."). As a result, Delaware law governs Robinson's "breach" of the LTIP Restrictive Covenants.

Second, and alternatively, Delaware law (which governs the LTIP Plan) must also govern the LTIP Agreement because both are interconnected and contemporaneous agreements. Contracts connected in time and content—like the LTIP Plan and LTIP Agreement—are to be construed as one whole and harmonized. *Tretheway v. Furstenau*, 2001 UT App 400, ¶ 9; *HCA Health Servs. of Utah, Inc. v. St. Mark's Charities*, 846 P.2d 476, 484 (Utah 1993). Because both the LTIP Plan and LTIP Agreement were "executed substantially contemporaneously and are clearly interrelated"—indeed, they function as one contract—"they must be construed as a whole and harmonized, if possible." *HCA Health Servs.*, 846 P.2d at 484 (citing *Verhoef v. Aston*, 740 P.2d 1342, 1344 (Utah Ct. App. 1987)).

The district court's refusal to follow these principles and apply Delaware law is incorrect and would lead to the inconsistent result of applying Delaware law to define "breach" in one context but a different law to define "breach" in a another context—with possible different outcomes under the same facts.[4]

2. In Delaware, courts tailor restrictive covenants to a proper scope.

Under Delaware law, courts conform the scope of a restrictive covenant to proof of the protection needed. This provides appropriate protection of proper business interests even where the covenant's written scope is broader than necessary. *See Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171, 175 (Del. Ch. 1969) (finding that "a restrictive covenant should be enforced only to the extent that it is reasonable so to do," and that the stated geographical area at issue was "much too broad" but holding that former employee was enjoined from a more reasonable geographic scope that protected plaintiff's interests); *Singh v. Batta Env'tl Assocs., Inc.*, 2003 WL 21309115, at *8 (Del. Ch. May 21, 2003); *Research & Trading Corp. v. Pfuhul*, 1992 WL 345465, at *12 (Del. Ch. Nov. 18, 1992); *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *14 (Del. Ch. Ct. Oct. 23, 2002) (reducing the duration of a restrictive covenant from the three-year

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[4] The district court also mistakenly said that "Solar asserts, without legal analysis, that Delaware law—which may allow this blue-penciling—should govern the LTIP Agreement." R. 1437. Legal analysis was provided by S&A at oral argument (not before) because Robinson provided a substantive choice-of-law argument against the application of Delaware law to the LTIP Agreement for the first time in his reply memorandum. R. 1287–91. S&A again showed why Delaware law applied to the LTIP Restrictive Covenants when opposing Robinson's Motion for Award of Attorney Fees. R. 1648–50. Also, given the terms of the agreements, the court's refusal to apply Delaware law is plain error.

stated term to two years).

The district court erred on summary judgment in refusing to apply Delaware law to the LTIP Restrictive Covenants, and not conforming the scope of Robinson's covenants to the parties' evidence of the protections needed, as Delaware law requires.

3. In Utah, Restrictive Covenants Should be Construed to be Reasonable.

Courts in Utah have not expressly declared the adoption of the blue-pencil doctrine, but they have acknowledged analogous principles in similar contexts. The court in *Bad Ass Coffee Co. of Hawaii, Inc., v. JH Nterprises, L.L.C.*, addressed a claim that overbreadth in a non-competition covenant should render it unreasonable and unenforceable, saying that "in both Utah and Florida, courts avoid reading covenants not to compete in a manner that would render them unreasonable." 636 F. Supp. 2d 1237, 1246 (D. Utah 2009). The court recognized that "in Utah, this proposition is bourne [sic] out in the common law." *Id.* The court cited *System Concepts* where the Utah Supreme Court evaluated the geographic scope of a restrictive covenant that was not just overbroad, but entirely absent. *Sys. Concepts*, 669 P.2d at 427. Rejecting the defendant's overbreadth argument, the court stated that "[w]hile some courts have held that an omission of the space requirement will render the covenant void, we are of the opinion that *such a harsh penalty is not warranted*." *Id.* (emphasis added). It noted that "[t]he reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant." *Id.* The *System Concepts* court then evaluated the evidence and

determined that the covenant was "impliedly limited to the area in which SCI has been and is seeking its market." *Id.*

Similarly, the Court in *J & K Computer Sys., Inc. v. Parrish*, 642 P.2d 732, 736 (Utah 1982), addressed an overbreadth challenge to a non-competition clause. The clause required the defendant to pay a fee if the defendant worked for one of plaintiff's "current customers" after leaving plaintiff's employ. *Id.* The Court found that the defendant had worked for a "current customer" after leaving, but expressly avoided deciding whether the clause was too broad when considered in its entirety. Rather, the Court upheld the clause's validity, reasoning that "[w]e only need here to decide, and we do decide, that the covenant was enforceable as it related to a current customer of the plaintiff." *Id.*

Here, the district court misapprehended and rejected the *System Concepts* analysis that was apparent to the court in *Bad Ass Coffee*. *Bad Ass Coffee*, 636 F. Supp. 2d at 1246–47. In fact, the district court suggested that S&A's interpretation of *System Concepts* was "misleading" because, in its view, the Utah Supreme Court "did not *reform* the restrictive covenant to interpose a territorial restriction," but instead merely "found the omission of a territorial restriction to be unimportant under the particular facts of the case." R. 1428–29 (emphasis added).[5] But the district court overlooked that the *System Concepts* court did not state that the omission of a geographic limitation was unimportant. It found instead that "specific activity restrictions" had "greater utility and

[5] The district court's misperception of *System Concepts* appears to have been colored by a fundamental misunderstanding that "reformation" must be pled before courts will construe restrictive covenants with a narrowed scope. *See infra* pp. 21–22. The district court's rigid view is also consistent with its mistaken application of a strict construction standard.

propriety than a spacial restriction" under the facts. *Sys. Concepts,* 669 P.2d at 427. In other words, the *System Concepts* court considered the facts and decided that a reasonable geographic restriction could be inferred so as not to invalidate the restrictive covenant that was allegedly too broad to enforce. *Id.*; *Bad Ass Coffee*, 636 F. Supp. 2d at 1246–47 (acknowledging that the *System Concepts* court rejected "the overbreadth argument" and "reasoned that the clause was valid because the '*breadth of the covenant is sufficiently limited by specific activity restrictions,' making an express limit unnecessary under the facts of that case.*") (emphasis added).

The fact-dependent analysis of restrictive covenants by Utah courts in *System Concepts, J & K Computer Sys.*, and *Bad Ass Coffee* is consistent with application of blue-penciling principles of partial enforcement. The district court should have applied them here as a matter of Utah law (for the ARM Agreements) and under Delaware law (for the LTIP Restrictive Covenants) to "avoid reading covenants not to compete in a manner that would render them unreasonable." *Bad Ass Coffee*, 636 F. Supp. 2d at 1246. By ruling as it did that Robinson's covenants were outright unenforceable, the court contravened these principles, ignored the great harm Robinson caused, and imposed the unwarranted "harsh penalty" disfavored by the *System Concepts* court. *Sys. Concepts*, 669 P.2d at 427. The district court's ruling, which was guided at each step by its incorrect "strict construction" perspective, should be reversed.

D. Pleading Reformation is not a Prerequisite to the Blue-Pencil Doctrine.

The district court also refused to apply blue-pencil principles based on an incorrect conclusion that these principles cannot be invoked without a claim for reformation.

R. 1427–28. But a reformation claim is not a prerequisite.[6] The blue-pencil doctrine is not reformation; it applies where partial enforcement of a contract is necessary to give some effect to the parties' stated intentions.[7] *See Saccomanno v. Honeywell Int'l, Inc.*, 2010 WL 1329038, at *5 (N.J. Super. Ct. 2010) ("Blue-penciling, however, is not reformation of the contract; it is partial enforcement of the contract" and it "does not require the traditional showing for the equitable remedy of reformation.").

E. The District Court Erred in Failing to Apply Severability Terms.

Even if Utah courts did not construe restrictive covenants to avoid finding unreasonableness (and they do), the terms of the parties' agreements required it. The LTIP Plan states that "[i]f any provision of the Plan or any Award or Award Agreement is or becomes or is deemed to be invalid, illegal or unenforceable . . . such provision shall be construed or *deemed amended* to conform to the applicable laws . . . and the remainder of the Plan and any such Award shall remain in full force and effect." R. 1188 (emphasis added).

The ARM Agreements provide that "if any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable law or rule in any

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[6] "Reformation" applies where "the instrument does not embody the intentions of both parties to the contract" or "one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party." *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985).

[7] Though reformation and blue-penciling are separate doctrines, courts occasionally use the verb "reform" (not the doctrine of "reformation") to describe the process of enforcing a narrower scope of a restrictive covenant under blue-pencil principles. *See, e.g.*, *Saddlers Row, LLC v. Dainton*, 2012 WL 7989526, at *2 (Ill. Ct. App. Apr. 23, 2013) (stating that to blue-pencil a covenant is to "*reform* the agreement to make it acceptable to the trial court" and finding trial court abused its discretion by failing to blue-pencil covenant where defendant was clearly in breach) (emphasis added).

jurisdiction . . . this Agreement *shall be reformed*, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision had never been contained herein." R. 791, 830 (emphasis added).

The severability clause in all the agreements confirms that "it was the intent of the parties" that any overbroad or unlawful provision be deemed amended or revised to comply with governing law. *Rockford Mfg.*, 296 F. Supp. 2d at 689 (finding "Severability Clause" in non-solicitation agreement reflected "the intent of the parties" that unenforceable terms be severed from non-solicitation agreement); *see also Mgmt. Servs. Corp. v. Dev. Assocs.*, 617 P.2d 406, 408 (Utah 1980) ("A contract is severable . . . depending on the intent of the parties at the time they entered into the contract.").[8]

The district court acknowledged that terms of the ARM Agreements "*could authorize*" enforcing a reasonable scope. R. 1429 (emphasis added). However, it flatly refused to honor them (and entirely ignored the LTIP Plan's severability clause), citing grounds it alone constructed; the court ruled *sua sponte* "that the undisputed evidence uniformly indicates that not only are the restrictive covenants in the Sales Representative Agreement *substantively unconscionable*, but the agreement itself was obtained through *procedurally unconscionable* means."[9] R. 1430 (emphasis added). The court also made

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[8] S&A demonstrated how Robinson's restrictive covenants could be construed and narrowly enforced under the agreements' severability clauses. *See* R. 1113–16, 1119–20. But the district court never addressed this. R. 1429–38.

[9] The court also found that the ARM Restrictive Covenants were "deliberately" overbroad because, in its view, ARM "knows" how to draft "appropriate restrictive covenants" because it did so for "higher-level executives." R.1433. But there is no record evidence of the drafters' intent, and differences between Robinson's covenants and those in other agreements is irrelevant. The court's focus must be "the *subject*

the charged conclusion that the LTIP Restrictive Covenants could not be blue-penciled because of "procedurally unconscionable behaviors to obtain a substantively unconscionable contract." R. 1438. As shown below, these rulings were incorrect as a matter of law and violate summary judgment standards.[10]

F. The District Court's *Sua Sponte* "Unconscionability" Rulings are Incorrect.

1. Unconscionability Is an Affirmative Defense that Robinson Waived.

Unconscionability, whether substantive or procedural, is an affirmative defense. *See Bose Corp. v. Ejaz*, 732 F.3d 17, 23 (1st Cir. 2013) (holding "[u]nconscionability is an affirmative defense" and to show unconscionability a party "must prove both 'procedural' and 'substantive' unconscionability"); *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489, 1490 (N.D. Ill. 1990) (same). A party must set forth an affirmative defense in its pleadings, "otherwise, the defense is waived." *Pratt v. Bd. of Educ.*, 564 P.2d 294, 298 (Utah 1977); *see also* Utah R. Civ. P. 12(h) (a party "waives all defenses . . . which [he] does not present either by motion . . . or . . . in his answer or reply"). Robinson did not plead the affirmative defense of unconscionability in his Answer or otherwise preserve it. *See* R. 55–57. Unconscionability as a defense was thus waived; it was not at issue in this matter, much less a ground for summary judgment.

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covenant." *Sys. Concepts*, 669 P.2d at 427 (emphasis added). Finally, the district court's inference on intent against S&A (the non-moving parties) violates summary judgment standards. *See infra* p. 12.

[10] The court also claimed that ARM supplied "no legal analysis to assist the court" in applying the severability clause contained in the ARM Agreements. R. 1429. This is incorrect. *See infra* p. 35 n.16.

2. Parties Determine the Scope of Summary Judgment.

Robinson did not claim that the restrictive covenants (much less the entire agreements) were unconscionable. The district court alone crafted the unconscionability argument and conclusion. *See* R. 326–85, 1235–1316. But granting summary judgment on claims or defenses that were not raised, were waived, were not the subject of discovery, were not briefed and were not argued is inappropriate because the parties define the scope of summary judgment. *Kell v. Utah*, 2008 UT 62 ¶ 49, 194 P.3d 913 (finding that trial court "erred when it *sua sponte* entered summary judgment" on claims not raised because "[u]nder the rules of summary judgment, only parties to the case may define the scope of summary judgment").

The court's *sua sponte* unconscionability rulings cannot construct a defense that Robinson never raised and therefore waived. An unraised affirmative defense may only be allowed in the interests of justice *and* where the opposing party is given adequate opportunity to defend itself. *See F.M.A. Fin. Corp. v. Build, Inc.*, 404 P.2d 670, 671 (Utah 1965) (stating that "[i]f the interests of justice so require and the opposing party is given fair opportunity to meet the defense, the trial court may permit" an affirmative defense that was not pled in the answer); *see also Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996) (interpreting the pleading rules to "turn upon the fact that what the parties are entitled to is notice of the issues raised and an opportunity to meet them").

S&A had no opportunity to address unconscionability, which first appeared when the district court presented it as its main ground for summary judgment. R. 1429–34, 1438.

3. There was no Record Evidence of Unconscionability.

Even if Robinson had properly raised unconscionability, and S&A were allowed to address it, there is no "undisputed" evidence of unconscionability permitting summary judgment. The principle of "unconscionability" "is one of the prevention of oppression and unfair surprise." *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1041 (Utah 1985) (citation omitted). Unconscionability focuses upon the substance of an agreement's contents and the procedure relating to the contract's formation. *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998). Unconscionability is established "only by clear and convincing evidence." *Res. Mgmt. Co.*, 706 P.2d at 1043. "[T]he critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties." *Id.* "Unconscionability cannot be demonstrated by hindsight." *Id.*

Substantive unconscionability examines whether a contract's terms are "so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain." *Sosa v. Paulos*, 924 P.2d 357, 361 (Utah 1996). "The terms of the contract should be considered 'according to the mores and business practices of the time and place.'" *Id.* (citing 1 *Corbin on Contracts* § 128, at 551 (1963)). Here, the district court cited no such evidence. There is no evidence (much less clear and convincing evidence) of the mores

and business practices relevant to S&A's industries, or that Robinson was either "oppressed" or "unfairly surprised" by the agreements. The evidence viewed in the light most favorable to S&A confirms that Robinson was given the agreements prior to voluntarily signing them, and he could have objected or refused to sign if he believed there was an unfair imbalance in obligations. Instead, he voluntarily signed the agreements, accepted the terms, and took the money. R. 391, 786, 825, 1195.

"Procedural unconscionability focuses on the negotiation of the contract and the circumstances of the parties." *Ryan*, 972 P.2d at 403. "A party claiming [procedural] unconscionability bears a heavy burden." *Id.* at 402. Whether this burden was met requires the court to consider developed evidence of six factors: (1) whether each party had a reasonable opportunity to understand the contract's terms, (2) whether there was no opportunity for meaningful negotiation, (3) whether the contract was boilerplate drafted solely by the party in the strongest bargaining position, (4) whether contract's terms were explained to the weaker party, (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the contract, and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions. *See Sosa*, 924 P.2d at 362. "None of the factors is dispositive; rather, [the court] consider[s] all the circumstances in light of the doctrine's purpose to prevent oppression and unfair surprise." *Ryan*, 972 P.2d at 403.

Without the aid of briefing, affidavits, depositions or documentary evidence from the parties, or even the benefit of parties with an awareness of the issue, the court concluded—on summary judgment—"that all six factors indicate that ARM obtained

[Robinson's] signature on the Sales Representative Agreement through procedurally unconscionable means."[11] R. 1431. In doing so, the court ignored the summary judgment standard which requires all factual inferences to be drawn in favor of the non-moving parties (S&A). *See Pugh*, 2005 UT App 203, ¶ 23. Having mistakenly adopted the strict construction standard, R. 1425, the district court did the opposite; it interpreted facts and inferences in favor of Robinson, the *moving* party.

a. Opportunity to understand terms.

The court concluded: "Robinson lacked a reasonable opportunity to understand which terms and conditions of the agreement ARM was going to enforce and which it would abandon." R. 1431. First, this misses the point of the rule which involves a reasonable opportunity to understand *the agreement terms*, not which terms parties may later enforce. *See Jones v. Johnson*, 761 P.2d 37, 39 (Utah Ct. App. 1988) ("Procedural unconscionability will be found . . . where lack of education or sophistication results in no opportunity to understand the terms of the agreement."). Second, no evidence shows that Robinson lacked an opportunity to read, understand, or seek clarification on the ARM Agreements' terms (or terms of the LTIP Agreement).[12] *Sosa* requires the absence of a "reasonable opportunity to understand the terms." *See The Cantamar, LLC v. Champagne*, 2006 UT App 321, ¶ 36, 142 P.3d 140 (finding no procedural

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[11] The district court did not separately analyze unconscionability as to Robinson's LTIP Restrictive Covenants, saying only that "severance is not available to maximize one's reward for engaging in procedurally unconscionable behaviors to obtain a substantively unconscionable contract." R. 1438. S&A's analysis of the district court's findings as to the ARM Agreements thus also applies to the LTIP Plan and LTIP Agreement.

[12] Robinson acknowledged in the LTIP Agreement that he had an opportunity to consult with counsel prior to signing. R. 1195.

unconscionability because there was "no evidence demonstrating[] that [the defendant] did not have a reasonable opportunity to understand the [agreement]").[13] To the extent evidence on this element existed (and none exists), all inferences on summary judgment should have been drawn in favor of S&A. *Pugh*, 2005 UT App 203, ¶ 23.

b. Meaningful negotiation.

Citing no evidence, the district court found that Robinson lacked the opportunity for meaningful negotiation. R. 1431. First, the *lack* of a "negotiation" does not mean that there was *no opportunity* for one, and this does not of itself render and agreement unenforceable. *See Montoya v. Fin. Fed. Credit, Inc.*, 872 F. Supp. 2d 1251, 1271 (D.N.M. 2012) (parties do not need to individually negotiate each aspect of a contract for those provisions to be enforceable). Second, Robinson did not present evidence that he had no opportunity to negotiate. *See The Cantamar*, 2006 UT App 321 ¶ 36 (holding there was no evidence of procedural unconscionability where defendant did not demonstrate a lack of opportunity to negotiate).

c. Bargaining position.

The district court found "the agreement was entirely boilerplate drafted by ARM, the party in the strongest bargaining position." R. 1431. However, as *Ryan* recognized, "[a]lmost all employment contracts are drafted by the employer" and this factor alone will not render the agreement unconscionable. *Ryan*, 972 P.2d at 404.

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[13] The ARM Regional Manager Agreement contained no restrictive covenant that conflicted with covenants in the ARM Agreements to create ambiguity about which version would apply. R. 1157. Indeed, the ARM Regional Manager Agreement states that it does not void other contracts with Robinson that do include restrictive covenants. *Id.*

d. Explained terms.

The district court stated that "the terms of the agreement were never mentioned or explained to Robinson." R. 1431. Yet, no discovery was done on this or any other *Sosa* factor, and no evidence supports this element.[14] Robinson presented no evidence suggesting he wanted or needed an explanation. The evidence (in the light most favorable to S&A) demonstrates the opposite—Robinson knew how to seek clarification when he wished, as shown when he contacted Vivint's Todd Santiago to ask for an explanation of a term in the proposed LTIP Plan which he opposed. R. 394. That S&A did not affirmatively walk Robinson through each term of the agreements does not satisfy this element and does not give Robinson a defense of ignorance. *See Res. Mgmt. Co.*, 706 P.2d at 1048 (finding no procedural unconscionability because "it was incumbent upon them to read the contract and to seek the advice of an attorney before signing the contract"). "One party to a contract does not have a duty to ensure that the other has a complete and accurate understanding of all terms embodied in a written contract. Each party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense." *Id.* at 1047.

d. Meaningful choice.

The district court also found as "undisputed" on summary judgment that "Robinson lacked a meaningful choice and was compelled to accept the terms". R. 1431. Again, no evidence appears to support this. And unlike the patient in *Sosa*, Robinson was

[14] Had Robinson raised the defense of unconscionability, S&A would have produced evidence showing that Robinson was not only familiar with the ARM Agreements, he encouraged others he recruited to sign the same agreement.

not coerced or unfairly pressed to execute the ARM Agreements or the LTIP Agreement. *See Sosa*, 924 P.2d at 362 (finding a patient's arbitration agreement was obtained through procedurally unconscionable means where the doctor required the patient's signature minutes before surgery). Robinson had ample time to review and consider the Agreements' terms. Indeed, he signed ARM Agreements twice in two calendar years. R. 786, 825. Here, Robinson cannot cite any evidence of coercion because there is none.[15]

e. How the agreement was obtained.

The district court found that "ARM employed *deceptive practices* to obtain the agreement by interposing it as a required computer portal after purportedly negotiating all the terms of Robinson's employment through attorneys, and by *secretly relying* on its restrictive covenants while openly abandoning its remaining terms." R. 1431 (emphasis added). No evidence (much less evidence in a light favoring S&A) shows that any agreement was done in secret or by deceptive means. Rather, Robinson was aware of the terms and neither ARM nor Solar did anything to "oppress or unfairly surprise" him, regardless of the "reason" Robinson may give as to why he signed them. *Ryan*, 972 P.2d at 404. Moreover, that Robinson chose to employ an attorney to negotiate one agreement does not make other agreements "deceptive" where he elected not to hire one. To make

[15] This factor was not satisfied merely because Robinson's acceptance was required for employment. The plaintiff in *Ryan* unsuccessfully argued that he had no meaningful choice because the defendant "coerced him into signing the [agreement] by refusing to give him his paycheck until he did so." *Ryan*, 972 P.2d at 404. The court held that "[e]ven if true, this did not eviscerate [plaintiff's] choice whether to accept the terms of the [agreement], "because he could have quit, collected his paycheck, and sought "employment with another pharmacy that did not maintain at-will employment." *Id.*

these findings of fact, the district court necessarily made improper inferences against S&A. *See Pugh*, 2005 UT App 203, ¶ 23.

For these reasons, even if Robinson had not waived the unconscionability defense, and if S&A were allowed to respond, the district court did not establish unconscionability with clear and convincing evidence. And it erred by making fact findings against S&A *sua sponte* on summary judgment when all reasonable inferences should have been drawn in their favor.

II. THE DISTRICT COURT ERRONEOUSLY AWARDED FEES

An award of attorney fees under Utah Code Section 78B-5-825(1) is rare and only permitted if "the court determines that the action . . . was without merit and not brought or asserted in good faith." "The statute is narrowly drawn. It was not meant to be applied to all prevailing parties in all civil suits." *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983). The court "must determine *both* that the losing party's action or defense was 'without merit' *and* that it was brought or asserted in bad faith." *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 7, 122 P.3d 556 (emphasis in original). These inquiries are made "independently" of one another, *see id.* ¶ 12, and an award of fees without a finding of both will be reversed. *In re Olympus Constr., L.C.*, 2009 UT 29, ¶ 32, 215 P.3d 129.

A. S&A's Claims and Request for Relief Had Merit.

A claim is without merit only if it is "frivolous" or "is of little weight or importance having no basis in law or fact." *Cady*, 671 P.2d at 151 (internal quotation marks omitted). "A party may bring a good faith action and not prevail. Failure of a

cause of action or defense does not automatically require the losing party to pay costs." *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1068 (Utah 1991), *abrogated on other grounds.*

1. S&A's claims have a basis in fact.

The facts described above supply a solid factual basis for the relief ARM and Solar requested. They show:

1. ARM's parent, Vivint, hired Robinson as a Regional Sales Manager and gave him $600,000 as a signing bonus and budget to develop a sales team. R. 1136–37, 1140.

2. Robinson entered into ARM Sales Rep Agreements in 2013 and 2014 in which Robinson agreed not to solicit ARM's employees. R. 786, 791, 825, 830.

3. Robinson entered into the LTIP Agreement to participate in the LTIP Plan which includes Robinson's covenant not to compete with Solar or solicit Solar employees. R. 1195–96.

4. While still working for ARM and with Solar, Robinson formed a competing company, established a business relationship with Solar's competitor (SunRun), and led away important members of S&A's valuable sales employees. R. 887, 890–93, 895–99, 903–04, 907, 1150–52.

5. Robinson violated his restrictive covenants. R. 907, 919.

This is a firm factual basis upon which S&A's claims rest. *See Verdi Energy Grp., Inc. v. Nelson*, 2014 UT App 101, ¶ 34, 326 P.3d 104 (finding factual context sufficient to support claim even though court ultimately determined that no contract was formed).

2. S&A's claims have a basis in law.

S&A sought to enjoin Robinson from violating his agreements. Such a contract claim establishes a basis in law for the injunctive relief that S&A seek. *C.f. id.* ¶ 34

(disagreeing that breach claim "lacked merit" even though no contract existed).

S&A's Complaint asked for a declaration that the restrictive covenants were fully enforceable to authorize an injunctive remedy. R. 14, 18 (seeking injunctive relief "as requested below"). And the requested injunctive relief was limited to Robinson's alleged misconduct. R. 18. S&A did *not* ask to enjoin Robinson from other actions that the restrictive covenants might preclude but which he chose not to do. The narrowed scope of requested relief fully complies with the agreements' terms and blue-pencil principles because it allows the court to "avoid reading covenants not to compete in a manner that would render them unreasonable." *Bad Ass Coffee,* 636 F. Supp. 2d at 1246.

S&A's claims are grounded in contract-based restrictive covenants. It is undisputed that Robinson's misconduct falls squarely within the covenants' prohibitions. *See* R. 791, 830, 1196–97. And although the district court ultimately determined not to enforce the covenants, S&A were well within their right to bring the action based on Robinson's harmful conduct. A claim based on a reasonable interpretation of an employment agreement has "a basis" in contract even if the agreement is found unenforceable. *See Utah Tele. Open Infrastructure Agency v. Hogan*, 2013 UT App 8, ¶ 16, 294 P.3d 645 (court rejected request for attorney fees where Utah law had not addressed the enforceability of the confidentiality provision and the defendant had a contractual duty to protect the materials, though defendant argued that the lack of merit "should have been obvious"). S&A's action is therefore based at minimum on a reasonable (and S&A believe, correct) interpretation of the restrictive covenants in which Robinson agreed not to solicit S&A's employees or compete with Solar. *See id.*

3. Application of blue-pencil principles of partial enforcement has a basis in law.

The nature of Robinson's chosen actions made it unnecessary for S&A to seek the full scope of injunctive relief under the restrictive covenants. They only requested an injunction tailored to Robinson's conduct, consistent with blue-pencil principles of partial enforcement. R. 18 (seeking to enjoin Robinson from working with SunRun in competition with Solar). And requesting a narrower remedy under these covenants is a right grounded in law and is not "frivolous."[16] *See Verdi Energy Grp., Inc.*, 2014 UT 101, ¶ 34 (reversing fee award where facts and law permitted a colorable argument in favor of the losing party's position).

S&A showed that: (1) Blue-penciling is not conditioned on a claim for reformation, *see Saccomanno*, 2010 WL 1329038, at *5; *see also supra* pp. 21 to 22, and (2) blue-penciling principles and contract severance terms are enforceable, *see supra* pp. 18–21, 22–24. At minimum, the unsettled nature of Utah law on the doctrine also supports a finding that this action had "merit." *Hogan*, 2013 UT App 8, ¶ 16; *see also In re Olympus Constr.*, 2009 UT 29, ¶ 31. Solar also showed that the court should have applied blue-pencil principles to the LTIP Restrictive Covenants under settled Delaware law.[17] *See supra* pp. 16–18.

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[16] On summary judgment, the court said that "ARM now concedes" that its Complaint is "frivolous." R. 1434. This is baseless. ARM made no such concession. Rather, ARM showed that its narrowed claim for injunctive relief was proper and should be enforced. R. 1111–13, 1117–20, 1540–1551.

[17] The court found that S&A "affirmatively alleged in the Complaint that Utah law governs both the agreements." R. 1889. This is incorrect. While the Complaint states that "[a]ll claims herein are governed by Utah law," it clarifies that the choice of law

Finally, even the district court concluded that Solar "provided *some basis* as to why and how the Court could enforce a more limited scope of the restrictive covenants." R. 1889 (emphasis added). It also concluded that Solar provided "some argument and basis as to why and how the Court could enforce a more limited scope of the restrictive covenants." R. 1889. By finding a "basis" for Solar's claims, the court invalidated its attorney fee award against Solar as a matter of law. *Still Standing Stable, LLC,* 2005 UT 46, ¶ 7 (fee award under the statute only if the court determines "*both* that the losing party's actions or defenses was 'without merit' *and* that it was brought or asserted in bad faith.")

Moreover, the district court's "basis" finding as to Solar indirectly confirms the basis in law and fact for ARM's claims as well because (1) the nature of ARM's claims is similar (seeking a narrowed injunctive remedy under contract-based covenants), R. 3–19, and is consistent with Utah authority applying principles analogous to the blue-pencil doctrine, *see supra* pp. 19–21, and (2) the claims are based substantially on the same background facts, *see supra* pp. 3–8.

In sum, S&A's claims had a firm basis in law. The court's refusal to accept S&A's claims does not undermine the existence of the legal basis for those claims.

4. The district court's conclusions on "unconscionability" do not render the claims meritless.

The district court's conclusions on unconscionability are erroneous, *see supra* pp.

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provision in the statement comes from the ARM Agreements. R. 2. Neither the LTIP Plan nor LTIP Agreement are referenced, and S&A did not "affirmatively allege" that Utah law governed them.

24–32, and do not render S&A's claims meritless. Moreover, the success of an affirmative defense would not mean that a claim was without merit. *See Hogan*, 2013 UT App 8, ¶ 16 (failure on the merits of a case does not mean the action was meritless).

B. S&A Brought and Asserted this Action in Good Faith.

Because S&A's claims had a firm basis in law and fact, this Court need not address whether this action was asserted in bad faith. Utah Code § 78B-5-825(1) (both "without merit" *and* "bad faith" must be shown). But the court's award of attorney fees against S&A was also incorrect because S&A brought and asserted "the action" in good faith.

A finding of bad faith is no small thing, and must be based on record evidence that the plaintiff had the *subjective intent* to bring the action in bad faith. *Still Standing Stable*, 2005 UT 46, ¶ 13. Disputed pre-lawsuit business transactions are not the statute's focus; the inquiry involves the party's conduct relating to or arising from the litigation itself. *See Hopkins v. Hales*, 2008 UT App 95, ¶ 11, 182 P.3d 402; Utah Code § 78B-5-825 ("the action" was "not *brought* or *asserted* in good faith" (emphasis added)).

To establish bad faith, Robinson had the heavy burden to prove with evidence of S&A's subjective intent that one or more of the following facts was wholly absent: (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; or (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay or defraud others. *Cady*, 671 P.2d at 151; *see also Still Standing Stable*, 2005 UT 46, ¶ 16.

1. The district court did not identify evidence of subjective bad faith intent.

The court said that *all* three *Cady* factors proved S&A's subjective bad faith intent, ostensibly based on the "pleadings, briefing, and undisputed facts and evidence." R. 1885. But in evaluating subjective intent, the district court's bare conclusions and statements cannot substitute for "evidence" upon which a finding of bad faith must rest. *See Verdi Energy Grp.*, 2014 UT App 101, ¶ 29 ("While the court seems to conclude that Verdi's claims were brought for the purpose of delay so that it could force the Sellers to sell the property to Verdi, without a belief in their actual merits, there does not appear to be any evidence in the record to support these findings."). The district court here does not identify specific record evidence of S&A's "subjective intent" to bring and assert "this action" in bad faith.

First, notwithstanding of the court's bad faith "findings" (discussed below), in the end the court contradicted and invalidated its bad faith conclusion and fee award by expressly finding that it was "not convinced that Solar's argument was necessarily made in bad faith."[18] R. 1889. As a matter of law, this finding precludes an award of fees against Solar under Section 78B-5-825. Because the claims, arguments and analysis made by Solar (discussing Delaware law) and by ARM (discussing Utah law) regarding

[18] The court also implied that Solar's arguments at least request an extension of Utah law that is proper for appellate review, saying the claims "would have to be raised at the trial court level before it can be raised at the appellate court level." R. 1889. This conclusion likewise precludes a fee award. *C.f. Hogan*, 2013 UT App 8, ¶ 16.

partial enforcement of the restrictive covenants were similar, the court's findings of no bad faith would apply to ARM as well.[19]

But despite its not-in-bad-faith conclusion, the court misapprehended the standard and incorrectly awarded Robinson 50% of his attorney fees incurred in defending against Solar's claims, and 100% of his fees defending against ARM's claims. R. 188–89. Accordingly, the district court's contradicted conclusion on bad faith is clearly erroneous, and the fee award should be reversed as to both Solar and ARM.

2. There is no evidence of subjective intent showing that S&A lacked an "honest belief" in the propriety of their claims.

The district court concluded that S&A lacked "an honest belief" in any claim. It inferred this from one line in the Complaint's claim for declaratory relief. R. 1885. According to the court, it was bad faith for S&A to request a declaration that the "restrictive covenant provisions 'were and are valid and fully enforceable'" because the court believed the covenants were extremely broad. *Id.* According to the district court, this was so because anyone ("even a non-lawyer") could discern that the "restrictive covenants were invalid and unenforceable." *Id.* This does not constitute evidence of subjective bad faith intent.

First, the district court's "finding" must be rejected because it incorrectly conflates the "without merit" element of Section 78B-5-825 and the "bad faith" element. The

[19] The district court said that "ARM . . . provided no basis whatsoever—it did not cite any cases or make any argument—as to how or why the Court should enforce a more limited scope of its restrictive covenants." 1889. This is incorrect. ARM explained at length how under Utah law and the severability clause contained in the ARM Agreements the court could enforce ARM restrictive covenants. *See, e.g.*, R. R. 1111–13, 1117–20, 1540–1551. ARM was not "offensively silent" as the court said. R. 1821.

court's finding is dependent on and assumes the correctness of the court's rejection of blue-penciling principles and the agreements' severability clauses to enforce part of the restrictive covenants, as S&A asserted. R. 1111–20, 1425–34, 1436–39. As a result, the court believed the "overbroad" covenants were clearly "invalid and unenforceable," and S&A had to know this and could not honestly believe they could enforce them.

But "the 'bad faith' determination must be made independently of the 'without merit' determination." *Still Standing Stable*, 2005 UT 46 at ¶ 12 (*quoting Sonnenreich,* 2004 UT 3 at ¶ 49). The Utah Supreme Court "cautioned against intertwining the statutory 'without merit' and 'bad faith' requirements," because "'it does not follow that simply because the [plaintiff] had no legal foundation to bring the action that it was also acting in bad faith.'" *Id.* ¶ 11 (*quoting Sonnerreich,* 2004 UT 3 at ¶ 49). The Court has rejected such "conflated" findings of bad faith. *Id.* ¶ 16 (reversing trial court order awarding attorney fees "to the extent it conflated the 'without merit' and 'bad faith' requirements of [former] section 78-27-56"). Because the district court here conflated the "without merit" and "bad faith" requirements of the statute, the court's finding should be rejected.[20]

Second, the district court overlooked the fundamental difference between a general Complaint allegation for enforceability and the specific claim for relief that limits

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[20] The district court also said that Appellants "never even attempted to demonstrate the reasonableness or legality of the restrictive covenants" but instead "simply ignored" the relief sought in their Complaint. R. 1885. Again, the court overlooked Appellants' analysis of blue-pencil principles and the agreement's severance terms requiring partial enforcement of the restrictive covenants and the limited injunctive relief sought in the Complaint.

enforcement. The Complaint included a claim for a declaration that the restrictive covenants were enforceable in order to authorize an injunctive remedy. *See* R. 14, 18. But the requested injunction was specific only to Robinson's misconduct. R. 18. S&A did *not* ask to enjoin Robinson from other actions that the restrictive covenants might preclude. This allowed the court to "avoid reading covenants not to compete in a manner that would render them unreasonable." *Bad Ass Coffee,* 636 F. Supp. 2d at 1246.

Third, no evidence establishes that S&A *knew* the district court would not enforce the covenants, and neither Robinson nor the court cited evidence establishing S&A's subjective intent on this. R. 1445–46, 1885–86. Rather, S&A knew that the contracts *required* severance of terms found overbroad, R. 791, 830, 1188, and that, under Delaware law, courts would blue-pencil Robinson's LTIP Restrictive Covenants. Also, because a majority of states apply the blue-pencil doctrine, and in view of the result in *System Concepts* and *J & K Computer Sys.*, as recognized in *Bad Ass Coffee*, more than a colorable argument was made by S&A that Utah law supported application of blue-pencil principles. *See supra* pp. 16 n.3, 19–21. This confirms S&A's honest belief that the restrictive covenants would be enforced to the extent necessary to protect their legitimate business interests, and they were not "silent or sheepish" on the scope of enforcement sought. R. 1886.

3. No evidence shows that S&A had the subjective intent to take "unconscionable advantage" of Robinson.

The district court relied on the same "fully enforceable" line from the Complaint to find that S&A had the subjective intent to take "unconscionable advantage" of

Robinson because (1) "the overbreadth of the Plaintiffs' Complaint was *intended* for unconscionable advantage"; (2) Robinson was not an "employee" of Solar and did not sell Solar products to customers; (3) Appellants "sought to prevent" him from competing with Solar in the solar industry and "several other industries"; and (4) Appellants might have enjoined Robinson from joining a "competitor other than SunRun." R. 1886. Like the district court's finding on "honest belief," its "unconscionable advantage" finding does not prove that S&A brought or asserted the action in "bad faith."

First, this finding incorrectly assumes that S&A's claims are "without merit"—that the doctrine of partial covenant enforcement or severability clauses could not apply because of covenant "overbreadth." It also incorrectly assumes that as a matter of law employee non-solicitation and non-competition covenants cannot apply to persons who work for a company though not as "employees," or who make no direct customer sales. The district court thus did not independently identify evidence of bad faith but incorrectly conflated the "without merit" and "bad faith" requirements of Section 78B-5-825. *Still Standing Stable*, 2005 Utah 46 at ¶¶ 12, 16.

Second, this finding also ignores the effect of S&A's narrowed request for injunctive relief that was specific to Robinson's alleged misconduct. R. 18. S&A did not ask to enjoin Robinson from working in "several other industries," R. 1886, or from other unknown or possible misconduct on which the district court speculates but which Robinson chose not to do, or from taking employees to competitors Robinson chose not to join.

Third, restrictive covenants are not limited at law to "employees" who make direct customer sales. *See, e.g.*, *Americare Healthcare Servs. Akabuaku*, 2010 WL 4705148, at *6 (Ohio Ct. App. Nov. 18, 2010) (non-compete agreements signed by contractors are enforceable). As shown above, such covenants are intended to protect a legitimate interest like the employee goodwill Robinson was hired to develop and paid to protect. *See supra* pp. 12–16. The district court's contrary assumptions are incorrect and cannot substitute for actual evidence of "bad faith." *See Verdi Energy Grp.*, 2014 UT App 101, ¶ 29.

Fourth, the district court's finding ignores that Robinson's participation in the LTIP Plan was voluntary. That he was not a Solar "employee" or did not sell solar products is immaterial. Robinson was offered a lucrative compensation program under the LTIP Plan related to sales of Solar's products by employees he recruited. R. 391. If Robinson wished to participate, he in turn had to agree to the related obligations and restrictions, including non-compete and non-solicitation covenants. R. 1195. Robinson was free not to participate in the LTIP Plan and could have declined to recruit sales employees for Solar. However, Robinson desired the financial upside and entered into the LTIP Agreement. R. 391. Neither he nor the court can cast Solar's efforts to protect its sales force from Robinson's violations as an "unconscionable" effort to "take advantage."[21]

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[21] Robinson also argued below that the covenants were "deliberately overbroad" for an "i*n terroram* effect" on "former sales representatives," and that this was more valuable to S&A than having a narrowly-drafted and enforceable covenant. R. 1446. But no evidence showed that an *in terroram* effect exists and, if it did, that it was valuable to

Lastly, that S&A plainly did not take unconscionable advantage of Robinson here is confirmed by the lawsuit Robinson's company filed to enjoin former LGCY sales representatives and managers for violating non-competition and non-solicitation covenants by allegedly misappropriating goodwill with LGCY's sales force. This alleged misconduct is similar to Robinson's here. *See supra* p. 14.

In sum, the district court's analysis and "findings" of "unconscionable advantage" do not provide independent evidence that S&A brought or asserted the action in "bad faith."

4. No evidence establishes that S&A intended to bring and assert this action solely to wrongfully hinder, delay or defraud Robinson.

The district court made a series of highly charged "findings" it says are proof of S&A's intent to improperly delay Robinson. But these, like the district court's two prior "bad faith" findings, are based on the same phrase in the Complaint and the court's underlying conclusions regarding the unenforceability of "overbroad covenants." R. 1887. But the district court went further under this *Cady* factor, saying that the "vast overbreadth of Plaintiffs' Complaint and the restrictive covenants combined" with Plaintiffs' "lack of candor in their pleadings and briefing as to the scope of the relief they were seeking" prove that "Plaintiffs intended to hinder and delay" Robinson from "his

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S&A. Citing the court's summary judgment ruling, Robinson also suggested that the restrictive covenants were "foisted" on "unsophisticated employees" and used as a "bullying tactic." R. 1446. Again, there was no evidence of this, and the district court's conclusions alone are not evidence. *See Verdi Energy Grp.*, 2014 UT App 101, ¶ 29. And this speculation only relates to contracting issues; it is not evidence of bad faith in bringing *this action*. *See* Utah Code § 78B-5- 825(1) (award appropriate only if the *action* was brought or asserted in bad faith).

lawful employment or to delay the discovery of an overbroad pleading and overbroad covenant." *Id.* As harshly worded as the court's statements are, they are not independently derived findings proving that S&A asserted this action in bad faith for purposes of Section 78B-5-825.

First, this finding is again improperly conflated with the assumption that S&A's claims are "without merit." *See Still Standing Stable*, 2005 UT 46 ¶¶ 12, 16.

Second, this finding ignores that the scope of the injunctive relief S&A sought was clearly stated and expressly limited just to Robinson's alleged misconduct of soliciting S&A's employees to work with him at SunRun through his competing business. *See* R. 18. The limited relief sought was *not* hidden from "discovery," as the district court incorrectly concludes; each claim referred to the scope of the requested injunction, including S&A's claim for declaratory relief.[22] S&A's request for limited relief from the outset demonstrates that they did not bring this lawsuit merely to hinder, delay, or defraud Robinson, or to take unconscionable advantage, but to take reasonable action to protect themselves when Robinson wrongfully began to compete and solicit S&A's employees. R. 894, 907, 1150–52.

The district court's extreme finding implies that it would consider anything short of an unqualified concession in S&A's Complaint that Robinson's restrictive covenants were entirely unenforceable under Utah and Delaware law, to be a "lack of candor in [S&A's] pleadings and briefing," and proof of intent to wrongfully delay Robinson.

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[22] Each claim for relief stated that S&A sought injunctive relief "as requested below." R. 14 ¶ 49 d., 15 ¶ 57, 17 ¶ 62. And "below," S&A expressly detailed that relief and it was limited to Robinson's competition with Solar and his employee solicitations. R. 18 ¶ 70;

R. 1887. Indeed, the court implies that by not simply conceding error, S&A "forced" Robinson to seek summary judgment. Remarkably, the district court cast this as a "scorched earth tactic" that "drove up the costs of litigation," presumably in bad faith.[23] R. 1887. This ignores that while parties always incur litigation costs in addressing disputed claims, that does not establish bad faith under Section 78B-5-825.[24] As shown above, S&A demonstrated that the covenants were enforceable under Delaware and Utah law to enjoin Robinson, as requested in the Complaint. *See supra* pp. 8, 16–21. That showed not only that summary judgment was improper, it also confirmed that S&A's action was not asserted in "bad faith."

Third, it is telling that the actions cast by the district court as proof of "bad faith" are very much *not* the type found in other cases to constitute evidence of bad faith. This is not a case where S&A brought an action without any reasonable basis in fact for their assertions[25]; to delay debt collection efforts[26]; to unduly burden the defendant by engaging in scorched earth litigation tactics[27]; to bring claims they *knew* no longer existed[28]; where S&A disobeyed court orders[29]; persisted in dilatory tactics and other

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[23] "Scorched earth tactics" actually involve conduct such as oppressive motion practice, excessive and facially irrelevant discovery, suing anyone remotely connected to the case, and piling on allegations. *See, e.g.*, *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 83 (D.N.J. 2006*); In re* Cooper, 253 B.R. 295, 298 (N.D. Fla. 2000).

[24] If failure of a cause of action does not automatically require the losing party to pay costs, *see Watkiss & Campbell*, 808 P.2d at 1068, it follows that legal fees and distraction are not themselves evidence of bad faith intent since nearly all litigation involves legal fees and distraction.

[25] *See Bresee v. Barton*, 2016 UT App 220, ¶¶ 59–61, 387 P.3d 536.

[26] *See Migliore v. Livingston Fin., LLC*, 2015 UT 9, ¶¶ 33–36, 347 P.3d 394.

[27] *See Edwards v. Powder Mt. Water & Sewer*, 2009 UT App 185, ¶ 30, 214 P.3d 120.

[28] *See Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 23, 20 P.3d 868.

efforts calculated to harass the opposing party and drive up litigation costs[30]; or presented witnesses to provide false testimony[31].

In contrast, the district court's findings involve nothing resembling such conduct, are not supported by record evidence developed independent of the district court's "without merit" conclusions, and fail to meet any of the three *Cady* factors establishing subjective bad faith intent.

Because S&A's claims have a firm (and they believe correct) basis in law and fact, and because no evidence of subjective intent shows that the action was brought in bad faith, the district court committed reversible error in awarding Robinson attorney fees.

CONCLUSION

For the above reasons, ARM and Solar request that the district court's summary judgment order and orders awarding Robinson attorney fees should be reversed.

DATED THIS 25th day of July, 2017.

Durham Jones & Pinegar, P.C.

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[29] *See Warner v. Warner*, 2014 UT App 16, ¶ 37, 319 P.3d 711; *Coalville City v. Lundgren*, 930 P.2d 1206, 1211 (Utah Ct. App. 1997).
[30] *See Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998).
[31] *See Outsource Receivable Mgmt., Inc. v. Bishop*, 2015 UT App 41, ¶ 15, 344 P.3d 1167; *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 17, 178 P.3d 922; *Valcarce*, 961 P.2d 305, 315; *Topik v. Thurber*, 739 P.2d 1101, 1104 (Utah 1987); *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991).

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2017, I caused two true and correct copies of the foregoing BRIEF OF APPELLANTS to be sent by standard mail to:

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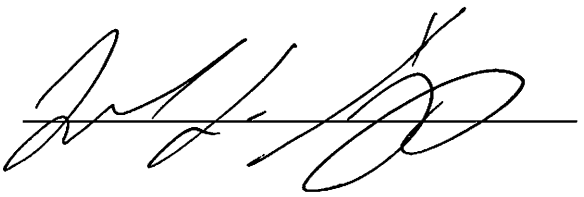
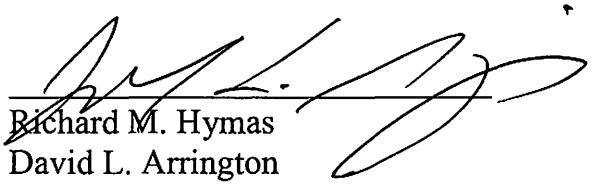


CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,435 words, excluding the parts of the brief that are exempted by Utah R. App. P. 24(f)(1)(B).

DATED THIS 25 day of July, 2017.

DURHAM JONES & PINEGAR, P.C.



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INDEX OF ADDENDA

Tab A

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LGCY POWER, LLC, a Delaware limited liability company, Plaintiff, v. LOGAN NEWBY, an individual, TYLER MCALLISTER, an individual, ROBERT SEAN GODDARD, an individual, MARC DUNHAM, an individual, PAUL CHOJNACKY, an individual, CODY WARNER, an individual, JARED STEARNS, an individual, JOSIAH HETLAND, an individual, PATRICK RAPOZA, an individual, RYAN GRAVES, an individual, TIM DEWEY, an individual, TORREY HOMER, an individual, TREVOR ROELOFS, an individual, FUSION POWER LLC, an Arizona limited liability company, FUSION POWER, INC., an Arizona corporation, FUSION ENERGY LLC, an Arizona limited liability company, and DOES 1-10, Defendants.	**COMPLAINT** ***Jury Trial Demanded*** (Discovery Tier 3) Case No. _____ Judge: _____

Plaintiff LGCY Power, LLC, by and through its undersigned counsel, hereby complains against Defendants Logan Newby, Tyler McAllister, Robert Sean Goddard, Marc Dunham, Paul Chojnacky, Cody Warner, Jared Stearns, Josiah Hetland, Patrick Rapoza, Ryan Graves, Tim Dewey, Torrey Homer, Trevor Roelofs, Fusion Power LLC, Fusion Power, Inc., Fusion Energy LLC, and Does 1–10 (collectively, "Defendants") and for causes of action alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. LGCY Power, LLC ("LGCY") is a Delaware limited liability company with its principal place of business in Utah.

2. Defendant Logan Newby ("Newby"), an individual, is a former sales manager of LGCY and is, upon information and belief, a resident of Arizona.

3. Defendant Tyler McAllister ("McAllister"), an individual, is a former sales manager of LGCY and is, upon information and belief, a resident of Arizona.

4. Defendant Robert Sean Goddard ("Goddard"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of Arizona.

5. Defendant Marc Dunham ("Dunham"), an individual, is a former sales manager of LGCY and is, upon information and belief, a resident of Arizona.

6. Defendant Paul Chojnacky ("Chojnacky"), an individual, is a former sales manager of LGCY and is, upon information and belief, a resident of California.

7. Defendant Cody Warner ("Warner"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

8. Defendant Jared Stearns ("Stearns"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

9. Defendant Josiah Hetland ("Hetland"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

10. Defendant Patrick Rapoza ("Rapoza"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of Arizona.

11. Defendant Ryan Graves ("Graves"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

12. Defendant Tim Dewey ("Dewey"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

13. Defendant Torrey Homer ("Homer"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of Arizona.

14. Defendant Trevor Roelofs ("Roelofs"), an individual, is a former sales representative of LGCY and is, upon information and belief, a resident of California.

15. Defendants Newby, McAllister, Goddard, Dunham, Chojnacky, Warner, Stearns, Hetland, Rapoza, Graves, Dewey, Homer, and Roelofs are sometimes collectively referred to in this Complaint as the "Individual Defendants" and each is sometimes individually referred to in this Complaint as an "Individual Defendant."

16. Defendant Fusion Power LLC is, upon information and belief, an Arizona limited liability company with its principal place of business in Arizona.

17. Defendant Fusion Power, Inc. is, upon information and belief, an Arizona corporation with its principal place of business in Arizona.

18. Defendant Fusion Energy LLC is, upon information and belief, an Arizona limited liability company with its principal place of business in Arizona.

19. Defendants Fusion Power LLC, Fusion Power, Inc., and Fusion Energy LLC are sometimes collectively referred to in this Complaint as the "Fusion Entities."

20. Defendants Does 1–10 are, upon information and belief, individuals or entities that may bear responsibility for the actions described herein. LGCY will amend this Complaint to individually and specifically name the Doe Defendants upon discovering their identities and their respective roles in the actions described herein.

21. This Court has personal jurisdiction over the Individual Defendants pursuant to Utah's long-arm statute (Utah Code Ann. § 78B-3-205) because each Individual Defendant has transacted business in Utah, executed a contract with LGCY in Utah, caused injury to LGCY in Utah, and otherwise has sufficient minimum contacts with Utah. Furthermore, pursuant to each Individual Defendant's contract with LGCY, the Individual Defendants consented to personal jurisdiction in this Court.

22. This Court has personal jurisdiction over the Fusion Entities pursuant to Utah's long-arm statute (Utah Code Ann. § 78B-3-205) because the Fusion Entities have tortiously caused injury to LGCY in Utah and otherwise have sufficient minimum contacts with Utah.

23. This Court has subject matter jurisdiction over this lawsuit pursuant to Utah Code Ann. § 78A-5-102.

24. Venue is proper in this Court pursuant to Utah Code Ann. §§ 78B-3-304 and/or 78B-3-307.

GENERAL ALLEGATIONS

25. LGCY is in the business of marketing and selling residential solar energy systems in various parts of the country, primarily through direct door-to-door sales.

26. LGCY is a certified partner of Sunrun—one of the nation's foremost residential solar energy companies.

27. LGCY hires sales representatives to market Sunrun's products and services door-to-door by contacting potential customers, making presentations about Sunrun's products and services, and obtaining signed customer contracts.

28. LGCY is highly successful in its sales and marketing efforts, generating thousands of sales and substantial customer goodwill for both LGCY and Sunrun.

29. LGCY maintains confidential, highly valuable information about customers and potential customers who have expressed interest in obtaining a residential solar energy system. This information includes, but is not necessarily limited to, an individual's name and address; the individual's credit score; the individual's level of interest in a residential solar energy system; and information about the individual's home and the home's suitability for a solar energy system.

30. LGCY protects its confidential information in a number of ways, including by storing the information in password protected information systems, limiting access to its information systems to certain individuals with a business purpose for accessing the information, and requiring those with access to its information systems to enter into confidentiality and non-disclosure agreements.

31. The lifeblood of LGCY's success is its sales force, which consists of sales managers and sales representatives. LGCY invests substantial time, money, and resources into developing and maintaining its relationships with its sales representatives and sales managers.

32. LGCY invests significant time and resources training its sales managers and sales representatives, which includes educating them about the nature of the solar industry generally, informing them about the advantages of the specific products and services offered by LGCY, teaching them effective and appropriate sales presentation techniques, and providing ongoing oversight and training during the tenure of the individual's work for LGCY.

33. LGCY's sales managers are heavily involved in all aspects of recruiting new sales representatives to join LGCY's sales force. Because recruiting new sales representatives is such an important part of LGCY's business, LGCY goes to great lengths to support the recruiting efforts of its sales managers.

34. LGCY's sales force is organized in a hierarchical structure in which sales managers oversee sales representatives assigned to the manager's office. A portion of the compensation that sales managers are able to earn from LGCY consists of override commissions based on the performance of the sales representatives in the manager's office. These override commissions are in addition to the compensation that a sales manager may earn from his or her own sales. The organization of sales representatives below a higher-level sales manager in this manner is referred to as the sales manager's "downline."

35. A LGCY sales manager is typically assigned to work in designated geographic areas with the sales representatives in his or her downline. Because the geographic areas in which LGCY's sales teams operate are dispersed and often distant from the company's home

office, LGCY relies heavily on its sales managers to develop and maintain strong professional bonds and goodwill between LGCY and the members of its sales force. Indeed, for many of the sales representatives in LGCY's sales force, the representative's sales manager is the face of the company. LGCY's sales managers receive significant compensation to develop and maintain relationships of trust with LGCY's sales representatives on LGCY's behalf.

36. Additionally, because LGCY's sales managers are compensated in part based on the performance of the downline sales representatives that they recruit and manage, sales managers are incentivized to develop and maintain strong personal and professional relationships with the members of their downline for LGCY's benefit. The amount of compensation that a sales manager may receive depends largely on the success of his or her recruiting efforts and the resulting sales made by the representatives in the manger's downline.

37. LGCY compensates its sales managers to develop and maintain strong relationships on behalf of LGCY with the members of the company's sales force.

38. LGCY places significant trust and responsibility in its sales managers. In addition to successfully conducting their own sales, LGCY's managers are also responsible for overseeing the efforts of the sales representatives in their downline and for interfacing between LGCY's corporate operations and its sales force.

39. To protect the relationships and goodwill that LGCY develops both with the members of its sales force and with customers and potential customers, LGCY requires its sales managers and sales representatives to enter into agreements containing noncompetition, nonsolicitation, and confidentiality provisions.

40. Each of the Individual Defendants entered into a written contract with LGCY, as follows:

a. Newby entered into that certain Solar Manager Agreement with LGCY dated October 1, 2014 (the "Newby Agreement");

b. McAllister entered into that certain Solar Manager Agreement with LGCY dated June 17, 2015, (the "McAllister Agreement");

c. Dunham entered into that certain Solar Manager Agreement with LGCY dated November 30, 2016, (the "Dunham Agreement");

d. Chojnacky entered into that certain Solar Manager Agreement with LGCY dated January 14, 2015, (the "Chojnacky Agreement");

e. Goddard entered into that certain Experienced Solar Representative Agreement with LGCY dated December 8, 2016, (the "Goddard Agreement");

f. Warner entered into that certain Solar Representative Agreement with LGCY dated December 11, 2015, (the "Warner Agreement");

g. Stearns entered into that certain Experienced Solar Representative Agreement with LGCY dated February 3, 2016, (the "Stearns Agreement");

h. Hetland entered into that certain Solar Representative Agreement with LGCY dated June 23, 2016, (the "Hetland Agreement");

i. Rapoza entered into that certain Experienced Solar Representative Agreement with LGCY dated May 12, 2016, (the "Rapoza Agreement");

j. Graves entered into that certain Experienced Solar Representative Agreement with LGCY dated January 31, 2016, (the "Graves Agreement");

k. Dewey entered into that certain Solar Representative Agreement with LGCY dated May 10, 2016, (the "Dewey Agreement");

l. Homer entered into that certain Experienced Solar Representative Agreement with LGCY dated May 3, 2016, (the "Homer Agreement"); and

m. Roelofs entered into that certain Solar Representative Agreement with LGCY dated September 12, 2016, (the "Roelofs Agreement").

41. The Newby Agreement, the McAllister Agreement, the Dunham Agreement, the Chojnacky Agreement, the Goddard Agreement, the Warner Agreement, the Stearns Agreement, the Hetland Agreement, the Rapoza Agreement, the Graves Agreement, the Dewey Agreement, the Homer Agreement, and the Roelofs Agreement are sometimes collectively referred to in this Complaint as the "Individual Defendant Agreements" and each is sometimes individually referred to in this Complaint as an "Individual Defendant Agreement."

42. Each of the Individual Defendant Agreements contains provisions protecting LGCY's confidential information, including the following confidentiality provision:

> **Confidentiality**. Representative understands and acknowledges that, during Representative's relationship with the Company under this Agreement, Representative has had and will have access to and has learned and will learn (i) information proprietary to the Company and its affiliates (collectively for purposes of this Section, the "***Company***") that concerns the operation and methodology of the Company Business as the same is now and hereafter conducted by the Company, and (ii) other information proprietary to the Company, including, without limitation, trade secrets, know-how, prices, customer and supplier lists and data, customer databases, pricing and marketing plans, policies and strategies, details of customer and supplier relationships, operations methods, sales techniques, business acquisition plans, the identity of employees and other independent contractors, new recruitment and personnel acquisition plans, processes, patent and trademark applications, Web sites, Internet addresses, email

addresses and domain names, including all software, information and processes necessary to operate the Company's Web site, and all other confidential information with respect to the Company Business (collectively, "***Proprietary Information***"). Representative agrees that, from and after the Effective Date, Representative will keep confidential and will not disclose directly or indirectly any such Proprietary Information to any third party, except as required to fulfill Representative's duties as a Representative of the Company during the Term of this Agreement, and will not use such Proprietary Information except for the Company's benefit and for the Company Business and will not misuse, misappropriate, or exploit such Proprietary Information in any way. The restrictions contained herein shall not apply to any information that was (a) already available to the public at the time of disclosure, or subsequently becomes available to the public other than by breach of this Agreement, or (b) disclosed due to a requirement of law, provided that Representative shall have given prompt notice of such requirement to the Company to enable the Company to seek an appropriate protective order with respect to such disclosure.

43. Each of the Individual Defendant Agreements contains the following noncompetition provision:

> Noncompete. During the period commencing on the date of this Agreement and ending on the date that is the one (1) year anniversary of the date that Representative's relationship with the Company terminates (the "***Noncompetition Period***"), Representative shall not, directly or indirectly (whether as a principal, agent, independent contractor, employee, partner, owner, or in any other similar capacity), own, manage, operate, participate in, perform services for, be employed by, or otherwise carry on, a business similar to or competitive with the Company Business anywhere in which the Company or any of its affiliates, during the Noncompetition Period, is engaged, or to the Representative's knowledge the Company intends to become engaged in the Company Business. Notwithstanding the foregoing, Representative may own not more than one percent of the voting stock of any publicly traded entity that competes with the Company.

44. In defining "Company Business," each of the Individual Defendant Agreements states that LGCY "is in the business of marketing, selling, and installing solar panels and solar-

panel related products and services, and is otherwise generally engaged in other related business activities."

45. Each of the Individual Defendant Agreements contains the following provision prohibiting the solicitation of LGCY's employees and the members of LGCY's sales force:

> Nonsolicitation of Current or Potential Employees or Representatives. During the Noncompetition Period, Representative shall not, directly or indirectly, (i) recruit, solicit, induce, or influence (or seek to induce or influence) any person who is employed by, hired by, affiliated with, or acts as a consultant, independent contractor, or salesperson for, the Company to terminate or alter his relationship with the Company . . . .

46. Each of the Individual Defendant Agreements contains the following provision protecting LGCY's relationships with its customers and potential customers:

> Nonsolicitation of Customers. Except as permitted by the Company or as is otherwise necessary to carry out Representative's duties, during the Noncompetition Period, Representative shall not, directly or indirectly, call on or solicit any person, business or other entity who or which is, or had been within the prior two years, a customer or potential customer, or supplier or potential supplier, of the Company with respect to the Company Business or any business similar to or competitive with the Company Business as of the termination of Representative's relationship with the Company under this Agreement, as the case may be.

47. LGCY has recently learned that the Individual Defendants have engaged, and are engaging, in conduct that violates their contractual obligations to LGCY and that harms LGCY's goodwill, existing contractual relationships, and prospective economic relationships.

48. Specifically, LGCY has learned that the Individual Defendants have terminated their relationships with LGCY and have formed, or gone to work for, a direct competitor.

49. Although LGCY's investigation is ongoing, and discovery is expected to uncover significant additional details, the Individual Defendants have engaged in at least the following wrongful conduct (individually and in concert with the Fusion Entities):

a. Defendants Newby and McAllister formed the Fusion Entities in or around February or March 2017. The Fusion Entities compete directly with LGCY in the door-to-door sale of residential solar energy systems in geographic areas in which LGCY has operated and continues to operate.

b. Defendants Newby and McAllister have directly or indirectly recruited or solicited—and attempted to recruit or solicit—numerous members of LGCY's sales force to leave LGCY and join the Fusion Entities, including without limitation Dunham, Chojnacky, Goddard, Warner, Stearns, Hetland, Rapoza, Graves, Dewey, Homer, and Roelofs. The members of LGCY's sales force that Newby and McAllister have recruited or solicited, and attempted to recruit or solicit, include those that they worked with and supervised while at LGCY and for which they were paid signing bonuses and other compensation to build relationships on behalf of LGCY.

c. The Individual Defendants have directly or indirectly recruited or solicited—and attempted to recruit or solicit—numerous members of LGCY's sales force to leave LGCY and join the Fusion Entities. The Individual Defendants have done so with full knowledge that the members of LGCY's sales force are subject to confidentiality, noncompetition, and nonsolicitation covenants with LGCY that are the same as, or substantially similar to, those contained in the Individual Defendant Agreements.

d. Upon information and belief, one or more of the Individual Defendants have retained LGCY confidential information, including without limitation lists containing confidential information about sales representatives, customers, and/or potential customers, and have used that information to further the Fusion Entities' business.

e. Upon information and belief, the Fusion Entities have received, and are using, LGCY's confidential information to develop and advance the Fusion Entities' business.

f. One or more of the Individual Defendants have engaged in door-to-door sales of residential solar energy systems for the Fusion Entities while wearing LGCY uniforms and presenting LGCY credentials to customers and potential customers. In so doing, these Individual Defendants have intentionally misled multiple customers and potential customers as to the origin and affiliation of the products and services they are marketing. These individuals are also trading on the goodwill and business reputation of LGCY to advance the Fusion Entities' business.

g. Upon information and belief, one or more of the Individual Defendants have targeted LGCY's customers and potential customers—including customers and potential customers with whom the Individual Defendants had previously interacted on LGCY's behalf—using confidential information that they obtained while working for LGCY in the Defendants' continuing efforts to divert the business of these customers and potential customers to the Fusion Entities and away from LGCY.

50. Upon information and belief, one or more of the Individual Defendants engaged in the wrongful conduct described in this Complaint while still working as a member of LGCY's sales force.

FIRST CLAIM FOR RELIEF
(Breaches of the Individual Defendant Agreements—Against Newby, McAllister, Goddard, Dunham, Rapoza, and Homer)

51. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

52. Individual Defendants Newby, McAllister, Goddard, Dunham, Rapoza, and Homer entered into their respective Individual Defendant Agreements with LGCY pursuant to which each of them agreed, among other things, to be bound by the agreement's confidentiality, noncompetition, and nonsolicitation provisions.

53. The Individual Defendant Agreements of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer are valid and enforceable contracts between each of them and LGCY.

54. LGCY fully complied with its obligations under the Individual Defendant Agreements of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer, or else LGCY's performance was excused by the Individual Defendant's prior material breach.

55. Each of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer, on the other hand, has materially breached his or her obligations under his or her Individual Defendant Agreement by, among other things, violating the agreement's noncompetition, nonsolicitation, and confidentiality provisions.

56. Specifically, but without limitation, each of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer, has, upon information and belief, (i) formed or gone to work for a company that markets solar energy systems in direct competition with LGCY, (ii) directly or indirectly solicited LGCY sales representatives to leave LGCY, (iii) directly or indirectly

solicited current or potential LGCY customers to leave LGCY, and/or (iv) improperly used or disclosed LGCY's confidential information.

57. As a direct and proximate result of the numerous material breaches by Newby, McAllister, Goddard, Dunham, Rapoza, and Homer of their respective Individual Defendant Agreements, LGCY has been damaged in an amount to be proven at the trial of this matter but no less than $300,000, plus costs, attorney fees, and pre- and post-judgment interest.

58. LGCY is further entitled to temporary, preliminary, and permanent injunctive relief against Newby, McAllister, Goddard, Dunham, Rapoza, and Homer as set forth below in the Prayer for Relief.

59. Unless enjoined by this Court, Newby, McAllister, Goddard, Dunham, Rapoza, and Homer will continue to wrongfully (i) compete against LGCY, (ii) solicit LGCY's sales representatives, customers, and potential customers, and (iii) use or disclose LGCY's confidential information.

60. LGCY has already suffered and will continue to suffer irreparable harm if this Court does not restrain Newby, McAllister, Goddard, Dunham, Rapoza, and Homer from soliciting, and attempting to solicit, its sales representatives, customers, and others in violation of the confidentiality, noncompetition, and nonsolicitation provisions of their respective Individual Defendant Agreements.

61. The harm to LGCY if an injunction is not issued outweighs any injury the injunction may cause to Newby, McAllister, Goddard, Dunham, Rapoza, and Homer.

62. The requested injunction is not adverse to the public interest.

63. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

SECOND CLAIM FOR RELIEF
(Breaches of Covenant of Good Faith and Fair Dealing in the Individual Defendant Agreements—Against Newby, McAllister, Goddard, Dunham, Rapoza, and Homer)

64. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

65. As a matter of law, the Individual Defendant Agreements of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer contain a covenant of good faith and fair dealing requiring Newby, McAllister, Goddard, Dunham, Rapoza, and Homer to not act in such a way as to injure or to destroy LGCY's right to receive the benefits of its bargains under the respective Individual Defendant Agreements but to act in a manner consistent with the law and within LGCY's justified expectations under the respective Individual Defendant Agreements. LGCY entered into the Individual Defendant Agreements with Newby, McAllister, Goddard, Dunham, Rapoza, and Homer with the justified expectation that it would receive, among other things, Newby's, McAllister's, Goddard's, Dunham's, Rapoza, and Homer compliance with the terms contained in their respective Individual Defendant Agreements, including the confidentiality, noncompetition, and nonsolicitation provisions.

66. Each of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer has breached the covenant of good faith and fair dealing in his or her Individual Defendant Agreement by, among other things, engaging in the wrongful conduct set forth in this Complaint.

67. As a direct and proximate result of the breaches of the covenant of good faith and fair dealing in the respective Individual Defendant Agreements by Newby, McAllister, Goddard, Dunham, Rapoza, and Homer, LGCY has been damaged in an amount to be proven at the trial of

this matter but no less than $300,000, plus costs, attorney fees, and pre- and post-judgment interest.

68. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

THIRD CLAIM FOR RELIEF
(Breaches of the Individual Defendant Agreements—Against Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, Roelofs)

69. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

70. Individual Defendants Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs entered into their respective Individual Defendant Agreements with LGCY pursuant to which each of them agreed, among other things, to be bound by the agreement's confidentiality and nonsolicitation provisions.

71. The Individual Defendant Agreements of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs are valid and enforceable contracts between each of them and LGCY.

72. LGCY fully complied with its obligations under the Individual Defendant Agreements of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs, or else LGCY's performance was excused by the Individual Defendant's prior material breach.

73. Each of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs on the other hand, has materially breached his or her obligations under his or her Individual Defendant Agreement by, among other things, violating the agreement's nonsolicitation and confidentiality provisions.

74. Specifically, but without limitation, each of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs has, upon information and belief, (i) directly or indirectly solicited LGCY sales representatives to leave LGCY, (ii) directly or indirectly solicited current or potential LGCY customers to leave LGCY, and/or (iii) improperly used or disclosed LGCY's confidential information.

75. As a direct and proximate result of the numerous material breaches by Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs of their respective Individual Defendant Agreements, LGCY has been damaged in an amount to be proven at the trial of this matter but no less than $300,000, plus costs, attorney fees, and pre- and post-judgment interest.

76. LGCY is further entitled to temporary, preliminary, and permanent injunctive relief against Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs as set forth below in the Prayer for Relief.

77. Unless enjoined by this Court, Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs will continue to wrongfully (i) solicit LGCY's sales representatives, customers, and potential customers, and (ii) use or disclose LGCY's confidential information.

78. LGCY has already suffered and will continue to suffer irreparable harm if this Court does not restrain Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs from soliciting, and attempting to solicit, its sales representatives, customers, and others in violation of the confidentiality and nonsolicitation provisions of their respective Individual Defendant Agreements.

79. The harm to LGCY if an injunction is not issued outweighs any injury the injunction may cause to Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs.

80. The requested injunction is not adverse to the public interest.

81. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

FOURTH CLAIM FOR RELIEF
(Breaches of Covenant of Good Faith and Fair Dealing in the Individual Defendant Agreements—Against Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs)

82. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

83. As a matter of law, the Individual Defendant Agreements of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs contain a covenant of good faith and fair dealing requiring Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs to not act in such a way as to injure or to destroy LGCY's right to receive the benefits of its bargains under the respective Individual Defendant Agreements but to act in a manner consistent with the law and within LGCY's justified expectations under the respective Individual Defendant Agreements. LGCY entered into the Individual Defendant Agreements with Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs with the justified expectation that it would receive, among other things, Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs compliance with the terms contained in their respective Individual Defendant Agreements, including the confidentiality and nonsolicitation provisions.

84. Each of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs has breached the covenant of good faith and fair dealing in his or her Individual Defendant Agreement by, among other things, engaging in the wrongful conduct set forth in this Complaint.

85. As a direct and proximate result of the breaches of the covenant of good faith and fair dealing in the respective Individual Defendant Agreements by Chojnacky, Warner, Stearns,

Hetland, Graves, Dewey, and Roelofs LGCY has been damaged in an amount to be proven at the trial of this matter but no less than $300,000, plus costs, attorney fees, and pre- and post-judgment interest.

86. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

FIFTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty—Against Individual Defendants)

87. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

88. As a sales managers, sales representatives, and/or leaders in LGCY's sales force, LGCY reposed significant trust, confidence, and reliance on the Individual Defendants as its agents by, among other things, allowing them access to the company's confidential information and granting them a significant amount of independence in recruiting, training, and leading teams of LGCY sales representatives.

89. Each Individual Defendant owed certain fiduciary duties to LGCY including, but not limited to, a duty of loyalty.

90. Each Individual Defendant breached his or her fiduciary duties to LGCY by, among other things, competing against LGCY and recruiting LGCY sales representatives to leave the company while still working for LGCY, using LGCY's uniforms and materials to market and sell for other competing companies, and diverting customers and potential customers to other competing companies.

91. LGCY has suffered damages in an amount to be proven at trail as the direct and proximate result of each Individual Defendant's breaches of fiduciary duties.

92. The Individual Defendants' acts and omissions as alleged herein were the result of willful and malicious or intentionally fraudulent conduct, or were acts and omissions that manifest a knowing and reckless indifference toward, and disregard of, the rights of others (including LGCY), entitling LGCY to recover punitive damages against the Individual Defendants.

93. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

SIXTH CLAIM FOR RELIEF
(Violation of Utah Uniform Trade Secrets Act, Utah Code Ann. § 13-24-1, et seq.—Against All Defendants)

94. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

95. LGCY's confidential information, including without limitation the information it has gathered, assembled, and developed related to customers and potential customers, constitutes LGCY's trade secrets.

96. LGCY has spent—and continues to spend—significant resources, time, and energy developing its trade secrets, and its trade secrets derive independent economic value from not being generally known to and not being readily ascertainable through proper means by, other persons who can obtain economic value from the disclosure or use of its trade secrets.

97. LGCY employs efforts that are reasonable under the circumstances to maintain the secrecy of its trade secrets by, among other things, limiting the individuals to whom its trade secrets are disclosed to only those individuals who have a business need for such information, and by requiring its employees and the members of its sales force to execute agreements (such as

the Individual Defendant Agreements) requiring them to maintain and refrain from using or disclosing LGCY trade secrets and other confidential and proprietary information.

98. As sales managers, sales representatives, and/or leaders in LGCY's sales force, the Individual Defendants were provided access to LGCY's trade secrets only after they executed the Individual Defendant Agreements requiring them to protect LGCY's confidential and proprietary information.

99. The Individual Defendants therefore acquired LGCY's trade secrets under circumstances giving rise to a duty to maintain their secrecy and to limit their use only for purposes of LGCY's business.

100. Upon information and belief, the Individual Defendants have disclosed LGCY's trade secrets to the Fusion Entities and possibly other LGCY competitors, and the Fusion Entities have used LGCY's trade secrets to further their business.

101. Upon information and belief, Defendants have misappropriated LGCY's trade secrets by, among other things, acquiring, disclosing, and using LGCY's trade secrets for Defendants' benefit and to LGCY's detriment and harm.

102. As the direct and proximate result of the Defendants' misappropriation of LGCY's trade secrets, LGCY has suffered damages in an amount to be proven at trail and is further entitled to temporary, preliminary, and permanent injunctive relief.

103. The Defendants' conduct and misappropriation as alleged herein were the result of willful and malicious or intentionally fraudulent conduct, or were acts and omissions that manifest a knowing and reckless indifference toward, and disregard of, the rights of others (including LGCY), entitling LGCY to recover punitive damages against the Defendants.

104. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

SEVENTH CLAIM FOR RELIEF
(Intentional Interference with Contract and with Prospective Economic Relations—Against All Defendants)

105. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

106. LGCY has, and had, existing contractual and/or other established relationships with its customers.

107. LGCY has, and had, existing contractual and/or other established relationships with the members of its sales force.

108. LGCY has, and had, prospective economic relations with its customers and with potential customers in the market.

109. Each Defendant knew of the existence of LGCY's existing contractual and prospective economic relations.

110. Defendants have, upon information and belief, intentionally interfered with LGCY's existing contractual and/or prospective contractual and economic relations by, among other things, willfully and maliciously disclosing LGCY's confidential and trade secret information and by attempting to advise, induce, or solicit certain of LGCY's customers, potential customers, and members of its sales force to terminate their relationships with LGCY.

111. Upon information and belief, Defendants have intentionally interfered with LGCY's current and prospective relations using improper means, including without limitation by engaging in common law unfair competition, by violating state deceptive trade practices laws, by disclosing LGCY's confidential and trade secret information in violation of Utah's Trade Secret

Act and the Individual Defendant Agreements with the immediate purpose of inflicting injury to LGCY, and by making false and misleading statements and representations regarding the affiliation or approval of the Fusion Entities products or services by LGCY.

112. As the direct and proximate result of Defendants' intentional interference with LGCY's existing and prospective business relationships using improper means, LGCY has suffered damages in an amount to be proven at trail and is further entitled to temporary, preliminary, and permanent injunctive relief.

113. Defendants' conduct and intentional interference as alleged herein were the result of willful and malicious or intentionally fraudulent conduct, or were acts and omissions that manifest a knowing and reckless indifference toward, and disregard of, the rights of others (including LGCY), entitling LGCY to recover punitive damages against the Defendants.

114. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

EIGHTH CLAIM FOR RELIEF
(Alter Ego—Against the Fusion Entities, Newby, and McAllister)

115. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

116. Upon information and belief, such a unity of interest and ownership exists among the Fusion Entities and Newby and/or McAllister, both separately and collectively, that the separate personality of each of the Fusion Entities no longer exists but, instead, is the alter ego of the other Fusion Entities and of Newby and/or McAllister.

117. Observation of the corporate form of each of the Fusion Entities would sanction a fraud, promote injustice, and/or result in an inequity.

118. Accordingly, LGCY is entitled to an Order of the Court declaring that each of the Fusion Entities is the alter ego of the other Fusion Entities and the alter ego of Newby and/or McAllister, and that each of the Fusion Entities, Newby, and McAllister is jointly and severally liable for all damages caused to LGCY.

119. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

NINTH CLAIM FOR RELIEF
(Lanham Act—Against All Defendants)

120. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

121. In promoting the Fusion Entities' products and services, Defendants have communicated false and misleading information regarding the affiliation of such products and services with LGCY by, among other things, (i) presenting the Fusion Entities' goods and services to customers and potential customers wearing LGCY uniforms and presenting LGCY credentials, and (ii) misleading customers and potential customers to believe that the Fusion Entities' goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have, or that the Defendants have a sponsorship, approval, status, affiliation, or connection that they do not have, by falsely representing, among other things, that Defendants are affiliated with LGCY.

122. Defendants' false and misleading statements have actually deceived some LGCY customers and potential customers, and have the tendency to deceive a substantial number of LGCY's customers and potential customers as to, among other things, whether Defendants are affiliated with LGCY.

123. Defendants' false and misleading statements have confused, and will continue to confuse, LGCY's customers and potential customers as to the origin, sponsorship, or approval of the Fusion Entities' goods and services.

124. Defendants' false and misleading statements are material because they have influenced, and are likely to influence, customers' purchasing decisions.

125. At all relevant times herein, Defendants were engaged in a commercial activity in interstate commerce.

126. Defendants caused their false and misleading statements to enter interstate commerce.

127. Defendants violated, among other provisions, 15 U.S.C. § 1125(a)(1)(A) because their representations deceived customers as to Defendants' affiliation, connection, or association with LGCY and/or as to the origin, sponsorship, or approval of the goods and services offered by Defendants.

128. Defendants violated, among other provisions, 15 U.S.C. § 1125(a)(1)(B) because they misrepresented the nature, characteristics, qualities, or geographic origin of the Fusion Entities' goods, services, and/or commercial activities.

129. LGCY has been, and will continue to be, injured as a result of Defendants' false and misleading statements by a direct diversion of sales from LGCY to the Fusion Entities and/or by a lessening of the goodwill associated with LGCY's goods and services.

130. As a direct and proximate result of Defendants' false and misleading statements, LGCY has suffered, and will continue to suffer, damages and is entitled to its damages, its attorney fees and costs, Defendants' profits, and treble damages pursuant to 15 U.S.C. § 1117(a)

in an amount to be proven at trial, and LGCY is further entitled to temporary, preliminary, and permanent injunctive relief.

131. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

TENTH CLAIM FOR RELIEF
(Common Law Unfair Competition—Against All Defendants)

132. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

133. Defendants' actions, including but not limited to making false and misleading statements to LGCY's customers and potential customers, constitute unfair competition under Utah common law because Defendants' misrepresentations caused confusion or were likely to cause confusion in the minds of LGCY's customers and potential customers.

134. As a direct and proximate result of Defendants' unfair competition, LGCY has suffered, and will continue to suffer, damages in an amount to be proven at trial, and LGCY is further entitled to temporary, preliminary, and permanent injunctive relief.

135. Defendants' acts as alleged herein were the result of willful, knowing, and actually malicious conduct, or were acts and omissions that manifest a knowing and reckless indifference toward, and disregard of, the rights of others (including LGCY), entitling LGCY to recover increased, exemplary, and punitive damages against Defendants, in an amount to be determined at trial.

136. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

ELEVENTH CLAIM FOR RELIEF
(Violation of State Deceptive Trade Practices Laws in Utah and Other States—Against All Defendants)

137. LGCY incorporates by this reference the allegations set forth in each of the foregoing paragraphs as if fully set forth herein.

138. Defendants have engaged in deceptive trade practices, such as those prohibited by Utah Code Ann. § 13-11a-1 *et seq.* and other similar laws in states where Defendants transact business, by making false and deceptive representations to LGCY customers and potential customers.

139. Defendants' deceptive trade practices include, but are not necessarily limited to, the following:

a. Passing off the Fusion Entities' goods and services as those of LGCY by, among other things, presenting the Fusion Entities' goods and services to customers and potential customers wearing LGCY uniforms and presenting LGCY credentials; and

b. Representing that the Fusion Entities' goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have, by representing, among other things, that Defendants were affiliated with LGCY when actually they were working for the Fusion Entities.

140. As a direct and proximate result of Defendants' deceptive trade practices, LGCY has suffered, and will continue to suffer, damages in an amount to be proven at trial, and LGCY is further entitled to temporary, preliminary, and permanent injunctive relief.

141. LGCY is therefore entitled to relief as set forth below in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, LGCY prays for relief against Defendants as follows:

A. On LGCY's First Claim for Relief, asserting a claim for breaches of contract against Newby, McAllister, Goddard, Dunham, Rapoza, and Homer, for (i) judgment against each of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer for breaching the applicable Individual Defendant Agreement in an amount to be proven at trial but no less than $300,000, plus attorney fees, costs, and pre- and post-judgment interest; and (ii) temporary, preliminary, and permanent injunctive relief enjoining Newby, McAllister, Goddard, Dunham, Rapoza, and Homer from further violations of the confidentiality, noncompetition, and nonsolicitation provisions of the applicable Individual Defendant Agreement, including without limitation prohibiting them from soliciting LGCY sales representatives.

B. On LGCY's Second Claim for Relief, asserting a claim for breaches of the covenant of good faith and fair dealing against Newby, McAllister, Goddard, Dunham, Rapoza, and Homer for (i) judgment against each of Newby, McAllister, Goddard, Dunham, Rapoza, and Homer for breaching the covenant of good faith and fair dealing in the applicable Individual Defendant Agreement in an amount to be proven at trial but no less than $300,000, plus attorney fees, costs, and pre- and post-judgment interest; and (ii) temporary, preliminary, and permanent injunctive relief enjoining Newby, McAllister, Goddard, Dunham, Rapoza, and Homer from further violations of the confidentiality, noncompetition, and nonsolicitation provisions of the applicable Individual Defendant Agreement, including without limitation prohibiting them from soliciting LGCY sales representatives.

C. On LGCY's Third Claim for Relief, asserting a claim for breaches of contract against Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs, for (i) judgment against each of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs for breaching the applicable Individual Defendant Agreement in an amount to be proven at trial but no less than $300,000, plus attorney fees, costs, and pre- and post-judgment interest; and (ii) temporary, preliminary, and permanent injunctive relief enjoining Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs from further violations of the confidentiality and nonsolicitation provisions of the applicable Individual Defendant Agreement, including without limitation prohibiting them from soliciting LGCY sales representatives.

D. On LGCY's Fourth Claim for Relief, asserting a claim for breaches of the covenant of good faith and fair dealing against Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs for (i) judgment against each of Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs for breaching the covenant of good faith and fair dealing in the applicable Individual Defendant Agreement in an amount to be proven at trial but no less than $300,000, plus attorney fees, costs, and pre- and post-judgment interest; and (ii) temporary, preliminary, and permanent injunctive relief enjoining Chojnacky, Warner, Stearns, Hetland, Graves, Dewey, and Roelofs from further violations of the confidentiality and nonsolicitation provisions of the applicable Individual Defendant Agreement, including without limitation prohibiting them from soliciting LGCY sales representatives.

E. On LGCY's Fifth Claim for Relief, asserting a claim for breach of fiduciary duty against the Individual Defendants, for judgment against each Individual Defendant for his

breaches of fiduciary duty in an amount to be proven at trial and for punitive damages, plus attorneys' fees, costs, and pre- and post-judgment interest.

F. On LGCY's Sixth Claim for Relief, asserting a claim for violation of the Utah Uniform Trade Secrets Act against Defendants, for (i) judgment against Defendants for damages caused by their misappropriation of LGCY's trade secrets in an amount to be proven at trial, plus statutory, exemplary, and/or punitive damages, and attorney fees and costs, and (ii) injunctive relief including a temporary restraining order, and a preliminary and permanent injunction that restrains Defendants from further misappropriations or disclosure of LGCY's trade secrets.

G. On LGCY's Seventh Claim for Relief, asserting a claim for intentional interference with contract and with prospective economic relations against Defendants, for judgment against Defendants for damages caused by their intentional interference with LGCY's contractual relationships and prospective economic relations in an amount to be proven at trial, plus exemplary and/or punitive damages.

H. On LGCY's Eighth Claim for Relief, asserting a claim for alter ego against the Fusion Entities, Newby, and McAllister, for an Order of the Court declaring that each of the Fusion Entities is the alter ego of the other Fusion Entities and the alter ego of Newby and/or McAllister, and that each of the Fusion Entities, Newby, and McAllister is jointly and severally liable for all damages caused to LGCY.

I. On LGCY's Ninth Claim for Relief, asserting a claim against Defendants for violation of the Lanham Act, for (i) judgment against Defendants for damages caused by their violations of the Lanham Act in an amount to be proven at trial, plus statutory, exemplary, and/or punitive damages, and attorney fees and costs, and (ii) injunctive relief including a temporary

restraining order, and a preliminary and permanent injunction that restrains Defendants from further Lanham Act violations.

J. On LGCY's Tenth Claim for Relief, asserting a claim against Defendants for unfair competition, for (i) judgment against Defendants for damages caused by their unfair competition in an amount to be proven at trial, plus statutory, exemplary, and/or punitive damages, and attorney fees and costs, and (ii) injunctive relief including a temporary restraining order, and a preliminary and permanent injunction that restrains Defendants from further unfair competition.

K. On LGCY's Eleventh Claim for Relief, asserting a claim against Defendants for engaging in deceptive trade practices in violation of state law in Utah and in other states where Defendants transact business, for (i) judgment against Defendants for damages caused by their deceptive trade practices in an amount to be proven at trial, plus statutory, exemplary, and/or punitive damages, and attorney fees and costs, and (ii) injunctive relief including a temporary restraining order, and a preliminary and permanent injunction that restrains Defendants from further deceptive trade practices.

L. For punitive, exemplary, and/or statutory damages as provided by law.

M. For LGCY's attorney fees and costs incurred in bringing this action.

N. For such other and further relief as the Court deems necessary, just, and proper.

DEMAND FOR JURY TRIAL

LGCY hereby demands a trial by jury on all issues so triable and submits the required fee concurrently with the filing of this Complaint.

DATED this 5th day of June 2017.

MITCHELL BARLOW & MANSFIELD, P.C.

/s/ J. Ryan Mitchell
J. Ryan Mitchell
Andrew V. Collins
Gregory H. Gunn
Attorneys for Plaintiff LGCY Power, LLC

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Tab B

IN THE FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, AMERICAN FORK DEPARTMENT

VIVINT SOLAR, INC., a Delaware corporation; and ARM SECURITY, INC., a Utah corporation, Plaintiffs, v. DOUGLAS ROBINSON, Defendant.	RULING and ORDER on DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Case No. 140100223 Judge Low

THE ABOVE-ENTITLED MATTER comes before the court on Defendant's motion for summary judgment. Oral arguments were held on April 21, 2016, David L. Arrington and Peter H. Donaldson appearing on behalf of Plaintiffs, and J. Ryan Mitchell and Andrew V. Collins appearing on behalf of Defendant. Being fully advised in the premises, the court now enters the following ruling and order:

RULING

ARM is an authorized dealer of Vivint, one of the nation's largest security and home automation companies. It sells home automation products and security services through direct-to-home sales. Defendant ("Robinson") was hired as a regional manager

for ARM on November 3, 2012. At that time he and ARM either signed or otherwise agreed to (1) a Regional Manager Employment Agreement and (2) a Side Letter to Regional Manager Employment Agreement. These agreements were negotiated by ARM and Robinson through attorneys over a period of time. Later, in order to access ARM's computer system and perform his duties, Robinson electronically filled out and signed a Sales Representative Agreement. This agreement was apparently set up online as a required portal in order for Robinson to access the online tools he required to perform his duties. It was never discussed, negotiated, or even mentioned between the parties, and Robinson apparently thought it was nothing important; in fact, its terms directly conflict with the employment agreements he negotiated and entered into on November 3, 2012. But the Sales Representative Agreement contains restrictive covenants that are not in Robinson's other employment agreements. ARM now seeks to enforce these covenants.

Vivint Solar ("Solar") is a solar energy company founded and headquartered in Utah engaged in the design, installation, maintenance, monitoring, and financing of solar energy systems in—at the times relevant to this dispute—seven states within the United States. It sells these systems through direct-to-home sales using a sales force like ARM's. In 2013, Robinson and other ARM sales managers were encouraged to refer salesmen to Solar with the incentive that they would eventually receive stock options based on the

number of solar units sold by the salesmen they referred. The incentives were outlined in the 2013 Long-Term Incentive Pool Plan for Recruiting Regional Sales Managers ("LTIP Plan"). Robinson enrolled in this Plan by signing a separate agreement; namely, the 2013 Long-Term Incentive Pool Plan for Recruiting Regional managers—Notice of Award and Award Agreement ("LTIP Agreement"). Only the LTIP Agreement was signed by Solar and Robinson. By signing it, Solar offered the LTIP Plan to Robinson and Robinson accepted it. Other than that, its only other apparent purpose was to set forth all the restrictive covenants that would be applicable to Robinson as a participant in the LTIP Plan; no financial details of the LTIP Plan itself are included in the LTIP Agreement. The LTIP Plan, on the other hand, was not signed by anyone. It was unilaterally issued by Solar and it contains all the financial details of the incentive program that apply to everyone who participate in the program.[1]

Robinson signed the LTIP Agreement and began to participate in the LTIP Plan. He did not leave his employment at ARM but referred up to 30 salesmen from his ARM sales teams over to Solar, at some short-term financial sacrifice to himself, in the hopes of reaping a long-term reward of stock options through the LTIP Plan. However, in 2014,

[1] An LTIP Agreement could apparently modify one's compensation under the LTIP Plan on a case-by-case basis. LTIP Plan § 4(b). Robinson's LTIP Agreement did not do so.

and after referring these salesmen to Solar, Todd Santiago, the Chief Sales Officer at ARM (and a hierarchical superior to Robinson) emailed ARM's regional managers and vice presidents to set up a meeting to discuss amending the LTIP Plan. Robinson followed up with Mr. Santiago directly and was told that the LTIP Plan that he had accepted was unsatisfactory to Solar's executives and would need to be amended to Robinson's disadvantage. In other words, Robinson was going to be asked to give up some of the LTIP Plan's rewards that he had been counting on. Robinson began forming a desire to leave ARM's employment. Mr. Santiago's final email to Robinson stated,

> The [LTIP Plan] allow[s] the board the right to make changes to the plan at their discretion. Considering the fact that the docs were disseminated without executive approval, the plan needed to be reworked. Probably not what you wanted to hear, but that's the situation with the [LTIP Plan].

Mr. Santiago was incorrect. The board could only propose changes to the plan. To become effective, any changes would need to be accepted by a majority of the participants in the plan, such as Robinson himself.

On August 6, 2014, ARM fired Robinson by letter. The same letter purported to revoke his rights under his LTIP Agreement and Solar's LTIP Plan. And finally, the letter reminded Robinson about all of his restrictive covenants and threatened to take any

action necessary to enforce them.

Two days later, ARM and Solar sued Robinson. The Complaint seeks the following relief: (1) declaratory relief that all of the restrictive covenants are completely valid and fully enforceable, (2) damages for Robinson's alleged breach of the restrictive covenants, (3) damages for Robinson's alleged breach of the implied covenant of good faith and fair dealing related to the restrictive covenants, and (4) injunctive relief to prevent any future violations of the restrictive covenants. Robinson now moves for summary judgment on all of these claims.

Summary Judgment is proper only if the pleadings, depositions, affidavits, and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Billings ex rel. Billings v. Union Bankers Ins. Co.*, 819 P.2d 803 (Utah 1991); URCP 56(c). "If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party [and] the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment." *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). When a court addresses a motion for summary judgment, the court's function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court's "sole inquiry should be

whether material issues of fact exist." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

1. ARM's Restrictive Covenants

Robinson argues that the restrictive covenants in the Sales Representative Agreement, which he filled out electronically online, were never intended to be applicable to him because the agreement was not negotiated, nor was it ever adhered to by either ARM or him. He also argues that the terms of the agreement are illegally broad. ARM disagrees and asserts that it relied upon Robinson's execution of the Sales Representative Agreement and that ARM intentionally required its acceptance as a prerequisite to access its online system. However, ARM concedes that the restrictive covenants in the Sales Representative Agreement are impermissibly broad and asks the court to reform them as might be appropriate.

The court concludes that a material issue of fact exists as to whether the restrictive covenants within the Sales Representative Agreement were intended to bind Robinson. The agreement contains numerous terms that are wholly inapplicable to Robinson, such as summer sales program rules. It even contains some terms that directly conflict with his negotiated employment agreements, such as its compensation program. ARM has never sought to enforce any of these irrelevant or conflicting terms against Robinson; instead,

both ARM and Robinson always complied with the employment agreements that they entered into with the assistance of counsel on November 3, 2012. Nevertheless, testimony indicates that ARM deliberately made the agreement a prerequisite to accessing its online sales tools. A reasonable inference can be made that it did so in order to protect its goodwill in its sales force and clients because the Sales Representative Agreement contains a non-solicitation clause. Therefore, the court cannot conclude, as a matter of law, that ARM did not rely in any way on Robinson's Sales Representative Agreement.

Nevertheless, Robinson argues that the restrictive covenants in the Sales Representative Agreement are impermissibly broad. ARM concedes this but asks the court to reform them to make them reasonable.

Restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property. *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 p.2d 194, 198 (Utah 1991). Express restrictive covenants are upheld only where they are necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is imposed than is reasonably necessary to secure such protection. *Id.* To be valid and enforceable, a restrictive employment covenant must comply with the requirements set forth in *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951); namely, (1) the covenant must be supported by

consideration, (2) no bad faith may be shown in the negotiation of the contract, (3) the covenant must be necessary to protect the goodwill of the business, and (4) it must be reasonable in its restrictions as to time and area. *System Concepts*, 669 P.2d at 425-26.

It is undisputed that the restrictive covenants in the Sales Representative Agreement were not negotiated. Instead, ARM and Robinson negotiated a Regional Manager Employment Agreement and a Side Letter to Regional Manager Employment Agreement, both of which were silent as to any restrictive covenants.

It is also undisputed that the restrictions are overbroad and unnecessary to protect ARM's goodwill. For example, they restrict Robinson, for five years, from marketing services to any customers of ARM or its affiliates that are similar to any services provided to the customer—at any time in the past, no matter how long ago—by ARM or any of its "affiliates." ARM has refused to identify, even in discovery, who all of its affiliates are—probably because it cannot do so. Just one of them is The Blackstone Group, L.P., a $330 billion investment firm that owns 87 portfolio companies as diverse as amusement parks, the Crocs footwear company, and a healthcare IT company. Thus the restrictive covenants would purport to prohibit Robinson, who sold home security systems for ARM for less than three years, from selling shoes—for five years—to any stores anywhere in the world that ever sold Crocs at any time in the past. ARM cannot, and does not, justify

these restrictions. They are not merely unnecessary; they shock the conscience and are substantively unconscionable.

Instead of defending the overbroad covenants, ARM asks the court to reform them to make them legal. The court declines to do so.

A request to reform a contract invokes the court's equitable powers. *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985). But those powers are "narrowly bounded." *Id.* "A court does not have carte blanche to reform any transaction to include terms that it believes are fair." *Id.* (quoting *Cunningham v. Cunninigham*, 690 P.2d 549, 552 (Utah 1984)). A contract may be reformed for either of two reasons: (1) "the instrument does not embody the intentions of both parties to the contract," or (2) "one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party." *Id.* "Under either set of circumstances, because courts are reluctant to change contractual obligations and rights, the party seeking reformation must plead the circumstances constituting the mistake with particularity." *Id.* (citing Utah R. Civ. Pro. 9(b)).

ARM did not plead for reformation of the contract—let alone with particularity. Instead, its Complaint seeks full enforcement of each and every term of the restrictive covenants. *See, e.g.*, Complaint, ¶ 49(a) (asking the court to declare that all the restrictive

covenants "are valid and fully enforceable"). For this reason alone, reformation is not available.

In addition, no evidence exists that ARM and Robinson labored under a mutual mistake about the restrictive covenants or that ARM labored under a unilateral mistake and Robinson knew about it and conceded to it. Instead, ARM's understanding and intention to take full advantage of every restrictive covenant in the Sales Representative Agreement is made clear in both its termination letter and the Complaint filed two days later. Besides, it unilaterally drafted the covenants, so claiming a mistake in its understanding of them is difficult. And were a mistake as to the legality of the restrictive covenants a valid basis for reformation, and the court is not convinced that it is, the evidence is undisputed that ARM knows how to draft appropriately tailored restrictive covenants because it has done so for its top executives. Therefore, even had ARM pled for reformation with particularity as is required under the rules, it still would not qualify for that relief.

ARM suggests that the Utah Supreme Court reformed a restrictive covenant in *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983). *Memo in Opposition* at 57. Dixon, the defendant in that case, served as the national sales manager for System Concepts, Inc., which sold cable television equipment. She quit and started working as

the national sales manager for its competitor, MetroData. System Concepts, Inc., sued to enjoin that employment. The applicable restrictive covenant omitted a territorial restriction. Nevertheless, the supreme court ruled that given the sparse nationwide potential customer base for the cable television equipment being sold by both companies, System Concepts was probably entitled to the injunction anyway. In other words, the supreme court found the omission of a territorial restriction to be unimportant under the particular facts of the case. It did not reform the restrictive covenant to interpose a territorial restriction, and ARM's implication that it did is misleading.

ARM also asks that the unreasonable terms of the Sales Representative Agreement be severed, leaving the reasonable ones. The agreement does contain a severability clause that could authorize this. But other than pointing to this provision, ARM supplies no legal analysis to assist the court. Merely acknowledging a restrictive covenant's unreasonableness does not necessarily entitle one to severance and enforcement of the remaining restrictive covenants.

To determine whether the unreasonable restrictions can be severed from the Sales Representative Agreement, and the remainder enforced, the court looks to the law relating to unconscionable contracts. This is appropriate where the restrictive covenants here are not merely unnecessary but so overbroad as to shock the conscience. And the court

concludes that the undisputed evidence uniformly indicates that not only are the restrictive covenants in the Sales Representative Agreement substantively unconscionable, but the agreement itself was obtained through procedurally unconscionable means.

Factors bearing on procedural unconscionability include (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement, (2) whether there was a lack of opportunity for meaningful negotiation, (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position, (4) whether the terms of the agreement were explained to the weaker party, (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement, and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions. *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1966).

It is undisputed that ARM and Robinson spent significant effort negotiating, through attorneys, the agreements that Robinson believed were going to govern his employment relationship with ARM. The Sales Representative Agreement was never negotiated or even mentioned during any part of this process. Robinson was never told that the Sales Representative Agreement would be forthcoming as a required portal on his

computer, or that it was intended to supplement the employment agreements he had already negotiated. His negotiated agreements did not mention the Sales Representative Agreement and the Sales Representative Agreement did not mention his negotiated agreements. It is further undisputed that the Sales Representative Agreement is almost wholly inconsistent with—and even contradictory to—the agreements he negotiated with ARM. And it is undisputed that the *only* terms of the Sales Representative Agreement that ARM has ever sought to enforce against Robinson are the restrictive covenants.

In light of this undisputed evidence, the court concludes that all six factors indicate that ARM obtained Defendant's signature on the Sales Representative Agreement through procedurally unconscionable means: (1) Robinson lacked a reasonable opportunity to understand which terms and conditions of the agreement ARM was going to enforce and which it would abandon; (2) there was a lack of opportunity for meaningful negotiation; (3) the agreement was entirely boilerplate drafted by ARM, the party in the strongest bargaining position; (4) the terms of the agreement were neither mentioned nor explained to Robinson; (5) Robinson lacked a meaningful choice and was compelled to accept the terms of the agreement if he was going to honor the employment agreements he had already negotiated and agreed to; and (6) ARM employed deceptive practices to obtain the agreement by interposing it as a required computer portal after purportedly negotiating

all the terms of Robinson's employment through attorneys, and by secretly relying on its restrictive covenants while openly abandoning its remaining terms.

In *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996), the Utah Supreme Court found a doctor's arbitration agreement with his patient to have been obtained through procedurally unconscionable means: the doctor required the patient to sign the agreement when she was minutes away from surgery and already in surgical clothing. The agreement contained a substantively unconscionable provision requiring the patient to pay the doctor's attorney fees even if he was found to have committed malpractice. So the doctor asked the court to simply sever that provision and give effect to the rest of the agreement. The Utah Supreme Court declined to do so. Because its reasoning is precisely relevant to the undisputed facts here, the court quotes it generously:

> Were we to adopt Dr. Paulos' argument in this case, the doctrine of procedural unconscionability would be effectively destroyed. Under his theory, any party in a stronger bargaining position would have an incentive to engage in procedurally unconscionable behavior to induce a weaker party to sign an agreement containing extremely unfavorable terms. So long as the stronger party includes a severance clause, it will always reap the full benefit of its overreaching agreement unless the weaker party files a lawsuit

> successfully challenging the agreement's terms under the exacting doctrine of substantive unconscionability. Furthermore, even if a court finds certain terms *substantively* unconscionable, these terms can be severed and the stronger party will still get the benefit of its unbargained-for agreement. In other words, a severance clause enforced in this fashion would encourage procedural and substantive overreaching because the stronger party will have nothing to lose by trying to intimidate.

924 P.2d at 364 (emphasis in original).

Likewise, severing the unconscionable terms from the restrictive covenants here would reward bad behavior. It appears obvious to the court that the restrictive covenants in the Sales Representative Agreement were deliberately drafted to be overbroad. The evidence is undisputed that ARM knows how to draft appropriate restrictive covenants because it has drafted them for its higher-level executives. It only foists unconscionable terms on its less sophisticated employees, and apparently only through procedurally unconscionable means.

ARM has used these unconscionable terms as a bullying tactic. It delivered an aggressively worded termination letter to Robinson that threatened "any and all action necessary" to enforce *all* the restrictive covenants, even the ones it now concedes are

unreasonable. And its Complaint just as unabashedly asks the court to fully enforce these same unreasonable restrictions. Neither the termination letter nor the Complaint concede what ARM has apparently known all along; namely, that most of the restrictive covenants are unreasonable and unenforceable. Nor has ARM ever, at least until now, indicated a desire to enforce just the reasonable ones. Only after being challenged by Robinson's motion does ARM make that concession and express this desire.

These circumstances give rise to the appearance, at least, that ARM deliberately extracts overbroad restrictive covenants from its employees and then threatens their full enforcement as a standard operating procedure. If so, it is far from unlikely that someone, somewhere, has capitulated to such strong-arm tactics rather than deal with the hostility.[2] In any event, the court is disinclined to reward the tactics here, especially where they include the filing of a Complaint that ARM now concedes is frivolous.

2. Solar's Restrictive Covenants

a. Repudiation

Robinson argues that Solar repudiated the LTIP Award Agreement, and the associated restrictive covenants, when his superior at ARM, Todd Santiago, wrote him an

[2] The court can think of no other reasons for ARM's intentionally overbroad restrictive covenants—and ARM presents none—than that they sometimes work.

email indicating that Solar's unilateral amendment of the LTIP Plan had already occurred or was imminent. Specifically, the email said the following:

> The [LTIP Plan] allow[s] the board the right to make changes to the plan at their discretion. Considering the fact that the docs were disseminated without executive approval, the plan needed to be reworked. Probably not what you wanted to hear, but that's the situation with the [LTIP Plan].

Robinson further points out that Solar eventually did exactly what Mr. Santiago predicted—albeit after Robinson's termination.

The court cannot conclude that Mr. Santiago's statement constitutes a repudiation of Robinson's LTIP Agreement as a matter of law. Repudiation occurs "when a party to an executory contract manifests a positive and unequivocal intent not to render performance when the time fixed for performance is due." *Kasco Services Corp. v. Benson*, 831 P.2d 86, 89 (Utah 1992). While Mr. Santiago may have been Robinson's contact person on Solar's LTIP Plan, Robinson's LTIP Agreement was with Solar, not ARM. And it was ARM, not Solar, who employed Mr. Santiago. Mr. Santiago was undoubtedly in an advantaged position to discuss what Solar was doing and even to predict what it was about to do. But a genuine issue of fact exists as to whether he could have repudiated Robinson's LTIP Agreement on Solar's behalf. And even if he could,

the email he sent to Robinson does not necessarily convey the sort of positive and unequivocal intent not to render performance that repudiation requires. An equally reasonable interpretation is that it reveals what the upper echelons of Solar's management were thinking and planning, but not what that they had already done.[3]

So the court turns to Robinson's next argument; namely, that the LTIP Agreement's restrictive covenants are impermissibly broad. Solar, like ARM, declines to defend the restrictive covenants. And the court agrees they are indefensible. They restrict Robinson from engaging in numerous business activities even though those activities are completely unrelated to Solar's business, and they prevent him from engaging in those activities anywhere in the world if it is within 100 miles of anywhere that any of Solar's affiliates are engaging in any aspect of their businesses. At the time, Solar was in the business of selling solar panels in seven states in the United States. Robinson was never an employee of Solar and did not sell a single solar panel. Nevertheless, the restrictive covenants demand that he not so much as sell wireless phone service anywhere in the world if any of Solar's as-yet unidentified business affiliates are doing any kind of business anywhere within 100 miles of the location. This includes,

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[3] This notwithstanding the past-tense used by Mr. Santiago in the phrase "the plan needed to be reworked."

again, The Blackstone Group, L.P.—as well of all of *its* affiliates. Solar, like ARM, cannot (or will not) name them all. The restrictive covenants also purportedly restrain Robinson from discussing employment with any employees of Solar or any of its affiliates, including The Blackstone Group and *its* affiliates.

Again, Solar does not attempt to demonstrate the reasonableness of all these restrictions. But it now insists that all it ever wanted to do was enforce the reasonable ones, and it asks the court to exercise the "blue-pencil" doctrine to reform them and render them reasonable. Solar asserts, without legal analysis, that Delaware law—which may allow this blue-penciling—should govern the LTIP Agreement. The court disagrees and declines to reform the covenants.

The LTIP Agreement contains no choice of law provision, and Solar does not claim that the agreement contains any ambiguities. If it did, then Solar could adduce extrinsic evidence—such as the LTIP Plan—to clarify the ambiguity. *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269. In the absence of an asserted ambiguity in the LTIP Agreement, the court declines to look to extrinsic evidence, such as the LTIP Plan, to create one, which is what Solar, without legal analysis, necessarily asks the court to do.[4]

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[4] The court recognizes that extrinsic evidence can be used to create an ambiguity. *Daines*, ¶¶ 25-27. But where Solar has not even suggested that the LTIP Agreement is ambiguous, the court declines to do its heavy lifting to create and resolve any ambiguities on Solar's behalf. At

In the absence of a relevant choice of law provision, it is undisputed that Utah law governs the LTIP Agreement. Consequently, the fate of Solar's restrictive covenants is the same as ARM's, and the court declines to blue-pencil them for the same reasons: Solar's Complaint does not plead for reformation of the covenants, let alone with particularity; Utah law does not prescribe the use of a judicial blue pencil to reform outrageously overbroad restrictive covenants; severance is not available to maximize one's reward for engaging in procedurally unconscionable behaviors to obtain a substantively unconscionable contract; Solar's restrictive covenants are deliberately overbroad; and Solar has used the overbroad covenants as a bullying tactic in this case. For these reasons, the court declines to protect Solar from the consequences of its overreaching. Doing so, of course, would only encourage overreaching.

CONCLUSION

ARM's and Solar's restrictive covenants are indefensibly overbroad, but their overbreadth was only acknowledged after Robinson filed his motion for summary

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best, Solar argues that its *LTIP Plan* is ambiguous—by failing to identify Delaware law as the governing law for everyone's separate LTIP Agreements. Not only are any ambiguities in the LTIP Plan irrelevant, but the LTIP Plan has all the earmarks of an adhesion contract, like an insurance policy, so any ambiguities in *it,* after considering extrinsic evidence, would be construed against Solar anyway. *See*, *e.g.*, *Fire Ins. Exchange v. Oltmanns*, 2012 UT App 230, ¶ 6, 285 P.3d 802.

judgment. They are unenforceable as written, and the court declines to rewrite them. Robinson's motion for summary judgment is granted.

ORDER

Based on the foregoing, the court enters the following order:

1. Defendant's motion for summary judgment is GRANTED.

2. Plaintiffs' Complaint is dismissed on the merits and with prejudice.

3. This is the order of the court. No additional order is necessary on the motion unless attorney fees are at issue.

DATED this 5 day of May, 2016.

BY THE COURT:

JUDGE LOW

[MAILING CERTIFICATE ON FOLLOWING PAGE]

Tab C

The Order of the Court is stated below:
Dated: October 24, 2016 05:03:53 PM
/s/ Thomas Low
District Court Judge

Order Prepared By:

J. Ryan Mitchell (9362)

Andrew V. Collins (11544)

Steven J. Joffee (13258)

MITCHELL BARLOW & MANSFIELD, P.C.

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH – AMERICAN FORK DEPARTMENT

VIVINT SOLAR, INC., a Delaware corporation; and ARM SECURITY, INC., a Utah Corporation, Plaintiffs, v. DOUGLAS ROBINSON, an individual, Defendant.	**ORDER GRANTING DEFENDANT DOUGLAS ROBINSON'S MOTION FOR AWARD OF ATTORNEY FEES** Case No. 140100223 Judge Thomas Low

Defendant Douglas Robinson's Motion for Award of Attorneys' Fees pursuant to Utah Code Ann. § 78B-5-825(1) came before the Court for a hearing on September 20, 2016. Plaintiffs were

represented by David Arrington and Peter Donaldson from the law firm Durham Jones & Pinegar. Defendant was represented by Ryan Mitchell from the law firm Mitchell Barlow & Mansfield. Having considered the pleadings, briefing, arguments of counsel, and otherwise being fully advised in the premises, the Court hereby GRANTS Defendant's Motion for Award of Attorneys' Fees as set forth below.

I. Utah's Attorney Fee Statute For Actions Asserted In Bad Faith.

Utah Code § 78B-5-825(1) states in relevant part that "[i]n civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith. . ." Under this statute, a prevailing party is entitled to his reasonable attorneys' fees incurred defending against a lawsuit if the court finds: (1) the action was without merit, and (2) the action was not brought in good faith. *Migliore v. Livingston Financial, LLC*, 2015 UT 9, ¶¶ 30–32, 347 P.3d 394. An action is without merit if it is "frivolous or of little weight or importance having no basis in law or fact, or clearly lacks a legal basis for recovery." *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 30 (internal citations and quotations omitted). An action has not been brought in good faith if at least one of the following factors is present: (i) the party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with knowledge that the activities in question would hinder, delay, or defraud others. *Migliore*, at ¶ 32 (internal quotation omitted).

Here, there is no dispute that Robinson is the prevailing party having obtained summary judgment dismissing with prejudice of all Plaintiffs' claims. Moreover, based on the pleadings and briefing in this matter, the Court finds that Plaintiffs ARM Security Inc.'s ("ARM") and Vivint Solar Inc.'s ("Solar") claims against Robinson were without merit and were not brought or asserted in good

faith.

A. Plaintiffs' Claims Against Robinson Are Without Merit.

First, the Court finds that at least some of the claims and some aspects of the claims in the Complaint lack merit and lack a basis in law or fact. Plaintiffs brought this action seeking to enforce certain restrictive covenants—specifically non-compete and non-solicitation provisions—against Robinson. Plaintiffs' Complaint expressly requested that the Court enter a judgment against Robinson finding and declaring that the restrictive covenants "were and are valid and fully enforceable" against Robinson but there is no valid basis in law or fact for such a request.[1] Under Utah law, restrictive covenants are enforceable only if they are negotiated in good faith, supported by consideration, are necessary to protect the goodwill or trade secrets of the business, and are reasonably restricted in time and area. *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425–26 (Utah 1983); *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951). Although Plaintiffs brought this action seeking full enforcement of the restrictive covenants against Robinson, Plaintiffs failed to present any evidence, argument, or explanation showing that the restrictive covenants were necessary to protect their goodwill or were reasonable in scope as to time and area as drafted. Plaintiffs instead ignored the scope and breadth of the restrictive covenants they drafted almost entirely and focused their efforts on attempting to convince the Court that it could reform, sever, or blue pencil Plaintiffs' overbroad restrictive covenants to make the restrictions reasonable and enforceable. In other words, through their silence, Plaintiffs tacitly conceded that as drafted their restrictive covenants were invalid and unenforceable against Robinson.

Based on the undisputed facts and evidence, the Court agrees that Plaintiffs'

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restrictive covenants are invalid and unenforceable because they are outrageously, unconscionably, senselessly, and offensively overbroad. For example, ARM's restrictive covenant sought to prohibit Robinson for five years from attempting to solicit, induce, or encourage not only ARM's current representatives or employees to leave or compete with ARM, but also any of ARM's *former* employees or representatives regardless of how long ago the former employee's or representative's relationship with ARM ended. Further, the restrictive covenant not only prevented Robinson from soliciting ARM representatives, but also from soliciting employees or representatives of Vivint, Inc. or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of these entities.

Similarly, Solar's restrictive covenant sought to prevent Robinson from working in industries in which Solar admittedly did not operate. And even in the solar industry, Solar tried to prevent Robinson from working in geographic locations where Solar admittedly did not do business. And even though ARM and Solar drafted their restrictive covenants, neither could explain—nor did they even try to articulate—an argument to show that the scope of their restrictive covenants ~~were~~ was reasonable ~~in scope~~ and ~~were~~ necessary to protect their goodwill. Accordingly, the Court finds that at least some aspects of Plaintiffs' Complaint are without merit because they lack a basis in law or fact.

B. Plaintiffs' Claims Were Brought and Asserted In Bad Faith.

The Court also finds that ARM's and Solar's claims against Robinson were brought and asserted in bad faith.[2] Specifically, based on the pleadings, briefing, and undisputed facts and evidence, the Court finds that ARM and Solar had the requisite bad faith subjective intent because: (1) ARM and Solar did not honestly believe in the propriety of their claims when they filed their Complaint; (2) ARM and Solar were trying to take unconscionable advantage of others, and specifically Mr. Robinson, and (3) ARM and Solar brought this action intending to improperly hinder and delay Robinson.

1. **Plaintiffs did not honestly believe that their claims were legally proper.**

The pleadings and briefing in this case demonstrate plainly that ARM and Solar lacked an honest belief in the propriety of their claims against Robinson when they brought this action and filed their Complaint. As discussed above, although Plaintiffs sued Robinson on the basis that their restrictive covenant provisions "were and are valid and fully enforceable," Plaintiffs never even attempted to demonstrate the reasonableness or legality of the restrictive covenants they claimed were fully enforceable, but instead have simply ignored that they sought this relief in their Complaint. And the Court understands why: it is impossible for Plaintiffs to show that the restrictive covenants are valid and fully enforceable because they are so outrageously overbroad. Indeed, anyone—even a non-lawyer—who compared ARM's and Solar's restrictive covenants with the requirements established by *Allen v. Rose Park Pharmacy*, and its progeny, including *System Concepts, Inc. v. Dixon*, could easily discern that Plaintiffs' restrictive covenants were invalid and unenforceable. Plaintiffs in fact ended up abandoning this claim—but only after Robinson filed his

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motion for summary judgment. Until summary judgment, however, Plaintiffs never once claimed that they were seeking anything less than full enforcement of the restrictive covenants. ~~But~~ And even when Plaintiffs abandoned their effort to fully enforce the restrictive covenants, they did so almost silently and sheepishly and certainly not in an overt or open manner. Accordingly, the pleadings and briefing as well as Plaintiffs' actions and arguments demonstrate that they did not honestly believe their restrictive covenants were fully enforceable against Robinson when they brought this action.

1. **Plaintiffs' brought this action seeking to take unconscionable advantage of Robinson.**

The pleadings and briefing in this case also show that ARM and Solar intended to take unconscionable advantage of others, and specifically Mr. Robinson by filing this action. It is undisputed that Robinson was never an employee of Solar and never sold any of Solar's products or interacted with any of its customers. Despite this fact, Plaintiffs' Complaint, among other things, sought to prevent Robinson from competing in the solar industry (as well as several other industries) throughout the entire United States. The overbreadth of Plaintiffs' Complaint was intended to take unconscionable advantage of Robinson, essentially to freeze him out of business. Although the Complaint specifically mentions SunRun and requests an injunction barring Robinson from working for SunRun, that is because this is where Plaintiffs believed Robinson was working when the Complaint was filed. But there is nothing in the Complaint that indicates an intention to limit those covenants to SunRun only.[3] Instead, the Complaint specifically asks for a finding and a declaration of full enforceability of all the restrictive covenants. There is nothing to suggest that if Robinson would have sought employment with a competitor other than SunRun, that Plaintiffs would not have also sought to freeze Robinson out of those businesses as well.

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1. **Plaintiffs' claims against Robinson were intended to improperly hinder and delay him from engaging in business.**

Finally, the Court finds based on the pleadings and the briefing that Plaintiffs manifestly acted with the intent and knowledge that their filing of this action would improperly hinder and delay Robinson from engaging in business. The vast over breadth of Plaintiffs' Complaint and the restrictive covenants combined with the Plaintiffs' lack of candor in their pleadings and briefing as to the scope of the relief they were seeking against Robinson is evidence showing Plaintiffs intended to hinder and delay Robinson from working in his lawful employment, or to delay the discovery of an overbroad pleading and overbroad covenant. Plaintiffs filed their Complaint alleging that the restrictive covenants were valid and fully enforceable. And there is no indication from the Complaint that Plaintiffs were asking the Court to uphold only certain portions of the restrictive covenants.

In their Complaint and briefing, Plaintiffs also never conceded that at least some of their claims were overbroad. To the contrary, Plaintiffs avoided making any concessions whatsoever in the Complaint and briefing. And even when defects in their claims were pointed out, Plaintiffs did not expressly concede that their clams were defective or overbroad in any respect; they simply ignored the defects and argued that regardless of their enforceability the Court could reform, sever, or blue pencil the restrictive covenants to make them enforceable. That is somewhat of a scorched earth tactic. Plaintiffs' lack of candor with respect to concessions forced Robinson to show how all of Plaintiffs' restrictive covenants were overbroad and unenforceable, which increased the costs of litigation and drove up the barriers to defending against Plaintiffs' claims. To plead for full enforcement of the restrictive covenants and then to sit silent when defects in the claims are pointed out, is not the type of candid pleading and briefing that is expected by the Court and is evidence that

Plaintiffs intended to hinder and delay Robinson from engaging in lawful employment and to delay the resolution of this lawsuit.

II. Conclusion And Award Of Robinson's Reasonable Attorneys' Fees Incurred Defending This Action.

In conclusion, the pleadings and briefing demonstrate clearly that ARM's and Solar's claims against Robinson are without merit and that ARM and Solar brought and asserted this action in bad faith. In fact, if this case does not justify an award of attorneys' fees under Utah Code § 78B-5-825(1), it would be difficult for the Court to think of a case that would trigger the statute. Accordingly, Robinson's Motion for Award of Attorneys' Fees is GRANTED and Robinson is entitled to payment of his reasonable attorneys' fees as follows:

With respect to Robinson's attorneys' fees incurred in defending against ARM's claims in this action, Robinson is awarded and entitled to payment from ARM of 100% of his reasonable attorneys' fees incurred in defending against ARM's claims, which shall be established by ~~a~~ affidavit or declaration from Robinson's counsel, allocating the fees between ARM's claims and Solar's claims.

With respect to Robinson's attorneys' fees incurred in defending against Solar's claims in this action, Robinson is awarded and entitled to payment from Solar of 50% of his reasonable attorneys' fees incurred in defending against Solar's claims, which shall be established by affidavit or declaration from Robinson's counsel, allocating the fees between Solar's claims and ARM's claims.

The Court, in its discretion, has decided to limit Solar's responsibility to only 50% of the attorneys' fees Robinson incurred in defending against Solar's claims because although Plaintiffs

affirmatively alleged in the Complaint that Utah law governs both the agreements, during summary judgment Solar at least made some argument and provided some basis as to why and how the Court could enforce a more limited scope of the restrictive covenants. The Court is not convinced that Solar's argument on this issue was necessarily made in bad faith. And, in fact, this argument would have to be raised at the trial court level before it can be raised at the appellate court level. So the Court will reduce the attorneys' fees payable by Solar by 50%. ARM, however, provided no basis whatsoever—it did not cite any cases or make any argument—as to how or why the Court could enforce a more limited scope of its restrictive covenants. The briefing was instead offensively silent as to ARM's restrictive covenants and simply requested the Court to reform ARM's restrictive covenants to make them reasonable.

Counsel for Robinson is directed to allocate its fees in a way that the Court can review and see if the Court agrees or disagrees with how counsel has allocated them. Counsel for Robinson is directed to submit a declaration or affidavit for review by counsel for Plaintiffs and for the Court. Then the Court will review it and determine if it is reasonable or not reasonable and if it is allocated in a way the Court believes is appropriate. If counsel for Plaintiffs wishes to be heard regarding the affidavit or declaration, Plaintiffs may file an objection or motion.

* * * *

In accordance with Utah Rule of Civil Procedure 10(e), the Court's signature appears at the top of the first page of this Order.

Approved As To Form

/s/ David L. Arrington*

Richard M. Hymas

David L. Arrington

Peter H. Donaldson

DURHAM JONES & PINEGAR, P.C.

Attorneys for Plaintiffs

*Signed with permission provided by email.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2016, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT DOUGLAS ROBINSON'S MOTION FOR AWARD OF ATTORNEY FEES** to be served via the Court's Electronic Filing System and email upon the following:

Richard M. Hymas

David L. Arrington

Peter H. Donaldson

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/s/ Jennifer Latzke

Complaint, at ¶ 49.

For purposes of Utah Code Ann. § 78B-5-825, the phrase "not brought or asserted in good faith" is synonymous with "bath faith." *See Cady v. Johnson*, 671 P.2d 149, 151–52 (Utah 1983) ("While there may be a distinction between bad faith and 'lack of good faith' in other areas of the law, for purposes of U.C.A., 1953, § 78-27-56 [the predecessor to current 78B-5-825], the two terms are synonymous.").

Even that claim, however, is overbroad, but perhaps less obviously so.

Tab D

The Order of the Court is stated below:
Dated: March 14, 2017 03:44:15 PM
/s/ Thomas Low
District Court Judge

Order Prepared By:

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David L. Arrington (4267)
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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

VIVINT SOLAR, INC., a Delaware corporation; and ARM SECURITY, INC., a Utah Corporation, Plaintiffs, v. DOUGLAS ROBINSON, an individual, Defendant.	**ORDER AND FINAL JUDGMENT** Case No. 140401123 Judge Thomas Low

This matter came before the Court for an evidentiary hearing and oral argument on Monday, January 30, 2017, regarding Plaintiffs' Objection to Allocation and Reasonableness of Attorney Fees submitted by counsel for Defendant Douglas Robinson following the Court's October 24, 2016 Order granting Defendant Douglas Robinson's Motion for Award of Attorney Fees. The Court previously granted summary judgment on all pending claims in this case by its

Ruling and Order dated May 5, 2016. Plaintiffs Vivint Solar, Inc. and ARM Security, Inc. were represented at the hearing by Richard M. Hymas and Peter H. Donaldson of the law firm Durham Jones & Pinegar. Defendant Douglas Robinson was represented by J. Ryan Mitchell and Andrew V. Collins of the law firm Mitchell Barlow & Mansfield, P.C.

The Court, having considered the Declaration of J. Ryan Mitchell Concerning Defendant Douglas Robinson's Attorneys' Fees dated October 20, 2016; the Plaintiffs' (1) Objection to the Proposed Allocation of Attorney Fees in the Declaration of J. Ryan Mitchell, and (2) Motion for Evidentiary Hearing on Allocation and Reasonableness of Attorney Fees dated November 4, 2016; Defendant Douglas Robinson's Memorandum in Opposition to Plaintiffs' (1) Objection to the Proposed Allocation of Attorney Fees in the Declaration of J. Ryan Mitchell, and (2) Motion for Evidentiary Hearing on Allocation and Reasonableness of Attorney Fees dated November 17, 2016; the Plaintiffs' Reply Memorandum in Support of Motion for Evidentiary Hearing on Allocation and Reasonableness of Requested Attorney Fees dated November 30, 2016; the evidence and arguments of counsel presented at the January 30 hearing; and otherwise being fully advised in the matter, hereby ORDERS as follows:

(1) Plaintiffs Vivint Solar, Inc. and ARM Security, Inc. are ordered to pay Defendant Douglas Robinson attorney fees in the amount of $207,421.43 for the reasons stated on the record at the hearing of January 30, 2017. It is further ordered that, based on the Court's Order Granting Defendant Douglas Robinson's Motion for Award of Attorney Fees dated October 24, 2016, the payment of attorney fees to Robinson shall be apportioned as follows: $140,987.65 shall be paid by ARM Security, Inc., and $66,433.78 shall be paid by Vivint Solar, Inc.

(2) Judgment under Utah Rules of Civil Procedure 54(a) **and 58A(a)** is entered against ARM Security, Inc. and in favor of Douglas Robinson in the amount of $140,987.65. Judgment under Rules 54(a) **and 58A(a)** is entered against Vivint Solar, Inc. and in favor of Douglas Robinson in the amount of $66,433.78.

*** * * END OF ORDER * * ***

Pursuant to Rule 10(e) of the Utah Rules of Civil Procedure, this Order is entered by the Court as set forth in the official stamp at the top of the first page of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2017, I caused a true and correct copy of the foregoing to be served via the Court's electronic filing system upon all counsel of record.

/s/ Peter H. Donaldson

Tab E

V Solar Holdings, Inc.
2013 Long-Term Incentive Pool Plan
for Recruiting Regional Sales Managers

Section 1. Purpose. The purpose of the V Solar Holdings, Inc. 2013 Long-Term Incentive Pool Plan for Recruiting Regional Sales Managers is to:

(a) provide a means through which V Solar Holdings, Inc. (the "Company") and its Affiliates may attract and retain key Recruiting Regional Sales Managers (and prospective Recruiting Regional Sales Managers); and

(b) provide a means whereby Recruiting Regional Sales Managers (and prospective Recruiting Regional Sales Managers) of the Company and its Affiliates can be paid incentive compensation measured by reference to the value of shares of the Company's Common Stock, thereby strengthening their commitment to the welfare of the Company and its Affiliates and aligning their interests with those of the Company's direct and indirect stockholders.

Section 2. Definitions. Capitalized terms used in the Plan shall have the meanings assigned such terms herein or in Appendix A (Definitions).

Section 3. Eligibility.

(a) Any Recruiting Regional Sales Manager of the Company or its Affiliates shall be eligible to be designated a Participant by the Committee.

(b) Unless otherwise provided for in an Award Agreement, when a Participant ceases to be a Recruiting Regional Sales Manager or otherwise ceases to satisfy the eligibility requirements for participation in this Plan (the last date of such participation, the "Cessation Date"), but continues to provide Services, such Participant shall be eligible to continue to receive payments in respect of LTIP Credits accrued on or prior to the Cessation Date pursuant to Section 4(c) and otherwise in accordance with the Plan, provided that such Participant shall not accrue any additional LTIP Credits in this Plan after the Cessation Date. Such a Participant may be eligible to participate in other long-term incentive plans of the Company or its Affiliates, but LTIP credits accrued under any other such plan shall not constitute "LTIP Credits" under this Plan.

(c) Unless otherwise provided for in an Award Agreement, an individual actively accruing benefits under a similar long-term incentive plan of the Company shall not be eligible to accrue LTIP Credits with respect to the same period of time under this Plan, unless otherwise provided by the Committee in the Award Agreement.

Section 4. LTIP Share; Timing and Amount of Payments.

(a) Grant of Awards. From time to time, the Committee may make awards of LTIP credits (each, an "LTIP Credit") to Participants under the Plan (each, an "Award") which shall be evidenced by a written award agreement (each, an "Award Agreement"). Awards may be expressed as a right, subject to satisfaction of the terms and conditions of the Award, to receive a

stipulated number of LTIP Credits or a number of LTIP Credits derivable by a formula; provided that if no such number of LTIP Credits or formula is specified in the Award Agreement, then the number of LTIP Credits for such Award shall be calculated pursuant to Section 4(b).

(b) Calculation of LTIP Share.

(i) Unless otherwise provided in the applicable Award Agreement, a Participant's share of the LTI Pool (the "LTIP Share"), as of any date of determination, shall be calculated as a fraction, (x) the numerator of which shall be such Participant's LTIP Credits accrued during all Measurement Periods as of such date of determination and (y) the denominator of which shall be the total number of LTIP Credits accrued during all Measurement Periods for all Participants (excluding Terminated Participants) with Awards as of such date of determination. All determinations related to the calculation of the LTIP Share and the LTIP Credits shall be reasonably determined by the Committee in good faith and shall be binding and final on all Participants.

(ii) LTIP Credits, Generally. Each Participant will be allocated one LTIP Credit for each installed solar-generating power system sold by a Regional Sales Manager, District Sales Manager or manager who was recruited by such Regional Sales Manager after the Effective Date.

(iii) Calculating LTIP Credits. A Participant's LTIP Credits for any Measurement Period in which a payment is made or calculated under Section 4(c) shall be determined in good faith by the Committee for purposes of making such payment, with the Committee's decisions binding and final on all Participants.

(c) Payment of Awards. Satisfaction of Awards shall occur as described in either sub-section (i), sub-section (ii), sub-section (iii), or a combination of either sub-sections (i) or (ii) and sub-section (iii), below.

(i) Public Offering. Upon the occurrence of a Public Offering of the Company (or any other similar event specified in the sole discretion of the Committee), each Participant with an outstanding Award shall be issued a number of Stock Appreciation Rights under the Company's Stock Plan with an Intrinsic Value equal to such Participant's LTIP Share of the LTI Pool, with the Strike Price under each Stock Appreciation Right equal to the Adjusted Exercise Price. Issuance of such Stock Appreciation Rights shall constitute full and complete satisfaction of the Participant's rights in respect of the LTI Pool and under this Plan.

(A) One-sixth of such Stock Appreciation Rights shall be mandatorily exercisable on the date that is six (6) months following the closing of the Public Offering (unless the Participant ceases to provide Services before such mandatory exercise date, in which case the Stock Appreciation Right shall be forfeited).

(B) One-sixth of such Stock Appreciation Rights shall be mandatorily exercisable on the date that is eighteen (18)

months following the closing of the Public Offering (unless the Participant ceases to provide Services before such mandatory exercise date, in which case the Stock Appreciation Right shall be forfeited) (collectively, with the Stock Appreciation Rights described in clause (A) above, the "Time-Vesting SARs").

(C) One-third of such Stock Appreciation Rights shall be mandatorily exercisable on the later of (x) the date on which the First Performance Hurdle has been satisfied and (y) the date that is six (6) months following the closing of the Public Offering (unless the Participant ceases to provide Services before such mandatory exercise date, in which case the Stock Appreciation Right shall be forfeited).

(D) One-third of such Stock Appreciation Rights shall be mandatorily exercisable on the later of (x) the date on which the Second Performance Hurdle has been satisfied and (y) the date that is six (6) months following the closing of the Public Offering (unless the Participant ceases to provide Services before such mandatory exercise date, in which case the Stock Appreciation Right shall be forfeited).

Upon exercise of any Stock Appreciation Right issued in accordance with this Section 4(c)(i), payment may be made in one of the following forms, as determined by the Committee in its sole discretion: (w) cash, or (x) shares of Common Stock valued at Fair Market Value, or (y) shares of Common Stock or units of capital stock of Parent or one of Parent's majority-owned Subsidiaries that beneficially owns, directly or indirectly, a majority of the voting power of the Company's capital stock ("Alternative Equity") valued at Fair Market Value (measured as though all references to shares of Common Stock in such definition of "Fair Market Value" were replaced with Alternative Equity) or (z) any combination thereof.

(ii) Notwithstanding the foregoing, if a Participant's Services are terminated by the Participant's employer after the closing of the Public Offering other than for Cause (or as a result of the Participant's death or disability (as defined in the employer's long-term disability insurance plan)), then subject to and conditioned upon the execution and non-revocation of a General Release, any Time-Vesting SARs which remain outstanding and unsettled shall not be forfeited, and instead shall be mandatorily exercisable on the first trading day following the thirtieth () day after such termination of Services.

(iii) Change of Control. Upon the occurrence of a Change of Control (or any other similar event specified in the sole discretion of the Committee), each Participant with an outstanding Award shall be eligible to be paid an amount equal to the product of (1) the Participant's LTIP Share, (2) the LTI Pool and (3) the Vested Percentage (such product, the "Change of Control Payment Amount"), which payment may be made in one of the following forms, as determined by the Committee in its sole discretion: (w) cash,

(x) shares of Common Stock valued at Fair Market Value, (y) Alternative Equity valued at Fair Market Value (measured as though all references to shares of Common Stock in such definition of "Fair Market Value" were replaced with Alternative Equity) or (z) any combination thereof. The Change of Control Payment Amount will be paid to a Participant in installments as follows:

(A) One-third of the Change of Control Payment Amount shall be paid within thirty (30) days of the consummation of such Change of Control (unless the Participant ceases to provide Services before such consummation date, in which case the Change of Control Payment shall be forfeited);

(B) One-third of the Change of Control Payment Amount shall be paid on the date that is nine (9) months after the date of the consummation of such Change of Control (unless the Participant ceases to provide Services before such date, in which case the unpaid portion of the Change of Control Payment shall be forfeited); and

(C) One-third of the Change of Control Payment Amount shall be paid on the date that is eighteen (18) months after the date of the consummation of such Change of Control (unless the Participant ceases to provide Services before such date, in which case the unpaid portion of the Change of Control Payment shall be forfeited);

provided that if a Participant's Services are terminated by the Participant's employer after the consummation of a Change of Control other than for Cause (or as a result of the Participant's death or disability (as defined in the employer's long-term disability insurance plan)), then subject to and conditioned upon the execution and non-revocation of a General Release by such Participant, any unpaid portion of the Change of Control Payment Amount shall be paid to such Participant within thirty (30) days of such termination of Services.

(iv) Other Payments. The Committee may, at any time in its sole discretion, declare a payment from the LTI Pool, in which case each Participant with an outstanding Award shall be paid an amount equal to such Participant's LTIP Share of the payment amount so declared by the Committee, which payment may be made in one of the forms described in Section 4(c)(i); provided that any such payments, together with all other payments made pursuant to this Section 4(c)(iii), shall not exceed an amount equal to the product of (A) the Vested Percentage and (B) the LTI Pool.

(v) Adjustment to LTI Pool. Any payment made pursuant to Section 4(c) shall constitute a payment pursuant to the LTI Pool and shall, therefore, reduce the amount of

the LTI Pool available for future distributions, as described in the definition of "LTI Pool."

Section 5. Administration.

(a) The Committee shall administer the Plan.

(b) Subject to the provisions of the Plan and applicable law, the Committee shall have the sole and plenary authority, in addition to other express powers and authorizations conferred on the Committee by the Plan, to: (i) designate Participants; (ii) determine the type or types of Awards to be granted to a Participant; (iii) determine the terms and conditions of any Award; (iv) determine whether, to what extent, and under what circumstances Awards may be settled or exercised in cash, shares of Common Stock, other securities, other Awards or other property, or canceled, forfeited, or suspended and the method or methods by which Awards may be settled, exercised, canceled, forfeited, or suspended; (v) determine whether, to what extent and under what circumstances the delivery of cash, shares of Common Stock, other securities, other Awards or other property and other amounts payable with respect to an Award shall be deferred either automatically or at the election of the Participant or of the Committee; (vi) interpret, administer, reconcile any inconsistency in, correct any defect in and/or supply any omission in the Plan and any instrument or agreement relating to, or Award granted under, the Plan; (vii) establish, amend, suspend, or waive any rules and regulations and appoint such agents as the Committee shall deem appropriate for the proper administration of the Plan; and (viii) make any other determination and take any other action that the Committee deems necessary or desirable for the administration of the Plan.

(c) Except to the extent prohibited by applicable law or the applicable rules and regulations of any securities exchange or inter-dealer quotation system on which the securities of the Company are listed or traded, the Committee may allocate all or any portion of its responsibilities and powers to any one or more of its members and may delegate all or any part of its responsibilities and powers to any person or persons selected by it. The Committee may revoke any such allocation or delegation at any time. Without limiting the generality of the foregoing, the Committee may delegate to one or more officers of the Company or any of its Affiliates the authority to act on behalf of the Committee with respect to any matter, right, obligation, or election which is the responsibility of or which is allocated to the Committee herein, and which may be so delegated as a matter of law.

(d) Unless otherwise expressly provided in the Plan, all designations, determinations, interpretations, and other decisions under or with respect to the Plan or any Award or any documents evidencing Awards granted pursuant to the Plan shall be within the sole discretion of the Committee, may be made at any time and shall be final, conclusive and binding upon all persons or entities, including, without limitation, the Company, any Affiliate, any Participant, any holder or beneficiary of any Award, and any stockholder of the Company.

(e) No member of the Board, the Committee or any employee or agent of the Company (each such person, an "Indemnifiable Person") shall be liable for any action taken or omitted to be taken or any determination made with respect to the Plan or any Award hereunder (unless constituting fraud or a willful criminal act or omission). Each Indemnifiable Person shall be

indemnified and held harmless by the Company against and from any loss, cost, liability, or expense (including attorneys' fees) that may be imposed upon or incurred by such Indemnifiable Person in connection with or resulting from any action, suit or proceeding to which such Indemnifiable Person may be a party or in which such Indemnifiable Person may be involved by reason of any action taken or omitted to be taken or determination made under the Plan or any Award Agreement and against and from any and all amounts paid by such Indemnifiable Person with the Company's approval, in settlement thereof, or paid by such Indemnifiable Person in satisfaction of any judgment in any such action, suit or proceeding against such Indemnifiable Person, and the Company shall advance to such Indemnifiable Person any such expenses promptly upon written request (which request shall include an undertaking by the Indemnifiable Person to repay the amount of such advance if it shall ultimately be determined as provided below that the Indemnifiable Person is not entitled to be indemnified); provided that the Company shall have the right, at its own expense, to assume and defend any such action, suit or proceeding and once the Company gives notice of its intent to assume the defense, the Company shall have sole control over such defense with counsel of the Company's choice. The foregoing right of indemnification shall not be available to an Indemnifiable Person to the extent that a final judgment or other final adjudication (in either case not subject to further appeal) binding upon such Indemnifiable Person determines that the acts or omissions or determinations of such Indemnifiable Person giving rise to the indemnification claim resulted from such Indemnifiable Person's fraud or willful criminal act or omission or that such right of indemnification is otherwise prohibited by law or by the Company's certificate of incorporation or bylaws. The foregoing right of indemnification shall not be exclusive of or otherwise supersede any other rights of indemnification to which such Indemnifiable Persons may be entitled under the Company's certificate of incorporation or bylaws, as a matter of law, individual indemnification agreement or contract or otherwise, or any other power that the Company may have to indemnify such Indemnifiable Persons or hold them harmless.

(f) Notwithstanding anything to the contrary contained in the Plan, the Board may, in its sole discretion, at any time and from time to time, grant Awards and administer the Plan with respect to such Awards. Any such actions by the Board shall be subject to the applicable rules of any securities exchange or inter-dealer quotation system on which the shares of Common Stock is listed or quoted. In any such case, the Board shall have all the authority granted to the Committee under the Plan.

Section 6. Amendment and Termination; Changes in Capital Structure and Similar Events.

(a) The Committee may amend, alter, suspend, discontinue, or terminate the Plan and/or any Award, or any portion thereof, at any time; provided that no such amendment, alteration, suspension, discontinuation or termination shall be made without shareholder approval, if such shareholder approval is necessary to comply with any tax or regulatory requirement applicable to the Plan; and provided, further, that any such amendment, alteration, suspension, discontinuance or termination (including without limitation any change effected by amendment, restatement, modification or waiver relating to any agreement cross-referenced herein (collectively, an "Amendment") that would impair the rights of any Participant or any holder or beneficiary of any Award theretofore granted shall not to that extent be effective without the consent of either (x) the affected Participant or (y) a number of Participants with a majority of the then

outstanding LTIP Credits. Notwithstanding the foregoing, (i) the Committee may terminate the Plan and pay Participants the Vested Percentage of the LTI Pool pursuant to Section 4(c)(iii) without any shareholder approval or Participant consent at any time, in which case this Plan shall be terminated following such payment without any further obligation on the Company thereafter and (ii) the Committee may amend the method of calculating and allocating LTIP Credits (including, without limitation, imposition of or amendment to annual minimum performance requirements for any Participant to be allocated LTIP Credits under the Plan in respect of a Measurement Period) on a prospective basis without any shareholder approval or Participant consent at any time.

(b) In the event of (a) any dividend or other distribution (whether in the form of cash, shares of Common Stock, other securities or other property and excluding any dividend or distribution used to satisfy indebtedness of Parent and/or its Affiliates and Subsidiaries), recapitalization, stock split, reverse stock split, reorganization, merger, consolidation, split-up, split-off, spin-off, combination, repurchase or exchange of shares of Common Stock or other securities of the Company, issuance of warrants or other rights to acquire shares of Common Stock or other securities of the Company, or other similar corporate transaction or event (including, without limitation, a Change of Control) that affects the shares of Common Stock, or (b) unusual or nonrecurring events (including, without limitation, a Change of Control) affecting the Company or any Subsidiary or Affiliate, or the financial statements of the Company or any Subsidiary or Affiliate, or changes in applicable rules, rulings, regulations or other requirements of any governmental body or securities exchange or inter-dealer quotation system, accounting principles or law, such that in either case an adjustment is determined by the Committee in its sole discretion to be necessary or appropriate, then the Committee shall make any such adjustments in such manner as it may deem equitable, including without limitation, any or all of the following:

(i) adjusting any or all of (A) the number of hypothetical Stock Options in the LTI Pool (and the kind of securities thereunder) and the number and type of securities which may be delivered in respect of Awards and (B) the Exercise Price with respect to any Award;

(ii) providing for a substitution or assumption of Awards (or awards of an acquiring company), accelerating the exercisability of, lapse of restrictions on, or termination of, Awards or providing for a period of time (which shall not be required to be more than ten (10) days) for Participants to exercise outstanding Awards prior to the occurrence of such event (and any such Award not so exercised shall terminate upon the occurrence of such event); and

(iii) canceling any one or more outstanding Awards and causing to be paid to the holders holding Awards the value of such Awards, if any, as determined by the Committee (which if applicable may be based upon the price per share of Common Stock received or to be received by other stockholders of the Company in such event), including without limitation, in the case of an outstanding or hypothetical Stock Options, the Intrinsic Value thereof (which may be zero).

provided, however, that in the case of any "equity restructuring" (within the meaning of the Financial Accounting Standards Board Accounting Standards Codification Topic 718 (or any successor pronouncement thereto)), the Committee shall make an equitable or proportionate adjustment to outstanding Awards to reflect such equity restructuring.

Payments to holders pursuant to clause (iii) above shall be made in cash or, in the sole discretion of the Committee, in the form of such other consideration necessary for a Participant to receive property, cash, or securities (or combination thereof) as such Participant would have been entitled to receive upon the occurrence of the transaction if the Participant had been, immediately prior to such transaction, the holder of the number of shares of Common Stock covered by the Award at such time (less any applicable Strike Price). In addition, prior to any payment or adjustment contemplated under this Section 6(b), the Committee may require a Participant to (A) represent and warrant as to the unencumbered title to his Awards, (B) bear such Participant's pro rata share of any post-closing indemnity obligations, and be subject to the same post-closing purchase price adjustments, escrow terms, offset rights, holdback terms, and similar conditions as the other holders of Stock, and (C) deliver customary transfer documentation as reasonably determined by the Committee.

Section 7. General Provisions.

(a) Nontransferability. No Award may be assigned, alienated, pledged, attached, sold or otherwise transferred or encumbered by a Participant other than by will or by the laws of descent and distribution and any such purported assignment, alienation, pledge, attachment, sale, transfer or encumbrance shall be void and unenforceable against the Company or an Affiliate; provided that the designation of a beneficiary shall not constitute an assignment, alienation, pledge, attachment, sale, transfer or encumbrance.

(b) Tax Withholding.

(i) A Participant shall be required to pay to the Company or any Affiliate in cash or its equivalent (e.g., check), and the Company or any Affiliate shall have the right and is hereby authorized to withhold, from any cash, shares of Common Stock, other securities or other property deliverable under any Award or from any compensation or other amounts owing to a Participant, the amount (in cash, shares of Common Stock, other securities or other property) of any required withholdings or taxes in respect of an Award, its exercise, or any payment or transfer under an Award or under the Plan and to take such other action as may be necessary in the opinion of the Committee or the Company to satisfy all obligations for the payment of such withholdings and taxes.

(ii) Without limiting the generality of clause (i) above, the Committee may, in its sole discretion, permit a Participant to satisfy, in whole or in part, the foregoing withholding liability by (A) the delivery of shares of Common Stock or Alternative Equity (which are not subject to any pledge or other security interest) owned by the Participant having a Fair Market Value equal to such withholding liability or (B) having the Company withhold from the number of shares of Common Stock or Alternative Equity otherwise issuable or deliverable pursuant to the exercise or settlement of the Award a number of shares of Common Stock or Alternative Equity with a Fair Market

Value equal to such withholding liability, provided that with respect to shares of Common Stock or Alternative Equity withheld pursuant to clause (B), the number of such shares of Common Stock or Alternative Equity may not have a Fair Market Value greater than the minimum required statutory withholding liability.

(c) No Claim to Awards; No Rights to Continued Services; Waiver. No employee, advisor or consultant of the Company or an Affiliate or Subsidiary, or other person, shall have any claim or right to be granted an Award under the Plan or, having been selected for the grant of an Award, to be selected for a grant of any other Award. There is no obligation for uniformity of treatment of Participants or holders or beneficiaries of Awards. The terms and conditions of Awards and the Committee's determinations and interpretations with respect thereto need not be the same with respect to each Participant and may be made selectively among Participants, whether or not such Participants are similarly situated. Neither the Plan nor any action taken hereunder shall be construed as giving any Participant any right to be retained in the Service of the Company or an Affiliate or Subsidiary. The Company and any of its Affiliates and Subsidiaries may at any time dismiss a Participant from Services, free from any liability or any claim under the Plan. By accepting an Award under the Plan, a Participant shall thereby be deemed to have waived any claim to continued exercise or vesting of an Award or to damages or severance entitlement related to non-continuation of the Award beyond the period provided under the Plan or any Award Agreement.

(d) Designation and Change of Beneficiary. Each Participant may file with the Committee a written designation of one or more persons as the beneficiary(ies) who shall be entitled to receive the amounts payable with respect to an Award, if any, due under the Plan upon his or her death. A Participant may, from time to time, revoke or change his or her beneficiary designation without the consent of any prior beneficiary by filing a new designation with the Committee. The last such designation received by the Committee shall be controlling; provided, however, that no designation, or change or revocation thereof, shall be effective unless received by the Committee prior to the Participant's death, and in no event shall it be effective as of a date prior to such receipt. If no beneficiary designation is filed by a Participant, the beneficiary shall be deemed to be his or her spouse or, if the Participant is unmarried at the time of death, his or her estate.

(e) No Rights as a Stockholder. Except as otherwise specifically provided in the Plan or any Award Agreement, no person shall be entitled to the privileges of ownership in respect of shares of Common Stock which are subject to Awards hereunder until such shares of Common Stock have been issued or delivered to that person.

(f) Governing Law. The Plan shall be governed by and construed in accordance with the internal law of the State of Delaware applicable to contracts made and performed wholly within the State of Delaware, without giving effect to the conflict of law provisions thereof that would direct the application of the law of any other jurisdiction. Any suit, action or proceeding with respect to this Plan, or any judgment entered by any court in respect of any thereof, shall be brought exclusively in any court of competent jurisdiction in Salt Lake City, Utah, and each of the Company and the Participant hereby submits to the exclusive jurisdiction of such courts for the purpose of any such suit, action, proceeding or judgment. Each of the Participant and the Company hereby irrevocably waives (i) any objections which it may now or hereafter have to the

laying of the venue of any suit, action or proceeding arising out of or relating to this Plan brought in any court of competent jurisdiction in Salt Lake City, Utah, (ii) any claim that any such suit, action or proceeding brought in any such court has been brought in any inconvenient forum and (iii) any right to a jury trial.

(g) Severability. If any provision of the Plan or any Award or Award Agreement is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction or as to any person or entity or Award, or would disqualify the Plan or any Award under any law deemed applicable by the Committee, such provision shall be construed or deemed amended to conform to the applicable laws, or if it cannot be construed or deemed amended without, in the determination of the Committee, materially altering the intent of the Plan or the Award, such provision shall be construed or deemed stricken as to such jurisdiction, person or entity or Award and the remainder of the Plan and any such Award shall remain in full force and effect.

(h) No Trust or Fund Created. Neither the Plan nor any Award shall create or be construed to create a trust or separate fund of any kind or a fiduciary relationship between the Company or any Affiliate, on the one hand, and a Participant or other person or entity, on the other hand. No provision of the Plan or any Award shall require the Company, for the purpose of satisfying any obligations under the Plan, to purchase assets or place any assets in a trust or other entity to which contributions are made or otherwise to segregate any assets, nor shall the Company maintain separate bank accounts, books, records or other evidence of the existence of a segregated or separately maintained or administered fund for such purposes. Participants shall have no rights under the Plan other than as unsecured general creditors of the Company, except that insofar as they may have become entitled to payment of additional compensation by performance of Services, they shall have the same rights as other employees under general law.

(i) Non-Qualified Deferred Compensation. This Plan and Awards hereunder are designed to be exempt from the provisions of Section 409A of the Internal Revenue Code of 1986, as amended (the "Code") and Department of Treasury regulations and other interpretive guidance issued thereunder, including without limitation any such regulations or other guidance that may be issued after the Effective Date. Notwithstanding any provision of the Plan to the contrary, in the event that the Committee determines that any amounts payable hereunder will incur additional tax under Section 409A of the Code and related Department of Treasury guidance, the Committee may in its sole discretion (a) adopt such amendments to the Plan and appropriate policies and procedures, including amendments and policies with retroactive effect, necessary or appropriate to preserve the intended tax treatment of the benefits provided by the Plan and Awards hereunder and/or (b) take such other actions necessary or appropriate to comply with the requirements of Section 409A of the Code and related Department of Treasury guidance, including such Department of Treasury guidance and other interpretive materials as may be issued after the Effective Date.

Section 8. Effectiveness. The Plan shall be effective as of July 31, 2013 (the "Effective Date") and shall continue in effect, as amended from time to time, until terminated pursuant to Section 6.

Appendix A
Definitions

"Adjusted Exercise Price" shall mean the Exercise Price under the hypothetical Stock Option described in the LTI Pool, as adjusted from time to time.

"Affiliate" means (i) any person or entity that directly or indirectly controls, is controlled by or is under common control with the Company or Parent and/or (ii) to the extent provided by the Committee, any person or entity in which the Company or Parent has a significant interest. The term "control" (including, with correlative meaning, the terms "controlled by" and "under common control with"), as applied to any person or entity, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person or entity, whether through the ownership of voting or other securities, by contract or otherwise.

"Board" means (i) prior to a Public Offering, the board of directors of the Parent and (ii) following (A) a Public Offering or (B) the date Parent ceases to be the "beneficial owner" (as such term is defined in Rules 13d-3 and 13d-5 under the Exchange Act (or any successor rule thereto)), directly or indirectly, of 80% or more of the total voting power of the voting equity of the Company, the board of directors of the Company.

"Cause", in the case of a particular Award, unless the applicable Award Agreement states otherwise, shall have the meaning ascribed to such term in the Participant's then-current employment agreement, and if not so defined, or no such employment agreement exists, "Cause" shall mean (A) the Participant's continued failure substantially to perform the Participant's employment duties (other than as a result of total or partial incapacity due to physical or mental illness), (B) dishonesty in the performance of the Participant's employment duties, (C) an act or acts on the Participant's part constituting (x) what would be classified as a felony under the laws of the United States or any state thereof or (y) what would be classified as a misdemeanor involving moral turpitude under the law of the United States or any state thereof, (D) use, possession, sale, or purchase of controlled substances or alcohol during working hours or on the job site or being under the influence of controlled substances or alcohol during working hours or on the job site, (E) the Participant's willful malfeasance or willful misconduct in connection with the Participant's employment duties or any act or omission which is or could reasonably be expected to be injurious to the financial condition or business reputation of the Company or any of its Subsidiaries or Affiliates, (F) the Participant's fraud or misappropriation, embezzlement or misuse of funds or property belonging to the Company or an Affiliate or Subsidiary or (G) the occurrence of any Restrictive Covenant Violation; provided that none of the foregoing events shall constitute Cause unless Participant fails to cure such event and remedy any adverse or injurious consequences arising from such event within ten (10) days after the receipt of written notice from the Company of the event which constitutes Cause (except that no cure or remedy period shall be provided if the event or such consequences are not capable of being cured and remedied).

"Change of Control" shall mean (i) the sale or disposition, in one or a series of related transactions, of all or substantially all of the assets of the Company and its Subsidiaries, as a whole, to any Person or Group other than Parent or Sponsor (or an Affiliate of Parent or

Sponsor) or (ii) any Person or Group, other than Parent or Sponsor (or an Affiliate of Parent or Sponsor), is or becomes the "beneficial owner" (as such term is defined in Rules 13d-3 and 13d-5 under the Exchange Act (or any successor rule thereto)), directly or indirectly, of 50% or more of the total voting power of the voting equity of the Company, including by way of merger, consolidation or otherwise and Parent and Sponsor (or an Affiliate of Parent or Sponsor) cease to directly or indirectly control the Board.

"Committee" shall mean either (i) the Board or (ii) any committee to which the Board delegates its authority in respect of this Plan.

"Common Stock" shall mean the Company's common stock.

"District Sales Manager" shall mean a District Sales Manager who provides Services.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and any successor thereto. Reference in the Plan to any section of (or rule promulgated under) the Exchange Act shall be deemed to include any rules, regulations or other interpretative guidance under such section or rule, and any amendments or successor provisions to such section, rules, regulations or guidance.

"Exercise Price" means the option price per share of Common Stock for each Stock Option.

"Fair Market Value" shall mean, on a given date, (i) if the Common Stock is listed on a national securities exchange, the closing price of the Common Stock reported on the primary exchange on which the Common Stock is listed and traded on such date, or, if there are no such sales on that date, then on the last preceding date on which such sales were reported; (ii) if the Common Stock is not listed on any national securities exchange but is quoted in an inter-dealer quotation system on a last-sale basis, the average between the closing bid price and ask price reported on such date, or, if there is no such sale on that date, then on the last preceding date on which a sale was reported; or (iii) if the Common Stock is not listed on a national securities exchange or quoted in an inter-dealer quotation system on a last-sale basis, the amount determined by the Board (or, after a Public Offering, the Committee) in good faith to be the fair market value of the Common Stock.

"First Performance Hurdle" shall mean that, prior to the date of determination, that Sponsor shall have received cash proceeds in respect of its shares of Common Stock held from time to time by Sponsor in an amount that equals $250,000,000 more than Sponsor's cumulative invested capital in respect of its shares of Common Stock (which amount shall be deemed to be $75,000,000, plus any amounts invested after November 16, 2012 and through such date of determination).

"General Release" shall mean a general release of claims in favor of the Company and its affiliates, and their respective officers, directors, and employees, in such standard form as the Company may adopt from time to time.

"Group" means "group" as such term is used for purposes of Section 13(d) or 14(d) of the Exchange Act (or any successor section thereto).

"Intrinsic Value" shall mean, as of any date of determination in respect of a Stock Option, the amount by which the Fair Market Value of a share of Common Stock exceeds the Exercise Price under such Stock Option.

"LTI Pool" as of any date of determination, shall mean an amount equal to the Intrinsic Value of 1,544,118 hypothetical Stock Options issued under the Stock Plan with an Exercise Price equal to $1.00 each (such number and such Exercise Price subject to adjustments as provided in the Stock Plan), less the amount of any payments or distributions from the LTI Pool prior to such date of determination made pursuant to Section 4(c), including the Intrinsic Value of any Stock Options issued pursuant to Section 4(c). All determinations related to the calculation of the LTI Pool shall be reasonably determined by the Committee in good faith and shall be binding and final on all Participants.

"Measurement Period" shall mean the Company's fiscal year (or such other period determined by the Committee from time to time).

"Parent" means 313 Acquisition LLC, a Delaware limited liability company.

"Participant" shall mean each Recruiting Regional Sales Manager selected by the Committee to receive an Award under the Plan.

"Person" means any individual, entity or group (within the meaning of Section 13(d)(3) or 14(d)(2) of the Exchange Act.

"Plan" shall mean this V Solar Holdings, Inc. 2013 Long-Term Incentive Pool Plan for Recruiting Regional Sales Managers (as amended, modified or supplemented from time to time).

"Public Offering" shall mean any offering by the Company of Common Stock to the public pursuant to an effective registration statement under the Securities Act.

"Recruiting Regional Sales Manager" shall mean each Recruiting Regional Sales Manager who provides Services.

"Regional Sales Manager" shall mean a Regional Sales Manager who provides Services.

"Restrictive Covenant Violation" means the Participant's breach of any provision of any agreement (including any Award Agreement) with the Company or any Affiliate or Subsidiary (whether currently in existence or arising in the future from time to time, and whether entered into pursuant to the Plan or otherwise) containing covenants regarding non-competition, non-solicitation, non-disparagement and/or non-disclosure obligations.

"Sales Manager" shall mean a Sales Manager who provides Services.

"Second Performance Hurdle" shall mean that, prior to the date of determination, that Sponsor shall have received cash proceeds in respect of its shares of Common Stock held from time to time by Sponsor in an amount that equals $500,000,000 more than Sponsor's cumulative invested capital in respect of its shares of Common Stock (which amount shall be deemed to be

$75,000,000, plus any amounts invested after November 16, 2012 and through such date of determination).

"Service Recipient" with respect to a Participant shall mean the Company or one of its Affiliates (or any combination thereof) that engages the Services of such Participant at the time he or she is granted an Award hereunder (or that will prospectively engage the Services of such Participant following such grant).

"Services" means (i) a Participant's employment if the Participant is an employee of the Company (or, following a Change in Control, any successor of the Company or the acquiring entity) or any of its Affiliates (or Parent or one of its Subsidiaries) or (ii) a Participant's services as an advisor or consultant, if the Participant is an advisor or consultant to the Company (or, following a Change in Control, any successor of the Company or the acquiring entity) or any of its Affiliates (or Parent or one of its Subsidiaries).

"Sponsor" shall mean The Blackstone Group, L.P. and its Affiliates.

"Stock Appreciation Right" or "SAR" means a Stock Appreciation Right issued under the Stock Plan.

"Stock Option" means a Stock Option issued under the Stock Plan.

"Strike Price" shall have the meaning set forth in the Stock Plan.

"Stock Plan" means the V Solar Holdings, Inc. 2013 Omnibus Incentive Plan.

"Subsidiary" means, with respect to any specified Person:

(a) any corporation, association or other business entity of which more than 50% of the total voting power of shares of such entity's voting securities (without regard to the occurrence of any contingency and after giving effect to any voting agreement or stockholders' agreement that effectively transfers voting power) is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person (or a combination thereof); and

(b) any partnership (or any comparable foreign entity) (A) the sole general partner (or functional equivalent thereof) or the managing general partner of which is such Person or Subsidiary of such Person or (B) the only general partners (or functional equivalents thereof) of which are that Person or one or more Subsidiaries of that Person (or any combination thereof).

"Terminated Participant" shall mean any Participant holding an Award whose Services with the Service Recipient is terminated for any reason. For the avoidance of doubt, a Participant who ceases to be a Regional Sales Manager, but continues to provide Services in another capacity shall not be a Terminated Participant.

"Vested Percentage" as of any date of determination shall mean (x) if the First Performance Hurdle has not been satisfied, 33.33%, or (y) if the First Performance Hurdle has

been satisfied, but the Second Performance Hurdle has not been satisfied, 66.66%, or (z) if the First Performance Hurdle and the Second Performance Hurdle have been satisfied, 100%.

Tab F

CONFIDENTIAL

V Solar Holdings, Inc. 2013 Long-Term Incentive Pool Plan
for Recruiting Regional Managers
Notice of Award and Award Agreement

October 7, 2013

Dear Doug Robinson

You ("Participant") have been designated as eligible to participate in the 2013 Long-Term Incentive Pool Plan for Recruiting Regional Managers (the "Plan") of V Solar Holdings, Inc. (the "Company"). Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Plan.

As an eligible Participant, you will have an opportunity to be paid incentive compensation measured by reference to the value of shares of the Company's Common Stock (an "Award"). Your Award is subject to the terms of the Plan and this letter (your "Award Agreement").

In order to accept your Award, you must agree to be bound by the restrictive covenants set forth in Appendix A to this Award Agreement and fully incorporated herein. In addition, you must acknowledge receipt of a copy of the Plan, which is attached hereto as Exhibit A. By signing this Award Agreement and accepting the Award, you acknowledge and agree that you have reviewed this Award Agreement and the Plan in their entirety, have had an opportunity to obtain the advice of counsel prior to executing this Award Agreement, and fully understand all provisions of this Award Agreement (including Appendix A), and the Plan.

If you have any questions about your Award or this Award Agreement, please contact Chance Allred at challred@vivintsolar.com or 801.234.6368. Please indicate whether or not you choose to accept the Award on the terms set forth in this Award Agreement and the Plan, and return a copy by pdf to 1stopsolar@vivint.com by October 18, 2013.

Sincerely,

V SOLAR HOLDINGS, INC.

By: _____
Name: Greg Butterfield
Title: CEO & President

☒ I accept the Award on the terms set forth in this Award Agreement and the Plan.

☐ I do not accept the Award.

Signed: _____

Name: Doug Robinson 15369

EXHIBIT 6
WIT: Meads
DATE: 11·10·15
ALPINE COURT REPORTING

Appendix A
Restrictive Covenants

1. Non-Competition; Non-Solicitation; Non-Disparagement.

(a) The Participant acknowledges and recognizes the highly competitive nature of the businesses of the Company and its Affiliates and accordingly agrees as follows:

(i) During the Participant's Services with the Company or its Affiliates or Subsidiaries (the "Employment Term") and for a period of one year following the date the Participant ceases to be employed by the Company or its Affiliates or Subsidiaries, or any such longer period as may be agreed to between the Participant and the Company or any Affiliate (the "Restricted Period"), the Participant will not, whether on the Participant's own behalf or on behalf of or in conjunction with any person, firm, partnership, joint venture, association, corporation or other business organization, entity or enterprise whatsoever (for the purposes of this Appendix A, a "Person"), directly or indirectly solicit or assist in soliciting the business of any then-current or prospective client or customer of any member of the Restricted Group in competition with the Restricted Group in the Business.

(ii) During the Restricted Period, the Participant will not directly or indirectly:

(A) engage in the Business anywhere in the United States, or in any geographical area that is within 100 miles of any geographical area where the Restricted Group engages in the Business, including, for the avoidance of doubt, by entering into the employment of or rending any services to a Core Competitor, except where such employment or services do not relate in any manner to the Business;

(B) acquire a financial interest in, or otherwise become actively involved with, any Person engaged in the Business, directly or indirectly, as an individual, partner, shareholder, officer, director, principal, agent, trustee or consultant; or

(C) intentionally and adversely interfere with, or attempt to adversely interfere with, business relationships between the members of the Restricted Group and any of their clients, customers, suppliers, partners, members or investors.

(iii) Notwithstanding anything to the contrary in this Appendix A, the Participant may, directly or indirectly own, solely as an investment, securities of any Person engaged in a Business (including, without limitation, a Core Competitor) which are publicly traded on a national or regional stock exchange or on the over-the-counter market if the Participant (i) is not a controlling person of, or a member of a group which controls, such person and (ii) does not, directly or indirectly, own 2% or more of any class of securities of such Person.

(iv) During the Employment Term and the Restricted Period, the Participant will not, whether on the Participant's own behalf or on behalf of or in conjunction with any Person, directly or indirectly:

(A) solicit or encourage any employee of the Restricted Group to leave the employment of the Restricted Group;

(B) hire any executive-level employee, key personnel, or manager-level employee (i.e., any operations manager or district sales manager) who was employed by the Restricted Group as of the date of the Participant's termination of employment with the Company or who left the employment of the Restricted Group coincident with, or within one year prior to or after, the termination of the Participant's employment with the Company; or

(C) encourage any consultant of the Restricted Group to cease working with the Restricted Group.

(v) For purposes of this Agreement:

(A) "Restricted Group" shall mean, collectively, the Company and its subsidiaries and, to the extent engaged in the Business, their respective Affiliates (including The Blackstone Group L.P. and its Affiliates).

(B) "Business" shall mean (1) origination, installation, or monitoring services related to residential or commercial security, life-safety, energy management or home automation services, (2) installation or servicing of residential or commercial solar panels or sale of electricity generated by solar panels, (3) design, engineering or manufacturing of technology or products related to residential or commercial security, life-safety, energy management or home automation services and/or (4) provision of television, wireless voice and/or data services, including internet, through a common internet connectivity pipeline into the home.

(C) "Core Competitor" shall mean ADT Security Services/Tyco Integrated Security, Security Networks, LLC, Protection 1, Inc., Protect America, Inc., Stanley Security Solutions, Inc., Vector Security, Inc., Slomins, Inc., Monitronics International, Inc., Life Alert, Comcast Corporation, Time Warner, Inc., AT&T Inc., Verizon Communications, Inc., DISH Network Corp., DIRECTV, Pinnacle, JAB Wireless, Inc., Clearwire Corporation, CenturyLink, Inc., Cox Communication, Inc. and any of their respective Affiliates and current or future dealers, and Sungevity, Inc., RPS, Sunrun Inc., Solar City Corporation, Clean Power Finance, SunPower Corporation, Corbin Solar Solutions LLC, Galkos Construction, Inc., Zing Solar, Terrawatt, Inc., and any of their respective Affiliates or current or future dealers.

(vi) Notwithstanding the foregoing, if Executive's principal place of employment is located in California, then the provisions of Sections 1(a)(i) and 1(a)(ii) of this Appendix A shall not apply following Executive's termination of employment to the extent any such provision is prohibited by applicable California law.

(b) During the Employment Term and the three-year period beginning immediately following the Employment Term, the Participant agrees not to make, or cause any other person to make, any communication that is intended to criticize or disparage, or has the effect of criticizing or disparaging, the Company or any of its affiliates, agents or advisors (or any of its or their respective employees, officers or directors), it being understood that comments made in the Participant's good faith performance of his duties hereunder shall not be deemed disparaging or defamatory for purposes of this Agreement. Nothing set forth herein shall be interpreted to prohibit the Participant from responding truthfully to incorrect public statements, making truthful statements when required by law, subpoena or court order and/or from responding to any inquiry by any regulatory or investigatory organization.

(c) It is expressly understood and agreed that although the Participant and the Company consider the restrictions contained in this Section 1 to be reasonable, if a final judicial determination is made by a court of competent jurisdiction that the time or territory or any other restriction contained in this Appendix A is an unenforceable restriction against the Participant, the provisions of this Appendix A shall not be rendered void but shall be deemed amended to apply as to such maximum time and territory and to such maximum extent as such court may judicially determine or indicate to be enforceable. Alternatively, if any court of competent jurisdiction finds that any restriction contained in this Appendix A is unenforceable, and such restriction cannot be amended so as to make it enforceable, such finding shall not affect the enforceability of any of the other restrictions contained herein.

(d) The period of time during which the provisions of this Section 1 shall be in effect shall be extended by the length of time during which the Participant is in breach of the terms hereof as determined by any court of competent jurisdiction on the Company's application for injunctive relief.

(e) The provisions of Section 1 hereof shall survive the termination of the Participant's employment for any reason.

2. Confidentiality; Intellectual Property.

(a) Confidentiality.

(i) The Participant will not at any time (whether during or after the Participant's employment with the Company) (x) retain or use for the benefit, purposes or account of the Participant or any other Person; or (y) disclose, divulge, reveal, communicate, share, transfer or provide access to any Person outside the Company (other than the Participant's professional advisers who are bound by confidentiality obligations or otherwise in performance of the Participant's duties under the Participant's employment and pursuant to customary industry practice), any non-public, proprietary or confidential information --including without limitation trade secrets, know-how, research and development, software, databases, inventions, processes, formulae, technology, designs and other intellectual property, information concerning finances, investments, profits, pricing, costs, products, services, vendors, customers, clients, partners, investors, personnel, compensation, recruiting, training, advertising, sales, marketing, promotions, government and regulatory activities and approvals -- concerning the past, current or future business, activities and operations of the Company, its Affiliates or Subsidiaries and/or any third party that has disclosed or provided any of same to the Company on a confidential basis ("Confidential Information") without the prior written authorization of the Board.

(ii) "Confidential Information" shall not include any information that is (a) generally known to the industry or the public other than as a result of the Participant's breach of this covenant; (b) made legitimately available to the Participant by a third party without breach of any confidentiality obligation of which the Participant has knowledge; or (c) required by law to be disclosed; provided that with respect to subsection (c) the Participant shall give prompt written notice to the Company of such requirement, disclose no more information than is so required, and reasonably cooperate with any attempts by the Company to obtain a protective order or similar treatment.

(iii) Except as required by law, the Participant will not disclose to anyone, other than the Participant's family (it being understood that, in this Agreement, the term "family" refers to the Participant, the Participant's spouse, children, parents and spouse's parents) and advisors,

the existence or contents of this Agreement; provided that the Participant may disclose to any prospective future employer the provisions of this Appendix A. This Section 2(a)(iii) shall terminate if the Company publicly discloses a copy of this Agreement (or, if the Company publicly discloses summaries or excerpts of this Agreement, to the extent so disclosed).

(iv) Upon termination of the Participant's employment with the Company for any reason, the Participant shall (x) cease and not thereafter commence use of any Confidential Information or intellectual property (including without limitation, any patent, invention, copyright, trade secret, trademark, trade name, logo, domain name or other source indicator) owned or used by the Company, its Affiliates or Subsidiaries; and (y) immediately destroy, delete, or return to the Company, at the Company's option, all originals and copies in any form or medium (including memoranda, books, papers, plans, computer files, letters and other data) in the Participant's possession or control (including any of the foregoing stored or located in the Participant's office, home, laptop or other computer, whether or not Company property) that contain Confidential Information, except that the Participant may retain only those portions of any personal notes, notebooks and diaries that do not contain any Confidential Information.

(b) Intellectual Property.

(i) If the Participant creates, invents, designs, develops, contributes to or improves any works of authorship, inventions, intellectual property, materials, documents or other work product (including without limitation, research, reports, software, databases, systems, applications, presentations, textual works, content, or audiovisual materials) ("Works"), either alone or with third parties, at any time during the Participant's employment by the Company and within the scope of such employment and/or with the use of any the Company resources ("Company Works"), the Participant shall promptly and fully disclose same to the Company and hereby irrevocably assigns, transfers and conveys, to the maximum extent permitted by applicable law, all of the Participant's right, title, and interest therein (including rights under patent, industrial property, copyright, trademark, trade secret, unfair competition, other intellectual property laws, and related laws) to the Company to the extent ownership of any such rights does not vest originally in the Company. If the Participant creates any written records (in the form of notes, sketches, drawings, or any other tangible form or media) of any Company Works, the Participant will keep and maintain same. The records will be available to and remain the sole property and intellectual property of the Company at all times.

(ii) The Participant shall take all requested actions and execute all requested documents (including any licenses or assignments required by a government contract) at the Company's expense (but without further remuneration) to assist the Company in validating, maintaining, protecting, enforcing, perfecting, recording, patenting or registering any of the Company's rights in the Company Works.

(iii) The Participant shall not improperly use for the benefit of, bring to any premises of, divulge, disclose, communicate, reveal, transfer or provide access to, or share with the Company any confidential, proprietary or non-public information or intellectual property relating to a former employer or other third party without the prior written permission of such third party. The Participant shall comply with all relevant policies and guidelines of the Company that are from time to time previously disclosed to the Participant, including regarding the protection of Confidential Information and intellectual property and potential conflicts of interest.

(iv) The provisions of Section 2 hereof shall survive the termination of the Participant's employment for any reason.

3. Repayment of Proceeds. If the Participant's Services terminated by the Company or an Affiliate with Cause or a Restrictive Covenant Violation occurs, or the Company discovers after any termination of Participant's Services that grounds for a termination with Cause existed at the time thereof, then the Participant shall be required to pay to the Company, within 10 business days' of the Company's request to the Participant therefor, an amount equal to the aggregate after-tax proceeds (taking into account all amounts of tax that would be recoverable upon a claim of loss for payment of such proceeds in the year of repayment) the Participant received either in cash, shares of Common Stock, or Alternative Equity in respect of Participant's Award, or upon the sale or other disposition of, or dividends or distributions in respect of, any such equity. Any reference in this Agreement to grounds existing for a termination with Cause shall be determined without regard to any notice period, cure period or other procedural delay or event required prior to finding of, or termination for, Cause. The foregoing remedy shall not be exclusive.

Exhibit A
Plan

[*Separately attached*]

Tab G

2013 Authorized dealer for Vivint.

ARM

Office Use Only
Badge # 65369
☐ Passport OR
- Drivers License AND
- SSC

☐ I-9
☐ W-9

Sales Representative Agreement

Name: First: Douglas	Middle: F	Last: Robinson	
Preferred Name:	SSN: 528557806	SIN: ___-___-___	
Previous Sales Company: Pinnacle	☒ Male ☐ Female	Date of Birth: 12/23/1981	Place of Birth: Utah
Previous Summer Sales Experience: ☒ Alarm ☐ Satellite ☐ Pest Control ☐ Knives ☐ Utilities			
Current Address: Street: 544 E 410 N	City: Hyde Park	State: Zip: 84318	☐ Check if same as permanent address
Permanent Address: Street: 544 E 410 N	City: Hyde Park	State: Zip: 84318	Home Phone: 8013800075
Cell Phone: 8013800075	Cell Provider: AT&T		Email Address: drobinson@armarketing.c
Hat Size: ☐ S/M ☒ L/XL	Select Housing Type: ☒ Single Share ☐ Single Private ☐ Married 1BR ☐ Married 2BR ☐ Married 3BR	I agree NO pets allowed in Vivint Housing: ☒ YES	Start Date: End Date:
Shirt Size: ☐ XXS ☐ XS ☐ S ☐ M ☒ L ☐ XL ☐ 2XL ☐ 3XL ☐ 4XL ☐ 5XL ☐ 6XL			
Shoe Size: 10.5	☐ Women's ☒ Men's	Pant Size: Waist Size: 36	Length: 32	Jacket Size: ☐ S ☐ M ☒ L ☐ XL ☐ 2XL

PERSONAL PROFILE

Height: 5'10"	Weight: 200	Ethnicity: White (not Hi
Eye Color: Blue	Hair Color: Brown	
Emergency Contact's Name: Krista Robinson		
Emergency Contact's Number: 8013806681		
Drivers License State: UT	Drivers License Number: 162204394	
Company LLC Name		
Company LLC Tax ID Number		
Have you ever been charged, arrested, or convicted of a crime? ☐ Yes ☐ No If yes, please provide Criminal History Form		

VIVINT EMPLOYMENT HISTORY

Have you ever worked for Vivint, ARM, APX?
☐ Rep ☐ Tech ☐ Corp ☐ No

If so, what is your Badge ID number?

How many previous years have you been a Manager for Vivint, ARM, APX? ☐ No ☐ Yes # of Years?

FOR REGIONAL MANAGER TO COMPLETE

Regional Manager's Name: Bowdy B Gardner

Regional Manager's Signature

Recruited By:

Payscale
☐ Manager
☐ Co-Manager
☐ Assistant Manager

Co-Managers Name

* All ORANGE fields are mandatory. Any field left blank will result in a partial.

SIGNATURE

I will submit:
☐ Copy of my valid passport OR
☐ Copy of my valid drivers license AND social security card
☐ Applicable employment tax forms (I-9 and W-9)
☐ Information for applicable employment licensing forms

Douglas Robinson (electonically signed) — Signature

11/29/2012 12: — Date

2013 Sales Representative / Direct Seller Employment Agreement

For good and valuable consideration, the receipt and sufficiency of which is hereby established, Douglas Robinson ("Representative") and ARM Security, Inc. ("ARM"), hereby enter into this Sales Representative/Direct Seller Employment Agreement ("Agreement"). This Agreement constitutes the terms of services to be provided by Representative to ARM during the 2013 Summer Program Term as defined herein below.

1. DIRECT SELLER/SALES REPRESENTATIVE EMPLOYMENT RELATIONSHIP
Representative represents and agrees that for State or Federal Income Tax purposes, Representative will be paid as a "Direct Seller" as defined in Publication 15A of the Internal Revenue Service Employee Supplemental Tax Guide and, therefore, Representative is solely responsible for the timely payment of all taxes for any amounts paid to Representative under this Agreement including, but not limited to, all federal, state, or local taxes. Representative further represents and agrees that ARM is under no obligation to withhold any amounts for taxes for Representative nor to inform Representative of any tax obligations, prepare any tax reports, or transfer any amounts for taxes. For all other purposes including worker's compensation insurance and licensing requirements, Representative is an employee of ARM and ARM will provide coverage for Representative under ARM's insurance and, where required by state law, withhold employment taxes such as unemployment withholdings. Representative represents and agrees that this Agreement is not, and shall not be construed as, an offer or contract of employment for any period, an offer or guarantee of future employment an offer or guarantee of a future contractual relationship. Instead, Representative is an employee at will and subject to termination at any time.

2. SERVICES
Representative agrees to be responsible for such services as are commensurate with and required by such position and any other services as ARM may assign or delegate to Representative from time to time.

3. COMPENSATION
The compensation that Representative shall receive for Representative's services under this agreement is set forth on Exhibit 1. Representative shall only be entitled to compensation for services performed pursuant to this Agreement, and Representative shall not be entitled to any compensation from ARM other than what is set forth in this Agreement.

4. SUMMER PROGRAM
The 2013 Summer Program commences on April 29, 2013, and ends on August 31, 2013 (the 2013 Summer Program Term"). Representative is required to be in Representative's designated area working during the 2013 Summer Program Term unless Representative has received written permission from Representative's Regional Manager.

5. POLICIES AND PRACTICES
Representative agrees to abide by all ARM rules, regulations, handbooks, manuals, training, policies, practices and procedures, including, but not limited to, those Policies set forth in Exhibit 3 hereto. ARM, in its sole discretion, may from time to time amend, modify or revise its rules, regulations, handbooks, manuals, policies, practices and procedures. By signing this Agreement, Representative acknowledges and represents that Representative has received, reviewed, read and agrees to abide by all of the provisions in the Employee Handbook and Training Manual, including the Sexual Harassment Policy set forth therein. Representative shall not perform any services for ARM unless Representative is (i) authorized by ARM to perform services in that area, (ii) properly licensed to perform services in that area, and (iii) has previously obtained any and all permits or licenses required for the services Representative is performing in that area. Representative represents and agrees that prior to performing any services for ARM in any area, Representative will contact ARM and notify ARM of the locations where Representative intends to perform services.

6. ARM UNIFORM AND WORK MATERIALS
The "ARM Uniform" shall be an ARM issued polo-style shirt and an ARM picture identification badge worn on an ARM lanyard. Representative may also wear an ARM baseball cap. ARM will provide Representative with the following items for the summer: four (4) polo-style shirts, an ARM baseball cap, a picture identification

badge and lanyard. The ARM uniform will be sent out according to Representative's verified summer start date. It is the individual responsibility of Representative to verify their summer start date with their Manager, and the corporate department, 1stop. Representative represents and agrees that (i) Representative will not wear any unauthorized apparel while working for ARM under the terms of this Agreement, and (ii) Representative will not wear any clothing or identification bearing the ARM mark or logo, or the marks or logos of any of ARM's affiliates, including without limitation Vivint, Inc., Vivint Solar, after the expiration of this Agreement. . ARM will provide Representative with work materials necessary for Representative to provide the services under this Agreement, including a sales binder, office supplies, and forms and paperwork. By signing this Agreement, Representative covenants that (i) Representative will use the Uniform in accordance with the terms of the Agreement, (ii) the Uniform and the logos and marks on the Uniform are the property of ARM and that Representative has no rights to them, (iii) Representative will not abuse the Uniform or wear it except while performing services for ARM under the terms of this Agreement, and (iv) the Uniform is issued to Representative solely for use during work related functions and not for personal use. Representative is responsible for the reasonable care and maintenance of the Uniform and shall return the Uniform to ARM at the end of the 2012 Summer Sales Season or such earlier date as ARM may request. Once the ARM uniform has been issued, it is the responsibility of Representative to purchase additional or replacement uniform apparel at the ARM store if necessary. Once the ARM identification badge has been issued, it is the responsibility of Representative to purchase a replacement badge at the ARM store if necessary.

7. SUMMER HOUSING

ARM will make available to Representative optional Single or Family housing accommodations and furniture rental for the 2013 Summer Program Term in the area where Representative has agreed to provide services under this Agreement. If Representative participates in ARM's summer housing program, Representative hereby directs ARM to deduct from Representative's paycheck each week during the 2013 Summer Program Term (covering rent, furniture, and reasonable utilities)

(i) $100.00 for Single housing (shared room) and $16.00 for utilities
(ii) $200.00 for Single Private housing (private room) and $16.00 for utilities
(iii) $250.00 for Family housing and $25.00 for utilities

Pets are not allowed in ARM housing. ARM will not provide special housing arrangements to accommodate pets. Should Representative bring a pet into the housing provided by ARM, Representative will be charged all deposits and fees required by the complex or home where the pet is housed, and for any damages caused by the pet. Bringing a pet to a location where pets are prohibited in the lease terms may result in eviction from ARM housing.

If Representative lives in housing pursuant to the ARM summer housing program, Representative agrees to comply with all of the rules and regulations applicable to the housing unit where Representative resides, as well as ARM's housing guidelines and Housing Code of Conduct, attached hereto in Exhibit 2 Section 5. In the event that Representative's actions result in Representative or ARM being evicted, fined and/or penalized, Representative shall be responsible for all additional housing costs, fines, penalties, moving fees, or other expenses or costs resulting from Representative's actions, including any and all attorneys' fees and costs. ARM will arrange for cleaning of the Representative's housing at the end of the 2013 Summer Program Term. Representative directs ARM to deduct from Representative's paycheck for cleaning (i) $75.00 for Single housing or (ii) $125.00 for Family housing to cover the cost of the cleaning service. If the Representative's actions necessitate extra cleaning or repair, Representative will be charged additional cleaning fees or costs to cover the cost involved. Representative authorizes and directs ARM to deduct any and all charges, costs, fines, penalties, fees or expenses referred to or referenced in this Section 7 relating to Representative's participation in the ARM summer housing program from any commissions or other amounts due or owing to Representative.

8. CODE OF CONDUCT

Representative agrees to be honest and ethical in all of Representative's dealings with ARM, its affiliates, or any customers or potential customers. If a customer complains to ARM or any governmental entity or cancels

an account because of Representative's alleged dishonest, unethical or improper conduct, or because of an alleged violation of any of ARM's policies and procedures, including, but not limited to, performing services without the necessary or required permits or licenses, ARM shall terminate this Agreement, and Representative shall be liable and responsible to ARM for any and all fines, damages, attorneys' fees and or costs incurred as a result of Representative's actions. Representative shall faithfully, and to the best of Representative's ability, perform all of the services and duties required under the expressed or implicit terms of this Agreement. Representative agrees to comply with all laws, rules, regulations, or ordinances applicable to the services that Representative performs under this Agreement and that Representative will review and make himself or herself aware of said laws, rules, regulations or ordinances before performing any services for ARM under this Agreement.

9. DRUG TESTING

ARM is a drug-free work place and Representative is prohibited from manufacturing, distributing, dispensing, possessing, selling, or using illegal drugs or any other controlled substance not specifically prescribed to Representative, or alcoholic beverages in any housing provided to Representative by ARM, at any workplace, or while performing any services under this Agreement. Violation of this policy shall result in the termination of this Agreement. Representative represents, agrees and consents to random drug testing of Representative at the sole discretion of ARM. Testing will be done only for illegal drugs, controlled substances and alcohol use. Representative agrees and understands that as a condition of this Agreement and his employment with ARM, Representative is required to submit to such a test at the request of ARM, and Representative agrees that Representative's signature on this Agreement shall be Representative's express authorization to any such testing. Representative agrees and understands that Representative's failure to submit to a drug and alcohol test will result in immediate termination of this Agreement.

10. BACKGROUND CHECK

This Agreement is contingent on ARM's receipt, evaluation and approval of a background check on Representative. Accordingly, Representative hereby expressly authorizes ARM or any of its affiliates to perform a background check on Representative, and Representative shall cooperate in the performance of said background check. Representative's failure to provide consent to or the required information for a background check, or failure to answer any background question fully and truthfully, will result in the termination of this Agreement. Representative represents that Representative has read and agrees to the terms of the Release Authorization and Disclosures set forth in Exhibit 8 hereto relating to a background check.

11. LICENSING

Representative will (i) complete any and all necessary licensing applications, (ii) provide accurate and truthful information on all licensing applications or to any governmental entity that requests any information from Representative for purposes of licensing, permits, or other requirements for the performance of Representative's services under this Agreement, and (iii) not perform any services under this Agreement for ARM unless Representative has completed all licensing, permitting, or other requirements for said services, including, but not limited to, obtaining, if necessary, any and all licenses required for said services. Representative's failure or inability to obtain any license or permit necessary or required for Representative to perform services under this Agreement, or performance of any services under this Agreement without the necessary or required license or permit is a breach of this Agreement and shall result in the immediate termination of this Agreement.

12. TRANSPORTATION

Representative will provide Representative's own transportation to and from the assigned 2013 Summer Program area.

13. Assignment of Inventions and Works of Authorship and Improvement

A. Assignment. Representative shall keep ARM fully informed of inventions and works of authorship conceived by Representative (either alone or with others) during Representative's employment with ARM and hereby assigns to ARM all rights in and to such inventions and works of authorship. Representative covenants and agrees that, upon the request of ARM, Representative shall make,

execute, and deliver such additional assignments and other instruments as may be necessary or convenient for effectuating or further memorializing such assignment.

B. Further Assurances. Representative further agrees that (i) all such inventions and works of authorship (to the extent of Representative's interest therein) shall be the property of ARM, (ii) Representative shall not assign to any person other than ARM any interest therein, and (iii) Representative shall, without charge to ARM, assign to ARM all of Representative's right, title and interest in any such inventions and works of authorship, and execute, acknowledge and deliver such instruments as are necessary to confirm the ownership thereof by ARM.

14. TERMINATION OF AGREEMENT

Representative agrees that this Agreement may be terminated as follows:

A. Termination by Representative. If Representative terminates this Agreement for any reason prior to the end of the 2013 Summer Program Term, Representative will (i) not be entitled to any Earnings subsequent to Representative's termination of this Agreement, regardless of whether Representative would have been eligible or entitled to such Earnings had Representative not terminated this Agreement prior to August 31, 2013, and (ii) pay ARM for all rents, utilities, and deposits on housing and furniture Representative requested for the entirety of the 2013 Summer Program Term, regardless of whether Representative lives in the apartments, less any amounts previously paid pursuant to Section 7 of this Agreement. For purposes of this Agreement, "Earnings" shall be defined to include advances, bonuses, overrides, or incentives of any kind, but shall not include any unpaid commissions that Representative earned as of the date of Representative's termination of this Agreement.

B. Termination For Cause. If ARM terminates this Agreement For Cause prior to August 31, 2013, Representative agrees and understands that Representative will (i) not be entitled to any Earnings subsequent to Representative's termination of this Agreement, regardless of whether Representative would have been eligible or entitled to such Earnings had this Agreement not been terminated by ARM prior to August 31, 2013, and (ii) pay ARM for all rents, utilities, and deposits on housing and furniture Representative requested for the entirety of the 2013 Summer Program Term, regardless of whether Representative lives in the apartments, less any amounts previously paid pursuant to Section 7 of this Agreement. Termination "For Cause" shall include, but is not limited to, (i) commission of a crime involving moral turpitude, theft, fraud or deceit, (ii) conduct which brings ARM, or any of its affiliates into public disgrace or disrepute, including, but not limited to, being arrested for a crime, (iii) Representative's death, (iv) voluntary termination of this Agreement, (v) violation of ARM's rules, regulations, handbooks, manuals, policies, practices and procedures, including any provision of this Agreement, (vi) falsification of paperwork, (vii) failure to perform any of Representative's obligations under this Agreement, or (viii) failure or inability to obtain any necessary or required license(s) or permit(s).

C. Termination of Agreement by ARM without cause. If ARM terminates this Agreement other than For Cause prior to August 31, 2013, Representative's eligibility for all Earnings that have not been paid will not be affected and the payment of those Earnings to Representative will be governed by this Agreement as though Representative worked until August 31, 2013.

D. Upon termination of Agreement, accounts sold by Representative may not be transferred or changed from Representative to any other active or existing Representative.

15. AMENDMENTS

No supplement, modification, amendment or waiver of the terms of this Agreement shall be binding on the parties hereto unless executed in writing by the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed to or shall constitute a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided in writing. Any failure to insist upon strict compliance with any of the terms and conditions of this Agreement shall not be deemed a waiver of any such terms or conditions.

16. NOTICES
All notices required or permitted under this Agreement shall be in writing and shall be deemed delivered when delivered in person or on the third day after being deposited in the United States mail, postage paid, addressed as follows:

ARM Security, Inc.
Attn: Shawn Brenchley
4931 North 300 West
Provo, Utah 84604
Representative
At the address listed on Representative's W-9 or application.

17. FULL UNDERSTANDING
Representative acknowledges that Representative has carefully read and fully understands all of the provisions of this Agreement and that Representative is voluntarily entering into this Agreement. No other person or affiliate of ARM can sign on behalf of Representative

18. SEVERABILITY
This Agreement supersedes all prior agreements, written or oral, between Representative and ARM concerning the subject matter hereof. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable law or rule in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision or any other jurisdiction, but this Agreement shall be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision had never been contained herein.

19. NON-SOLICITATION
In the event of termination of this Agreement or Representative's employment with ARM, and for a period of five (5) years from the date of such termination, Representative will not directly or indirectly engage in the following conduct, nor will Representative aid, abet, assist, encourage, or influence others to do so: Induce or attempt to induce, solicit or attempt to solicit, or encourage or attempt to encourage, in any capacity, on Representative's behalf or on behalf of any other firm, person, or entity, (a) any current or former customer of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities (herein defined as a "Customer") to terminate any contract with ARM, Vivint, or any other entity, or to allow any such contract to be cancelled, not renewed, or to enter into a contract with another company for services or products similar to that provided to Customer under their contract with ARM, Vivint, or any other entity, or (b) any current or former representative, employee, or contractor of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities to terminate their relationship with that entity or work for an entity that competes with ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities. Representative acknowledges and agrees that the names, addresses, product specifications, and information regarding any Customers or representatives and employees of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities, constitute Proprietary Information, and that the unauthorized use or disclosure of this or any other Proprietary Information that Representative obtained during the course of this Agreement constitutes unfair competition. Representative will not to engage in any unfair competition either during the term of Representative's employment or at any time thereafter. It is agreed that in the event that Representative violates this Section 18 with respect to any Customer, that in addition to any other damages to which ARM may be entitled against Representative, ARM will be entitled to monetary damages of the monthly monitoring rate (MMR) for that Customer multiplied by Fifty (50).

20. ENTIRE AGREEMENT
This Agreement, together with all of the Exhibits referenced herein and attached hereto, represents the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all prior representations and agreements, whether oral or written, pertaining to the subject matter hereof, and cannot be modified, changed, waived or terminated except by a writing signed by the parties. No course of conduct or trade custom or usage will in any way be used to explain, modify, amend or otherwise construe this Agreement.

21. CHOICE OF LAW, JURISDICTION AND VENUE
The parties agree that this Agreement shall be construed in accordance with, and governed by, the laws of the State of Utah, without regard to the application of conflicts of law principles. The parties agree that any suit, action or proceeding arising out of or relating to this Agreement must be instituted in a state court of competent jurisdiction located in Utah County, Utah and the parties hereby irrevocably submit to the exclusive jurisdiction of any such court.

22. SUCCESSORS IN INTEREST
This Agreement shall be binding upon and inure to the benefit of the successors or assignees of ARM.

23. HEADINGS
The headings used in this Agreement are for convenience only and are not to be considered in construing or interpreting this Agreement.
BY SIGNING THIS AGREEMENT, REPRESENTATIVE ACKNOWLEDGES THAT REPRESENTATIVE HAS CAREFULLY READ AND FULLY UNDERSTANDS ALL OF THE PROVISIONS OF THIS AGREEMENT AND THAT REPRESENTATIVE IS VOLUNTARILY ENTERING INTO THIS AGREEMENT.

Douglas Robinson
Representative's Printed Name

Douglas Robinson (electonically signed) Date 11/29/2012 12:01:02PM
Representative's Signature

Date
ARM Security, Inc.

Exhibit List

EXHIBIT 1	Payscale
EXHIBIT 2	Job Specifications
EXHIBIT 3	Vivint Packages
EXHIBIT 4	ARM Credit Criteria & Points
EXHIBIT 5	ARM Policies
EXHIBIT 6	Budget/Advances Agreement
EXHIBIT 7	Additional Attachment
EXHIBIT 8	Background Check
EXHIBIT 9	Sexual Harassment Policy
EXHIBIT 10	W-9
EXHIBIT 11	Form I-9 Employment Eligibility Verification
EXHIBIT 12	Direct Deposit Form

Tab H

2014 Authorized dealer for Vivint.

OFFICE USE ONLY
Badge ID 65369
☐ Passport OR
• Driver's License AND
• SSC
☐ I-9
☐ W-9

Sales Representative Agreement

Full Given Name: First Douglas	Middle Name F	Last Robinson	
Preferred Name: Doug	SSN: 528557806	SIN:	
Previous Sales Company: Pinnacle	X Male ☐ Female	Date of Birth: 12/23/1981	Place of Birth: Utah
Previous Summer Sales Experience: X Alarm	☐ Satellite	☐ Pest Control	☐ Knives ☐ Utilities
Current Address: Street 10165 N Yorkshire Ct	City Highland	Postal Code 84003	☐ Check if same as permanent address
Permanent Address: Street 544 E 410 N	City Hyde Park	Postal Code 84318	Home Phone: 8013800075
Cell Phone: 8013800075	Cell Provider: AT&T	Email Address: drobinson@armarketing.com	
Hat Size: ☐ S/M X XXL	Select Housing Type: ☐ Single ☐ Married (Agree NO pets allowed in Vivint Housing) X YES	Are you a college student: ☐ YES X NO College: _____	Start Date: End Date:
Shirt Size: ☐ XXS ☐ XS ☐ S ☐ M X L ☐ XL ☐ 2XL ☐ 3XL ☐ 4XL ☐ 5XL ☐ 6XL			
Shoe Size: 10.5 ☐ Women's X Men's	Pant Size: Waist Size: 35 Length: 31	Jacket Size: ☐ S ☐ M X L ☐ XL ☐ 2XL	

PERSONAL PROFILE

Height: 5'10"	Weight: 190	Ethnicity: White (not Hispanic)
Eye Color: Blue	Hair Color: Brown	
Emergency Contact's Name: Krista Robinson		
Emergency Contact's Number: 8013806681		
Driver's License State: UT	Driver's License Number: 162204394	
Company LLC Name:		
Company LLC Tax ID Number:		

Have you ever been charged, arrested, or convicted of a crime?
☐ Yes ☐ No *If yes, please provide Criminal History Form

VIVINT EMPLOYMENT HISTORY

Have you ever worked for Vivint, ARM, APX?
☐ Rep ☐ Tech ☐ Corp ☐ No

If so what is your Badge ID number?

How many previous years have you been a Manager for Vivint, ARM, APX? ☐ No ☐ Yes # of Years?

FOR REGIONAL MANAGER TO COMPLETE

Regional Manager's Name: Bowdy B Gardner

Regional Manager's Signature:

Recruited By:

Payscale:
☐ 1st Year
☐ Experienced

Co-Managers Name:

* All ORANGE fields are mandatory. Any field left blank will result in a partial

SIGNATURE

Must Submit:
☐ Copy of my valid passport OR
☐ Copy of my valid driver's license AND social security card
☐ Applicable provincial tax forms (I-9 and W-9)
☐ Information for applicable provincial licensing forms

Douglas Robinson — Signature
11/11/2013 — Date

2014 Sales Representative / Direct Seller Employment Agreement

For good and valuable consideration, the receipt and sufficiency of which is hereby established, Douglas Robinson ("Representative") and ARM Security, Inc. ("ARM"), hereby enter into this Sales Representative/Direct Seller Employment Agreement ("Agreement"). This Agreement constitutes the terms of services to be provided by Representative to ARM during the 2014 Summer Program Term as defined herein below.

1. DIRECT SELLER/SALES REPRESENTATIVE EMPLOYMENT RELATIONSHIP
Representative represents and agrees that for State or Federal Income Tax purposes, Representative will be paid as a "Direct Seller" as defined in Publication 15A of the Internal Revenue Service Employee Supplemental Tax Guide and, therefore, Representative is solely responsible for the timely payment of all taxes for any amounts paid to Representative under this Agreement including, but not limited to, all federal, state, or local taxes. Representative further represents and agrees that ARM is under no obligation to withhold any amounts for taxes for Representative nor to inform Representative of any tax obligations, prepare any tax reports, or transfer any amounts for taxes. For all other purposes including worker's compensation insurance and licensing requirements, Representative is an employee of ARM and ARM will provide coverage for Representative under ARM's insurance and, where required by state law, withhold employment taxes such as unemployment withholdings. Representative represents and agrees that this Agreement is not, and shall not be construed as, an offer or contract of employment for any period, an offer or guarantee of future employment an offer or guarantee of a future contractual relationship. Instead, Representative is an employee at will and subject to termination at any time.

2. SERVICES
Representative agrees to be responsible for such services as are commensurate with and required by such position and any other services as ARM may assign or delegate to Representative from time to time.

3. COMPENSATION
The compensation that Representative shall receive for Representative's services under this agreement is set forth on Exhibit 1. Representative shall only be entitled to compensation for services performed pursuant to this Agreement, and Representative shall not be entitled to any compensation from ARM other than what is set forth in this Agreement.

4. SUMMER PROGRAM
The 2014 Summer Program commences on April 28, 2014, and ends on August 30, 2014 (the 2014 Summer Program Term"). Representative is required to be in Representative's designated area working during the 2014 Summer Program Term unless Representative has received written permission from Representative's Regional Manager.

5. POLICIES AND PRACTICES
Representative agrees to abide by all ARM rules, regulations, handbooks, manuals, training, policies, practices and procedures, including, but not limited to, those Policies set forth in Exhibit 5 hereto. ARM, in its sole discretion, may from time to time amend, modify or revise its rules, regulations, handbooks, manuals, policies, practices and procedures. By signing this Agreement, Representative acknowledges and represents that Representative has received, reviewed, read and agrees to abide by all of the provisions in the Employee Handbook and Training Manual, including the Sexual Harassment Policy set forth therein. Representative shall not perform any services for ARM unless Representative is (i) authorized by ARM to perform services in that area, (ii) properly licensed to perform services in that area, and (iii) has previously obtained any and all permits or licenses required for the services Representative is performing in that area. Representative represents and agrees that prior to performing any services for ARM in any area, Representative will contact ARM and notify ARM of the locations where Representative intends to perform services.

6. ARM UNIFORM AND WORK MATERIALS

The "ARM Uniform" shall be an ARM issued polo-style shirt and an ARM picture identification badge worn on an ARM lanyard. Representative may also wear an ARM baseball cap. ARM will provide Representative with the following items for the summer: four (4) polo-style shirts, an ARM baseball cap, a picture identification badge and lanyard. The ARM uniform will be sent out according to Representative's verified summer start date. It is the individual responsibility of Representative to verify their summer start date with their Manager, and the corporate department, 1stop. Representative represents and agrees that (i) Representative will not wear any unauthorized apparel while working for ARM under the terms of this Agreement, and (ii) Representative will not wear any clothing or identification bearing the ARM mark or logo, or the marks or logos of any of ARM's affiliates, including without limitation Vivint, Inc., Vivint Solar, after the expiration of this Agreement. . ARM will provide Representative with work materials necessary for Representative to provide the services under this Agreement, including a sales binder, office supplies, and forms and paperwork. By signing this Agreement, Representative covenants that (i) Representative will use the Uniform in accordance with the terms of the Agreement, (ii) the Uniform and the logos and marks on the Uniform are the property of ARM and that Representative has no rights to them, (iii) Representative will not abuse the Uniform or wear it except while performing services for ARM under the terms of this Agreement, and (iv) the Uniform is issued to Representative solely for use during work related functions and not for personal use. Representative is responsible for the reasonable care and maintenance of the Uniform and shall return the Uniform to ARM at the end of the 2014 Summer Sales Season or such earlier date as ARM may request. Once the ARM uniform has been issued, it is the responsibility of Representative to purchase additional or replacement uniform apparel at the ARM store if necessary. Once the ARM identification badge has been issued, it is the responsibility of Representative to purchase a replacement badge at the ARM store if necessary.

7. SUMMER HOUSING

ARM will make available to Representative optional Single or Family housing accommodations and furniture rental for the 2014 Summer Program Term in the area where Representative has agreed to provide services under this Agreement. If Representative participates in ARM's summer housing program, Representative hereby directs ARM to deduct from Representative's paycheck each week during the 2014 Summer Program Term (covering rent, furniture, and reasonable utilities)

(i) $100.00 for Single housing (shared room) and $16.00 for utilities
(ii) $200.00 for Single Private housing (private room) and $16.00 for utilities
(iii) $250.00 for Family housing and $25.00 for utilities

Pets are not allowed in ARM housing. ARM will not provide special housing arrangements to accommodate pets. Should Representative bring a pet into the housing provided by ARM, Representative will be charged all deposits and fees required by the complex or home where the pet is housed, and for any damages caused by the pet. Bringing a pet to a location where pets are prohibited in the lease terms may result in eviction from ARM housing.

If Representative lives in housing pursuant to the ARM summer housing program, Representative agrees to comply with all of the rules and regulations applicable to the housing unit where Representative resides, as well as ARM's housing guidelines and Housing Code of Conduct, attached hereto in Exhibit 2 Section 5. In the event that Representative's actions result in Representative or ARM being evicted, fined and/or penalized, Representative shall be responsible for all additional housing costs, fines, penalties, moving fees, or other expenses or costs resulting from Representative's actions, including any and all attorneys' fees and costs. ARM will arrange for cleaning of the Representative's housing at the end of the 2014 Summer Program Term. Representative directs ARM to deduct from Representative's paycheck for cleaning (i) $75.00 for Single housing or (ii) $125.00 for Family housing to cover the cost of the cleaning service. If the Representative's actions necessitate extra cleaning or repair, Representative will be charged additional cleaning fees or costs to cover the cost involved. Representative authorizes and directs ARM to deduct any and all charges, costs, fines, penalties, fees or expenses referred to or referenced in this Section 7 relating to Representative's participation in the ARM summer housing program from any commissions or other amounts due or owing to Representative.

8. CODE OF CONDUCT

Representative agrees to be honest and ethical in all of Representative's dealings with ARM, its affiliates, or any customers or potential customers and thereby agrees to abide by the ARM Code of Conduct as outlined in Exhibit 5 Section 7. If a customer complains to ARM or any governmental entity or cancels an account because of Representative's alleged dishonest, unethical or improper conduct, or because of an alleged violation of any of ARM's policies and procedures, including, but not limited to, performing services without the necessary or required permits or licenses, ARM shall terminate this Agreement, and Representative shall be liable and responsible to ARM for any and all fines, damages, attorneys' fees and or costs incurred as a result of Representative's actions. Representative shall faithfully, and to the best of Representative's ability, perform all of the services and duties required under the expressed or implicit terms of this Agreement. Representative agrees to comply with all laws, rules, regulations and ordinances applicable to the services that Representative performs under this Agreement and that Representative will review and make himself or herself aware of said laws, rules, regulations and ordinances before performing any services for ARM under this Agreement.

9. DRUG TESTING

ARM is a drug-free work place and Representative is prohibited from manufacturing, distributing, dispensing, possessing, selling, or using illegal drugs or any other controlled substance not specifically prescribed to Representative, or alcoholic beverages in any housing provided to Representative by ARM, at any workplace, or while performing any services under this Agreement. Violation of this policy shall result in the termination of this Agreement. Representative represents, agrees and consents to random drug testing of Representative at the sole discretion of ARM. Testing will be done only for illegal drugs, controlled substances and alcohol use. Representative agrees and understands that as a condition of this Agreement and his employment with ARM, Representative is required to submit to such a test at the request of ARM, and Representative agrees that Representative's signature on this Agreement shall be Representative's express authorization to any such testing. Representative agrees and understands that Representative's failure to submit to a drug and alcohol test will result in immediate termination of this Agreement.

10. BACKGROUND CHECK

This Agreement is contingent on ARM's receipt, evaluation and approval of a background check on Representative. Accordingly, Representative hereby expressly authorizes ARM or any of its affiliates to perform a background check on Representative, and Representative shall cooperate in the performance of said background check. Representative's failure to provide consent to or the required information for a background check, or failure to answer any background question fully and truthfully, will result in the termination of this Agreement. Representative represents that Representative has read and agrees to the terms of the Release Authorization and Disclosures set forth in Exhibit 8 hereto relating to a background check.

11. LICENSING

Representative will (i) complete any and all necessary licensing applications, (ii) provide accurate and truthful information on all licensing applications or to any governmental entity that requests any information from Representative for purposes of licensing, permits, or other requirements for the performance of Representative's services under this Agreement, and (iii) not perform any services under this Agreement for ARM unless Representative has completed all licensing, permitting, or other requirements for said services, including, but not limited to, obtaining, if necessary, any and all licenses required for said services. Representative's failure or inability to obtain any license or permit necessary or required for Representative to perform services under this Agreement, or performance of any services under this Agreement without the necessary or required license or permit is a breach of this Agreement and shall result in the immediate termination of this Agreement. Any fines including payment of bail incurred by the failure of Representative to obtain the proper license or permit will be the sole responsibility of the Representative and will not be paid for or reimbursed by ARM.

12. TRANSPORTATION

Representative will provide Representative's own transportation to and from the assigned 2014 Summer Program area.

13. Assignment of Inventions and Works of Authorship and Improvement

A. Assignment. Representative shall keep ARM fully informed of inventions and works of authorship conceived by Representative (either alone or with others) during Representative's employment with ARM and hereby assigns to ARM all rights in and to such inventions and works of authorship. Representative covenants and agrees that, upon the request of ARM, Representative shall make, execute, and deliver such additional assignments and other instruments as may be necessary or convenient for effectuating or further memorializing such assignment.

B. Further Assurances. Representative further agrees that (i) all such inventions and works of authorship (to the extent of Representative's interest therein) shall be the property of ARM, (ii) Representative shall not assign to any person other than ARM any interest therein, and (iii) Representative shall, without charge to ARM, assign to ARM all of Representative's right, title and interest in any such inventions and works of authorship, and execute, acknowledge and deliver such instruments as are necessary to confirm the ownership thereof by ARM.

14. TERMINATION OF AGREEMENT

Representative agrees that this Agreement may be terminated as follows:

A. Termination by Representative. If Representative terminates this Agreement for any reason prior to the end of the 2014 Summer Program Term, Representative will (i) not be entitled to any Earnings subsequent to Representative's termination of this Agreement, regardless of whether Representative would have been eligible or entitled to such Earnings had Representative not terminated this Agreement prior to August 30, 2014, and (ii) pay ARM for all rents, utilities, and deposits on housing and furniture Representative requested for the entirety of the 2014 Summer Program Term, regardless of whether Representative lives in the apartments, less any amounts previously paid pursuant to Section 7 of this Agreement. For purposes of this Agreement, "Earnings" shall be defined to include advances, bonuses, overrides, or incentives of any kind, but shall not include any unpaid commissions that Representative earned as of the date of Representative's termination of this Agreement.

B. Termination For Cause. If ARM terminates this Agreement For Cause prior to August 30, 2014, Representative agrees and understands that Representative will (i) not be entitled to any Earnings subsequent to Representative's termination of this Agreement, regardless of whether Representative would have been eligible or entitled to such Earnings had this Agreement not been terminated by ARM prior to August 30, 2014, and (ii) pay ARM for all rents, utilities, and deposits on housing and furniture Representative requested for the entirety of the 2014 Summer Program Term, regardless of whether Representative lives in the apartments, less any amounts previously paid pursuant to Section 7 of this Agreement. Termination "For Cause" shall include, but is not limited to, (i) commission of a crime involving moral turpitude, theft, fraud or deceit, (ii) conduct which brings ARM, or any of its affiliates into public disgrace or disrepute, including, but not limited to, being arrested for a crime, (iii) Representative's death, (iv) voluntary termination of this Agreement, (v) violation of ARM's rules, regulations, handbooks, manuals, policies, practices and procedures, including any provision of this Agreement, (vi) falsification of paperwork, (vii) failure to perform any of Representative's obligations under this Agreement, or (viii) failure or inability to obtain any necessary or required license(s) or permit(s).

C. Termination of Agreement by ARM without cause. If ARM terminates this Agreement other than For Cause prior to August 30, 2014, Representative's eligibility for all Earnings that have not been paid will not be affected and the payment of those Earnings to Representative will be governed by this Agreement as though Representative worked until August 30, 2014.

D. Upon termination of Agreement, accounts sold by Representative may not be transferred or changed from Representative to any other active or existing Representative.

15. AMENDMENTS

No supplement, modification, amendment or waiver of the terms of this Agreement shall be binding on the parties hereto unless executed in writing by the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed to or shall constitute a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided in writing. Any failure to insist upon strict compliance with any of the terms and conditions of this Agreement shall not be deemed a waiver of any such terms or conditions.

16. NOTICES
All notices required or permitted under this Agreement shall be in writing and shall be deemed delivered when delivered in person or on the third day after being deposited in the United States mail, postage paid, addressed as follows:

ARM Security, Inc.
Attn: Todd Santiago
4931 North 300 West
Provo, Utah 84604
Representative
At the address listed on Representative's W-9 or application.

17. FULL UNDERSTANDING
Representative acknowledges that Representative has carefully read and fully understands all of the provisions of this Agreement and that Representative is voluntarily entering into this Agreement. No other person or affiliate of ARM can sign on behalf of Representative

18. SEVERABILITY
This Agreement supersedes all prior agreements, written or oral, between Representative and ARM concerning the subject matter hereof. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable law or rule in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision or any other jurisdiction, but this Agreement shall be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision had never been contained herein.

19. NON-SOLICITATION
In the event of termination of this Agreement or Representative's employment with ARM, and for a period of five (5) years from the date of such termination, Representative will not directly or indirectly engage in the following conduct, nor will Representative aid, abet, assist, encourage, or influence others to do so: Induce or attempt to induce, solicit or attempt to solicit, or encourage or attempt to encourage, in any capacity, on Representative's behalf or on behalf of any other firm, person, or entity, (a) any current or former customer of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities (herein defined as a "Customer") to terminate any contract with ARM, Vivint, or any other entity, or to allow any such contract to be cancelled, not renewed, or to enter into a contract with another company for services or products similar to that provided to Customer under their contract with ARM, Vivint, or any other entity, or (b) any current or former representative, employee, or contractor of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities to terminate their relationship with that entity or work for an entity that competes with ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities. Representative acknowledges and agrees that the names, addresses, product specifications, and information regarding any Customers or representatives and employees of ARM, Vivint, Inc., or any parent, subsidiary, agent, dealer, affiliate, assignee, or assignor of said entities, constitute Proprietary Information, and that the unauthorized use or disclosure of this or any other Proprietary Information that Representative obtained during the course of this Agreement constitutes unfair competition. Representative will not to engage in any unfair competition either during the term of Representative's employment or at any time thereafter. It is agreed that in the event that Representative violates this Section 18 with respect to any Customer, that in addition to any other damages to which ARM may be entitled against Representative, ARM will be entitled to monetary damages of the monthly monitoring rate (MMR) for that Customer multiplied by Fifty (50).
20. ENTIRE AGREEMENT
This Agreement, together with all of the Exhibits referenced herein and attached hereto, represents the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all prior representations and agreements, whether oral or written, pertaining to the subject matter hereof, and cannot be modified, changed, waived or terminated except by a writing signed by the parties. No course of conduct or trade custom or usage will in any way be used to explain, modify, amend or otherwise construe this Agreement.

21. CHOICE OF LAW, JURISDICTION AND VENUE
The parties agree that this Agreement shall be construed in accordance with, and governed by, the laws of the State of Utah, without regard to the application of conflicts of law principles. The parties agree that any suit, action or proceeding arising out of or relating to this Agreement must be instituted in a state court of competent jurisdiction located in Utah County, Utah and the parties hereby irrevocably submit to the exclusive jurisdiction of any such court.

22. SUCCESSORS IN INTEREST
This Agreement shall be binding upon and inure to the benefit of the successors or assignees of ARM.

23. HEADINGS
The headings used in this Agreement are for convenience only and are not to be considered in construing or interpreting this Agreement.
BY SIGNING THIS AGREEMENT, REPRESENTATIVE ACKNOWLEDGES THAT REPRESENTATIVE HAS CAREFULLY READ AND FULLY UNDERSTANDS ALL OF THE PROVISIONS OF THIS AGREEMENT AND THAT REPRESENTATIVE IS VOLUNTARILY ENTERING INTO THIS AGREEMENT.

Douglas Robinson
Representative's Printed Name

Douglas Robinson Date 11/11/2013
Representative's Signature

Date
ARM Security, Inc.

Exhibit List

EXHIBIT 1	Payscale
EXHIBIT 2	Job Specifications
EXHIBIT 3	Vivint Packages
EXHIBIT 4	ARM Credit Criteria & Points
EXHIBIT 5	ARM Policies
EXHIBIT 6	Budget/Advances Agreement
EXHIBIT 7	Additional Attachment
EXHIBIT 8	Background Check
EXHIBIT 9	Sexual Harassment Policy
EXHIBIT 10	W-9
EXHIBIT 11	Form I-9 Employment Eligibility Verification
EXHIBIT 12	Direct Deposit Form
EXHIBIT 13	W-4